The Role of Antitrust Law in Railroad Mergers - A Case Study: The Great Northern and Northern Pacific Merger

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NOTE

THE ROLE OF ANTITRUST LAW IN RAILROAD MERGERS—A CASE STUDY: THE GREAT NORTHERN AND NORTHERN PACIFIC MERGER

The railroad industry is so highly regulated that practically any action it takes or attempts to take is subject to Interstate Commerce Commission approval.[1] Among the many regulations, perhaps the most important is the control over competition. There are two basic areas of control over railroad competition handled by the Commission: ratemaking[2] and required approval of all merger and control proceedings. This Note will deal exclusively with the latter of these two controls.

It was established early that the Sherman Antitrust Act[3] and section 7 of the Clayton Act[4] were applicable to railroads.[5] In 1920, Congress reversed the national policy concerning railroad consolidation by authorizing exemptions from the antitrust laws to mergers that were in the public interest;[6] this exemption is still applicable today. The exemption did little if anything to clarify the Commission's position. The question immediately arose as to whether or not any unification that substantially lessened competition was in the public interest. The Justice Department has continually challenged mergers on antitrust grounds, and the Commission deciding each merger on a case to case basis appears uncertain as to just what part competition should play. In recent years, the Commission has realized that the railroads are no longer in a position to infracture the antitrust laws by substantially lessening competition. This change of thought has met with opposition from both the Justice

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1. 49 U.S.C. §§ 1-27, §§ 301-328 (1958); Parts I and II of the Interstate Commerce Act.

2. Rate-making has had a long struggle with the antitrust laws extending as far back as United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

3. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958); Section 1 states "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

4. 38 Stat. 731 (1914), 15 U.S.C. § 18 (1958) provides that, "No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition my be substantially to lessen competition or to tend to create a monopoly." This is the section as amended by Celler-Kefauver Act (1958).

5. Northern Sec. Co. v. United States, 193 U.S. 197 (1904); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

6. Transportation Act of 1920, 41 Stat. 456 (1920).

Department and the newly formed President's Interagency Committee.[7]

This Note will make a complete review of the problems involved, pointing out the significant periods of railroad legislation, the changes that have taken place in the competitive position of the railroad industry and will attempt to establish as a general proposition that antitrust law should not apply to railroads. The proposed merger between the Great Northern Railway, Northern Pacific, Chicago Burlington & Quincy and Spokane Portland & Seattle serves as an excellent case study. Though this merger is not typical, it is suitable for study because it contains several of the elements that have heretofore curbed mergers.

RAILWAY LEGISLATION AND THE PROBLEM

Prior to the establishment of the Interstate Commerce Commission in 1887, the government did not affirmatively exercise the right to regulate rail commerce between the states, rather such regulation was left to the individual states.[8] The power of the states, however, was inadequate for broad regulation and in the absence of the exercise of federal jurisdiction the railroads policed themselves.[9] It was in this period of loose regulation that the first flood of mergers took place bringing together local lines in an effort to provide direct routes between the major traffic centers. The most active period in this regulation free paradise was between 1889-1890 when one-sixth of the total rail mileage was absorbed.[10]

The Sherman Act of 1890[11] did not include an exemption for railroads, but since the Interstate Commerce Act, passed in 1887,[12] did not have any provisions for the control of consolidation, it was apparent that Congress intended to subject railroads to antitrust law. In striking down an attempt to consolidate the Great Northern and Northern Pacific under a holding company in 1904, the Supreme Court decided the landmark case of *Northern Securities v. United States*[13] which put to rest any doubt about whether or not the antitrust laws should apply to consolidations. The court held that the two lines were parallel and competing, therefore violated antitrust law.

Virtually every proposed merger from the *Northern Securities*

7. President Kennedy, in his transportation message to Congress on April 5, 1962 announced the formation of an interagency committee consisting of representatives of the Departments of Commerce, Justice, Labor and the Chairman of the Council of Economic Advisers. 108 CONG. REC. 5987 (1962).

8. Harris, *Symposium of the Interstate Commerce: Introduction*, 31 GEO. WASH. L. REV. 1, 4 (1962).

9. *Ibid.*

10. Statitics of Railways in the United States 19 (1899).

11. *Supra* note 3.

12. 24 Stat. 379 (1887).

