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Railroad
Abandonments:
The Competitive Ideal†

Regulation of railroads as an industry presumably exempt from the discipline of normal competition has reflected a broad social commitment to a competitive ideal. Accordingly, definition of the appropriate scope for private managerial discretion regarding rail abandonments has also been achieved and justified by reference to this basic standard. Recent abandonment cases, however, cast doubt upon the present vitality and relevance of the competitive ideal. Professor Weissman concludes that though this experience suggests the difficulties inherent in the articulation and application of a new norm, it prompts caution in deriving policy recommendations from estimates of competitiveness in the market for transport services.

I

To be or not to be. Let us concede at once that for the railroads this cannot be the question. Abandonment of track or operations usually involves much less than total extinction of the corporate personality, and however strong the temptation to cast the railroads in the role of romantic hero, even a decision to give up completely can be contemplated with an equanimity impossible for Hamlet. After all, the enterprise, having absorbed the costs of salvage, is reasonably sure of rebirth as the assets of other undertakings. And the pricing of assets, whatever their incarnation, must no doubt persist as the ultimate concern of economic actors. Nevertheless, the right to decide upon the form in which assets are to be held is a necessary ingredient of real responsibility for the use of scarce resources, and it thus seems reasonable to expect that inquiry into the rather specific problem of railroad abandonments will shed light

† This article is based upon a study undertaken as a Research Associate in Law and Economics in the School of Law, University of Chicago.
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upon the general question of managerial responsibility and upon the
degree to which such private discretion can and should be utilized
to direct the economy. It is with such broader considerations in
mind that it is proposed to examine and evaluate the present status
of the right of railroads to abandon a service.

II

Railroad regulation by the Federal Government reflected from
the outset the idealization of competitive behavior that matured
during the middle of the last century and gave form to the legisla-
tive response when social protest became intense after 1873. The
apparent paradox is easily resolved. The Sherman Act of 1890\(^1\)
made it illegal to thwart the processes of the competitive market by
agreements in restraint of trade or by monopolization, on the as-
sumption that public and private interest would be reconciled in
the emerging industrial order if each economic actor desisted from
attempts to influence price and adapted demand or supply decisions
to a price given by the market.\(^2\) But the social norm that dictated
reliance upon unrestricted competition to the fullest possible extent
also pointed to the necessity for governmental intervention when
competition did not exist and could not be assured by fiat.\(^3\) Emer-
gence of the basic antitrust statute at almost the moment when con-
trols were being established for the transportation industry did not
indicate a contradiction in legislative standards. The Sherman Act
and the Interstate Commerce Act\(^4\) are as related to each other as
the Yin and Yang of Chinese philosophy. The antitrust laws may be
called the “positive” principle, an affirmation of confidence in the

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2. The history of the Sherman Act, particularly since the appearance of the “rule
   of reason” in Standard Oil Co. v. United States, 221 U.S. 1 (1911), has produced un-
   certainty about the extent to which the commitment to reliance upon competition was
   intended to stress the element of atomism (no firm taking into account the response of
   others to its own action). An aspect of this problem appears in Dean Rostow’s dis-
   cussion of whether, and to what degree, the Sherman Act intended “agreements in restraint
   of trade” and “monopolization” under sections 1 and 2 of the act to be separate and
   distinct crimes. See Rostow, Monopoly Under the Sherman Act: Power or Purpose?,
   43 ILL. L. REV. 745 (1949); Levi, The Antitrust Laws and Monopoly, 14 U. Chi. L.
   REV. 153 (1947). But, in the world before Chamberlain’s The Theory of Monopo-
   listic Competition (1st ed. 1933) made economists and lawyers self-conscious about
   oligopolistic market models, this uncertainty remained of little practical importance and
   did not create doubt about the basic reliance of the law upon a competitive model as
   thesis in University of California at Berkeley Library) chs. 1, 2 (1956).
3. See generally CLARK & CLARK, THE CONTROL OF TRUSTS (1912), arguing for di-
   rect action to supplement the “thou shalt nots” of the Sherman Act; CLARK, SOCIAL
   CONTROL OF BUSINESS passim (2d ed. 1939).
   1001–22 (1952).
unregulated mechanism of a competitive market. The Interstate Commerce Act has represented the “negative” principle, recognizing the competitive ideal only to justify the imposition of social control when individual enterprise seems inescapably monopolistic or morbidly and excessively competitive. The two declarations appeared as complementary aspects of an identical social ideal.

General application of the “negative” principle to transport enterprise did not occur, of course, until the public—at least the politically potent sections of it that generated the Granger and Populist crusades—became convinced that railroading was characterized by monopoly. Until the early seventies railroads benefited with other businesses from the evolving faith in laissez faire. Only as attention shifted from the level of rates to rate discrimination between places and parties did the view of the railroad industry as a “natural monopoly” begin to crystallize. But no feature of railroad operation in the years before motor transport appeared was more likely to emphasize the lack of alternatives that should characterize a competitive supply than an abandonment. The courts acted early to limit the right to abandon—though it is worth noting that be-

6. The norm commanded respect because of its apparent precision. Desirable economic behavior was defined in terms of responses to revenue and cost, leading toward a long-run equilibrium at which resources would be ideally allocated. Economic theory tended to obscure the fact that the norm was far from unequivocal about the process of adjustment to change and problems such as the impact of change upon individual security—so important in abandonment cases. See Bain, Pricing, Distribution, and Employment 175–77 (1933). This made it easier to be confident that the competitive ideal distinguished good (competitive) from wicked (monopolistic) behavior. Whether this confidence can survive the “discovery” of monopolistic competition and oligopoly is at the heart of the present inquiry.
7. The history is traced in Bucx, The Granger Movement passim (1923).
8. Professor Sharfman, commenting on the Senate’s full dress survey of the industry in 1874 observes: “The Windom Committee concluded that the stimulation of competition would afford the most effective remedy against extortionate charges, and recommended, to this end, the further improvement of waterways and the construction or acquisition of control by the Federal Government or the states of one or more lines between the middle west and the seaboard to compete with the then existing carriers.” 1 Sharfman, The Interstate Commerce Commission 17, n.13 (1931).
9. Those served by just one carrier presumably were burdened even by the perfectly rational decision of the railroad to collect only variable costs at competing points.
10. Large shippers bargained for rebates unavailable to smaller rivals who did not similarly give the carrier traffic in areas where competing carriers were available and so could not exert the pressure of a threat to withdraw it.
12. They undertook to protect the public that had relied upon the establishment of service by a rigid rule that common carriers by rail must continue all services as long as their operations as a whole were profitable. Abandonment of an unprofitable segment was allowed only if the losses there jeopardized the entire investment. Brooks-Scanlon Co. v. Railroad Comm’n, 251 U.S. 396 (1920). The promise that state regulatory commissions might moderate the common law by weighing local needs against the interest of the general community in a healthy transportation system never materialized. See
cause such social intervention emerged in an environment growing more and more favorable to the idea of free enterprise the courts chose to rely upon the law of contract for justification.\textsuperscript{13} And the ease with which power over abandonments was transferred in 1920 from state to federal hands, by testifying to an unawareness that the rise of motor transport rivalry would make the issue more important, only confirms the strength of the prevailing conviction that the competitive model was inappropriate for transportation and that competition could not be counted upon to explain, mitigate or justify railroad abandonments.\textsuperscript{14}

