Railroad—Motor Carrier Intermodal Ownership

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I. INTRODUCTION

This article explores the law of rail-motor intermodal ownership as it has evolved since the passage of the Motor Carrier Act of 1935.[1] Intermodal ownership signifies the operation of transportation services of two different transport modes[2] under single ownership or control, not merely intermodal operations in which two or more modes are utilized to perform a particular transportation service. Railroads are generally in favor of com-

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1. Pub. L. No. 255, 49 Stat. 543 (1935).
2. For example, railroads, motor carriers, water carriers, or air carriers.

mon ownership while motor carriers are almost uniformly opposed to it.[3] This is hardly a surprise. While the railroads' share of intercity freight traffic has been steadily decreasing since the late 1930's, the truckers' share has been steadily rising.[4]

Surprisingly, the national policy on this subject is based almost entirely on ideological argument and not on economic data.[5] The basic argument supporting national policy is a fear that if the railroads are allowed to own and operate subsidiary motor carriers, they will dominate the motor carrier industry.[6] This argument is expressed as follows:

> The immediate result of a change in the law to allow common ownership would be that competition for available motor and water traffic would be increased and intensified. Independent motor and water carriers, most of which are financially sound, might be able to withstand such competition for a time; but, eventually, the railroad parents' financial power would sharply reduce, and possibly completely eliminate, competition by independent motor and water carriers. . . .
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> Once a sharp reduction in competition by independent motor and water carriers had been achieved, the railroads could be expected to look to their ultimate objective which, because of their investment in rail plant, would be to get traffic which formerly moved by motor and water onto the rails.[7]
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> An embellishment of the monopoly argument is that if monopoly would not necessarily occur as a result of railroads being able to participate freely in highway carriage, it would come about by predatory tactics which might be expected from the railroads in the form of cutting truck rates in order to eliminate other truckers and subsequently increasing such rates or deteriorating service in order to force the highway business back to the railroads.[8]

Does this reflect unrealistic paranoia? Certain evidence suggests that it may not.[9] Some of the alleged evils said to result from a monopoly situation include price fixing, limitations on service, discriminations among ship-

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3. *See* Douglas, *The Economic Irrelevance of Common Ownership*, 36 I.C.C. PRAC. J. 1794 (1969).

4. Compare I.C.C. Annual Report statistics over the years.

5. *See* Douglas, *supra* note 3. *See also* Cherington & Schwartz, *The Common Ownership Issue From Political Ideology To A Practical Consideration of Benefits and Goals For Public Service*, 2 TRANSP. L.J. 1 (1970).

6. One commentator has turned the tables somewhat and argues: "Indeed, if the traffic trends established in 1966-1968 are projected to 1975, motor carrier acquisition of railroads, if 'common ownership' becomes legal, seems a more likely development than railroad purchase of truck lines." Douglas, *supra* note 3, at 1798.

7. Beardsley, *Integrated Ownership Of Transportation Companies And The Public Interest*, 31 GEO. WASH. L. REV. 85, 102 (1962).

8. Buland & Fuhrman, *Integrated Ownership: The Case For Removing Existing Restrictions On Common Ownership Of The Several Forms Of Transportation*, 31 GEO. WASH. L. REV. 156, 182-83 (1962).

9. See, *e.g.*, discussion in Fulda, *Rail-Motor Competition: Motor Carrier Operations By Railroads*, 54 NW. L. REV. 156, 206, 209 & nn.246 & 258 (1959). *See also* Beardsley, *supra* note 7, at 97-100.

pers, and obstructions of technological progress in the transportation field.[10] Observers have also expressed fear that independent truckers would be "driven" out of the motor carrier field.[11] Finally, antitrust policy discourages mergers of directly competing entities.[12]

On the other hand, observers advance a number of positive benefits to be achieved if intermodal ownership is allowed without restrictions. Some of these observations include: (1) rail-motor coordination simply will not increase until unified and unrestricted transportation companies exist;[13] (2) motor operations will increase the total profitability of rail lines needing increased profits in order to continue to successfully compete; and (3) centralized planning and operations would result in economies of scale and reduced personnel, management, and facilities, leading to reduced costs which would be passed on to the consumer in the form of lower rates. It is also argued that the trucking industry is no longer an infant industry requiring excessive protection from additional competition[14] and that it is impractical to hope for coordinated rail-motor service through voluntary cooperation between independent business units.[15]

Whatever the ideology or the argument, it is necessary to review the legislative history of particular provisions of the Motor Carrier Act to understand why the national policy against common ownership is restrictive.

II. Legislative History

The passage of section 213(a)(1) of the Motor Carrier Act of 1935[16]

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10. *See Common Ownership Of Intermodal Transportation: An Appraisal*, 27 U. Pitt. L. Rev. 85, 99 (1965).

11. *See* Hale & Hale, *Competition Or Control III: Motor Carriers*, 108 U. Pa. L. Rev. 775, 805 n.134 (1960).

12. This approach should not be taken to extremes.

> . . . . under the approach adopted in the antitrust laws, the creation of intermodal ownership patterns by direct investment rather than acquisition would not be barred, except and to the extent such investment monopolized or was used as a part of an attempt to monopolize a line of commerce. Whether intermodal ownership produced superior transportation service would be tested by the marketplace. As to merger, such intermodal ownership patterns as did not eliminate or prejudice competition would be permitted freely, those which do so would be prevented.

Pearce, *Common Ownership Of Transport Modes—Some Antitrust Policy Perspectives*, 2 Transp. L.J. 83, 91-92 (1970).

13. Some observers blame the railroads for this lack of coordination because of their reluctance to participate in joint rates with motor carriers. *See* Beardsley, *Restrictions Against Rail Entry Into Other Transportation Fields*, 24 Law & Contemp. Prob. 643 (1959); Fulda, *supra* note 9, at 208. Others chalk it up to the natural tendency of transportation competitors to want to "gain the greatest return for its share of the haul." *See* Buland & Fuhrman, *supra* note 8, at 185.

14. *See* Beardsley, *supra* note 7, at 93.

15. *See* Fulda, *supra* note 9, at 185.