13. 193 U.S. 197 (1904).

case until the Transportation Act of 1920 was struck down on the grounds that it was in violation of antitrust law. The reason for the strict interpretation of the antitrust laws subsequent to the *Northern Securities* case has never been fully explained. One author has reasoned that the carriers received a governmental grant of monopoly in a franchise and they should be barred from any action that would extend the monopoly.[14] In the latter part of the 19th century, there was a vigorous anti-monopoly movement composed largely of farmers and laborers who wanted dissolution of all trusts.[15] Since the railroads were near these small pressure groups, they were the most logical target for this politically favored discipline demanding strict antitrust policy.

Section 7 of the Clayton Act passed in 1914,[16] which prohibited a corporation engaged in commerce from acquiring the stock of another corporation when such acquisition would substantially lessen competition between them, was applicable to railroads and brought to a halt any type of railroad consolidation.

The Transportation Act of 1920 passed in an effort to cure post-war weekness resulted in two significant changes in railroad consolidation. First, section 5(4) required the Commission to draw up a plan for consolidating the railroads of the United States and in the plan it was required to take into account the following factors: (a) the preservation of competition; (b) the effect the consilidation would have on existing routes and channels of trade; (c) the consolidation should be arranged in such a manner that the companies would receive substantially the same rate of return on their investment. Second, section 5(8) provided for the exemption of carriers from state and federal antitrust laws when necessary to effect any combination authorized by the Commission. In the twenty years after the act several plans were introduced by the Commission,[17] but none solved the problems. In 1929, the Commission advanced a solution whereby twenty-one regional systems would be formed.[18] This plan was a dismal failure because of the financial crisis of the thirties and the realignment of railroad ownership and control not conforming to the master plan.[19]

In an effort to cure some of the ills of the 1920 act Congress passed the Emergency Railroad Transportation Act of 1933.[20] This

14. Levi, *The Antitrust Laws and Monopoly,* 14 U. CHI. L. REV. 153, 157 (1947).
15. Walden, *Antitrust in the Positive State,* 41 TEXAS L. REV. 741, 747 (1963).
16. *Supra* note 4.
17. Consolidation of Railroads, 63 I.C.C. 455 (1921).
18. Matter of the Consolidation of the Railway Properties of the United States into a Limited Number of Systems, 159 I.C.C. 522 (1929).
19. Liipfert, *Consolidation and Competition in Transportation: The Need for an Effective and Consistent Policy,* 31 GEO. WASH. L. REV. 106, 114 (1962); Although there was considerable shifting in the industry, it is interesting to note that for the period 1929 to 1940 there was only one merger recorded and that was of the "failing business" variety. Gulf, M. & O. R.R. Merger, 236 I.C.C. 61 (1939).
20. 48 Stat. 211 (1933).

act placed the control of all consolidations under a single set of standards and required the Commission to consider the promotion of public interest when approving mergers. Despite this additional legislation, the financial crisis of the day prevented any active consolidation.

Up to this time the transportation problems of the nation were largely restricted to the railroads, but with the development of the intercity highway systems in the late 1920's and 1930's the competitive motor carrier was introduced. The inland water carriers, also, gained competitively during this period when government sponsorship and encouragement instigated a program of improved waterways.[21] With these new developments, intermodel competitors became a factor as well as intramodel competition when considering a proposed merger.

The Transportation Act of 1940[22] was passed after it became obvious that the nationalized system promulgated by the Commission was not feasible and that the transportation picture of the nation had changed. This legislation was devoted to mergers that were strictly carrier initiated and abandoned the forced consolidation technique of prior plans. The consolidation laws for both railroads and motor carriers were combined into one section and the rules governing mergers were set out in more detail. The Commission was authorized to allow mergers if they were in the public interest by giving weight to the following factors: (1) the effect of the proposed transition on adequate transportation service to the public; (2) the effect upon the public interest of the inclusion of, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; (4) the effect on the interest of the carrier's employees.[23] The exemption from antitrust prosecution afforded in the 1920 act was continued in the Transportation Act of 1940.[24] This exemption was relatively untried up to 1940 due to the unfavorable atmosphere that had hovered over the industry for the past two decades. It had been decided early that there was a combination illegal under the Sherman Act that could be approved by the Commission as "consistent with the public interest,"[25] but there was no determination as to what created such a situation or to what extent the Commission would go to shut out the antitrust laws. The more favorable economic conditions and the new act sparked interest