It must be acknowledged that the "affirmative" and "positive" character of the Transportation Act of 1920\textsuperscript{15} does seem to argue that the act was itself a testimonial to the decline of the competitive ideal and the emergence of a new standard idealizing in a general sense the broad national interest in "adequate transportation."\textsuperscript{16} Such a transformation was perhaps intended, as one result of the heightened sense of national—in contrast with individual—welfare engendered by the war. Judging, however, from the subsequent history of the abandonments section, it cannot be said that a new ideal was articulated clearly enough to become controlling. The Commission quickly interpreted "public convenience and necessity" to refer to the local public directly affected by an abandonment, foregoing the opportunity to consider each abandonment in the light of a national interest in the rail network as a whole.\textsuperscript{17} Professor

\textsuperscript{13} The railroads, and other utilities, had themselves promoted the historical victory of contract over status in this area in order to avail themselves of the doctrine of Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 518 (1819), and stave off impairment of charter rights wrested from legislatures that might later change their minds. So strong did the notion of railroad charters as contracts become that courts at first, when insisting upon continuance of a service, sought justification in the strict construction of the charter language. Obviously, this technique had its limitations, for the law of contracts knows of conditions (the obligation to serve could be conditioned upon the possibility of earning a return) and consideration (the public's consideration for the promise to serve might be its willingness and ability to use the service sufficiently), and legislatures began to provide for statutory controls. See in this connection Field, The Withdrawal from Service of Public Utility Companies, 35 Yale L.J. 169 (1925); Bonin, Public Utilities—Railroads—Discontinuance of Passenger Service on Branch Lines, 26 Tul. L. Rev. 110 (1951).

\textsuperscript{14} CHERINGTON, op. cit. supra note 12, at 36.


\textsuperscript{16} The act, for example, imposed upon the Commission responsibility for fixing rates that would assure an adequate national railway system, and granted authority to divide rates on the basis of distinctions between weak and strong roads. See Wisconsin R.R. Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 585 (1922).

\textsuperscript{17} The leading case is Colorado v. United States, 271 U.S. 153 (1926). Senator Clyde Reed's bill in 1943, S. 1499, 78th Cong., 1st Sess. (1943), was offered to upset just this Commission interpretation of its responsibilities and require a broader view of the public interest in any abandonment.
Cherington has blamed this "particularist" approach on the fact that the only existing body of law which the Commission could use as a guide was local in character, that local protestants made themselves heard as those with a national view could not, and that in the period just after 1920 the potential range of the abandonment problem was still unrealized.¹⁸

But, if the new law really expressed the demise of the competitive ideal for transport, it seems strange that the Commission so docilely accepted, and persisted in, a narrow interpretation of its responsibilities. If, on the other hand, the legislation was basically a renewed effort to assure by governmental intervention what was ideally expected from the free play of competition, the "particularist" approach adopted by the Commission did make good sense. The failures of the unregulated market reveal themselves in particular markets and in particular burdens imposed by noncompetitive conditions of supply or demand. A regulatory body, viewing its authority as a substitute for the competitive market, would tend to relate its orders to the local circumstances in which the degree of competition or monopoly was revealed. The Commission's own view, as manifested by its treatment of abandonments, tends to support the suggestion that the essentially complementary nature of federal transport and antitrust policies persisted beyond 1920.¹⁹

III

Since the law of abandonments grew as an integral part of total transport policy, application of section 1(18) of the Interstate Commerce Act²⁰ could hardly have been modified to reflect at once and

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¹⁸. CHERINTON, op. cit. supra note 12, ch. 2. It took time to realize that the shrinkage begun during the war was to persist and accelerate. See UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, at 202 (Series K-29 1949).

¹⁹. When the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12–29 (1952) and the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41–58 (1952), undertook to outlaw certain competitive practices as "discriminatory" or "unfair," they did so in the name of the competitive ideal and professed to be checking incipient monopoly. When the Transportation Act of 1920, 41 Stat. 456 (1920), 49 U.S.C. § 1 (1952), encouraged such monopolistic practices as supervised railroad combination and a measure of profit pooling, it testified to the degree of social control felt warranted by the failure of transport to conform to the ideal pattern. The shift of control over abandonments from state to federal hands in the 1920 act served, in fact, to expand the carriers' freedom to adjust to changing competitive conditions. The process by which Congress completed the transformation of the ICC from policeman into guardian provided the railroads with a forum that could receive sympathetically requests for permission to abandon and subsequently facilitated the abandonment of more than 10% of the national railroad network. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945 (Series K2, K29 1949).

²⁰. 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(18) (1952). The section states: "No carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been
completely the appearance of competitive factors in abandonment cases. So long as competition was not deemed pervasive enough to permit a general reduction in the degree of governmental control, particular incidents of competition could well be thought disequilibrating rather than equilibrating. The decision to control motor transport in 1935, after Joseph Eastman's classic survey of the industry, was a recognition of this possibility. Nevertheless, it is reasonable to suppose that the growing importance of competition could receive acknowledgment most quickly in the judging of requests for permission to abandon. Abandonments, after all, are normally part of a drive for economic health and not apt to serve as a stratagem in an excessively competitive game. Congress did not deem it necessary to provide that motor carriers get permission for total abandonments when regulating this segment of the industry, or to put any limit upon the freedom of water carriers to abandon service when subjecting these revitalized rivals of the railroads to ICC control in 1940. Given the basic premise that the dimensions of its controls are established by the extent of competition, the Commission has had similar inducement to acknowledge rivalry as the cause of abandonments and then to find abandonments thus motivated to be consistent with "public convenience and necessity." The history of abandonments, at least until the mid-forties, evidences such a regulatory response.

obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."


