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In the transportation industry the enforcement of section 7 of the Clayton Act is, for practical purposes, left to the respective regulatory agencies; for their approval of a merger grants immunity from the antitrust laws. The Interstate Commerce Commission may approve a carrier merger if it is "consistent with the public interest." The Civil Aeronautics Board, on the other hand, cannot approve an airline merger that would create a monopoly. The powerful merger movement of the past decade in the transportation industry has brought the agency process of balancing the Transportation Act and the antitrust laws to the foreground. In this Article, Professor Fulda examines the interplay between competition and regulation in recent agency decisions; he focuses on the apparent lukewarm attitude toward competition of the ICC, in contrast with the desire to promote intermode competition of the CAB. Professor Fulda suggests that Congress correct the current "mood" toward intermode competition of the ICC, perhaps by an antimonopoly proviso similar to that governing the CAB.

Carl H. Fulda*

I. THE STATUTORY FRAMEWORK

Prevention of mergers with anticompetitive tendencies or effects is one of the foremost antitrust problems of our day,1 not only in the free sector of the economy, which is subject to section 7 of the Clayton Act,2 but also in the regulated industries of transportation and banking, where enforcement of section 7 is

*Professor of Law, Ohio State University. This Article is an enlarged version of a talk given on December 29, 1963 at the Round Table on Trade Regulation, Association of American Law Schools, Los Angeles, California.

entrusted to the respective regulatory agencies. With regard to transportation, there are other enactments relating to mergers and consolidations which, for practical purposes, supersede the Clayton Act: Thus, section 408(a) of the Federal Aviation Act prohibits mergers of air carriers “unless approved by order of the [Civil Aeronautics] Board,” and section 414 of the same statute relieves from the operations of the antitrust laws—which, of course, include section 7 of the Clayton Act—all persons affected by such an order. In other words, by its approval the CAB may legalize a merger of airlines which, but for such approval, would violate the Clayton Act. The CAB’s power in granting such an antitrust exemption, however, is curtailed by section 408(b): Approval of any merger “which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the . . . merger” is expressly forbidden. Otherwise, a merger shall be approved unless the Board finds that it “will not be consistent with the public interest.”

The legal setting for surface carriers is similar to that governing airlines. Section 5 of the Interstate Commerce Act authorizes the Interstate Commerce Commission to approve mergers, consolidations, or acquisitions of control through stock ownership if it finds such transactions “consistent with the public interest.” Again, ICC approval has the effect of granting immunity from the antitrust laws. The Interstate Commerce Act, however, does not contain the anti-monopoly proviso of the corresponding provision in the Federal Aviation Act. Hence, Congress may have been more concerned with the preservation of competition among airlines than among railroads or other surface carriers. Yet the Supreme Court has repeatedly emphasized that the Commission, in passing on applications for approval of mergers pursuant to section 5 of the Interstate Commerce Act,

must estimate the scope and appraise the effects of the curtailment of

8. See 72 Stat. 737 (1958), 49 U.S.C. § 1202(d) (1958), which requires the CAB to consider “competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the . . . commerce of the United States . . . .” There is no comparable provision in the Interstate Commerce Act.
competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.9

The Court described this complicated task as one posing "a problem of accommodation of the Transportation Act and the anti-trust legislation."10 In other words, the Commission shall put the antitrust and the "regulatory" aspects of each case on two scales and decide which outweighs the other. The Antitrust Division of the Department of Justice usually intervenes before the ICC and the CAB as representative of the public interest in the maintenance of competition and the prevention of monopoly.

II. THE CAUSES OF THE MERGER MOVEMENT IN TRANSPORTATION

A powerful and much-publicized railroad merger movement has been under way since the mid-fifties. Probably its decisive motivation is to be found in the competition of the railroads with other forms of surface transportation.11 Railroad passenger traffic in 1961 dwindled to 2.67 percent of total passenger-miles of intercity traffic, while the private automobile accounted for almost 90 percent and the airlines for 4.5 percent.12 As to freight, the percentage of ton-miles carried by the railroads dropped from 68.19 percent in 1946 to 43.24 percent in 1961, while the percentage of the trucks increased from 7.28 percent to 23.1 percent.13 Similarly, operating revenues of the railroads fell from 70 percent of total revenues of surface carriers in 1946 to 50 percent in 1961.14 This was reflected in low returns on investment for some Northeastern roads15 (which are characterized by short hauls), losses for other-
ers,\textsuperscript{16} and receivership for the New York, New Haven & Hartford Railroad.

It should also be remembered that there was no control of entry into railroading until 1920,\textsuperscript{17} too late to be effective. Various observers have asserted that railroad plant, including parallel rail routes and duplicate terminal facilities constructed at a time when the railroads had a virtual transportation monopoly, is overbuilt in relation to current traffic volume and may today be wasteful. Although these difficulties should not be generalized, mergers appeared to offer a solution to this problem. But as the discussion below will demonstrate, some large railroads that desire to merge are now enjoying considerable prosperity; the approach to the railroad merger movement should, therefore, proceed on a case-by-case basis.

Recent proposals for airline mergers were less complex. The domestic trunkline industry has, since the inception of federal regulation, been characterized by the dominance of the Big Four (American, Eastern, T.W.A., and United).\textsuperscript{18} There are now only seven smaller trunk lines; six others have disappeared through mergers and consolidations.\textsuperscript{19}

The clamor for further concentration in the airline industry was brought about by the advent of the jet age, which necessitated great capital expenditures for the conversion from piston equipment. In addition, the industry was plagued by labor disputes and, in so far as it engaged in foreign operations, by foreign competition. Hence, it was not surprising that cost-cutting mergers were thought to provide a remedy. Significantly, however, the majority of the Small Seven came through the adjustment period better than the majority of the Big Four: Among the latter only American suffered no interruption in profits, while four of the Small Seven had a similarly favorable experience.\textsuperscript{20} Thus, the

\textsuperscript{16} E.g., the Erie-Lackawanna Railroad, \textit{Moody, op. cit. supra} note 15, at 426, and the Baltimore & Ohio Railroad, \textit{id.} at 1135.


