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OCTOBER TERM, 1969

In the Matter of:

Docket No.

UNITED STATES, & LIVINGSTON ANTI-MERGER COMMITTEE, Appellant, vs. INTERSTATE COMMERCE COMMISSION, ET AL. Appellee.	Docket Nos. 28 and 44
CHARLES E. BRUNDAGE, ET AL. Appellants, vs. UNITED STATES, ET AL. Appellees.	Docket No. 38
CITY OF AUBURN, Appellant, vs. UNITED STATES, Appellees.	Docket No. 43

Not to be copied.

Pt. 2

Place Washington, D. C.

Date October 22 1969

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES OF AMERICA, Appellant, vs. INTERSTATE COMMERCE COMMISSION, et al, Appellees.	:	No. 28
CHARLES E. BRUNDAGE, et al., Appellants, vs. UNITED STATES OF AMERICA, et al. Appellees.	:	No. 38
CITY OF AUBURN, Appellant, vs. UNITED STATES OF AMERICA, et al., Appellees.	:	No. 43
LIVINGSTON ANTI-MERGER COMMITTEE, Appellant, vs. INTERSTATE COMMERCE COMMISSION, et al. Appellees.	:	No. 44

Washington, D. C.
October 22, 1969

The above-entitled matter came on for argument at 10:15 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

(As heretofore noted.)

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: Mr. Cox, you may proceed

3 when you are ready.

4 ARGUMENT OF HUGH B. COX
ON BEHALF OF APPELLEES
5 GREAT NORTHERN RAILWAY CO.

6 MR. COX: Mr. Chief Justice and may it please the

7 Court:

8 This morning I shall discuss the exchange ratio. The

9 negotiations over that ratio extended for more than three and a

10 half and, as it was observed yesterday, each of the two companies

11 here was advised by an independent company of investment bankers,

12 Northern Pacific by Morgan Stanley and the Great Northern by

13 First Boston.

14 Now as Mr. Dailey indicated, perhaps the greatest

15 problem in these negotiations was the natural resource proper-

16 ties of the Northern Pacific. It was agreed by everyone on both

17 sides of the bargaining table that if you looked at merely rail-

18 road properties and railroad earnings, the Great Northern was

19 entitled to a very substantial premium in this exchange ratio.

20 But the Northern Pacific's position was that its natural resource

21 properties entitled it to parity, share after share.

22 The Great Northern took the position that that was not

23 the case. It said even with the natural resource earnings, based

24 on historic record of earnings it was entitled to a substantial

25 preference in this exchange ratio and it took different positions

1 about the amount of that preference, but toward the end of the
2 negotiations it said that giving due allowance to the resources
3 it was entitled to about a 20 percent premium.

4 Q Does the Great Northern own any substantial non-
5 railroad income-producing properties?

6 A No. I has some industrial properties, but I
7 think you can fairly say as a general matter that the earnings
8 represent earnings from railroad activities.

9 Q I suppose it does own real estate.

10 A Yes, it has some industrial real estate and some
11 properties of that kind, but nothing like the properties of the
12 Northern Pacific. I think that has to be said.

13 This went on until 1960. At that time, and I think this
14 is rather significant, the banking advisors of Northern Pacific,
15 Morgan Stanley, suggested the compromise that was finally adopted,
16 the exchange ratio that the parties agreed to.

17 Now that was described yesterday. I would merely like
18 to say this about the ratio. The reasoning that underlies it is
19 that it gives the shareholders of Northern Pacific in the long
20 term an equal share in the equity of this new company, but at
21 the same time it gives an immediate but not a lasting recognition
22 through this preferred stock to the historical fact that the
23 earnings and dividends of the Great Northern had been greater
24 at the time the exchange ratio was established.

25 Now this compromise proposed by Morgan Stanley was

approved by both investment banking houses, by the Board of Directors of each company and it was twice approved by the stockholders of Northern Pacific, once in 1961 and once last year in 1968. In each occasion it was approved by 3 percent of the stockholders. The first time there were about 6 percent of the stockholders who voted against it. The second about 2 percent of the stockholders voted against it.

I think it must said about 2 percent declined on that vote, that the committee conducted a proxy fight and they did ask that those who favored their point of view not vote as well as vote against, so that without that part accounted for the decline in the votes.

But the committee in the proxy fight presented all the arguments that they presented here.

Now the Commission and our Examiner both found that this ratio was just and reasonable. The Commission found that it fairly represented the contribution that each group of shareholders made to the new enterprise. I emphasize that fact because I think the impression might have been left with the Court yesterday that the Commission based its approval of the ratio solely on the finding that there was arm's length bargaining.

It did find that there had been arm's length bargaining, but it also made this finding on fair contribution to the new company by each group of shareholders.

The findings that were made by the Commission on the

4

1 fairness of the ratio, we submit, are supported by substantial
2 evidence. There was a great deal of evidence to support the
3 Commission's finding that this ratio fairly represented the con-
4 tribution made by each group of shareholders. The ratio was
5 based finally on an appraisal of earnings, both an appraisal of
6 the past earnings to which there was evidence before the parties
7 and which was before the Commission, and in judgment about the
8 earnings in the future, including the earnings of the natural
9 resources properties.

