Notes

Antitrust and Motor Carriers: ICC Use of Clayton Act § 7 To Prevent An Involuntary Takeover

INTRODUCTION

In *Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines, Inc.*, 122 M.C.C. 345 (1976), the Interstate Commerce Commission has, for the first time, used its Clayton Act power to prevent an involuntary takeover of one motor common carrier by another. The Commission's eagerness to find a violation of § 7 of the Clayton Act in an attempted takeover situation represents a significant shift in the position of the ICC toward antitrust enforcement, and should put transportation lawyers on notice that, as one writer has put it, "[w]e are now at a regulatory watershed."[1]

The primary issue resolved by the decision is the determination of a proper "product market" and "geographic market" for the purposes of Clayton Act analysis. The Commission also has clarified the interrelationship between its Interstate Commerce Act § 5 authority and its Clayton Act § 7 powers, as well as providing a diagram for future § 7 proceedings.

I. BACKGROUND

Navajo Freight Lines is a motor common carrier of general commodities with authority over a regular-route network extending from Los Angeles and San Francisco to Fort Wayne, Indiana.[2] It controls several

1. Barnum, *Transportation*, 43 A.B.A. ANTITRUST J. 349, 350 (1974).
2. This and the following information is based on Navajo Inc.'s structure in 1970, the period pertinent to these proceedings. Navajo, Inc., has grown considerably since that time.

other motor common carriers through stock ownership, and is in turn controlled by United Transportation Investment Company (UTIC), which holds 90 percent of Navajo's outstanding capital stock.

Garrett is also a motor common carrier of general commodities with regular-route authority in a fourteen-state area, extending generally from Minneapolis/St. Paul, Denver and Albuquerque on the east to Los Angeles, San Francisco, Portland and Seattle on the west. A majority of Garrett's common stock is closely held. Although Navajo Freight Lines, Inc. is presently much larger than Garrett, during the period pertinent to these proceedings they were approximately equal in size, with gross annual revenues in the area of $50,000,000.

In 1965 Navajo began acquiring Garrett stock and by 1970 had acquired approximately a 26% interest in Garrett, representing a $5,000,000 investment. In addition, Navajo had, through its voting power, placed two representatives on the nine-member Garrett Board of Directors. Further participation by Navajo in Garrett's management was thwarted by Garrett's creation of a ten-year voting trust, controlling approximately 58% of its outstanding capital stock.

In 1970 the Department of Justice filed suit against Navajo and its two representatives on the Garrett Board,[3] alleging violations of sections 7 and 8 of the Clayton Act.[4] While this action was pending the Interstate Commerce Commission instituted its own investigation[5] pursuant to § 5(8)[6] of the Interstate Commerce Act and § 11 of the Clayton Act.[7] The investigation sought to determine:

> 1) whether a violation of section [5(5)][8] had occurred through control or management of Navajo and Garrett in common interest without prior commission approval, 2) whether Navajo's acquisition of Garrett stock caused a violation of section 7 of the Clayton Act by substantially lessening competition, tending to create a monopoly or restraining commerce, and 3) if any violation were found what actions were necessary to eliminate and to prevent future violations.[9]

Approximately fourteen weeks after the Commission initiated its investigation, Navajo applied to the Commission under § 5(2) of the Interstate

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3. United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554 (1971), *cert. denied*, 405 U.S. 1035 (1972).

4. 15 U.S.C. §§ 18 and 19 (1970).

5. Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines Inc., MC-F-11094 (I.C.C., Feb. 18, 1971).

6. 49 U.S.C.A. § 5(8) (Supp. 2, 1976) (§ 5(7) was redesignated § 5(8) by the Railroad Revitalization and Regulatory Reform Act of 1976, § 403(a), 90 STAT. 63 (1976)).

7. 15 U.S.C. § 21 (1970).

8. 49 U.S.C.A. § 5(5) (Supp. 2, 1976) (§ 5(4) was redesignated § 5(5) by the Railroad Revitalization and Regulatory Reform Act of 1976, § 403(a), 90 STAT. 63 (1976)).

9. 122 M.C.C. at 350.

Commerce Act for authority to acquire control of Garrett.[10] The Commission consolidated consideration of the § 5(2) application with its ongoing § 5(8) investigation.

