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Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

UNITED STATES & LIVINGSTON ANTI-MERGER COMMITTEE, Appellant, vs. INTERSTATE COMMERCE COMMISSION, ET AL. Appellee.	**Docket No.** 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

Pt. 1

Place Washington, D. C.

Date October 21 1969

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C O N T E N T S

BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

UNITED STATES,

Appellant

vs

No. 28

INTERSTATE COMMERCE COMMISSION, ET AL.

Appellee

CHARLES E. BRUNDAGE, ET AL.,

Appellants

vs

No. 38

UNITED STATES, ET AL.,

Appellees

CITY OF AUBURN,

Appellant

vs

No. 43

UNITED STATES, ET AL.

Appellees

LIVINGSTON ANTI-MERGER COMMITTEE, Appellant	)	
vs	)	
INTERSTATE COMMERCE COMMISSION, ET AL. Appellee	)	No. 44

Washington, D. C.
October 21, 1969

The above-entitled matter came on for argument at 10:50 o'clock 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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 28; number 38; number 43; number 44, the Northern Lines Merger Cases we will call them collectively.

Mr. McLaren, you may proceed.

ORAL ARGUMENT OF HONORABLE RICHARD W. MC LAREN

ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES

ON BEHALF OF APPELLANT UNITED STATES

MR. MC LAREN: Thank you, Mr. Chief Justice. May it please the Court, I will direct my argument to case Number 28, the United States v the Interstate Commerce Commission. This is a civil case that comes to the Court on direct appeal from the judgment of a three-judge District Court. The District Court denied the Government's request for an injunction and upheld the I.C.C.'s approval of the merger of the Great Northern and the Northern Pacific Railroad that has been referred toin our brief as the Northern Lines and their various railroad subsidiaries.

The merger has been stayed by this Court's Order. The issue in this case is whether the I.C.C. correctly applied the Public Interest Test of Section 52(b) of the Interstate Commerce Act when it approved this merger, holding that the savings and service benefits of the merger outweigh the elimination of substantial railroad competition between the Northern Lines and the northern tier of Western States.

Case number 43, the City of Auburn case is related to

our case and it also raises competitive issues. The other two cases, Case Number 38, the Brundage case, involving the fairness of the merger terms to Northern Pacific stockholders, and Number 44, the Livingston case, questioning the Northern Pacific's title to its property, raise unrelated issues.

Now, although the record in this case is a very long one, the basic facts are relatively simple. First, I would like to identify the roads which propose to merge in terms of the areas they serve. The trunklines of the merger parties are shown in various points on the fold-out map at the end of the Great Northern brief. I have taken the liberty of requesting the Court to distribute each Member of the Court an extra copy of this map and also a copy of the map which is prepared from Exhibit 85 and used by the Government in the District Court pursuit.

The latter shows the applicant roads as they will appear when it has merged. Looking first at the Great Northern's map, the bigger one, you will see that the Great Northern trunklines are at the top in red. With its affiliates, Great Northern carries on operations over some 8200 miles of road in the northern tier states, from Minneapolis and Duluth -- Duluth in the east, to Spokane, Seattle, Portland and other terminals in the Pacific Northwest.

Northern Pacific is green on the map and its affiliates operate over some 6800 miles of road somewhat south

of the Great Northern and they serve the same main terminals as the Great Northern in Minnesota and the Pacific Northwest.

Q I don't see the green ones -- the Great --

A The Great Northern map, Your Honor, shows the trunklines and in colors --

Q I've got it.

A Yes, sir; and the lighter black lines show more branch lines.

Q The simple black lines are part of the same system?

A They are in that particular case; yes, Mr. Justice Stewart. Some of the other black lines shown, as I understand, belong to various other roads.

Q Yes.

A Shown on the Government's map, the smaller one, in red are all of the routes as they will appear of the merged roads, both trunklines and branches.

The Chicago, Burlington and Quincy road, jointly owned by the Northern Lines, is shown -- its main line is shown in brown on the big fold-out map. Burlington conducts operations over some 8600 miles of road, running northwest from Chicago and Minneapolis and also west from Chicago to serve such points as St. Louis, Kansas City, Omaha, Denver, Billings, Montana and with a connection with Northern Pacific in Montana.

Subsidiaries of the Burlington go south as far as the

Texas Gulf Coast, as is shown on the Government map. And as the Great Northern map shows, I think the Burlington service seems to be complementary to, rather than competitive with the service of the Northern Lines.

Also involved in the merger is the Spokan, Portland and Seattle Railroad. About 600 miles of road shown in blue and its main route on the Great Northern map. It is also jointly owned by the Northern Lines and its main line provides their shortest route from Spokane down to Portland.

The third line -- the third rail line providing service across the northern tier states is the Milwaukee Railroad shown in black on the Government's map and also on the Great Northern.

Now, there is no dispute that the Northern Lines are financially strong firms. They own vast acreage of valuable land and mineral rights, as well as rail and motor carrier assets. They are also regularly profitable, although it's fair to say that their profits have fluctuated over the years and do not reflect a large percentage of return on their investment capital.

As merged, the Northern Lines and the Burlington would constitute one of the largest rail systems in the country. The merged company would have some 27,000 miles of track in 16 states; total assets around $3 billion; annual rail revenues $823 million and net income in the neighborhood of $131 million

a year.

Q How do these compare with the Penn-Central merger in size?

A I believe, Mr. Justice Harlan, that in package it is bigger; in terms of revenue it is not as big.

Q Not as big.

A I'm not positive of those figures.

As the maps seem to indicate, the Northern Lines are head-to-head competitors for traffic across the northern tier states. Each is the main competitor of the other and the Milwaukee is a very weak third. The nature and extent of this competition -- rail competition and intermotor competition in this area is covered by the findings in the I.C.C reports as I will describe in just a moment.

To summarize, the proceedings in the Interstate Commerce Commission there are two main reports, the first disapproved the merger on grounds that it would have a drastically adverse effect on competition as well as adverse effects on its employees.

The second report, on reconsideration reversed and then approved the merger. I should say that the findings of fact in the first report are of significance, since they are largely found again the second report which is based on substantially the same record. There are a few exceptions, as I will point out.

I also think that the rationale of the first report is important since it is out contention that it applied the correct legal standards, whereas the second report did not.

Q I wonder if this set of figures in the prospectus will help me if you will pinpoint the figure that you have in mind of the competition which will be eliminated in terms of practice in the northern tier in which these two roads operate. I'm talking about a figure of somewhere around 6 percent there in one aspect and another figure; could you pinpoint those for me?

A I believe that the figures that Your Honor is recalling has to do with approximately 6 percent at points where the Northern Lines are the only rail service. I believe that there is another figure of some 37 or 38 percent where they compete for revenues and there is also some other competition. And the broad figure that we use and that I will get into in some further detail later is that the Northern Lines directly compete for around 43 percent of their revenue and there is an additional overhead portion of their revenue, 12 percent. So, we're contending that they are competitors for about 55 percent of their revenue. There are some other figures as to the percentage of the market they have, which I will get to. It runs 67 and 80 percent in different areas.

To review just briefly the proceedings in the Interstate Commerce Commission, they began in 1961 when the

applicants petitioned for authority to merge. Public hearings were held in 1961 and 1962 in which the Justice Department participated, and in 1964 the Examiner issued a report recommending the merger with certain conditions, be approved. The matter was then briefed and argued before the I.C.C and in 1966 ICC issued its first report disapproving the merger, even if conditioned as demanded by various intervenors, including various other affected railroads.

Now, in the course of this first report the Commission analyzed the evidence of the estimated savings to the applicant's merger. It estimated around 22 and a half million dollars after ten years. The report detailed and analyzed the various efficiencies, principally the combining of yards and other facilities, the reduction of work forces and the report listed also the advantage to shippers, principally, more direct routing and faster schedules all of which the merger promised.

On the other hand, the report noted that applicants could coordinate certain facilities and realize very substantial savings without merger. They pointed out that the applicants are "large, strong and prosperous railroads, and growing stronger." They also found that their long-term trend was favorable as against motor carriers it found that their ton miles of freight had increase substantially during the 1960 through 1964 period and it found that the railroads had what it called a decided competitive advantage in many long-haul movements.

Now, in approaching the public interest test laid down by Section 52 of the Commerce Act, the Commission saw its task as one of determining whether the adverse effects of the merger upon competition and on carrier employees were outweighed by the cost savings to applicants and the improved service to shippers. It saw the public interest scale as being imbalanced, neither for nor against the merger under the law.

Analyzing the competitive effects of the merger, the Commission focused on the northern tier states as being the area in which low-cost rail transportation was, as it said, of primary importance to long-haul raw material shippers and the area where rail competition would be most adversely affected by the merger.

The report also found that whereas animal, mineral, agricultural and forest products account for around 60 of Northern Lines' revenues, this kind of traffic was generally not attractice to motor carriers and was not highly susceptible to diversion to motor carriers. In fact, hit found that inter-motor competition is not as strong in the northern states as in other parts of the country.

The report also found that the Northern Lines ran direct and substantial competition with one another and that when this was eliminated the merged road would have a dominant position in the northern tier states.

For example, it found that the -- together the

Northern Lines would handle 61 percent of the carload traffic moving westbound in the northern tier and 83 percent eastbound. As to West Coast traffic from Washington to California it would have 73 and a half percent moving north and south through the Shasta and Beaver Gateways. And they would move 67 percent, a total ton miles of rail freight in the northern tier states: 45 percent in Minnesota, 81 percent North Dakota, 82 percent in Montana and 77 percent in Washington.

After the merger the first report found the Northern Lines would, as the report said, reign supreme. They would overshadow all their rail competitors within this region, and from this region to points beyond.

Measuring the competition that would be eliminate, ICC found that the Northern Lines were in direct competition, as I mentioned at points accounting for 43 percent of their revenues, and further that they competed for overhead traffic accounted for another 12 percent, thus the merger would eliminate competition between them for 55 percent of their total revenue.

As to the Milwaukee Road the ICC found that for various reasons it was a handicapped and weak competitor. It accounted for only 12 percent of east-west traffic in the northern tier. The first report recognized that the Milwaukee could be strengthened by conditions attached to the merger and it considered these conditions: principally the granting of

traffic rights into Portland, Oregon and into Billings, Montana and the opening of 11 gateways where it could exchange traffic with Northern Lines. The report found even with these conditions the benefits would be, as it said, minimal, and Milwaukee's relative competitive position after the merger would be weaker than ever.

Q My impression is that only three of the six conditions had been accorded to the Milwaukee Road.

A I believe that the Examiner's Report denied most of them, Mr. Justice Stewart, but then the -- in the first report the Commission took it assuming, as I understand.

Q Assuming all of them?

A Assuming all of them, yes, and saying that even though they had all these gateways and the new terminal on the coast at Portland, they still would be relatively weaker.

And matter of factly, the report went on to point out that the new company would have what it referred to as tremendous solicitation advantages, the merged company would, and noted that the Milwaukee's solicitation efforts would be puny by comparison. This is important, because when you open gateways this is a two-way street, the other fellow can get traffic as well and the Milwaukee could lose as well as gain traffic.

Now, the first report concluded by holding that applicants had failed to establish that the merger would result

in transportation service superior to that which could be provided without merger and indeed that "the disadvantages of an appropriately conditioned merger, a drastic lessening of competition, and adverse effects on carrier employees outweigh the benefits that might be derived by applicants and the shipping public.

Now, there is a dissent to the first report by Commissioners; five commissioners dissented and they did so, not on the theory that the Northern Pacific and Great Northern road was dominant, as the majority found, but on the theory that they giants who do not now bother to compete.

They said that the Northern Lines, in their language, "are fat and happy. They split the lion's share of the northern transcontinental traffic and revenues between them and so preserve a facade of competition."

Q What was the information on that; you said there were five on the dissenting side?

A Yes, Your Honor, and I think six on the majority.

Q Six to five.

A The dissent also found that the Northern Lines had what they call a common-law marriage and they said they hold the shippers captive over great distances with a virtual lock on traffic routed through Spokane and between cities; that they hamstrung and short-hauled the Milwaukee and that they condemned it to a marginal and steadily deteriorating existence.

The dissent reported that what was really needed here is to write off the present family competition, as it called it, by using the conditioning power of Section 5 to try to establish the Milwaukee as a genuine and authentic competitor. Now, I emphasize this dissent because upon reconsideration as I will describe in a moment, the Commission reversed itself and it approved the merger and the minority became the majority in the second report and it used some of the same language and reasoning as in the dissent from which I just read.

Q How many shifted over to the majority?

A Well, Justice Harlan, there was a change in some people on the Commission. The new lineup was eight to two and one abstained.

Q Did any shift?

A I think two must have shifted, Mr. Justice Harlan.

Q I mean it wasn't all a question of new personnel?

A No, not entirely a question of new personnel. There were two or three -- two that shifted.

Now, after the first report was issued in 1966 the applicants petitioned the ICC for reconsideration. They formally stated that they were willing to accept various conditions, included all those asked for by the Milwaukee and the Chicago

and Northwestern Railroad. At the same time applicants entered into an agreement with those two roads, the Milwaukee and the Chicago and Northwestern, not to oppose their proposed mergers, return from which Milwaukee and Chicago and Northwestern agreed to withdraw their opposition and support the Northern Lines merger.