21. Liipfert, *supra* note 19, at 115.
22. 54 Stat. 898 (1940); 49 U.S.C. § 5 (1958).
23. 54 Stat. 906 (1940); 49 U.S.C. § 5(2)(c) (1958).
24. 54 Stat. 905 (1940); 49 U.S.C. § 5(11) (1958), "Any carrier . . . [is] relieved from the operation of the antitrust laws and of all other restraints . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved . . . by the Commission."
25. Control of Central Pacific Ry. by Southern Pacific, 76 I.C.C. 508 (1923).

in mergers and it became apparent that the extent of the Commission's power would be questioned.

The case of *McLean Trucking v. United States*[26] is the first case to deal directly with the antitrust law exemption. In this case the Supreme Court held that the Commission was not bound to a vigorous application of the antitrust laws in merger cases for this would render the exemption meaningless. The court reasoned that it was for the Commission in each case to give "strict regard" to the impact of the antitrust laws and then strike an appropriate balance between competition and the "public interest."[27] Justice Douglas' dissent in this case challenged the weight accorded competitive factors by the Commission, arguing that "exercise of the administrative authority to grant exemptions from the antitrust laws should be closely confined to those occasions where the transportation need is clear."[28] Justice Douglas contended that the "public interest" must include the principles of free enterprise because they are basic in our economy[29] and that Congress could hardly have intended these principles "to be swept aside unless they were in fact obstacles to the realization of the national transportation policy."[30] This is the view adopted in the Attorney General's report on Antitrust Law:

> All other factors being equal, the policy of the antitrust laws would clearly favor competition by two to service by one. If, therefore, the statutory standard of 'public interest' gives any effect at all to antitrust policy, in a case in which all other factors neutralize one another, it should require a regulatory agency to resolve such an issue in favor of competition rather than monopoly.[31]

In a recent case, the Supreme Court substantiated the *McLean* decision by holding that the Commission had authority to abridge the antitrust laws, and inconsistency in its own right would not necessarily invalidate the Commission's approval.[32] The Court did not give the Commission a free hand, but rather attempted to limit its authority by requiring a balancing of the curtailment of competition, with the advantages afforded the carrier and the public to determine whether or not a proposed consolidation would assist in effectuating the overall transportation policy.

Although the Supreme Court may have indicated a willingness to support the Commission on any merger that is reasonable

26. 321 U.S. 67 (1944).
27. *Id.* at 86.
28. *Supra* note 26, at 93.
29. *Supra* note 26, at 94.
30. *Id.*
31. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 267 (1955).
32. Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173 (1959); Compare Toledo P. & W. R.R., 295 I.C.C. 523 (1957).

considering public interest,[33] its "balancing test" has placed the role of competition and antitrust in a state of uncertainty and confusion. The Commission, in its traditional manner,[34] has approved mergers in which competition was not a factor.[35] But when a merger between two parallel roads would reduce intramodel competition it has had a tendancy to refuse the application.[36] The Justice Department, on the other hand, when opposing a proposed merger asserts that the merger would "flagrantly contravene" the antitrust laws because it would "destroy the vigorous competition" existing between the two roads. The Department argues that the courts have held that the I.C.C. cannot ignore the antitrust laws in deciding a merger case if the effect of the merger would lessen competition substantially.[37] Thus, the present status of competition in railway mergers is unknown. The Commission is still handling mergers on a case to case basis and a clash with the Justice Department appears almost certain.

Today mergers are taking place under different pressures and conditions than existed in the past.[38] Monopoly was one of the few issues raised in the pioneer mergers; today, labor and service to the public account for major issues.[39] Monopolistic claims are obsolete, a relic of the past when rails served local needs and lacked rivals.[40] A merger no longer lessens competition, rather it makes competition in that it enables the railroads to better serve the public. More definite guide lines should be set up for the Commission so the railroads will be able to forecast the outcome of a proposed merger.[41] The "public interest" yardstick does not

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33. The 1940 Act subsituted the phrase "be consistent with" for "promote" with regard to public interest. It has been suggested that the new phrase "be consistent with" the public interest does not connote a public interest to be deprived or suggest the idea of promotion of public interest. The thought conveyed is merely one of compatibility. Pacific Power & Light v. Federal Power Comm., 111 F.2d 1014, 1016 (9th Cir. 1940).