\textsuperscript{18} \textit{Fulda, Competition in the Regulated Industries, Transportation} 211, 212, 254–56 (1961).

\textsuperscript{19} All are “grandfather” carriers; \textit{i.e.}, they were in operation in 1938 when the Civil Aeronautics Act was passed. No new domestic trunk line has ever been certificated. For details, see \textit{Fulda, op. cit. supra} note 18, at 192. 225–31; Fulda, \textit{The Regulation of Aviation}, 19 A.B.A. REP., \textit{Section of Antitrust Law} 977, 984, 985 (1961).

\textsuperscript{20} During the calendar-year 1961 and during the years ended June 30, 1962 and June 30, 1963, Eastern and TWA operated at a loss. United had a
myth that small firms are necessarily and inescapably less efficient than big ones was once more refuted.\textsuperscript{21}

III. THE INTERAGENCY COMMITTEE ON TRANSPORTATION MERGERS

President Kennedy, in his Message to Congress on Transportation of April 5, 1962, took notice of the attempts at restructuring the railroad and aviation industries through mergers. He announced the formation of an interagency committee to “formulate general administration policies on mergers in each segment of the transportation industry” and to “assist the Department of Justice in developing a Government position on each merger application for presentation before the regulatory agencies.” The group — composed of representatives of the Departments of Commerce, Justice, and Labor and the Chairman of the Council of Economic Advisers — was directed to examine each pending merger on the basis of the following criteria:

(1) Effective competition should be maintained among alternative forms of transportation, and, where traffic volume permits, between competing firms in the same mode of transportation.

(2) The goals of economical, efficient, and adequate service to the public — and reduction in any public subsidies — should be secured by the realization of genuine economies.

(3) Affected workers should be given the assistance to make any necessary adjustments caused by the merger.\textsuperscript{22}

The Committee’s report was published on March 6, 1963. It set forth the following ten questions with respect to which detailed facts will be sought in each merger:

1) Will the proposed merger restrict effective competition in the provision of transportation services in the area affected?

2) Will the proposed merger permit an economically more efficient use of resources, through fuller utilization, over a period of time,


21. The president of Continental Airlines, one of the smallest carriers, advocated lower costs and lower fares, suggesting that a diversion of just 4\% of private automobile traffic to airlines would double present air traffic volume. In 1961 Continental had a break-even load of 43.5\% for every 100 seats, compared to 56.3\% for the rest of the industry. \textit{N.Y. Times}, April 1, 1962, p. XX18, col. 4.

of plant and equipment and/or reduction in direct costs per unit of output, which will reduce costs while maintaining or improving the general quality of services offered to users?

3) Can the economies sought by the proposed merger be achieved by alternatives more easily revocable which promise to be of comparable effect in accomplishing the improvement in overall efficiency?

4) Will the cost and quality benefits resulting from the merger be reflected in the benefits to the public? To what extent will potential passengers or shippers retain a choice of services from this or other modes of transportation?

5) Will the proposed merger, with the increased market power of the merged carrier, have substantial undesirable repercussions on other carriers in the industry?

6) Will the proposed merger serve the long-run interests of the public and of the carriers concerned or is it merely an attempt to meet a short-run crisis arising because of unfavorable economic conditions in general, or a particular transitory problem?

7) Is the merger proposed, in part, because of the imminent failure of one or more of the merging carriers and is it the most appropriate solution to this difficulty?

8) Are the legitimate interests of existing creditors and equity holders of the merging carriers adequately protected?

9) Does the merger provide adequate protection and assistance to affected employees, and take into account community employment effects?

10) Will the proposed merger serve other objectives of public policy?

The Committee observed that the first question "sounds a warning that a reduction of competition may result in reduced benefits to users . . . ." The fourth question is accompanied by the statement that "over the long run, effective competition is ordinarily the best guarantee of transfer of benefits." All these questions and comments were intended to spell out the vague merger criteria in the existing statutory and decisional law and, perhaps, warn the agencies not to overlook that part of the Supreme Court's mandate that requires consideration of antitrust principles as one ingredient of the "public interest." Ultimately, the courts will have to determine whether the broad, general statutory principles have been correctly applied in each specific case.

IV. CURRENT RAILROAD MERGERS

During the period from 1957 through 1960 some relatively minor railroad mergers were approved that involved claims of large cost savings and that had provoked serious objections only from labor.23 By contrast, the presently pending cases involve

major roads and vast territories; from the antitrust point of view, these cases should be divided into two groups.

A. The Northeastern Mergers

The first group involves the railroads in the Northeast quadrant of the United States. As already noted, most of the ailing railroads are found in that region. Hence, everyone, including the Government's Interagency Committee, agrees that "some rationalization of the existing railroad facilities" is needed, but the shape and scope of consolidation is a matter of controversy. The most hotly contested proposal is, of course, the application for approval of the Pennsylvania-N.Y. Cent. merger, filed early in 1962, which shows that on the basis of income after fixed charges New York Central had a loss of $12,549,048 dollars in 1961 while Pennsylvania's income, calculated on the same basis, was $3,515,586 dollars. In addition to significant improvements in the quality of service, the parties expect $75 million dollars in annual savings, which would be reflected in the rate structure.


