# The Western Coal Traffic League Case: Condoning ICC Eschewal of Rail Monopoly Ratemaking

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TABLE OF CONTENTS

I. INTRODUCTION ..... 308
II. THE ISSUE ..... 309
III. ICC'S FLUCTUATING INTERPRETATIONS ..... 311
IV. THE COURT'S INTERPRETATION ..... 312
V. THE CONFERENCE COMMITTEE REPORT ..... 314
  A. *THE REPORT'S LANGUAGE INTERPRETED* ..... 314
  B. *WEIGHT AND CREDIBILITY TO BE ATTRIBUTED TO REPORT LANGUAGE* ..... 316
VI. LEGISLATIVE HISTORY OF THE STAGGERS ACT ..... 317
  A. *THE RESOLUTION OF HOUSE DIFFERENCES* ..... 320
  B. *THE INTENT OF CONGRESS AS REFLECTED BY ACTION AND STATEMENTS ON THE FLOOR* ..... 321

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VII. THE COURT'S ARGUMENT THAT "WE MUST DEFER TO THE AGENCY'S DETERMINATION" ..... 322
A. *POWER NOT DELEGATED TO ICC TO DETERMINE OWN JURISDICTION* ..... 324
VIII. SUMMARY AND CONCLUSION ..... 326

## I. INTRODUCTION

In *Western Coal Traffic League v. United States*,[1] decided on November 14, 1983, the Court of Appeals for the Fifth Circuit squarely addresses the question of ICC control over railroad rates charged to shippers by a railroad which is the sole connecting link between the origin of shipment and the point to which a shipper must transport his goods. It is appropriate to start with a brief chronology of legislative and administrative events:

1. In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act (4R Act),[2] deregulating railroad rates except where there exists market dominance. The ICC was directed to develop standards and procedures for determining whether and when a railroad possesses market dominance.

2. Soon afterward, the ICC in Ex Parte No. 320,[3] pursuant to Congressional directive, established procedures interpreting market dominance as being the lack of effective competition for the specific traffic and movement (from one point to another) to which the rate applied.

3. In 1978, Congress recodified the Interstate Commerce Act.[4] Since the initial task of formulating and commencing the new program under the 4R Act had been accomplished,[5] the authorization to develop such standards and procedures was not included.

4. In 1980, Congress enacted the Staggers Rail Act of 1980,[6] which retained the market dominance concept of the 4R Act but created a series of rising threshold rate levels below which lack of market dominance would be conclusively presumed.

5. In 1981, the ICC in Ex Parte No. 320 (Sub-No. 2)[7] made rules

1. 719 F.2d 772 (5th Cir. 1983) (en banc).

2. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified in scattered sections of 49 U.S.C.).

3. Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act Report, 353 I.C.C. 874 (1976) [hereinafter cited as Ex Parte No. 320].

4. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (codified in scattered sections of 49 U.S.C.).

5. *See Western*, 719 F.2d at 776 n.7. Though the repeal of the language in 1978 is thus recognized by the court, it appears to rely on it as the congressional "mandate" to the ICC in 1981, when it changed its view of geographic and product competition.

6. Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.).

7. Market Dominance Determinations and Consideration of Product Competition, 365 I.C.C. 118 (1981) [hereinafter cited as Ex Parte No. 320 (Sub-No. 2)].

altering its original definition of "market dominance" so as to include consideration of geographic and product competition.

## II. The Issue

First, consideration must be given to the manner in which the issue arises. A coal mine in the Powder River Basin must transport coal from its mine in Gillette, Wyoming to Cheyenne to reach various railroads connecting with its potential markets. The Burlington Northern Railroad owns and operates the only rail line between Gillette and Cheyenne. The coal, by the most direct route, might travel over Burlington Northern's lines to Fort Worth, or over the Santa Fe lines in a somewhat less direct route to Fort Worth. From Fort Worth on to San Antonio or Houston it might proceed over the lines of any one of several different railroads.

Assume that the shipper is a utility in Houston. Burlington Northern charges a rate which the utility considers excessive, and the utility files a complaint with the ICC, asking it to establish a "just and reasonable" rate. The premise on which the shipper bases its complaint is that Burlington Northern exercises market dominance over the transportation involved. The 4R Act of 1976, as amended by the Staggers Act of 1980, provides that where the rate is above a certain threshold figure and the railroad exercises market dominance, the ICC shall determine a rate which is just and reasonable.

The question raised in such a case is whether the Burlington Northern exercises market dominance in setting the rate. If so, the shipper is entitled to have the ICC review the rate and require that the railroad apply a just and reasonable one. If the railroad is not in a position of market dominance, it may set whatever rate it chooses and the ICC may not intervene.

An equitable resolution of the market dominance issue has troubled the ICC, the courts and Congress for at least a decade. Its resolution will have wide ramifications respecting the distribution and choice of the energy resources within the United States and will have pervasive impact on the nation's transportation policy. Ultimately, it may vitally affect the growth or retardation of industrial development throughout the country. Though the decision in *Western* meets the issue squarely, it does not deal with it in the historical depth and conceptual breadth that the matter deserves. Indeed, in the narrow ambit within which the majority of the court confine themselves, they are precluded from dealing with the issue comprehensively.

The central issues are: What is "market dominance" and what is that "effective competition" which eliminates it? "Market dominance" was defined in the 4R Act of 1976, as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to

which a rate applies."[8] This language remained intact[9] after passage of the amendments contained in the Staggers Act. The dispute between the majority of the court[10] and Judges Rubin and Reavley, who dissented, centered on the meaning of "market dominance." The latter two judges, who comprised the majority of the three judge panel which first heard the case,[11] contended that in order for there to be effective competition, there must be competition for the movement of essentially the same commodity from the general vicinity in which the transportation commences to the destination. The majority, on the other hand, held that the ICC may find "effective competition" from others "for the traffic or movement to which a rate applies" if there is geographic or product competition. Hence, there is no market dominance, and the Commission must decline jurisdiction.

