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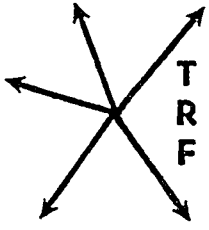

TRANSPORTATION RESEARCH FORUM

The Evolution of Rail Merger Policy

*by Daniel Smith**

INTRODUCTION

THE RAILROAD MAP is now being redrawn by the second modern merger movement. Over the 150 years of U.S. railroad history, hundreds of mergers and acquisitions have produced today's Class I carriers. The first modern merger movement began with the L&N-NC&StL merger filed in 1955 and came to a crashing halt with the Penn Central bankruptcy of 1970. Now the merger movement has resumed with a vengeance, and the last few years have seen the creation of regional and interregional systems such as CSX, NS, BN, and PRS. The long-predicted transcontinental system seems imminent, and speculation abounds over the fate of smaller carriers.

Changes in law and regulation divide the history of rail mergers into four distinct eras. In each era, consolidations have been driven by different economic forces and approved or rejected by different rules. Reversals of previous decisions have been common. The cost savings rationale under which the Penn Central merger was approved in 1966 is a minor issue under present policy. The DT&I conditions, routinely imposed to protect competition in the 1960's and 1970's, were rejected as anticompetitive in 1982. The Supreme Court broke up the Northern Securities Company in 1904, and permitted its reconstruction as Burlington Northern in 1970.

This paper will examine the changes in ICC merger policy in the "modern era." A brief historical review will place recent developments in context. Current policy will be explained with case references. No cases have yet been decided under the latest policy revisions, so the conclusions require some informed interpretation.

RAIL MERGERS UNDER THE SHERMAN ACT

The Sherman Act was passed in 1890, just after the Interstate Commerce Act itself. Rail mergers had not been regulated before, and countless mergers and acquisitions had taken place. But since the Sherman Act contained no exception for the railroads, they received the full force of the anti-trust and anti-railroad sentiments of the time.

In 1904, the Supreme Court concluded that the combination of Great Northern and Northern Pacific under Northern Securities violated the Sherman Act. The Supreme Court also ordered Union Pacific to sell its interest in Southern Pacific, which controlled the original Central Pacific. Conant (1964) suggests that the decision was largely a reaction to the economic power of the Harriman interests. The Southern Pacific came under separate attack in 1917. The Supreme Court reversed a district court ruling and found that SP and CP were parts of separate, potentially competitive routes. Divestiture was ordered, but passage of the Transportation Act of 1920 kept the company together.

In the trust-busting era between 1890 and 1920, railroads were perceived as rich and powerful. There was no "rule of season," and the Supreme Court applied the Sherman Act stringently. Just a few anti-trust cases were brought against railroads, but their impact on the industry was significant. Besides the breakup of the Harriman empire and Northern Securities, New Haven's control of B&M was ended by consent decree in 1914, and control of B&O by PRR, and NKP by NYC, was dissolved before 1920 under pressure from the Attorney General's office.(1)

THE TRANSPORTATION ACT OF 1920 AND THE SECOND ERA

In returning the railroads to private control after WWI, Congress also changed merger policy. The inefficient fragmentation of the industry was apparent in the failure to move wartime tonnage without government intervention, so the Transportation Act of 1920 attempted to encourage orderly consolidation. The ICC was given primary jurisdiction over rail mergers, with separate sections covering consolidation and control without consolidation. Once approved by the ICC, rail mergers would be exempt from the anti-trust laws.

