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NOTES

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In two recent merger proceedings under section 5(2) of the Interstate Commerce Act,[1] *Seaboard Air Line R.R. — Merger — Atlantic Coast Line R.R.*[2] and *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger,*[3] the Interstate Commerce Commission imposed conditions[4] whereby it retained jurisdiction over the proceedings for five years to allow specified railroads[5] to petition for inclusion in the new railway systems. Their inclusion would be ordered if found by the Commission, after a full hearing, to be consistent with the public interest.[6]

Section 5(2)(d) of the ICA[7] gives the Commission authority to require the inclusion of additional railroads in a proposed merger. No court has yet decided whether the language of section 5(2)(d) is sufficiently broad to authorize the Commission's retention of jurisdiction to permit the possible inclusion of other railroads *after* the consummation of the primary merger, and there is no legislative history for the subsection that is helpful in resolving this interpretative prob-

1. 54 Stat. 905 (1940), 49 U.S.C. § 5(2) (1958).

2. 320 I.C.C. 122 (1963).

3. Finance Docket No. 21510, ICC, June 24, 1964.

4. 320 I.C.C. at 268-69 (Condition 14) and Finance Docket No. 21510, ICC, App. "O" (Condition 1). The condition imposed in the *Norfolk & Western* case provides: "For a period of five years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by [the three specified railroads] for inclusion in the Norfolk & Western system. Upon the filing of such petition or petitions, . . . if the . . . affiliations then sought . . . be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition." The *Seaboard* condition was similar except for an additional requirement of good faith negotiation. See note 6 *infra*.

5. Nine railroads in the *Seaboard* case and three in the *Norfolk & Western* case were so designated.

6. The condition in the *Seaboard* case required the surviving corporation to negotiate in good faith with the petitioning railroads; if the parties could not reach agreement, the Commission would order the inclusion if it were found to be consistent with the public interest. As is usual in railroad mergers under § 5(2), the Commission also added many other conditions, concerned primarily with routing, trackage agreements, gateways, and similar nonorganic changes.

7. 54 Stat. 905 (1940), 49 U.S.C. § 5(2)(d) (1958), provides that "the Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads . . . and upon a finding that such inclusion is consistent with the public interest."

lem.[8] Arguably, section 5(2)(d)'s language, "as a *prerequisite* to its approval of the *proposed* transaction . . . ,"[9] permits inclusion of railroads petitioning to be made parties to the merger only at the time of the effectuation of the principal merger. However, it appears more probable that the statutory grant of authority would be construed as authorizing the conditions of possible future inclusions that were affixed in the principal cases. While the interpretation given a statute by the body charged with its administration is not conclusive, courts are not easily persuaded to overturn that interpretation.[10] Specifically, the courts are inclined to allow the ICC considerable latitude in interpreting its powers, and the quoted statutory language is not expressly inconsistent with the imposition of this type of condition.[11] Moreover, section 5(2), which was added to the Interstate Commerce Act by the Transportation Act of 1940,[12] generally broadened rather than restricted the Commission's authority.[13] Since the Commission had imposed conditions substantially similar to those in the principal cases in unification proceedings in 1931[14] and 1933,[15] the amendment would seem to indicate legislative approval of the Commission's construction.[16] Furthermore, the Commission, in implementation of its authority under section 5(2), has for years imposed conditions retain-

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8. The legislative history pertinent to the Transportation Act of 1940 is in H.R. REP. No. 1217, 76th Cong., 1st Sess. (1939); S. REP. No. 433, 76th Cong., 1st Sess. (1939); *Hearings on S. 2009 Before the Senate Committee on Interstate Commerce*, 76th Cong., 1st Sess. (1939).

9. 54 Stat. 905 (1940), 49 U.S.C. § 5(2)(d) (1958). (Emphasis added.) See note 7 *supra*.

10. See Brewster v. Gage, 280 U.S. 327 (1930) (Treasury Department's interpretation of Revenue Acts of 1918 and 1921); Logan v. Davis, 233 U.S. 613 (1914) (Secretary of the Interior's interpretation of Adjustment Act of 1887); ICC v. Weldon, 90 F. Supp. 873 (W.D. Tenn. 1950), *aff'd*, 188 F.2d 367 (6th Cir. 1951) ("The contemporaneous constructions placed upon the provisions of the Interstate Commerce Act by the Commission which possesses special competence in this field, are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous." 90 F. Supp. at 877.).

11. See, *e.g.*, American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); ICC v. Weldon, *supra* note 10; United States *ex rel.* Chicago Great W.R.R. v. ICC, 71 F.2d 336 (D.C. Cir. 1934), *aff'd*, 294 U.S. 50 (1935).