10 The parties didn't use any arithmetical formula, but
11 they reached a judgment about that and established the exchange
12 ratio accordingly.

13 Now the committee seems to make really two points about
14 the evidence. They complain about the fact that the ratio wasn't
15 based on an asset appraisal, an appraisal of the market value
16 of these properties. They suggest that there was really no evi-
17 dence about that before the Commission, but I think that is not
18 quite a complete account of what did happen. There was each of
19 the railroads here got independent asset appraisals from inde-
20 pendent firms of the more important of these properties and in
21 their direct testimony before the Commission, the executive of
22 the railroad applicants testified about these appraisals and
23 explained why they didn't use them in establishing the exchange
24 ratio.

25 The committee asked for the appraisals and they were

5

1 produced and the committee put them in evidence before the Com-
2 mission. The Commission had some evidence about the asset
3 appraisals and also testimony why they weren't used. They weren t
4 used because they were party's judgment. They were not reliable
5 as earnings. There were enormous differences between them and
6 even the independent firms who made them in some instances said
7 they weren't sure that they reflected market value.

8 The committee also complains that not enough weight
9 was given to the earnings of the natural resources properties
10 of the Northern Pacific. It says they should have been valued
11 at 50 times earnings or perhaps 22 and a half times earnings,
12 but I submit there is nothing in the record that required the
13 Commission to accept those particular arithmetical formulas as
14 a standard for judging the legality of this exchange ratio.

15 The 50 times earnings, at the time it was testified to,
16 would have produced a value for the natural resources property
17 of the Northern Pacific alone, which was $90 million higher than
18 the total stock market value of the entire enterprice, including
19 railroad properties.

20 It would have produced a valuation that was $280 mil-
21 lion more than the amount that the committee proposed that these
22 properties be sold for in connection with the divestiture pro-
23 posal that the committee put before the Commission. So that
24 formula really didn't come within any measurable distance of
25 reality.

1 The 22 and a half times formula, if applied to the
2 five years before 1960 when the exchange ratio was determined,
3 produces an exchange ratio that is a little less favorable to the
4 Northern Pacific stockholders than the ratio they actually
5 received. That is true if you apply in some more recent years.
6 Nor the committee can apply it to certain yars and
7 get results that they say show that the ratio wasn't fair. These
8 computations are in our brief and in their brief. I am inclined
9 to think that what they show is that with one of these arith-
10 metical formulas you can get different results if you apply them
11 to different years.
12 But the fact is that there was substantial evidence
13 before the Commission about all the matters the parties con-
14 sidered in relation to earnings, the various things that affected
15 earnings in the past and what might affect them in the future, to
16 indicate that this exchange ratio had a substantial basis. And
17 that evidence was all before the Commission and is discussed in
18 detail. There are about 28 pages in the Examiner's report, about
19 11 pages in the Commission's report that sets out this evidence.
20 Now what I have said about the finding as to the fair-
21 ness of the contribution that each group of shareholders made
22 to the company, I think could also be said about the finding that
23 there was arm's length bargaining. Both the Examiner and the
24 Commission made that finding and the Examiner made it after
25 hearing testimony from the executives who participated in these

negotiations and from the representatives of the banking house which participated and advised the two companies.

I think that I understand what the committee's point of view is. Ithink they believe, no doubt sincerely, that the Commission may have given too much weight to some evidence and not enough weight to another, or perhaps they prefer their inferences to the inferences that the Examiner and the Commission drew from the evidence.

But I think it cannot be said really that these findings lack support and substantial evidence in the record.

Now the committee makes another contention which was referred to briefly yesterday, and that is that the Commission abused its discretion in 1968 when it didn't reopen this record and retry the issue of the fairness of the exchange ratio. We have discussed that point in our brief and replied to the showing that they have made as to changed conditions with analysis of those conditions which we submit show that the matters on which they rely to not really support the argument that the Commission abused its discretion.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cox.

Mr. Tolan?

ARGUMENT OF FRED H. TOLAN
ON BEHALF OF APPELLEES
PACIFIC NORTHWEST SHIPPERS

MR. TOLAN: Mr. Chief Justice and may it please the

Court:

I speak only for the shippers and receivers of freight here today. Shippers want and need this merger as it is now conditioned. I appear for 230 intervenor shipper-receivers, who will cover over 1,000 actual shippers and receivers of freight from the very smallest industries of the West to the largest out there.

We want this merger because it will help us tremendously. The scope of people that are covered by the appearance here today run from pool car shippers, fish, clothing, furniture, peat moss, almost every aspect of business. The complete list of whom I speak here today are covered on page 2 of my brief and page 1312 of the appendix lists all the 230 interventions for whom I speak.