16. 49 U.S.C. § 313(a)(1) (1935). This section permitted consolidation, merger, and acquisition of control upon Commission approval with, however, the following proviso:

> That if a carrier other than a motor carrier is an applicant, or any person which is con-

climaxed a series of developments going back to the early years of the twentieth century. Of course, the first truly modern form of transportation was railroading, and it dominated this early transportation scene.

> Railroads were early discovered to require exclusive control of the entire operation by a single management including control of the use of the traveled way. This was in contrast to road and water transport where a multiple control system could operate on a common way. Railroads thus became inherently a common carrier service, not easily dominated by any shipper or receiver of goods. This was because of the need for common operational control, plus the enormous capital requirements for a threshold into the business. . . .
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> Newer forms of modern transportation by water, pipeline, highway, and air lived in fear of the already established behemoth railroad industry. The railroad industry itself tended to look with disdain upon its newer and more puny rivals and either ignored the opportunities to get into the new transport enterprises or, if they did get in, took a rather restrictionist point of view, usually with the aim of limiting competition with the railroad.
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> In this way a political situation was created—the railroad and its supporters versus its newer competitors and their supporters. . . .[17]

Politics, then, led to the passage of the Panama Canal Act of 1912,[18] which prohibited rail ownership or control of water carriers except under certain defined circumstances. Its purpose was to protect the water transportation industry from rail domination. The underlying policy was expressed as follows: "The proper function of the railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition."[19]

The Commission picked up the ball and ran away with it. In *Lake Line Applications Under Panama Canal Act*,[20] the Commission eliminated the extensive rail ownership of water services on the Great Lakes. The rail companies had formed an association to operate boat lines for the benefit of the rail lines and had divided traffic and determined rates so that independent boat lines could not compete. They had temporarily reduced their rates to drive out independent boat lines. The Commission denied all rail applications to continue such water operations on the Great Lakes. Commenting on this Commission decision, a few observers deemed it to be

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trolled by such a carrier other than a motor carrier or affiliated therewith . . . the Commission shall not enter such an order, unless it finds that the transaction proposed will *promote* the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage *in its operations* and will not unduly restrain competition.

17. Cherington & Schwartz, *supra* note 5, at 2.

18. Pub. L. No. 337, 37 Stat. 566 (1912) (as amended); 49 U.S.C.A. § 5(14)-(16) (1959). This is now codified at 49 U.S.C. 11321 (Supp. II 1978).

19. H.R. REP. No. 423, 62d Cong., 2d Sess. 12 (1912).

20. Lake Line Applications Under Panama Canal Act, 33 I.C.C. 699 (1915) [hereinafter cited as Lake Line].

a political diatribe, abounding in rhetorical statements, and lacking the most elementary judicial or economic analysis of the problem presented:[21]

> In *Lake Line*, the Commission made no distinction between the use of Great Lakes shipping to destroy competition and the constructive use of it to improve transportation service. The end-to-end service of small railroads, such as the Lehigh Valley, was wiped out along with the parallel routes of other lines. The constructive work of the Pennsylvania in transforming an old obsolescent fleet into first class water service was eliminated, along with the most blatant anti-competitive "fighting ship" outfits. *Lake Line* was in reality a necktie party motivated by political rhetoric and nothing more. It not only eliminated rail control of Great Lakes shipping, it was probably the most important single event in the elimination of common carrier service on the Lakes. Certainly, the liberated forces of independent water lines did not respond after their unleashing by the ICC rhetoricians. By the 1930's the last common carrier on the Lakes of general cargo had disappeared.[22]

Political rhetoric had established its place in the national transportation policy. Yet, before 1935, no special restrictions upon rail control of motor carriers existed. In fact, in the 1920's and 1930's the railroads found that utilizing motor carriers was useful as a substitute for branch line rail service and for use in pickup and delivery. A few also employed motor carriage in linehaul service.[23] The Commission concluded that railroads should be specifically authorized to engage in motor carriage of both passengers and property over the public highways.[24] These conclusions were based on a mass of data accumulated by the Federal Coordinator of Transportation (I.C.C. Commissioner Eastman).

For example, after several months of hearings held in seventeen cities around the country, a Commission examiner recommended that "[r]ail carriers should be permitted the same opportunity to engage in motor vehicle operations and upon the same terms as any other corporation or individual."[25] Subsequently, the entire Commission adopted this recommendation saying:

> That railroads, whether steam or electric, and water carriers, subject to the act, should be specifically authorized to engage in the transportation of *both persons and property* by motor vehicles in interstate commerce over the public highways and that thereafter such service, when directly engaged in by any such rail or water carrier, should be subject to the provisions of the interstate commerce act and legislation supplemental thereto. . . .[26]

The Commission therein recomended participation of the railroads "on an

21. *See* Cherington & Schwartz, *supra* note 5, at 3.

22. *Id.*

23. Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928).

24. *Id.* at 745.

25. L. FLYNN, COORDINATION OF MOTOR TRANSPORTATION, S. DOC. NO. 43, 72d Cong., 1st Sess. 102 (1932).

26. Coordination of Motor Transp., 182 I.C.C. 263, 386 (1932).

equal basis with independent operators in the transportation of freight by motor truck"[27] since "unrestrained competition is an impossible solution."[28]

Later, however, Commissioner Eastman, commenting on a wider application of common ownership asserted:

> While railroads should be permitted to use trucks freely in connection with their rail service, there appears to be no present need for encouraging a movement toward the absorption by them of truck, bus, and water operations. Railroad credit conditions permit of no such movement at the present time, and a more or less independent development of the rival agencies is plainly desirable. It is possible that experience may later furnish occasion for changing this view, but that is a bridge that need not be crossed now.[29]

He also offered testimony before a Congressional committee that advocated greater utilization by the rails of motor operations in combination with, and not independent of, railroad service.[30]

These evolving views were based on conditions at the time immediately preceding passage of the Motor Carrier Act of 1935.[31] These views, plus continuing fears regarding rail domination of the motor carrier industry absent a restrictive policy, formed the basis for the language passed by the Congress in the proviso to section 213(a)(1) of the Motor Carrier Act of 1935.[32]

The legislative history of the proviso shows that it was intended to prevent rail monopoly over highway transportation while permitting railroads to utilize motor carriage in coordination with their own rail operations. For example, Senator Wheeler, the chief Senate spokesman for the legislation which became the 1935 Act, made it clear that unrestricted entry by railroads into the motor carrier field was not the intention of Congress. "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests."[33] Congressman Sadowski,

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27. *Id.* at 377.