25. I.C.C. Finance Dkt. No. 21089, Application 36-38 (1962): concentration of through freight traffic in volume and the elimination of interchanges . . . will expedite service . . . . Classification and re-handling will be reduced and more frequent dispatchments will be possible. Equipment delays will be reduced, and the pooling of special equipment will increase the availability of such equipment to the public.

Pennsylvania Railroad officials recommended that approval of their merger with New York Central should lead to three consolidated rail systems: The other two would evolve around the Chesapeake & Ohio and the Norfolk & Western; the New England roads were urged to merge into a separate fourth system. The Pennsylvania suggests that such regrouping would redress the competitive imbalance which would otherwise be created by approval of the mammoth Pennsylvania-New York Central combination. The Interagency Committee and the Antitrust Division, on the other hand, oppose the merger on the ground that it “would preclude more balanced restructuring of the Eastern District Railroads both now and in the future.” According to the Committee, smaller carriers 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 benefits”; such “hasty realignments” would not be in the public interest. Indeed, the Committee voiced apprehensions about “the prospects and even the continued existence of several smaller railroads” which were not included in any merger or control proposals. Moreover, the elimination of competition between the Pennsylvania and New York Central would deprive “a number of important areas and traffic flows of satisfactory alternatives among roughly equal rival railroads.”

The case for the opposition to the Pennsylvania-New York Central merger will be presented to the Commission in briefs to be filed by the Antitrust Division early in 1964. The statement in opposition quoted above is only a bare outline, which raises more questions than it answers: First, one may wonder whether the possible disappearance of “several smaller railroads” is an evil per se; this may or may not be a just price for “rationalization” which is, admittedly, necessary. Second, and more important, the Interagency Committee and the Department of Justice, in the very same statement, generally approved the creation of two systems led by the Chesapeake & Ohio and the Norfolk & Western, respectively, which the Pennsylvania itself had urged as capable of providing “countervailing power” to its own merger. The posi-

Mergers, because they tend to build up firms representing great concentration of control over service, create situations more conducive to larger firm dominance over the give and take of association rate procedures. The pressures that can be exerted by such dominant members against independent and experimental price adjustments are very real.
29. Statement by Orrick, supra note 24.
tion of the Department thus boils down to the proposition that there should be "serious study" of mergers "which would not involve combining the Pennsylvania with the New York Central." The Examiner and the Commission will have to explore the justification of this attitude.

The interrelationship between the three proposed Eastern systems in terms of relative competitive strength, the impact on the parties included and those not included, and the necessity of evidence to determine whether or not a three-system plan in the East would be consistent with the public interest appeared to warrant consideration in one record. The Antitrust Division therefore moved for the consolidation of the Pennsylvania-N.Y. Cent. case with the proceedings in Chesapeake & O. Ry. — Control — Baltimore & O.R.R. and Norfolk & W. Ry. & New York, C. & St. L.R.R. (Nickel Plate) — Merger. The Commission denied this motion and approved acquisition of control of the Baltimore & Ohio by the Chesapeake & Ohio. The majority held that the precarious physical and financial condition of the Baltimore & Ohio demanded an expeditious disposition, that the Chesapeake & Ohio was able to bring about rehabilitation of the Baltimore & Ohio, and that the two roads were "generally complementary;" a complaint by several labor organizations was dismissed by the three-judge court and the Supreme Court affirmed.

In the proceedings before the ICC, the acquisition of the B & O by the C & O was opposed not only by labor, but also by the New York Central and, of course, the Antitrust Division. The New York Central contended that it could not withstand the estimated diversion of 41 percent of its traffic to the C & O - B & O affiliation; but the Commission thought that these estimates were unwarranted. The New York Central abandoned its opposition upon its application for merger with the Pennsylvania. The Department of Justice, as the statutory defendant of ICC orders, first confessed error and supported the appeal to the three-judge court on the ground that the overall impact on railroad competition in the East had not been established. When the case reached the Supreme Court, the Department withdrew this objection and

30. Ibid.
35. 375 U.S. 216 (1963) (per curiam).
was content with a stipulation by which the parties agreed to a reservation of jurisdiction by the Commission whereby the proceeding might be reopened by the Department or by any adversely affected carrier or by the Commission itself "when and if necessary to obtain the imposition of additional conditions to deal with any undue diversion of traffic from other railroads." In fact, the Department and the Interagency Committee now acknowledge that "ultimate integration of the C & O and the B & O, with proper conditions which may be imposed by the Commission at the time of their projected merger, could create a rational rail network which would permit improved service to the public." On that point the Department and the Interagency Committee seem to be in agreement with the Pennsylvania.

The third of the major Eastern cases, Norfolk & W. Ry. & New York, C. & St. L.R.R. (Nickel Plate) — Merger, was approved by the Examiner on April 17, 1963 and is now pending before the Commission. It involves the merger of the Nickel Plate into the Norfolk & Western and a lease of the Wabash by the surviving railroad, such lease being considered as preparatory to the ultimate merger of the Wabash into the Norfolk & Western system. While these three railroads enjoy sound financial conditions, the merger is motivated by the desire to bring about economies, improved operating conditions, and greater strength in the struggle for business with the C & O and other railroads and other modes, including pipelines.