12. 54 Stat. 905 (1940), 49 U.S.C. § 5 (1958).

13. "It has often been recognized that Section 5 confers broader authority and greater administrative discretion than most any other section of the Act and that the legislative history of the recent amendments to this section of the Act show congressional intent to broaden the authority of the Commission." Nash v. Air Terminal Servs., 85 F. Supp. 545 (E.D. Va. 1949).

14. Alton R.R. Acquisition and Stock Issue, 175 I.C.C. 301 (1931), *appeal dismissed sub nom.* Alton R. Co. v. United States, 58 F.2d 399 (N.D. Ill.), *rev'd*, 287 U.S. 229 (1932), *vacated*, 189 I.C.C. 271 (1933).

15. Union Pac. R.R. Unification, 189 I.C.C. 357 (1933).

16. The usual weakness of the re-enactment doctrine is that Congress may not have been aware of the position supposedly approved. In this instance, however, the presence of the strong common-carrier pressure groups increases the probability that this problem was brought to the attention of Congress.

ing jurisdiction to add further conditions[17] and to allow interested parties to petition for modification of the conditions in the Commission order;[18] such conditions, when challenged and considered by the federal courts, have been held valid.[19]

The Commission, in deciding to delay the decision whether to require the inclusion of the petitioning railroads,[20] balanced broad public policy considerations against the disadvantages to the merging railroads. These disadvantages, caused by the possibly lengthy period of uncertainty as to the ultimate composition of the system, and the complications arising from the necessity of the corporations' compliance with section 5(11) of the ICA[21] and the state merger statutes[22] can be considerable. The ICC must decide how best to protect the public interest of which it is the guardian in section 5(2) transactions.[23] The financially weak railroads that may be seriously affected by the merger[24] present a major problem in railroad unification cases, and an adequate provision for their future is essential to the public interest. An evaluation of the effects of the merger must be made not only with regard to the ability of the weaker lines to remain in operation but also with regard to the effect on the quality of the service to the public in the area affected by the merger or in particular sub-

17. *E.g.*, Rock Island Motor Transit Co. Common Carrier Application, 63 M.C.C. 91, 108 (1954) ("[W]e shall retain jurisdiction to impose in the future whatever restrictions or conditions, if any, appear necessary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers."); Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co., 40 M.C.C. 457, 477 (1946) ("Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.").

18. *E.g.*, Savannah & A. Ry. Control, 282 I.C.C. 39 (1951). This type of condition was imposed in both *Seaboard* (320 I.C.C. at 268, Condition 13) and *Norfolk & Western* (Finance Docket No. 21510, ICC, Apps. K, L, M, and N).

19. *E.g.*, American Trucking Ass'ns v. United States, 364 U.S. 1 (1960) (impliedly approving the type of condition found in the *White Line* case, 40 M.C.C. 457 (1946), quoted in note 17 *supra*); American Trucking Ass'ns v. United States, 355 U.S. 141 (1957) (unchallenged); United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951), *reversing* 90 F. Supp. 516 (N.D. Ill. 1949) ("auxiliary and supplemental to train service" condition upheld, but not clear from the report whether the applicant challenged the condition itself or merely the procedure of imposing it).

20. The ICC appears to be the only federal regulatory agency to have employed this particular type of condition. For example, the CAB has statutory authority to impose conditions on mergers but apparently has not imposed such a retained-jurisdiction condition. 72 Stat. 767 (1958), 49 U.S.C. § 1378 (Supp. IV, 1963). The FCC has no authority to impose conditions on a proposed merger.

21. 54 Stat. 905 (1940), 49 U.S.C. § 5(11) (1958).

22. The problems raised under § 5(11) of the ICA and the state statutes are considered *infra* in the text accompanying notes 28-37.

23. The "public interest" is to be judged in light of the National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C., preceding § 1, at 9 (1958). The NTP is declared to be "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . . all to the end of developing, coordinating, and preserving 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."

24. See note 37 *infra*.

regions thereof and with regard to the benefits to the public of the continued operation of the weaker lines. If the Commission cannot accurately evaluate the effects of a proposed merger on the weaker lines in the geographic area until the new rail network is actually in operation, a deferment of the ultimate order regarding further inclusions would appear to be the best means of safeguarding the public interest.