The difference in positions may best be shown by exemplar: To use the hypothetical posed by Judge Brown in the panel decision, if the route in question is transportation of coal from the Powder River Basin in Wyoming to Chicago, and the coal purchaser could employ another avenue of traffic or movement from southern Illinois for the same kind of coal, that could constitute "effective competition from other carriers or modes of transportation for the traffic or movement to which a rate applies."[12]

The dissenting judges take the position that this does not constitute competition for that traffic or movement to which the rate applies, noting that the language of the statute does not embrace the concept of general market competition, but rather competition for the particular haulage. Thus, in the instant example, they argue that for there to be that "effective competition" which deprives the ICC of jurisdiction, there must be some other carrier to compete in transporting coal from the Powder River Basin area to the Chicago area.

The difference between the two interpretations has vast practical implications. To accept the court's interpretation is to open up a wide area of competition. The shipper would have to anticipate all such possibilities in order to be prepared to negate them and to show that the carrier had market dominance and is subject to ICC jurisdiction for the particular transportation involved. However, under the dissent's interpretation, the shipper need only show, for example, that Burlington Northern stands at the turnstile, controlling the movement of coal out of the Powder River Basin. Its burden of proving ICC jurisdiction to consider the reasonableness of the

8. Pub. L. No. 94-210, § 210, 90 Stat. 31, 35.

9. 49 U.S.C. § 10709(e) (Supp. V 1981).

10. Clark, C.J.; Brown, Politz, Tate, Johnson, Williams, Jolly and Higginbotham, J.J.; Gee, Randall and Garwood, J.J., recused themselves.

11. Western Coal Traffic League v. United States, 694 F.2d 378 (5th Cir. 1982).

12. *Id.* at 398.

rate is then clearly identified and the issue is narrowed to tangible and limited factors which can be meaningfully considered.

## III. ICC's Fluctuating Interpretations

The ICC emphasized these points in its original interpretation of the 4R Act in Ex Parte No. 320:

> After assessing the statutory language and considering the need for quickly identifying whether effective competition is present, we have concluded that the appropriate market is the market for transportation services which directly compete with the service outlined in the tariff under consideration. Limiting consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations for a short time period.[13]

The Commission rested its decision on an interpretation of the language of section 202 of the 4R Act. Even at that time contentions like those contained in Judge Brown's panel dissent (later adopted in principle by the court) were made by the railroads. However, the Commission rejected such arguments, holding that consideration of geographic and product competition in determining whether or not effective competition existed was not in accordance with the language, "traffic or movement to which the rate applies." The Commission said:

> The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word "movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage [on particular commodities] in a given territory.[14]

From this language it is apparent that the Commission was not merely choosing to accept jurisdiction within a range of permissive authority in which it could eschew jurisdiction. It was accepting the proposition that within the constraints of the language of the statute, it could not eschew jurisdiction on the basis of the existence of geographic or product competition.

Five years later, the Commission in Ex Parte No. 320 (Sub-No. 2)[15] concluded that its reading was unnecessarily restrictive in focusing only on direct carrier competition and ignoring the indirect competitive impact of geographic or product competition. Therefore, it established that there

13. Ex Parte No. 320, *supra* note 3, at 904.
14. *Id*. at 904-05.
15. *Supra* note 7.

were four major forms of competition affecting rail transportation: (1) competition by railroad with railroads; (2) competition with railroads by other forms of transportation; (3) geographic competition; and (4) product competition.[16] If there is competition in any of these respects, the Commission concluded, there is not that market dominance which is the threshold requirement for ICC review of the rate involved. The Commission did not make a reasoned decision on this issue until after the passage of the Staggers Act, and it based its authority in large measure on a comment concerning the ICC's flexibility in appraising effective competition contained in the Conference Committee Report on the Staggers Act.[17] The Fifth Circuit in *Western* also relies heavily on that language.[18]

In considering the following hypothetical situation it is easy to see how the ICC holding would apply. A Texas utility can get coal from Wyoming by the Burlington Northern, which controls 100% of the coal traffic from that state. It can also get coal from Montana by another railroad via another route. Under a cost-based rate determination, the rate offered by Burlington Northern to deliver Wyoming coal would be at 170% of variable cost. If coal were supplied from Montana, the cost would be much higher because of the greater distance. This rate, if applied to the Wyoming-Texas haul, would be 212% of variable cost. Burlington Northern is offering to haul the coal from Wyoming to Texas at 212% of variable cost, saying that such rate is affected by the competition of Montana coal. It therefore contends that there is effective competition which precludes ICC jurisdiction.

The Texas utility contends that a rate of 170% of variable cost is as much as should be reasonably levied, arguing that it should not be required to pay a rate at 212% of variable cost which can only be exacted because Burlington Northern has a complete monopoly out of the area where the coal originates. The ICC denies the utility's complaint, asserting that the Montana coal competition is effective to keep the rate no higher than 212% of variable cost.

## IV. The Court's Interpretation

Though the case stated above is hypothetical, the majority of the three judge panel in the initial determination of this case rejected such a contention:

> Competition for a movement of coal by rail from coal deposited in Wyoming to a utility company in Texas, for example, is created only if some other carrier is willing to move that product from the same origin to the same destination.[19]

16. *Id.* at 131.
17. *See infra* text accompanying notes 25-35.
18. *See infra* text accompanying notes 27-31.
19. *Western*, 694 F.2d at 390.

The court reversed the panel and supported the theory of the ICC in Ex Parte 320 (Sub-No. 2), with Judges Rubin and Reavley dissenting.

All judges, however, agreed that the language of the 4R Act governs the question of market dominance and that the Staggers Act did not change this governing language. Yet Judge Brown, in his dissent on the panel, had implied that the Staggers Act left the matter of reexamining geographic and product competition to the Commission. He treated the Conference Committee Report as reinstating the 4R Act's initial delegation of authority to develop standards and procedures relating to the term "market dominance."[20] This concept is carried on in the opinion of the court pursuant to the court's consideration *en banc*, although the concept is never clearly articulated in Judge Johnson's opinion. He refers to the authority to develop standards and procedures as if it rests on the actual language of the 4R Act that was deleted.