The Norfolk & Western has presently no physical connection with the Nickel Plate or the Wabash, and it does not serve any of the points served by those carriers. The connection would be established by purchase of the line of the Connecting Railway Company between Columbus, Ohio and Sandusky, Ohio; this would provide "the essential link between Norfolk & Western, on the one hand, and Nickel Plate and Wabash on the other, making possible single-line service to many points where only joint-line service is now available" and would "afford the Norfolk & Western the direct line it has long sought for marketing its lake cargo coal." Although some competition between Nickel Plate and Wabash would be eliminated, this would have no effect on shippers since "all cities on the proposed system with a population in excess of 50,000, other than Roanoke, Va. . . . would have

39. Id. at 56, 57 (Examiner's Report).
service by at least 2 rail carriers in addition to the unified line. . . .”

In fact, no shipper and no rail carrier appeared in opposition to the proposal; again, New York Central had withdrawn its initial opposition after its merger agreement with the Pennsylvania.

Under these circumstances, the objections of the Antitrust Division seemed unconvincing, except as to one point: The Division insisted that the Pennsylvania should be required to divest itself of its 33.77 percent stock interest in Norfolk & Western, and the Examiner accepted this condition, noting that this would eliminate the interdependence of this case and the Pennsylvania-N.Y. Cent. merger. Obviously, such divestment would be indispensable lest the Pennsylvania might exercise control of or influence over the system that was designed to compete with it.

The Interagency Committee and the Antitrust Division announced on October 1, 1963 that they now favored the contemplated Norfolk & Western, Nickel Plate and Wabash combination, subject to the additional conditions that the Erie-Lackawanna be included and that the proceeding be reopened after completion of the study of the New England railroads by the Department of Commerce. The question of the affiliation of the Erie-Lackawanna was explored by the ICC Examiner, who reported that Erie-Lackawanna did not wish to join at that time. Hence, the Interagency Committee’s demand for a shot-gun marriage seems unexplainable.

All told, the creation of two major Eastern systems headed by the C & O and the N & W seems assured. It also seems reasonably certain that there will and must be a third major Eastern system, but whether it will be the Pennsylvania-New York Central or some other combination cannot be predicted at this time. In any event, it is, probably, of great significance that the decision on the Pennsylvania-N.Y. Cent. case will come at a time when the

40. Id. at 60.

41. Id. at 69.

42. Id. at 109. The Pennsylvania has taken the position that it cannot afford to surrender its investment in N & W until it has some assurance that its own plan to merge with the New York Central will be approved. Hence, N & W is trying to neutralize Pennsylvania’s shares by placing them in a voting trust. Wall Street Journal, Nov. 18, 1963, p. 11, col. 2.

43. Statement of Orrick, supra note 24. The Interagency Committee believes that the New England study will show that the best interests of the New Haven would be served by its inclusion in the N & W system. All the New England railroads are investigating creation of a unified New England system controlled by the N & W or the Pennsylvania. N.Y. Times, Oct. 30, 1963, p. 1, col. 5.

two other cases will have been virtually completed. The Pennsylvania will then try to refute the argument that its merger with the New York Central would weaken intra-mode rail competition by pointing to the two newly created competing systems. It may also try to delay ultimate sale of its investment in Norfolk & Western pending approval of its own absorption of the New York Central. In short, the present posture of the three related cases may give to Pennsylvania a most helpful leverage that it would not have had if the cases had been consolidated.

B. OTHER RAILROAD MERGERS

Outside the so-called Northeast quadrant, at the end of 1963 there were two cases in which the Antitrust Division had intervened, one finally and the other tentatively decided by the ICC, that posed the question whether profitable and competing railroads should be permitted to merge, or whether rail competition should be preserved where its workability has been demonstrated by prosperous carriers.

The most dramatic illustration of this problem is Seaboard Air Line R.R. — Merger — Atlantic Coast Line R.R., approved by the ICC by a 9 to 2 vote on December 2, 1963. First, the majority found “the past earnings record of both Seaboard and Coast Line . . . impressive,” with uninterrupted dividend payments. Likewise, their net rate of return “is above the norm for Class I railroads,” although the majority thought the returns were lower than “in other industries or in other modes of transport.” Second, the merger would eliminate the present competition between the two roads, particularly in Florida, where “the merged company would have approximately 81 percent of the railway mileage in the state.” In the six states in which the two lines operate, where they serve 121 points in common, they would, according to the majority, control more than 54 percent of total

45. See note 42 supra.
46. See also Missouri-Pacific R.R. Control, Chicago & E. Ill. R.R., I.C.C. Finance Dkt. No. 21755, Sept. 26, 1963 (Examiner's Recommended Decision), which approved the acquisition of stock control of the Chicago & Eastern Illinois by the Missouri-Pacific. The Department of Justice did not intervene.
48. Id. at 35, 36. The dissent emphasized that rates of return of railroads are lower than those of trucks because of differences in cost structures. Id. at 156.
49. Id. at 55.
railroad mileage compared with 34 percent for Southern, their nearest competitor. The majority concedd “that there will be a significant reduction in rail competition in Florida” and that 88 counties in the six-state area would have no other rail line, but those counties comprised only 15 percent of the population. In any event, the majority insisted that

with the development of intense competition in recent years from other modes of transport, the preservation of intramodal rail competition has lost much of its significance in the furtherance of the overall national transportation policy.

Moreover, “railroads have the basic characteristics of public utilities” and, therefore,

it is not realistic to insist that intramodal rail competition must be preserved in all places, at all times and under all circumstances.

Having said this, the majority proceeded to discuss in great detail the “competitive effects on other railroads through traffic diversion,” thus indicating concern about rail competitors who opposed the merger. Admitting that “losses to Central [of Georgia] and to the Savannah & Atlanta will . . . be substantial,” the majority thought “that the potential injuries to these railroads . . . will be offset to a large extent by reason of their being affiliated with Southern.” Florida East Coast Railroad predicted a loss of five million dollars annually, while applicants estimated East Coast’s annual loss as amounting to 388,000 dollars; the majority concluded that “a realistic estimate would fall midway between the two extreme predictions.”

