more definite and certain by expressing it in terms of an over-all industry exception, thus avoiding the uncertainty and possible vagaries of administrative interpretation.

While the AAR's position as outlined above is that the rail industry should be excluded from age discrimination legislation, we wish to bring to the attention of the Committee what we think are deficiencies of the pending bills:

1. The general prohibitory paragraph of H.R. 5481 and of Section 4 of H.R. 3651 would make unlawful age discrimination and does not include the qualifying term "arbitrary." This is a departure from the concept of eliminating only "arbitrary" discrimination which is the concept set forth throughout "The Older American Worker," the Report of the Secretary of Labor upon which the legislation is based.[5] In the Report it is concluded that all age restrictions cannot be conceived as arbitrary and that there should be concentration on the arbitrary aspects of discrimination which could and should be stopped:

"The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' and to concentrate on the prohibition of practices which include this element."[6]

Since the Report, as well as the declared purposes of H.R. 3651 (Section 2(f)), establish that it is only "arbitrary" discrimination which is intended to be proscribed and recognize that there is a difference, the substantive provisions of the bills should be amended to specifically apply only to arbitrary discrimination. This distinction has not been made in the one place where it is most important, *i.e.*, the provisions of H.R. 5481 and H.R. 3651 which would make discrimination unlawful.

2. It would be particularly inappropriate to impose criminal enforcement provisions as H.R. 3651 would do. A determination of whether arbitrary discrimination had been committed would be a highly subjective one. Where criminal penalties are involved, citizens are entitled to some specific indication of what is unlawful. Whether a specific act or course of conduct amounts to arbitrary discrimination will frequently involve hairline distinctions. The imposition of criminal penalties is totally unjustified in these circumstances.

In this regard a bill before the Senate (S. 830) which as introduced was identical with H.R. 3651 has been the subject of hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare. On April 26, 1967, the Labor Subcommittee ordered S. 830, with certain amendments, reported to the full committee. S. 830 as ordered reported by the subcommittee has been amended to eliminate the criminal penalty features which are objectionable.

3. Section 13 of H.R. 3651 would limit the prohibitions in the bill to individuals who are at least forty-five years of age but less than sixty-five years of age but would grant the Secretary of Labor unlimited discretion to adjust these maximum and minimum age limits either upward or downward as he may deem appropriate. This broad discretion to adjust the applicable age limits should be eliminated. There are no standards provided to direct the Secretary in exercising such authority. The bill and the supporting statements made in its behalf are directed toward the problem of older workers. The Secretary's Report, on which H.R. 3651 is based, deals solely with the problems of older workers. There has been no justification whatever for permitting the age minimum to be lowered. The consequences of raising the maximum age limit would be far reaching. They would be such that Congress itself should make any later adjustment if any is to be made and if any could be shown to be essential.

4. Consideration must be given to how the pending legislation would affect private pension and retirement plans in industry. Section 4 of H.R. 3651 would make unlawful any private pension or insurance plan which specifies a maximum age limit after which new employees are not covered by such plans, *i.e.*, maximum participation ages. In his testimony on S. 830 (which is identical with H.R. 3651) before the Labor Subcommittee of the Senate Committee on Labor and Public Welfare, the Secretary stated (Hearings, Transcript of Record, pp. 39–40) that the effect of Section 4(f)(2) would be to protect almost all private pension plans of which he is aware. This is not the case as we understand and read that section of the pending bill. That section would protect only a mandatory retire-

[5] The Older American Worker—Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (June 1965).

[6] Ibid, p. 21.