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Gilbert Schroeder

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CASE NOTES

ANTI-TRUST—RAILROAD MERGERS—A MATTER OF PUBLIC INTEREST

On March 2, 1962, the New York Central Railroad Company (NYC) and the Pennsylvania Railroad Company (PRR) filed applications with the Interstate Commerce Commission (ICC) pursuant to law,¹ seeking permission to merge their facilities into one company, the Pennsylvania-New York Central Transportation Company (Penn-Central). Hearings began in August, 1962, and the Commission's Examiners issued their report on March 29, 1965, recommending approval of the merger subject to certain conditions. The Commission adopted in general the findings of its Examiners as its own in its report of April 6, 1966,² and authorized consummation of the merger on May 31, 1966. Numerous parties expressed dissatisfaction with the report and order, and filed petitions for reconsideration with the Commission, which then deferred the effective date from May 31st to September 30th. On August 29th the Commission refused to postpone this further, although its Report on Reconsideration had not yet been issued, whereupon Erie-Lackawanna Railroad Company brought suit to enjoin the merger.³ The Commission then issued its Report on Reconsideration on September 19, 1966,⁴ which varied from its earlier report in several respects, but which did not alter the effective date of September 30, 1966. The injunction sought was denied by the district court, but on appeal, the United States Supreme Court reversed and remanded, holding that the Commission had authorized immediate consum-

¹ 49 U.S.C. § 5(2) (1964).

² Pennsylvania R.R.—Merger—New York Cent. R.R., 327 I.C.C. 475, 481-82 (1966).

³ Erie-Lackawanna R.R. v. United States, 259 F. Supp. 964 (S.D.N.Y. 1966). This action eventually came to include, by intervention and consolidation, as plaintiffs: Baltimore and Ohio Railroad Company (B. & O.), Chesapeake and Ohio Railway Company (C. & O.), Norfolk and Western Railway Company (N. & W.), Central Railroad Company of New Jersey (C.N.J.), Reading Company (Reading), Delaware and Hudson Railroad Corporation (D. & H.), Boston and Maine Railroad Company (B. & M.), Chicago and Eastern Illinois Railroad Company (C. & E.I.), Western Maryland Railway Company (W.M.), Milton J. Shapp (Shapp), City of Scranton (Scranton) and another not pertinent; as defendants: United States of America, PRR, NYC, the Trustees of the New York, New Haven and Hartford Railroad Company (NH), and others not here pertinent.

⁴ Pennsylvania R.R.—Merger—New York Cent. R.R., 328 I.C.C. 304 (1966).

mation of a merger which, in view of its own findings, failed to fulfill the statutory mandate.⁵ With numerous events intervening, the Commission again approved the merger, supposedly in accordance with the Supreme Court's opinion, on June 9, 1967.⁶ Again various parties instituted an action to enjoin the merger,⁷ the injunction was denied, and the denial appealed to the United States Supreme Court, which on this occasion affirmed the decision of the lower court. *Penn-Central Merger and N. & W. Inclusion Cases*, 389 U.S. 486 (1968).

Within the last decade the problem of railroad mergers has come rather suddenly to the fore. The Penn-Central merger would be significant merely from the fact that the two roads, as the Supreme Court recognized, "dominate rail transportation in the Northeast,"⁸ but it is worthy of comment more broadly by virtue of what it portends for the future. The purpose of this note is to briefly explore the history of railroad mergers in the United States; the background of the instant case; the main arguments advanced against the Penn-Central merger,⁹ as indicative of those to be expected in future cases; and finally the significance of the present decision as related to forthcoming railroad mergers.

In their earliest years, railroad companies in the United States were controlled, in regard to combinations of all types, solely by state legislation. As a general rule, a railroad company had only the authority to construct and operate its road, and could not dispose of it to another company.¹⁰ Consequently, in order to validate the purchase of one railroad by another, one road had to have at least the power to buy, and the other at least the power to sell, conferred by legislative authority.¹¹ Other less direct methods of combination, such as leasing, were similarly outside the power to a railroad company, absent specific legislative authorization.¹²

As the railroads grew in size and number, and began to seek a lessening of competition by combinations of various types, a policy arose against such practices both through case law and specific constitutional and stat-

⁵ *Baltimore & O.R.R. v. United States*, 386 U.S. 372, 378 (1967).