28. *Id.* at 380.

29. *See* REGULATION OF TRANSPORTATION AGENCIES, S. DOC. NO. 152, 73d Cong., 2d Sess. app. E, at 35 (1934).

30. *Regulation of Interstate Motor Carriers: Hearings on H.R. 5262 and H.R. 6016 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 46 (1935).

31. *See* Nupp, Regulatory Standards In Common Ownership In Transportation, 34 I.C.C. PRAC. J. 21, 26 (1966).

32. *See* note 16 *supra*. *See also* Buland & Fuhrman, *supra* note 8, at 170 n.43.

33. 79 CONG. REC. 5655 (1935). Senator Wheeler makes further reference to the political propaganda that was carried on for the purpose of stirring up the belief that motor buses and trucks were going to be regulated in the interest of the railroad. *Id.* at 5656-57.

Chairman of a Subcommittee of the House Committee on Interstate and Foreign Commerce put it more bluntly:

> I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor carrier industry, that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation.[34]

The legislative history of the Motor Carrier Act demonstrates that it was the intent of Congress to restrict rail entry into the motor carrier field.

III. The Statute

The language of the proviso to section 213(a)(1) is general in nature. It fails to define how or in what manner any motor carrier operations would be used to public advantage by a rail carrier *in its operations*. The three words "in its operations," however, have been held to have a restrictive meaning.[35]

In contrast, there is no express restriction on railroads being authorized to engage in motor operations under *new certificates or permits* as distinguished from the *acquisition* of these operating authorities already in existence and held by other carriers. In fact, the provisions of sections 207 and 209 of the Motor Carrier Act of 1935[36] authorize the Commission to grant new certificates or permits to applicant carriers: (1) where they are found to be fit, willing, and able to properly perform the service proposed (as either a common or contract carrier) and to conform to the provisions of the Act and Commission regulations thereunder; and (2) where the applicant makes certain showings that its proposed service is or will (a) be required by the present or future public convenience and necessity (for common carriers), or (b) be consistent with the public interest and the national transportation policy declared in the Act (for contract carriers).[37] There are no restrictions in these sections determining what the Commission can or cannot do if the applicant for motor carrier authority is a railroad. Hence, a literal reading of the language of the statute would open the door to easy circumvention of the policy of the proviso to section 213(a)(1).

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34. 79 Cong. Rec. 12206, 12206, 12684-85 (1935). The weakness of the motor carrier industry in 1935 was highlighted in S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935):

> Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves.

35. *See* the discussion in the text encompassing notes 45 and 46 *infra*.

36. Now 49 U.S.C. §§ 10922-10923 (Supp. II 1978).

37. The National Transportation Policy is now found at 49 U.S.C. § 10101 (1980).

In 1938, an amendment was proposed to close this loophole between sections 213(a)(1) and 207 by inserting into section 207 the same language contained in the proviso.[38] The amendment was withdrawn after testimony by Commissioner Eastman that:

> [I]n administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of Section 213.[39]

Consequently, the general policy underlying the restrictive provisions of section 213 was to be applied to applications for new authority under sections 207 and 209, even though specific restrictions need not be. A healthy body of authority for this proposition has developed over the years from the Federal courts,[40] the Commission,[41] and the observations of leading commentators.[42]

IV. "Auxiliary and Supplemental" Doctrine

Recognizing Congress' strong general policy against railroad invasion of the motor carrier field, the Commission, in a series of early decisions, set forth certain basic conditions that non-motor carriers were required to meet in order to qualify for motor carrier authority. These were the first indications of the Commission's attempt to apply Congressional policy.

The first case, *Pennsylvania Truck Lines, Inc.—Control—Barker*,[43] involved a section 213 acquisition proceeding which established the "auxiliary and supplemental doctrine." Here, a rail subsidiary sought to acquire an independent motor carrier both to establish coordinated rail-motor operations and to provide independent motor carrier services unconnected with the railroad. The Commission had this to say:

> The proof is convincing that over some of the routes in question the railroad can "use service by motor vehicle to public advantage in its operations." The motor vehicle can undoubtedly be used as a very valuable auxiliary or

38. *See Hearings on S. 3606 Before Senate Subcomm. on Interstate Commerce*, 75th Cong., 3d Sess. 23-29 (1938).

39. *Id.* at 30.

40. *E.g.*, Auclair Transp., Inc. v. United States, 221 F. Supp. 328, 334-35 (D. Mass. 1963); American Trucking Ass'ns v. United States, 364 U.S. 1, 6-7 (1960); American Trucking Ass'ns v. United States, 355 U.S. 141, 149-50 (1957).

41. McCloud River Trucking Co.—Purchase—Zamboni, 101 M.C.C. 131, 135 (1966); Rock Island Motor Transit Co. Com. Car. Application, 63 M.C.C. 91, 100-101 (1954); Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, 473 (1946); St. Andrews Bay Transp. Co. Extension of Operations, 3 M.C.C. 711, 715 (1937).

42. Beardsley, *supra* note 7, at 94-95; Fulda, *supra* note 9, at 180; Guandolo, Intermodal Acquisitions Under The Interstate Commerce Act, 2 Transp. L.J. 11, 12 (1970); Hale & Hale, *supra* note 11, at 804 n.130.

43. 1 M.C.C. 101 (1936).

> adjunct to railroad service, particularly less-than-carload service. . . . Such coordination of rail and motor-vehicle operations should be encouraged. . . .
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> While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was convinced that this should be done. Truck service would not, in our judgement, have developed to the extraordinary extent to which it has developed if it had been under railroad control. . . .
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> . . . .
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> We have authority to approve the instant transaction upon such terms and conditions as we may find just and reasonable and with such modifications as we may prescribe. . . . The conditions . . . involve action on the part of the new company to divest itself of authority to conduct operations not auxiliary and supplementary to those of the railroad.[44]

In a subsequent phase of the same case, the Commission added:

> Approved operations are those which are auxiliary and supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.[45]

Thus, the "auxiliary and supplemental" doctrine emerged as the Commission's basic policy regarding acquisitions of motor carriers by railraods. These words are not found in the Act. They do, however, describe how the Commission interprets the section 213 statutory proviso language "enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage *in its operations*."