Consolidations had to follow a master plan drawn up by the ICC under Section 5(4). This plan was intended to preserve competition, maintain existing traffic patterns, and combine weak roads with strong. The initial plan was drawn up by Professor William Ripley and submitted in 1921. In hearings it became

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apparent that the railroads would not cooperate. Starting in 1925, the ICC repeatedly requested Congress to relieve it of this impossible task, but to no avail. The Commission reluctantly published an unpopular 19-system plan. Since mergers had to follow this plan, few true consolidations took place in this era. For example, the proposed NW-Virginian merger was denied for nonconformance.(2)

Stock control was governed by Section 5(2) and did not require a plan. Stock control and long-term leases therefore became the favored methods of combination between 1920 and 1940. Many present-day control situations date from that era. For instance, the Southern Pacific controls the St. Louis Southwestern (1932), the Northwestern Pacific (1928), the Petaluma and Santa Rosa (1932), and the Holton Interurban (1925) in various subsidiary relationships. Under these provisions, the ICC voided Supreme Court divestiture orders for Southern Pacific and Lehigh Valley.(3) GN and NP were allowed to rejoin upon divestiture of CB&Q (which was never carried out).(4) The popularity of stock control ended with the Emergency Railroad Transportation Act of 1933, which brought such transactions into the consolidation plan and regulated non-operating holding companies.

The Clayton Act of 1914 gave the ICC authority to apply Section 7 to railroads.(5) The ICC brought Clayton Act cases against KCS (for control of MKT and SSW) and (for control of Lehigh Valley and Wabash) among others. In most cases, the carriers divested or placed the stock in trust.

In this period, the principal test for control cases was consistency with the "public interest." The ICC generally found that the control and support of small weak carriers by larger strong carriers was in the public interest, and this became the dominant pattern for combinations of the time.

THE TRANSPORTATION ACT OF 1940 AND THE FIRST MODERN MERGER MOVEMENT

The unsuccessful consolidation plan was replaced with specific merger criteria by the Transportation Act of 1940. The ICC could now authorize consolidation or control if it was consistent with the public interest. In addition, Congress laid down four specific considerations for the ICC:

1) the effect on the adequacy of transportation to the public;
2) the effect of including, or failing to include, other carriers in the area involved in the proposed transaction;
3) the total fixed charges that would result; and
4) the interest of affected carrier employees.(6)

This merger policy remained intact throughout the first modern merger movement.

Although there were stock control cases earlier, the first modern merger movement really began with the L&N-NC&StL case, which was filed in 1955. Why 1955, fifteen years after the legislation? One explanation is that the railroads were preoccupied, first with wartime demands then with rebuilding and dieselization. Much of our awareness of a "railroad problem" dates from the mid 1950s, when railroads lost passengers and freight in large volumes to competing modes and the marginal viability of some railroads became obvious. Until the Penn Central bankruptcy, consolidation was a standard prescription for ailing railroads. Where there had been only a handful of consolidations between 1920 and 1940, 37 consolidation proposals and 25 control applications were filed between 1955 and 1975.

The L&N-NC&StL decision set the pattern for many more to follow.(7) The Commission found that NC&StL competed with L&N (despite being controlled by L&N), but the loss of competition was outweighed by an estimated annual savings of $3.2 million. This pattern was followed in the Erie-Lackawana, CNW-M&StL, and N&W-Virginian mergers.(8)

The emphasis was on **parallel** mergers, which hold the greatest prospects for cost savings. The "weak and strong road" problem was being solved voluntarily. The applicants typically produced reports that showed substantial savings through consolidation, and traffic studies that showed a minimum of diversion from other carriers. Protestants typically submitted traffic studies showing large diversions which they claimed would prevent them from competing and force them to curtail services.

What of the four considerations cited above? Because merger proposals always cite improved service and increased efficiency, the "adequacy of transportation" has seldom been a central issue. The Commission does consider protestants' claims that they will be forced to curtail services. The Commission occasionally ordered the inclusion of other carriers, such as the New Haven in the Penn Central merger, but has now taken a strong policy stand against forced in-

clusion. The fixed charges provision was occasioned by the Depression and played only a small part in post-war merger decisions. The "interest of carrier employees," meaning labor relations, was handled with sets of standard conditions. Much of the Washington Agreement of 1936 was written into the Transportation Act of 1940. This agreement was superseded by the Oklahoma conditions of 1944 and the New Orleans conditions of 1948. Early agreement with labor was viewed as a prerequisite for a successful merger application.