The majority’s solution for the losses of other railroads is to be found in a list of 14 “Routing and Gateway Conditions,” which are designed to minimize the diversion of traffic from these protestants. Among the most important of these conditions is, of course, the usual general command that the surviving company

50. Ibid. The majority found that one-third of the combined total freight traffic of the applicants was competitive and that 19.7% of that competitive traffic would remain competitive with other railroads. Id. at 56.
51. Id. at 59.
52. Id. at 57.
53. Id. at 60.
54. Id. at 61.
55. Id. at 62–79.
56. Id. at 67, 68.
57. Id. at 69.
58. Id. at 62.
59. Id. at 71.
60. Id. app XI.
“shall maintain and keep open all routes and channels of trade via existing junctions and gateways” and shall continue the “present neutrality of handling traffic inbound and outbound . . . so as to permit equal opportunity for service to and from all lines reaching the rails of these carriers without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.” In addition, there are some specific conditions for the protection of specific rail competitors: For instance, the surviving Railroad

shall open new routes, and maintain thereover competitive joint rates and just and equitable divisions thereof in connection with Norfolk Southern Railway Company via Wilson, N.C., via Fayetteville, N.C., and via Raleigh, N.C., on all traffic moving between (i) all stations on the Seaboard Coast Line Railroad Company and its connections south of Norfolk Southern’s line, on the one hand, and (ii) Norfolk, Va., and points in official territory . . . .

Similarly, the surviving railroad shall, as to all traffic,

be required to maintain, in connection with the Southern and its affiliates to and from the Jacksonville gateway, joint rates no higher than the rates applicable over the lines of the merged company through that, or any other gateway: Provided, . . . that Southern and its affiliates will extend similar reciprocity to the merged company. . . .

There is, also, a requirement for the transfer of trackage rights to the Central of Georgia over the tracks of the merged company between Albany and Tifton, Ga.

Whether these conditions will preserve rail competition in the Southeast outside of Florida is, of course, a matter of conjecture. The Commission imposed them in order to accomplish that purpose, although it generally deprecated the importance of inter-mode rail competition. Perhaps, the Commission’s lack of faith in both the effectiveness of its protective conditions and in the desirability of rail competition is unwittingly revealed in its retention of jurisdiction for five years to permit all affected parties to ask either for modification of these conditions or for inclusion in the merger.

The majority’s affirmative case for the merger then rests on inter-mode competition and an estimate of over 38 million dollars in annual savings, which seems to anticipate no difficulties in obtaining authorizations for abandonment of duplicate lines. Last, but not least, the majority relied on testimony from shippers and public officials that the merger would result in cheaper and faster service, more flexible schedules and more direct routes, elimination of interchanges, and the like. There was, however, extensive testimony in opposition from rail users and communi-
ties in the affected areas; these protestants were apprehensive about the loss of rail competition, which would bring about less dependable service. Naturally, the Antitrust Division’s Brief presenting Exceptions to the Examiner’s Recommended Report heavily emphasized the statements of the opponents, which may be epitomized in the following testimony of a member of the Georgia Public Service Commission:

There has never been any doubt in my mind,—and I do not believe that any shipper who is honest with himself can hold otherwise—that service is far better to an industry located on two or more railroads than it is to one “captive” upon the line of a single carrier. We have had too many experiences before my Commission of just such “captive” situations for it not to be conclusively demonstrated to us that competition, even in regulated industries, greatly improves the service to that area of the public able to avail itself of such competitive operations. The list of advantages of a competitive rail location... include such substantial benefits as more effective rate negotiations, greater carrier concern in expediting service, better car supply and freedom from restriction to captive “long-haul” routes.61

The majority’s answer was that the supporters of the merger, numerically and by tonnage shipped, far outnumbered the opponents. Yet, even here the majority deemed it necessary to make a concession to St. Regis Paper Company, one of the most vigorous opponents of the merger. St. Regis requested that the merger be conditioned upon the sale or lease by the applicants of one of their rail lines from Jacksonville to Quinlan, the site of St. Regis’ plant, to Southern Railway, and this request was granted.62 Thus, the majority acknowledged, in this instance, that an important shipper had the right to insist on the continued enjoyment of competitive rail service. One may wonder why only St. Regis was successful in vindicating this right.

Before attempting to draw conclusions from this decision, brief reference should be made to the Examiner’s recommended decision in Southern Pac. Co.—Control—Western Pac. R.R.,63 dated September 9, 1963. This involved rival applications by the Southern Pacific and the Santa Fe; each desired to acquire stock control of the Western Pacific. The Antitrust Division’s Brief in Opposition, filed on May 1, 1962, urged rejection of both: Southern Pacific’s application was objected to because it would give Southern a monopoly of rail transportation in two important areas of the West; the granting of Santa Fe’s application would,

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62. I.C.C. Finance Dkt. No. 21215, at 84; id. Condition No. 11.
63. I.C.C. Finance Dkt. No. 21314, Sept. 9, 1963 (Examiner’s Recommended Decision).
it was asserted, have an adverse effect on other railroads. Since all three were in sound condition, the Department viewed the disappearance of Western Pacific as unnecessary. A minority of Western Pacific's board of directors also advocates independence of that road. The Examiner rejected Southern Pacific's application but recommended granting Santa Fe's application because Western Pacific by itself can prove to be no real match for the Southern Pacific in preserving rail competition, and certainly it is reasonable to predict that the Santa Fe alone, without the collaboration of the Western Pacific, would be a less effective competitor of the Southern Pacific in Central California and the San Francisco bay area. On the other hand, the combination of the Santa Fe and the Western Pacific will produce a sound and efficient system, which can contribute to the growth and development of the territory involved, not only by providing needed rail service, but by preserving the essential minimum of rail competition.