24. A review of the first 120 certificates granted by the ICC, to May 1, 1925, suggested that rail and nonrail rivalry together accounted for 20.1% of the cases. Trumbower, Railroad Abandonments and Their Relation to Highway Transportation, 6 Public Roads 169–73 (1925). When all approvals through 1940 were considered by Cherington, competition was found to explain 32.9%. Cherington, op. cit. supra note 15, ch. 5. In an ICC study limited to cases decided from 1935 through 1943, the figure jumped to 52.7%. ICC BUREAU OF TRANSPORTATION ECONOMICS AND STATISTICS, RAILROAD ABANDONMENTS, 1920–1943 (Statement No. 453, 1945).

For an interesting discussion of how "coordination" of regulated transport aims—and should aim—at achieving the competitive ideal result so far as rates are con-
Recall, however, the character of the law of abandonments and the economic pattern of an abandonment case, particularly when the railroad’s difficulties stem from the encroachments of a competing mode of transportation. The law demands a “balancing of interests,” the authorities undertaking to say whether local protesters are entitled to protection against a carrier’s attempt to improve its own position. The clear implication that some interests must be left unprotected, some burdens of adjustment left to fall where they may, is emphasized by the economic aspects of a typical situation. There is no reason to expect that all shippers will find it equally feasible to utilize the new service that has emerged in an area as the increasingly successful competitor of a railroad. On the contrary, when rail traffic has shrunk to a point at which management no longer can consider the investment warranted, many individual shippers are likely to find themselves threatened by higher costs that do not bear equally upon their own competitors, located on railroads with different traffic characteristics. Permitting an abandonment in such circumstances imposes upon these shippers the problem of adjusting, perhaps moving, their enterprise, with a consequent impact upon related businesses and individuals.

The Commission, then, in its “balancing,” cannot avoid responsibility for the distribution of the costs of economic change. What is more, it is here engaged directly in the process by which the meaning of “managerial discretion” is defined. And, in order that such critical interventions may be characterized as just, the Commission’s decisions must derive support from the basic social norm that the statute is presumed to express. The writer has undertaken to prove elsewhere that it is precisely the role of the ideal element in law to reconcile the conflicting claims of formal consistency and the implementation of concrete social purpose. The details of the argument concerned, see Locklin, Transport Coordination and Rate Policy, 15 Harv. Bus. Rev. 417 (1937).


26. This is, after all, what would happen in a normal, competitive market, and is the effect that the ICC was, in fact, established to achieve.

It is sometimes suggested that protests against the abandonment of a passenger service are frivolous, entered as a matter of pride by communities that no longer need or use the service. See, e.g., Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pt. 1, at 25 and passim (1958). Perhaps some protests by local governments or community organizations when freight is involved are similarly motivated. But, if the railroad requesting an abandonment certificate is assumed to be making a rational decision, there seems no good reason to doubt the good faith and economic rationality of businessmen who testify that loss of rail service will force them into a difficult competitive position and that they cannot economically use the substitute carrier.

need not be presented here, but application of the thesis to the abandonment problem would indicate that lack of a generally accepted norm must create doubt about the justice of the Commission’s rulings and frustrate efforts to agree upon the essential elements of either “managerial discretion” or “public convenience and necessity.” Protestants will insist that they are being sacrificed to an excessively formal definition of managerial prerogatives. Carriers will discover, as heatedly, that there is no certain limit to what restraints upon change the Commission can declare expedient. Both sides, agreeing on the facts, will find the public intervention capricious and arbitrary. If the Commission has avoided serious charges of excessive rigidity or pure arbitrariness, its success can be explained in large measure by the fact that its rulings as an acknowledged substitute for the unrestricted market have manifested an awareness of the force and relevance of the very same competitive ideal that has simultaneously justified the impact of enterprise in uncontrolled sectors of the economy. But to recognize this is to at once be put on notice that, if the social commitment to such a basic ideal has altered, at least so far as change in transport is concerned, the Commission’s efforts to establish the limits of private managerial discretion could no longer so easily be characterized as just, unless, perhaps, they could be related to some more acceptable ideal suggesting the new proper balance between the claims of social change and individual (local) security. It is, therefore, of particular interest that recent abandonment experience, as evidenced by ICC decisions and the debates and actions of Congress, does question in a variety of ways the present force of the competitive ideal.

IV

The Commission itself, of course, could hardly be expected to trumpet a shift from the traditional foundations of its abandonment

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28. Conversely, critics must profess to find that the Commission, in deciding what to "balance" against the carrier's loss, fails to limit itself to the adjustment costs imposed upon shippers by lack of a reasonably adequate set of transport alternatives.

29. Norms relevant to economic behavior may be compound concepts, mingling aesthetic or other values with economic ones. The attitude toward clustering of persons in urban centers, for example, can obviously affect social judgment of changes in transport service. Nevertheless, it will be convenient to keep the present discussion in economic terms, contrasting the competitive ideal with standards stressing security and stability. On the question of norms for economic behavior see Levin, Standards of Welfare in Economic Thought, 70 Q.J. Econ. 117 (1956).

30. Reliance upon impressions gained from ICC decisions means concentration upon freight operations and the effects of abandonments upon businesses. Clearly disputes over passenger service raise similar questions about the appropriate norms for dividing public and private responsibility, but, since these typically arise in partial discontinuance rather than abandonment proceedings, they are generally judged by state commissions, with political as contrasted to economic considerations likely to
policy. As a quasi-judicial body it shares the desire of any court for continuity and consistency. And since relatively few of the abandonment cases reported during the 1945-1955 decade were concerned primarily with competition as the cause of the abandonment, there have been few opportunities to discover the Commission in the act of acknowledging the competitive impact while persisting in ignoring it. Yet there is provocative evidence that this has occurred. Consider, for example, the government's continued thwarting of the efforts by the Chicago & North Western Railway Co. to abandon its service to What Cheer, Iowa. For many years this town of 1100 inhabitants, situated in an agricultural area producing principally corn, oats, and soybeans, enjoyed the service of two independent railroads. The North Western ran a 37-mile branch south to What Cheer from Belle Plaine on its main Chicago-Omaha route, the line having been constructed by a predecessor in 1884. Until early in 1957 the Chicago, Rock Island & Pacific Railroad Co. also offered service, on a 5-mile stub branch from What Cheer to Thornburg, a station on the Rock Island's Iowa City-Montezuma branch. In 1942 the North Western requested permission to abandon its branch, urging that traffic no longer sufficed to support two roads and that operation of their line was already a net drain on system rev-