Competition was interepreted and handled much differently than it will be in the future. Intermodal competition was one answer to the loss of intramodal rail competition. A second was the assertion that the merged carrier would be a stronger competitor than its parts, so the merger would increase competition. The market power of the merged carrier was routinely addressed by the "DT&I conditions." First applied in the DT&I control case of 1950,(9) these conditions required the maintenance of existing routes and gateways.

Merger proposals became larger and more complex. The Erie-Lackawana merger, filed in 1959, might be regarded as the first of the "big" mergers. C&O-B&O, SAL-ACL, and WP-SP all followed in 1960. The BN and Nickel Plate-N&W-Wabash cases were filed in 1961, the Penn Central case in 1962, and the mammoth Rock Island case in 1963. The size and sophistication of the documents escalated, as did the interrelationships of the various cases. The merger proceedings took longer and longer: two years for L&N-NC&StL, four years for WP-SP, six and one-half years for BN, four years for Penn Central, and eleven years for Rock Island.

The Penn Central disaster destroyed the rationale of parallel mergers, namely cost savings. It was the ultimate parallel merger. The applicants claimed it would save $81 million annually, and were willing to give lavish labor concessions and accept the faltering New Haven in order to merge. The spectacular bankruptcy of June 1970 discredited the entire merger movement. The proposed C&O-N&W merger was called off, and no applications were made for the next two years.

The Rock Island case exposed the inadequacy of existing procedures to handle complex cases expeditiously. The case took eleven years from the original CNW filing in 1963 to the final decision in 1974.(10) Judge Klitenic, faced with claims, counter claims, and inconsistent applications, attempted a rational solution by preparing a consolidation plan for the West, not unlike the Ripley plan of 1921. Even though specific acquisitions were approved, the railroads rejected the plan and nothing was accomplished.

THE 4R ACT AND THE SECOND MODERN MERGER MOVEMENT

The Penn Central bankruptcy and the utter frustration of the Rock Island case changed attitudes toward rail mergers. Conant, writing in 1964, criticizes the preoccupation with intramodal competition and the delays imposed on cost saving consolidations.(11) Saunders writing in 1978, criticizes the ICC's superficial analysis and the pressures brought by financial interests to rubber stamp wasteful and ill-conceived mergers.(12)

The 4R Act of 1976 was "intended to encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system."(13) The ICC took this as a mandate for change. The Act provided for the participation of DOT, the Rail Services Planning Office (RSPO) and the Office of Rail Public Council (now the Office of Special Counsel, OSC) in various parts of the consolidation process. The Congressional purpose was to promote "A rational, coordinated approach to mergers" and "to remedy the chronic problem of extended and unnecessary delay . . . ."(14)

Title IV of the 4R Act set a strict 31-month schedule for consolidation proceedings, including specific time allotments for intermediate steps.(15) The first major cases involved carriers who had suffered extreme delays in previous cases. Burlington Northern and Frisco filed a merger application in December 1977 which was approved in 28 months. Southern Pacific applied in February 1978 to purchase a portion of the Rock Island that had been allocated to SP in the interminable but unconsummated Rock Island case. This was approved in 27 months. The Commission has always met the 31-month deadline, and even the complex UP-MP-WP case was decided in 25 months.

In 1977, the ICC authorized RSPO to undertake a comprehensive study of rail mergers. The RSPO report was issued in 1978 and came down strongly in favor of end-to-end rather than parallel merger.(16) RSPO also found that mergers are not a "proper or effective method for dealing with marginal carriers," and recommended that the ICC focus on adequate service rather than the survival of corporate entities.

The ICC's General Policy Statement on rail mergers, which was issued in De-

cember 1978, encouraged "consolidations where operating efficiencies will occur, marketing opportunities will be enhanced, essential rail services will be retained, and competition will not be unnecessarily diminished."(17) The four criteria from the 1940 Act remained. In addition, the Commission would consider:

- whether essential services would still be provided by applicants or affected carriers;
- whether opportunities for operating efficiencies would increase;
- whether redundant facilities would be eliminated;
- whether the new system would attract new business;
- whether the consolidated company would be financially viable;
- whether effective inter- and intramodal competition would be maintained where economically possible; and
- whether the environment would be adversely affected.