In reaching this conclusion, the Examiner did not overlook the competition between Santa Fe and Western Pacific for transcontinental traffic in northern California. But he agreed with the Santa Fe that the lessening or elimination of such competition was overbalanced by the ability of the two railroads to give the Southern Pacific more effective and vigorous competition than either Santa Fe or Western Pacific can give separately. This is the same argument invoked by Bethlehem Steel Corp. and Youngstown Sheet and Tube Co. to justify their merger as a competitive weapon against United States Steel, which was rejected by the court in that case. The Antitrust Division had attempted to rely on that precedent before the ICC.

It should be added, parenthetically, that the Examiner referred to the fact that the railroads in the West have done better than in the East and that "a considerable body of traffic important to the economy of the region . . . moves predominantly by rail."

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64. Wall Street Journal, Nov. 19, 1968, p. 9, col. 2. The stockholders of Western Pacific recently voted against merging with the Santa Fe, but management maintained that the vote was advisory only. The agreement between the two roads calls for a stockholder vote only after ICC approval. Wall Street Journal, Jan. 20, 1964, p. 6, col. 2.
65. I.C.C. Finance Dkt. No. 21314, at 125. (Emphasis added.)
66. Id. at 31.
68. See Brief for the U.S. Dep't of Justice, pp. 35, 36. The Department of Justice has recently abandoned its opposition to control of Western Pacific by Santa Fe. Wall Street Journal, Feb. 7, 1964, p. 21, col. 5.
69. I.C.C. Finance Dkt. No. 21314, at 77.
C. Conclusion

The Commission’s decision in the *Atlantic Coast Line* case has, to put it very mildly, raised several important questions.

First: This is the first time that two prosperous and competing carriers have been allowed to merge. The original justification for the railroad merger movement—necessity for rationalization because of poor or unsatisfactory results caused by oversupply of duplicate railroad services—was, therefore, absent.\(^7\) The parties in this case had demonstrated that competition between railroads can work, and the protesting shippers, whose plants were located in Florida, where the surviving railroad will have a practical monopoly of rail service, insisted on continuation of that competition.

Second: The contrast between the *Atlantic Coast Line* decision and all the other cases with respect to intra-mode rail competition is breathtaking. The overriding consideration in the Northeastern cases is the creation of at least three railroad systems none of which should be so strong as to drive the others to the wall; in short, it seems that the ICC—with the blessing of the Interagency Committee, which, strangely enough, has not been heard from in the *Atlantic Coast Line* case—is exerting every effort to reshape the railroads into viable competitive units. The same policy is reflected in the Examiner’s recommendation in the *Western Pac.* case. In fact, that case is comparable to the Northeastern mergers in one point: The purpose of confronting the huge Southern Pacific with the increased competitive strength resulting from the Western Pacific-Santa Fe combination is similar to the attempt at neutralizing the Pennsylvania-New York Central through competing systems. In *Atlantic Coast Line*, on the other hand, intra-mode rail competition is generally belittled.

\(^7\) The same situation prevails in the application of the Great Northern Pacific and Burlington Lines to acquire the properties of the Great Northern Railway and the Chicago, Burlington & Quincy Railroads. I.C.C. Finance Dkt. Nos. 21478–80. The Brief for the Department of Justice in Opposition, filed January 4, 1963, argues that the merger would, contrary to the public interest, create a monopoly of rail transportation in the northern tier of states: “The applicants are presently successfully competing with other forms of transportation, and there is no substantial evidence upon which to base any finding to the contrary or that there will be effective competition by other forms of transportation if the merger is approved,” Brief for the Dep’t of Justice as Amicus Curiae, pp. 88–111, I.C.C. Finance Dkt. Nos. 21478–80; “the proposed merger would have an adverse effect on many states, cities, communities, and shippers,” id. at 119–29. At the time of this writing the Examiner has not yet ruled on this application.
as irrelevant, it is practically ended in Florida, and in the other areas involved it is weakened to an unprecedented degree.

To add that intra-mode rail competition should not be abandoned is hardly necessary. As the testimony of the protestants in the Atlantic Coast Line case indicates, the availability of competitive rail transportation is often necessary to assure fast and dependable service. That is not the only advantage. It is true that rate fixing by rate-bureaus is authorized by the so-called Reed-Bulwinkle Act of 1948, subject to approval by the ICC of the agreement establishing the bureau and its procedure. That statute also guarantees to each member of a bureau the right of independent action and to each shipper the right to appear at bureau meetings and to be heard with regard to rate proposals affecting his interests. Consequently, there is a serious danger that railroads of overpowering dominance may dilute these important protections.

Third: No doubt, inter-mode competition is a significant consideration justifying railroad mergers that are designed to "rationalize" over-built railroad plants. Whether such competition alone also justifies mergers of financially sound railroads that are successfully competing not only with each other but also with other modes of transport is, of course, another question. In any event, the mere existence of successfully competing modes of transportation should not be enough; there should be specific evidence of such competition with respect to the commodities that make up the railroads’ freight traffic. Such evidence was apparently lacking in Atlantic Coast Line. Indeed, Commissioner Webb enumerated in his dissent the nine major commodities that represent 75 percent of the combined carload tonnage for the two lines. Since 1946, tonnage for these commodities, which he described as “captive traffic for the railroads,” increased 100 percent and freight revenue increased more than 150 percent. He concluded that, in view of this strong hold on bulk- and low-rated commodities, there was “no adequate substitute for intramodal rail competition for the principal commodities carried by the applicants and, thus, no reason to believe that the foundation of applicants’ prosperity is not secure.”