The earlier decisions following *Barker* only required restriction of the proposed auxiliary truck service, usually for less-than-carload freight, from or to points which are stations on the railroad, with a reservation of power to impose additional conditions if deemed necessary.[46] But the meaning of the phrase "auxiliary and supplementary" was hardly crystal clear.

In a series of Commission decisions, this concept was clarified. For instance, in *Texas & Pacific M. Transport Co. Common Carrier Application*,[47] the Commission defined the concept "auxiliary and supplemental" as limiting the *character* of service to be performed:

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44. *Id.* at 111-12.
45. Pennsylvania Truck Lines, Inc.—Control—Barker M. Freight, 5 M.C.C. 9, 11-12 (1937).
46. *See* Fulda, *supra* note 9, at 166, and n.55.
47. 41 M.C.C. 721 (1943).

> to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. . . . [This condition] permits all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading.[48]

The *Texas & Pacific* case further defined the concept as meaning that the motor carrier subsidiary of the railroad may not be a party to tariffs containing all motor local or all motor joint rates, precluding interlining with other motor carriers.[49] It must be substituted in lieu of, and be functionally related to, an existing rail operation conducted by the parent railroad.[50]

This is in opposition to the theory that the words "auxiliary and supplemental" might connote mere geographical limitations on service. It is clear that the phrase implies a limitation of function (type of trucking service) and not merely a geographical limitation (place where the service is performed).[51] The Commission's power to impose "auxiliary and supplemental" conditions has been confirmed in a number of Supreme Court opinions:[52]

> We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes, the Commission may require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service . . . . Such a restriction is a logical method to insure the maximum development of the two transportation agencies—rails and motors—as coordinate transportation services in accordance with [the National Transportation Policy].[53]

In 1940, Congress passed a new transportation act.[54] Under that act, section 213(a)(1), including the proviso, was re-enacted as section 5(2)(b) of the Interstate Commerce Act.[55] The new act narrowed the restrictions against common ownership so as to apply only to rail ownership of motor carriers, and it liberalized the language of the new section to enable the Commission to grant an acquisition application if it found the transaction to be "consistent with the public interest," rather than requiring that the transaction "promote" the public interest.

The Commission viewed these Congressional actions as supporting its

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48. *Id.* at 726.

49. *See* Santa Fe Trail Transp. Co.—Purchase—Meddock Truck Line, 87 M.C.C. 211 (1961); Burlington Truck Lines, Inc.—Purchase—Pirnie, 85 M.C.C. 363 n.2 (1960).

50. American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); Green Bay & W.R.R. Extension—Neenah, 91 M.C.C. 363 (1962).

51. American Trucking Ass'ns v. United States, 364 U.S. 1, 9 n.50 (1960); Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, 470-71 n.41 (1946).

52. *See* United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951); *see also* American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); American Trucking Ass'ns v. United States, 355 U.S. 141 (1957).

53. United States v. Rock Island Motor Transit Co., 340 U.S. 419, 430-31 n.52 (1951).

54. The Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898 (1940).

55. Now 49 U.S.C. § 11344(c) (Supp. II 1978).

previous interpretations of the necessity that motor operations be "auxiliary and supplementary" to rail service.

> [The National Transportation Policy made it] inconsistent with the public interest, and *a priori* something not required by the public convenience and necessity, for railroads directly or indirectly . . . to engage, except in special circumstances, in motor-carrier operations other than those auxiliary to, and supplemental of, their own train service and designed to be coordinated with train service to produce in effect a new and improved type of coordinated motor-rail service.[56]

V. "Auxiliary and Supplemental" Conditions

Having defined the type of motor operations to be performed by railroads, it is now necessary to examine the specific conditions imposed in acquisition cases under section 5(2) and operating authority applications under sections 207 or 209. As has already been stated, there is no language within sections 207 or 209 comparable to that contained in section 5(2)(b).[57] However, the general policy underlying the restrictive provisions of section 5(2)(b) was indeed applied to section 207 and 209 operating authority applications. The specific conditions which were often imposed on applications by rail carriers to conduct motor carrier operations were intended to ensure that such operations were auxiliary and supplementary to rail service, thereby preventing railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. The conditions attempt to prevent the dual competition of an all-motor service (operated by a railroad) in addition to the rail service itself.[58]

The five basic conditions imposed in acquisition and extension applications were enunciated in *Kansas City S. Transport Co., Common Carrier Application*.[59] These are:

> (1) The service to be performed by motor vehicle shall be limited to service which is auxiliary to, or supplemental of, the rail service [of the railroad],[60]
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> (2) The motor carrier shall not render any service to or from, or interchange traffic at any point [rail terminal area] not a station on a rail line of the railroad,

56. Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, 466 (1946).

57. *See* the discussion in the text encompassing notes 35-42 *supra*.

58. Burlington Truck Lines, Inc., Extension—Lemont, Ill., 94 M.C.C. 195 (1963); Burlington Truck Lines, Inc.—Purchase—Pirnie, 85 M.C.C. 363 (1960); Rock Island Motor Transit Co. Com. Car. Application, 63 M.C.C. 91 (1954); Kansas City S. Transp. Co., Inc., Com. Car. Application, 28 M.C.C. 5 (1941).

59. 28 M.C.C. 5 (1941).

60. As previously indicated, this condition limits the character of the service to be rendered and not merely the territorial scope of the service. "It is best illustrated by the substitution of trucks for peddler or way-freight service or station-to-station service. It requires that the traffic handled be that of the railroad, under rail responsibility to the public, and on rail billing and rail rates." Reading Transp. Co.—Control and Merger, 93 M.C.C. 11, 19 (1963).