⁶ *Pennsylvania R.R.—Merger—New York Cent. R.R.*, 330 I.C.C. 328 (1967).

⁷ *Erie-Lackawanna R.R. v. United States*, 279 F. Supp. 316 (S.D.N.Y. 1967).

⁸ *Penn-Cent. Merger and N. & W. Inclusion Cases*, 389 U.S. 486, 493 (1968).

⁹ See generally, Comment, 18 Sw. L.J. 439 (1964), for arguments advanced for and against railroad mergers.

¹⁰ *Branch v. Jesup*, 106 U.S. 468 (1882).

¹¹ *Louisville & N.R.R. v. Kentucky*, 161 U.S. 677 (1896).

¹² *St. Louis, V. & T.H.R.R. v. Terre Haute & I.R.R.*, 145 U.S. 393, (1892); *Pittsburgh, C. and St. L.R.R. v. Keokuk and Hamilton Bridge Co.*, 131 U.S. 371 (1889).

utory prohibition.¹³ To effectuate this policy, the Interstate Commerce Act¹⁴ was passed, initiating a much broader participation by the federal government in the regulation of transportation. Antitrust laws were then held applicable to the field of railroad mergers in 1904, and were effectively utilized to prevent these mergers until 1920,¹⁵ when Congress passed the Transportation Act,¹⁶ which directed the Interstate Commerce Commission to "as soon as practicable prepare and adopt a plan for the consolidation of railway properties of the continental United States into a limited number of systems." Competition was to be preserved as fully as possible in formulating the plan, and all petitions for authorization to consolidate (as distinguished from control by lease, purchase of stock, etc.) could be approved only if in harmony with the plan. Further, all consolidations thus approved were exempted from the operation of the antitrust laws.¹⁷ Professor William Z. Ripley of Harvard was retained by the Commission to prepare such a plan.¹⁸ He presented it to the Commission in 1921, and finally in 1929 the Commission published a scheme based on this proposal.¹⁹ While the 1920 legislation thus provided the machinery for approval of railroad mergers, the initiation of proceedings was left to the carriers, who at first were precluded by lack of formulation of the requisite plan, and later by disagreement with the plan itself.²⁰

¹³ State *ex rel.* Nolan v. Montana Ry., 21 Mont. 221, 53 P. 623 (1898).

¹⁴ 24 Stat. 379 (1887), 49 U.S.C. §§ 1-40 (1964).

¹⁵ Northern Securities Co. v. United States, 193 U.S. 197 (1904); United States v. Union P.R.R., 226 U.S. 61 (1912); United States v. Lehigh V.R.R., 254 U.S. 255 (1920). They had earlier been held applicable to railroads in other respects, *e.g.*, price fixing, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). See generally, Conant, *Railroad Consolidations and the Antitrust Laws*, 14 STAN. L. REV. 489 (1962); Phillips, *Railroad Mergers: Competition, Monopoly, and Antitrust*, 19 WASH. & LEE L. REV. 1 (1962).

¹⁶ 41 Stat. 480 (1920).

¹⁷ *Id.* at 481-82.

¹⁸ Riordan, *A Railroad Merger—Dissected*, 16 BUS. LAW. 577, 578 (1961).

¹⁹ Consolidation of Railroads: In the Matter of Consolidation of the Railway Properties of the United States into a Limited Number of Systems, 159 I.C.C. 522 (1929), modified by Consolidation of Railroads: In the Matter of Consolidation of the Railway Properties of the United States into a Limited Number of Systems, 185 I.C.C. 403 (1932).