Judge Johnson, writing for the majority of the court sitting *en banc*, recognized that "Congress . . . did not alter the market dominance statute enacted in the 4-R Act"[21] but concluded that the ICC's statutory mandate is broad enough to permit it to use geographic or product competition as that "effective competition" which precludes market dominance and ICC regulation. Moreover, he broadly interpreted that statutory authority to render the fact that "the members of this Court might have construed the statute differently inconsequential."[22] He based his decision in part on the Conference Committee Report on the Staggers Act, noting that:

> [T]he Staggers Act reflects a reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determination. The Conference Commission [sic] Report specifically stated that Congress' action was "not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases." . . .[23] This is particularly significant, since Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated.[24]

The citation of the Report is correct if it means that Congress' action in passing the Staggers Act was "not intended in any way to restrict the ability of the Commission to apply" the concept of market dominance as defined in the 4R Act. However, the analysis reaches too far when it considers this language as permitting the Commission to apply the concept of effective

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20. *Western*, 694 F.2d at 397.

21. *Western*, 719 F.2d at 777.

22. *Id*. *See also infra* text accompanying notes 49-63.

23. It should be noted that neither the Report nor anything related to the text or the history of the Staggers Act purported to reinstate the provisions of the 4R Act (§ 202(b)) referring to "standards and procedures." (Footnote added).

24. *Western*, 719 F.2d at 779-80 (citations omitted).

competition in a way not restricted to such competition for the traffic or movement involved.

The court's latter interpretation confuses the Commission's authority to establish standards and procedures which carry out the mandate of the 4R Act with the Commission's authority to establish its own mandate under the guise of rule-making. The Commission cannot make a rule contrary to its legislative mandate on grounds that this is the best way to meet "the practical realities of day-to-day regulation." The purport of Judge Johnson's reasoning is that it not only can do so, but that it has statutory authority to establish the standards and procedures for the "construction of its statutory authority" under section 202(b) of the 4R Act, which authority had been repealed at the time Ex Parte No. 320 (Sub-No. 2) was adopted.

## V. THE CONFERENCE COMMITTEE REPORT[25]

The importance of the language in the Conference Committee Report is greatly over-emphasized. The only reason for discussing it at length here is to show that it cannot be considered an express delegation by Congress of authority which would place this case under the rule in *Batterton v. Francis*,[26] which holds that a court has no congressional authority to disturb agency action taken pursuant to express delegation.

By its very nature, Report language cannot be taken as express delegation of authority by Congress. It is the work of staffers, not house members. It is necessary to give attention to the Report beyond what is merited only because it is the basis of the ICC's decision in Ex Parte No. 320 (Sub-No. 2) and is relied upon so heavily by the court in justifying the Commission's broadened view of that competition which negates market dominance.[27]

### A. *THE REPORT'S LANGUAGE INTERPRETED*

The most significant language in the Report is in its first sentences: "The definition of market dominance under existing law has not been altered by the substitute, and it is not intended that there be any change in the meaning of the term . . . ."[28] The explanation might well have stopped there because any further reference to "effective competition" must be considered as restricted under the 4R Act to competition for the

25. H.R. REP. NO. 1430, 96th Cong., 2d Sess. 88, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4110 [hereinafter cited as HOUSE REPORT].

26. 432 U.S. 416 (1977).

27. Thus, the interpretation in Judge Johnson's opinion is one in the third degree: It is an interpretation of the Conference Report's interpretation of the Staggers Act's interpretation of the 4R Act. Judge Rubin's opinion simply interprets the 4R Act.

28. HOUSE REPORT, *supra* note 25, at 4120.

traffic or movement involved. The sentence upon which Judge Brown heavily relied reads:

> In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the Conferees intend that *whenever there is effective competition* . . ., such competition should continue to function as the regulator of the rate rather than the Commission.[29]

Judge Brown reads this section as if the term "effective competition" could be disjointed from the restricting terms of the 4R Act which follow—as if it were competition of any nature so long as it affects the rate. But this interpretation ignores the sentence in the Report that disavows any change in the meaning of the term.

Judge Johnson rests his view that the Staggers Act reflects a reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determinations on the succeeding sentence in the Report:

> Maintenance of the "market dominance" standard is *not intended in any way to restrict the ability of the Commission to apply this concept*, both in its regulations and individual cases.[30]

But what is this "concept"? It is the concept of effective competition as used and restricted in the 4R Act. It is not a concept of roving authority granted to the Commission to expand the term to include any competition by traffic or movement, or any product obtained from another place.[31] Most importantly, since the language is clearly subject to this interpretation it cannot be taken to be an express authority granted to the Commission to define its own scope of authority under the Interstate Commerce Act.

That the conferees intended "that whenever there is effective competition, such competition should continue to function as the regulator of the rate rather than the Commission" is not in dispute by any party, but it does not answer the question: What is effective competition? The answer to that question must be found in the 4R Act itself. As all agree, "it is not intended

29. *Id.*, *quoted in Western*, 694 F.2d at 398 (Brown, J., dissenting) (emphasis added).

30. HOUSE REPORT, supra note 25, at 4120 (emphasis added).

31. One difficulty with permitting product competition to be used to oust ICC jurisdiction is that, though that competition may give an option to the *purchaser* of coal, it does not make the railroad any less dominant over the supplier of coal.

Suppose one of a dozen coal mines is a captive shipper to Burlington Northern Railroad respecting its shipment of coal out of the Powder River Basin to Houston. But suppose the utility in Houston that has contracted for the coal could use foreign oil, and the rail rate demanded is raised to what the market will bear up to a relatively high price for foreign oil at the Port of Houston.

The Burlington Northern may not have a monopoly as supplier of fuel to the Houston utility, but it is in a monopoly position as hauler of coal from the mine. The cost to the utility is the sum of the fuel cost plus the transportation cost, and the railroad's monopoly position will permit it to take the lion's share of the total price of the product at the point of delivery. The railroad can bid down the fuel cost because there are eleven more mines competing to sell their product, but there is only one railroad to move it out of the Basin.

that there be any change of the meaning of [market dominance]" as used in that Act. Therefore, there is not only no intent in the Staggers Act to "restrict the ability of the Commission to apply this concept" but no intent to enlarge it.