34. See generally Huntington, *The Marasmus of the I.C.C.: The Commission, the Railroad and the Public Interest*, 61 YALE L.J. 467, 472-74 (1952). This article indicates that the Commission and the railroad industry have been traditionally dependent upon each other and as a result the former will give the railroads favorable consideration if it is within the Commission's power. It is also mentioned that this harmony has been lessened somewhat with the reduced standing and influence of the railroad industry.

35. Chicago & N.W. Ry., 312 I.C.C. 285 (1960); Duluth So. S. & Alt. R.R., 312 I.C.C. 341 (1960); The Commission apparently confused on the meaning of competition, has in the past taken the view that if two railroads run parallel they are competitive. This fallacy, stemming from the days of the railway monopoly, has to some extent been overcome in recent decisions, which is indeed encouraging. They have, also, shown a willingness to weigh heavily the economics of a merger against the lessening of competition.

36. Chesapeake & O. Ry., 271 I.C.C. 5 (1948). See generally Connant, RAILROAD CONSOLIDATION AND THE ANTITRUST LAWS, 14 STAN. L. REV. 489, 509-16 for a complete discussion of the merger situation and an analysis of many of the recent decisions.

37. Wall Street Journal, Nov. 1, 1961, p. 4, col. 3; See Wall Street Journal, March 27, 1964, p. 2, col. 1 for a more recent development in Justice Department challenge.

38. Louisville & N. R.R., 295 I.C.C. 457, 468 (1957).

39. The union groups in order to raise public support in their behalf have devised various methods of approach. The Northern Pacific employees have received their pay in silver dollars to show the effect their wages have on the economy of Billings, Montana. In Jamestown, North Dakota, a similar scheme was devised only payment was made in two dollar bills. Checks printed with the slogan "these are railway dollars" have, also, been used. Wall Street Journal, April 6, 1962, p. 1, col. 6.

40. Burck, *A Plan to Save the Railroads*, Fortune, Aug. 1958, p. 83; President Kennedy's Message on Transportation System of the United States, 108 CONG. REC. 5986 (1962).

41. "This administration has a responsibility to recommend more specific guidelines than those now available and more specific procedures for applying them." President Kennedy's Message, *supra* note 40, at 5987.

provide an adequate standard.[42] The Sherman and Clayton Acts should not be used as guide lines since if they do serve a purpose in modern industry, though this is doubted by some authorities,[43] they do not in the railroad industry.

A CASE STUDY OF THE GREAT NORTHERN—NORTHERN PACIFIC PROPOSED MERGER

The problems of a merger are so complex and different, it is virtually impossible to find a typical case, but the merger of Great Northern, Northern Pacific, Chicago Burlington & Quincy, and Spokane Portland & Seattle is most suitable for this analysis because it involves the following factors:

(1) This proposed combination is the only railroad system that sets up a natural time table for mergers:

a. First merger attempt was before the establishment of antitrust law.

b. Second merger proposal resulted in a landmark case establishing the principle that antitrust laws were applicable and controlled railway mergers.

c. Third attempt was made in 1930; a significant period for railway merger and antitrust law.

d. Present merger proposal came in the midst of a consolidation movement when application of antitrust principles is uncertain.

(2) The two major roads, Great Northern and Northern Pacific, are parallel; this fact has been the number one hindrance of consolidation until recently.

(3) The two major roads dominate a specific geographic area.

(4) All of the railroads involved are of the "healthy" variety.

(5) After consolidation, this railroad will be the largest in the nation. Considering the above factors, if antitrust laws are held to be inapplicable in this merger they would not apply in future cases.

During the development of the Northern Pacific, mortgage bonds were issued, the majority of which were bought by the Great Northern. The Northern Pacific later became insolvent and was forced into the hands of receivers. A bond issue to facilitate reorganization was guaranteed by the Great Northern in return for control of the Northern Pacific. An individual bondholder brought an action to enjoin the taking control of the Northern Pacific by the Great Northern. This action was commenced under a Minnesota statute

42. This argument was rejected in New York Cent. Sec., 287 U.S. 12, 25 (1932).
43. Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 755 (1963).

enacted in 1874 which prohibited a railroad from purchasing, leasing, or controlling the franchise of another railway owning or having control of a parallel or competing line.[44] The United States Supreme Court held that the state law did apply to the railroads and that such an acquisition was in violation of the antitrust act and could not be allowed.[45] Hence, the first attempt to operate the two northern lines as a single unit failed.