²⁰ From 1920 to 1929 the only railroad combination of significance was that of the Chesapeake and Ohio and Pere Marquette, which was not accomplished under § 5(2), but under § 5(6) of the 1920 Act, through a holding company called the Allegheny Corporation. Proposed Control of Erie R.R. and Pere Marquette Ry. by Chesapeake & O. Ry., 138 I.C.C. 517 (1928). From 1929 to 1940 (the life of the Plan) the only significant consolidation was that of two weak roads into the Gulf, Mobile & Ohio Railroad in 1939, and even this required a modification of the Commission's Plan before it could be approved. Gulf, M. & O. R. R. Merger, etc., 236 I.C.C. 61 (1939).

The Emergency Railroad Transportation Act of 1933²¹ eliminated the different procedures for consolidation and control by means other than consolidation, and allowed the Commission to approve applications if they "promoted the public interest" and were in conformity with the plan; and authorized the Commission to impose conditions to assure the promotion of the public interest.²²

Congress later passed the Transportation Act of 1940,²³ which is, in substance, the present governing legislation. It elucidated the nation's transportation policy, eliminated the requirement that the Commission formulate a national plan, substituted the words "be consistent with the public interest" for "promote the public interest," and again left initiation of proceedings up to the carriers.²⁴ The Act stated four specific factors to be considered in passing upon proposed transactions,²⁵ and again empowered the Commission to fix conditions for its approval, one of which was specifically, inclusion of other railroads.²⁶

The 1940 Act, coupled with changing economic circumstances, especially increased extramodal competition, forced the railroads to seriously consider merger proceedings in the late 1950's. Two instances provide the background for the Penn-Central merger.

The first is the acquisition of control by the financially stronger C & O of the financially weaker B. & O.,²⁷ a combination of two roads whose facilities were more complimentary than competitive. The second is the merger of the N. & W. and the Nickel Plate.²⁸ These two proceedings

²¹ 48 Stat. 211 (1933). *See generally*, Fletcher, *The Emergency Railroad Transportation Act—1933*, 13 ORE. L. REV. 134 (1934); Perley, *Emergency Railroad Transportation Act of 1933*, 20 A.B.A.J. 444 (1934).

²² 48 Stat. 211, 217 (1933).

²³ 54 Stat. 898 (1940), 49 U.S.C. §§ 1-15 (1964).

²⁴ 54 Stat. 899 (1940), *preface to* 49 U.S.C. § 1 (1964).

²⁵ 49 U.S.C. § 5(2)(c) (1964): "In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

²⁶ 49 U.S.C. § 5(2)(d) (1964). Of course, exemption from the operation of the anti-trust laws was continued, 49 U.S.C. § 11 (1964). *See generally*, Florida E. C. Ry. v. United States, 259 F. Supp. 993 (M.D. Fla. 1966), *aff'd* 386 U.S. 8 (1967); Minneapolis & St. L. Ry. v. United States, 361 U.S. 173 (1959); Note, 29 U. CIN. L. REV. 276 (1960). *See also*, note, 41 N. D. L. REV. 40 (1964), which traces a specific merger proceeding through the historical periods outlined above.

²⁷ Chesapeake & O. Ry.—Control—Baltimore and O.R.R., 317 I.C.C. 261 (1962), which report was sustained in Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd per curiam* 375 U.S. 216 (1963).

²⁸ Norfolk & W. Ry. and New York, C. & St. L. Ry.—Merger, 324 I.C.C. 1 (1964).

resulted in the existence of four large rail systems in the northeast, the two above, the PRR and NYC.

The N. & W. case is closely related to the Penn-Central merger because that case also involved a provision for possible inclusion of three other roads in the N. & W. system at a later date, the E-L, D. & H. and B. & M.²⁹ The Commission approved the N. & W. merger without requiring the immediate inclusion of any of the three, finding that as far as D. & H. and B. & M. were concerned, "the proposed Norfolk & Western system should have no harmful effects."³⁰ However, the Commission reserved jurisdiction for five years following the N. & W. merger to permit inclusion of any or all of the three roads in the N. & W. system.³¹ The three roads also petitioned for inclusion in the pending Penn-Central system. While the Commission left this avenue open, it found that "in each case an affiliation with the Norfolk & Western is preferred."³²