(3) No shipments shall be transported by the applicant between any of the following points, or through or to or from more than one of the following points: [a list of the points follows],[61]

(4) All contractual arrangements between the applicant and the railway shall be reported to the Commission and shall be subject to revision, if it is found necessary, in order that such arrangements shall be fair and equitable to the parties,

(5) Such further specific conditions as the Commission may find it necessary to impose in the future in order to insure that the service shall be auxiliary to, or supplemental of, train service.[62]

These conditions are generally imposed today just as they were in 1941.[63] It may be argued that they are discretionary with the Commission as to whether they shall be imposed or not.[64] They certainly are discretionary in

61. This is the "key point" restriction. Key points are larger communities on the rail line. This restriction prohibits railroad controlled motor operations between such points, while still permitting those operations to and between smaller way stations. The purpose of the condition is to permit substituted truck service between major distribution (break-bulk) centers and smaller way stations, and between the way stations themselves, but preventing operations in competition with independent motor carriers on longer hauls. In lieu of the key point restriction, certain cases impose an "immediately prior or subsequent movement by rail" restriction. This restriction requires that shipments move partly by railroad and partly by motor vehicle. It is somewhat less liberal than the key point restriction since motor deliveries could not be made between way stations without a prior or subsequent movement by rail. In either form, however, the restriction supplements and insures the effectiveness of the "auxiliary and supplemental" concepts by insuring that the motor operations be performed on rail billing at rail rates and only between points served by the railroad. Illinois Cent. R.R., Ext.—New Orleans and Baton Rouge, 81 M.C.C. 83 (1959) and 83 M.C.C. 79 (1960). A full discussion of when the key point restriction is imposed or not and under what circumstances it may be removed can be found in Fulda, *supra* note 9, at 184-91.

62. The last condition was inserted as a precautionary measure at first. However, beginning with Frisco Transp. Co.—Purchase—Reddish, 35 M.C.C. 132 (1940), and continuing into the mid 1940's, this condition was not imposed in virtually all such cases. With this departure, carriers began to treat the restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the service which might be rendered by the railroad or its affiliate. The Commission began to reimpose the condition. This reservation of power is comparable to the equity practice of retaining jurisdiction after issuance of a final decision for the purpose of permitting reopening of the case if required by changed circumstances. *See* Fulda, *supra* note 9, at 167 n.58. The reservation has been upheld. *See* United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951).

63. *See* Western Pac. Transp. Co. Com. Car. Application, 126 M.C.C. 883 (1977).

64. At least the Commission believes that the "auxiliary and supplemental" conditions may or may not be imposed as are found appropriate under the circumstances of a particular case. *See* Santa Fe Trail Transp. Co.—Purchase—Meddock Truck Line, 87 M.C.C. 211, 213 n.49 (1961) (and cases cited therein). Specifically the Commission has asserted:

> The contention that we lack the power to approve a transaction such as this [a purchase under the proviso of section 5(2)(b)] without imposing the condition in question [the auxiliary and supplemental condition] is without merit. The proviso of section 5(2)(b) contains no such limitation; it merely provides that we may approve such a proposed transaction if we find that it "will be consistent with the public interest and will enable (the railroad) to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition. . . . Beginning with [the Barker decision,] a large number of rail-motor acquisition cases were approved, and in none was a condition imposed restricting the operating rights in the manner urged by ATA until *Southern Pac. Transp. Co.*—

application cases under sections 207 and 209 since only the general policy underlying the restrictive provisions of section 5 need be applied, not the specific restrictions.[65] In any case, the Commission recognizes that its duty

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Pur.—Trinity M. Frt. Lines, 40 M.C.C. 215 (1945). . . . Neither the *White Line* case nor the opinion of the Supreme Court affirming the order therein, *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419 (1951), indicates any such lack of power to approve a transaction under section 5 without such a restriction.

Burlington Truck Lines, Inc.—Purchase—Pirnie, 85 M.C.C. 363, 365-66 (1960). This position is somewhat precocious as well as being self justifying. The very purpose of the "auxiliary and supplementary" conditions was to effectuate the language contained in the proviso to section 5(2)(b) that the Commission is required to deny an application for *acquisition* of operating rights unless it finds that the transaction proposed will be consistent with the public interest by enabling the rail carrier to use service by motor vehicle to public advantage *in its operations* and will not unduly restrain competition. Additionally, merely because the Commission has failed to impose "auxiliary and supplemental" conditions in a section 5 acquisition case does not mean that the Commission holds such a power and merely because the Court decision is silent on a point does not mean that its silence indicates assent. In fact, a subsequent decision of the Supreme Court makes this very point:

> The appellants in Nos. 15 and 16, American Trucking Associations, Inc., and Railway Labor Executives' Association, urge us to hold that the Commission was without power to issue unconditioned certificates to appellee because of the requirements of §5(2)(b) and, therefore, the certificates issued to appellee were void. *We have not had occassion to rule definitively whether that Section states rigid requirements that operations of rail-affiliated motor carriers be auxiliary or supplementary to train service*. Cf. *American Trucking Ass'ns v. United States*, 355 U.S. 141, 78 S. Ct. 165, 169. As resolution of the question is unnecessary for the present decision, we intimate no position with regard to it.

American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 140 n.5 (1958) (emphasis added).

65. *See* notes 40 through 42 *supra*, and the text accompanying them. It can be argued that the language of the proviso "in its operations" coupled with the Commission's general policy of imposing "auxiliary and supplemental" restrictions in such cases makes the imposition of those restrictions *mandatory* in acquisition cases. The beleagured American Trucking Associations, in fact, made this contention in a series of Commission cases decided between 1960 and 1962. *See* Burlington Truck Lines, Inc.—Purchase—Pirnie, 85 M.C.C. 363 (1960); Santa Fe Trail Transp. Co.—Purchase—Meddock Truck Line, 87 M.C.C. 211 (1961); Rio Grande Motor Way, Inc.—Control & Merger, 87 M.C.C. 479 (1961), and 90 M.C.C. 643 (1962). A testy Commission reaffirmed its position for the last time:

> At the risk of being redundant, but in the interest of administrative finality, we reiterate that there is nothing in the statute which delimits us, in the proper exercise of our discretion, from approving a transaction such as this one either with or without restrictions, depending upon the particular circumstances involved. This subject was fully discussed in the *Pirnie* case, and a restatement of what was there said would be pointless.