The *Norfolk & Western* case presents some of the problems facing the ICC in its study of the effects of a proposed merger on competing lines. Three railroads—the Erie-Lackawanna, the Delaware & Hudson, and the Boston & Maine—have the opportunity to petition for inclusion within five years. Although both the surviving Norfolk & Western railroad and the Erie-Lackawanna railroad favor inclusion at some time,[25] the financial plight of the latter stands as "an insurmountable obstacle to the negotiation of reasonable terms"[26] for a present affiliation. After the hearings had been completed, the Delaware & Hudson railroad and Boston & Maine railroad petitioned for inclusion, fearing economic losses due to the proposed Pennsylvania-New York Central merger.[27] Furthermore, the arrangements for a possible Norfolk & Western-Delaware & Hudson affiliation are dependent to some extent on whether the Erie-Lackawanna becomes a part of the Norfolk & Western system. In view of such factors, the Commission's postponement of a final disposition of the proposals for inclusion seems reasonable.

Nevertheless, the imposition of these conditions, if within the power of the Commission, raises the concomitant problem of the corporations' compliance with state laws relating to corporate mergers and with section 5(11) of the ICA.[28] The six states[29] under whose laws the carriers in the principal cases are organized have nearly identical statutory provisions[30] requiring that the stockholders of the merging

25. Erie-Lackawanna had originally requested inclusion in the unification but, after the hearings had begun, withdrew its petition pursuant to an agreement between it and Norfolk & Western in which Norfolk & Western promised to enter into good-faith negotiations with Erie-Lackawanna to try to find a mutually agreeable plan of affiliation.

26. Finance Docket No. 21510, ICC, June 24, 1964, at 29.

27. These two lines had also petitioned for inclusion in the proposed Pennsylvania-New York Central merger.

28. 54 Stat. 905 (1940), 49 U.S.C. § 5(11) (1958). See note 33 *infra* and accompanying text.

29. Seaboard, Atlantic Coast Line, and the Norfolk & Western are all Virginia corporations; the New York, C. & St. L. exists under the laws of New York, Pennsylvania, Ohio, Indiana, and Illinois.

30. *E.g.*, "Any two (2) or more . . . corporations may merge into one (1) of such . . . corporations in the following manner: (a) Agreement of Merger. The board of directors of each corporation shall . . . approve a joint agreement of merger setting forth: . . . (2) The terms and conditions of the proposed merger and the mode of carrying the same into effect. . . . (b) Adoption of Agreement. The agreement of merger so approved shall be submitted to a vote of the shareholders of each corporation entitled to vote in respect thereof at [a] meeting . . . and the agreement shall be

corporations approve "the plan of merger," which must contain the "terms and conditions" of the proposed merger. In the two principal cases the shareholders had approved the merger plans subsequently submitted to the Commission.[31] However, the Commission's addition of a condition designed to lead to the inclusion of other railroads, and therefore to the formation of a coalition potentially far different from that originally contemplated, would seem to alter materially the "plan of merger."[32] Of course, the condition might lead to a form of affiliation not requiring the approval of the shareholders of the surviving corporation, as would be the case if the ICC ordered the inclusion of a petitioning railroad through a purchase of assets rather than a merger. At present, the form of the potential inclusion is uncertain, and that inclusion, the form and details of which would be decided upon as a result of the petition and hearings, could be a merger. Thus, the directors of the firms, upon proceeding to implement the initial merger without shareholder approval of the condition subsequently attached by the Commission, could be acting ultra vires.

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adopted . . . upon receiving the affirmative votes of the holders of a majority of the outstanding shares entitled to vote in respect thereof." IND. STAT. ANN. § 25-231 (1960). See ILL. REV. STAT. ch. 32, §§ 157.62-.64 (1963); N.Y. BUS. CORP. LAW §§ 902-03; OHIO REV. CODE ANN. §§ 1701.78-.79 (Page 1964); VA. CODE ANN. §§ 13.1-68, 13.1-70 (1964).

31. In addition, the shareholders in the two merging corporations in *Norfolk & Western* passed a resolution delegating to their respective boards of directors the authority to provide for the consummation of the merger by approving any conditions imposed by the Commission as long as the conditions affected neither the rights and privileges of the capital stock of the surviving corporation nor the ratio of conversion of the stock. However, the state statutes requiring shareholder approval of a proposed fundamental corporate change would appear to preclude delegation by the shareholders of their final authority over such proposals. *E.g.*, VA. CODE ANN. § 13.1-56 (1964) (amendment of articles of incorporation); § 13.1-64 (reduction in stated capital); § 13.1-70 (merger and consolidation); § 13.1-77 (sale or lease of all or substantially all the firm's assets). *Cf.* text accompanying note 30 *supra.*

