THE INTERSTATE COMMERCE COMMISSION

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The decade of the Sixties was for the Interstate Commerce Commission (ICC) an era of significant and far-reaching developments in the field of transportation. The number and complexity of cases which confronted the Commission during this period accounted for an unprecedented workload.[1] This increasing activity resulted in major Commission decisions and judicial opinions which illuminated several important provisions of the Interstate Commerce Act,[2] most notably those added by the Transportation Act of 1958.[3] A comprehensive review of the Commission's work during the decade is beyond the scope of this article. Rather, its purpose is to discuss briefly some of the developments under the Interstate Commerce Act which are of particular significance. Emphasis will be placed upon selected decisions of the ICC in the field of railroad consolidations and mergers under Section 5 of the Act,[4] for, it is submitted, the Commission's actions here during the past decade will have the most lasting effect upon the nation's transportation system.

I. APPLICATION DURING THE SIXTIES OF MAJOR PROVISIONS OF THE TRANSPORTATION ACT OF 1958

A. *Intermodal Rate Competition*

Section 15 of the Interstate Commerce Act empowers the Commission to determine and prescribe "just and reasonable" maximum and minimum rates to be charged for the transportation of persons or property by any interstate common carrier subject to the Act.[5]

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1 During fiscal 1966, a total of 11,572 formal cases was received by the ICC, an increase of 20.9% over the previous year and 36% over fiscal 1964. ICC Ann. Rep. 6 (1956-6).

2 49 U.S.C. § 1 et seq. (1964), as amended, (Supp. IV, 1969).

3 Act of Aug. 12, 1958, Pub. L. No. 85-625, 72 Stat. 571, amending 49 U.S.C. § 1 et seq. (1964).

4 49 U.S.C. § 5 (1964).

5 49 U.S.C. § 15 (1964).

Subsection (3) of section 15a, which was added by the Transportation Act of 1958, requires that the Commission not hold the rates of one carrier "up to a particular level to protect the traffic of any other mode of transportation."[6] The meaning of this mandate has since been clarified by the Supreme Court in two decisions[7] which reviewed the Commission's application of the new provision.

In *Commodities—Pan-Atlantic S.S. Corp.*,[8] the Commission disallowed the establishment of railroad rates on a parity with certain reduced sea-land and rail-water-rail rates of competing modes. In doing so, the Commission emphasized that the prohibition of section 15a(3) is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this act."[9] Finding that the continued operation of coastwise water carriers is important to that policy and would be gravely threatened by lower railroad rates,[10] the Commission prescribed a differential of 6 percent for rail rates above those of the other competing modes.[11]

In *ICC v. New York, N.H. & H.R.R.*,[12] the Supreme Court reviewed this determination and approved the action of the three-judge district court[13] in setting aside the rate differential by which the Commission proposed to protect water carriers. The Court found that the intent of Congress with regard to section 15a(3) "was to permit the railroads to respond to competition by asserting whatever inherent advantages[14] of cost and service they possessed."[15] Thus, unless a railroad's rate reduction is not below its own fully distributed costs, the reduction should not be considered an unfair or destructive competitive practice in violation of the National Transportation Policy.[16]

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6 49 U.S.C. § 15a(3) (1964). This subsection provides:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation. . . .

7 ICC v. New York, N.H. & H.R.R., 372 U.S. 744 (1963); American Comm'l Lines v. Louisville & N.R.R., 392 U.S. 571 (1968).

8 313 I.C.C. 23 (1960).

9 Id. at 46.

10 Id. at 47-48.

11 Id. at 50.

12 372 U.S. 744 (1963).

13 New York, N.H. & H.R.R. v. United States, 199 F. Supp. 635 (D. Conn. 1961).

14 The term "inherent advantage" derives from the National Transportation Policy, 49 U.S.C. preceding § 1 (1964), and is incorporated by reference into § 15a(3) of the Interstate Commerce Act, 49 U.S.C. § 15a(3) (1964).

15 372 U.S. at 757.

16 Id. at 759-61.

The second case, *Ingot Molds, Pa. to Steelton, Ky.*,[17] focused upon the criteria for determining how the low-cost carrier's inherent advantages should be measured and protected in cases of intermodal competition. The Commission here determined that a proposed reduction in rail rates was unjust and unreasonable.[18] The standard applied was that of fully distributed cost which had been suggested by the Court in the *New Haven* case. The Commission rejected the railroad's contention that the proposed rate need exceed only the incremental out-of-pocket costs of providing the service.[19] This decision of the Commission was approved in *American Comm'l Lines v. Louisville & N. R. R.*[20] After another thorough review of the legislative history of section 15a(3), the Court concluded that in situations involving intermodal competition, the Commission may use either out-of-pocket or fully distributed costs as a measure of inherent advantage,[21] and that the initial choice between the two is in each case to be made by the Commission.[22]

The question of which is the proper standard to apply has produced a continuing controversy.[23] The Court's seeming deference[24] to the Commission's pending rule-making[25] on this subject has, however, been questioned by one commentator who notes that "the Court appears to have definitely ruled out incremental cost as a possible general measure of inherent advantage."[26] Nevertheless, at present there is no indication that the Commission's almost universal application of the fully distributed cost standard will be successfully challenged before the Supreme Court.

B. *Discontinuance of Railroad Passenger Service*

Another major area of Commission activity produced by the 1958 Act was in the field of railroad passenger service. In 1958 section 13a was added to the Interstate Commerce Act permitting railroads the option of applying to the ICC rather than state commissions for authorization to discontinue or change the operation or service of any

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17 326 I.C.C. 77 (1965), rev'g 323 I.C.C. 758 (1965).

18 326 I.C.C. at 85.

19 Id. at 81-82. The proposed rate of $5.11 per ton exceeded the "long-term out-of-pocket cost" of $4.69 per ton, but not the fully distributed cost of $7.59 per ton. Id.