31. This fact and the contrast with pre-war observations of a much more frequent competitive component in the cases have relevance for a final evaluation of the appropriate role for competition in transportation. It should be added that the suggestions offered here about factors challenging clear-cut use of a competitive standard have been culled from a sample of ICC decisions during the decade. The limitation was imposed by the fact that since 1942 the Commission has only published a substantial sampling of its decisions. (The published reports are intended to include all in which novel considerations or shifts in policy appear.) More cases might have lengthened the list of elements compromising or negating a competitive test, but would be very unlikely to dilute the weight of factors urged upon our attention by the cases in the sample.
expenses, with worse losses in prospect since substantial maintenance costs could no longer be deferred. The merits of this application, which was denied, need not be weighed here, for the possibilities of trucking were confused by extraordinary war-time restrictions, and the Commission’s decision no doubt was affected by a desire to moderate the rash of abandonments suddenly being justified by the War Production Board’s demand for scrap rails. Early in 1945, with the end of the war in sight, the carrier renewed its attempt to secure a certificate. And the Commission, though it challenged the method by which the railroad sought to prove its loss, acknowledged that, even if different accounting techniques showed the branch to be contributing something to the system’s general overhead burden, “the future holds no prospects of substantial earnings” to justify extensive rehabilitation expenditures. Nevertheless, the request was again denied, the Commissioners unanimously agreeing that abandonment was still unjustified since, with the extent of the railroad’s loss in dispute, there was no doubt that major outlays for repair could be delayed “for at least another year” and that war-neglected roads and trucks were still the only—and unsatisfactory—substitutes available to shippers if rail service stopped.

Four years later, when highways were again in normal repair and trucks readily available, the North Western for the third time sought permission to act upon its own considered judgment that the service from Belle Plaine to What Cheer should be abandoned. Though tonnage handled by the branch had actually increased since the previous request was rejected, the railroad maintained that costs had risen more than revenues, and that its estimates proved abandonment would still give the system a badly needed increase in net revenue. Prospects for further tonnage increases were said to be negligible, since the growing range of truck service not only argued against expecting rail recapture of livestock traffic but promised to divert other carriage as well. Deferred maintenance continued to press for attention. And, finally, it was announced that the Rock Island stood ready to acquire a North Western spur and thereby

33. The number of applications approved jumped from 118 in 1941 to 180 in 1942, after averaging only 112 in the five preceding years. The previous high was 157 in 1934. ICC BUREAU OF TRANSPORT & STATISTICS, 1920–1943, op. cit. supra note 24, at 4. Of course, the problem posed for the Commission by the war carries its own implications concerning the usefulness of reference to a competitive norm in an economy being organized for actual or anticipated military effort.
35. Ibid.
36. The applicant’s suggestion that the biggest shippers could arrange to use the Rock Island was also dismissed for the time being since equipment needed by the Rock Island for an immediate expansion of service was in short supply.
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continue rail service for most of the tonnage in and out of What Cheer. The carrier did not prevail. The renewed application produced two decisions, one by a Division 4 panel, after a further hearing, the other by the full Commission. Both decisions rejected the railroad’s petition. Yet it was clear that in doing so the regulatory agency had changed somewhat the basis for its rulings. Stress was no longer placed upon the unavailability of substitute service, nor did the Commissioners express serious doubt that truck rivalry was at the heart of the branch’s dim prospects. Instead, having observed that a number of shippers had testified about real costs to them from a cessation of rail service, the Commission chose to minimize the carrier’s claimed loss and to substitute its judgment for that of management in deciding what costs would be saved by an abandonment. It did not concede that Iowa property taxes attributed to the branch account should be deemed a “savable” expense. It denied that roadway depreciation charges could be treated as other than a bookkeeping expense, and adhered to the position already established in another Chicago & North Western case that only actual outlays, unavoidable in the relevant period, could be counted. And, in estimating the costs of handling branch traffic on other system lines—which would be avoided if the branch were abandoned—the Commission insisted upon its own rule of thumb, using 50% of the revenue assigned to the rest of the system from traffic originating or terminating on the branch instead of the approximately 60% used by the railroad in its own calculations.

37. The spur served the clay products firm which alone accounted for more than half of all the business of the North Western’s entire line.
40. Commissioner Mahaffie’s dissent emphasized just these considerations in arguing that maintenance of two rail services in the area was economically unwarranted. Id. at 535.
41. To justify an abandonment it must be shown that otherwise unavoidable outlays can be saved thereby in an amount exceeding the revenues lost to the entire system by the contraction. Presumably the carrier has no quarrel with such a test in principle, for its own desire to abandon should rest upon it. Troxel, op. cit. supra note 22, at 521–29.
42. Whether abandonment of a line segment will reduce property taxes depends upon the particular method used by the state to assess values and set rates. To the degree that valuations depend upon net earnings or the value of the carrier’s stocks and bonds, a justified abandonment can raise the tax base and actual tax outlays. The opposite result can be expected when the tax base is related to gross revenues or to the cost of the installation. Iowa has given its commissions wide discretion but net earnings and the value of securities have been regularly considered. See Lynch, Railroad Taxation and Abandonments, 18 Harv. Bus. Rev. 496 (1940).
44. The carrier did not dispute that it was harder to ascertain the exact costs of adding branch traffic to the general flow of traffic on other parts of the railroad system than to find costs directly assignable to branch operations or calculate system revenues derived from branch traffic. But it argued that realistic estimates should take into
short, the Commission chose to defend the public interest by disputing the railroad's calculations of its own private interest, finding that the branch had a "feeder" value to the North Western in spite of the managerial declaration to the contrary.

The history of rail service to What Cheer can be brought quickly up to date. On March 28, 1956, the Rock Island line applied for permission to abandon the stub branch from Thornburg. Net system losses for each of the two preceding years were proved by standard ICC accounting methods. And in December the Commission found that "the present and future public convenience and necessity permit abandonment." The Commission observed optimistically that the line's largest shipper, a What Cheer coal and lumber yard, might find a site on the North Western's track, or, even better, that the North Western might purchase at net salvage value the trackage needed to extend its own service to the lumber company — though the North Western had indicated no such intention in response to the Rock Island's informal inquiry. In the event, the forty-day waiting period passed without an offer from the North Western, the Rock Island tracks were physically removed (March, 1957), and at almost the same moment the Chicago & North Western instituted a new effort to abandon its branch. The railroad's subsequent testimony indicated that prompt outlays of nearly $600,000 — indeed, over $1,100,000 if future maintenance were to be kept normal — had become absolutely necessary to permit continued safe operation. On June 4, 1958, sixteen years after permission was first sought, approval was granted, ending rail service to What Cheer.