The Commission, after reviewing the record, approved the Penn-Central merger on April 6, 1966.³³ The Commission agreed with its Examiners that while the merger would result in a shifting of traffic patterns, the loss of traffic to most of the railroads in the region would be offset by "the creation of new traffic relationships between such non-participating carriers, their affiliates and non-aligned carriers, [so] that the net effect will not be detrimental to such carriers."³⁴ But it differed with its Examiners and refused to apply the same rationale to the E-L, D. & H. and B. & M. Instead it formulated a set of "protective conditions," to protect the traffic and revenue of these three roads from adverse effects due to the merger, based on its findings that:

More specifically, the Commission's order of June 24, 1964, authorized in addition to the merger of the New York, Chicago and St. Louis Railroad Co. (Nickel Plate) into the N. & W., the acquisition by N. & W. of the Wabash Railroad through lease and stock control, the acquisition by N. & W. of stock control of the Akron, Canton & Youngstown Railroad Co., the lease by N. & W. of the properties of the Pittsburgh & West Virginia Railroad Co., and the purchase by N. & W. of the Sandusky line of PRR. The N. & W. had earlier acquired the Virginia Railroad. Norfolk & Western Ry. Merger, etc., Virginia Ry., 307 I.C.C. 401 (1959).

²⁹ E-L later withdrew its petition for inclusion due to an agreement with the N. & W. that upon approval of its merger, the N. & W. would negotiate with E-L for some form of combination. Norfolk & W. Ry. and New York, C. & St. L. Ry.—Merger, 324 I.C.C. 1, 19-20 (1964).

³⁰ *Id.* at 31.

³¹ "Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated . . ." *Id.* at 148.

³² *Id.* at 30.

³³ *Supra* note 2.

³⁴ *Supra* note 2, at 481.

It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger.³⁵

The conditions were of two types, traffic and revenue.³⁶ The traffic conditions required Penn-Central to maintain the rate and routing situation as though there had been no merger in all cases where it was in competition with the three "protected roads." The revenue conditions required Penn-Central to indemnify the three protected roads for loss of revenue due to the merger.

At this juncture, various parties petitioned the Commission for reconsideration of its report and order. In essence, the three protected roads sought more beneficial indemnification terms, as well as capital loss indemnification.³⁷ The "unprotected roads," on the other hand, contended the conditions were illegal,³⁸ as agreements or combinations for the pooling or division of traffic or revenue without the requisite findings by the Commission that such an arrangement is in the public interest.³⁹ Further, it was argued, since Penn-Central was to indemnify the protected roads for traffic diverted to it and away from them, this would constitute a "community of interest" whereby Penn-Central would seek to divert traffic to the protected roads to lessen the indemnification, while the protected roads in turn would seek to divert traffic to Penn-Central to increase the indemnification, all to the detriment of the unprotected roads.⁴⁰

E-L then filed suit to enjoin the merger,⁴¹ as did numerous other parties. On September 19, 1966, in its Report on Reconsideration,⁴² the Commission retained the traffic conditions but temporarily rescinded the indemnity conditions, pending further hearings which it concurrently ordered. However, the Commission stated that if the indemnities were reintroduced,

³⁵ *Supra* note 2, at 531-32.

³⁶ *Supra* note 2, at 561 ("Appendix G"); also in *Baltimore and O.R.R. v. United States*, 18 L. Ed. 159, 174 (1967).

³⁷ Capital loss indemnification means indemnification for the loss of value of the road as a whole as a result of the Penn-Central merger. The protected roads were well aware of the high probability they would eventually be included in some major system and desired Penn-Central to bear any loss in their own overall value from the time of consummation of the Penn-Central merger to the time of such actual inclusion.

³⁸ Jurisdictional Statement of the Baltimore and O.R.R. at 16, *Baltimore and O.R.R. v. United States*, 386 U.S. 372 (1967).

³⁹ 49 U.S.C. § 5(1) (1964).