This merger is a good merger. It is a merger in the public interest. It will reduce transportation costs, it will speed service and it wil improve -- and I emphasize the word "improve" -- competition beyond anything that we have today. The shipping public virtually to a man, and I emphasize that word "virtually to a man," is solidly behind this merger as directed by the Interstate Commerce Commission and before this Court today.

We cannot support the Department of Justice's position of what they would provide by their solution is a mere aspirin, when what the shipping public needs is a surgery of this

type of action.

The position of the Department is not realistic, it will not give the shippers the benefits and the competitive safeguards that the Interstate Commerce Commission order gives us. For that reason we support the order before the Court today.

Now I want to be specific, very specific because basically my part of the presentation is to give the facts of the benefit of the public in this merger. Here are the basic points I would like to touch on in the time that I have here.

First, the direct shipper benefits from the Great Northern-Northern Pacific-Burlington merger. The second thing, those many added benefits that we get from a new and revitalized Milwaukee Railroad. The third thing, the vast amount of competitive traffic that will available to us to protect us after the merger is accomplished. Fourth, the tremendous number of safeguards that the Interstate Commerce Commission has built into the order that is before this Court today to protect us from rate discrimination and service discrimination, some really wonderful safeguard. And lastly, the $40 million saving, the benefits that will directly accrue to the shipping public from the manifesting of those savings to the railroads involved.

Now coming specifically, are the shippers that I represent here today, are they the pawns of the railroads? Are we the ones swayed by the brochure? The answer is "no."

We intervened in the case, disagreed -- and I emphasize

1 the word "disagreed" -- with the Northern Lines and took an
2 independent position with independent witness, independent coun-
3 sel and it was only after the petition for reconsideration came
4 in that we are all together. Right from the start we felt there
5 had to be conditions for the Milwaukee Railroad. There had to
6 be a merger, but there had to be conditions and we fought
7 valiantly for something over ten years, even before the official
8 filing, to accomplish this end result which is before the Court
9 today.
10 The shippers are uniquely situated to judge the effect
11 of this. Our people in over 50,00 carloads of freight are
12 aggregated in the shippers for whom I speak here today. We have
13 studied this, we have lived with it for ten years, we have
14 participated in every phase of the action from an independent
15 status position, and we believe we do have the facts that will
16 justify to this Court why we think the merger should be approved
17 by the Court.
18 First, if I could touch on the direct benefits from
19 the GN and NP-Burlington merger without touching on the Milwaukee.
20 First is faster service. That cannot -- the value of that cannot
21 be overestimated. It increases the shelf life of our perish-
22 ables, our apples, our potatoes, our lettuce. It reduces the
23 inventory requirements for the stocks out in the West, where we
24 have such tremendous distances, that reduces icing and refrigera-
25 tion costs, that produces less inventory requirements.

1 All of this is tremendous to us. It will make one to
2 two days' difference into the Kansas City-Midwest markets and at
3 least a day's net final difference to us to and from the Chicago
4 market, not on hot-shot one-train westbound a day, but on basic
5 all-freight that is so critical to the marketing of the Pacific
6 Northwest.

7 We will have faster north-south as well as east-west
8 service. A second part of this is the dependability of the
9 service. After this merger the merged railroads will have two,
10 not one, lines, which will give us dependability when there is
11 weather washouts, detailments and other things that repeatedly
12 occur on railroads of the type of the operation here.

13 But more importantly, on the dependability is the
14 fact that they will be using vastly shorter routes to and from
15 the key markets. For example, the rrecord shows right now that
16 15 million car-miles a year will be saved by the new short routes
17 that will be utilized by this merged line in the operation after
18 merger is accomplished. They will do that by running more
19 traffic through the Laurel-Billings area that now goes through
20 Missouri gateways.

21 They will do it by using the best and shortest parts of
22 the combined system, such as was touched on earlier by other
23 speakers. They will do that by making improvement in north-
24 south as well as east-west routings.

25 Now the third great thing is the improved transit

1 privileges. Unfortunately in the West we raise strawberries in
2 one area, beans in another area and we must put those together
3 to get the advantages of low rates. That means stopping transit
4 to complete loading to make the necessary mix the customers
5 want. They don't want a straight carload of strawberries or
6 beans. They want a mix.

7 We start at one point and complete on another. At
8 the present time we have to do that essentiall all on the GN or
9 essentially all on the NP. After the merger the scope of the
10 mix vastly improves. The ability to fabricate lumber and other
11 products that are fabricated are equally done. Grain and flour
12 and feed will be able to draw cross lines where they are now
13 restricted just to the NG or just to the NP for the transit privi-
14 leges. All of those are tremendous advantages.

15 Now a better car supply. Actually 61,555 car-days will
16 be eliminated by having one pool instead of three pools of equip-
17 ment. Financially able railroads will be able to buy more equip-
18 ment than they are able to buy now, which are essentially based
19 on earnings. We get new cars when railroads are profitable, we
20 don't get new cars when railroads aren't profitable. Unfortu-
21 nately the car supply now is diminishing.