90 M.C.C. at 648. What is the solution? A number of Supreme Court and Federal court decisions appear to provide an answer. Keeping in mind the difference between the provisions of sections 5 versus 207 and 209, a distinction is made between (1) insuring that the operations proposed will enable the railroad to use motor vehicle operations to public advantage in its operation and will, therefore, be "auxiliary and supplemental" of rail service versus (2) imposing the "auxiliary and supplemental" conditions. First, the Supreme Court implies that the provisions of section 5 (and consequently the auxiliary and supplementary conditions) are mandatory:

> Section 207, which defines the showing on which issuance of a certificate of public convenience and necessity is predicated, makes no reference to the phrase "service . . . in its operations" used in §5(2)(b), nor is there any language even suggesting a *mandatory* limitation to service which is auxiliary and supplementary. . . . (Italics added)

is only to carry out the statutory command, and not to legislate by the administrative process.[66]

VI. Special Circumstances

As with all principles of general applicability, certain defined exceptions arose. Early on, the Commission recognized that rigid application of its general policy of requiring auxiliary and supplemental operations would result in a number of transportation anomalies: lack of any service whatso-

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. . . .

We conclude, therefore, that the Congress did not intend the *rigid requirement* of §5(2)(b) to be considered as a limitation on certificates issued under §207 . . . .

We find no indications that the Commission has permitted the §207 proceedings in this case to be used as a device to evade §5(2)(b) restrictions.

American Trucking Ass'ns v. United States, 355 U.S. 141, 149-52 (1957) (emphasis added). Nowhere, however, does the Court specifically say here that the section 5(2)(b) restrictions *are* mandatory. In a later decision, the Court confirms Commission power to impose "auxiliary and supplementary" restrictions and states that to accomplish the Congressional purpose (to meet the conditions of the proviso to section 5(2)(b)) "the Commission can either state in the certificate the conditions necessary to provide the limitations or reserve the right to impose conditions should the necessity arise." American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 140-41 (1958). In the latest Supreme Court decision on this point, the distinction is finalized:

[T]his Court has confirmed the correctness of the Commission's conception of its responsiblities under both §5(2)(b) and §207 . . . . The Court has also taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in §5(2)(b) of the provisions of §213(a), after some of the pertinent Commission decisions had been specifically called to the Congress' attention . . . .

. . . .

The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so *characterized*, it is clear enough that there is compliance with the *mandate* of §5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage *in its operations*."

. . . .

But while the judicial and administrative current has run strongly in favor of auxiliary and supplemental *restrictions* on motor carrier subsidiaries of railroads, the Commission has determined, and this Court has agreed, that the public interest may sometimes be promoted by not imposing such limitations. A prime example is *American Trucking Ass'ns v. United States, supra*, where the trucking service was not being performed adequately by independent motor concerns. We there observed that the *mandatory provisons* of §5(2)(b) do not appear in §207, and approved the Commission's policy of not attaching auxiliary and supplemental *restrictions* where "special circumstances" prevail.

American Trucking Ass'ns v. United States, 364 U.S. 1, 6-11 (1959) (emphasis added). *See also* American Trucking Ass'ns, Inc. v. United States, 425 F. Supp. 903, 907 (D.C. Cir. 1975), *aff'd*, 425 U.S. 955 (1976) where the Commission decision not to impose "auxiliary and supplemental" conditions in a section 5 application was upheld.

66. Reading Transp. Co.—Control & Merger, 93 M.C.C. 11, 21 (1963). Unfortunately, the Commission did not let well enough alone. In Propane Transp., Inc.—Purchase—Propane Transp., 109 M.C.C. 384 (1970) the Commission had this to say:

[T]he requirement in section 5(2)(b) that the rail carrier show it can use the motor carrier service to public advantage in its rail operations is outdated by a continental United States. . . . Considering the circumstances here, we do not believe a finding is necessary that the rail carrier involved be able to use the motor carrier service of Propane, Calif., to advantage in its rail operations.

ever, resulting abandonments of rail service, or poor and inefficient service. To forestall any such problems, the Commission began to grant unrestricted authority to railroads to engage in motor vehicle operations.

The first inkling of a possible exception came in *Santa Fe Trail Stages, Inc.,—Control—Central Arizona*,[67] where the Commission granted an application to provide motor service not parallel or adjacent to the railroad. The Commission relied heavily on the fact that the proposed operation penetrated territory not served by other transportation agencies and was equivalent to the building by the railroad of a branch or feeder line into territory without service, and hence was an operation auxiliary and supplementary to its rail operations. In addition, no protest was filed against the application.

In a series of decisions since *Santa Fe*, it has been Commission policy to deny or restrict applications by railroads to conduct motor vehicle operations unless there are special circumstances which justify a grant without the usual "auxiliary and supplemental" restrictions.[68] This principle applies to both acquisition and extension applications.[69]

A specific showing must be made or a burden of proof must be met by applicants in both acquisition[70] and extension cases.[71] For acquisitions, applicant must first show that the proposed transaction would enable the railroad to use motor vehicle service to public advantage in its operations, and would not unduly restrain competition (the section 5(2)(b) proviso requirements). This is a necessary and preliminary inquiry which must be affirmatively resolved before the transaction can qualify for approval with or without restrictions, depending upon the "special or unusual circumstances" demonstrated. For extension applications, applicants must first

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67. 1 M.C.C. 225 (1936).

68. *E.g.*, Green Bay & W.R.R. Extension—Neenah, 91 M.C.C. 363 (1962); Rio Grande Motor Way, Inc.—Control & Merger, 87 M.C.C. 479 (1961) (and cases cited therein); Rock Island Motor Transit Co. Com. Car. Application, 63 M.C.C. 91 (1954); Texas & Pac. Motor Transp. Co. Ext.—Point Blue, La., 47 M.C.C. 425 (1947); Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457 (1946). Each case of this character must be decided according to the facts and circumstances disclosed by the evidence. 63 M.C.C. at 108.

69. Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, 473-74 (1946). The special circumstances doctrine has been upheld in the courts. *See* United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1960); American Trucking Ass'ns, Inc. v. United States, 425 F. Supp. 903 (D.C. Cir. 1975).