Applicants also filed their agreement to enter into an attrition agreement for the benefit of employees and they urged that ICC had erred in estimating merger savings in the first report; that these would be substantially greater than it had found and that it asked for further evidence to be heard on the subject.

In January of '67 the Commission granted the petition. They issued an order reopening the proceedings and as the latter report stated, this was a limited reopening. The further hearing was limited solely to determining on the basis of the most current information readily available, the amount of estimated savings resulting from the proposed merger in the light of (1) agreements entered into between the applicants on the one hand and on the other the Milwaukee and the Northwestern and second, the effect of relevant financial, operational and other changes the savings which have occurred subsequently to the close of hearings.

Q Did the personnel of the [redacted] from the time this case began until it ended?

A The personnel did change, Mr. Justice Black. I believe that in the second report there were eight in the majority, and this included five that had been in the majority before plus two that had changed and plus one new commissioner and there were two that still were dissenting and then there was one new commissioner who did not participate.

Q There was a new commissioner but he did not participate?

A Well, there was one new commission who did not and there were two who did.

Q And the only change was that one during from the beginning to the end?

A No, there were five in the original dissent.

Q I am not talking about the way they divided up among themselves. You had a number of men on the commission -- members of the commission. What was the difference in the personnel of that commission from the time this case began until it ended?

A I believe I'm right in thinking that there were three different commissioners.

Q Three different commissioners?

A Yes, sir.

Q When were they appointed?

A I'm sorry, sir, I don't have that information, but I could get it.

Q All right. But one of those three went each way and one abstained; is that what you told us?

A I think that that's right, Mr. Chief Justice, that there were two from the former majority that switched and then one new commissioner that added to the original five and made the eight. And then there was one new commissioner who didn't participate.

Q So it was not the new commissioners who altered the results, though? Basically it was the change in the position of some of the former commissioners?

A That would do it; yes. Because they had five and they did get the majority from -- by one of -

Q Do you know whether the change in personnel had anything to do with the judgment that wasfinally rendered?

A I really can't speakon that, Mr. Justice Black. I think that the basic fact here is that there was a change in the standards that they applied.

Q Well, that's -- there might be a change in the standards, but was there a change in the number of men who applied the standards?

Q Seven members of this majority were on the Commission at the time that -- of the first decision, I gather.

A It's either seven or eight, Mr. Justice Harlan.

Q Well, there is only an eight-man majority; isn't that right? Eight to two the vote was?

A Eight to two and one abstained.

Q And one abstained. And seven of those -- if only one new commissioner was in the majority on the last report that meant seven were on the commission at the time of the first report.

A Of the majority?

Q Yes.

A Our basic contention, Mr. Justice Harlan, is that the Commission failed on the second report to apply a public needs standard which is the basic issue that we contend to the Court.

Q That's not very close to a leading question, is it?

A Well, it's a very difficult question, Mr. Justice Black, because the Court has laid out the requirements for an accommodation of the Transportation Act, the organization of roads into systems and serving the needs and requirements of efficient transportation.

On the other hand, the Courthas held we do haveaa national policy favoring competition and that the cases say that the Commission in approaching these merger cases must accommodate the views and the policies of these two statutes.

Q Is it possible to preserve competition and to permit mergers?

A Well, to --

Q Preserve it to the extent that it existed before.

A Not among the same identical parties, but I think, Mr. Justice Black, we have for example in your Penn-Central merger a situation where the roads merged and the Commission had in mind the remaining competition, then the Norfolk and Western Roads and from the Chesapeake and Ohio system what was coming along it looked at the fact that you have a network of good roads and strong inter-motor competition and then it found a public interest factor here in that the roads had the burden of providing public service and for commutation in cities and they had the very puzzling and difficult problem of what to do with the bankrupt New Haven Railroad and in balance all parties felt that in the Penn-Central litigation that that merger was a good thing.

Q It might be a good thing and might not wholly preserve competition.

A That's very true. And the matter did not come to the Court, although it came to the Court on other issues, it did not come up on the competitor question.

Q Of course, you are not representing the Department of Justice finding it on the basis that it is a bad thing?

A I didn't understand, Mr. Justice Black.

Q I don't suppose you, as a representative of the

Department of Justice, are opposing this on the basis that the whole merger of all those railroads and all that part of the United States, is a bad thing or a good thing?

A Well, we're opposing it on the theory, Mr. Justice Black, that if you have healthy, directly competing railroads, they do not need this merger in order to continut to give good service; they are dominant in this area of the northern tier states and we think that under those conditions the requirement of accommodations of the policy of the Transportation Act and the anti-trust laws require that they -- that such an anti-competitive merger not be permitted unless it serves a real public need and that that kind of elimination of competition should not be permitted to serve the private interests of the parties and if there are public interests that are being served by the merger, but if they could be served by a less anti-competitive alternative, then the merger should not be permitted. The less competitive alternatives should be put into effect by the Interstate Commerce Commission which, after all, under the law, is given vast powers and great discretion to regulate and to supervise the affairs of the railroads.

And in this case it is our contention that the Commerce Commission should have considered to what extent it could have opened up the gateway in order to strengthen the Milwaukee if that/the was matter of public interest that's found here.

Q I take it that you do concede that better

service might well justify an anti-competitive merger?

A Certainly if an area has inadequate service and the way to remedy that would be to have a merger, that would be wise.

Q So, you would say not always. You have to first find that there is inadequate service? Before you can ever justify a merger?

A No, I don't say that -- I don't think that's true.

Q That better service is enough?

A Better service might be enough, but if it's a terribly anti-competitive merger, if better service can be achieved by a less anti-competitive alternative, then the merger should not be permitted unless there is some real public need for it.

Q Well, then, what's wrong here is, in your view, is that the Commission, although it found there would be better service, didn't make an express finding that they could not achieve these results by another route?

A That's one of the things; yes, Mr. Justice White. They did find that in the first report.

Q All right, what if they had found that they couldn't get this better service by another route in this case, let's assume the Commission in the second report had made that finding, would you be here?

A Yes. I think if they made that finding and that thre was a need -- a public service resulting from this, I think that they would have that power. I am not sure that we wouldn't be here, because I think that then the Court has a right to look at this situation and see if the -- if that determination is supported by substantial evidence. And I see as a question in this particular case, that the Commission has done more than really give lip service to the question of the value of competition. They have followed the dissent, the point that I made a little earlier, that after all, these giants have not competed for years; they have thrown up their hands, given up hope and they said, "well, let's let 'em merge and we'll try and make something out of the Milwaukee and maybe it will provide the competition that we seek to get from the Northern Lines."

Now, on the second report the Commission came out and they said that this is a matter of where we were in error on the savings that will come from the merger. There will be some $39 million in savings after a few years instead of 22 or 25 million earlier estimated and they dwell at some length on the improved service which ultimately would result from the merger, but they did cite no prospective service benefits that had not been considered in the first report.

And I think it's fair to say that what they did do inthe second report was to discharge or reverse two principles

of analysis which had been followed by the majority in the first report. They took a new perspective as they said. First they determined to focus not so much on competitive effects on the northern tier states where competition would be eliminated, but rather they broadened out the focus and they took the broad view of the total area that was served by all the merger parties, included that down in the central corridor which is served by the Burlington. And, of course, the effect on competition looked somewhat less drastic, taking that view.

Second, in considering the anti-competitive effects of the merger the Commission determined that primary rates not be given to the competition eliminated, that is the competition for 55 percent of their revenue, because it held that there was substantial intermotor as well as intramotor competition, though it survived the merger.

Q Would it also be correct to say that they took a different view of the meaning of Section 5; is that in the report?

A That was argued in the lower courts, Mr. Justice Stewart. I think that they are kind of on both sides of that question.

Q Both sides in both reports?

A Yes, sir. There was an indication in the first report that there is a presumption in favor of mergers. On the other hand, there is a statement that the matter is imbalanced.

And then the second thing in effect, said in the second report is that it does appear that they in effect, did accept the idea that there is a presumption in favor of mergers that are brought out by the private parties in the second report, whereas they gave competition a certain value and weight in the first report that they didn't in the second report.

The difficulty, as they pointed out the first report, Mr. Justice Stewart, is you have the difficult task of weighing an intangible value, competition. On the one hand against the savings of a merger the tangible values you can say well, its $25 million here and how can you say that a competition was worth $25 million a year? I think that there is some indication inthe recent holdings of the Court, starting with McLean where this test was laid out that there must be the accomodation;the Commission must consider on the one hand the comparative consequences; on the other the savings, improvements in service and so on. That was spelled out in McLean. It was followed in the Denver -- it was followed in the Minneapolis-St. Louis case and it has been referred to at various times since then. I think that two or three of the Court's more recent cases have cast some additional light on this in the sense that the Court has treated competition as a basic policy and it has treated the power of the administrative agency to grant immunity from that as carrying a rather important determination that is to be made by the administrative agency.

Q Are you referring to cases like the Maritime Commission case, Svenska or whatever it is?

A Svenska is one of them; the Denver-Rio Grande case, I think is one of them. That's the Railway Express Agency stock purchase and in the Denver-Rio Grande opinion there is a passage that has to do with it and it points out that this 52 power is the power to grant immunity from the policy which favors competition and it implies that this is a matter of considerable importance for the Commission to determine. And I think that when you then get to the Svenska case, true, that was a Maritime case and true that was not a merger case but it did specifically mention two of the rail merger cases and it said that those case followed the same pattern.

Q Mr. McLaren, as I read this record, there are some very, very substantial reductions in the time runs. Now, on agricultural products, which is one of the figures that I have here in my mind from the apple-growing country in Oregon and Washington, particularly Washington, I guess, that's a very important factor isn't it in this day of speed?

A Yes, it certainly is, Mr. Chief Justice. What I point out now is that the original figures came out and I don't remember them precisely, but I think the rail time from the Northwest down into the Chicago area was something like 94 hours and they said, "When we merge we can put together better, more direct routes and we can cut 12 hours off of that. But,

then the record was closed because the Milwaukee had put throughsome faster trains. They had cut 12 hours off already. They took some lighter weight equipment and they were more careful in their scheduling and there is nothing to prevent them if Your Honor please, to work out these routings without merger. They don't have to merge these railroads in order to get direct routings and that's what the dissent in the first report is pointing to. They sat here fat and happy and they have been entirely unwilling to take advantage of the possibilities that they work for more direct routings, to try and meet the truck competition talks about. They could have done that; they don't have to merge to do it, and they could cut very, very substantial time off the run from the West down into the markets, wherever they need to market these products from the raw materials country.

Referring once again to the Svenska case, I wanted to point out that they -- this came up on the Maritime Commission's power, which is comparable to the Commission's power to grant immunity to an anti-competitive arrangement and there I think it was an explicit dealing arrangement and referring to the question ofthe national economic policy, the Court pointedout that an otherwise illegal arrangement, as the Court said, "alone will normally constitute substantial evidence that the agreement is contrary to the public interest unless other evidence fairly detracts in the light of this factor."

Now, we contend that the Maritime Commission rule that was discussed and upheld in Svenska, precisely describes the standard which governs here. FMC's rule puts the burden on the proponent of an anti-competitive agreement just as we would put the burden on the applicants to merge to demonstrate that it was required by a serious transportation need necessary to secure the important public benefits or in furtherance of a balanced regulatory pertinence. The Court not only upheld the Svenska FMC Rule, but it stated that this standard was "in full accord with the kind of accommodation between anti-trust and regulatory objectives approved by this Court in the Seaboard Airline in theMinneapolis-St. Paul rail merger decisions."

Q Mr. McLaren, you stated at the outset that your submission was that there had been a change in the standards between the two reports?

A That would be yes.

Q Would you mind stating what that change was?

A In the first report I think that the Commission majority followed the standard that I have just described. They gave some real weight, not just lip service to the value of competition. They considered the possibility that the advantages of the merger could be achieved by less competitive means and then they looked at what was left over that would just be accomplished by merger and they said that isn't enough, because on the other hand, you can eliminate all this competition

and virtually create a rail monopoly in these northern tier states.

Q And your premise on the second report are what?

A And our view is that in the second report that they, in effect, took the savings claimed by the carriers and they looked at the better service that would be given and they threwup their hands as far as their actual powers to regulate and to force competition and to give the Milwaukee a viable position in this market and they said, okay, let them merge; we will try and work out conditions that will make the Milwaukee for the first time give shippers in the area for the first time a realistic choice of carriers.

Q There doesn't seem to me to be very much difference when they struck the balance the first time and using the same considerations struck the balance the other way in the second report.

A Now, Mr. Justice Brennan, I don't think that in the second report they really gave value to the question of competition, nor did they bear down on the question of the public need for the thing. In other words, there must first be a public benefit from it; secondly, there must be a need for it. And there isn't a need for it if it can be done by less drastic means.

Q Can you give us a record cite on where in the

first or second report the Commission ever said what standards were applied?

A I don't think I can, Mr. Justice Brennan.

Q You just have to read it out of what they did?