⁴⁰ *Supra* note 38, at 8.

⁴¹ *Supra* note 3.

⁴² *Supra* note 4.

they would be retroactive to the date of the merger, and that date would not be altered.

The district court refused to enjoin the merger, but on appeal, the United States Supreme Court reversed.⁴³ The Court reasoned that the finding that the merger was consistent with the public interest was based upon Penn-Central's unqualified acceptance of the original protective conditions, which meant those conditions were such as were contemplated by the Commission⁴⁴ to be temporarily in force in lieu of immediate inclusion of the three roads in a major system. Therefore, when the conditions were in part rescinded on September 19th, without the issue of inclusion being determined, the Commission, by its own findings, was authorizing a merger which was not in the public interest.⁴⁵ The phraseology the Court chose in stating its decision had, as will be shown, repercussions when the merger was again approved.⁴⁶

On June 9, 1967, the Commission ordered the N & W system to include the three protected roads within itself by acquisition of their stock,⁴⁷ and at the same time again authorized immediate consummation of the Penn-Central merger, imposing amended conditions to protect the three roads in the interim between consummation of the Penn-Central merger and the actual inclusion of the three roads in a major system.⁴⁸ Suit was again filed to enjoin the merger,⁴⁹ and an injunction was again denied by the district court.⁵⁰ The United States Supreme Court affirmed.⁵¹

The Supreme Court lucidly noted that "[a]ll participants, with relatively minor exceptions . . . agreed that the merger itself would be in the public

⁴³ *Supra* note 5.

⁴⁴ *Supra* note 2, at 532.

⁴⁵ *Supra* note 43, at 378.

⁴⁶ Two passages from the opinion of the Court are in point: "We hold only that under the uncontradicted findings of the Commission it was necessary for it to *conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger*. We believe that the Commission erred in approving the immediate consummation of the merger *without determining the ultimate fate of the protected roads*." (emphasis added).

Supra note 2.

⁴⁷ Norfolk & W.R.R. and New York, C. & St. L.R.R.—Merger, etc., 330 I.C.C. 780, 796 (1967).

⁴⁸ *Supra* note 6.

⁴⁹ *Supra* note 7.

⁵⁰ The arguments advanced against the merger do not vary substantially between the 1967 and 1968 cases, except for the issue presented by the language cited *supra* note 46. Therefore, citations to the earlier case and the materials connected therewith are appropos.

⁵¹ *Supra* note 8.

interest. There were sharp differences, however, with respect to certain issues. These primarily concerned the provisions to be made for [the] three smaller lines"⁵² Thus, the parties protesting did not oppose the merger *per se*, but rather desired to be as certain as possible that they would not be adversely affected by it.

The substance of the argument by the unprotected roads against the merger was that the protective conditions established to benefit the three small roads would adversely affect the unprotected roads. This was presented in three phases.

First, the unprotected roads contended Congress has prohibited such an arrangement absent an "express finding" by the Commission that it fulfilled the statutory requirements set out by law.⁵³ The Commission, on the other hand, contended that this section did not apply to arrangements ordered by the Commission purely on its own initiative and against the wishes of the carriers so ordered, but solely to consensual acts of carriers.⁵⁴ The Supreme Court upheld the view of the Commission, and noted that even if the section was applicable, the finding required was contained implicitly in the Commission's report.⁵⁵ This is the first time the specific question involved has been ruled upon by the Supreme Court, since the instant case is the first time in which this type of condition has been imposed in such a situation.⁵⁶ The Court's ruling will doubtless encourage the Commission to use this extremely flexible power in the future to protect smaller roads on an interim basis pending their later inclusion in a system which will afford a superior position.

The second phase of the attack on the protective conditions was that, even if they were legal, as applied here they created the "community of interest" earlier referred to. The Court again accepted the Commission's view, that as a finding of fact such was not the case because of the economic and geographical factors relevant to traffic diversion, noting that the

⁵² *Supra* note 8, at 494.