After lengthy hearings and the compilation of thousands of pages of evidence, the Commission concluded: 1) that Navajo's § 5(2) application would be disapproved as not being in the public interest; 2) that Navajo *had not* violated § 5(5) of the Interstate Commerce Act because it had been unable to acquire control of Garrett; 3) that Navajo *had* violated § 7 of the Clayton Act because its holdings in Garrett would eventually lead the two carriers to seek a common ground, creating the potential for a substantial lessening of competition; and 4) that divestiture by Navajo of its Garrett stock was the only adequate remedy.[11]

II. Primary Jurisdiction Issue

Navajo's § 5(2) application presented a primary jurisdiction question at the district court level. As will be explained more fully later, Commission approval of the acquisition of control by one common carrier over another immunizes the carriers involved from the application of the antitrust laws insofar as is necessary to carry out the approved acquisition.[12] The conduct at issue in the antitrust proceedings of both the Commission and the Department of Justice was the same conduct at issue in the Commission's § 5 proceeding. Thus, there was a possibility that the Commission would approve Navajo's § 5(2) application, which would render both antitrust proceedings moot. Faced with this possibility the court decided that primary jurisdiction should rest with the Commission, stating:

> We think that granting the ICC primary jurisdiction of § 7 cases which involve stock acquisitions by one carrier in another would facilitate orderly administration and make the statutory scheme more workable.[13]

It should be noted that the district court decision does not place exclusive jurisdiction with the Commission. Exclusive and prior jurisdiction are sometimes confused, yet they are clearly distinct. Exclusive jurisdiction is involved where a particular court or agency has the *sole* jurisdiction to proceed with an action and to issue an enforceable decree.[14] Primary jurisdiction, on the other hand, arises where a claim is originally cognizable in the courts but enforcement of the claim requires

10. Navajo Freight Lines, Inc.—Control—Garrett Freightlines, Inc., MC-F-11198 (I.C.C., June 4, 1971).

11. 122 M.C.C. at 388-89.

12. 49 U.S.C.A. § 5(12) (Supp. 2, 1976) (§ 5(11) was redesignated § 5(12) by the Railroad Revitalization and Regulatory Reform Act of 1976 § 403(a), 90 Stat. 63 (1976)).

13. United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554, 566 (1971), *cert. denied* 405 U.S. 1035 (1972).

14. Landis v. City of Rosenburg, 243 Or. 44, 411 P.2d 282 (1966).

the resolution of issues which by statute have been placed within the special competence of an administrative body.[15] The courts' jurisdiction is suspended as to these particular issues, but the court may retain jurisdiction over the cause of action, the remaining issues and the relief to be granted.[16]

The doctrine is used to assure a workable allocation of business between the courts and administrative agencies.[17] It may thus arise in a number of different circumstances. In the *Navajo* case the court employed what has been called the "immunization theory" of primary jurisdiction, stating:

> We think the . . . doctrine is properly applied where there is a clear possibility that the agency may immunize precisely that conduct which is the basis of the antitrust complaint. . . .[18]

It is evident from this statement that it is only where a Clayton Act violation has been alleged and its ultimate resolution could be affected by a § 5(2) or § 5(8) proceeding that primary jurisdiction would rest with the Commission. Where the outcome of a § 7 case was not contingent upon the outcome of a § 5(2) or § 5(8) proceeding the concurrent jurisdiction of the Commission and the Department would theoretically be unaffected.

III. The Agency's Decision

A. *Statutory Scheme*

A brief review of the dual statutory scheme involved in the *Navajo* decision is helpful to an understanding of the case.

Under § 5(12)[19] of the Interstate Commerce Act the Commission has authority to immunize certain mergers, combinations and acquisitions of control from the operation of the antitrust laws.[20] The exclusive means of obtaining approval, and thus immunization, is through application to the Commission under § 5(2) of the Act.[21] Section 5(5) makes it unlawful for

15. United States v. Western Pa. R.R., 352 U.S. 59 (1956).

16. L. Jaffe, Judicial Control of Administrative Action, 121 (abrid. stud. ed.) (1965).

17. *Id.*

18. United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554, 561 (1971), *cert. denied,* 405 U.S. 1035 (1972).

19. 49 U.S.C.A. § 5(12) (Supp. 2, 1976).