Judge Johnson attempts to enlarge it by construing the language beyond its stated meaning, as reflecting some reinforced intent of Congress to expand ICC authority beyond the plain language of the 4R Act. There was, however, never such an intent.

### *B. Weight and Credibility to be Attributed to Report Language*

A conference report should be treated by a court as a useful summary of the bill as it has come out of conference. Unlike the colloquy on the floor and the treatment of amendments offered there and in committee, it is not the direct expression of members, countered and disputed in open debate. It is the impression of staffers as to what has occurred in conference and an attempt by them to cull from this action the intent of the conferees. It cannot be taken as an expression by members of the conference of their intent, because it is usually hurriedly written and seldom perused by a conferee (other than possibly the House and Senate chairmen) before it is printed and circulated on the floor. The conference report involved here is typical, except that it was prepared under greater than ordinary pressure and under conditions of greater than ordinary secrecy.[32]

Of course, conference reports can be useful charts and records of the interplay of ideas which emerge in the conference discussion of issues. Their usefulness in this respect is proportionate to the time spent in conference and the depth of those discussions. In this case, there were no such discussions with a quorum of members assembled.

The conference on the Staggers Act was called on September 4, 1980. It lasted for exactly nineteen minutes. Senators Cannon and Packwood and six of the House conferees were present. Without discussion with the House conferees, Mr. Florio, Chairman for the House conferees, announced that they had reached an agreement and that the staff would prepare a draft of it. Senator Cannon confirmed the Senate's agreement, with the reservation that members would have the opportunity to review the final bill and the report before these were filed.

The final language of the legislation and report did not exist at that time. It was prepared in the four days between the meeting and the time the report was presented on the floor. The only draft that was available later that day was an instrument containing many variations from the lan-

32. Members of the Conference Committee were not even permitted to know the number of the room the compilers of the Report were working in.

guage of either the House or the Senate versions.[33] In the four intervening days before adoption of the Report, some of these changes were corrected to conform with either the position of the House or Senate, or what was deemed appropriate by the staff as a compromise between the two bodies.[34] All of this was done without reconvening the conference or checking the changes with its members, and the hastily prepared report was available to conferees and other members only on the date of enactment in the House and after it was printed. On September 29, 1980, the day the Conference Report was voted on by the House, the only accurate rendition of the report, as it was acted upon on that day, was on the Speaker's desk.[35]

## VI. Legislative History of the Staggers Act

It would not seem necessary, given the clear mandate of the 4R Act—that the ICC shall exercise its jurisdiction if there is no effective competition for the movement involved—to explore the legislative history of the Staggers Act. The ICC has so heavily leaned on a scintilla of evidence from this history, (i.e., the Conference Report language), and the court, also relying

33. The author was one of the House conferees on the Conference Committee and can personally attest to the fact that the conference was concluded while he and most of the House conferees were necessarily away from the conference during and immediately after a vote on the House floor. There also was no instrument purporting to be the language of the agreement available to conferees until *after* adjournment of the conference.

34. *See* 126 Cong. Rec. 27,472-74 (1980); 126 Cong. Rec. 27,859-900 (1980).

35. The report which was printed and made available to the members at the time they approved the report (which, in accurate form had been printed in the Congressional Record and was on the speakers desk) materially misstated the content of the governing document. The official report on the Speaker's desk and printed in the record read: "The Conferees do not intend that the Commission alter the jurisdictional threshold by reducing *or increasing* the items which will be considered as part of variable cost." The italicized phrase was erroneously omitted from the print circulated as House Report No. 1430.

The altered language carries the implication that the Commission may make the jurisdictional threshold more restrictive by *increasing* the items considered but not less so by *reducing* them. The official report makes it clear that the Commission may neither reduce nor *increase* the items which will be considered part of variable cost.

It should be noted that the language of the official report on this point is balanced and consonant with the changes made in floor amendments, which tended to restrict the Commission's scope for curtailing its own jurisdiction. To change it in the manner of the erroneous print would tend to move the legislation back to the form in which it left the House Committee. If the omission was accidental, it reflects lack of deliberation; if intentional, a fraudulent intent of someone acting behind the scenes to slant the interpretation of the agreed upon compromise back to the original subcommittee position which had been altered by House floor action. Materials hastily assembled in a report after a virtually nonexistent conference between the House and Senate are weak reeds for a court to lean on in divining legislative intent. They are typically drawn by staffers with a natural bias for interpreting the bill in a manner favorable to the form in which it left the committee or subcommittee where they had worked on it—not as it came to conference from the House and Senate.

Yet the altered view of the ICC in Ex Parte No. 320 (Sub-No. 2) relies on three sentences of the Report discussed in the preceding section and the court gives controlling weight to the ICC's erroneous interpretation of them.

on this, has come to a conclusion so contrary to the legislative history, that an analysis is necessary to rebut the interpretation given to it by the Report.

As discussed, the court recognizes that it is the language of the 4R Act that governs market dominance. Yet Judge Johnson, pointing to the Conference Report, asserts that it "is particularly significant, since Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated."[36] Indeed, Congress was well aware of it, but the dominant assumption that colored the debate was that the Rail Act would have to be changed if "effective competition" were to embrace geographic and product competition. The Department of Transportation was calling for a change in the statutory definition of market dominance. It proposed to substitute two new jurisdictional tests for the market dominance criterion set forth in the 4R Act. One would establish a quite high cost recovery ratio for rail traffic below which the ICC would not have jurisdiction; the other would provide that carrier rates could be whatever the carrier could obtain if effective competition existed under a broadened definition of that term.[37]

In the administration bill "effective competition" would be present where there exists an "actual or present potential transportation alternative . . . for the particular transportation to which the rate applies." Furthermore, effective competition would be deemed to exist if "the consignee is able to obtain the same commodity in sufficient quantities from another source at a delivered cost which is not substantially greater than the cost of the rail transported commodity."[38] The administration bill also struck out the key words in the 4R Act, "for the traffic or movement to which the rate applies," then substituted for them the words "with respect to the transportation to which the challenged rate applies." But the administration bill supporters recognized that there could be instances in which, if legislative standards were not laid out, railroads could seize upon an inordinately high rate in an isolated and exceptional situation to exercise a monopoly squeeze, when in fact there was no effective competition. Thus, if a carrier could avoid regulation by merely pointing to a shipment of coal from some remote point at a higher rate than that demanded by the carrier for the particular haul, the railroad would be free to exact anything up to that rate. Therefore, the Florio approach required a showing that "comparable traffic has been shipped recently in similar quantities"[39] over the route.