72. For details, see Fulda, op. cit. supra note 18, at 288–305.
73. See id. at 295–99.
74. See id. at 301, 302.
75. See Healy, supra note 23, at 442.
77. Id. at 152. Compare United States v. E. I. duPont de Nemours & Co.,
Fourth: The majority in Atlantic Coast Line suggested that intra-mode rail competition was relatively unimportant because the railroads are regulated. That observation would be persuasive only if the Commission should be prepared to implement it: It is one thing to say that the public will benefit from enormous annual cost savings resulting from a merger; it is quite another to make sure that these savings will actually be passed on to the public. In other words, the only substitute for workable competition is increased regulation, and the Commission should, therefore, be prepared to exercise its supervisory authority over the rates of the surviving company and over rate-bureaus to which it belongs on its own initiative in order to back up its philosophy. Reasonable men may differ as to whether this would, in the long run, be preferable to faith in competition, particularly when that faith has been borne out by facts.

Fifth: The ICC is operating under a statute that contains no concrete standards and under a Supreme Court interpretation of that statute that only directs it to consider competition, which it has certainly done in the Atlantic Coast Line case. Hence, the majority of the Commission cannot fairly be criticized for disregarding its statutory mandate. The attempts of the Antitrust Division to have all the rules developed by the courts in merger cases in the free sector of the economy made applicable to mergers in regulated industries are not plausible. On the other hand, it is doubtful whether more specific standards than those now governing the agencies can be framed. Perhaps, the three criteria by which the Interagency Committee is to judge merger applications might be enacted as a congressional declaration of policy. Alternatively, I suggest insertion of an anti-monopoly proviso in section 5 of the Interstate Commerce Act, similar to section 408(b) of the Federal Aviation Act. Without such an amendment, the majority of the ICC may be expected to continue in its lukewarm or skeptical attitude toward competition, which may even find some basis in the fact that section 5 was originally enacted for the purpose of encouraging consolidations. What is needed

351 U.S. 377, 394 (1956) (holding that a monopoly does not exist "where there are market alternatives that buyers may readily use for their purpose"). The same criteria probably apply in merger cases under § 7 of the Clayton Act. See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).


79. See text accompanying note 22 supra.

80. See McLean Trucking Co. v. United States, 321 U.S. 67, 80, 81 (1944). Section 5 of the Interstate Commerce Act was first enacted as part of the
is an explicit reminder from Congress that competition is of crucial importance; this would create a “mood” different from that which now prevails. Preferably, the proposed amendment may even go further by establishing a presumption in favor of competition, which the Commission must rebut by a clear demonstration that the increased quality and efficiency of transportation resulting from the merger would outweigh possible advantages of maintaining competition.82

The change of attitude suggested here implies an additional inquiry described in the third question posed by the Interagency Committee: Are there alternative methods to achieve the economies sought by mergers? The Commission has, apparently, never bothered to investigate that question, the pursuit of which seems essential in helping to maintain the rebuttable presumption in favor of competition.

V. AIRLINE MERGERS

The majority of the past airline mergers involved smaller trunk lines with complementary route structures;83 their competitive strength vis-a-vis the Big Four was thus increased in a manner comparable to that resulting from the mergers of independent automobile manufacturers. A notable exception was the United-Capital merger, which was approved on the ground that Capital was on the brink of bankruptcy and would have gone out of business if the merger had been disapproved.84

The attempt at a radical revamping of the domestic trunk lines by merging Eastern and American was unsuccessful. On November 27, 1962, Hearing Examiner Ralph L. Wiser recommended denial of the application for approval. On June 20, 1963 the CAB announced “tentative” disapproval, without opinion. Subsequently, American advised Eastern that it terminated the

Transportation Act of 1920, which authorized the Commission to consolidate all railroads into a limited number of systems. Act of Feb. 28, 1920, ch. 91, 41 Stat. 456.

82. This view was recommended by the Attorney General’s National Committee to Study the Antitrust Laws, ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 269, 270 (1955), which relied on the dissenting opinion of Mr. Justice Douglas in McLean Trucking Co. v. United States, 321 U.S. 67, 92 (1944). The same philosophy is reflected in H.R. No. 82, 86th Cong., 1st Sess. (1959) (introduced by Congressman Celler); H.R. No. 2142, 85th Cong., 1st Sess. (1957); H.R. No. 9762, 84th Cong., 2d Sess. (1956).
merger agreement, and the Board then issued a brief order dismissing the case.

The Examiner found that the merger would result in creating a monopoly in the Boston-New York (70 percent of the passengers in 1960), New York-Washington (67 percent), New York-Providence (97 percent), Chicago-Indianapolis (94 percent), Hartford-New York (95 percent), Baltimore-New York (87 percent), and Louisville-New York (94 percent) markets and, generally, in trunkline air transportation in the Northeastern area of the United States. The Examiner also found that the transaction would not be consistent with the public interest: The merged carrier’s routes would extend over the entire United States except the Northwest; 20 of the 23 large traffic hubs and 28 of the 38 medium hubs would be served. These points account for 76.8 percent of domestic air passengers. The merged carrier would have at the outset

32.9% of total operating revenue, 34.4% of revenue passengers, 33.6% of revenue passenger-miles, 39.7% of freight ton-miles, 33.3% of passenger revenue, 36.3% of total investment, 36.2% of total assets, 35.6% of promotion and sales expense and 32.4% of advertising expense. The resources of the merged carrier “would enable it with little difficulty to blanket particular competitive segments with schedules and drive its competitors out of the market.”