70. *Cf.* Reading Transp. Co.—Control & Merger, 93 M.C.C. 11, 18 n.66 (1963); Canadian Nat'l Transp.—Control—Husband Internat'l, 93 M.C.C. 80, 86 (1963). *See also* Northern Pac. Transp. Co.—Purchase—Stark, 90 M.C.C. 206 (1962); Rio Grande Motor Way, Inc.—Control & Merger, 87 M.C.C. 479 (1961); Burlington Truck Lines, Inc.—Purchase—Filbey Freight Lines, 85 M.C.C. 480 (1960).

71. *Cf.* Green Bay & W.R.R. Extension—Neenah, 91 M.C.C. 363 (1962); Northern Pac. Transp. Co., Ext.—Substitute Authority, 103 M.C.C. 68 (1966). *See also* Great N. Ry. Extension—Ex Rail Cement, 96 M.C.C. 699 (1964); Soo Line R.R. Extension—Barron, Wis., 94 M.C.C. 19 (1963).

show that the proposed transaction is or will be required by the requisite public convenience and necessity. This may be accomplished by demonstrating a need for the service through the testimony of public witnesses or by showing that certain operating economies, efficiencies or improvements in existing rail service would result. This must also be demonstrated before the operating authority to be granted can be issued with or without restrictions, depending on the "special or unusual circumstances" presented in the case.

This brings us to the question of what are the special circumstances which may cause the Commission to grant unrestricted authority in such cases. As already indicated, the proviso of section 5(2)(b) is not directly applicable in certificate application cases. Consequently, one would believe that the Commission has handled certificate cases with greater flexibility than acquisition cases. In fact, while the *number* of certificate applications granted without restriction is undoubtedly larger than the number of acquisition cases granted without restriction, the "unusual" circumstances accepted in application cases are few in number whereas acquisition cases appear to offer a more *varied* list of factual "special" circumstances.

The special circumstances policy for certificate (and permit) application cases was enumerated in *Rock Island Motor Transit Co. Common Carrier Application*.[72] There the Commission said:

> The main purpose for the policy of imposing the five [auxiliary and supplemental] restrictions . . . was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except when it suited their convenience.[73]

Consequently a great number of certificate cases can be found granting applications without the auxiliary and supplemental restrictions where existing service was either non-existent or where the existing carriers who held appropriate authority were failing to render the kind of service for which a public need had been demonstrated.[74]

On the other hand, acquisition cases possess a more varied rationale. Unrestricted applications under section 5 have been granted where (1) the

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72. 63 M.C.C. 91, 102 (1954).

73. *Id.* This language has been quoted in Great N. Ry. Extension—Ex Rail Cement, 96 M.C.C. 699, 705 n.71 (1964), and Green Bay & W.R.R. Ext.—Neenah, 91 M.C.C. 363, 365 n.68 (1962).

74. Consolidated Freightways Corp. of Del. Ext.—Phoenix, 108 M.C.C. 379 (1969). *See also* the cases cited in Fulda, *supra* note 9, at 195 n.196.

vendee is small and, therefore, not a threat to competition in the territory or where discontinuance of vendee's rail operations is threatened;[75] (2) the application is unopposed;[76] (3) no other transportation service is available or the particular type of service needed is unavailable;[77] (4) there were long delays, circuitous routes, or other inefficiencies in existing service;[78] (5) the area to be served is sparsely settled;[79] or (6) the rights to be acquired duplicate, to a certain extent, rights already held but which are not now restricted.[80]

Certain other situations have been specifically found not to warrant "special circumstances" treatment: (1) where the Commission granted a permit without restriction, the Supreme Court held the decision to violate the policy of the Act since the Commission reasoned that by imposing the restrictions, it would force applicant into a common carrier status and no other special circumstances were demonstrated[81] and (2) where rail applicants have attempted to show "special circumstances" by showing a financial need to regain or retain the traffic.[82]

VII. Is Congressional Re-Examination Justified?

The Commission has charted a middle ground between two extremes: complete prohibition of railroad controlled motor operations versus complete freedom. Rail carriers have been permitted to enter the motor carrier field where the motor service is subordinate to rail service, thereby preventing rail domination of the motor carrier industry and preserving competition of modes within the transportation community.

While it may still be argued that genuine competition between railroads and independent motor carriers would be unlikely to outlive the elimination

75. *See* Louisville, N.A. & C.R.R.—Purchase—Meerman, 45 M.C.C. 6 (1946).

76. *See* Burlington Truck Lines, Inc., Extension—Lemont, Ill., 94 M.C.C. 195 (1963); Burlington Truck Lines, Inc.—Purchase—Pirnie, 85 M.C.C. 363 (1960). *See also* New York Cent. Transp. Co. Ext.—Oakbrook, Ill., 99 M.C.C. 94 (1965); Burlington Truck Lines, Inc.—Purchase—Filbey Freight Lines, 85 M.C.C. 480 (1960).

77. *See* Santa Fe Trail Transp. Co.—Purchase—Lang and Givens, 70 M.C.C. 773 (1957), and 75 M.C.C. 385 (1958); Burlington Truck Lines, Inc.—Purchase—Coffey, 70 M.C.C. 385 (1957); Pacific Motor Trucking Co.—Purchase—Lowinel Trucking Co., 60 M.C.C. 373 (1954). *But see* Canadian Nat'l Transp.—Control—Husband Internat'l, 93 M.C.C. 80 (1963), and Great N. Ry. Extension—Ex Rail Cement, 96 M.C.C. 699 (1964), where authority was denied because there was an abundance of available motor service.

78. Burlington Truck Lines, Inc.—Purchase—Hobby, 75 M.C.C. 322 (1958).

79. McCloud River Trucking Co.—Purchase—Zamboni, 101 M.C.C. 131 (1966); Santa Fe Trail Transp. Co.—Purchase—Brooks and Pitts, 70 M.C.C. 723 (1957).

80. Burlington Truck Lines, Inc.—Purchase—Love, 75 M.C.C. 258, 258, 603 (1958).

81. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 (1960). The Supreme Court there basically said that the Commission's reason for not imposing the restriction was insufficient justification for its action in awarding an unrestricted permit.