22 Faster routes. The faster routes that I touched on
23 earlier will save 639,000 car-days a year by using the faster
24 routes rather than the longer, circuitous routes. Then again
25 this case is badly oriented east and west. We think there has

1 been a myoptic view of this case in thatit is a tremendous north-
2 south impact railroad. We will get an end of the stranglehold
3 that the SP on the north-south traffic has by making a new gate-
4 way at Klamath Falls that will enable this line to interchange
5 traffic at Klamath Falls, giving them roughly half of the traffic
6 between north and south that we do not have today.

7 We will have new Northern Pacific gateway with the
8 Western Pacific which we don't have today.

9 Now another great benefit is job security. We fought
10 valiantly for conditions for labor on this one and now all labor
11 has virtually lifetime jobs in the City of Auburn that is before
12 you here today or not before you here today, but in pleadings
13 to the Court. We now have the assurance that the yards are stay-
14 ing in Auburn, they are growing there. It is a boom area of
15 our part of the country. It is anything but grass-in-the-streets
16 kind of concept. There is now to be newer job impairment and
17 the security that it gives that it knows that that is going to
18 be there.

19 Now the last important benefit directly from the GN and
20 NP merger is this: This will save about $40 million a year. Now
21 will that go to the shippers? We know it will go to the shippers
22 for just this reason. The railroads in the last 18 months have
23 had three separate increases before the Interstate Commerce Com-
24 mission -- 3 percent, 5 percent. Then ten days, just ten days
25 ago, they asked another 6 percent, all based on added cost of

1 operation. As shippers we know the only way we can get rates
2 down or not hold them down, not let them get down, but just hold
3 them going out to the moon, is to get lower costs of operation.
4 This merger will save $40 million a year and coincidentally that
5 would be just about the equivalent of 6 percent that is before
6 the Commission today for rate increase. It is that important
7 to the shipping public.

8 Now beyond those tremendous benefits for the GN-NP
9 merger, what do we get as added benefits because we get a new
10 Milwaukee railroad and we do get a new Milwaukee. We get a
11 vitalized east-west railroad with the ability to take long hauls
12 instead of being cut off at the pockets in St. Paul. Now they
13 have to give all traffic to the GN-NP at St. Paul. Now they will
14 be able to haul it clear out as far west as Seattle and Spokane.

15 We will have a new north-south railroad because we
16 have no Milwaukee connection south of Wellington today. They
17 will go into Portland and we will have have a brand-new competi-
18 tive line there. We will have a new Canadian railroad with high-
19 speed service to and from the Sumas area.

20 We will have another railroad in Billings, the Milwau-
21 kee. In the Bellingham area we will have a vastly improved
22 service there. Vast industrial lands and properties on the
23 Milwaukee that no sensible industry could locate on because of
24 their absence of proper rates and routes, because of their
25 limited coverage and other deficiencies will be open for

1 industrial development.

2 And beyond all that this should make such a substan-
3 tial improvement in the revenue position of the Milwaukee Rail-
4 road that they will be a vital competitor, even better than they
5 are today.

6 Now after the merger those are the benefits of the
7 Milwaukee. Are we going to left then with the withdrawal of the
8 GN competition with something of a vacuum of competition? To me
9 it is unbelievable that such an assertion could be made to the
10 Court here and to the courts below and to the Commission. For
11 example, the Union Pacific.

12 The Union Pacific will handle over 100,000 cars of
13 loaded freight through the Huntington, Oregon, gateway to the
14 the Pacific Northwest. If that is weak competition, it is cer-
15 tainly not the adjective that shippers would use.

16 After the merger, the Great Northern-Northern Pacific
17 merger, the UP holding just the business they have today would
18 handle still about 25 percent of the business of the Northwest.
19 We will have the strengthened Milwaukee. The SP will handle
20 42 percent of the business out of the State of Oregon.

21 Now those tremendous assets from the competitive rail-
22 roads that will exist plus the CPR-Soo are of vital importance
23 to us in giving us competition for the future.

24 Beyond that we will have transcontinental truck lines,
25 eight new ones since this case was filed. We have exempt trucks.

1 We have a vast amount of trucking, covering everything from
2 lowest rated to highest rated traffic.
3 Now the last major point I would like to make is,
4 what safeguards has the Interstate Commerce Commission built into
5 their order that will protect us from rate discrimination and
6 service discriminations if this Court approves that order?
7 The most important thing is this: The long and short-
8 haul provisions of Section 4 of the Act will prevent any competi-
9 tive or totally noncompetitive point from being charged more
10 than the next beyond point. Thatmakes with 236 competitive
11 points on this railroad, that would give a fantastic amount of
12 long and short-haul rate protection that is iron-clad and is
13 not waived anywhere in this order.
14 We will have rate protection because the competitive
15 rates will serve at the maximum at any intermediate points.
16 Beyond that, we have the ability to short-haul the GN-NP by giving
17 the traffic to the Milwaukee. For example, in the Columbia
18 Basin, we they would not give proper car supply, we could take
19 the GN-NP and turn the traffic over to the Milwaukee at Spokane
20 to take on to Chicago.
21 We will have at least eight other routes, such as the
22 Western Pacific, the Soo Line route, the rates via the CPR-Soo,
23 the rates by the Union Pacific and those via the Western Pacific.
24 Beyond that the Commission has even gone this far. They have
25 given us a five-year safety valve, any of us -- shipper or