Early in 1901 the Great Northern and the Northern Pacific jointly acquired control of the Chicago, Burlington and Quincy.[46] In November of 1901, the Northern Securities Company was formed. This holding company obtained control of the Great Northern, Northern Pacific, and also gained control of the Chicago, Burlington and Quincy as a result of a stock exchange agreement with the stockholders of the Great Northern and Northern Pacific.[47] In 1904, the United States Supreme Court held this holding company arrangement invalid.[48] The Court held that competition had ceased to exist between the two lines and one powerful corporation had resulted; that this type of consolidation was a restraint of interstate commerce and a violation of the Sherman Antitrust Act. The company was dissolved and the three roads once again functioned as single units.[49]

In 1930, another proposal was introduced in an effort to secure approval of the merger under the Transportation Act of 1920. The Great Northern, Northern Pacific, Burlington, and Spokane, Portland & Seattle would be consolidated into one company entitled the Great Northern Pacific Railway Company operating as a single unit. The Interstate Commerce Commission decided that the control and operation of the Great Northern Railway, the Northern Pacific, and the Spokane Portland & Seattle by the newly formed company would be in the "public interest" and legal under the Transportation Act of 1920.[50] The Commission, struggling to comply with the statutory mandate of Congress which provided that it should promulgate a master plan for the voluntary establishment of a limited number of railroad systems, excluded the Burlington from the proposal.[51] The two northern roads apparently felt that the Burlington was an imperative part of the plan because the merger was never carried out.

Although the involved lines have since carried on in a co-operative manner, there was no further "merger talk" between them until

44. GEN. LAWS OF MINN. ch. 29 (1874).
45. Pearsall v. Great Northern Ry., 161 U.S. 646 (1896).
46. The First Ninety Years, Historical Sketch of the Burlington Railroad 13 (1941).
47. Tucker and O'Brien, *The Public Interest in Railroad Mergers*, 42 B.U.L. REV. 160, 164 (1962).
48. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).
49. It is interesting to note that the assets of the Northern Securities Company, which consisted of Great Northern and Northern Pacific shares, were distributed to the stockholders of the holding company when the company was dissolved. The same stockholders, therefore, controlled both roads.
50. Great Northern Pacific R.R. Acquisition, 162 I.C.C. 37 (1930).
51. *Ibid.*

1955 when the present proposal was presented. The engineering consulting firm of Wyer, Dick and Company was employed to determine if a proposed merger would be economically feasible and if service could be improved by such action. In December 1957, the Wyer report was submitted advocating a saving of 43 million dollars yearly, through unification.[52] The proposed merger was given a favorable vote by the stockholders of each road and arrangements were made to carry it out.

A new railroad, the Great Northern Pacific and Burlington Lines, was incorporated under the laws of the state of Delaware and an agreement was executed whereby the stock of the new company was to be exchanged for the old in the event the merger was accomplished.[53] Extensive hearings on the proposed merger were held by the Interstate Commerce Commission early in 1963 and there is speculation that the Commission will make a report at anytime.[54] The merger of these four roads will establish a railroad of 24,728 track miles and give birth to the biggest railroad in the United States. The Great Northern ranks thirteenth in size[56] among the railroads of the United States serving ten states in the northwestern area of the United States and two Canadian provinces. It serves a predominantly agricultural area in northeastern Minnesota, North Dakota, and Montana, a highly productive mining area in northeastern Minnesota, and a revenue producing lumber area in Oregon and Washington. The total operating revenue and revenue ton miles has been above the Northwestern Region and Class I Railway averages since 1949.[57]

The Northern Pacific Railway, which is the nineteenth largest railway per operating revenue in the United States,[58] serves eight states and the province of Manitoba. The Northern Pacific, like the Great Northern, has the majority of its branch lines in North Dakota and Minnesota while its main line extends westerly from St. Paul to the states of Washington and Oregon. The Burlington, the largest system in the merger, ranks number eleven in the United

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52. Brief of Applicants, p. 8, Great Northern Pac. & Burlington Lines, Inc. Merger, Finance Docket No. 21478-80 (1963).