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36. *Western*, 719 F.2d at 780.

37. These changes were incorporated into the Rail Act of 1980, H.R. 7235, 96th Cong., 2d Sess. (1980).

38. *See id.* § 202 (containing proposed amendment to 49 U.S.C. § 10709). *See also* H.R. REP. No. 1035, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 4000-01.

39. Rail Act of 1980, supra note 37, at § 202.

Thus, even the railroad faction supporting the administration bill was not seeking to displace ICC jurisdiction with altogether standardless authority. Such baseless authority was seized upon by the Commission in Ex Parte No. 320 (Sub-No. 2) and condoned by the Fifth Circuit upon a rationale that it cannot look into the reasonableness of such a construction because Congress has granted only the Commission that authority. But the exercise of such unlimited authority was not one of the options considered in the course of passage of the Staggers Act.

On the other side of the debate was the shipper faction, which had consistently contended that the *Coleto Creek* case[40] misinterpreted the jurisdictional standard of the 4R Act. This group's leadership was centered in the Subcommittee on Oversight and Investigation of House Interstate and Foreign Commerce, and its position had been enunciated in early 1980 by a Committee Print[41] issued by the Subcommittee. Its position was there stated as follows:

> The Subcommittee finds that the ICC's implementation of these market dominance regulations in coal rate cases *during the 1977-1979* period comports with the mandate of the 4-R Act. The agency exercised its rate review authority in cases where *direct* competition was extremely limited or nonexistent. The Commission acted forcefully to issue findings of market dominance where long-term coal supply contracts foreclosed use of alternative carriers and modes.[42]

Judge Brown, referring to the Committee Print, said in his dissent in the panel decision that the Subcommittee praised the ICC's treatment of market dominance.[43] But it praised the ICC's treatment of market dominance as it was applied *before* the *Coleto Creek* case. Thus, the Print takes the opposite viewpoint from that for which it is cited. It condemns the departure of the ICC from traditional rulemaking procedures on ground that the new approach subsidizes the railroad's operations in competitive markets. The Print states:

> Rate increases approved by the ICC greatly exceed those which would have been deemed reasonable under traditional ICC ratemaking standards. . . . From 1977 to 1979, the ICC justified extraordinary coal rate increases primarily on interpretations of Section 205 of the 4-R Act which are arbitrary, unworkable and *inconsistent with congressional directives* . . . . The ICC has applied its interpretation of Section 205 so that coal shippers subsidize non-coal traffic. The agency's theory is that coal revenue should subsidize a carrier's operations in competitive markets. Since the 4-R Act deregulates rates in competitive markets, a policy to insulate a carrier from the discipline of ef-

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40. Incentive Rates on Coal — Axial, CO, to Coleto Creek, TX, 362 I.C.C. 572 (1980).

41. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 2D SESS., REPORT ON RAILROAD COAL RATES AND PUBLIC PARTICIPATION: OVERSIGHT OF ICC DECISIONMAKING (Comm. Print 1980) [hereinafter cited as IFC Print].

42. *Id.* at 44 (emphasis added).

43. *Western*, 694 F.2d at 395 n.3 (Brown, J., dissenting).

fective competition *is contrary to congressional intent* . . . .[44]

Thus, the shipper side always took the position that the 4R Act applied the definition of market dominance that excluded geographic and market competition from consideration as effective competition for the movement involved. The railroad side did not insist that the ICC already had authority to recognize geographic and product competition, but rather that it should have such authority, and, of course, their bill would have granted it.

### A. The Resolution of House Differences

After extensive debate, a compromise was struck in the Staggers-Rahall substitute which supplanted the earlier amendment[45] and became the pertinent part of the enacted bill. The substitute abandoned the immediate application of the cost recovery percentage. Also, it accepted the Eckhardt-Rahall proposal presuming no market dominance for rates less than 160%, but only through September 30, 1981. It moved the threshold upward five percentage points on October 1, 1981, and another five percentage points on October 1, 1982. Then, from October 1, 1983, through September 30, 1984, the threshold figure was to move to the lesser of 175% of variable cost or the cost recovery percentage. After October 1, 1984, the cost recovery percentage was to be used to determine the ICC's jurisdictional threshold with the qualification that it be not more than 180% nor less than 170% of variable cost.

In the final resolution of the dispute, the House dealt with this issue of geographic and product competition in a rational way. It excluded its use as a jurisdictional barrier, and provided in § 205 that the Commission should commence a proceeding to determine whether, and to what extent, geographic and market competition should be used in determining rate reasonableness. But it expressly excluded consideration of this language (permitting consideration of geographic and product competition) in defining the term "market dominance."[46]

The fact that Congress provided this flexibility in the realm of rate reasonableness clearly shows that it did not desire to open the door for the Commission to construe its jurisdictional scope, and it made this clear in explicit terms.[47] To permit the consideration of geographic and product

44. IFC Print, *supra* note 41, at 3 (emphasis added).

45. It did not, however, restore the stricken language referred to *supra*.

46. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 205, 94 Stat. 1895, 1905-06 (set forth in historical note to 49 U.S.C. § 10701a (Supp. V 1981).

47. § 205 provides in subsection (3)(B):

> Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance," as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term

competition as jurisdictional barriers would not have merely introduced this factor in determining rate reasonableness, but would have precluded weighing against it the desirability of having railroad competition for the traffic movement to which the rate applied.

Thus, the House, and ultimately Congress, acted in an even-handed way; providing such flexibility to the Commission as Congress chose, but without, as the court erroneously held, giving the Commission a mandate to construct its own area of authority. That area, if there be doubt about it, remains to be construed by the court under the language of the statute, not by the ICC. Congress did not leave the determination of market dominance to conjecture in a committee report; on the contrary, it made the determinations legislatively in the provisions codified as section 10709 of the Interstate Commerce Act. These contain both the market dominance provisions of the 4R Act and the provisions of section 202 of the Staggers Act.