The public interest consideration was expressed as "the effect which the proposed consolidation would have on the rail system and the needs of the users of rail service." Finally, the Commission made it clear that they would rarely condition approval on inclusion of another carrier. The BN-Frisco, SP-Tucumcari, CSX, NS, and UP mergers were all approved under these guidelines. A refined version issued in August 1980 made procedural changes.(18) However, the provisions of the Staggers Act (1980) affected the ICC's decisions in NS and UP even though new guidelines were not issued until February 1982.

The BN-Frisco case, which was decided in 1980, did not delve deeply into the issues of competition later raised in the UP case. But the Commission clearly signalled a departure from previous policy by drawing a distinction between the interests of opposing carriers and the interests of the public. The merger was approved despite evidence of substantial losses to protestants on the grounds of net public benefits. In this sense, the BN-Frisco decision inaugurated the "Second Modern Merger Movement."

CURRENT MERGER POLICY

The current merger policy and procedures were issued in Ex Parte No. 282 (Sub No. 3) **Railroad Consolidation Procedures**, decided February 19, 1982.(19) The changes made embrace both the Commission's own procedural refinements and the provisions of the Staggers Act. The policy itself is set forth at 366 I.C.C. 91.

> "a) General. The Interstate Commerce Commission encourages private industry initiative that leads to the rationaliation of the Nation's rail facilities and reduction of its excess capacity . . . (the) Commission does not favor consolidations that substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anti-competitive fashion. Our analysis of the competitive impacts of a consolidation is especially critical in light of the congressionally mandated commitment to give railroads greater freedom to price without regulatory interference."

There is a general presumption in favor of consolidation. Rationalization is a vague concept; its clearest expression is the reduction of excess capacity. But rationalization also embodies a sense of "neatness," and the connection of colored lines on a map has the appearance of progress. The second critical feature is the emphasis on competitive impacts. To the four considerations established in 1940 the Staggers Act added a fifth: "the effect on competition among rail carriers in the affected region." The original four points have been treated as a checklist in recent decisions and will play only a small role in future proceedings. The fifth has become the primary consideration.(20)

In the simplest possible terms, the Commission will approve transactions which have a net balance of **public** benefits. The Commission assumes the applicants know what is in their best interest, and concerns itself only with the public interest. Improved service and **genuine** cost savings are accepted as public benefits. Revenues diverted from other carriers are **private** benefits, and do not enter into the calculation. According to the current guidelines, the public can be harmed principally through reductions in competition and threats to essential services.

The ICC's balancing test considers only **public** benefits and **public** harms.(21) Unless they can be convincingly translated into public benefits or harms, effects on carriers are of lesser account. The Commission sees an inherent risk to competition in rail mergers, and will consider whether the alleged benefits could be attained through co-

ordination short of merger. The ICC is supported by the RSPO Rail Merger Study, which devoted an entire volume to less risky means of coordination.

Section 1111.1(c)(2) covers public harms from reduction of competition or harm to essential service. The treatment of competition is very similar to antitrust principles in its concern for the preservation of **competition**, rather than **competitors**. The Commission requires both parallel and end-to-end mergers as having potential anticompetitive effects. The analysis will depend on the relevant market, and on the presence or absence of truck competition. The ICC considers that "a service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available." In practice, therefore, the ICC has replaced the "adequacy of transportation" with an essential services standard.

A successful essential services argument is extremely difficult to make because the ICC has used such strict standards. These standards are covered in the ICC order of February 27, 1981, in the UP case:

> "Can a reasonable substitute be readily found for services provided by a particular carrier in a particular market? How would price or service options available to shippers change as a result? Would substitute carriers, rail or truck, be likely to earn adequate revenues and therefore continue to provide and invest in the service? What particular operating or regulatory difficulties might impede provision of services? . . . Identify any shippers, class of shippers or communities for whom protestant's service is essential and would likely be terminated as a result of the proposed consolidation. Explain why that service is essential."