1 injured railroad or other injured party -- can come back to this
2 Commission any time within five years and say, "We have been
3 treated unfairly, we need help" and the Commission is holding
4 this record open to take care of that.
5 The last thing is our own state commissions, who do
6 not opose this merger now, will be able to bring their vast
7 influences to bear.
8 Now in conclusion, I would like to say this: There is
9 no labor opposition before this Court today. There is no state
10 opposition here. The Department of Agriculture supports the
11 merger and the Department of Defense does not oppose it. No
12 shipper opposition, no chamber, port or other group is here
13 opposing this merger.
14 The ICC obviously supports it. Not one railroad is
15 here contesting this. For all of those reasons we respectfully
16 urge the Court to affirm the decision of the lower court and
17 allow the merger to proceed forthwith.
18 Thank you very much.
19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tolan.
20 Mr. Merrill?
21 ARGUMENT OF R. K. MERRILL
ON BEHALF OF APPELLEES
22 CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO.
23 MR. MERRILL: Mr. Chief Justice, may it please the
24 Court:
25 The Milwaukee feels a little bit hurt by the brushoff
we received from the Department of Justice as a weak third

1 competitor of the applicant lines. It is true, as the evidence
2 which we ourselves put into the case demonstrates, we are not
3 as favorably situated financially as any of the applicants, as
4 reflected in net income, working apital, and the various other
5 measures. But the Commission has not said we are not a good
6 competitor.

7 The Commission in its first report, which the Depart-
8 ment of Justice says has correctly analyzed the competitive pos-
9 ture of this case, points out that we compete with the applicant
10 lines in 11 states, that we provide an efficient and essential
11 service in the areas where we are the principal competitors
12 of the applicant, that the shippers look to the Milwaukee for
13 active and vigorous competition, both in rate negotiations and
14 in quality service, and as a matter of fact, the only reference
15 in this whole argument to any improved service as a result of
16 competition, the only specific example has been that of faster
17 train service to the West Coast, which was the result of the
18 Milwaukee's competition.

19 For the Department of Justice to say that we are a
20 weakcompetitor represents a complete turnabout from the repre-
21 sentations made by the Department to the Commission. In its
22 brief to the Interstate Commerce Commission it referred to the
23 acquisition case of the Spoke International Railroad by the Union
24 Pacific, and referred to the Court decision as well as the Com-
25 mission's decision in that case, and said, "This recognition by

1 by Commission and the Court of intense competition among the
2 Northern Lines and the Milwaukee is supported by ample and sub-
3 stantial evidence in the record in this case," meaning the case
4 before us today, "and there is no substantial evidence to
5 support a contrary finding."

6 The Department went on and pointed out that the Mil-
7 waukee generally follows the route of the Northern Pacific. It
8 is a 10,596-mile system. Milwaukee is in competition with the
9 Burlington and the Northern Lines at 137 stations, 135 of which
10 are located in Washington, Montana, North Dakota and Minnesota.

11 And finally, the Department says, "Applicants admit
12 that at present the Milwaukee is a very aggressive and effective
13 competitor and there is 'intensive competition' between them
14 for the traffic."

15 The Justice Department went further and in their brief
16 to the Commission pointed out nine representative instances of
17 how the Milwaukee's active and vigorous rail competition and
18 independent action has brought great advantages to the public.
19 I will not read of all of those reasons. They appear on pages
20 140 to 142 of Justice's brief to the Commission.

21 The question may well be raised if we are such a good
22 competitor, why aren't we rich? Or perhaps more specifically,
23 why is our share of the traffic so small?

24 The Milwaukee is confined to the area which it serves
25 along the northern tier of states and on the West Coast,

1 principally in the State of Washington. We are unable to serve
2 the City of Billings, which is the principal distribution between
3 the Twin Cities and the West Coast. We do not reach Portland
4 or Beaver as do the Northern Lines, where they have friendly
5 connections to work with or traffic moving to Oregon and Cali-
6 fornia.

7 We do not have a fast route north of Seattle where we
8 can be effectively competitive for the traffic moving to and from
9 Canada.

10 And finally, with the western junctions west of the
11 Twin Cities closed to the Milwaukee, we find that we may origi-
12 nate traffic in the Midwest or receive traffic from our connec-
13 tions in the Midwest, but when we get as far as the Twin Cities
14 we are compelled to turn it over to our competitors if the traffic
15 moves to a station local to our competitors or if the shipper
16 wants our competitors to have the line haul.

17 Notwithstanding that, for example, a car going to
18 Vancouver, Washington, could physically be handled by the Mil-
19 waukee all the way to Tacoma and then turned over for the haul
20 beyond. But by reason of the rate structure and the right which
21 the Northern Lines have under the law to protect their long haul,
22 we are not able to compete for that traffic for the long haul.