⁵³ 49 U.S.C. § 5(1) (1964): "Except upon specific approval by order of the Commission as in this section provided . . . it shall be unlawful for any common carrier subject to this chapter . . . to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings . . . whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division . . . will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if asserted to by all the carriers involved, such pooling or division. . . ."

⁵⁴ Brief of the Interstate Commerce Commission at 71, *Baltimore & O.R.R. v. United States*, 386 U.S. 372 (1967).

⁵⁵ *Supra* note 8, at 513-14.

⁵⁶ *Supra* note 54, at 25.

Commission had retained jurisdiction to reopen the proceedings and modify the conditions if such practices should appear.⁵⁷

The third argument was that if the result envisioned by the unprotected roads occurred, the Commission would be precluded from correcting it, because once having found these conditions to be necessary to preserve the protected roads, it could not rescind them.⁵⁸ The Court did not specifically deal with this objection, in part because its agreement with the Commission that the result envisioned by the unprotected carriers would not occur, precluded the issue. The Court also seems to imply that even if the result envisioned did occur, there could be some modification of the conditions.

The Court's earlier decision gave rise to another issue argued by the unprotected carriers. They reasoned that determination of the "ultimate fate"⁵⁹ of the three roads included the process of judicial review, and since the Commission's order to the N. & W. to include the three roads might be reversed at a later date, the merger could not be immediately consummated in accordance with the earlier Supreme Court mandate. The Court, however, citing another section of its earlier opinion,⁶⁰ held it meant only to require that the Commission make a decision admittedly within its power as to the future of the three roads. It further stated this did not require an "indeterminate delay . . . pending the resolution of the jockeying, negotiating, and fighting among all of the parties concerned and completion of the multitudinous procedures necessarily involved."⁶¹ This, like the question of the protective conditions, is the first time the specific issue has been decided, again because it is the first time the Commission has utilized the procedure involved here. The Court found that the public interest at stake was too important to allow a delay which would serve mainly the interests of the other carriers.⁶² In so deciding it has set a policy which will doubtless be cited as precedent in the future when non-participating carriers seek to delay a merger while they "jockey" for better position.

The appellant roads next argued that the order to N. & W. to include the three roads in its system in no way bound the roads themselves to accept such inclusion. Therefore, it was argued, the roads could reject inclu-

⁵⁷ *Supra* note 8, at 514-15.

⁵⁸ Brief for Baltimore & O.R.R. at 36, *Érie-Lackawanna R.R. v. United States*, *supra* note 7.

⁵⁹ *Supra* note 46.

⁶⁰ *Supra* note 43, at 390.

⁶¹ *Penn-Cent. Merger and N. & W. Inclusion Cases*, 389 U.S. 486, 517 (1968).

⁶² *Supra* note 62.

sion, leaving them outside a major system, the very situation the Commission found incompatible with the public interest.⁶³ The district court attempted, in essence, to dispose of this contention as a mere theoretical possibility.⁶⁴ The Supreme Court did not even specifically consider what would appear to be a valid objection, but rather hinted that the public interest in consummating the Penn-Central merger, when weighed against the likelihood of rejection of inclusion by any of the three roads, was overriding.⁶⁵

Finally, the unprotected roads contended that the very facts which were supposed to make the Penn-Central merger so vital to the public interest (better service, lower costs, savings accruing to the roads involved, etc.) would not occur immediately upon consummation due to the protective traffic and revenue conditions imposed.⁶⁶ Again, the Court did not specifically consider the point, but the answer of the Commission, that the longer the consummation date of the merger was set back, so too would be the date when such savings would begin, seems to be implicitly accepted by the Court when it stresses so heavily the over-riding public interest in immediate consummation.