20. 49 U.S.C.A. § 5(12) (Supp. 2, 1976). It provides in pertinent part:

> . . . [C]arriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved . . . .

21. 49 U.S.C.A. § 5(2) (1970). It provides in pertinent part: § 5, para. (2). Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and

any person to effectuate "the control or management in a common interest of any two or more carriers" without approval of the Commission. Section 5(8)[22] authorizes the Commission, upon petition or its own initiative, to investigate and determine whether any person has effected control without authorization, in violation of § 5(5). If the Commission finds that § 5(5) has been violated it must "by order require such person to take such action as may be necessary . . . to prevent continuance of such violation."[23]

Section 7 of the Clayton Act makes illegal the direct or indirect acquisition by one corporation of the stock or share capital of another where the effect is to substantially lessen competition.[24] Concurrent jurisdiction to enforce § 7 is explicitly conferred upon the Department of

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> operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .
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> (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission . . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . . .
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> (c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

22. 49 U.S.C.A. § 5(8) (Supp. 2, 1976).
23. 49 U.S.C.A. § 5(8) (Supp. 2, 1976).
24. 15 U.S.C. § 18 (1970). It provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where *in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition*, or to tend to create a monopoly . . . .
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> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition . . . .
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> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce . . . from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or interest therein is so acquired. (emphasis added).

See, United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (D.C.N.Y. 1965) (§ 7 applies to mergers between actual competitors even though the firms have competed directly in only a fraction of the relevant product and geographic markets in which either has operated, and also bars any acquisition by one corporation of another, competitor or not, whenever reasonable likelihood appears that the acquisition may lessen competition substantially or tend to create a monopoly).

Justice and the ICC; § 5 authorizes the Attorney General to enforce the Clayton Act in the district courts,[25] while § 11 authorizes the Commission to enforce § 7 against ICC regulated carriers.[26] Although this § 11 authorization has been construed as placing an obligation upon the ICC to enforce the Clayton Act,[27] the Commission has not been overzealous in this regard. The only previous proceedings by the Commission solely under § 7 of the Clayton Act which this author could find were in 1929-1933 and involved proceedings against two railroads who were acquiring large percentages of stock in competing roads in an attempt to forestall possible Commission action under a general plan of consolidation of United States railroads.[28]

The anticompetitive aspects of an acquisition have been considered by the Commission in proceedings under § 5 of the Interstate Commerce Act,[29] but the focus under § 5 is significantly different from the Commission's focus under § 7 of the Clayton Act. Under § 5 the antitrust laws are only one aspect of the Commission's considerations which must be weighed against the "public interest" of the proposed acquisition of control.[30] Under § 7 the anticompetitive effect of a merger or control acquisition is the sole consideration for the finding of a violation.[31] Moreover, the Commission may give, and has given, retroactive approval to *past* conduct which violated § 5(5) of the Act, thereby immunizing that conduct from antitrust prosecution.[32] It was this willingness to grant retroactive approval of § 5(5) violations that lead many in the transportation field to believe that ICC regulated carriers were ipso facto "immune" from prosecution under the antitrust laws. The *Navajo* decision may lay to rest once and for all that mistaken belief. The Commission has made manifest what it has often said[33]—common carriers do not have carte blanche in regard to antitrust immunity, and that the Commission has an obligation to enforce the Clayton Act against regulated carriers.

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25. 15 U.S.C. § 24 (1970).
26. 15 U.S.C. § 21 (1970).
27. Denver & R.G.W.R.R. v. United States, 387 U.S. 485, 501 (1967).
28. Interstate Commerce Comm'n v. Pennsylvania R.R., 169 I.C.C. 618 (1933), *rev'd on other grounds*, 66 F.2d 37 (3d Cir. 1933); Interstate Commerce Commission v. Baltimore and O.R.R., 160 I.C.C. 785 (1930); Interstate Commerce Comm'n v. Baltimore and O.R.R., 152 I.C.C. 721 (1929).
29. Denver and R.G.W.R.R. v. United States, 397 U.S. 495 (1967); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Transcontinental Bus System, Inc. v. The Greyhound Corp., 104 M.C.C. 524 (1968).
30. Note 21 *supra*.
31. Note 24 *supra*.
32. Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962).
33. Transcontinental Bus System v. The Greyhound Corp., 104 M.C.C. 524, 555 (1968); Interstate Commerce Comm'n v. Baltimore & O.R.R., 152 I.C.C. 721, 739-40 (1933).