20 392 U.S. 571 (1968), rev'g 268 F. Supp. 71 (W.D. Ky. 1967).

21 Id. at 583-90. The economic aspects of the two approaches are discussed in Dodge, The Dilemma of Intermodal Rate Competition, 36 ICC Prac. J. 1801 (1969).

22 392 U.S. at 590.

23 See, e.g., Harbeson, The Supreme Court and Intermodal Rate Competition, 36 ICC Prac. J. 1487 (1969).

24 See American Comm'l Lines v. Louisville & N.R.R., 392 U.S. 571, 591 (1968).

25 Rules to Govern the Assembling and Presenting of Cost Evidence, ICC Dkt. No. 34013. Examiner's report filed Oct. 10, 1966.

26 Harbeson, supra note 23, at 1492-93.

train or ferry not located wholly within a single state.[27] The complete abandonment of a line of track has been within the ICC's jurisdiction since 1920;[28] however, prior to the addition of section 13a, discontinuance of service without complete abandonment was within the police power of the interested states.[29] Because some state commissions had assumed obstructive attitudes which resulted in delay or refusal to authorize discontinuance of services,[30] this alternative of appealing to the ICC was instituted in an effort to curtail mounting operating deficits arising in large part from the forced continuance of little-used commuter passenger services.[31]

Under section 13a(1) a carrier may file notice with the Commission "at least thirty days in advance of any . . . proposed discontinuance or change."[32] For carriers on lines located wholly within a single state, the ICC route is available under section 13a(2) only after a state agency has refused to authorize discontinuance or has failed to act upon an application.[33] Under subsection (2), the Commission must conduct a full hearing before authorizing discontinuance; however, under subsection (1) the Commission need not, but may initiate an investigation within the 30-day period after notice is filed.[34]

> If, after hearing in such investigation . . . the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service . . . in whole or in part, for a period not to exceed one year from the date of such order.[35]

Of the flood of discontinuance actions which have come before the Commission during the past ten years, the great majority of the requests were granted. Authorization for discontinuance may be given either automatically—as a result of the Commission's failure to initiate an investigation within the 30-day period—or after an investigation

27 49 U.S.C. § 13a (1964).
28 49 U.S.C. § 1(18) (1964).
29 See H.R. Rep. No. 1922, 85th Cong., 2d Sess. 13 (1958).
30 Id.
31 Id. at 12.
32 49 U.S.C. § 13a(1) (1964).
33 49 U.S.C. § 13a(2) (1964).
34 49 U.S.C. § 13a(1) (1964).
35 49 U.S.C. § 13a(1) (1964). This subsection was held to be constitutional in Pennsylvania R.R. v. Sharfsin, 368 F.2d 276 (3d Cir. 1966), cert. denied, 386 U.S. 982 (1966).

The findings required under § 13a(2) for authorizing discontinuance are essentially the same. 49 U.S.C. § 13a(2) (1964).

and hearing which results in findings that continuance of the service is not required by public convenience and necessity and would, in fact, unduly burden interstate commerce.[36]

It has been estimated that since the enactment of section 13a more than 1,000 trains have been discontinued.[37] Indeed, intercity passenger service has been entirely eliminated in some populous areas of the Northeast.[38] Because of this, the ICC has been criticized for adopting a too lenient and even fatalistic attitude toward discontinuance of passenger trains.[39] This lenience is in part an effectuation of the congressional purpose embodied in the Act to alleviate passenger deficits. In addition it is supported by a Supreme Court holding which lightens the evidentiary burden upon railroads. The Court announced in *Southern Ry. v. North Carolina*[40] that even where a company shows an overall profit, the ICC may grant discontinuance based upon a finding that a certain run carries an undue burden of the entire operation of the company's service.

Frequently the alleged predisposition of the Commission toward discontinuance and the thorough, persuasive evidence presented by the petitioning railroad meet little effective opposition in the course of an investigation.[41] The evidence presented by affected passengers and communities has been chronically disorganized.[42] Still, by use of a "balancing doctrine," the Commission has in some cases required continuance even where operation of the service has resulted in a deficit. This result may be achieved where the public need for the service outweighs the financial burden upon the carrier and interstate commerce,[43] and sometimes where the losses which would be eliminated by discontinuance would not leave the carrier in a better overall

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36 See, e.g., Chicago, R.I. & P.R.R., Discontinuance of Trains, 328 I.C.C. 796 (1967); New York, N.H. & H.R.R., Discontinuance of Trains, 327 I.C.C. 151 (1966); St. Louis-S.F. Ry., Discontinuance of Trains, 327 I.C.C. 433 (1965); Boston & Maine Corp., Discontinuance of Service, 324 I.C.C. 418 (1965); Southern Pac. Co., Discontinuance of Trains, 324 I.C.C. 577 (1965); Chicago & N.W. Ry., Discontinuance of Passenger Trains, 320 I.C.C. 648 (1964); Louisville & N.R.R., Discontinuance of Trains, 320 I.C.C. 669 (1964); Baltimore & O.R.R., Discontinuance of Service, 317 I.C.C. 673 (1963); New York C. & St. L.R.R., Discontinuance of Trains, 317 I.C.C. 775 (1963).

37 Thoms & Laird, Derailing the Passenger, 36 ICC Prac. J. 1118, 1134 (1968).

38 See Boston & Maine Corp., Discontinuance of Service, 324 I.C.C. 705 (1965); Boston & Maine Corp., Discontinuance of Service, 324 I.C.C. 418 (1965); New York, N.H. & H.R.R., Discontinuance of Trains, 327 I.C.C. 151 (1966), which involved 278 trains and was the largest single discontinuance action.

39 Thoms & Laird, supra note 37, at 1132.

40 376 U.S. 93 (1964).