A I think that you can tell in the first report in the final paragraph where they -- where it says that the proponents of the merger have failed to carry their burden of establishing this and they point to the fact that there are less drastic alternatives to this.

Q What page is that, do you have it convenient?

A 165 and 166, I believe. On Page 166 they point out that to find competition is not worth between $12 and $25 million a year, thus expenditures to achieve those savings would be tantamount to a conclusion that the value of intramotor rail competition is negligible and they mention this tangible savings factor that they said that they were convinced that they were not as great as the value of competition. They conclude that the disadvantages of the appropriately-conditioned merger, the drastic lessening of competition and adverse effects on carrier employees outweigh the benefits that might be derived by applicants and the shipping public.

And I think that the standard follows then at the top of Page 167. "Applicants have failed to show that the proposed merger would result in transportation service to the public that is superior to that which can be provided without merger or that

the benefits reasonably attributable to the merger outweigh the adverse effects of the merger on carrier employees and benefits that shippers derive. "

Q Well, now, look at Page 343. Is there a counterpart to what you have been reading to us from the first report in the second report? I am thinking of the language: "The result in the prior was the product of the weighing of three factors: a lessening of competition as between GN and NP and an adverse effect upon employees and the benefits to be derived by applicants from the shipping public."

And then: "On reconsideration of these factors, based upon the entire record, we now reach a different conslusion." Doesn't that suggest that the same standard is applied in both instances but that the balance was struck one way the first time and the other way the second time?

A Well, I just don't read it that way, Mr. Justice Brennan. It seems to me that they abandoned the possibilities that the Commission has this broad power to bring about the better service that is anticipated here and what you have left in this merger is really private benefit.

Q Well, are you saying that specifically when they enumerated the three factors that in the second time they abandoned the first, a lessening of competition?

A The second time I think they really followed what the dissent had talked about, that they were going to

strengthen the Milwaukee and they said in the second report on reconsideration from comes a good bit later in another volume, they said that the Milwaukee conditions are necessary predicates of their decision.

In other words, as I read that, that really the Milwaukee conditions were the main purpose; the main public value; the main reason they found it was consistent with the public interest and had it not been for that they would have thought it was inconsistent with the public interest. And I think that that appears two or three times in the second report.

Q Well, now, on Page 344 they say this: "We see this transaction as a means for achieving the appropriate conditions" -- I gather that has reference to the Milwaukee conditions primarily? "Overriding benefits to the public through improved transportation." What significance do we attach to that?

A Well, they had given up as they said, on the Northern Lines ever doing a proper job here and they were going to --

Q Where did they ever say that, Mr. McLaren?

A The five between the majority and --

Q Where did they say it in this final report?

A I don't think they did say it in the final report.

Q Well, they never did say "We give up on the

Northern Lines ever competing,"did they?

A Not in the second report, no. And I think it's a fair underlying fact that you can't ignore in the second report.

Q If you only read the second report you couldn't find it anywhere.

A Well, excepting in the finding that they say that the conditions for the benefit of the Milwaukee and the improvements for the Milwaukee, bringing it through to the Portland area, the necessary predicate and I have the impression from the overall report that that's really the main benefit that the ICC promulgated.

Q Well, let's stick to the facts in the first and second reports. In other words, although you disagree with the suggestion in the question of Mr. Justice Brennan that the Commission, in fact, applied the same basic standard in each case and it came out differently. At least I would suppose if there were changes in the facts, as I understand there were, that it would have been quite possible for the same Commission to apply the same standards and come out differently and the changes to which I refer are: first of all, the petition by these applicants which led to the second report accepting every single one of the conditions affecting the Milwaukee; every single one of the conditions affecting the Chicago-Northwestern agreeing fully to enter into collective bargaining agreements

with the representatives of their employees to take care of attrition, and finally pointing out that the profits that would ensue -- I beg your pardon, the savings that would ensue upon this merger, were substantially greater than had first been assumed.

Now, if I am correct, if these or any of these changes in facts were evident; were present at the time of the second report, it would be quite conceivable that you could apply the same standards and come out with a different result.

I'd like to answer that if I may. As far as the conditions are concerned, Mr. Justice Stewart, I think in the first report they assumed the conditions as to the Milwaukee, at least, which I think are preeminent. Now, I am not sure that they assumed the attrition agreements in favor of employees and it's true that in the first report they pointed out that it was both the anti-competitive effect and the adverse effect upon employees that was bad.

But the main conditions for the Milwaukee, I think, had been considered. As far as the savings are concerned, the new evidence that came in -- there were just four days of hearing on reconsideration -- three of them with a proposed one for rebuttal, and the savings there with additional evidence had largely to do with simply an adjustment factor, applying a percentage to previously estimated -- previously estimated savings. So, I don't think that that was a matter of new

evidence, particularly.

Now, the fact that the Anti-Trust Division petitioned that the matter be reopened both to find out how many more changes there had been already put into effect, like this faster train business and so on and also what savings had been achieved and could be achieved without merger and this was denied by the Examiner and was held by the Commission.

Q As I understood your answer, there was at least one fundamental change in the facts between the first hearing -- the time of the first hearing and the time of the second hearing and that is the elimination of any problem with respect to attrition of the employees.

A That's true; that's true. And then there's also the fact that the Milwaukee and Northwestern withdrew their opposition because each agreed to the other's merger, in fact.

Q Yes.

MR. CHIEF JUSTICE BURGER: You are in your rebuttal time now if you were saving some.

A Oh, all right. Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Some time ago.

Mr. Dailey.

ORAL ARGUMENT BY LOUIS B. DAILY, ESQ.

ON BEHALF OF NORTHERN PACIFIC

STOCKHOLDERS' PROTECTIVE COMMITTEE

MR. DAILEY: Mr. Chief Justice, and may it please

the Court: I feel, and there has been a three-judge District Court in the District of Columbia unanimously affirming -- unanimously dismissing our complaint in an action seeking to annul and set aside and restrain the enforcement of two Interstate Commerce Commission orders which have approved the merger terms and it also affirmed the Commission orders.

My remarks will be directed as to the justice, propriety of the stock exchange ratios and only. There are certainly basic factors that I think the Court must keep in mind in connection with our appeal. One is that this isn't just another railroad case coming down or up the legal tracks. Northern Pacific has been mentioned here has a great many, very vast and valuable land interests containing oil and gas, timber, coal, iron ore and many other minerals yet unfound, in an area that is about as large as Massachusetts and Connecticut combined.

Now, the basic character of Northern Pacific changed after 1951 when substantial oil was found in the Williston Basin. The State recognized this when they eliminated Northern Pacific stock from the Dow-Jones rail average.

In 1960, to give an idea of what it did to the earnings, in 1960, in order to protect their earnings of Northern Pacific and eliminate the Burlington dividend, which was substantial, of the remaining earnings, 50 percent of that came from natural resources and 50 percent through transportation

properties.

So that what we are talking about here is a very, very vital matter in determining stock ratios.

Now, one of the things that you must keep in mind on this appeal, raising a new problem for the Interstate Commerce Commission. That's to the valuation of such properties quite disparate from all their properties. The District Court, was faced with this new problem and we suggest that in the Schwabacher case and Northern Railroad case, that this Court has been faced with this particular problem.

Now, when I speak in respect that the -- pardon I will refer tothe Northern Pacific as NP and the Great Northern as GN. I think the first thing we should do is simply state what are the proposed merger terms, to have it as background.

Under the terms Northern Pacific stockholders will get one share of the new company's common stock for each share they have. The same for Great Northern. But, in addition the Great Northern is going to get a half a share for the $10 par preferred stock which must be reviewed commencing five years after the consummation of the merger over the next 25 years at 4 percent a year. It has a call provision in it that any time after five years of consummation of the merger, that it may be retained.

But the thing to note is that surely Northern Pacific stockholders cannot even achieve equality withthis Great

Northern until thirty years after consummation, when right today the holdings of Northern Pacific are greater than Great Northern's.

Q Is the result to be a par of $10 a share?

A Yes. It might be $110; I'm not sure of that.

Now, I come to the first point and that is this: that the Commission in District Court committed error in misinterpreting what the standards are as to the applicationof Section 2 the -- of Section 5 in the Interstate Commerce Act.

But perhaps the best thing to do is to quote first what the Commission said and then what the District Court said. Let me quote from the Commission -- this is in 297 in your appendix.

"The issue here is whether the exchange ratios are just and reasonable and limited thereto we find the record both adequate and affirmative in that they meet the necessary and required tests: (1) that they are the result of arms length bargaining and (2) that they fall in the direct contributions of each group of stockholders as a combined system. That was the basis of the Commission decision.

Now, what the District Courts say: "On the basis of the record from which the Commission relied we have no reason to rule or to permit the ratio which was established with approval of the companies and of a large majority of their stockholders, is just and reasonable.

Now, let's take a look at Section 5. There are really three steps involved in achieving a railroad merger. The first is that the parties have to agree on something. The second is that the Commission then takes action, supposedly independently and that they approve these terms or they modify them under Section 52, to achieve what the test is of justice and reasonableness.

And the third thing that happened: After the Commission was all through with the tests then you must have assent of the stockholders by an appropriate vote. Now, the Court's view is one that is quite independent of any agreement of the parties or stockholder approval. The parties don't agree because the ICC objects. And the stockholder approval is only in there having to do with relevance as to the enforcement of whatever the Commission has found.

So that the area here is in relying for the decision on irrelevant things as the agreement of the parties in the first place and the subsequent approval by the stockholders. This, we claim has legal bearing.

Now, there is no relation to Section 5 of arms length bargaining, not at all. The only reference in Section 5 at all is at the subdivision 11 where it says that it is a precondition of consummation you've got to get the approval of the stockholders.

In the North American Power and Light the Circuit

Court in the Third District held in a public utility holding case that the presence of arms length bargaining is not a decisive criterion. Now, all that we claim is that Section 5 doesn't make arms length bargaining and a stockholder's vote a necessary required test under 5. I think it might be helpful to the Court for whatever weight or relevance you think these two factors have and to just examine what the record says about this.

First, let's take the arms length bargaining business. May I say we impute no fraud or chicanery to the negotiators of these terms, perfectly responsible people; we recognize that.

But, the common interests which they have had in joint ownership of the Burlington, running back to 1901 and holding ownership of the SP and S in which the persons alternated as presidents of the SPS and the joint operations of the Manitoba Railroad, you just couldn't have this kind of arms length bargaining which I think any court would consider to be arms length bargaining.

But of more disturbing importance is the conflict of interests that shows up on the part of the two members of the five members on the Northern Pacific Consolidation Committee which was the negotiating committee. One of them -- this is an Exhibit 46on Page 21. One of them owned 400 shares of Northern Pacific, but he was the vice president and director of the

Ford Foundation. Not a single share of Northern Pacific and more than 18,000 shares of Great Northern.

Q Well, was that a beneficial interest of any kind?

A No, this is a representation by the man on the board. The man, personally, owned 400 shares of Northern Pacific stock and no Great Northern.

Q I was wondering how much you would weigh his --

A I think the Court will be able to judge that more than I, Mr. Chief Justice.

Another member of the Committee was the president of two mutual funds. One of them had a large amount of Northern Pacific stock only, but the second one had only 13,000 Northern Pacific stock and more than 46,000 of Great Northern stock.

Now, the legal definition of what constitutes market value and this Court in Schwabacher posited the fact that the true criterion was the present intrinsic or market value of the contribution to be made by the various groups. Having that in mind, the general legal definition is what a knowledgable and willing trade is -- who wanted to make a deal and a trade, acting under no compulsion at all, what figure would they arrive at?

Now, let's take a look at that much that is in this record. The Great Northern head testified on his direct -- this isn't cross -- that the achievement of railroad mergers and

properties was, as he said, "done under extreme compulsion."

The President of Northern Pacific confirmed this on his direct. He characterizes the very accurate adjective. He said that this matter of achieving railroad consolidation was quite the"overriding consideration" .

Now, how soft the bargaining was in this matter is shown by when they got up to discussing the industrial properties which both railroads had, Northern Pacific had been evaluated at $32,700,000, so they are not talking about peanuts. The financial advisor for Northern Pacific was willing to take really the assurance without any appraisals that the two men had, that they had properties of very substantial character. But, the earnings from -- the relative earnings from this particular category of assets in 1960 when these merger terms were agreed upon, Northern Pacific was twice that of Great Northern.

And so I say this: If this is arms length bargaining, the records show that the arms were exceedingly short.

Now, about the stockholders' vote. A lot has been said in the record about that. I think the stockholders' vote in this particular case should be a red flag to this Court to take a good look at the merits of it. It was passed by a vote of 73.2 percent of those entitled to vote. It was the lowest vote -- next to the lowest vote -- the Erie was the lowest of any group of stockholders in any of the railroad mergers that have recently been engaged in. It came only after the

act of adjourning the meeting for four days to determine the outcome. Newspapers called it a cliffhanger.

Q Wasn't this exchange ratio the product of tax breaks --

A They sought advice of those two -- that is correct.

Q They agreed?

A I am coming to that. They both approved the terms, Mr. Justice Harlan. I see my time has run out.

Q All right, we can pick that up after lunch.