The fact that the *Navajo* case involves an attempted *involuntary* takeover makes it a novel antitrust situation and complicates a § 7 analysis. In the usual § 7 proceeding, as in a § 5 proceeding for that matter, there is evidence of a *cooperative* effort on the part of two corporations to merge or otherwise combine and thereby create the potential for a substantial lessening of competition. In this case, however, Garrett assumed a hostile stance toward all of Navajo's actions and succeeded in thwarting both majority stock ownership and substantial management participation by Navajo. The status quo, which prevented even the existence of a potential for anticompetitive cooperation, presented a hurdle which the Commission was not able to clear.

B. Section 5(5) Issue

The issue of "control" is at the heart of every § 5(5) proceeding. The courts have consistently held that control is a term of art, not a precise definition, and that the Commission has *exclusive* jurisdiction to determine whether control exists upon the basis of the particular facts of each case.[34] In the *Navajo* case, the Commission determined that Garrett's hostility and Navajo's inability to acquire either a majority stock interest or a veto power on Garrett's Board prevented an acquisition of control by Navajo. Therefore no violation of § 5(5) was found.

C. Section 7 Issue

The failure to find a § 5(5) violation does not end a Clayton Act § 7 investigation but rather sets the stage for it. The Commission was in agreement with both the Department of Justice[35] and strong case law in holding that a violation of § 7 does not depend upon a finding of illegal control.[36] The Commission's § 5 and §7 powers are clearly separable with the only overlap being the Commission's power under § 5 to immunize *certain* conduct from prosecution under § 7. The § 5 powers of the Commission come into play only when the initial determination of illegal control has been made.[37] Section 5 does not deal with the lessening of competition resulting from a stock acquisition which falls short of providing the acquiring corporation with control. This area is appropriately covered by § 7, the purpose of which is "to arrest restraints of trade in their

34. Chicago South Shore & South Bend R.R. v. Moran R.R., 235 F. Supp. 984 (N.D. Ill. 1964); Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962); Alleghany Corp. v. Breswick & Co., 353 U.S. 151, *rehearing denied* 353 U.S. 989 (1957); 49 U.S.C. § 1(3)(b) (1970) (definition of control).

35. Under 15 U.S.C. § 21(b) the Attorney General may appear as a matter of right in § 7 proceedings by the Commission.

36. Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962); Transcontinental Bus System, Inc. v. The Greyhound Corp., 104 M.C.C. 524 (1968).

37. Denver & R.G.W.R.R. v. United States, 383 U.S. 485, 501 (1967).

incipiency and before they develop into fullfledged restraints violative of the Sherman Act."[38] As stated earlier, the sole question in a § 7 proceeding is whether the alleged conduct has the effect of "substantially lessening competition." Section 7, therefore, may be violated by a stock acquisition which does not amount to control. In fact, in a situation falling short of control, § 7 is the only legal tool available to the Department of Justice and the ICC to reach the anticompetitive conduct.

Utilizing *Brown Shoe Co. v. United States*[39] as an analytical reference, the Commission discussed seriatum the requirements for a showing of a § 7 violation. Drawing from that case the Commission stated the four requirements for a § 7 violation as follows:

> The threshold inquiry in an alleged section 7 violation requires the existence of two corporations engaged in commerce and the acquisition by one of the stock of the other. . . . The next inquiry is whether in any line of commerce (a product market) in any section of the country (a geographic market) the acquisition would have anticompetitive effects.[40]

As the Commission correctly stated, it is not until you have delineated a product market and a geographic market that you reach the real test of a § 7 violation, whether the acquisition has a substantial anticompetitive effect.[41]

1. Product Market

The determination of the proper product market was the primary point of dispute between Navajo and the Department of Justice. The difficulty of drawing the thin line necessary to isolate the proper market for antitrust analysis is evidenced by the fact that both sides cited the same decisions in support of their radically differing proposals. In a § 7 proceeding against a corporation marketing tangible products the determination of a product market is relatively simple. Even in a "tangible products" case, however, there can be disputes, since the product must be one for which there is substantial competition between the corporations concerned and for which there is not a readily available competitive substitute.[42]