A demonstration of this depth would be a formidable task, and could be challenged on a line-by-line, shipper-by-shipper basis.

The procedural provisions under Section 1111.7 **Market Analysis** shed more light on the Commission's attitude. They require that applicants submit impact analyses of the impacts of the proposed transaction—both adverse and beneficial—on competition and essential services. Presumably, the Commission expects protestants to reply in the same terms. The reasoning behind the switch from **traffic** studies to **impact** analysis is given in the background discussion:

> "These traffic studies, while generating useful information, had tended to focus the attention of the parties (and, hence, the Commission) more on the issues of traffic diversion than on the impact of a transaction on competition or essential services. . . . Accordingly, the September 1980 proposal replaced the traditional 'traffic study' with a requirement that applicants submit an 'impact analysis' which not only indicated the potential diversion of traffic ('for the purpose of assessing the possibility that such [competing] carriers will be unable to provide essential services'), but also addressed the competitive impact of the merger."(22)

Thus, the diversion of traffic volume and revenue **per se** is now applicable primarily to essential services arguments under the 1982 guidelines. Diversion is not automatically assumed to be either the result or the cause of reductions in competition.

The impact analysis must address specific relevant markets, as discussed in Section 1111.7. The Commission has generally followed antitrust precedents. The relevant market is the "area of effective competition," and necessarily has product and geographic dimensions. The products in question must be "reasonably interchangeable," and the ICC has employed economic concepts such as cross-elasticity of demand.(23) In use, the major issue is what traffic flows (state-to-state, region-to-region) and commodities are affected, and whether there is effective truck competition.

The NS, Guilford, and UP-MP-WP cases were decided under the 1980 procedures but incorporating the principles of the current policy.

The Norfolk Southern Decision, F.D. 29430. The NS decision did not involve a balancing test since no anticompetitive effects or threats to essential services were found. Neither DOJ nor DOT opposed the merger or suggested conditions. The major protestants, MILW and GTW/DTI, reached settlements that were approved by the Commission. SP/SSW sought Kansas City-St. Louis trackage rights, but the Commission found their revenue loss to be insignificant. The application was quickly approved.

The Guilford Decision, F.D. 29772. Although the first Guilford Decision (control of D&H by Guilford Transportation Industries) cites other benefits of Guilford control, the Commission's overriding concern was the preservation of the D&H. The Commission found that the D&H transaction is unlikely to harm any

essential services. Each protestant's argument was considered in detail, and rejected.

The Commission next analyzed the competitive impact. The relevant market was defined as traffic between points in Eastern Canada and New England on one hand, and points in the Mid-Atlantic and South on the other. Unlike the UP case, the Commission found strong motor carrier competition for affected commodities in the relevant market. Thus, the protestants could not successfully argue that shippers would be hurt by a reduction in rail competition. But the Commission did note that D&H is the only rail competition to Conrail in some areas, and that preservation of this competition is a benefit. After reviewing all the traffic studies and competition arguments, the Commission concluded that significant reductions in competition were unlikely and approved the transaction.

The Union Pacific Decision, R.D. 30000. The merger of UP, MP, and WP was approved, including the CR and CNW settlements, with trackage rights for DRGW, SP, and MKT. This case is far more complex than any other recent rail merger, and it demonstrates the policies of DOT and DOJ as well as the Commission's own approach. All three agencies gave their full attention to the effects on competition.

The Commission found the transaction to be in the public interest, meaning that the public benefits outweighed the public harms once settlements and conditions were included. The Commission generally accepted the applicants' description of merger benefits. However, the Commission distinguished public benefits from private benefits and reduced the applicants' claimed annual net revenue increase of $106.4 million to about $47 million in public benefits. DOT's brief gave a similar figure. The major reduction was in diverted revenue, which the Commission eliminated from the public benefit and loss calculation.

The Commission distinguished diversions due to market power from diversions due to other factors, relying on DOT's work.