These provisions, and the history that surrounds them, demonstrate that Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated, and it dealt with the matter in the final configuration of section 10709. But Congress did not choose to ratify the ICC's intent to treat these factors as determinations of market dominance. It chose to treat them as being permissible considerations in determining rate reasonableness. The courts should construe the Act in accordance with the intent of Congress so expressed in the language of the Act and in the language of those who actually engaged in its formulation.

### B. *The Intent of Congress as Reflected by Action and Statements on the Floor*

The important point, for purposes of this discussion, is that all the language supportive of geographic or product competition as an element in determining market dominance remained stricken. Thus, the 4R Act's treatment of market dominance continued intact. The disputants had settled their differences by dealing with the rate-level jurisdictional threshold and by leaving the market dominance jurisdictional threshold as it had been traditionally interpreted.

The most important single expression in the course of this legislative history is the statement of Representative Rahall, who had been active during the floor debate and had been a party to all the main amendments on this issue. He had just co-authored the amendment which struck the compromise between shippers and railroads; this dispute had been so heated

"market dominance" or whether there is market dominance over the transportation to which any particular rate applies.
49 U.S.C. § 10701a (Supp. V 1981).

that Chairman Florio suspended the bill until a compromise had been reached. Representative Rahall stated:

> This compromise amendment today is not undoing what the original Eckhardt-Rahall amendment accomplished. . . . It will assure that the Interstate Commerce Commission does not proceed headlong into deregulation without guidelines and without a bill from the Congress . . .[48]

It should be noted that Mr. Rahall was at that time working on the team with Subcommittee Chairman Florio and full Committee Chairman Staggers and was in complete accord with them. There is nothing in the record that indicates any contradiction or contrary viewpoint. The bill as so amended became law largely as it was compromised in the House.

The statement of legislative intent of Congressman Rahall is far more credible (because of its source, the fact that it was made on the floor, and that it stood without contradiction), than the staffer's statement so heavily relied upon by the ICC and the court. It encapsulates the situation which existed and is confirmed by all the legislative history.

There were two well understood options on the floor: (1) To retain the market dominance standard as it had been enunciated in Ex Parte No. 320 as having the effect that its language spontaneously yields; or (2) to change it to a clearly enunciated authority permitting consideration of geographic and market competition under guidelines. Congress chose the former course, since no one even proposed consideration of geographic and market competition without guidelines. Nevertheless, the ICC has proceeded "headlong into deregulation without guidelines," a course which Representative Rahall assured would not be sanctioned. The court in *Western Coal Traffic League* has sanctioned it on the basis that it can do nothing else, the Congress having willed it so. The Rahall statement accurately reflects the actions and intent of the framers of the Act as being precisely to the contrary.

## VII. THE COURT'S ARGUMENT THAT "WE MUST DEFER TO THE AGENCY'S DETERMINATION"

It is clear that the court should have construed the legislation as deciding the question against treating geographic and product competition as competition which precludes market dominance. The court, however, decided that Congress had not given it that option; that only the ICC was empowered to establish a "construction of its statutory authority" by virtue of certain language in section 202(b) of the 4R Act. It is the purpose of this section to show that such is not the case.

It is true, as the court says, that, in the 4R Act in 1976, "Congress not only expected but required the ICC to undertake the task of developing

48. 126 CONG. REC. 85,651 (1980).

'standards and procedures' for determining 'whether and when a [railroad] possesses market dominance.' "[49] That authority—of a type that is customarily provided in a statute to permit an agency to "set up housekeeping" under a new provision of law— was in effect on August 21, 1976, when the ICC established *Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976*.[50]

If, indeed, this authority, as delegated to the Commission by the 4R Act, permitted the broad leeway attributed to it by Judge Johnson, the Commission did not use the delegation to stray from the strict construction of the words "effective competition . . . for the traffic or movement to which the rate applies." Thus, it construed the Act as prohibiting it from stretching these words to include geographic and market competition.

Let us assume, *arguendo*, that the language in section 202(b) of the 4R Act, permitting the ICC to "establish, by rule, standards and procedures for determining . . . whether and when a carrier possesses market dominance," did authorize the ICC at that time to establish a "construction of its [own] statutory authority." This construction is unlikely, and the case that the court cited in support of its holding on this point, *Aberdeen & Rockfish Railroad v. United States*, is clearly distinguishable.[51] But even if it had done so, there was no such authority extant at the time the ICC (having failed in 1980 to attain such express authority in the 96th Congress) attempted in 1981 to enlarge its own authority to permit it to consider geographic and product competition as a jurisdictional barrier. By that time the language authorizing the development of standards and procedures to implement the 4R Act had been withdrawn. Since the Commission's activities

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49. *Western*, 719 F.2d at 778.

50. 353 I.C.C. 874, *modified*, 355 I.C.C. 12 (1976).

51. 682 F.2d 1092 (5th Cir. 1982). The exercise of authority by the ICC here is very different from that reviewed in *Aberdeen*, relied on by the court. There the ICC had required that, if a carrier desired to change rates in a tariff required to be posted, it must indicate the changes by use of uniform symbols: (R) to denote reductions; (A), increases; or (C), changes which result in neither. Failure to comply would permit claims for overcharges on grounds that the changed tariffs were unlawful, and such claims could be filed within the prescribed three year limitation period.

Upholding the authority, the court in that case held that the requirement did not raise "difficult issues of economic cost and common carrier responsibility," *id*. at 1098, and was within the ordinary regulatory authority of the agency. The court recognized, however, that "[s]tatutory construction normally raises only questions of law, which are freely reviewable *de novo* by the Courts." It further stated that the flexibility permitted under the facts of that case "does not permit us blithely to accommodate each new gloss placed by an agency upon its enabling legislation without troubling ourselves to inquire whether the revised interpretation, ruling or practice remains plausible within the authority conferred by statute." *Id*. at 1100.