The N. & W. raised certain arguments, somewhat peculiar to its own situation, which will be briefly noted. First, it argued that while the Commission had decided that inclusion of all three of the protected roads in the N. & W. system would be in the public interest, it had not decided that inclusion of less than all three would fulfill this requirement. Since all three might not accept inclusion, it was argued, the inclusion decision was defective.⁶⁷ The Court, however, found that the Commission's original decision in the N. & W. merger case "clearly contemplates" action by one or more roads for inclusion, and therefore the Commission's decision was that inclusion of less than all three roads would still be in the public interest.⁶⁸

Next, the N. & W. argued that the protective conditions were so attractive the three roads might decide to remain subject to them rather than accept inclusion.⁶⁹ The Court disposed of the issue briefly by noting that

⁶³ Jurisdictional Statement of the Baltimore and O.R.R. at 13, Penn-Cent. Merger and N & W Inclusion Cases, 389 U.S. 486 (1968).

⁶⁴ *Supra* note 7, at 356-361.

⁶⁵ *Supra* note 61, at 518.

⁶⁶ *Supra* note 63, at 26-28.

⁶⁷ Jurisdictional Statement of the Norfolk & W. Ry. at 15-21, Penn-Cent. Merger and N. & W. Inclusion Cases, *supra* note 63.

⁶⁸ *Supra* note 61, at 518.

⁶⁹ *Supra* note 67.

the Commission had, in the Court's opinion, sufficiently reserved jurisdiction in the case to alter the protective conditions if the situation N. & W. feared in fact occurred.⁷⁰

Third, the N. & W. contended that the Commission's findings as to the worth of the roads it was to include was not valid.⁷¹ While the N. & W. in effect contended the price of the roads was too high, the B. & M. contended too low an estimate was placed on its value. The Court answered both arguments by stating that this was merely a disagreement as to facts, the decision of which Congress has entrusted to the Commission, and it was therefore not within the purview of judicial review to reweigh the findings of an administrative agency.⁷²

The Court also noted that in this case the Commission, pursuant to the power it reserved in the original N. & W. merger case, prescribed terms rather than having the parties concerned work them out.⁷³ This is the first time the Commission has so acted. The Court upheld the Commission, observing it had the power to proceed as it did, and commenting that the "exigencies of the situation" provided a suitable background for its use. In so stating, the Court seems to have encouraged the Commission to reserve such broad jurisdiction in future cases, and to use its power rather liberally.

The New York, New Haven and Hartford Railroad Company (NH), a small road in the process of re-organization under the Bankruptcy Act, was ordered included in the Penn-Central system by the Commission on November 21, 1967, subject to the approval of the bankruptcy court. Further, the Penn-Central was to provide a loan to the NH and bear a fraction of its operating losses.⁷⁴ Certain NH bondholders objected to the terms. The Court disposed of the matter by noting that while the interests of bondholders are entitled to respect, they do not override all else, and in the instant case the bondholders were fortunate to have fared as well as they did.⁷⁵

The objections of certain parties in Pennsylvania who opposed the merger on its merits were briefly considered, but the court upheld the

⁷⁰ The E-L's argument that it might be subject to traffic diversion by N & W was analogously answered, *i.e.*, the Commission could take appropriate steps to prevent or remedy this.

⁷¹ *Supra* note 67, at 10-21.

⁷² *Supra* note 61, at 524.

⁷³ *Supra* note 61, at 523.

⁷⁴ *Supra* note 61, at 509.

⁷⁵ *Supra* note 61, at 510-511; *accord*, Schwabacher v. United States, 334 U.S. 182 (1948); *see generally*, Stott v. United States, 166 F. Supp. 851 (S.D.N.Y. 1958) regarding the rights of minority stockholders in general in railroad merger cases.

view of the district court that these represented merely differences of opinion with the Commission, and further, were precluded on procedural grounds.⁷⁶

While recognizing that the point was not really at issue, the Court felt compelled to reiterate that it is the duty of the Commission to decide whether or not a given merger is in the public interest, and that the courts, in judicially reviewing that decision, have only to decide whether the administrative agency has acted in accordance with the law, and whether its decision is supported by substantial evidence.⁷⁷

Mr. Justice Douglas dissented in part from the opinion of the Court, arguing two main points: first, the Pennsylvania interests opposing the merger on its merits were not properly heard; second, the Commission did not make the necessary findings in regard to the NH to permit adequate judicial review. The first argument concerns the fact that the merger and inclusion proceedings were not dealt with as one issue, which may have resulted in unfairness. The second argument deals with whether the whole NH situation was dealt with equitably by the Commission.⁷⁸

The Penn-Central merger case thus seems to have decided several important questions. First, the pooling provisions set out by Congress⁷⁹ do not apply to cases where the Commission orders inclusion of its own initiative and against the wishes of the carriers so ordered. Moreover, even if the section is held to apply, the findings of the Commission would ordinarily be sufficient to meet the requirements set out in that section.