> "In our view, traffic diversions in and of themselves, are not a measure of the costs or benefits of a transaction. Instead, in this proceeding, we have used traffic diversions caused by an increase in applicant's market power as a measure of reductions in competition."(24)

This is a critical distinction between using market power diversions as a measure or indication of anticompetitive effects, and claiming diversions as a source of anticompetitive effects. The Commission acknowledges a potential link to essential services ". . . when traffic shifts expected from the consolidation are so substantial that essential service over a competing carrier's line would no longer be economically viable."(25) However, the ICC agreed with DOJ, who rejected the traditional argument that revenue diversions weaken the competing carrier overall and thus force general service curtailments.

The UP decision contains a description of the two-stage analysis the ICC uses to evaluate whether a proposed transaction will harm essential services.(26) First, the Commission determines "whether any affected carrier faces financial harm that would reduce its operational viability." Second, the Commission determines whether the threatened services are essential. In this case, the Commission found that no carrier would suffer service-threatening losses, so the second step was unnecessary. Although the Commission acknowledged some possibility of essential service losses on MKT and SP in the UP case, all other essential services arguments were explicitly rejected. Even then, the Commission awarded trackage rights on the basis of competitive impacts and characterized the abatement of threats to essential services as a "byproduct."

Unlike the Guilford-D&H case, the Commission found motor carrier competition relatively unimportant in F.D. 30,000, thus siding with the protestants and the nonrail parties. The Commission described the relevant market as follows:

> ". . . we have determined that relevant geographic markets in this proceeding are 1) transcontinental traffic (a) over the central corridor and (b) over all routes; 2) Midwest traffic (a) between Omaha/Council Bluffs and Kansas City, (b) between points in Kansas, and (c) between the upper Midwest and the Gulf of Mexico; and 3) traffic between points on the West Coast."(27)

After defining the relevant markets, the ICC concluded that through parallel effects, UP's market share of transcontinental traffic moving through the central corridor east of Denver would rise from about 75 percent to about 85 percent. For all transcontinental routes serving Northern California, UP's participation share would rise from 19 percent to 32 percent. The Commission

called this a "substantial lessening of competition" that "must be addressed" to approve the consolidation. In the Kansas City-Omaha/Council Bluffs corridor, the UP-MP consolidation would reduce competition even after the CNW pooling agreement. But the Commission found, due to the pattern of service and traffic, that MP and UP were not direct competitors within Kansas and that competition in Kansas would not be harmed.

The Commission divided **end-to-end** effects into 1) source competition, and 2) impacts related to traffic diversions. The decision summarizes the DOJ analysis and agrees that the UP consolidation would not lessen source competition. The competitive impacts related to traffic diversions boil down to foreclosure of markets to joint line connections where the merged carrier will favor just one of all possible combinations. This "vertical foreclosure" was found primarily at Kansas City (the Ogden/Salt Lake case was viewed as part of the parallel effects in the central corridor), where the Commission found that MKT would be foreclosed from competing for a substantial volume of traffic. Since UP gives MKT 6.49 times as much traffic at Kansas City as it gets, MKT has little leverage over its connection (this "leverage factor" analysis was used by DOT). This type of vertical reduction in competition promises to be a major issue under the present guidelines.

Since it found substantial lessening of competition, the Commission granted trackage rights to SP, DRGW, and MKT. The DRGW trackage rights from Pueblo to Kansas City were already conceded by the applicants. The Commission considered the SP-DRGW-SSW combination to be a competitive alternative to the various UP routes. The MKT trackage rights (Kansas City-Omaha-Lincoln-Council Bluffs) were granted to ameliorate the anticompetitive effects.

The overwhelming message of the UP decision is the Commission's concern for competition. Because this was the first major application of the new ICC policy towards competition, none of the parties knew for certain how competition would be analyzed or how to make a successful argument on competitive issues. As it turned out, the Commission's analysis did not coincide with the claims of any one carrier, but most closely matched the submissions of DOJ and DOT. Because the applicants already had substantial shares in relevant markets, the standard argument that their merger would strengthen competition was rejected. ICC, DOJ, and DOT agreed that the concentration of power in relevant markets would reduce competition, and appropriate conditions were attached.