53. *Id.* at 93.

54. Since the writing of this Note the Interstate Commerce Commission's examiner has issued his report recommending that the merger be allowed with some exceptions. It is speculated that a final ruling of the Commission will be forthcoming in about a year's time. Examiner's Proposed Report, Aug. 24, 1964, Finance Docket No. 21478.

55. The track miles of the participating carriers are as follows: Great Northern 8,288, Northern Pacific 6,834, Burlington 8,670, and Spokane Portland & Seattle 936. Consolidation-Key to Transportation Progress (Feb. 6, 1961) [Booklet published by the participating roads providing basic information on the merger. Reproduced in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess., pt. 2, at 802 (1962)].

56. *Id.* at 993.

57. MOODY, TRANSPORTATION MANUAL 225 (1963).

58. *Supra* note 55. Northern Pacific has around eleven million dollars in revenue that is derived from over two million acres of land and it has various rights on four million more.

States.[59] Its principal main lines extend from Chicago northwesterly to St. Paul-Minneapolis; from Chicago westerly to Omaha, Nebraska and Denver; from Lincoln, Nebraska to Billings, Montana. The Burlington, unlike the Northern Pacific and Great Northern, receives a great deal of its traffic from interchange with other roads. The Spokane Portland and Seattle, a minor railroad of 600 miles, is not of great importance in regard to the problems confronting this merger, therefore, no purpose would be served by exploring its physical and operational aspects.

All the carriers involved in the proposed merger are in good financial condition. The Great Northern and Northern Pacific are regarded as two of the strongest railroads in the country financially.[60] The abundant blessings of nature in the northern area they serve has been the main reason for this financial strength. Agriculture, forest and mining products are ideal for railroad handling in that the revenue is high and the utility of handling is low. They do not require a high class of equipment and many of them have a common destination. The diversity among their lead products is another factor that contributes to their financial strength since these products are in no way intradependent and provide a balancing of traffic movement. The earnings and dividends have been high and consistent.[61] The operating revenue and revenue ton miles of the Great Northern from 1949 to the present show a pattern well above the Northwestern Region and Class I Railroads.[62] The Northern Pacific shows a similar pattern. Both roads, also, have a great deal of non-operating revenue.[63] The Burlington displays similar financial success.[64]

It should first be established what connection there is between the "public interest" standard and competition or antitrust. Although it is not presently mentioned by the Commission as a distinct factor, competition is possibly the most important "public interest" consideration in railroad mergers, especially from the long range point of view.[65] In this particular merger hundreds of witnesses were heard in an effort to determine its effect on the public; the Commission made no attempt to determine for themselves the actual effect.

The "public interest" guideline born in the Transportation Act of 1920 did not provide any real standard for the Commission to follow.[66] The public interest might be one thing today and another, in the

59. *Supra* note 55.
60. Standard and Poors, Industry Surveys R.R. 53 (1963).
61. MOODY, TRANSPORTATION 1637 (April 10, 1964).
62. *Supra* note 57.
63. Northern Pacific, Sixty Seventh Annual Report 19 (1963); Great Northern, Seventy Fourth Annual Report 21 (1962).
64. *Supra* note 61, at 1749.
65. Railroad Consolidation, *Hearings Before the House Committee on Interstate and Foreign Commerce*, 70th Cong., 1st Sess., pt. 1, at 104 (1928).
66. *Id.* at 69.

light of different circumstances, tomorrow. The Supreme Court in 1932 held that the term was not a mere general reference to public welfare in the absence of standards for its application, but that it had a direct relationship to adequate service, economy and efficiency of operation, and to the best use of the facilities.[67] This case, as well as additional standards set by the Transportation Act of 1940, has served as a basic guide for determination of public interest for the past three decades. With the increased concentration of mergers since 1957, it has become increasingly apparent that the public interest does not remain static. Public interest is subject to such a wide interpretation and varies so much in each case that it serves little or no purpose as a standard. The view has been expressed that it would be difficult to conceive of a statute that confers more authority and greater administrative discretion than section 5 of the Interstate Commerce Act.[68] There has been an effort to spell out what is meant by the public interest standard,[69] but it is apparent, if any progress is to be made in the field of railroad mergers, a new standard must be adopted.