When the Commission rejects a request for a rate change, it is often tempting to accuse it of economic naiveté, of failing to recognize, for example, that softening one carrier's economic thrust may serve only to preserve returns on the excess, unneeded capacity of another. But in abandonment cases, with the public interest explic-
itly introduced by the phrase "public convenience and necessity," the record cannot as easily be said to evidence a lack of economic sophistication. Carrier costs are assessed diligently and the burdens of an unprofitable operation upon interstate commerce duly acknowledged. The Commission makes a serious effort to minimize the risk of catering to excessively vague or even imaginary burdens of protestants. The explanation for the Commission's persistent interference with rail management in situations like that at What Cheer cannot be expected to lie chiefly in faulty economic analysis. On the contrary, the law regulating abandonments may be assumed to accept the dictates of sound economic reasoning as an element in a total legislative effort to do justice. And when it is realized that the What Cheer situation seems more readily explained by the appearance of truck competition than any other freight case reported by the ICC since 1945, it is particularly intriguing to observe that the Commission ultimately chose to stress its rejection of management's judgment concerning costs and maintenance policies and revenue prospects, while permitting the matter of rivalry and alternatives for shippers to slip from view. This development certainly suggests that the Commission's attitude reflected some diminution in the vitality of the competitive norm and its usefulness for interpreting and applying legislative declarations of policy. It could as well mean recognition that the decision of the carrier to abandon, when able to prove a loss only by reliance upon accounting methods different from those generally used in abandonment cases and which put the branch operation in its least favorable light, might be motivated by managerial considerations not amenable to judgment merely by reference to the competitive standard.

The Commission, for example, has not been impressed by claims that real estate in the neighborhood of the line would suffer a general decline in value, and has thus avoided abuse of the concept of social costs that could result from its inability to receive at the same time proofs that realty values in other neighborhoods might in fact be raised by the alteration and greater health of the transport network. Boston & M.R.R. Abandonment, 290 I.C.C. 415 (1954). The tribunal tends to guide itself by financial considerations, and to count the measurable impact of altered transport costs more heavily than claims regarding other aspects of protestants' operations, which may be evidenced by a wide variety of accounting techniques. See Winch, The Interstate Commerce Commission 341-48 (1948).

Commission did not articulate such a justification for its stubborn rejection of the carrier's request for relief from the impact of growing competition. And it is by no means intended to derogate from the merit of the Chicago & North Western's attempt to leave What Cheer. Modification of the function of the competitive norm and acknowledgment of another standard need not indicate that the company's request should have been denied.

Nevertheless, it is not difficult to imagine a spectrum of managerial purposes—all perfectly reasonable—that could concern a regulatory commission charged with protecting local interests and attentive to considerations other than the growth of
Exactly the same possibilities are suggested — and even more forcefully — by the attempt of the Ohio & Morenci Railroad Co. to abandon a 21-mile line between Allen Junction and Morenci, both in Ohio. In 1933 the Toledo & Western Ry. Co. obtained permission to abandon 43 miles of its road and sold it for $55,000 to Joseph Schontal Co., a scrap iron dealer planning to realize a profit through salvage operations. Only part of the line was scrapped, however, for Schontal decided that the Allen Junction-Morenci section could be run profitably and created the Ohio & Morenci as a subsidiary for this purpose. Results justified the decision. The road made money and built up its corporate surplus while paying regular dividends to the parent company and its successor, Sumner Company. For six years ending with 1948, earnings amounted to almost 9% on the total investment, reaching 15% for 1948 alone. But in that year management found reason to be dissatisfied nonetheless. The price of re-rolling rails sky-rocketed to nearly $70 per ton, and Sumner's estimate of the salvage value of its asset rose also, to $242,800. Since 1947 earnings would represent only a 2% return on this swollen value, the owners wanted to liquidate. The Commission denied the application, frustrating the shrewd judgment of management (scrap falling below $35 again in 1949).50 Though a "public need" for rail service was said to have been established by the testimony of some small shippers, the burden was apparently a very modest one. The New York Central had already arranged to provide service to the two biggest shippers in Morenci, who together gave the line over 40% of its revenue. The general area, near Toledo, did not seem to suffer from any peculiar lack of transport alternatives. And Schontal's decision to continue rail service after the ICC had itself found total abandonment justified was not found to have induced substantial entry by shippers especially dependent upon railroad facilities. The decision, providing only for "renewal without prejudice after two years," made it very clear that the Commission was chiefly concerned to moderate the pace at which local communities could be forced to adapt to changes in transportation service, however sound the carrier's judgment about the best use of its resources.51

competition in the supply of transport. They might range from the desire to realize a tax loss, to the raising of working capital by avoiding scheduled maintenance (and avoiding tackling less tractable elements of the corporate financial pattern), to the building of a record in abandonment cases as leverage for rate proposals, or even to the soothing of stockholders by a display of managerial activity. Specific examples of such motives appear in the analyses of the cases discussed in the text infra.

51. To pass off the ruling as a protest against "profiteering" clearly introduces a rival to the traditional competitive standard. Actually, such an explanation is not very convincing here when it is remembered that the company's original decision to postpone salvage had given the community unexpected use of the road for 16 years, and that 1949 was not characterized by the regulations and acute shortages that give profit-
Winona R.R., Abandonment raises similar questions in a somewhat different way. At the beginning of 1947 this railroad was comprised of two segments, one being the 18.5 miles running north from Warsaw, Indiana, to New Paris, the other a forty-mile line south from Warsaw to Peru. The stockholders, who also owned the $600,000 worth of bonds issued by the company, initiated an effort to improve the railroad’s financial picture by voluntarily writing off $200,000 of the bond debt. They next secured permission to abandon the southern segment, and used the salvage proceeds to retire another $150,000 of the bond issue. As a third step they purchased some property from the railroad for something over $31,000 in bonds. Then in 1948 the owners sold the rest of their interest, the stock and the $218,750 worth of bonds still outstanding, for $44,000 to a group made up of men who had been—and remained—officers of the company. The new owners continued the liquidation process, selling various assets for a total of about $106,000. Some of the cash thus acquired was used to pay off debts on the assets sold, $9000 was paid against the bonds, and a small amount went for financing of rail operations. But about $53,000 was still in a deposit account when the company requested permission to abandon completely. The application declared that the salvage value was $68,000 plus the value of the right of way, that the line could not be run profitably, and that the new owners had to withdraw to save their investment.