41 See Thoms & Laird, supra note 37, at 1129.

42 Id.

43 See, e.g., Missouri Pac. R.R., Discontinuance of Passenger Trains, 320 I.C.C. 1 (1963); Soo Line R.R., Discontinuance of Passenger Trains, 312 I.C.C. 729 (1961); Great N. Ry., Discontinuance of Service, 307 I.C.C. 59 (1959).

financial position.[44] This balancing doctrine has been of particular importance where the public demand and need for the service cannot be satisfied by substituting services of motor carriers,[45] and in "last train off" situations.[46]

It is not clear that the discontinuance juggernaut which was launched by section 13a is truly in the public interest.[47] The present federal policy toward railroad passenger service appears inconsistent to the extent that the ICC has continued to make independent, piecemeal determinations on discontinuing passenger services at the same time that other agencies in the Department of Transportation have attempted to preserve and modernize the railroad passenger business.[48] It is arguable that the Commission should slow its trend toward granting discontinuances, at least until a reconsideration and coordination of that federal policy can be undertaken.

C. *Proceedings Not Brought Under the 1958 Transportation Act*

In addition to those cases which were progeny of the 1958 Act, many other major proceedings came before the Commission during the past decade. In 1961 the Commission faced for the first time the question whether a carrier under the Interstate Commerce Act can properly publish contract rates; it concluded, in the first such case, that the contract rates which were proposed would violate the National Transportation Policy.[49] The Commission's decision was upheld by the courts.[50] The Commission also made a number of significant determinations in the still-growing field of railroad trailer-on-flat-car (TOFC) service. These proceedings involved both the rates for the various forms of TOFC services which have evolved and the operating practices connected with those services.[51] In addition, the Sixties saw

44 New York, N.H. & H.R.R., Discontinuance of Trains, 320 I.C.C. 466 (1964).

45 E.g., St. Louis-S.F. Ry., Discontinuance of Service, 312 I.C.C. 713 (1960); Missouri Pac. R.R., Discontinuance of Passenger Trains, 320 I.C.C. 1 (1963).

46 E.g., Soo Line R.R., Discontinuance of Passenger Trains, 312 I.C.C. 729 (1961).

47 See generally Thoms & Laird, supra note 37.

48 E.g., the Federal Railroad Administration now controls demonstration projects authorized under the High Speed Ground Transportation Act of 1965, 49 U.S.C. § 1605 et seq. (Supp. I, 1965).

49 Contract Rates, Rugs and Carpeting from Amsterdam, N.Y., 313 I.C.C. 247 (1961); National Transportation Policy, 49 U.S.C. § 1 (0000).

50 New York Cent. R.R. v. United States, 194 F. Supp. 947 (S.D.N.Y. 1961), aff'd, 368 U.S. 349 (1962).

51 E.g., Eastern Cent. M. Carriers Ass'n v. Baltimore & O.R.R., 314 I.C.C. 5 (1961), aff'd, Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318, aff'd, 379 U.S. 6 (1964); Substitute Service-Piggyback, 322 I.C.C. 301 (1964), approved in part, Atchison, T. & S.F. Ry. v. United States, 244 F. Supp. 955 (N.D. Ill. 1965); American Trucking Ass'ns v. Atchison, T. & S.F. Ry., 387 U.S. 397 (1967). For an extended discussion of the latter proceedings see Anderson, Borghesani & Towle, Ex Parte 230: The ICC "Piggyback" Rulemaking Case, 9 B.C. Ind. & Com. L. Rev. 23 (1967).

the resolution of major disputes within the railroad family that had persisted over a period of many years. Thus, at least for the time being, arguments between the Official Territory railroads on the one hand and the Transcontinental lines and the Southern lines on the other over the division of freight revenues were put to rest,[52] and the litigation concerning freight car rental charges that had encompassed almost two decades had apparently come to a long awaited conclusion.[53]

II. The Railroad Merger Movement

A. *Legislative Background*

Under Section 5(2)[54] of the Interstate Commerce Act, the ICC is given exclusive jurisdiction to pass upon all unifications, mergers, and acquisitions of control involving two or more interstate carriers. All transactions of this nature must be preceded by an application to the Commission and, in cases involving a railroad, by a public hearing, unless found to be not necessarily in the public interest.[55]

In disposing of an application the Commission has broad powers to approve, deny or modify a proposed transaction. In order to approve a transaction, the Commission must find that it "will be consistent with the public interest."[56]

While there were a few proceedings under section 5 prior to 1960, since then virtually every major railroad in the United States has been involved in a merger or consolidation proposal before the Commission.[57] This acceleration of activity in the merger field during

52 Akron, C. & Y.R.R. v. Atchison, T. & S.F. Ry., 321 I.C.C. 17 (1963), 322 I.C.C. 491 (1963). The Commission's decision was sustained on appeal. Atchison, T. & S.F. Ry. v. United States, 238 F. Supp. 528 (S.D. Cal. 1965), rev'd, Chicago & N.W.R.R. v. Atchison, T. & S.F. Ry., 387 U.S. 326 (1967); Official-Southern Divisions, 325 I.C.C. 1, 1965, 325 I.C.C. 449 (1965), modified, Aberdeen & R.R.R. v. United States, 270 F. Supp. 695 (E.D. La. 1967), aff'd Baltimore & O.R.R. v. Aberdeen & R.R.R. Co., 393 U.S. 87 (1968).

53 Chicago, B. & O.R.R. v. New York, S. & W.R.R., 332 I.C.C. 177 (1968). The Commission decision was appealed to two different district courts, each of which found the Commission's action to be proper. Boston & M.R.R. v. United States, 297 F. Supp. 615 (D. Mass. 1969); Union Pac. R.R. v. United States, 300 F. Supp. 318 (D. Neb. 1969). Motions to affirm were granted in both cases on November 10, 1969. Boston & M.R.R. v. United States, 396 U.S. 27 (1969).

54 49 U.S.C. § 5(2) (1964).

55 49 U.S.C. § 5(2)(b) (1964).