(Whereupon, at 12:00 o'clock p.m. the arguments in the above matter were recessed to reconvene at 12:30 p.m. the same day)

AFTERNOON SESSION

12:30 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Dailey.

MR. DAILEY: Before I proceed with the argument, I would like to answer Mr. Justice Potter's question about the provisions -- someone asked about the provisions of the preferred stock and I was a little uncertain about -- was that you, Mr. Justice White?

They are redeemable for the sinking fund purposes at par. As to the --

Q Is the par value $10 for each share?

A Half a share; all he gets is a half a share.

As to the co-provisions it provides that five years after the consummation the exemption price would be $105 for the first two years. The next two years it would be 104 percent, and then after that in a descending scale until it --

Q $105?

A 105 percent of the par; that's right.

Q That's a dollar and fifty cents.

A Yes; and it keeps going down until it's redeemed at par at the end of 50 years.

Now, I have about concluded the first points. As to the issue interpretation, Section 5, in laying stress on the arms length bargaining and the stockholders' vote.

And now we come to Point 2. That is that there is

just not reliable, probative, substantial evidence in the whole record to support the finding of the Commission and the District Court that these terms are just reasonable under Section 5.

Now, the unique problem in this case is to determine merger terms, how do you value, weigh and relate the contributions of the two parties. One has only railroad properties and the other has railroad properties, plus these vast natural resources, some of which are not currently producing income, but are expected to in the future.

Now, there is no issue in this question about the valuation of railroad property. The Committee agrees that it is proper to take a capitalization of earnings. Of course, they are not readily marketable and they are worth only what they can earn. The Committee was satisfied with the 60-40 GN-NP relationship on the railroad.

Mr. Williams, the Committee's expert, came up with a price earnings ratio of 15 times earnings in 1960 when the terms were agreed upon as an appropriate one and that hasn't been questioned anywhere in the record. The real issue

The real issue is: how are you going to value these natural resources? The Applicant's positionon that in the record was that it's difficult, if not impossible to value respective stocks, except on the basis of capitalization earnings. But they made an attempt to value stocks by separate valuation and they found it impractical; why? Because they couldn't agree

on the stock ratio, because there's difficulty evaluating these properties, on account of market conditions and the uncertainties of their future potential. So, they made what they called "no definitive evaluation" of the property.

They said in the last analysis it just has to be a question of judgment. Now, the Committee's position was and is that to arrive at a proper intrinsic stockmarket value of these two stocks, which is what Schwabacher mandated, it is more appropriate to take a market value of them than to measure them on the basis of capitalization of earnings. If you do take current earnings and capitalize it in the marketplace there would be traders lined up with a very high price on each ratio.

Northern Pacific's financial advisor agrees with the Committee. Let me read to you from Exhibit 32, Page 3, which is Morgan Stanley's report on the non-railroad properties. Here is what they said:

"In essence, however, a sale of interest in the properties would take place to Great Northern stockholders. And on this basis Northern Pacific stockholders should realize sale value rather than value based on capitalization of earnings."

Now, the Committee Chairman, frankly testified on his direct testimony that you can't make any exact appraisal in dollars of these properties. We claim, however, although it's not easy to value, some approximate valuation is not only possible but is necessary if you are going to sustain merger

terms.

Now, what was the applicant's evidence in the record to support this finding? Based largely on past performances as to earnings, dividends, stockmarket quotations and pro forma dividend comparisons and, on an erroneous and gloomy prediction that there was nothing reasonably foreseeable to indicate that Northern Pacific's future earnings prospects were better than Great Northern's, and I am sure the Court is aware from my former statement that the last two years our earnings have exceeded Great Northern's.

Now, the GN's financial advisor, the first witness to testify: "The study of past performance is only important insofar as it measures or predicts the future prospects. This was his direct testimony. To that the Committee agreed.

Now, the applicant's case as to future prospects and value of these resources is basedon evidence that we regard as of little probative value and that's the test of the Administrative Procedure Act. They offered no market appraisal of these properties; they put on the stand no timber, oil or other geologist or expert on these matters that we could cross-examine, none of that. Both financial advisors on cross-examination were extremely vague as to past prices of timber and oil

In other words, the direct case of the applicants

was largely a low, dreary account of their negotiations, how they couldn't agree and all the arguments that they had. Then it was argument largely, not positive, reliable evidence.

Now, contrast the Committee's case. We were very serious in this proceeding. We were observing the attempts in the Immy case. It said receiving stockholders should put in positive evidence and should state precise inequities. We had this constantly ignored. So that when we put in our direct case we had three experts on stock valuation, analysis and order theologist that was subjected to searching cross-examinations.

They testified as to various factors that must be considered when you get to valuing what the trade is -- how they would trade these natural resources of property in the public market.

Mr. Brundage, the Chairman of the Committee, testified as to the strong earning power of the natural resources, improved geological, geophysical discovery techniques. The freedom of these properties from obsolescence, contrary to railroad properties, the low financial risk, the very high return on capital investment. Our natural resources are yielding each year more thatn 100 percent of the return whereas the testimony of the direct case was that Northern Pacific in 1960 was getting a return of 1.4 percent on its transportation properties. He spoke of the tax savings on -- running into

millions of dollars occasioned by the depletion allowances. He spoke of the control allowances that you didn't have to develop the properties in a hurry, you could take your time and really you are in control of it, and most important he spoke of the intrinsic and the survival values of these properties in an inflationary period.

Now, Mr. Williams reported on his studies of comparative companies that had similar properties and he wound up with a price savings ration which, in his judgment was 50 times earnings. And this has never been questioned by any testimony on the part of the applicants.

He pointed to the TXL, Texaco deal which happened to be consummated about that time. It was a merger like ours in which the price earnings ration was 75 times the earnings.

Now, in the Morgan Stanley report, as you can see in Exhibit 32, Morgan Stanley, in making their recommendations, for terms favorable to Northern Pacific as against GN, came up with a prices earnings ratic of 12 on oil and gas and 15 on timber and 15 on other minerals.

Our own geologist that was particularly familiar with the Willson Basin -- he cut his eye teeth up in that area -- testified as to the favorable prospects of the Willison Basin. He predicted a billion tons of oil cut of the basin in the next decade. He spoke of a use at the expiration there. The lack of the exploration of the deep layers of the ground.

He pointed out that in the Willison Basin they have got a higher rate of discovery than the national rate and he also said that additional income from the oil would come from secondary recovery.

Now, Mr. Stewart testified as to the economic matters, and particularly as to trend in price of natural resources and their value as a hedge against probable future monetary inflation.

Now, the important thing for this Court to realize is that this body of specific testimony on the part of the Committee was never rebutted. They -- the applicants had Morgan Stanley; they had all the oil experts and timber experts on the payroll. Thousands of our stockholders' money was paid to hire them but they didn't go on the stand and say that Mr. Williams' price earnings ratio was wrong, or that Mr. Brundage's testimony as to the various factors that must be considered in the marketplace, their ratings for natural resources were improper or how to weigh any factors that pertain to these natural resources. You just draw a blank from the applicants in that respect.

So, we say that their testimony is not probative. It isn't reliable; no experts; nobody to get at the truth. Now, the Committee doesn't claim that the exchange ratios should be based on exact dollar valuation but it does claim that there must be some rational basis in therecord for any alleged just

ratio.

If the Commission is to discharge its duties and this Court is to have any meaningful review of the record, and not just -- search this record and you will not find how they arrived at these decisions, except through this bargaining process.

Now, the Committee also developed compilations to show that they were precise in their criticisms of these terms. They were set forth on three different theories and on four different points in time. There were twelve different computations. And as far as we are concerned, they will, with one exception, show that Great Northern should be preferred. It's all in the appendix to our brief and I hope you will study it.

Now, this record contains no discussion by either the Commission or the District Court of this extensive testimony of the Committee. But with any rational explanation given, set forth anywhere as to how the particular ratios were developed or could be justified, we urge that the wholly conclusionary finding of the Commission that these mergers fairly reflect the contributions to the group of stockholders involved is not supported by reliable, probative and substantial evidence as the administrative procedure requires.

Now, I see the five-minute warning here. Our third point which is that the Commission grossly erred and abused the discretion that denied us due process in not

allowing a lot of evidence of -- of new evidence that's available now, that wasn't then.

The Pierce case has been cited here as viewed by the District Court as support. But the Pierce case was one in which they were dealing with the impact of rail inflation and they said that as to that matter the Commission was within its the scope of their particularized expertise and that therefore there was no reason to interrupt it. We concede that the general view is that you shouldn't interfere with this but the Atchison case was right on their -- there we were dealing with the depression; now we are dealing with inflation -- even the President in his radio speech last night drew this comparison.

So, we cite in conclusion that on no basis and on no theory does the record sustain the findings below and that they made a serious error when they took the wrong test and applied the bargaining process and the stockholders' vote as detexmined. The Commission simply didn't do its homework on this case and you are going to find difficulty, I think, in this record finding any rational basis to sustain what has been found.

So, in conclusion, I respectfully ask this Court that the judgment of the District Court be reversed; that the clause be remanded to it with instructions that the matter be remanded to the Commission for further proceedings not inconsistent with the Opinion of this Court.

Now, as was said by this Court in the Penn-Central case, a short delay occasioned by a remand is not too high a price to pay to assure that a disposition of this matter is just to all parties.

I thank you for your earnest consideration.

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

Mr. Deale.

ORAL ARGUMENT OF VALENTINE B. DEALE, ESQ.

ON BEHALF OF LIVINGSTON ANTI-MERGER COMMITTEE

MR. DEALE: Mr. Chief Justice, and may it please the Court: The Livingston Anti-Merger Committee raises two threshold issues in these consolidated cases. The first issue is the issue of jurisdiction, of whether the Interstate Commerce Commission has jurisdiction over the proposed merger.

The second issue is the issue of whether or not the proposed merger is barred by statutory law and contract.

The Commission's position also embraces the contention that neither the Court below nor the Commission gave adequate consideration to these two primary issues. The issue of jurisdiction is a twin issue: it is an issue of jurisdiction and ownership. In terms of the Committe's position the Commission does not have jurisdiction over the proposed merger since one of the central properties in the merger, namely, the mainline right-of-way, used and operated by Northern Pacific Railway Company is neither owned by a merger applicant nor

owned by a petitioner for inclusion in the merger.

Putting it another way, it's the Committee's position that the ownership of the mainline right-of-way continues to vest in the Federal chartered company, namely: Northern Pacific Railroad, an existing Federal company controlled, to be sure, by Railway.

The merger authorization authority of the Commission has boundaries and it's our position that these boundaries have not been heeded by the Commission. Not just any merger may be approved by the Commission. The kind of a merger that may be approved by the Commission is a merger where the properties to be merged are owned by the merger applicants. And in the case of a rail merger, the properties may also be owned by a petitioner for inclusion in the merger.

The law makes no provision for the merger of properties owned by someone else. Thus, involuntary mergers are outside the scope of the present law. Now, complementing these boundaries upon the Commission authority is Section 5(2)(b) of the Interstate Commerce Act, which specified that before the Commission may exercise its authority it must find that the proposed transaction is within the scope of the Act. In other words, in this case that the rail merger is the merger, the properties of which are owned either by an applicant or by a petitioner for inclusion in the merger.

Now, on the merits of the issue of who owns the

mainline right-of-way used and operated by Northern Pacific Railway Company since 1896, the Committee's position is this:

First we want to draw the distinction between the mainline right-of-way with its franchise and Federal tax exemption between that property or those properties and other properties of railroads, such as land grant lands. The properties of a Federally-chartered mainline right-of-way, with its franchise and tax exemption privileges, that property has a quality of inalienability. The company which receives such property from Congress; from the United States Government, may not -- may not transfer it voluntarily, except on the authority of Congress.

It is our position that Congress never enacted the necessary consent legislation to transfer title of the mainline right-of-way with the franchise and tax exemption privilege from Railroad to Railway. Now, contrary to the position of Railway, which has been uncritically accepted by the Commission, the resolution of May 31, 1870 was no consent to the purported transfer from Railroad, the Federally-chartered company, to Railway.

The joint resolution of 1870 authorized Railroad to issue bonds in aid of construction and it also authorized Railroad to place a mortgage to secure these bonds on Railroad's properties. Shortly thereafter, within two months thereafter, in fact, a mortgage -- bonds were indeed issued and

a mortgage was placed on Railroad's property. Subsequently there was default and the committee of bondholders, at a foreclosure sale, bought in the property. Later on the property was reconveyed to Railroad Company. Subsequently other bonds were issued and other mortgages were placed on the properties.

Three of these mortgages were involved in the so-called foreclosure sale of 1896 and it was from this sale that Railway claims good title to the property of mainline right-of-way. This foreclosure sale was analyzed in the Boyd case by this Court, the Court of Appeals and the Circuit Court. In that case an assignee of a remote creditor of Railroad sought to enforce his rights against Railway as a successor to Railroad. Railway defended on the basis that his rights -- the creditor's rights had been wiped out by the foreclosure and foreclosure sale. All three Courts agreed that Railroad's creditor should prevail and their basic reason was that the foreclosure proceeding and the foreclosure sale was one of form and not of substance.