In denying the application the Commission, of course, tried to minimize the claims of loss. The road had, in fact, almost covered expenses in 1948, when especially energetic solicitation by the president had secured for the line a much increased tonnage of coal traffic. But this traffic fell off when labor troubles hit the mines late in the year, and management professed to lack confidence that it could be recaptured. Indeed, it is not at all clear why the ICC should itself have been pleased with what had actually been a diversion of freight from the other better-located carriers that previously carried it. The fact is that the decision suggests the Commission’s uneasiness about the entire process by which the abandonment petition emerged and seems to rest upon a conviction that shippers are entitled to protection against a management more concerned with liquidating assets than with a serious effort to run the

52. F.D. 16566, 275 I.C.C. 818 (1950).
53. Not originating on or destined to the line, but carried by it as a “bridge” between other railroads.
54. Both the Pennsylvania and the New York Central serve the territory, the former going through Warsaw.
road. The two main protesters did allege that they had increased their operations (one was a creamery, the other a gravel and sand company) in 1948 in reliance upon the assurances of the new Winona owners, but it is not clear why either was entitled to special consideration for exercising poor judgment. The Commission in effect decided to temper the impact upon any shippers of factors that the market in which they purchased transport services might not easily reveal. Management could, for example, have resolved to liquidate for tax reasons or to rearrange ownership and control of particular properties, with the business of transport an incidental consideration. And though the abandonment was later granted,\textsuperscript{55} so that a loss was in effect forced upon the owners of the road by the delay, the Commission apparently felt that it was a proper use of its powers to reduce the pace at which shippers must adjust to such enterprise in a transportation industry. There was no indication that available alternatives entailed more serious cost increases to shippers than in any case where growing truck rivalry brings a rail line to the point of abandonment and a certificate is normally granted. The only unique factor was the possibility of a managerial motive not directly related to the degree of competitive pressure in its market.

The three cases just described must suffice here to show that though the Commission's regulatory powers emerged from an idealization of competition, and though the railroads and the Department of Commerce still urge that the degree of competition in transport measures the appropriate bounds of regulatory interference with managerial discretion in the use of transportation resources, the Commission has apparently responded to considerations quite distinct from the competitive one. Cases in which certificates were denied have been used as illustrations to emphasize the fact that Commission rulings do define the managerial function. It should not be assumed, however, that decisions in which abandonments were approved must fail to reveal the force of elements other than the intensity of competition. Approval was granted when a carrier was extremely anxious to realize a $700,000 income tax credit,\textsuperscript{56} or to cash in on an enormous increase in salvage value after the OPA removed ceiling prices on scrap rail,\textsuperscript{57} or to increase the profits of an already profitable "bridge traffic" operation by leasing better located facilities from another railroad instead of maintaining its own road.\textsuperscript{58} That these results seem to clash somewhat with those in the cases discussed above tends to confirm the expectation that lack of

\textsuperscript{55} Winona R.R. Abandonment, F.D. 16566, 282 I.C.C. 802 (1951).
\textsuperscript{56} Boston & M.R.R. Abandonment, 290 I.C.C. 415 (1954).
\textsuperscript{57} Missouri & A. Ry. Receivers Abandonment, 271 I.C.C. 171 (1948).
a well-defined basic norm to which a judgment can be related will create uncertainty about what a just ruling would be. Taken together, the cases do suggest that the competitive norm does not now play the simple role originally envisioned for it in the development of railroad regulation.59

V

The impression thus derived from a reading of abandonment reports is strengthened by other aspects of recent abandonment history. Witness, for example, the emergence in 1942 of the rule that the Commission could and would attach to abandonment certificates conditions protecting displaced workers. It is true that this responsibility was forced upon a reluctant Commission by the Supreme Court,60 but the result was that the Commission no longer avoided protecting the interests of particular persons against hardships dictated by market-oriented measures of efficiency.61 Deliberate intervention on the basis of an alleged "national interest in the stability of the labor supply available to the railroads"62 implies recourse to standards quite different from one idealizing a competitive adjustment to an abandonment.63

At almost the same time other evidence appeared that the potency of the market norm in abandonment cases had changed. In 1943, Senator Clyde Reed submitted to the 78th Congress a bill "to establish additional standards and to declare the policy of the Congress with respect to the abandonment of railroad lines."64

59. The courts, by reason of the well-established principle that discretionary judgments of administrative tribunals should be respected, have had little reason to challenge ICC interpretations of "public convenience and necessity." CHEW, op. cit. supra note 12, at 69-79. But, in a 1951 dissenting opinion, Mr. Justice Frankfurter found an opportunity to declare that the code of ordinary competitive business was inappropriate for transportation: "[U]nlike a department store or a grocery, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable." Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 353 (1951).

61. The Commission had adopted a contrary stance, quite consistent with a notion of itself as a judge only to the degree that the market is imperfect. In re Chicago Gr. West. R.R. Trackage, 207 I.C.C. 315 (1935).
63. Workers are spared from accepting the wage a free market would establish and the railroads required to moderate the pace of innovation. That the ideal sustaining social control in the interest of stability or security is, at least to the present time, a much less precise concept than the competitive model may be inferred from the fact that the Commission has not used a "particularist" approach when writing labor conditions into an abandonment certificate, but has instead relied upon mechanical application of the so-called Burlington Rule, established in Chicago, B. & Q.R.R. Abandonment, 257 I.C.C. 700 (1944).
The bill was introduced as a reaction against the war-engendered rush in 1942 for scrap rails, and the opening phrases pointed to the social interest that it was felt regulation should protect:

Be it enacted . . . that it is found and declared that the construction and operation of railroad lines induces the location of homes and the establishment of business enterprises and development of communities along such railroad lines by the public, in reliance upon the continued operation thereof as a permanent means of transportation; that the abandonment of such railroad lines ordinarily entails loss and hardship to individuals and disruption and destruction to established commerce, both intrastate and interstate, and endangers the prosperity and continued existence of communities served by the abandoned railroad lines. . . .