In the case of motor carriers, though, a service rather than a tangible product is sold. To deal with this service market, the Commission accepted the Department's proposal that a "cluster of services" be used to define the appropriate product market for § 7 analysis. Navajo argued for an industry-wide concept of a product market. They agreed that an area of effective competition must be determined but maintained that the

38. S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).
39. 370 U.S. 294 (1963).
40. 122 M.C.C. at 368.
41. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).
42. United States v. E.I. duPont deNemours Co., 353 U.S. 586 (1957).

area should be "intercity transportation." In Navajo's product market all modes of transportation would have to be considered as providing substitutable competitive service. "Transportation in space" would be the product.[43] The Commission did not accept this approach but instead delineated the following analytical basis:

> While available transportation service is certainly a general product market, it is not a market sufficiently precise for section 7 purposes, where the analysis involves *any* line of commerce. It is an accepted principle that within a broad product market definable submarkets for antitrust purposes may exist. . . .
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> In seeking the appropriate submarket in which companies compete, the goal is to define a certain 'cluster' or 'hard core' of products (or services) for which those companies have some comparative and competitive advantage over companies with different characteristics. The advantage need not cover all aspects of a particular product or service but must allow identification of certain core elements which distinguish it from other available products or services. Determination of the core elements of a particular submarket must be based on 'practical indicia' recognized by the public or within the industry.[44]

This is a relatively new concept which arose primarily from three recent Supreme Court cases: *United States v. Philadelphia National Bank*,[45] *United States v. Phillipsburg National Bank*,[46] and *United States v. Grinnel Corporation*.[47] *United States v. Philadelphia National Bank* was a civil action brought by the Attorney General to enjoin a proposed merger between two Philadelphia banks as violative of the Clayton Act. In defining the proper product market the court determined that the cluster of products and services denoted by the term "commercial banking," such as credit, checking accounts and trust administration, composed a distinct line of commerce.[48] This approach was reaffirmed in the *Phillipsburg National Bank* case,[49] also involving a proposed merger of two banks. In *United States v. Grinnel Corporation*, the Court held that the "accredited central station business," comprising burglar and fire alarm protection, is a relevant cluster of services product market for the purposes of the antitrust laws.[50]

All of the above decisions, as well as the present one, have a firm grounding in the submarket criteria set forth in the *Brown Shoe* decision:

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43. 122 M.C.C. at 368.
44. *Id.* (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).
45. 374 U.S. 321 (1963).
46. 399 U.S. 350 (1970).
47. 384 U.S. 563 (1966); *see*, United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, 418 U.S. 602 (1974); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
48. 374 U.S. 321, 356 (1963).
49. 399 U.S. 350, 359 (1970).
50. 384 U.S. 563, 572 (1966).

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets· for antitrust purposes. *United States v. E.I. duPont deNemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and use, [sic] unique production facilities.[51]

It should be apparent that this approach gives great flexibility to the Bureau of Enforcement of the ICC and to the Department of Justice to delineate a "cluster of services" market tailored to create the best possible argument for a § 7 violation. Even where there is *some* competition between all modes of transportation, on an industry-wide basis, the "cluster of services" concept can be used to isolate a core submarket in which there exists economically significant competition only between the parties charged with the § 7 violation.[52] In the *Navajo* case the Commission heard testimony from some twenty-two motor carrier witnesses, eleven shipper wittnesses and four economists. Relying heavily on 1967 *Census of Transportation* data and on information from *Trinc's Blue Book of the Trucking Industry* (1971 ed.) the Commission concluded that the proper cluster of services product market was:

> transportation by regular route motor common carrier of general commodities, with the usual exceptions, in less-than-truckload [LTL] quantities weighing 10,000 pounds or less.[53]

The Commission also gave the impression that this product market will remain relevant for regular-route motor common carriers of general commodities in future § 7 cases:

> Certain motor carriers provide service with particular characteristics which are most suitable for LTL movements and which distinguish LTL movements from movements of all general freight . . . . These elements comprise a distinct cluster of services based upon commercial and economic realities, for which there is effective competition not only between Navajo and Garrett but between other common carriers with authority to transport general commodities over regular routes.[54]

The particular service characteristics include "regular scheduled service, a distinct price, and the movement of a broad range of commodities."[55]

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51. 370 U.S. 294, 325 (1962).
52. United States v. Connecticut Nat'l Bank, 418 U.S. 656, 660 *et seq.* (1974).
53. 122 M.C.C. at 368.
54. 122 M.C.C. at 371.
55. Initial Decision of the Administrative Law Judge, MC-F-11094 (I.C.C., Jan. 8, 1975).