56 49 U.S.C. § 5(2)(b) (1964). When the transaction involves both a railroad and a motor carrier, an additional finding is required that the railroad will be enabled by the transaction to "use service by motor vehicle to public advantage in its operation" without undue restraint of competition. 49 U.S.C. § 5(2)(b) (1964).

57 The territorial scope of the merger movement is illustrated by a sampling of cases decided by the Commission in this period. Chicago & N.W. Ry. Purchase, Minneapolis & St. L. Ry., 312 I.C.C. 285 (1960), Southern Ry.—Control—Central of Ga. Ry., 317 I.C.C. (1962); Great N. Pac. & B.L.—Merger—Great N. Ry., 328 I.C.C. 460 (1966), 331 I.C.C. 228 (1967); Pennsylvania R.R.—Merger—New York

the past ten years was the most significant since the pre-1904 period when railroad mergers were free from federal regulation. That early period of laissez faire ended in 1904 with the Supreme Court's holding in *Northern Secs. Co. v. United States*[58] that the antitrust laws are applicable to railroad mergers. Understandably, that decision initiated a period of cautious restraint during which merger activity was almost totally lacking.

Then, following World War I, Congress recognized a need to encourage railroad unifications and to that end enacted the Transportation Act of 1920.[59] By that Act, Congress specifically adopted a policy of encouraging consolidation of the nation's railroads into a "limited number of systems," it directed the Commission to promulgate a plan for consolidating the nation's railroads into such a limited number of systems,[60] and to approve voluntary transactions proposed by the carriers when it could find such transactions to be both in the public interest and also in furtherance of the Commission's over-all consolidation plan.[61] Finally, antitrust immunity was given to unifications approved under the 1920 act.[62] Such immunity notwithstanding, and even though the Commission adopted the required unification scheme in 1929,[63] the approach of the 1920 Act proved inadequate to achieve the desired result. There was an almost complete lack of railroad unification activity from the date of its passage until the next major revision of section 5 in the Transportation Act of 1940.[64] The 1940 Act did not change the earlier statute's requirement that railroad unifications be carrier-initiated.[65] However, no longer was the Commission directed to author its own master plan and to require carrier proposals to fit that plan as a prerequisite to approval.[66] Still, the basic statutory requirement for approval of a pro-

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Cent. R.R., 327 I.C.C. 475 (1966); Seaboard Air Line R.R.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (1963).

58 193 U.S. 197 (1904).

59 Act of Feb. 28, 1920, ch. 91, 41 Stat. 474, as amended, 49 U.S.C. § 1 (1964).

60 Act of Feb. 28, 1920, ch. 91, 41 Stat. 481. Section 407 of the Transportation Act of 1920 amended § 5 of the Interstate Commerce Act. The new § 5(4) stated in part:

> The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems.

61 Act of Feb. 28, 1920, ch. 91, 41 Stat. 482. Transportation Act of 1920, § 407, amending § 5 of the Interstate Commerce Act by adding § 5(6)(a), (c).

62 Act of Feb. 28, 1920, ch. 91, 41 Stat. 482. Transportation Act of 1920, § 407, amending § 5 of the Interstate Commerce Act by adding § 5(8). Under the current statute this immunity is embodied in 49 U.S.C. § 5(11) (1964).

63 Consolidation of Railroads, 159 I.C.C. 522 (1929).

64 Act of Sept. 18, 1940, ch. 722, 54 Stat. 898.

65 Act of Feb. 28, 1920, ch. 91, 41 Stat. 482, amending § 5 of the Interstate Commerce Act by adding § 5(6).

66 49 U.S.C. § 5 (1964). Section 7 of the 1940 Act amended § 5 of the Interstate

posal by the Commission remained that it be found to be consistent with the public interest.[67] In addition, a new and, as subsequent events have proven, highly important power was granted the Commission. Section 5(2)(d) was added to the Act, providing that the Commission could condition its approval of a merger or consolidation proposal upon the inclusion of other railroads operating in the territory should they request inclusion.[68] Again, the statutory standard for such Commission-directed inclusion was the "public interest."[69] This newly enacted section was to become the principal vehicle for preserving the services of several eastern railroads which were unable to attract voluntary merger partners but whose services were important to the public.

Thus, the Transportation Act of 1940 made important changes in the means by which the railroads of the country could become unified. Yet it did not change the basic congressional purpose expressed twenty years earlier of encouraging the unification of the nation's railroads into a limited number of systems.[70] While utilization of the 1940 Act's provisions was necessarily delayed by World War II and postwar adjustments, major steps have since been taken toward the achievement of the congressional objective.

B. *The Merger Movement in the East*

Although the Sixties witnessed prolific merger activity touching every area of the continental United States,[71] a representative picture of that movement may be derived from focusing upon one geographical area. Because of the varied and interesting occurrences which attended recent mergers of eastern railroads, that area has been selected for a somewhat detailed exposition.

While it may be argued that credit belongs to the *Louisville & N. R.R. Merger* case of 1957,[72] most observers consider the harbinger of the railroad merger movement in the East to have been Commission approval two years later of Norfolk & Western's acquisition of the Virginian Railway Company.[73] Shortly after approval of the N & W-

Commerce Act repealing all references to the master plan including those in the old §§ 5(4), 5(5) & 5(6).

67 49 U.S.C. § 5(2)(b),(c) (1964).

68 49 U.S.C. § 5(2)(d) (1964).

69 49 U.S.C. § 5(2)(d) (1964).

70 See Penn Central Merger Cases, 389 U.S. 486, 493 (1968). The Court noted that "[t]he only change has been in the means of achieving [the] goal of a limited number of railroad systems."

71 See note 57, supra.

72 295 I.C.C. 457 (1957).

73 Norfolk & W. Ry. Merger, 307 I.C.C. 401 (1959). Some 30 years earlier, acting upon an application filed under the Transportation Act of 1920, the Commission had

Virginian merger, an application for authority to merge was filed by the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad. After hearings at which there was but limited opposition, the proposed merger was approved[74] by the ICC and the Erie-Lackawanna Railroad was formed.