While the bill provided only that no abandonment be permitted "unless and until it shall conclusively appear that the efficiency of the national transportation system will be increased thereby," the concept of efficiency thus catered to was hardly that incorporated in the notion of a competitive market. The "findings" required to support a ruling in favor of an applicant were spelled out, and they made abundantly clear that the intent was to block abandonments, regardless of why rail traffic was suffering, so long as the narrow confiscation rule of Brooks-Scanlon did not apply. At the hearings on the Reed bill, the state railroad commissioners, who may be presumed to have tried to express consciously the social morality of their communities, endorsed the bill just because it would secure those communities against rapid economic adjustment. And they suggested that in a society giving renewed emphasis to considerations of security and stability, the deliberate sacrifice of the gains from enterprise may be prescribed first in the transport sector.

Even before Senator Reed's efforts, the Transportation Act of 1940 — and particularly its introductory Declaration of National Transportation Policy — underlined the importance of nonmarket factors in all transportation decisions. The railroads, whose so-called Committee of Six first proposed the Declaration, no doubt assumed

65. Id. at 1–2.
66. Id. at 2–3.
69. Mr. John Benton, speaking for 33 state railroad and utilities commissions, berated the ICC for its refusal in a 1944 proceeding, Atchison, T. & S.F. Ry. Abandonment, 254 I.C.C. 767 (1944), to attach a stigma to abandonments motivated by an opportunity to establish tax losses, and Senator Reed expressed vigorous agreement. Hearings, supra note 68, at 11.
70. Id. at 63 (testimony of Commissioner McConnell). The rationale for such a priority lies, perhaps, in the fact that "changes in the technique or efficiency of transport affect all industries, not in equal degree, but to some extent, [which] tends to set transport apart from other industries, changes in whose technique are likely to affect some other industries, but practically never all." BONAVIA, THE ECONOMICS OF TRANSPORT 13 (1947).
—as they seem still to assume—that any “clarification” or even “articulation” of public policy would necessarily reflect the competitive norm and thereby remind the Commission that the (alleged) new ubiquity of competition in transport explained and justified the railroads’ hopes for greater freedom to compete as they saw fit. The railroads did not yet have the benefit of the British experience, which proved by the nationalization of transport in 1947 that acknowledgment of pervasive competition was compatible with a forthright denial of the competitive norm. It is true that the Policy, when declaring an intention to “promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers,” or of avoiding “unjust” discriminations, “undue” preferences, and “destructive” competitive practices, could be voicing a hope that regulation will produce a “competitive” result. But the Declaration also speaks forthrightly of “preserving the inherent advantages” of each type of carrier, and it explicitly adds “the needs of the Postal Service and of the national defense” to “the needs of commerce” as reasons for administrative intervention. The railroads now give priority to the need for a revision of the Declaration of Policy. The urgency of their request, moreover, testifies to the fact that the act of 1940 did represent a challenge to the use of the competitive norm for transport.

The Transportation Act of 1958, it is true, may prove to be a reversal of the suggested trend and a significant reaffirmation of the competitive norm. Certainly the railroads were pressing for such a result. But this outcome is by no means certain or necessary. As has already been noted, only actual cases can tell whether the increase in Commission control over service discontinuances—if its constitutionality is sustained—will significantly alter the pace at which passengers must adjust to the impact of competition upon their accustomed mode of travel, or entire communities to their own related problems. And, though the railroads may hope for greater freedom

71. The significance of such a possibility is not diminished by the fact that a later government undertook to reverse the nationalization of trucking. British railroading reacted to the motor transport threat exactly as its American counterpart was to do later. The industry campaigned for a “Square Deal,” which meant greater freedom to set rates “as competition required.” Since the average rail haul is shorter in Britain than in this country, the pervasiveness of truck rivalry was even more easily demonstrated. See MANCE, THE ROAD AND RAIL TRANSPORT PROBLEM, especially 112–31 (1940).


73. See testimony by the Department of Commerce and by railroad spokesmen. Hearings on Transportation Policy, supra note 30, at 172, 530, 561.

74. See Commissioner Eastman’s speech to the American Economic Association in December, 1939, The Transport Problem, 30 AM. ECON. REV. SUPP. 124 (1940).

75. 72 STAT. 568 (U.S. CODE CONG. & AD. NEWS 2969 (Aug. 20, 1958)).
to compete by rate setting under the revised rule of rate making. To the acceptance of the new language by the ICC makes it an open question whether a shift toward less inhibited competitiveness has in fact been achieved. ICC commissioners have testified that the constraints chiefly complained of by the railroads are required by the Declaration of National Policy in the Interstate Commerce Act. The act of 1958 does not change this Declaration, but, on the contrary, specifically reinforces it when announcing in very broad terms the purpose of the new legislation. The revision of the rate making rule, as just noted, incorporates a similar reference. The act and the debates leading to its enactment are episodes in the reexamination of our basic transportation norm to which the nation was called by the Weeks Report in 1955. But vigorous claims of growing competitiveness in transport have not yet produced the expected commitment to greater reliance upon the competitive test for all policy. This persistent ambiguity about the proper role of competition—in spite of its alleged ubiquity—is itself a comment upon the present vitality of the norm.

If evidence taken from abandonment cases and legislative history ran counter to the evidence in related areas of social experience, its value might be discounted. The fact is undoubtedly quite the reverse. Certainly public policy in the area of antitrust, marked by confusion about whether competition or competitors or both ought to be protected, and harassed by the difficulty of identifying the ideally competitive oligopolist, does not bear witness to a clear conviction that just and unjust decisions can be distinguished by reference to the traditional competitive standard. Doubts created by the Transportation Acts of 1920 and 1940 about the norm underlying regulation of transport have their parallels as the result of the Robinson-Patman Act, fair trade legislation, and current efforts to tighten restrictions upon the right of corporations to merge. And

76. A paragraph was added to the rule declaring: “In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.” (Emphasis added.)

77. See, e.g., the statement of Commissioner A. Arpaia in Hearings on Transportation Policy, supra note 80, at 295.

78. Section 501: “... to encourage the employment of labor and to foster the preservation and development of a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.”

79. Presidential Advisory Committee on Transport Policy and Organization, Revision of Federal Transportation Policy, April, 1955.