In the instant case the "new gloss" was an interpretation of the agency's basic jurisdiction in the field of railroad regulation with the potential effect of moving the ICC out of that field even when a railroad has complete monopoly control of all railroad transportation out of a given area and when the movement of the goods is not feasible through any other mode of carriage.

under the new concepts had been fully established, Congress omitted this provision in its codification of the revised Interstate Commerce Act, enacted on October 13, 1978.[52]

This chronology has great significance because the rule in support of which *Batterton v. Francis*[53] is cited is therefore not applicable. It is that rule which underlies the court's holding that "we must defer to the agency's interpretation of the statute and affirm that interpretation if 'it has a reasonable basis in law.' "[54] The court assumed that, in 1981, the ICC continued to have authority to set standards and procedures under the terms of section 202(b) of the 4R Act, although the majority opinion recognizes that those terms had been repealed. At most, "authority" could be implied, but this is hardly a reasonable basis for finding express delegation to an agency. Therefore, the court was clearly wrong in deeming it "inconsequential" that "the members of this Court might have construed the statute differently."[55]

### A. Power Not Delegated to ICC to Determine Own Jurisdiction

*Batterton v. Francis* would only support the final court decision if Congress had delegated to the ICC the power to define market dominance more narrowly than would be reflected by a literal interpretation of the language of the 4R Act. It is doubtful that power was ever delegated to the ICC to determine in so broad a manner its own authority. It is certain that no such "expressly delegated" authority existed at the time the ICC decided Ex Parte No. 320 (Sub-No. 2).

Thus *Batterton v. Francis*, as applied to the facts of this case, stands for the rule which it ordinarily establishes as applicable when no such express delegation exists: "Ordinarily, administrative interpretations of statutory terms are given important but not controlling significance."[56] Thus, the court's decision that it could not apply its own judgment to this paramount issue in the transportation field— but must, per force, defer to the agency's interpretation—was not in compliance, but in conflict with the rule in *Batterton v. Francis*.

It is true, of course, that the ICC has the rulemaking power ordinarily implied in an agency's mandate and, within the scope of authority granted it by Congress, may fill in the interstices of the Interstate Commerce Act. But, as the Supreme Court said in *CAB v. Delta Air Lines*,[57] the Board "is en-

52. Act of Oct. 13, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (codified in scattered sections of 49 U.S.C.).
53. 432 U.S. 416 (1977).
54. *Western*, 719 F.2d at 777.
55. *Id*.
56. *Batterton*, 432 U.S. at 424.
57. 367 U.S. 316 (1961).

tirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do."[58] Unless Congress has expressly given to the agency the power to determine what "it can do," it is the court that has both the authority and duty to make that determination.[59]

It has been conclusively shown in previous sections of this article that the court should have taken the position on the market dominance issue that was taken by the panel and the two judges who were in the majority there and who dissented in the *en banc* decision. But there is yet a more powerful reason for the Supreme Court to grant certiorari in this case. The Court of Appeals for the Fifth Circuit, a strong and competent court, has erroneously deprived itself of independently interpreting the language of the Interstate Commerce Act defining the concept of market dominance. It has limited its consideration to whether the ICC's decision had "a reasonable basis in law," or was arbitrary or capricious.[60]

That the question did not fall in that narrow ambit of determination is amply supported by *Voklswagenwerk Aktiengesellschaft v. Federal Maritime Commission*.[61] In that case, as here, the question was one of construction of an agency's duty to accept responsibility under an act of Congress. The Court of Appeals for the District of Columbia had affirmed a holding of the Commission, restricting itself to determining only whether the Commission's ruling was supported by "substantial evidence." The Supreme Court reversed on the basis that "the issue relates not to the sufficiency of the evidence but to the construction of a statute," and holding that reviewing courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[62]

Thus, the Court in *Volkswagenwerk* considered the case on the merits and decided the proper interpretation to be placed on the statutory language involved. The *en banc* court, in rubber-stamping the ICC's altered view, made the mistake warned against in *American Shipbuilding Co. v.*

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58. *Id*. at 322.

59. The instant case is in the mold of Delta Airlines v. CAB, 543 F.2d 247 (D.C. Cir. 1976), distinguished in *Aberdeen*. There, while CAB had authority to require air carriers to transport certain cargo and to reject or suspend tariffs, the authorizing statute required a notice and hearing. The court held that the matter of whether CAB had complied with the statute is for it to decide and overturned the Board.

The *en banc* decision of the court also cites United States v. American Trucking Ass'n, 310 U.S. 534 (1940). But, although in that case the Court sustained agency action, it did so after considering and construing the statutory language, saying: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Id*. at 543.

60. *Western*, 719 F.2d at 777.

61. 390 U.S. 261 (1968).

62. *Id*. at 272 (citing NLRB v. Brown, 380 U.S. 278, 291 (1965)).

Transportation Law Journal, Vol. 13 [1983], Iss. 2, Art. 8


*NLRB*: "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ."[63]

## VIII. Summary and Conclusion

Congress, in the 4R Act, changed the rail regulation scheme from general regulation to specific regulation of only market dominated traffic. At the time, realizing that a sweeping change from the regulatory scheme which had existed for more than three quarters of a century was being established, it provided that the ICC should promptly establish standards and procedures by which the new concept should be put into effect. This did not mean that the Commission was granted specific authority to establish its own domain under the market dominance test as narrowly or as broadly as it wished. Standards are mechanisms within jurisdictional bounds, not bases for determining these bounds.

The ICC, acting under this authority, established the required machinery in Ex Parte No. 320. The statutory scheme having thus been completed, Congress adopted the revised Interstate Commerce Act in 1978, withdrawing the direction and standard-making authority. At this point the new framework of regulation under the Commerce Act was complete. The jurisdictional determinations which were fixed and intended to remain in place consisted of: (1) the statutory definition of market dominance, and (2) the general standards and directions established under Ex Parte No. 320, specifically delegated by section 202(b) of the 4R Act and impliedly approved by the revised Interstate Commerce Act of 1978. What remained for ICC administrative control was the application of these statutory definitions and standards to specific cases.