82. *See* Great N. Ry. Ext.—Ex—Rail Cement, 96 M.C.C. 699 (1964); Pennsylvania Truck Lines, Inc., Extension—Cement, 91 M.C.C. 167 (1962).

of the general policy against mixing the modes (a kind of economic segregation), and that general antitrust policies oppose horizontal integration of similar businesses, these arguments appear to be groundless. There is nothing in the present transporation system of the Nation to support any prediction that railroad monopolies would be the result of liberalizing the general statutory policy. In fact, most railroads are not in good enough financial shape to accomplish such a feat.

The restrictions on rail ownership of motor carriers were originally imposed, in part, to prevent the already established rail industry from inhibiting the development of a competitive mode. Since trucking is now a well established industry, this rationale would no longer appear valid. The trucking industry today has assumed the dominant position in the intercity freight hauling market, which in 1976 amounted to thirty-eight percent of intercity tonnage compared to twenty-nine percent for the rails. It is widely observed that the railroads are hardly in "robust" health.

Additionally, the antitrust policy should be no bar to a liberalizing of the general policy since that policy has both economic goals—efficiency, innovation, fair allocations of resources—and political and social goals—decentralization and non-concentration of economic, social, or political power in a few hands. Under antitrust policy, the marketplace would test whether intermodal ownership produced superior results. Any lessening of competition would be prevented, but those operations which did not lessen competition would be permitted.

Economic predictions of the results of liberalizing the general policy are neither definitive nor convincing. In fact, it is never possible to prove that another course would yield superior results. Unfortunately, economic studies of the matter are rarely flavored with mathematical proofs. To escape that trap, they often cover their tracks with economic rhetoric.[83] In fact, the only major observable effect of the debate surrounding the general policy against intermodal ownership appears to be the growing number of words devoted to the topic. Quite probably, a fair judgement of the opera-

83. Important as they may be, efficiencies claimed for common ownership are not of present interest since unexhausted coordinative economies are still independently available. The central concern is the effect which the basic policy of ownership separation may have on the market feasilibity of establishing coordinative arrangements. . . .

Some insights into the coordinative implications of common and separate ownership can be developed from the model of abstract requirements for effective coordination which was established. While some improvements in operating compatibility can be visualized from common ownership, these gains are limited by the fact that such problems arise from technological diversity itself. . . . The greatest promise of common ownership is probably in the realm of carrier behavioral patterns and market conduct which would profit from eliminating frictions arising from intermodal animosities and competitive-cooperative ambivalence.

Merrill Roberts and Associates, Intermodal Freight Transportation Coordination: Problems and Potential (Dec. 1966) (report prepared for the Under Secretary of Transportation, U.S. Department of Commerce).

tional and economic advantages of common ownership cannot be made until it is really tried.

What are those possible advantages? For one, the Supreme Court has recognized the probable gains in operating efficiency from unified management.[84] Absent Commission authority to compel coordinated operations, many observers have recognized the reluctance of competing modes to cooperate,[85] perhaps because of fear of losing revenues or business to the competing mode or perhaps out of a desire to "run their own shop." Consequently, if the only way to advance cooperation is through liberalizing the general restrictive policy, why not try it?

It has also been recognized that the general restrictive policy hampers railroad companies in the use of physical facilities, personnel, and capital in the development of their transportation capabilities to encompass services that the public may desire.[86] Consequently, common ownership might provide investment and management for newer transportation services by using the economic strength of existing transportation companies.

A third point to be made is that the general restrictive policy bars, to a certain degree, another avenue for rail profit opportunities. It may not be in the public interest to bar railroads from this profit opportunity. Observers have noted that:

> A true transportation company, making full use of all the tools of transport, can more closely approach a perfect transport system than present transportation companies separated by artificial lines. A true transportation company, combining all forms of transport under one ownership, would have a real opportunity to provide the kind of transport the public desires: economical, swift, and safe.[87]

If such companies are to be developed on a more extensive scale than at present, perhaps removal of the general restrictive policy is necessary. For railroads, obviously, common ownership of trucking companies presents interesting profit opportunities which would enable railroad companies to be financially sounder with a wider range of profitable services to offer. Liberalization of the policy could provide some assistance to railroads experiencing critical cash flow problems. For example, railroads could reduce high fixed costs by substituting short-distance motor carrier service for service now offered over "feeder" or branch lines which may be infrequently used but nonetheless expensive to maintain. Additionally, railroads could offset losses on rail operations under their common carrier duty by utilizing profitable motor operations.

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84. ICC v. Parker, 326 U.S. 60, 73 (1945).

85. *See* Beardsley, *supra* note 7, at 102; Buland & Fuhrman, *supra* note 8, at 185.

86. United States v. Rock Island Motor Transit Co., 340 U.S. 419, 443-44 (1951).

87. Buland and Fuhrman, *supra* note 8, at 185.

VIII. CONCLUSION

While some may argue that the question of common ownership is an economic issue,[88] realistically it must be viewed as essentially a political one. If the economic analysts were to have their way, we would go through another systematic investigation of costs, benefits, and alternatives, including examinations of market structures, and advantages and disadvantages of each alternative, ad infinitum. Perhaps it might be better for Congress to re-examine the question and put railroads on the same footing as other carriers. This would involve dropping the proviso in 49 U.S.C. § 11344(c), and perhaps altering the National Transportation Policy to provide for a greater consideration of energy concerns and operating efficiencies while giving less consideration to preserving the inherent advantages of each mode.[89]

The future should belong to the multi-modal transporation company, a firm capable of offering the public a variety of services at a variety of prices. It seems that only then could this nation have the type of coordinated transportation system it has been seeking.

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88. *See* Pearce, *supra* note 12, at 103; *Common Ownership of Intermodal Transportation—An Appraisal*, *supra* note 10, at 100-01.

89. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), recently made such changes. The new National Transportation Policy stresses competition and efficiency in transportation and eliminates the concept of protecting the inherent advantages of each mode as a regulatory goal as applied to motor carriers of property. 49 U.S.C. § 10101(a)(7).