80. See Wilcox, Public Policies Toward Business 187, 411-27 (1955); see also recent efforts to inhibit mergers by requiring advance notice in various circumstances,
the oligopolistic implications of rivalry between large railroads and numerous small motor carriers find an echo in the patterns of oligopoly that presently plague efforts to find just results in the general field of antitrust law. What may be called ideal oligopolistic behavior has not yet been spelled out either in terms of the conventional competitive norm or in terms of some substitute standard. All in all, the implications drawn from recent abandonment experience gain plausibility from reference both to transportation developments generally and to the problems current in the complementary area of antitrust law.

VI

To know that the normative foundation of an important policy is under attack, or in the process of change, forewarns that decisions in particular cases will be difficult to justify. By the same token, explicit awareness of the ideal element in the law should enhance the capacity to assess proposed policy changes. One critic of the ICC argues that abandonment procedures be supplemented by a provision giving railroads an absolute right to abandon at the end of a definite waiting period. Another would broaden the ICC mandate, encourage a "particularist" approach, and permit resolution of the conflict of interests in typical cases by the application of a better-planned regulatory strategy. Both proposals were made in full awareness of the pattern of road-rail competition that had developed since the present law of abandonments was enunciated in 1920. But if idealization of competitive behavior is being challenged by norms emphasizing individual and communal security, proof of intensified inter-carrier rivalry for freight in What Cheer, Iowa, need not point toward expanding the scope of the North Western's managerial prerogatives with regard to abandonment. It may point, in fact, to stronger regulatory control, so that in a What Cheer of the

as reflected, for example in Hearings on Legislation Affecting Corporate Mergers Before the Subcommittees on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. (1956).


82. See generally, Weissman, op. cit. supra note 2, Ch. 4, considering the resulting uncertainty in the law.

83. Provocative suggestions about other aspects of the economy that have evidenced, or may reasonably be expected to evidence, a shift in the relative vitality of norms stressing competition and norms incorporating other values can be found in Galbraith, The Affluent Society (1958).

84. Conant, Railroad Consolidations and the Regulation of Abandonments, 32 Land Econ. 318–25 (1956). The precise waiting period in each case would be set by the ICC after a hearing, but could not exceed a given maximum, say seven years, fixed by the law. Under this plan carriers could still utilize present procedures if they felt so inclined.

85. Cherington, The Regulation of Railroad Abandonments ch. 10 (1948).
future the desire to protect citizens need not be handicapped by the Commission’s inability to consider any but the particular applicant’s rates and services. If, on the other hand, the competitive norm is reaffirmed, the “particularist” approach may continue to serve best the Commission’s essential purpose. Granted that it is the job of the law to do justice, the choice between these divergent proposals must reflect a more fundamental choice with respect to the norms that sustain such social legislation.

Two things remain to be said here. First, it must be stressed that to point out challenges to the values that have justified a policy is not to prove what the outcome of the challenges will be. A variety of forecasts about transportation can find support in other aspects of the contemporary scene. The sustained attempt to insulate farmers against the impact of the competitive market has shown, perhaps more clearly than it has shown anything else, how difficult it is to fashion a new norm that is precise enough to avoid condemnation as mere catering to political power and expediency. On the other hand, the growing insistence that managers of large corporations are somehow responsible to a community larger than the shareholding group—the abandonment parallel is obvious—indicates that more experience and sober reflection may not lead to a reaffirmation of the traditional ideal.

It would, of course, be beyond the scope of this Article to speculate about whether norms are the causes or the consequences of social events, or how long Is and Ought can be divorced in transport law, if at all. But perhaps the outlining of the specific abandonment problem in these terms will provide a starting point for further exploration of these jurisprudential issues.

A final consideration can be expressed as a question. Do the unique characteristics of present abandonment law and economics promise particular insights into the possible future of the competitive norm and the consequent definition of managerial discretion?

86. Whether diversion of the North Western’s traffic to the very much shorter Rock Island branch could have been made to warrant continued operation of the latter more easily than abandonment by the Rock Island could be found to justify continued North Western service to What Cheer was never directly posed for the Commission. Neither road was a party to the other’s application or hearing. The power to join carriers with whom an applicant shares rates could also affect decisions on abandonment. For an excellent discussion of the need for a “broader” Commission vision and authority, but in terms of rates rather than abandonments, see Williams, The ICC and the Regulation of Intercarrier Competition, 63 Harv. L. Rev. 1349 (1950).


88. See Kaysen, The Social Significance of the Modern Corporation, 47 Am. Econ. Rev. 311 (1957).
It can be said at once that the abandonment process reveals the tendency of intervention to proliferate. To require that a carrier continue an operation beyond the time when the market would divert investment from it must disturb the flow of capital into transport, unless the necessary return can be extracted from operations of the other system lines or is available from government subsidies. Since a broad increase in intercarrier competition is not being ruled out here, such a return presupposes a system of rate and service controls to limit the pinch of competition, or a system of subsidies to offset particular deficits. The farm price support program can again serve as an example of the risks in such broad interference with market processes. In some respects abandonment control is as much a blunderbuss method as the parity program, and may be said to testify in similar fashion to the advantages of uninhibited and unsubsidized managerial decision-making, with programs of relief quite independent and based upon completely political or humanitarian considerations of need and capacity. From this point of view abandonment experience would tend to strengthen the role of a competitive standard as the measure of justified interference with private enterprise in transport. Yet this experience does not preclude an opposite inference. The fact is that the absolute control given to the ICC by the law of abandonments is modified by the power of the carriers to make an abandonment economically unavoidable. Furthermore, only a very few of every hundred requests for a certificate are denied. The Commission in reality has not eliminated technological change or altered its essential direction. It has only moderated the pace. The technique used to this end, involving notice, hearings, and possibilities for delay or the attachment of conditions, is calculated not only to minimize the risk of managerial errors in connection with a vital community service or to mitigate the burden in cases of extreme hardship, but also to alert every shipper to an impending change, whether additional relief is contemplated or not. To the degree that a similar technique can be applied in other situations, say when the industry upon which a community is particularly dependent wants to move, the railroad abandonment cases may acquire new significance for a society anxious to acknowledge a modest shift in the balance between idealization of managerial initiative and idealization of social security.

89. Eventually, delayed maintenance must dominate all other considerations, the result of a decision to withdraw that the carrier may have made and been implementing long before the abandonment petition is presented to the Commission. See ThoXel, Economics of Transport 533 (1955).

90. ICC Bureau of Transportation Economics and Statistics, op. cit. supra note 24, at 7. It has been said that railroads only seek permission to abandon when they are quite certain to get it, but denials would be worth risking to build a record if management felt particularly abused.