Also in 1960 the Chesapeake & Ohio Railroad applied to the Commission for authority to acquire control of the Baltimore & Ohio Railroad.[75] During the proceedings before the Commission, the New York Central Railroad waged a vigorous campaign against the proposal on the ground that control by C & O would result in a serious diversion of freight traffic then interchanged between Central and B & O.[76] After intervening in the proceedings, Central later filed its own competing application for authority to control B & O and undertook, unsuccessfully, to persuade a majority of B & O's stockholders to accept its proposal rather than that of C & O.[77] Central finally withdrew both its opposition to the C & O-B & O application and its own competing application[78] and the Commission, expressing particular concern for preserving the services of the B & O, granted C & O's application.[79]

The first step toward the formation of the second of the three major railroad systems now existing in the East came with the application, filed March 17, 1961, of the Norfolk & Western Railway for authority to (1) merge with the New York, Chicago and St. Louis Railroad (the "Nickel Plate"), (2) lease the Wabash, (3) purchase the Sandusky line of the Pennsylvania Railroad, (4) acquire control of the Akron, Canton & Youngstown Railroad and (5) lease certain properties of the Pittsburgh & West Virginia Railway.[80]

Prior to the ICC's hearing on N & W's application, the Erie-

denied the Norfolk & Western authority to control the Virginian by lease. Control of Virginian Ry. by Norfolk & W. Ry., 117 I.C.C. 67 (1926).

74 Erie R.R. Merger, 312 I.C.C. 185 (1960).

75 Finance Dkt. Nos. 21160 & 21161 (filed June 14, 1960).

76 See Chesapeake & O. Ry.—Control—Baltimore & O.R.R., 317 I.C.C. 261, 280-84 (1962).

77 317 I.C.C. 261, 267 (1962).

78 Id. at 262.

79 317 I.C.C. 261, upheld sub nom. Brotherhood of Maint. of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), aff'd mem., 375 U.S. 216 (1963). The Commission noted that

> B & O's properties are in poor physical condition . . . (and) need to be rehabilitated . . . Its failure to survive would deal a heavy blow to the shipping public in the 13 States and the District of Columbia within which it now operates and compound the inconvenience of travelers by elimination of its already greatly curtailed passenger service. . . . Strengthened as a result of the control [by C & O], B & O's ability to meet adequately the needs of commerce and of the national defense will be enhanced.

317 I.C.C. at 290-91.

80 See Norfolk & W. Ry. Merger, 324 I.C.C. 1 (1964).

Lackawanna Railroad petitioned to intervene in the proceedings and also asked to be included in the proposed transaction under the provisions of Section 5(2)(d) of the Act.[81] This was the first attempt by a major railroad to utilize that section to force itself into an already proposed transaction.[82] However, the provision's effect in a transaction of such magnitude was not to be tested in this case, for following an agreement between Erie and N & W to enter into good faith negotiations for an affiliation, Erie withdrew its petition for inclusion in the merger.[83]

When the N & W case reached the full Commission, it was approved[84] subject to a number of conditions. Two of these were of particular significance. First, the Commission extended substantial protection to the public's interest in the services of three of the five railroads which had earlier petitioned for inclusion in the merger.[85] The Commission provided that these three, the Erie, the Delaware & Hudson and the Boston & Maine, could file petitions for inclusion in the N & W system at any time within a five-year period.[86] Second, the Commission required the Pennsylvania, over a period of time, to divest itself of its substantial stockholdings in both the Norfolk & Western and the Wabash.[87] Without Penn's voluntary acceptance of this condition, and without N & W's acceptance of the option for the three other roads to renew inclusion requests, the N & W merger could not have been carried out.

In both the B & O-C & O and N & W cases the Commission had been presented with requests for consolidation with other major merger proceedings. These requests were in both cases denied, though on notably different grounds. In the C & O case the Commission found that the delay inherent in consolidation "would cause immediate serious injury to B & O and ultimately to the general public."[88] However, in the N & W case the Commission relied upon an additional

81 Id. at 6.

82 Various public bodies including the United States and the State of New York supported Erie's application. Id. at 7-8. The New York Cent. R.R. and the Pittsburgh & Lake Erie R.R. also filed petitions for inclusion in the merger, but withdrew them during the proceedings in favor of a proposal instead to merge with each other. See 324 I.C.C. at 4, 6-7. After the hearings on the N & W application had concluded, two additional railroads sought inclusion under § 5(2)(d)—the Delaware & Hudson R.R. and the Boston & Maine. Because the routes of these two constituted portions of a principal railroad involving Erie, and because Erie had withdrawn its inclusion petition, the two requests were denied by Division 3 of the Commission without prejudice to renewal if and when Erie became directly involved in the N & W system. Id. at 30.

83 Id. at 7.

84 324 I.C.C. 1 (1964).

85 Erie, Delaware & Hudson and Boston & Maine.

86 324 I.C.C. at 148 (Appendix O).

87 Id. at 33-34.

88 317 I.C.C. at 265-66.

point raised by N & W—that the Commission was required by law to consider its application independently of any other plan of unification.[89]

The first step toward formation of the Penn Central system—the third of the major Eastern railroads—occurred with the filing on March 9, 1962, of a joint merger application by the Pennsylvania and New York Central Railroads.[90] Shortly thereafter, the reorganization trustees of the New York, New Haven and Hartford Railroad Company (New Haven) petitioned under section 5(2)(d) for inclusion in the proposed transaction. The New Haven's financial condition, particularly its passenger service deficit, had been the subject of deep concern and extensive review by the Commission.[91] The trustees contended that the pending reorganization would be prevented unless the New Haven were included in the merger. They argued that a merger of Penn with Central would cause a severe diversion of freight traffic from the already suffering New Haven.[92] After the first round of merger hearings had closed, the New Haven's trustees successfully negotiated with Penn and Central the terms for New Haven's inclusion in the Penn Central system.[93]

The three railroads, Erie, D & H and B & M, which had previously sought inclusion in the N & W system, also filed petitions for inclusion in the Penn Central system. Their common contention was that merger of the Penn and Central would nullify their bargaining power during their continuing efforts at inclusion in the N & W system.[94] Thus, as a second choice, they petitioned to be included in the Penn Central system. The question whether the three "orphans" should be included became the most controversial issue in the Penn Central proceedings.[95] However, before the Commission decided the *Penn Central* case, Erie, D & H and B & M exercised their options to again file for inclusion in the N & W system.[96]

The commission approved the Penn Central merger subject to several conditions[97] for the protection of other railroads. Provisions were made to protect the three orphans, both pending consideration of

89 324 I.C.C. at 17-18.