Second, the Court seemingly encourages the Commission to retain broad jurisdiction in railroad merger cases to deal equitably with situations which may later develop,⁸⁰ as for example, the alteration of protective conditions. It has also encouraged retention of jurisdiction to prescribe terms, such as those of inclusion, at a later date should the situation warrant it, rather than allowing the parties concerned to negotiate them.

Third, the whole attitude of the Court appears to be one of overriding concern with the public interest, such that it is reluctant to let objections

⁷⁶ *Supra* note 61 at 505-507. But as Mr. Justice Douglas notes at some length in his dissent, "The Court seemingly declares . . . a new rule of *res judicata* . . ." *Supra* note 8, at 541.

⁷⁷ See, e.g., *Illinois Central R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 69 (1966); *accord*, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

⁷⁸ As to Mr. Justice Douglas' consideration of the procedural questions in regard to the Pennsylvania interests, see *supra* note 76.

⁷⁹ 49 U.S.C. § 5(1) (1964).

⁸⁰ Citing the earlier case in the Supreme Court, a federal district court has upheld this power in regard to modifications of conditions relating to routing and solicitation of traffic. *Southern Pacific Co. v. United States*, 277 F. Supp. 671, 675 (D. Neb. 1967).

of other railroads, even those which are, in theory at least, valid, postpone or prevent mergers which would otherwise serve the interest of the public.

Finally, the Court seems indisposed to allow protracted litigation by community and private interests which it feels were duly heard by the Commission.

Two notable points apparently are still undecided. Given that the Commission finds inclusion of certain roads to be necessary to the public interest, is this condition satisfied by providing an opportunity for inclusion even though the roads involved may reject it? Also, may parties be precluded from litigating in multiple courts when a given court has allowed them to litigate therein?⁸¹ The answers to these questions will no doubt be forthcoming in the not too distant future.

⁸¹ *Supra* note 8.

Gilbert Schroeder

CONSTITUTIONAL LAW—CIVIL RIGHTS ACT OF 1866— NEW STRENGTH FOR AN OLD LAW

In the summer of 1965, in response to an advertisement in the St. Louis Post-Dispatch, Joseph Lee Jones, a Negro, and his wife, Barbara, visited the Paddock Woods community of St. Louis County, Missouri for the purpose of selecting a house and lot suitable to their needs. After investigating the available homes, the Jones' offered to purchase a particular house and lot. Defendants, through their agents, informed plaintiffs of their general policy against selling houses and lots to Negroes, and in effect refused to consider plaintiff's application to purchase a house. Plaintiffs then sought injunctive and other relief¹ in the District Court for the Eastern District of Missouri, alleging that the Alfred H. Mayer Co.² violated an act of Congress enacted in the Civil Rights Act of 1866, now 42 U.S.C. section 1982,³ by its refusal to sell them a home in the Paddock Woods community solely on account of their color.⁴ Both the district and appellate courts ruled that section 1982

¹ 28 U.S.C. § 1343 (4) (1962) gives the district court the power to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . ."

² Alfred Realty Company, Paddock Country Club, and Alfred H. Mayer were also respondents.

³ 42 U.S.C. § 1982 (1964): "All citizens shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *See*, 42 U.S.C. §§ 1981, 1983 (1964); Civil Rights Act of 1866, 14 Stat. 27.

⁴ The petitioners also argued that there was sufficient entanglement of the Missouri government in the licensing and use of state-controlled services for the subdivision to