23 Now there is no dissent among the Commissioners in their
24 first report that the Milwaukee should have adequate protection.
25 This is one thing they all agreed on. The six majority members

1 said that it would be inconceivable for this merger to be approved
2 without adequate protection for the Milwaukee, and five dissenters
3 regreted the fact that the Commission was passing up an oppor-
4 tunity, finally, to make the Milwaukee completely competitive
5 in the norther tier of states and the Pacific Northwest.

6 With these conditions, first of all, we will be able
7 to handle traffic which is destined to or from Billings or which
8 is to be stopped off at Billings for part loading or part unload-
9 ing. With these conditions we will be able to go to Portland
10 where the Southern Pacific is waiting to work with the Milwaukee
11 as an effective route for traffic to and from California and
12 Oregon, on the one hand, and the Midwest and the rest of the
13 country, on the other.

14 We will be able to participate with our traffic rights
15 north of Seattle for north and south traffic between Canada and
16 California -- Canada and Oregon -- on an equal basis with the
17 Northern Pacific-Great Northern after they merge.

18 And with the westbound traffic that we now handle and
19 have to give up at the Twin Cities, we will be able to hold that
20 traffic and take it to our farthest junction.

21 Our solicitation efforts aren't all that important if
22 a shipper, first, is dissatisfied with the service that the
23 Northern Lines give them. Secondly, if the traffic is already
24 in our possession, as much of it is, is going westbound.

25 And finally, the Justice Department has again conceded

1 that the Milwaukee will be strengthened by these conditions.

2 The effect upon the shippers has been been discussed

3 here by Mr. Tolan. I believe that the purpose of the antitrust

4 laws is not so much to stir up competition for the sake of com-

5 petition, but to make sure that there will be a free flow of

6 commerce and that shippers will be able to reach their markets

7 and to reach their sources of supply without discrimination,

8 without interference. These conditions that we have received

9 will enable Milwaukee shippers to do exactly that. They will be

10 able to originate a car on our railroad and stop it off at a

11 station served by one of the Northern lines today and then move

12 on to a destination either on our railroad or on their railroad.

13 These benefits are important for the free flow of com-

14 merce and there are many, many shippers of great size and import-

15 ance who came in to seek this opening up of the area for competi-

16 tion. As a matter of fact, it will open up competition to

17 point that have never had competition before.

18 Every local point on the Great Northern-Northern Pacific

19 or the Milwaukee, which has been a sacred domain insofar as com-

20 petition has been concerned, no one else could reach it, will be

21 open for competition whereby each of the competiting railroads

22 may solicit the long haul of the traffic through the closest

23 junction to those points and there interchange it with their

24 competitor, and the shipper thereby can wield a club over the

25 railroads and their service by using the railroad which gives

23

1 them the best service for the long haul of the traffic.

2 Q Is there any possibility of rate competition

3 between railroads?

4 A Any possibility of rate competition? Yes, sir,

5 there is, and in the area in which we compete we have given them

6 quite a bit of rate competition and we find that in many instances

7 that the Northern Lines and we do not at all see eye to eye, and

8 before the Commission and before the Courts we are on opposite

9 sides as we try to adjust our rates on commodities to or from

10 certain territories, and the Northern Lines have appeared to pro-

11 test and try to prevent our rate changes from taking effect.

12 Q Would you say service competition is more usual

13 than rate competition?

14 A I would say by and large that rate competition is

15 the more troublesome factor and the more likely to be at issue

16 between the railroads. We have ---

17 Q You mean that rate competition is really -- would

18 re lly put service competition into the shadow as an effective

19 competitive device?

20 A I do not wish to indicate that service is not

21 important. I believe it is very important.

22 Q It sure is.

23 A But I think that we find our disagreements among

24 ourselves and our attempts to better our position manifests

25 itself in rate adjustments more often than, as the Milwaukee did

1 not too long ago, improvement of a service in a very drastic
2 or substantial manner.
3 Q The Milwaukee, I suppose, feels that it isn't in
4 any worse position competing against a real gian than two giants.
5 Is it going to really interfere -- is it really going to make
6 your competitive position less tenable?
7 A We feel that it will definitely improve our com-
8 petitive position?
9 Q The conditions?
10 A Yes, sir, and their merger.
11 Q Absent the conditions, what about that?
12 A Absent the conditions, the Milwaukee took a very
13 strong position in opposition to the merger.
14 Q Why?
15 A Because the merger would permit the improvement
16 of service by the Northern Lines, permit them to offer their
17 shippers more than they can offer today, permit them to give
18 many of these benefits that the Milwaukee's conditions will
19 enable the Milwaukee to give its shippers.
20 Q Rate-wise, though, it wouldn't put you at any
21 disadvantage? I guess it would if there were lower costs from
22 the other lines.
23 A Yes, if they were able to lower their rates and
24 justify it by the cost of their handling and their costs were
25 lower than ours, we would find it rather difficult to match

their rates.