The facts of the transaction as provided in the cases and noted in the Committee's briefs bear out this conclusion. In effect, the stockholders and bondholders engaged in a private agreement to effectuate a transfer of title of Railroad's property, a Federally-chartered company, to Railway, which at that time was nothing but a paper corporation. By no standard of law could this be done in view of the inalienability

of the kind of properties we're talking about. And certainly the capacity for these private individuals to work out this sort of an arrangement was not enlarged by the mere fact of a judicial form which in this case was a consent foreclosure decree.

Now, the shadowy character of this foreclosure and this foreclosure sale is further indicated by the fact that the very Court which issued the foreclosure decree made a reservation in its foreclosure decree of the question of the validity of the mortgages being foreclosed. And this question was raised by one of the intervening parties in the foreclosure proceeding. And this reservation of the question of the validity of the mortgage being foreclosed was carried in the decree; in the master sale and the Court Order confirming the master sale and subsequently in the deeds of conveyance.

Q When was that decree?

A In 1896.

Q 1896. Are you challenging it or standing on it?

A We're challenging the decree.

Q The 1896 decree?

A That's correct, Mr. Justice Black.

It is suggested here that if the Courts in the Boyd case for the benefit of the assignee of a remote creditor can cut through the judicial trapping of a consent foreclosure

decree for the benefit of such a creditor, surely the same can be done when we talk about the rights of the public interest and welfare which the charter provisions were designed to secure.

Now, Railway itself at the time of the foreclosure proceedings, recognized that supportive legislation was necessary in order to effect the transfer of the Railroad's properties to Railway. And this is without regard, mind you -- without regard to any question as to the validity of the foreclosure decree. Congress nevertheless, did not accede to Railway's wishes and did not give the necessary authorization. Indeed, Congress has actually left open the question of who has title of the right-of-way used and operated by Railway.

In the Act of June 25, 1929 -- and this was an Act which authorized the United States to prosecute suits against Railway and Railroad to quiet titles owned by the -- to quiet titles to land owned by the United States against claims by Railroad and Railway. And in that Act Congress provided as follows:

"The provisions of this Act shall not be construed as affecting the present title of Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both in the rights-of-way of said roads or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road. This

language is certainly not language which recognizes any kind of title in Railway.

Further, the issue that we are raising here has never been adjudicated by any Court. To be sure, there has been some title language that has been used inapplicably in the Boyd case, particularly, the Land Grant case and in the Landell case. But in none of those cases was the issue in controversy. In the Boyd case, as we pointed out, it was simply a case of creditor's rights and in the Land Grant case the enabling statutes specifically exclude the question of title to Railway's right-of-way. And in the Landell case minority stockholders attempted to raise this issue but they were foreclosed from doing so by a summary judgment of the Courton the basis of laches.

Now, the second threshold issue which the Livingston Anti-Merger Committee is raising is independent of this jurisdiction -ownership issue. The Committee's position is that when Railway, taking Railway's position that it succeeded to Railroad and to the right-of-way of Railroad it succeeded to Railway with all the burdens and liabilities and obligations that were attached to the Federal charter.

When Congress granted Railroad a 400-foot-wide, 2100-mile long right-of-way, it did so together with 40 million acres of land. It understandably included in the Federal charter, protective provisions to assure that in perpetuity this

national highway would be maintained as a continuous line for the benefit of the public interest and welfare and also to serve certain governmental purposes.

Now, two of these protective provisions are these: (1) There is a prohibition against merger of this road and (2) there is a prohibition against placing on the road any lien or mortgage. These protective provisions, we submit, run with the road. They are more than merely personal limitations upon the original Federal grantee.

Now, in opposing this view, Railway has noted that it has placed, indeed, has placed several mortgages on the properties without Congressional consent. The implication is that another mortgage which is called for by this merger, would be all right. Now, there is ample authority in case law in this Court to support the proposition that the continuance of an authorized act does not make it right and that the lack of enforcement of a statutory provision does not effect any repeal.

Railway further suggests and the Commission chose to go along with the contention, that the plenary authority of the Commission to approve mergers is enough to sweep away the protective provisions of the Federal Charter. There are three reasons why this view is unsound:

First, it is too much to suppose that the general language describing the Commission's plenary authority with

respect to mergers overrides a particular right which Congress reserved unto itself in Railroad's Federal Charter. This is especially so, since both before and after Congress's grant to the Commission of authority to approve mergers, Congress re-affirmed its reservation or rights to alter, amend or appeal the Federal Charter.

Congress, in effect, has preempted the provision of the Federal Charter. Now, there are precedents to this conclusion. This conclusion, indeed, has been concurred in by the Department of Justice; by the Interstate Commerce Commission and by the Congress. And I refer to the Texas-Pacific case which is outlined in the Committee's brief on pages 46 to 49.

In this case a Federally chartered company, Texas-Pacific Railway Company, had burdens in its charter which it wanted to get rid of. One of the burdens was a limitation upon consolidation. Another burden was a limitation upon the financial structure of the company. So, how would it go about getting rid of these burdens? It went to the Congress and asked the Congress to amend its Federal Charter and in the course of the legislative process again, the Department of Justice, the Interstate Commerce Commission and the Congress all agreed that the legislative route was the correct one.

Now, there is a further point: However the authority of the Commission to approve mergers may be interpreted, there -- it is not sufficient to abrogate a statutory

contract made between the United States and the organizers of the Northern Pacific Railroad Company and their successors or assigns.

This contract which was consummated upon delivery of its acceptance to President Lincoln December 29, 1864, provided for a method of amendment by Congressional action. Accordingly, if the terms of the contract are not satisfactory to the parties, the approach is to amend the contract. An amendment of the contract is provided for by the terms of the contract and the terms of the contract spell out that Congress has reserved its right to alter or amend or repeal the contract.

And it is submitted, therefore, that under these terms the Interstate Commerce Commission has no right to abrogate terms of the contract and has no provision to repudiate any terms by approving a proposed merger which contradicts the terms of the contract.

Now, in summary, Railway officials themselves, have recognized -- what we are saying here is that Railway, if it did, indeed, take Railroad's mainline right-of-way, it took it cum onere.

In the hearings before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grant, Railway officials recognized that it is properly subject to all the limitations and liabilities and obligations imposed upon the original company by the granting act. And two

of those Congressional impositions are: (1) a prohibition against merger, and (2) a prohibition against placing a mortgage or lien on a mainline right-of-way without Congressional consent.

There are some procedural inadequacies and this is the third position of the Committee: Neither the Court below nor the Commission gave adequate attention to the foregoing threshold issues. The Hearing Examiner, indeed, recited the contentions of the Committee and he dismissed them -- but his evaluations of the contentions were mere surface evaluations. The Commission had no independent thoughts of its own on the subject. In other words, it accepted completely what the Hearing Examiner had to say about the subject.

The Court below, while recognizing that the issues that we are raising are ones of great magnitude, decided that the Commission really didn't have to look into the issues. Nevertheless, itacknowledged that should a Court at some other day in the indefinite future have occasion to look into the issues which we're raising now, and comes to another conclusion then that Court can measure the impact of its decision on the then status of the merger.

Furthermore, the Court below was completely silent on the issue of the currency of the Congressional imposition in the Federal Charter prohibiting merger and mortgage without Congressional consent.

In summary, the Commission does not have jurisdiction over the proposed merger because ownership in the Federally-chartered right-of-way continues to rest in Railroad which is neither a merger applicant nor a third party petitioning for inclusion in the merger.

Q May I ask you -- I guess I can't quite understand this. What you are raising is isn't it a question of ownership as between the old railway and the railroad?

A In the right-of-way.

Q Yes, in the right-of-way. Well, suppose you are right and they merge, would your client lose?

A If he did own it. The position is this: If Railroad does own the mainline right-of-way, then clearly the provisions of the Federal Charter prohibiting mergers and the provisions offthe Federal Charter prohibiting a mortgage and a lien on the line, without Congressional consent --

Q Well, what that would do would just be to knock out the whole thing, wouldn't it?

A It certainly would.

Q There is nothing to merge, as far as you are concerned.

A Mr. Justice Black, you must realize that the Livingston Anti-Merger Committee is against mergers.

Q I judged as much.

(Laughter)

A In brief --

Q That's a lawsuit outside of this one, isn't it?

A Well, Mr. Justice Black, the Commission, indeed has made this point and in judicial appeal. The Commission has suggested the point that you are making and I would first like to suggest that we directed our attention to this issue in the first ten pages of our reply brief.

But for the present in reply to your question, I would suggest that the Committee, the Livingston Anti-Merger Committee does have standing in the proceedings and having standing in the proceedings, it does have the right to raise a jurisdictional question and we're suggesting that title is intimately involved with the question of the Commission's jurisdiction.

Furthermore, by virtue of --

Q What difference would it make who owns it if it's only a question of merger. You are here as an intervenor.

A YEs, sir.

Q What difference would it make? Why couldn't they merge if it was owned by one group, the same as if it was owned by another group?

A Well, we fall back, Mr. Justice Black, to the provisions of the Federal Charter and the applicability of the provisions of the Federal Charter. Now, the Federal Charter would prohibit the merger; the Federal Charter provides that a

Railroad may -- that another road may be merged into Railroad.

Q I see. You claim that's an insuperable bar to any merger now or hereafter.

A So long as the Federal Charter remains effective. I must -- there's a corollary point here and that is that the Federal Charter also prohibits the placement of a mortgage or lien on the road without Congressional consent. And there has been no Congressional consent for the proposed mortgage on this road.

Q I thought they had been mortgaged all through the last century.

A There are many mortgages on the road and again, as we suggest, some of them have been authorized and we're also suggesting that some of them had not been authorized.

I see my time is up, Mr. Chief Justice. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kahn, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRITZ R. KAHN, ACTING GENERAL COUNSEL OF THE I.C.C., ON BEHALF OF THE I.C.C.

MR. KAHN: Mr. Chief Justice, and may it please the Court: Counsel for the Appellees in these consolidated cases, have agreed upon a division of their argument.

I submit that what we have expressed here is what the original standards observed by the Interstate Commerce

Commission in approving the merger of the Northern Lines, responded to the several contentions of the Department of Justice. Mr. Cox, Counsel for the railroads will the several facts or factors that went into the decision to merge these roads, including the benefits to the public that it will offer. He also will respond to the contentions of the Northern Pacific Committee.

He will be followed by Mr. Fred Tolan on behalf of 270 Northwest shippers who will deal with the merger expressly from the standpoint of the patrons of these roads and finally, Mr. Merrill, as Counsel for the Milwaukee will treat specifically with the conditions assessed by the Commission for the protection of that road.

The Public Utility Commissioner of Oregon, who had originally opposed the merger before the Commission, now supports it. He, however, relies on his brief and will not separately argue it.

Ten years ago a Committee of the Congress criticized in relation to the railroads. The report said the railroad industry has not been sufficiently interested in self-help in such matters as consolidations and mergers. And last year in this Court noted in the Penn-Central case that the intervening years marked a tremendous change and that railroads now are embarked upon a vast reorganization of rail transportation. Implementing the Congressional policy as incurred in

consolidation of the nation's railroads into a limited number of systems.

The Department of Justice has opposed that realignment. At one stage or another the Department has opposed every major railroad consolidation of the last decade. It's present attack challenges the very premise upon which the Commission heretofore has authorized and approved railroad mergers and the rationale upon which the Court, upon review has sustained them.

Essentially the question is this: May a consolidation of railroads be held to be in the public interest upon the Commission's finding of improved transportation, efficiency and economies the action itself will yield, when weighed against the fact of evident anti-competitive consequences.

The Commission and the Courts have said yes; the Department/has unsuccessfully maintained in the past, as it says no. It's position is that acknowledged savings, operational improvements and service benefits growing from the federation of railroads without cannot serve to offset the loss of competition.

Here the Commission found and the unanimous Lower Court agreed that the merger would produce savings of $40 million annually. The Commission found and the Lower Court agreed that it would result in better service. The Department does not now seriously challenge the finding of savings.

Q What would that saving be?

A In the second report, Your Honor, the Commission found annual savings of $40 million.

Q What did they find on that subject in the first one?

A In the first report they estimated the savings to be between $12.7 and $25.5 million. At the further hearing evidence was introduced showing that the savings would be substantially raised.

Q Difference in the amount of savings.

A Yes, sir.

The Department maintains and this merger cannot proceed. It likens the railroads to the players in a game. As its reply brief says, four is better than three; three better than two; and two better than one. But this hasn't been the rules of the game for nearly half a century. The Transportation Act of 1920 established altogether different standards marking a fundamental change in the scheme of railroad regulations.

By that legislation, the Commission for the first time, was empowered to authorize and approve the merger of railroads, not withstanding their anti-competitive effects. Indeed, that legislation specifically conferred anti-trust immunity upon transactions approved by the Commission.

Q Before that 1920 statute the Commission, do I understand it, had no role to play in railroad mergers?

A At that time; that is correct, sir. And before

that time mergers were governed solely by the Sherman and Clayton Acts, and it was during this period that this Court decided the North Securities case and the Southern Pacific case and so on.