90 See Pennsylvania R.R.—Merger—New York Cent. R.R., 327 I.C.C. 475 (1966).

91 The New Haven had been engaged in reorganization proceedings under § 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1964), since July 1, 1961. See Passenger Fares, New York, N.H. & H.R.R., 313 I.C.C. 411 (1961) (interim report), 314 I.C.C. 77 (1961) (final report).

92 Pennsylvania R.R.—Merger—New York Cent. R.R., 327 I.C.C. 475, 522 (1966).

93 See Penn Cent. Merger Cases, 389 U.S. 486, 508 (1968).

94 327 I.C.C. at 529.

95 Id. at 508.

96 The *Penn Central* case was decided on April 6, 1966, 327 I.C.C. 486 (1968). The petitions of Erie, D & H and B & M had been filed in September, 1965, and were still pending at the time of that decision. Id. at 488.

97 327 I.C.C. at 551-55, 561-65 (Appendices A, G-I) (1966).

their petitions for inclusion in N & W and against the possibility that those petitions would be denied.[98] The New Haven was required to be included upon terms to be later determined, and which would be subject to approval by the New Haven's reorganization court as well as the Commission.[99] The Commission specifically required the Penn Central to assume the burden of New Haven's deficit-producing passenger service as well as its freight service.[100] However, this requirement was qualified to the extent that the New Haven passenger deficit, if undue, need not be borne by savings resulting from the merger.[101]

Following the Commission's report, several petitions were filed seeking reconsideration, rehearing, or other relief which would postpone the effective date of the merger.[102] In addition, the N & W and an investor in New Haven securities, Oscar Gruss & Son, neither of whom had been parties to the proceeding, petitioned for leave to intervene in order to seek reconsideration and other relief. In its report on reconsideration, the Commission granted the petitions to intervene,[103] and modified its prior conditions for the benefit of Erie, D & H and B & M with respect to traffic losses as a result of the merger.[104]

In addition to their petitions to the ICC for reconsideration of its decision to approve the merger, many of the same parties also appealed to a statutory three-judge court for a temporary injunction against the merger.[105] The principal issue before the court was whether the protective conditions prescribed by the Commission for Erie, D & H and B & M were sufficient to permit immediate consummation of the Penn Central merger, particularly in view of the Commission's findings that continuation of the services rendered by those lines was in the public interest, and the fact that it had not yet completed action upon their renewed inclusion applications in the reopened N & W proceeding.[106] The district court, with one judge dissenting,

98 Id. at 561-63 (Appendix G).

99 Id. at 553 (Appendix A, ¶ 8).

100 Id. at 524.

101 Id. at 526.

102 Such petitions were filed by, among others: the C & O joined with the B & O, the Reading Co., the Chicago & E. Ill. R.R., the Delaware & Hudson R.R., the Erie-Lackawana R.R., the Central R.R. of New Jersey, and the Boston & Maine Corp. See Pennsylvania R.R.—Merger—New York Cent. R.R., 328 I.C.C. 304, 305 (1966).

103 328 I.C.C. at 306-07.

104 Id. at 320-23.

105 Among the motions which were consolidated for hearing in the United States District Court for the Southern District of New York were those filed by Erie, B & O, C & O, N & W, Central, B & M and D & H. See Erie-Lackawana R.R. v. United States, 259 F. Supp. 964, 966-67 (S.D.N.Y. 1966).

106 Id. at 967. Another appeal had been taken from the Commission's approval of the Penn Central merger by Oscar Gruss & Son and the First Mortgage 4% Bondholders' Committee of the New Haven. See Oscar Gruss & Son v. United States, 261 F. Supp. 386 (S.D.N.Y. 1966). The district court heard these cases separately and dis-

denied the motions seeking delay of the merger, concluding that the Commission's order was in accordance with applicable legal standards.[107]

Six separate appeals from the district court's decision were taken to the Supreme Court. On October 18, 1966, the Supreme Court granted a stay of enforcement of the ICC's order and set the matter for early hearing on an expedited schedule.[108] By a five-to-four decision, issued on March 27, 1967, the Supreme Court reversed the district court and held that the Commission had erred in not delaying the Penn Central merger until a decision could be reached in the reopened N & W inclusion proceedings as to the fate of the three protected railroads.[109] Justice Fortas' vigorous dissent, in which he was joined by three other members of the Court, contended that the majority's decision constituted an improper invasion by the judiciary into an area of administrative expertise.[110]

Less than three months after the Court's decision the Commission resolved the reopened *N & W* case by finding that inclusion of the Erie, the D & H and the B & M would be in the public interest.[111] This was the first time the Commission had utilized section 5(2)(d) to fix equitable terms for the inclusion of a carrier in a consolidation transaction. Then turning to the *Penn Central* case, the Commission, after noting its order in the *N & W* case, modified the protective conditions prescribed in its prior report, and found that consummation of the Penn Central merger should no longer be delayed.[112]

Once again a number of the parties sought judicial review of the propriety of the Commission's orders in both the *N & W* inclusion case and the *Penn Central* case.[113] These actions were consolidated and the three-judge District Court for the Southern District of New York

missed the complaints for lack of standing to assert the questions raised. Id. at 342-93. On appeal, the Supreme Court vacated that judgment and remanded the case instructing that "should appellant [Gruss] still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court." Oscar Gruss & Son v. United States, 386 U.S. 776 (1966) (per curiam).