The suggestion is made by the Justice Department that this relief is available in less drastic forms than a merger for the Milwaukee, but they not said that the Milwaukee can obtain obtain trackage rights to Portland, obtain trackage rights north of Seattle and get the right to serve Billings, because there is no law and no power in the Interstate Commerce Commission to require the Northern Lines to let us have any of those rights.

The only condition that is possibly obtainable under any part of the law today would be the opening of the western junctions and we tried that once. We came clear up to the Supreme Court, and although the Justice Department in its brief to this Court points its finger at the Commission and says that it does nothing to help the Milwaukee break the stranglehold, it was the Justice Department standing with the Commission who opposed us all the way in the lower court and in the Supreme Court from obtaining that relief.

Q How long ago was that?

A I would say in 1955 or '56, if my memory stands me.

Q Was there any effort made in terms of discussion in the Commission's reports to have a comparative analysis of the increased competition of the Milwaukee vis-a-vis the decreased competition between the two Northerns, or is that not

1 feasible to do?

2 A Do you mean, sir, in the case we are just talking

3 about where we attempted to open the gateway? Of course, at

4 that time there was no proposal to merge the two railroads, and

5 the problem in the law as it exists today to open gateways is

6 that it must be shown that the shipper must have this service

7 and the law prohibits the Commission from opening these gateways

8 for the purpose of improving the financial position or strength

9 of the carrier who seeks these gateways.

10 I would like to submit to the Court in the few minutes

11 remaining that this is a situation where the objective of the

12 national transportation policy and of the antitrust laws can

13 both be carried out. There is no conflict here. The Milwaukee

14 will be able to render efficient, economic transportation for

15 its shippers. It will foster sound economic conditions for the

16 Milwaukee and it will be able to provide a transportation service

17 adequate to the needs of the commerce of the United States and

18 of the Postal Service and of the national defense in accordance

19 with the national transportation policy.

20 At the same time the purposes of the antitrust laws

21 are frustrated by a prevention of competition as much as by any-

22 thing else, and when a competitor such as the Milwaukee Road is

23 prevented from competing, although it is equipped to do so, the

24 antitrust law objectives are especially frustrated and here with

25 the conditions to the Milwaukee, the objectives of both the

1 national transportation policy and the antitrust laws can be
2 carried out.
3 I would like, in closing, to renew a promise that we
4 made in the lower court and that is that if this merger is
5 approved subject to the Milwaukee's conditions, we promise that
6 with our hands finally untied so that we can phyically compete
7 for traffic over our lines to and from Washington as well as to
8 participate in traffic to and from Canada, Oregon and California
9 we will give the merged company and our other competitors such
10 as the Union Pacific and Canadian Pacific, who have profited by
11 our competitive handicaps more strong, vogorous and effective
12 competition than they may even have bargained for.
13 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Merrill.
14 Mr. McLaren, you have between nine and ten minutes.
15 REBUTTAL ARGUMENT OF RICHARD W. McLAREN
ASSISTANT ATTORNEY GENERAL
16 ON BEHALF OF THE UNITED STATES
17 MR. McLAREN: Mr. Chief Justice, may it please the
18 Court:
19 I believe that we have approximately that time. The
20 Livingston Committee, as I understand it, would like to have
21 two minutes.
22 I would like to, if I may, answer one point that came
23 up yesterday and then to finish a point which I started yesterday
24 and did not conclude.
25 Now it has been argued by the other side that our

position in this case is am amorphous one. We think it is not, it is very clear and it is simply this: As a matter of law, Section 52 of the Co-merce Act, when read in the light of the national transportation policy, does not authorize a merger which destroys very substantial competition among healthy railroads who dominate their territory in the absence of a serious transportation need which cannot otherwise be met.

Now, Mr. Justice White asked what kind of mergers will this permit? Well first, it will permit a vast number simply because most roads are not in competition with one another or if they are in competition with one another, it may very well be in a relatively small area that they cover. The overlap may be rather negligible.

Secondly, this would not prevent mergers of strong with weak roads, even if they are competing. Now these two types of mergers, we think, are theprincipal ones which Congress contemplated when it passed the 1920 and 1940 Acts, mergers which would strengthen the smaller and weaker roads and contribute to the development of competing systems, and the legislative history is discussed in our brief at page 30.

Finally, you do have the healthy dominant roads who are head-to-head competitors and what kind of needs would justify their merger?

Well in our view examples of serious transportation needs would include, first, a need to remedy inadequate service

1 which cannot other be made adequate. Perhaps this might involve
2 opening up an expensive new area to serve for some reason, and
3 it comes to mind the Alaskan frontier where new oil discoveries
4 have been made and it is very difficult to reach.

5 Second, a demonstrated inability of the merging roads
6 to separately serve expanding or projected new shipper markets.

7 Third, a need to shore up a weak or failing line,
8 whose services, while essential, cannot be maintained without
9 the drastic remedy of merger, and here comes to mind the Penn
10 Central merger.