The public has, in the interest of efficiency, accepted the elimination of competition and the creation of monopoly among many of our public utilities, but it has somehow held to the notion that competition must be preserved as much as possible in railroad transportation.[70] There may have been a time before effective regulation and before competition from other modes of transportation became a factor when this action was justified, but it cannot be justified since our transportation industry has made its revolutionary postwar change. Congress has neither made the antitrust laws wholly inapplicable to the railroad industry nor has it authorized the Commission, when passing on proposed mergers, to ignore competitive factors.[71] In fact, the Commission has refused to approve three recent mergers solely on the competitive grounds.[72] A consideration of the northern lines merger clearly indicates that the concern with the lessening of competition in a merger case is a fallacy.

The Great Northern, the Northern Pacific and the Burlington

67. New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 25 (1932).
68. Virginia Stage Lines v. United States, 48 F. Supp. 79, 82 (W.D. Va. 1942).
69. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong. 2d Sess., ser. 3093, pt. 2, at 809 (1962). This report devotes 85 pages to analysing what is meant by "public interest," but it is obvious they have done little more than confuse the issues. The late President Kennedy, expressing his view on the "public interest" standard, stated: ". . . [T]he soundness of such mergers should be determined not in the abstract, but by applying appropriate criteria to the circumstances and conditions of each case. . . ." 108 CONG. REC. 5987 (1962) (President Kennedy's message on Transportation Systems of the U.S.).
70. STAFF OF SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 87th CONG. 1ST SESS., REPORT ON NATIONAL TRANSPORTATION POLICY 260 (1961); referred to as Doyle's Report.
71. Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173 (1959); McLean Trucking v. United States, 321 U.S. 67 (1944).
72. Minneapolis St. P. & S. St. M. Ry. Acquisition, 295 I.C.C. 787 (1958); Spokane Int'l R.R. Control, 295 I.C.C. 425 (1956); Chicago B. & Q. Control, 271 I.C.C. 63 (1948).

each serve a geographic territory that is economically independent of the territory served by the other. The Great Northern and the Northern Pacific, irrespective of the fact that they are parallel, are widely separated, especially in North Dakota and Montana. Because of this position there will be very few so called monopolistic areas afforded the new company. Ninty-six per cent of the stations served by the applicants either will continue unchanged as to the number of railroads served or will continue to be served by two or more railroads.[73] The stations served by only one railroad account for over three per cent of the freight tonnage and most of them have other transportation facilities.[74] This becomes all the more significant in light of the fact that fifteen percent of all the cities in the United States are served by only one railroad.[75] Grand Forks, North Dakota, one of the biggest cities stranded with one road, has highway, pipeline and air competition.

The days are over when the extent of effective competition could be appraised by examining only the rail carriers. Today all types of transportation must be taken into consideration.[76] Since the end of World War II, the railroads have been getting less traffic each year while their competitors show a steady increase. The proportion of the intercity traffic carried by the railroads has decreased from sixty-six per cent in 1946 to forty per cent in 1961. The proportion carried by highway carriers in this same period has risen from nine per cent to twenty-six per cent; the portion by waterways increased from thirteen per cent to fifteen per cent; and by pipelines from ten per cent to seventeen per cent.[77] It should be noted that private and exempt motor carriers give additional competition.[78] In the thirteen state area served by the merging carriers, total truck registrations in 1962 were 2.8 million, an increase of almost one-fourth of the grain shipments to Minneapolis and Duluth.[79] The argument has been made that if the railroads are able to compete as single units the merger will cause them to be predominate and thereby become less competitive. The northern lines merger is susceptible to this argument because as explained earlier, all roads involved are strong financially and control the rail service in the area. The Interestate Commerce Commission in the recent case of *Seaboard Line R.R. Merger—Atlantic Coast Line R.R.*,[80] reasoned that the intense competition in recent years from other

73. *Supra* note 52, at 62.
74. *Supra* note 52, at 66.
75. Louisville & Nashville R.R. Merger, 295 I.C.C. 457, 482 (1957).
76. Norfolk & W. Ry. Merger, 307 I.C.C. 401, 417 (1959).
77. Interstate Commerce Comm., Bur. of Commerce & Stat., Statement No. 6103 Table 1 (1961).
78. Koontz, *Completition Between Regulated and Unregulated Transport*, 58 PUB. UTIL. FORT. 217, 220 (1956).
79. *Supra* note 52, at 70.
80. Seaboard Air Line R.R. Merger—Atlantic Coast Line R.R., Finance Dkt. No. 21215, decided Dec. 2, 1963.