107 Id. at 981.

108 Erie-Lackawanna R.R. v. United States, 385 U.S. 914, 915 (1966).

109 Baltimore & O.R.R. v. United States, 386 U.S. 372 (1967). In its decision, the majority of the Court made it clear that it was not passing on the validity of the merger itself or the special conditions included in the Commission's orders, but was addressing itself solely to the question whether consummation of the merger was required to be delayed. Id. at 378.

110 Id. at 458.

111 Norfolk & W. Ry. and New York & St. L. R.R. Merger, 330 I.C.C. 780 (1967).

112 Pennsylvania R.R.—Merger—New York Cent. R.R., 330 I.C.C. 328 (1967).

113 Three separate sets of actions, characterized by the court as the "merger actions," the "New Haven action" and "the inclusion action," Erie-Lackawana R.R. v. United States, 279 F. Supp. 316, 323 (S.D.N.Y. 1967), were brought, which, absent consolidation, would have resulted in litigation in six or more district courts.

unanimously approved immediate consummation of the Penn Central merger and approved as well the Commission's terms for inclusion of the three "protected railroads" in the N & W system.[114]

Some opposition had been raised to immediate consummation. The N & W and three members of the C & O family, the C & O itself, the B & O, and Western Maryland, had attacked the revised traffic protective conditions.[115] However, the district court found their claims to be without merit.[116] In addition, Erie and D & H joined forces with the N & W and the C & O group in attacking the Commission's refusal to grant their requests for prescription, of "capital loss indemnification" by Penn Central to reflect any adverse impact upon the price that they would be able to obtain from N & W by reason of diversion of their traffic to Penn Central. The Commission had found that capital indemnification was not justified because under its decision in the *N & W* inclusion case no such decrease in price would occur.[117] Again the Court found the challenges to the Commission's order to be without merit.[118]

The court also dismissed certain supplemental complaints which had asserted that the Commission should delay consummation of the Penn Central merger pending actual inclusion of the New Haven.[119] The court noted that the Commission had earlier, on August 1, 1967, considered means for preserving New Haven's operations pending resolution of the issues involved in its final inclusion with Penn Central.[120] On August 3 it approved a proposal to require the Pennsylvania and New York Central railroads, upon consummation of their merger, to conduct the New Haven's operations under a lease.[121] This was rejected by the New Haven's trustees as unfeasible; they proposed

114 Id. at 325-29.

115 After noting that the only parties ever to challenge the Commission's basic finding that the Penn Central merger was in the public interest have been two Pennsylvania communities and one individual, it dismissed their complaints for failure to file supplemental complaints as authorized by the Court. Id. at 324-25. The Court noted that a number of parties to the earlier round of litigation had now changed their positions: the intervening complaint of the Chicago & E. Ill. R.R. was dismissed on its own motion; the Trustees of the Central Railroad of New Jersey, which in the interim had filed a petition under § 77 of the Bankruptcy Act, stipulated that they sought no delay in the Penn Central merger; the B & M changed its position from opposition to support of immediate consummation of the Penn Central merger; and Erie and D & H indicated that they had no further objections to the traffic protective conditions for their benefit, as revised by the Commission following the Supreme Court's remand. Id. at 326.

116 Id. at 327-29.

117 330 I.C.C. at 360.

118 279 F. Supp. 316, 329-30.

119 These complaints were filed by Oscar Gruss & Son and the First Mortgage 4% Bondholders' Committee of the New Haven. See note 106 supra.

120 279 F. Supp. at 332-36.

121 Id. at 334.

an alternative form of de facto inclusion whereby Penn Central would be required to share in the New Haven's operating losses pending its de jure inclusion.[122] Then, on September 12, 1967, the Commission amended its August 3rd order to permit consideration of means other than by lease for interim inclusion of the New Haven. It ordered that consummation of the merger by Penn and Central would constitute irrevocable assent by the merged system

> to lease the NH or enter into a loan or other appropriate arrangement with the NH for continuation of the NH's operations under such just, reasonable, and equitable terms as the Commission may require.[123]

Thus, in view of this background and the pendency of a final determination on inclusion terms, the district court's dismissal of these supplemental complaints was without prejudice to any relief which might be sought "as a result of the Commission's decision in the proceeding initiated by its orders of August 3 and September 12, 1967, or of its order in the *NH* inclusion case."[124]

Turning to the various attacks on the Commission's decision in the reopened N & W case, the district court found unwarranted not only N & W's objections to the prescribed terms for inclusion of the three protected lines,[125] but also B & M's claim that the price fixed by the Commission for its inclusion was too low.[126] Having found all contentions against the two orders to be without merit, the court then gave separate consideration to the question whether the Penn Central merger should nevertheless be stayed for any purpose and if so, for how long.[127] It first considered whether the prior decision of the Supreme Court required stay of the merger until after the precise mechanics could be worked out for inclusion of the three small railroads. The court concluded that the Supreme Court had not directed a further injunction but left that issue to be determined by the district court in the customary fashion.[128] The district court noted the need for urgency, particularly the dire need of the New Haven, whose trustees had forecast that their cash would run out by the end of 1967, and concluded to stay consummation of the merger only for a period of

122 Id.
123 279 F. Supp. at 334.
124 Id. at 336.
125 Id. at 337-45.
126 Id. at 346-49.
127 Id. at 352-56.
128 Id. at 353.