32. The other conditions imposed in the principal cases, primarily concerning routing, gateways, and traffic, would not seem to raise this problem. Although the economic effect of these conditions on the railroads can be substantial, they do not involve fundamental corporate changes, but rather involve those types of actions that could be classed as management decisions and thus within the directors' discretion without the necessity of submitting them for shareholder approval. The text-writers generally include mergers, consolidations, increase or reduction of stated capital, new issues of stock, sale of all or a major part of the corporate assets, and the dissolution of a solvent concern in the class of "fundamental corporate changes" requiring shareholder approval. See, *e.g.*, LATTIN, CORPORATIONS 495 (1959). Most of the state statutes pertaining to the "plan of merger" to be approved by the shareholders contain a list of provisions that must be set forth in the plan; these provisions customarily deal only with matters such as corporate structural changes and stock conversion, and not with economic details of operation of the new or surviving corporation. *E.g.*, "The board of directors of each corporation shall . . . approve a plan of merger setting forth: (a) The names of the corporations proposing to merge. . . . (b) The terms and conditions of the proposed merger. (c) The manner and basis of converting the shares of each corporation into shares . . . of the surviving corporation. (d) A statement of any amendments in the articles of incorporation of the surviving corporation to be effected by such merger or a restatement of such articles of incorporation. . . ." VA. CODE ANN. § 13.1-68 (1964).

Section 5(11) of the ICA provides that any corporation whose plan of merger has been approved by whatever proportion of the stockholders is required by applicable state laws and that is participating in a section 5(2) transaction approved by the ICC shall be relieved from the restraint of all federal and state laws to the extent necessary to enable it to effectuate the transaction.[33] While the exemption given the merging corporations by section 5(11) of the ICA is stated to be in addition to the powers given the company by state law, this relief, because expressly dependent upon the assent of the proportion of shareholders required by state law, is so closely tied to the state shareholder-approval requirements that failure to comply with the state requirements would vitiate not only the state-given merger authority but also the exemptions derived from section 5(11).

The attempted consummation of a merger without the requisite shareholder assent could lead to two types of suits. A shareholder may bring suit in his own right seeking an injunction against a threatened ultra vires act by the firm's board of directors. However, to maintain this suit he must be able to show impending irreparable injury to his financial interest in the corporation unless the act is enjoined.[34] In the principal cases, the present damage to the stockholders is highly uncertain because it is contingent upon the possible future inclusion of one or more weak railroads into the system. Seemingly, therefore, a shareholder could not meet the "impending injury" requirement. Much more serious than the possibility of an injunction suit, though, is the threat of a shareholder's derivative suit, brought at the time of the inclusion of an additional line, seeking recovery against the directors for the financial damage to the corporation itself as a result of their unauthorized acts. Of course, as a prerequisite to the bringing of such a suit the individual must usually attempt to convene a shareholders' meeting for the purpose of demanding that the shareholders vote on whether to ratify the directors' acts or to bring suit.[35] Unless a ratification resulted, the directors would be forced to defend the derivative suit and could be held personally liable to the corporation. Therefore, it would appear that the only safe course of action for the directors is a resubmission of the merger plan, including the ICC conditions, to the shareholders prior

33. 54 Stat. 905 (1940), 49 U.S.C. § 5(11) (1958). In addition, the corporation and its officers are relieved from the operation of the federal antitrust laws.

34. See, *e.g.*, Norman v. Consolidated Edison Co., 89 F.2d 619 (2d Cir. 1937); Continental Sec. Co. v. Interborough Rapid Transit Co., 207 Fed. 467 (S.D.N.Y. 1913), *aff'd*, 221 Fed. 44 (2d Cir. 1915).

35. BALLANTINE, CORPORATIONS 345 (rev. ed. 1946). The "demand requirement" need not be complied with when the act is one that could not be ratified by the shareholders or when the demand would be a futile act, as where the defendants control enough shares to dictate the vote. Delaware & Hudson Co. v. Albany & S.R.R., 213 U.S. 435 (1909); Forbes v. Wilson, 243 Fed. 264 (N.D. Ohio 1917).

to any implementation.[36] The resubmission would be highly inconvenient, and the final plan could well meet with increased opposition. Since the railroads whose inclusion is contemplated are usually in poor financial condition,[37] the result will nearly always be to make the merger far less attractive. However, the directors' interest in staying within their authority requires that the question of shareholder acquiescence be decided *before* the initial merger goes into effect, and fundamental fairness to the stockholders demands that they be consulted upon such a substantial change in the previously approved plan.

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36. Of course, at this time the shareholders can approve only the primary merger, including the possibility that other railroads will be added to the system; they obviously cannot approve the still-unknown final composition of the system. However, approval of the total plan, now including the conditions, would bring implementation of the merger within the directors' authority, since they would be acting with the expressed approval of the required proportion of shareholders.

37. "[A] condition of this type is designed for the protection of, and should only apply to, financially weak railroads which could conceivably be adversely affected by the merger." 320 I.C.C. at 186.