The proposed legislation that culminated in the 1980 Staggers Act did not suggest a change from the basic concept of deregulation of traffic where effective competition existed and regulation of traffic where there was none. But it did reopen—wider than the ICC could— the question of what competition should be considered effective.

Ultimately, the two sides of the debate in Congress came to a practical solution. Stated simply, their agreement was that "it is excellent [for a railroad] to have a giant's strength," but it is impermissible for it "to use it like a giant."[64] Thus, as long as the rate did not exceed established thresholds

63. 380 U.S. 300, 318 (1965).

64. Oh, it is excellent to have a giant's strength,
But it is tyrannous to use it like a giant.

W. Shakespeare, Measure for Measure, Act II, Sc. 2, 1.108.

https://digitalcommons.du.edu/tlj/vol13/iss2/8

presumed not to evidence the use of monopoly control—or, more accurately, not to evidence market dominance—the ICC would not interfere.

Congress was not able to reach agreement on a change from the market dominance standard in the 4R Act. The more complex and far-reaching concept of the "actual or present potential transportation alternative" test was rejected by adoption of the Eckhardt-Rahall amendment and later, the Rahall-Staggers substitute.

If Ex Parte No. 320 (Sub-No. 2) were to stand, the entire debate and compromise in Congress would come to naught. The result would be that the railroads would enjoy the advantages given them in the compromise that resulted in the Staggers Act, a safe harbor for rates below the applicable threshold. The shippers would be deprived of the advantage they obtained in the compromise—the continuation of the concept of market dominance, confined within the terms of the statutory definition and the workable standards of Ex Parte No. 320, as the jurisdictional basis for rate regulation.

Nothing could more powerfully demonstrate how great this deprivation for shippers would be if Ex Parte No. 320 (Sub-No. 2) were upheld than the ICC's recent decision in *Aluminum Association, Inc. v. Akron, Canton & Youngstown Railroad.*[65] This case held that the burden "is on the complainants to prove market dominance by demonstrating that there is an absence of effective competition for the traffic to which the challenged rates apply;"[66] second, that the parameters within which the ICC determines "effective competition" are so broad as to make its determinations practically standardless.

It is true that the burden of proof for market dominance has always been on the complainant, but that burden becomes much greater when the shipper is called upon to disprove effective competition for any product from any place. The basis upon which the court in the *Aluminum* case justifies acceptance of jurisdiction on all four of the "effective competition" tests, linked with the nimbleness and alacrity with which the Commission overturns the decisions on each of them, amply illustrates that, under the ICC's present test, it may decide either way under any conceivable set of facts in which market dominance would have ordinarily existed under the original Ex Parte No. 320. The fact that the burden of proof is placed upon the shipper makes a showing of market dominance impossible against the Commission's determined effort to throw into the equation every possibility of competition of any magnitude, from any place.[67]

65. 367 I.C.C. 475 (1983).

66. *Id.* at 480.

67. The *Aluminum* case includes product competition from abroad as a means of disproving market dominance, thus bringing in the same concept of geographic competition from overseas that was involved in its *Coleto Creek* decision. If such competition is to be considered at the

Even the House Commerce Committee, which had accepted the general theory of the administration bill, recognized that if the effective competition concept were to be broadened to include geographic and product competition, the burden would have to be shifted to the railroad side.[68] Congress never considered a third alternative, which would impose a jurisdictional requirement that a complainant prove a standardless negative.

The ICC's action in Ex Parte No. 320 (Sub-No. 2), if upheld, would permit the Commission to bow out completely from control of railroad rates, even when they reflect the most flagrant uses of monopoly power. The history and content of the 4R Act and the Staggers Act clearly show that Congress never intended that the railroad industry should come full circle from an Interstate Commerce Act designed to prevent railroad monopoly to one fashioned to protect it. Unless the Supreme Court grants certiorari in *Western Coal Traffic League v. United States*, this will be the inevitable result.**

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threshold in determining market dominance, the Loefler amendment, respecting coal, embraced in § 205(a)(2)(D) can have no effect. It provides that: "For the purpose of this section, any coal imported in the United States for the generation of electricity by utilities shall not be taken into account in the determination of whether coal is available to a consignee from another source." Pub. L. No. 96-448, § 205, 94 Stat. 1895, 1906.

Since the exception is limited by its terms to § 205, and nothing in § 205 is "to be construed as altering the meaning, use or interpretation . . . of 'market dominance,' as defined in section 10709(a) of title 49, United States Code," *id.*, the Loefler amendment under the ICC's determination here would become meaningless. The ICC would never get to the determination of rate reasonableness (in which it is denied consideration of foreign coal competition) because it would have denied *jurisdiction* upon that very basis.

If it had been thought by those hammering out the terms of Title II of the Staggers Act that geographic competition was to be considered in the determination of market dominance under § 202 of the Act, clearly the Loefler amendment would have been added there. Mr. Loefler cannot be thought to have done a futile thing. The logical conclusion of members was that it was not necessary to so amend § 202 of the Act because the concept of market dominance was not affected under the 4R Act definition by the existence of geographic competition; therefore, it was not necessary to preclude foreign geographic competition.

68. On May 14, 1980, Mr. Eckhardt, in the mark up of H.R. 7235, offered a lengthy amendment aimed at elimination of the broader concept of effective competition embodied in the "actual or present potential transportation" test of the bill as it came from the Subcommittee on Transportation. It had been argued that such a broad concept made it virtually impossible for a shipper to sustain the burden of proving that there was no such transportation alternative, and the bill, as it emerged from the Subcommittee, placed the burden on the shipper. To counter this argument and to defeat the more extensive changes contained in the Eckhardt amendment, Mr. Madigan, a co-author of the bill, offered a substitute which changed the original language of the bill as it had come from the Subcommittee so as to shift the burden from the shipper to the carrier. Thus the original form resembled, in this respect, the result reached in the ICC's *Aluminum* case, but the Committee, by adopting the Madigan amendment, chose not to push the railroad advantage to the point to which the ICC has pushed it.

** *Ed.*: On April 23, 1984, the U.S. Supreme Court denied certiorari, 104 S. Ct. 2160 (1984).