Now, following the 1920 enactment, two acquisitions of control have reached this Court. And I specifically invite this Court's attention to the savings in the New York Central's Securities case and the Texas case. Now, the most dramatic example under the Transportation Act of 1920, the Commission could authorize the one railroad's acquisition of control of another, even in the face of the most serious anti-competitive consequences was accorded by the Southern Pacific case.

In 1922, this Court had found that the control of the Central Pacific by the Southern Pacific violated the Sherman Act and it ordered divestiture. Southern Pacific, however, in an effort to maintain control applied to the Commission for authorization under the provisions of the Transportation Act of 1920 enacted subsequently to the beginning of the anti-trust prosecution.

The Commission in its report found that separation of the lines would result in more expensive and less efficient and satisfactory service than can be rendered under unified control. It approved the controlled relationship and thereby tolerated the very relationship that this Court had found to be unlawful the preceding year.

Now, none of the cases have been decided by the Commission --

Q Did that case go beyond the Commission? Was there a judicial reivew of anything?

A The District Court for the District of Utah found that the mandate of this Court, in essence was satisfied in that no divestiture was required, the Commission having found the conerolled relationship to be consistent with the public interest. It was not reviewed on the merits, Your Honor.

Now, none of these cases decided by the Commission, some of which were sustained by the Courts and with the Commission's authorization, premised upon the findings such as the Department now would insist upon, in the face of their evident anti-competitive effects and their proposals were approved by the Commission upon Commission findings of improved transportation. The economies and efficiencies that the transaction itself would yield.

The Department discusses none of these cases. It ignores altogether the important cases of the 1920 to 1940 formative period.

By 1940 it had become apparent that the ambitious nationwide plan of consolidation which was a part of the 1920 Act was not going through. The Transportation Act of 1940 relieved the Commission of having to formulate the plan

and instead it permitted the Commission to approve carrier-initiated voluntary plans if consistent with the public interest. And so the '40 Act permitted the Commission to approve acquisitions, approve mergers of railroads as it previously had acquisitions of control, subject only to the standard of consistency with the public interest.

And this Court has repeatedly said that the Congressional purpose of this 1940 Act is to facilitate mergers and consolidations in the national transportation system. The result of the Act was a change in the means while the end remained the same.

We do not believe that Svenska - America as changing that. And we do not believe Svenska-American can be cited for -- in overruling decades of administrative and judicial construction.

Secondly, and most significant: in that proceeding and there were no benefits from the transaction from the agreements offered for Federal Maritime Commission approval. And the Federal Maritime Commission specifically so found. But, finally there is no suggestion in Svenska-America that the kinds of improvements: service benefits, soundly improved, flow from the transaction here approved by the Commission would not satisfy the requirement in Svenska-America.

Beginning with the decision in the McLean case, which, incidentally involved a merger of seven motor carriers

into the largest single motor carrier in the United States. This Court has consistently held that under the 1940 Act, as under the 1920 Act, the achievement of an adeqaute, efficient and economical system of transportation was a matter of paramount national concern and the preservation of competition among carriers, although still of value, is significant chiefly as it aids in the attainment of the objectives of the national transportation system.

Indeed we show in our brief that some of the very arguments which the Department now makes were considered and rejected by the Court in the McLean case. This Court's affirmance in 1967 of the Seaboard -- summary affirmance in 1967 of the Seaboard Coastline merger under the standards of the 1940 Act is one of several occurrences which followed the Commission's first report in the Northern Lines case and contributed to its change of mind and the approval of the Northern Lines merger in the second report.

In many of the characteristics, the Seaboard Coastline is similar to that of the Northern Lines, but from the standpoint of the anti-competitive consequences flowing from the transaction we submit that the present merger poses even fewer problems, less onerous than earlier on the Seaboard Coastline.

There here, the merger involved is two relatively healthy parallel rail competitors, dominant in an extensive and

economically significant section of the country. Only the earnings of the Seaboard Coastline and were found by the Commission to be better than they are in the Northern Lines.

There is here the merger of the railroads were each other's principal competitors; there again the volume of traffic for which they competed was greater for the Seaboard and Coastline than it is for the Northern Lines.

There is here and the merger of the railroads denied some communities of competitive rail service. Although cities of the size of Tampa and areas as extensive as central and western Florida, served only by the merged Seaboard Coastline are totally without counterpart in the Northern Lines merger.

Q Could I ask you a question? If I understood you correctly I think you said that the Seaboard decision here led to the second Commission report?

A Only partially, Your Honor.

Q Well, that's what I was interested in; would you elaborate that?

A I shall. The -- Commissioner Webb had dissented in the Seaboard Coastline case and of course, he is the author of the Commission's first report and some of his thinking as to the necessity for preserving railroad competition and certainly his views of the Transportation Act of 1920 of facilitating railroad mergers, that this doctrine does not carry forward into the 1940 Act, it was as evident in the one as in the other. And

a certain amount of confusion as to what the 1940 Act did was a factor which contributed to the second report. This is only one of several.

I should like co point out that in the Seaboard Coastline case and the Department, as it does here, opposed the transaction, and as it does here it said without overriding public benefits the transaction cannot be approved. Indeed, the lower court in its Opinion paraphrased the position of the Department and said that the Government's position really was that where two healthy competitors are involved economies and dollar savings and other alleged benefits could never be enough to overcome severe elimination of competition such as here involved. And of course, the lower court rejected the Department's argument and this Court summarily affirmed.

Turning to the other considerations in which occured between theffirst and the second report: the first of these is the accommodation of the employees of the railroads. In the first report the Commission had found some 5200 jobs on the applicant railroads would be eliminated and that the adverse effects due to bumping, would be even more severe. There is no ques ion that the Commission cast this into the balance in favor of denial.

Following the first report, of course, the railroads reached agreements with a couple of the unions and provided for protection of their members against job losses except and by

attrition. In approving the merger in the second report and the Commission imposed such protective conditions for all employees, including those not covered by the negotiated agreements.

Another change of course is the protection afforded the competing railroads. Milwaukee and Northwestern had opposed the merger unless certain conditions were attached. In turn, Northern Lines proposed the attachment of such conditions and this led the Commission to conclude in its first report that attaching these conditions indeed, might include -- might preclude consummation. And following the first report agreements were reached with the railroads and all of the sought-after conditions were attached.

Now, I shall not discuss these conditions in detail and Mr. Merrill for the Milwaukee shall. I simply wish to point out that as a result of these conditions that the Milwaukee for the first time will be able to reach Portland. For the first time will be able to render service at Billings, and incidentally, this is a new condition in the second report that was not considered for attachment in the first report

Thirdly, the Milwaukee for the first time will be able to participate in West Coast traffic to and from British Columbia. And for the first time the Milwaukee will be able to solicit northern tier, transcontinental traffic originating at or destined to points not on its line by being able to

interchange such traffic at competitive rates at 11 points served in common with the Northern lines. And the Commission found this affords the shipper a small club to shift over to the system in the event that he is not satisfied with the treatment he is getting.

In its third supplemental report the Commission specifically opened these eleven gateways into the transportation of grain destined for the primary markets of Minneapolis, St. Paul and Sioux City.

That these conditions will make of the Milwaukee a new railroad can scarcely be questioned. A I pointed out at the outset they were considered of sufficient consequence that the Public Utility Commissioner of Oregon who had opposed the merger for the Commission, upon the imposition of the conditions supported the merger.

And more importantly, the Secretary of Agriculture charged under the statute with representing the agricultural community, considered them to be of benefit to the public in general and to the agricultural community in particular, and accordingly, before the Commission he, too, changed his position and following the imposition of the conditions, withdrew his opposition to the merger.

Lastly among the conditions to obtain between the first and second reports was the receipt of additional evidence as to the savings. In the first report, as I indicated before,

in response to the question of Mr. Justice Harland, the Commission had found -- I believe it was -- the Commission had found that the savings might be $25.5 million. However, without explanation in bringing this figure down to its conclusion the Commission found that the savings might only reach $12.7 million and it is this figure, the range of $12.7 million to $25.5 million annually against which the Commission measured the anti-competitive consequences. Following the receipt of additional evidence, the analysis of additional studies the Commission concluded that the average savings had approached $49 million and the lower court agreed.

In reaching this conclusion I might point out that the Commission did, indeed, consider the possibility that certain savings, certain improvements might be achieved short of merger, by the coordination of facilities. But then at best would have yielded, as the Commission has found on Page 300 of the record; as the Commission mentioned at 300 of the record, at $5.2 million. But the Commission went on to state specifically that many of the coordinations that were physically feasible would produce grossly unequal benefits to Great Northern and Northern Pacific as separate carriers. Further, competition between the Northern Lines renders a difficult, if not impossible as a practical matter, to curb the expense involved in effecting such coordinations.

It is these benefits, then, that the lessening of

competition the Commission said must be weighed. And that there will be a very substantial lessening of competition has never been questioned. The Commission refers to this as the "undisputed fact," and as I believe Mr. Justice Black pointed out this morning, it is scarcely possible to conceive of a significant merger of railroads in an area that would not be anti-competitive. But that is not to say that these anti-competitive consequences can be ignored by the Commission.

And the Commission, very carefully referring to this Court's decision in the McLean and Minneapolis and Seaboard Coastline, said that it had a duty to estimate the scope and appraise the effect of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs to the shipper, to determine whether the consolidation will assist in effectuating overall transportation policy.

This, we submit, the Commission has done. The Commission noted that the Great Northern and Northern Pacific are competitive, and that their lines extend generally through the same northern tier states and from Seattle and Portland on the west to Duluth, Superior, Minneapolis and St. Paul on the east. But they are also complementary in that the Great Northern's principal mileage is in the east and Northern Pacific's in the west. And while their lines are parallel and Great Northern

primarily serves the northern communities in the northern tier states, the Northern Pacific serves those towards the south. And at many points, as the Commission has pointed out, as between Helena and southern Montana, the main lines of these railroads are better than 100 miles apart. And the Commission pointed out that obviously a separate road located at or near the line of one road is but 50 or 100 miles from the line of another is not influenced by competition in the selection of the carrier.

In our brief we offer many examples. We quote, for example: A Montana grain dealer who has elevators near the Northern Pacific tracks and he said"for the most part the grain has to move on the railroad pretty close to where it's grown. For instance, I can't ship on the Milwaukee, even if their rate is zero."

The Commission in the second report indeed recognized that the northern tier states are rich in animal, mineral, agricultural and forest resources. It recognized full well that this traffic constitutes, as Mr. McLaren pointed out, approximately 60 percent of the traffic originating and by these roads in this area. And it is for this very traffic that rail transportation offers the most distinct competitive advantage, to use his phrase, or the greatest inherent advantages.

But we point out in our brief that with respect to this very traffic, 80 percent comes from points that are

noncompetitive between the merging railroads. The Department at no time has challenged these figures; neither has the Department ever challenged the fact that truck competition has become very pervasive, at least as to one category of profits, manufacture and miscellaneous products. It was with respect to this category of traffic that the Commission specifically found in the second report that these railroads were most vulnerable to motor carrier competition. And found, moreover, it was this traffic that the rail carriers must retain to balance their operation in handling the products of the agricultural and extracted industries.

The record establishes and the Commission so found that this category of traffic, manufactured in miscellaneous parts, constituted more than 30 percent of the Great Northern's carload revenue and nearly 40 percent of the Northern Pacific's. And for both roads is the single most important category of traffic.

Now, with respect to the much-quoted Exhibit 16, referred to in the Commission's second report in the vicinity of Page 316 of the record. The Commission acknowledged full well in its second report as it had in its first, that rail competition will be eliminated entirely at 47 communities in the northern tier. However, the Commission went on to point out that the number of stations is small, being less then 5 percent of the stations in those very states and went on to point out

that these stations produced an insubstantial volume of Applicant's business; approximately 6 percent, whether measured by cars or revenue. In this way the Commission found with these so-called Class -- with respect to these so-called Class 1 points, that some of them are located on the main line of one applicant and on the branch line of another with the result that the loss of competition is more theoretical than real. However, Montana, a perfectly good example, it being on the main line of the Northern Pacific, but on the branch line of the Great Northern.

With respect to the Class II stations, those served by two or more of the applicant railroads and at least one other railroad, the Commission acknowledged in its second report as it had in the first, that rail competition will be diminshed but not eliminated at these 160 stations. It recognized in the second report as it had in the first, that these stations contributed about 33 percent of the cars and 38 percent of the revenue of the Northern Lines in this area.

Mr. McLaren would add all these figures, including overhead traffic, and tell you that the railroad merger would result in a loss of competition of 55 percent. Mr. McLaren forgot, however, that the addition of the bridge traffic increases the universe and as the Examiner found, at Page 771 of the record: "If bridge traffic were included the percentage of the total traffic handled in 1960 at the stations where there

will be a reduction in the number of rail carriers would be smaller than the figures said to be found."

We point out that a mere two-thirds of these Class II stations served by two of the applicants and one other road, with respect to these we point out that 97 out of the 160 stations, nearly two-thirds, all occur at four places: Seattle, Spokane, Minneapolis-St. Paul, Duluth, Superior. And it is with respect to these points that the Commission in the second report specifically found that following the merger none would be served by fewer than three railroads nor fewer than 15 trunklines.