15 days.[129] It further provided that if within the 15-day period a notice of appeal to the Supreme Court were filed and application for a stay made to that Court, the district court's stay would continue until determination by the Supreme Court of any such application for a stay.[130]

The anticipated appeals were taken and the Supreme Court summarized the issues presented as follows:

> Has the mandate of this Court been fulfilled, in that appropriate provision has now been made for the three smaller roads? Are the terms of the order providing for inclusion of the protected roads in the N & W system fair and equitable and in the public interest? Did the District Court err in refusing to enjoin consummation of the Penn-Central merger? Has adequate provision been made for resolution of the "peripheral" issues presented by the parties, which would not be foreclosed by a decision authorizing the consummation of the merger and inclusion of the protected roads in the N & W?[131]

With regard to the first question, the Court found that upon examination of the record and the findings, it was satisfied that the Commission "has properly and lawfully discharged its duties with respect to the merits of the merger."[132] The Court further found without merit the contention of the N & W that the Penn Central merger should be delayed until the actual inclusion of the Erie, D & H and B & M in the N & W system.[133] Such a delay, it reasoned "would place the public interest as well as the vast majority of the affected private interests at the mercy of decisions . . . of certain corporations whose interests are, in fact, secondary or derivative . . . ."[134] The Court noted that there is no provision of law by which the Commission or the Court could *compel* any of the three protected roads to accept inclusion in the N & W system against their will.[135] As to the terms of the N & W inclusion order the Court agreed with the district court that "the terms fixed by the Commission are clearly within the area of fairness and equity."[136]

The merger of the Pennsylvania and the New York Central Rail-

129 Id. at 355.
130 Id.
131 Penn Central Merger Cases, 389 U.S. 486, 498 (1968).
132 Id. at 500.
133 Id. at 516.
134 Id. at 517.
135 Id.
136 Id. at 526.

roads followed almost immediately after the second Supreme Court decision, and within a matter of months both D & H and Erie had become members of the N & W system. After obtaining a number of extensions of time within which to decide whether to accept or reject the Court-approved terms for its inclusion in the N & W system, the B & M finally failed to act, and thereby in effect rejected those terms.

While the Commission's November 16, 1967 report[137] had provided for interim support of New Haven, and while this support became a reality with consummation of the Penn Central merger, those measures had served only to provide a temporary stop-gap to a final resolution of the problem of preserving New Haven's operations. The Commission's decision on the terms for New Haven's inclusion, particularly as to the price to be paid by Penn Central for its properties, was itself the subject of a number of appeals to the District Court for the Southern District of New York.[138] While this litigation continued, New Haven's cash attrition continued in spite of the loans which it had received from Penn Central under the Commission's orders designed to provide it interim relief pending inclusion. This cash drain became so serious that on August 10, 1968, Judge Anderson, who was considering the New Haven's reorganization plan, noted that if the Commission did not issue an order for the Penn Central to take over the New Haven by January 1, 1969, the court would "reluctantly be forced to entertain a motion to dismiss the reorganization proceedings."[139]

In response to these admonitions and the remands of both courts,[140] the Commission reopened its proceedings on the terms for New Haven's inclusion, and consolidated those proceedings with proceedings already pending concerning the distributive step of the New Haven's plan of reorganization. On November 25, 1968, the Commission issued its *Fourth Supplemental Report* in the Penn Central merger proceedings embracing as well the New Haven reorganization case.[141]

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[137] 331 I.C.C. 643 (1967).

[138] New York, N.H. & H.R.R. Bondholders' Committee v. United States, 289 F. Supp. 418 (1968).

[139] New York, N.H. & H.R.R., 289 F. Supp. 451, 459 (1968). Judge Anderson also observed that

> the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property, and consequently the interests of the bondholders, without just compensation.

Id.

[140] The reorganization court remanded the reorganization plan submitted by the Commission for further proceedings including modification of the inclusion plan for the New Haven. 289 F. Supp. at 466. The *Bondholders* case was also remanded to the Commission for further consideration of conditions for the New Haven's inclusion in the Penn Central merger. 289 F. Supp. at 448.

[141] 334 I.C.C. 25 (1968).

In its decision the Commission modified its earlier findings as to the terms and conditions of New Haven's conveyance to Penn Central, approved the entire plan of reorganization of the New Haven as modified, and directed the inclusion of the New Haven in Penn Central as of January 1, 1969.[142] In effect, the Commission's orders provided that the New Haven properties should be conveyed to Penn Central at the price set forth in the Commission's opinion subject to later judicial review and possible modification. The inclusion of the New Haven in the merged system by conveyance of its railroad-operating properties to Penn Central took place on December 31, 1968. Still, at this writing the issue of price remains unresolved.[143]

CONCLUSION

In view of the vigorous restructuring that has occurred in the decade just closed, it may be that the Seventies will provide a period of relative calm on the merger front, at least in this section of the country. On the other hand, the continuing pressure of rising costs and the need for improved earnings to attract capital may very well produce activity which will streamline the railroad industry into an even more limited number of systems.

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142 Id.

143 On June 18, 1969, a three-judge court rendered an opinion finding that the Commission's Fourth Supplemental Report, 334 I.C.C. 25 (1968), had undervalued the New Haven's assets in certain respects. New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States, 305 F. Supp. 1049 (1969). Thereafter, following issuance of the Commission's Fifth Supplemental Report, the court entered an order requiring an increase of approximately $1 million in the consideration to be paid by Penn Central for the New Haven's assets. In the parallel proceeding under the Bankruptcy Act, 11 U.S.C. § 205(d) (1964), the reorganization court filed its memorandum on the issue of price in which it found that it could not approve the plan of reorganization unless the consideration to be paid by Penn Central were increased by approximately $29 million over the figure which had been approved by the Commission and by the three-judge district court. In re New York, N.H. & H.R.R., 304 F. Supp. 1136, 1138 (1969). See also In re New York, N.H. & H.R.R., 304 F. Supp. 1121 (1969) and In re New York, N.H. & H.R.R., 304 F. Supp. 793 (1969). The price issue thus awaits the conclusion of appeals from these conflicting district court opinions.