11 Fourth, a need for a restructuring in order to restore
12 effective competitive balance in a major area. As a hypotheti-
13 cal example, it might be perfectly reasonable to authorize the
14 merger of the Milwaukee with one of the Northern Lines, if
15 Milwaukee cannot otherwise be made viable. Such a merger would
16 have two effects: First, it would leave the two strong direct
17 competitors in the northern tier instead of the situation that
18 is created by this merger where one enormously dominant company
19 and one relatively weak competitor would be left. Second, such
20 a merger would involve only a relatively small amount of competi-
21 tion being eliminated.

22 Now Mr. Cox appears to concede that ICC proceeded in
23 this case on an ad hoc basis. I think that is the term he used.
24 It was not guided by some general principle of law. The only
25 principle which we seem to find that was followed in the second

1 report is the statement of the Commission that the policy of the
2 Act is clearly to facilitate and thereby to foster and encourage
3 consolidations which can be shown to be consistent with the
4 public interest. And then it went on to rely upon conclusive
5 language that the benefits of the merger outweigh the loss of
6 competition.

7 Well now, as I started to argue yesterday, we think that
8 ICC did give up too easily on these less drastic alternatives.
9 At 321 of the record said, in the second report denial of the
10 applications for the purpose of preserving competition between
11 the Northern Lines would merely perpetuate the existing dominance
12 of the GN and the NP in the northern tier. And then it went on
13 to say it would relegate the Milwaukee to an increasingly margi-
14 nal and deteriorating role.

15 We do not think with the vast power of the ICC to
16 supervise, as McLean Trucking indicates that it has, that this
17 statement fairly reflects the alternatives that the Commission
18 does have. For example, under Section 54 of the Act ICC has power
19 to order thru-routes and to open gateways when this is "needed
20 in order to provide adequate and more efficient or more economic
21 transportation."

22 And we think that if there is a transportation need
23 for this merger, why then we say that here is a less drastic
24 remedy which should first be exhausted.

25 In conclusion, I would just like to point out we think

1 this case involves an issue of the utmost urgency and importance
2 going to the enormous changes in the nation's railroad structure
3 which are now taking place, in particular.
4 The proposed merger represents a crucial and a far-
5 reaching step in the restructuring of the western rail system.
6 If the Commission's approach to this case is valie, other roads
7 in other areas can present similar cost savings and service
8 improvement evidence and it is difficult to see how ICC could
9 turn down any major proposal for a merger of parallel compeitors
10 even where they are dominant.
11 At stake, I seriously say to the Court, is the whole
12 question of rail competition and we say that it should not be
13 discarded.
14 Thank you.
15 MR. CHIEF JUSTICE BURGER: Thank you, Mr. McLaren.
16 Mr. Deale?
17 REBUTTAL ARGUMENT OF VALENTINE B. DEALE
ON BEHALF OF THE LIVINGSTON
18 ANTI-MERGER COMMITTEE
19 MR. DEALE: Mr. Chief Justice and may it please the
20 Court:
21 In oral argument before this Court the proponents of
22 the merger have chosen not to meet the committee's argument,
23 the Livingston Anti-Merger Committee's argument, on the merits,
24 and have chosen to rely on their briefs.
25 It is suggested here that the tide of difficult argu-
ments

1 of economic imponderables largely attached to the antitrust
2 issue not be allowed to sweep away the arguments of the Living-
3 ston Anti-Merger Committee.
4 In closing, therefore, it would seem appropriate to
5 note once more that the Livingston Anti-Merger Committee raises
6 the threshold issues in these consolidated cases. If the
7 Court finds in favor of the Livingston Anti-Merger Committee on
8 either of the two threshold issues which it has raised, the
9 arguments of economic imponderables become moot.
10 In summary, the Livingston Anti-Merger Committee
11 claims that ownership of the federally chartered right-of-way is
12 a jurisdictional element. If the right-of-way is not owned by
13 a merger applicant or party petitioning for inclusion in the
14 merger, and the committee claims that is isn't, the Commission
15 has no jurisdiction.
16 Secondly, even assuming the Commission has jurisdic-
17 tion over the proposed merger and accepting the Railway's claim
18 of title to the federally chartered right-of-way, the merger
19 is still barred by statutory law and contract. It is barred
20 by the provisions of the Federal charter which were imposed upon
21 the road when Congress granted the road in the first place.
22 And those two provisions -- there are two provisions.
23 One prohibits the merger and the other prohibits mortgage with-
24 out congressional consent. If Railway succeeded to the title of
25 the main line right-of-way federally chartered to Railroad, then

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1 Railway also succeeded to the liabilities and obligations
2 and burdens that that title carries. And two of those
3 burdens are "no merger" and "no mortgage without congressional
4 consent."
5 ICC has no position to override these impositions.
6 These are impositions that have been placed by Congress in
7 the Federal charter which Congress has preempted.
8 I see my time is up, Mr. Chief Justice. Thank you.
9 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted and we thank you for your submission.
11 (Whereupon, at 11:10 a.m. the argument in the above-
12 entitled matter was concluded.)
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