The Commission in its second report pointed out that even though some of the points they saw as Class II stations reflecting service by two or more of the applicant railroads and at least one other, they do not have the competition between the applicants today. For example, the larger community in the northern tier would be left without competitive rail service as a result of the merger is Pasco, Washington. At Pasco, Washington, the Northern Pacific comes up from one direction and the SP&S goes out in another direction. And the competition between them is really nonexistent.

As to all of the points, all of the Class II points the Commission found: First, a portion of traffic between Great Northern and Northern Pacific and the other roads serving these points is not wholly the result of interplay of competitive

forces, but often the result from other factors entirely.

Second: The shippers at these Class II locations, in addition to the Northern Lines and one other rail carrier, are generally served by other major transportation vigorously competing for traffic.

And third: By virtue of the conditions imposed in this case, the Milwaukee, which is the other railroad serving many of the Class II points, would be substantially strengthened as a meaningful, transcontinental competitor.

Q What's the current status of the merger between the Milwaukee

A I believe the argument has been held before the Commission and the report of the Commission, as being awaited.

Beginning at Page 38 of our brief we offer examples drawn from the record which fully support the Commission's findings. We show how some -- this is particularly true of tne large national accounts, simply allocate traffic as between available rail carriers. We show the number of the gross of the activities of trunk lines at the Class II points.

At Fargo, for example, 20 motor carriers compete for traffic with the railroads and the record establishes that's 50 percent of the less-than-carload merchandise traffic received there arrives by truck. And we point out that the Commission found that the Milwaukee has superior routes and superior grades and will offer competitive service right through the heart of the

northern tier, serving most of the Class II stations.

Moreover, the Commission in its second report, accorded much weight to the many shippers, trade associations and other groups which supported the merger, even in the face of express recognition that competition might be eliminated or reduced as a result.

Q I don't understand the Anti-trust Division to take issue with you on the question that, sure, there is betteer service resulting from this merger. I understand his position to be that's not the right standard in a case with two large railroads who are in competition that something more than mere betterment is necessary. That is something that Mr. Cox is going to argue, but I -- it seems to me there is no real issue between you so far and what the Anti-trust Division has argued.

A As I conceive it, sir, the difference between us is this: The Commission believes that the increase in transportation and the economies and efficiencies that the transaction will yield, alone can justify on balance, the offsetting consideration of the loss of competition. As we -- as I understand the Department's position, and it is that something else must be cast as the balance; that some over-riding public end and we --

Q That's right. Some overriding need, in the languages of other kinds of cases.

A Right. We submit that, as a rewriting of the

standards as consistently defined by this Court.

Q I think Mr. McLaren emphasized also -- certainly he did in his brief, that the condition of the carriers of one or both of the merging carriers was a very large factor. You have a section on that.

A That is correct. The Department transfers the "sick company doctrine" to the railroad merger situation where we submit it doesn't obtain. Benefits will flow from the merger the soundness of the railroads as we believe the Commission is entitled under the statute to approve such a merger.

In short, we say that the Department has relied essentially in this case upon a recitation of figures drawn from one or two exhibits. The figures which the first report of the Commission itself recognizes contained certain deficiencies, and as the lower court agreed, tend to exaggerate the competition which exists between the Northern Lines. The Commission viewed these figures in the context of the entire record and we submit that the Commission, indeed, made the requisite judgment as to the applicability of consequences that the merger would bring about.

We do believe that consistently with this Court's holding last year in the Penn-Central merger cases, the Commission has furthered the policy of the Congress. It is that policy which produces a variation from the traditional anti-trust laws of insisting upon the primacy of competition as the

touchstone of economic regulation. Competition is merely one consideration here and we think the Commission has adequately considered it.

MR. CHIEF JUSTICE BURGER: Mr. Cox.

ORAL ARGUMENT OF HUGH B. COX, ESQ.

ON BEHALF OF GREAT NORTHERN RAILWAY COMPANY, ET AL.

MR. COX: May it please the Court, Mr. Chief Justice, I appear in this case for the Applicant railroad. I propose to discuss in the first instance the argument of the Department of Justice and reserve, I hope, a brief period of time at the end of my argument to talk about the arguments of the stockholders committee and stockholders of Northern Pacific.

I think I shall, unless there are questions from the Court, submit the appeal of the Livingston Anti-Merger Committee on our brief where it is discussed in considerable detail.

Q Mr. Cox, would it be a fair or a safe generalization to start with in this problem that almost all mergers have an anti-competitive effect to some degree and probably in some degree -- not necessarily the same -- some savings and benefits. Doesn't that underlie the root of the problem?

A That underlies the problem and I suppose that you could find an economist who would say the more competition you supress the more savings and benefits you get, but it's a

question of fact in each case, I suppose and it is our view of the statute that what Congress has done here is to directly authorize the Commission to consider the elimination of competition on the one hand, and the benefits of transportation services and facilities on the other and having made that consideration, to decide on the facts of a particular case and not by the application of some rule of law general application, but to decide on the facts in that particular case whether the merger or preservation of the competition will do more to provide improved, adequate, and economical transportation service which is the standard that we find in the statute.

Now, that is, as we see it, was the issue here, as our view with the Commission in the second report it went to exactly that process, which is the process described in the McLean case in language which is frequently reiterated, that it weighed the adverse effects on competition against the benefits, improvements in transportation service facilities on the other, and it decided on balance that the merger would do more to provide adequate, economic and efficient transportation service in this area of the country with the conditions attached than would preservation of the competition between the Northern Lines. They made findings on this and in our view those findings were supported by substantial evidence and they provide a reasonable basis for what the Commission did.

Now, if the Court adheres, I submit, to what it has

said in the past, that should be the end of this case, but the Government's argument is a little protean. I have trouble sometimes getting my hands on it and I am never quite sure whether the Department of Justice is arguing for a new rule of law which, in effect, says that service improvements are not enough -- improvements in transportation services are not enough, there must be something over and beyond those services before you can authorize a merger that suppresses competition, substantial competition.

Now, whether that is really their argument, or whether they are, in effect, inviting this Court to review the record de novo and make an independent determination on whether the Court believes this merger is in the public interest. The argument, it seems to me, seems to be suspended rather uneasily between those two extremes.

Now, in view of that it was my intention this afternoon to talk a little bit about the facts, because I think any way you look at this case, the facts deserve some consideration and perhaps more consideration than they get from the argument from the Department of Justice. While it is quite true, they deal with these facts in a sense, but they deal with them in a rather curious technique, by admitting them they discount them. So that when they say, well, of course, we admit there are some service improvements here, I don't think the Court gets from that the full force and flavor of what this

record shows about what this merger means and with the Court's permission I should like to talk a little bit about that, even though, I suppose, in some certain respects the Assistant Attorney General will not dispute these facts.

Now, this is a mass of evidence in this record. There are 14,000 pages of transcript; 240 Exhibits, and the Examiner's Report takes up most of two volumes of this appendix here. And a great deal of it is related to the benefits of this merger to service benefits, the improvement in service and facilities and its not general abstract evidence; it's the particularized evidence about particular commodities, particular markets, particular routes and particular shippers. And I can't possibly do justice to it but there are three or four categories of this evidence that I would like to say something about.

First, the evidence that has to do with the faster and more reliable service. Now, that's been mentioned here this morning. The expedited schedules; there are a number of examples of those I could give to the Court. It makes some difference of time of the Yakima Valley of 12 hours to Chicago and 24 hours to Kansas City. From points west of Spokane it means 24 hours difference to Chicago; intermediate points the same thing. Some points of North Dakota and Montana it means 24 hours faster to Minneapolis.

Now, the whole point that the way the Department of Justice apparently tries to deal with that is to say, "Well,

the railroads could do this anyway, without merger." This anticipates the point that I intended to deal with a little later, but I will say this about that: There is evidence in this record -- not in the record, but there is evidence which everybody has taken -- no question about it, that while this proceeding was pending Milwaukee put on a fast train between Chicago and Seattle and I might that oddly enough, there was also evidence that the reason they did that was because of the fear of truck competition. Northern Lines responded by putting on fast trains and we were told that that shows that all these improved schedules could be achieved without merger.

Now, the fact is, and the Commission referred to this in its second report -- really, the third report. It's the second report on the reconsideration: "These trains that the Mailwaukee and the two northern lines put on between Chicago and Seattle, are light-weight, light-tonnage trains, since they put extra power." Which means, of course, that they are paying more for every kind of freight they carry on those trains. There is one of those trains each way each day except on one of the Northern Lines, which I believe was stricken Monday.

Now, in contrast what this merger would do would be to provide faster schedules for the fast trains, but it is going toprovide faster schedules for all the trains; the regular freight trains and not only the transcontinental trains, but these intermediate trains. So that the suggestion that

light-tonnage trains, light-weight trains that the Commission took into account proved that the carriers can do these schedules without merger, I submit, but not really supported by the rational consideration of the evidence.

Now, the other kind of improvement -- two other things that I should like to mention -- one is the improvement in car supply which this merger will bring which is a very serious matter in this part of the country. That improvement will come in two ways: In the first place the improvement in schedules, the elimination of interchanges and the elimination of switching time, turn-around time in the yard is going to make more cars available and there is a reasonably conservative in the record for the Commission that this would mean about 1700 additional cars daily which would be available for loading. Now, that's one way the car supply would be improved.

Another way it would be improved which is of great significance, is that when the lines are merged, of course the cars will be centralized; there will be a centralized control for the dispatch and distribution of the cars. Today there is evidence of this kind in the record, that these lines will sometimes stand idle on one of the lines while not too far as away the shipper is waiting for the car. Well, when you have one agency distributing those cars over the system that kind of thing certainly will be reduced and maybe eliminated.

Now, the third thing that I should like to mention

about these service benefits because -- so that the Court will get some senseof what's in this record, is a mass of evidence that has to do with the effect of improved through routes and single line service which is often in many cases for some commodities cheaper than even through rates by through railroads. And the transit and loading and unloading privileges which this merger will make available to shippers. Now, this evidence proves, and it rather surprised me that these shippers attach great importance to this transit and loading and unloading privileges. What they mean, vaguely, is this: that if the shipper ships over the line of a single railroad and he wants to stop the car, have it processed in some way and then move on or he wants to send out a car half-loaded and then load it completely or if he wants to unload it. If that takes place on a line of a single railroad; if the shipper can do it with the transit privilege on the single line or through rate, which is an advantageous rate, but yet when he stops at the processing of loading or unloading, he wants to have it moved on over another railroad, he pays what in effect, is a higher rate, something like a combination rate. Now, what this merger does is to make those privileges available to systemwide -- they are not now, because the Northern Lines don't extend this kind of privilege to one another -- but they will be over the entire system, as well as over many parts of Milwaukee, as a result of the conditions. And anyone who flavors the testimony, even the

Examiner's Report, much less going to the record, will see what importance the shippers attach -- economic importance -- to these particular privileges.

They open up markets, for example. They will enable a man in Pasco who hasn't been able to -- a lumber shipper in the first instance in the northeast who want to have lumber processed in Nebraska and sold in Missouri, to do it for the first time at a rate which will enable him to compete with lumber moving from other parts of the country.

Now, I should now to return to the point in which I somewhat anticipated myself to this question of whether these things can be done without merger. I've talked about the freight -- the expedited scheduled. I think Mr. Kahn has made the point which is not, I think, left entirely clear in the argument this morning taht the Commission did make some findings on this. They made the findings that Mr. Kahn referred to and the Examiner made a finding that there was more reasonable expectation that these railroads could achieve these improvements in service and these coordinations if they remained independent competitors.

I think that the findings that the Commission made on that represent one area of agreement between the first and the second reports because in the first report the majority of the Commission there said: "We agree that these carriers as competitors will not -- cannot as a practical matter, make

coordinations from which they derive grossly unequal benefits." And the Commission in the second report found that most of these instances these coordinations or facilities would produce grossly unequal benefits and therefore, as a practical matter it is not reasonable to expect the railroads to make them.

Now, this can be illustrated, and again, to give you some flavor of the record, I should like to descend into details that may be a little bit dreary, but I think they may be necessary.

One of the things that's going to be done in this merger is to coordinate routes, so that the trains in the combined system move over the best and most expeditious route. For example: on the main line west the main route would be composed of a segment of the line -- the present line of the Northern Pacific from the Twin Cities toa point in North Dakota. At that point the traffic will move on to what is now the main line of the Great Northern, which is a much better line, in a respect, and will move on the line of the Great Northern all the way across the top of the country to Sand Point in Idaho. At that point the traffic will be moved over to a line of the Northern Pacific below Spokane and then from Spokane it will move on to the coast over a line of the Great Northern.

Now, if you stop to think about it, that is the kind of thing -- they are going tobe running common trains -- that cannot be done by -- as a practical matter, by two

independent competing companies, despite some suggestions this morning to the contrary. The Commission has no authority to compel one railroad to give another railroad traffic rights over its line. So, if the railroads tried to do this they would have to have arrangements for compensation worked out. And since this is going to be done systemwide on all routes, what you would have to think about would be the two railroads sitting down to decide they were going to run trains over one another's routes, perhaps mixed trains. How they were going to pay one another was -- on a fair basis for the damages that each got out of it.