DT&I CONDITIONS

The DT&I conditions were routinely imposed on rail mergers from their formulation in 1950[28] until the BN-Frisco decision of 1980. These six conditions attempted to perpetuate premerger service, routing, and rate-making practices, thereby minimizing the impact on connecting carriers. The consistency with which the Commission applied these conditions reduced carrier opposition to mergers and simplified consolidation proceedings.

These conditions came under scrutiny following the passage of the 4R Act. Maintenance of existing gateways and prohibition of discrimination in favor of a new subsidiary were contrary to the new emphasis on rationality and efficiency. The Commission's efforts to prevent commercial closing of existing gateways or routes kept single-line rates at joint-line levels, and therefore artificially high. In the BN-Frisco case, the Commission examined the DT&I conditions and found them wanting,[29] and imposed them for only two years. In the SP-Tucumcari case, the Commission dispensed with protective conditions entirely.[30]

In a separate proceeding,[31] the Commission ended the routine application of the DT&I conditions and retroactively removed them from previous decisions. Measured against the intent of the Staggers Act, they were found to restrict the ability of merged carriers to compete with protected roads, and were therefore anticompetitive. Instead of restraining potential monopolistic behavior, they were found to prevent the realization of merger efficiencies and public benefits. The Commission did not rule out the application of protective conditions altogether: "We remain willing to consider imposing specific, narrowly focused traffic protective conditions if they meet the standards set forth in the **Merger Policy Statement.**"

CONCLUSIONS

Where does this long line of evolution leave us? Over the years, the ICC has been frequently accused of not having a rational merger policy, and of either impeding progress or rubber-stamping merger applications, depending on the point of view. The 4R Act and the deregulation movement have each recast rail merger policy in a new form. Do

we finally have a rational merger policy?

There no longer exists a tried-and-true formula for either application or opposition. There is a presumption in favor of consolidation, but it does not extend to a rubber-stamping. However, in approving mergers, the ICC has relied heavily on the ability of affected carriers to make competitive responses.(32) Subsequent consolidations may therefore be more difficult for the Commission to deny. The NS merger followed hard on the heels of the CSX merger, and the UP application cited both the BN-Frisco and SP-Rock Island transactions. Has this "momentum" reduced the depth of inquiry? The NS decision required a minimum of consideration while the UP decision included extensive analysis and conditions.

The Commission has intentionally broadened the specifications of admissible market analysts. A conventional one percent traffic study will still serve as a starting point, but to carry any weight it must be translated into **public impacts** good or bad. The concept of public impact transcends the interests of participating carriers and embraces the full range of effects on the public.

The showing of public harm rests on the reduction of competition and the analysis of merger impacts. In the Commission's view, competition is reduced when a carrier is restrained from offering competitive rates and services in a relevant market. Where the merged carrier can exert undue market power or prevent competing access to the market, competition is reduced. Although the Commission does not sit as an antitrust court, the economic principles employed are similar. Both the Commission and the antitrust laws concern themselves with competitive practices, not their success or failure. The concept of a relevant market enforces a connection with reality that may have been lacking in earlier eras. And the ICC is willing to construct its own market definition when, as in the UP case, the applicants offer an unrealistic formulation.

The stringent definition of essential service burdens both applicant and protestant. While it is extremely difficult to argue successfully that essential services will be harmed by a merger, it is equally difficult to claim that a merger will **preserve** essential services.

The emphasis on competition and the standards for essential services also apply to requests for merger conditions. The approval of conditions to protect a **carrier** depend on the threat to essential services, which is almost impossible to demonstrate. The ICC appears skeptical—even hostile—towards conditions requested to protect a corporate entity. No conditions were granted in the first Guilford decision, and the NS decision merely approved negotiated settlements.

It would be most accurate to conclude that we have always had a "rational" merger policy, but that the conception of "rational" has changed with the economic philosophy of Congress and the ICC, and with the changing circumstances of the railroad industry.

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