modes of transportation has caused the preservation of intramodel rail competition to lose much of its significance in the furtherance of anti-monopoly policy. This is indeed a wise and significant step for the Commission to take. The government's intense effort to obtain a shorter and more efficient highway network has given the trucking industry a decisive advantage over the railroads. Pipeline and air transportation has been given similar advantages. The railroads, on the other hand, were built in the late 1800's to serve the transportation needs of the nation at that time. As a result they are unable to give the service demanded by modern business. The only way they can establish a competitive position is to consolidate so that they will have shorter routes and obtain better utilization of their equipment. The northern lines have indicated that their proposal will shorten by eleven to thirteen hours the travel time from Seattle to Minneapolis and will better facilitate car movement by avoiding empty home movement in the rush seasons.[81] Such improved conditions will not allow unified carriers to be predominate,[82] rather they will be able to hold their own in advancing a national transportation system.

The final competitive problem is to determine the status of connecting lines. It is inherent in a consolidation or merger of railroads that there will be some traffic diversion. The problem in issue is the quantity. Three adjoining roads will be affected by this proposed merger — the Soo Line, the Milwaukee Road, and the Chicago and North Western. Although it has not been determined exactly what the decrease in traffic will be, the change will not be sufficient to jeopardize the position of these roads. In *Detroit, T & I. R. R. Control*[83] the Commission, as a solution to this diversion problem, prescribed a set of conditions for the protection of connecting carriers.[84] These conditions known as "standard routing conditions" have been used in most mergers since that decision.[85] The Commission held in a recent ruling very similar to the northern lines merger—large controlling lines connected by smaller lines—that intramodel competition will be controlled by these conditions.[86] It should be noted that the President's Interagency Committee interfered in this holding, even though in another recent merger, they issued a statement that if the merger was approved small carriers

81. *Supra* note 55.

82. See United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956), establishing that there is no monopoly where there are ready alternatives a person may turn to for his needs. Brown Shoe Co. v. United States, 370 U.S. 294 (1962), applied this criteria to merger cases under section 7 of the Clayton Act.

83. 275 I.C.C. 455, 492 (1950).

84. The prescribed conditions require that routes and gateways be left open to other carriers, that neutrality in handling and movement be maintained without discrimination against non-participating carriers, that no attempt be made to force industry to route over the unified lines, and that the commission retains the right to re-open the hearing on any abuse.

85. See Pennsylvania R.R. Control-Lehigh Valley R.R., 317 I.C.C. 139 (1962).

86. *Supra* note 80.

would be forced to seek immediate resolution of their problems by merging with others on the basis of short range expediency rather than long range benefit. Such hasty realignment would not be in the public interest and the small roads might even be driven out of existence.[87] In light of the fact that there is no large traffic loss and since unifying carriers have agreed to accept the "standard conditions," there is no intramodel competitive problem presented by the northern lines merger.

The foregoing discussion of the northern lines merger clearly demonstrates that in rail merger cases, even if it involves railroads that are dominate in an area, competition in fact is not substantially lessened to an extent that would violate either the Clayton Act or the Sherman Act. The fact that the merging roads may be of the "healthy" variety is not a criterion for refusing a merger. Their financial health may be attributed to other factors; competitively they may be as "sick" as any other road.

CONCLUSION

This writer concludes that there was a period in which the railroads were in a monopolistic position and restrictions on mergers were necessary, but this is no longer the case. The exemption from antitrust law was given to the railroads during a financial crisis. The railroads were still in a monopolistic state and the fictitious "public interest" standard was set up to keep the lessening of competition at a minimum. Although the financial crisis still exists, the monopolistic position does not, therefore, the "public interest" standard no longer serves a useful purpose.

Proper merger standards should be set so that a company proposing a merger will know just exactly what it is required to do in order to secure approval of the Commission. The present position of the railroad industry calls for a new policy which would remove railroad mergers from the ambit of antitrust law.

NEIL MCEWEN

87. Fulda, *Antitrust Aspects of Recent Transportation Mergers*, 48 MINN. L. REV. 723, 730 (1964).