Now, I submit if you stop to think about that, quite apart from the practical difficulties which I think would make the exchange ratio look easy. Apart from those, you couldn't do that without ending what was practically a de facto dealing of revenue and sharing of -- and that relationship could hardly be consistent with really effective and vigorous competition between the two lines. So, this coordination of routes -- and I would add here that the Commission, in the first report, the report which disapproved the merger, the Commission never found that coordination of routes between competing railroads was ordinarily not practical. So, here again there is really no dispute about it.

Now, the coordination of the routes is an essential part of all these improvements of service. It's obvious that it

has a direct relationship to the schedules and the car supply, but it's also essential to the coordination of these terminal facilities and the reason for that is that in order to construct these new terminal facilities you have to rearrange the traffic. You have difficulty getting ground in cities, usually, at the appropriate time and in most of these cities the two railroads come into the city from different directions, as they do, for example, in St. Paul.

So, that as an essential point of building a common yard, common switchings in the yard, the trunkline traffic has to be moved. As I explained a moment ago, all of that trunk-line traffic from St. Paul is going to come into St. Paul, the main traffic east and west over a line of Northern Pacific. Now, that is also true in some of these other terminals: Spokane and in Portland, where to do the terminal arrangements they have to coordinate the routes. Really, they have to run mixed trains.

Now, that again is not the kind of thing that can be done -- these yards, effectively and efficiently, between two independent companies. Of course, if you have a yard in which two companies are operating, they are both -- each of them are going to want to be sure it gets its trains out just as quickly as the other does. You have duplicate yards; duplicate switching fees. You can't do these things.

Indeed, there is here, I think, what a strange

internal inconsistency in the argument of the Anti-Trust Division which I think is worth commenting on.

If you did -- could do all of these things by voluntary coordination between the carriers, what you would have would be the two carriers running mixed or combined trains with common crews over each other's routes, using common terminals and common repair facilities. To some degree they would be using managerial staff in common -- at least they would have to have a common agency distributing the freight cars. You have a cooperating relationship that would be inconsistent with the existence of thekind of competition that the Anti-Trust Division says should be preserved. And, indeed, it somewhat surprises me to hear them taking this line inthis case because in other contexts, they have frequently pointed out the dangers and indeed the illegality that would arise from these cooperative and joint undertakings, which is exactly what they seem to be arguing for here.

I think that I should now like to speak briefly to the -- to one matter and leave it without much comment, and that's the matter of the savings to the railroads. I should merely like to point out to the Court that there is a direct relationship between the improvements in service and savings. Because the savings come in large part -- not entirely, but in large part, from the coordination of facilities and from the quicker routes and the other steps that will produce the

better service to the shippers, so that it is a mistake to think of the savings as being of only indirect benefit to the shippers, because they do have a direct relationship to the service improvements.

But, apart from that the Commission made findings which all relate to matters that it is entitled to give weight to under Section 5(2), which pointed out that a savings would decrease the pressure for rate increases which come from increasing costs but they would, by improving the rate of return to the carriers, would put them in a better position to buy modern, improved equipment and that they would increase their capacity and power to compete with the trucks, and other modes of transportation.

Now, the Department of Justice, as I stated at the beginning, seem to admit that these benefits exist, but it says that they really are not important as against the loss of competition that will be caused by the merger of the two Northern Lines. And, I said earlier, their view seems to be that almost as a matter of law you need something beside improvement to transportation services and facilities, you need something over and above and beyond that of a more extraordinary character.

Q What would that mean?

A Well, Mr. Justice White, I am not exactly the man to develop that.

Q I know, but I'm just trying to imagine the view.

A Well, they give two examples --

Q One of them might be a failing carrier.

A Failing carrier; the other one is where you have two prosperous carriers that say you need to put them together so that they can save a third failing carrier like the New Haven in the Penn-Central case. Do you follow me on that?

Q Yes.

A Those are the only two examples that they have given us and have a footnote in their reply brief which to some degree casts doubt on whether they -- whatthey really mean about the failing carrier, but that's as far as I can go, I regret to say.

Q I think it's -- they would say that if it's improved transportation services that we want, the law prefers the competitive way of securing them.

A That is right.

Q Now, while we have developed this legal argument in our brief and I don't want to retread what Mr. Kahn said, but we point out on our brief a number of things about that argument. One is that the act itself, almost by term, shows that Congress is not prepared to rely upon competition to produce these benefits and we point out specifically that the adequacy of transportation service is one of the four things in Section 5(2)(c) that the Commission is required to give weight

to when it is asked to consider a merger. And we also point out that the national transportation policy, which of course, pervades to a degree the interpretation of the provisions of the Act, speaks in terms of efficient, economical, adequate and safe transportation service.

Now, it is our view that you can look at the statute and if you look at the provisions of the statute, the very kinds of benefits that thiscase produces to shippers are the kinds of benefits that the Congress authorized the Commission to consider and if it had a reasonable judgment on thematter in evidence to support it, could justify a merger that suppressed substantial competition.

And of course, we argue, too, from the McLean case and the Seaboard case particularly, that they were precisely cases of that kind. That's what the Commission did and this Court sustained it.

Q I suppose the Government's feeling might be that you just developed the sections that shouldn't be ever held to apply or permit a merger between competing carriers.

A I don't think they would go that far, but --

Q At least when they are strong.

A Well, I couldn't honestly say that I could read their brief that way. As I say, I have some difficulty in getting into it and analyzing it precisely, but I certainly do say that you can't ever have a merger in that situation unless

you have some very extraordinary benefits that go far beyond improvements in service and the only two I know anything about are the New Haven or the Bankrupt Carrier.

Now, Mr. Kahn has discussed the competitive effects of thismerger, particularly with a view to suggesting that the Department has exaggerated the quantitative extent to which competition is affected and I don't want to cover any of that ground again.

There are some things about the competitive situation that I think it might be useful for me to speak of very briefly. One of them has -- they really relate, not so much as to the quantity of the competition that is eliminated, but to the economic condition of that elimination and particularly economic significance in relation to the adequacy, efficiency and economy of transportation service. Because I think it's important to remember here that we -- at least in our view, are not operating under a statute which gives competition as such in the abstract, some overriding and controlling importance. It is an important consideration and the Commission treated it as beingimportant, but it's important as it relates to the contribution it makes to good and improved transportation services.

Now, for the economic consequences in that sense to which I wish to speak. The Committee -- the argument for the Department of Justice, I think, rose together with a number of

things. Specifically, two of them, particularly, which are quite different. I think this has been clear, but I should like to be sure it's clear.

They take the traffic at points where there are only the two Northern Lines and they combine that with the points at which there are the two Northern Lines andone or more -- sometimes three or four other railroads. Now, of course the effect of this merger at those points is quite different. There is a significant difference. At the points where you have only the Northern Lines, the two Northern Lines, you remove their rail competition by this merger. But those points are not significant enough, either in terms of value on the volume of traffic produced, or on the markets they serve to support the arguments on the other side, so they had to combine the 6 percent revenues that come from points of that kind. That is where there are only the two Northern Lines.

With the revenues from the points where there are other railroads in addition to Northern Lines and it's that way they derive their percentage of 43 or 44 percent which is said to be the effect of the extent to which you can eliminate competition, at least on a station basis.

Now, I have said that there is a difference between the two situations and it's obvious that there is. The question I suppose really is: if you eliminate one of three or four railroads how economically significant is that in this

industry in relation to the service and the rates that the shipper will get? It is an elimination or reduction of competition, but there is nothing in this record thatsuggests in any way that the elimination of one Federal competing railroad in this industry has effects quite as devastating on railroad service and railroad rates as the argument on the other side suggests. And there is some pretty hard empirical evidence that points in a contrary direction.

That is the evidence of the shippers. Now, there is a large number of shippers who testified here and a good many of these shippers came from these points where there would be a reduction by run in the number of railroads serving the points. Yet, all of these shippers, practically unamous -- all of these shippers, while saying competition is a good thing, and we like competition, all of them supported this merger and particularly as its conditions protect the Milwaukee and Northwestern.

Now, that evidence seems to me to indicate pretty clearly that the shippers, at least, so long as they have two or more railroads, believe that the benefits from this merger to them in their pragmatic judgment,-- the benefits of this merger to them economically is of more consequence than the eliminating of one railroad out of several at these points.

Now, that is not, of course, a question to be decided, essentially, by shippers, but certainly, the

unanimity of support among the shippers is some persuasive evidence that looking at economic consequences, there was nothing unreasonable in the judgment that the Commission made.

I think, since I mentioned the shipper testimony, I should say one thing more about it because it -- this shipper testimony and several aspects of the case is rather embarrassing to the Anti-Trust Division. And in that regard I think they suggest that the Court really shouldn't pay any attention to it because, well, they say that perhaps the shippers were brainwashed by the railroads, and they also suggest that they are frightened of the railroads.

Well, as to the first suggestion, I merely declare that there were more than 200 of these shippers and about 39 associations representing shippers that testified. And they were cross-examined; the Examiner accepted their evidence as credible and persuasive and there is plenty of evidence in this record that they don't hesitate tolitigate and to oppose the railroads when they want to. In fact, they bitterly opposed the railroads in the first hearing in this case on the question of the Milwaukee conditions. So, there really isn't any basis for this suggestion that the railroads brainwashed them.

The suggestion we frightened them rests on -- apparently on a footnote citation of an article by a Professor in the trade zone. It was a rather remarkable attempt to discredit a large number of witnesses by a rather feeble

weapon, I think.

But, I suggest that these witnesses deserve consideration and weight has been given to them by the Examiner and by the Commission.

Now, there are two other things about the economic consequences of the elimination of competition that will be eliminated here, that I think are significant.

One has been referred to, which is the conditions of the Milwaukee. And I merely say about that, that while the Department attempts todismiss the Milwaukee as a weak and ineffective competitor, again there is ample testimony in this record from the shippers that the Milwaukee has been, even without the conditions, an effective competitor. And there is also evidence that they expect, with the conditions, that it will be/even an more effective competitor. And there is no doubt about the effect of what those conditions will do with competitive power. It's true it doesn't have as much money as the Northern Lines; it doesn't have as big a volume of traffic; it isn't as large, but those facts do not mean that a company is an ineffective competitor.

Indeed, if I may take somewhat the same line I took a moment ago, I have often heard the Anti-Trust Division attach great importance on the activities of small competitors on the grounds that they make up in hunger, ambition and enterprise for their lack of resources.

Well, the Milwaukee here has certainly been and will be, I think, on the basis of the facts, an effective competitor.

The other thing that I would like to mention before the Court rises, is the question of intermotal competition, which, again, as I think has been dismissed by the Department of Justice without a recognition of what the record shows. Here again the evidence -- there is a great deal of particularized evidence on what trucks are doing in this part of the United States. There may not be as much truck competition in the northwest as -- or in the northern tier as there is elsewhere, but there is enough of it to exert very direct and heavy pressure on these railroad competitively.

We have cited in our brief testimony from some of these shippers and along with the citations in one place, the shippers who said the real competition today is not rate competition; it is not between the railroads and the other railroads; it is between the trucks and the railroads. And as far as these agricultural commodities are concerned, the bulk commodities, there is particularized evidence that the trucks are moving in an increasing quantity to agricultural products, lumber, paper products, lime, salt, a whole range of bulk products which at one time was thought to be immune to truck competition. Of course, no one disputes that they are moving -- have been large quantities of the merchandise traffic, which

is the traffic that the -- that moved, for a large part, into this territory, instead of out.

The trucks have improved their time schedules. I made the reference to the Milwaukee situation a moment ago and they are building highways so that their time between the Twin Cities and the West Coast in some instances, will be less than that of a railroad today. So that this trucks which also serve these points -- they serve the points not only where there are railroads left but they serve the points there will beonly one railroad left. And they provide effective and direct competition today which in its strength and vigor it sufficiently compensates for the loss of one railroad at the points where there are several railroads.

Now, I have taken these things together. I should like to suggest at this point in the argument and leave it at that that when the Commission made this balance -- went through the balancing process in its second report which is what it did, it did not depreciate the value of competition, but as compared towhat it did in the first report, it engaged in more thoughtful and detailed analysis of what kind of competition would be left which was very important; and what economic significance the competition that was eliminated really was.

Q Were there not also some substantial changes in that interim, too?

A I'm sorry --

Q Were there not changes made to accommodate the objectors?

A Well, the Milwaukee conditions, of course, were in direct bearing on the competitive situation as did the Northwestern conditions. And those -- that was an important factor, as was the labor. The labor conditions were also important. But I was speaking largely of the consideration of the competitive balance between competition and the loss of competition and the benefits, Mr. Chief Justice.

Q Well, then on a 6 to 5 split on the first go around it appears to be a case in which it would take a very slight adding to one's scale to tip that balance.

A That is right. So, of course, there were three members of the Commission who did change their minds; three who didn't, who voted for the merger in the first place; and two new appointees who came to us fresh and voted for the merger, and that was how the result of the majority of 8 was composed on the second vote.

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

(Whereupon, at 2:30 o'clock p.m. the argument in the above-entitled matter was adjourned to reconvene at 10:00 o'clock the following day)