In short, the case presented

a major fork in the road. Decision to approve takes a road leading to the strong possibility of a domestic trunkline industry drastically reconstituted into something like a three- or four-carrier membership—an irreversible step which has not been established as justified. Decision against approval leads to probabilities of an industry with two or three times as many carriers as likely in the event of approval.

Significantly, the Examiner did not find evidence of business necessity for the merger. To be sure, American was and is a very strong

86. Id. at 63.
87. Id. at 70.
88. Id. at 70. A proposal to reduce all other trunk lines to four was published in the N.Y. Times, Feb. 4, 1962, p. XX1, col. 6. The Examiner followed the findings and conclusions of two preceding studies of the case, although he did not cite them. STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., PROPOSED MERGER OF EASTERN AIR LINES AND AMERICAN AIR LINES (Comm. Print 1962); Barber, Airline Mergers, Monopoly, and the C.A.B., 28 J. AIR L. & COM. 189 (1962). See also City of Houston v. C.A.B., 317 F. 2d 168 (D.C. Cir. 1963) (reversing the Board’s denial of Houston’s request to intervene in the merger proceeding).
carrier, but Eastern, although financially sound after 25 years of continuous profits, has suffered reverses since 1960. A less tough-minded hearing officer might well have succumbed to that. Mr. Wiser concluded, however, that Eastern's recent losses were attributable not to excessive competition, but to delayed acquisition of jets and uneconomic scheduling. Moreover, he did not believe that there was "a causal relationship between number of competitors and expenses per revenue ton-mile"; thus, he viewed Eastern's difficulties as transitory. He also rejected as unsubstantiated and speculative the savings claimed to result from the merger. The expected increase in profits would be at the expense of other carriers rather than caused by increased efficiency. There seemed to be no suggestion of lower fares.

The nub of the argument with regard to savings was Eastern's assertion that it would save ten large jets which it would have to acquire as a separate carrier. The Examiner's answer was that reduction in flying hours could be and actually had been accomplished by independent action of the separate carriers and that, in the long run, procurement would depend on public demand.

All told, the contrast between the "mood" of this decision, which the majority of the CAB seemed ready to adopt, and the approach of the ICC in the Atlantic Coast Line case is striking. Indeed, Mr. Wiser extolled the advantages of a competitive air transport system as encouraging "competitive ferment," "cost rivalry," and striving for "uninterrupted service." This philosophy is reflected in numerous Board decisions and, of course, in the anti-monopoly proviso of section 408(b) of the Federal Aviation Act. Mr. Wiser's finding that the proposed Eastern-American merger would violate that proviso compelled him to determine

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89. See note 20 supra.
91. Id. at 51-56. The president of Eastern recently announced that Eastern intended to break even in 1964 and expected profits in 1965. Wall Street Journal, Jan. 6, 1964, p. 5, col. 2. The reduced profits of the industry as a whole, and the losses of some of its members, were found to have been caused by labor disputes, adverse publicity as to the Lockheed Electra engine, and a jet-purchase program geared to an anticipated growth in traffic that did not materialize. American Airlines, Inc. Merger, Eastern Airlines, Inc., C.A.B. Dkt. No. 13855, Nov. 27, 1962, at 30, 31 (Examiner's Report).
92. Id. at 51.
93. Id. at 58-59.
94. Id. at 59, 60 (quoting from Delta's Brief in Opposition to the proposed merger).
the relevant markets in which the combined company would operate, and, with respect to that issue, he quoted extensively from the Supreme Court's decision in Brown Shoe Co. v. United States. Accommodation between regulation and competition in aviation thus seems to gravitate in the direction of the latter, at least by comparison with surface transportation.

Yet, we should not forget that the regulatory job of the CAB is child's play by contrast with the task of the ICC: Eleven domestic trunk lines with relatively little competition from surface carriers for passenger traffic are much easier to supervise than all railroads, domestic water carriers, and thousands of interstate truckers, engaged in fierce rivalry with each other. At least, the maintenance of workable competition between the domestic trunk airlines has been facilitated by the Board's consistent refusal to certify new trunk lines.

CONCLUSION

The foregoing discussion of recent merger proposals by railroads and airlines demonstrates once more the difficult interplay between competition and regulation. There may, of course, be disagreement with the bias in favor of competition demonstrated in these pages; but there can be no disagreement with the conclusion that under our present legal system and political realities, competition and regulation are not and cannot be mutually exclusive opposites, but complementary devices. The task of keeping these two elements in proper balance remains as one of the most challenging problems of public control.

97. Northeast, one of the eleven, has been saved from bankruptcy by the Board's decision to permit Hughes Tool Company to acquire control of Northeast Toolco-Northeast Control Case, E-18470, C.A.B., June 19, 1962, aff'd sub nom. National Airlines v. CAB, 321 F.2d 880 (D.C. Cir. 1963). Its future as an independent carrier may depend on the outcome of its struggle to keep the profitable New York-Florida route: On July 23, 1963, the Board refused to renew the temporary certificate of Northeast for New York-Florida service, thus leaving that market to Eastern and National. The decision was hailed by Eastern as relieving it from excessive competition, N.Y. Times, July 27, 1963, p. 21, col. 4, and it may have been the Board's consolation price to Eastern's defeat in the merger case. Northeast's appeal is pending in the Court of Appeals for the District of Columbia Circuit, which ordered extension of Northeast's authority for Florida service until final disposition of the appeal.
98. As to air freight, the airlines are not yet competitive with surface carriers.
99. The proposed merger of Pan American and TWA has been abandoned. The principal impact of that merger would have been in foreign markets, because Pan Am has no domestic operations. It may have strengthened U.S. competition with foreign carriers.
100. Fulla, op. cit. supra note 95, at 459.