The Commission noted that according to the 1967 *Census of Transportation*, motor carriers account for eighty percent of all tonnage transported beyond two hundred miles in shipments of 10,000 pounds or under, and that there is a distinct lack of competition for LTL freight from contract carriers, special commodities carriers, irregular route carriers, private carriers, freight forwarders and shipper associations.[56]

Since the purpose of determining a product market is to focus the antitrust inquiry, the narrower the definition, the more likely a determination that the conduct at issue will substantially lessen competition. In effect, by making the area of competition smaller the antitrust target is made larger. It is this flexible approach which should be of greatest concern to transportation lawyers and which is likely to make the determination of a product market the most litigated issue in § 7 proceedings involving motor carriers.[57] The product line, however, must be drawn somewhere or the effect of almost any anticompetitive conduct would be *de minimus*. The Commission has at least shown a willingness to disregard a market that is improperly "tailor made" to fit the exigencies of a particular case, as was one of the geographic markets discussed below.[58]

2. Geographic Markets

A geographic market may be drawn as narrowly as a product market for the purposes of § 7. Under the statute it is not necessary to show a substantial lessening of competition throughout the market served by the carriers, but only in "any section of the country." The market, however, "must, as nearly as possible, conform to competitive reality." (*United States v. Continental Can Co.*, 378 U.S. 441, 457 (1967)). It need not be "where the parties to the merger do business, or even where they compete, but where, within the area of effective competition the effect of the merger will be direct and immediate." (*United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 357 (1963)). In the Commission's words:

> A geographic market for section 7 purposes must be defined with reference to commercial and competitive realities. Not only must the geographic market be an area where the parties do business and compete; a geographic market must also be economically significant.[59]

The Department of Justice proposed seven separate geographic markets. Four of the markets were composed of city pairs served by both Garrett and Navajo. The Commission considered the market shares held by each line in 1968, the market share which a combined Navajo and

56. 122 M.C.C. at 369-70.

57. This is currently being challenged on appeal. Navajo Terminals, Inc. v. United States, No. 76-1635 (7th Cir., filed July 1, 1976).

58. 122 M.C.C. at 373.

59. 122 M.C.C. at 372.

Garrett would obtain, and the increase in market concentration among the few largest carriers which would result from a Navajo/Garrett combination.

In the first city pair, *Denver-Las Vegas*, the record established that in 1968 Garrett ranked first among the serving carriers, moving 56.1% of the LTL Freight. Navajo ranked seventh with a 2.6% market share. A combined Navajo and Garrett would rank first with a 58.7% market share, and the market concentration among the top few carriers would increase from 88.8% to 91.4%.[60]

In the second city pair, *San Francisco Bay Area-Las Vegas*, Garrett ranked third with 11% of the market and Navajo fourth with 7.3%. A combined Navajo/Garrett would rank second with an 18.3% market share, and the market concentration among the top four carriers would increase from 88% to 94.1%.[61] In the third city pair, *Los Angeles-Denver*, Garrett ranked fourth with 14.1% of the market and Navajo seventh with 5.6%. A combined Navajo/Garrett would rank second with a 19.7% market share, and market concentration among the top four carriers would increase from 71.1% to 76.7%.[62]

In the fourth city pair, *San Francisco Bay Area-Denver*, Garrett ranked third with 18.3% of the market and Navajo first with 24.1%. A combined Navajo/Garrett would rank first with a 42.4% market share, and the market concentration among the four largest carriers would increase from 77% to 87.1%.[63]

It can be seen that, although the market shares held by Garrett and Navajo varied considerably among the four city pairs, a Navajo/Garrett amalgamation would result in a significant increase in both the Navajo/Garrett market position and market concentration among the four largest carriers.

The fifth market was a transcontinental market between the Rocky Mountain Region and points east of the Mississippi River. The final two markets were gateway interchange markets at the cities of Denver and St. Paul. The administrative law judge combined the transcontinental and gateway markets into a single competitive geographic market. Garrett serves only the western half of the United States, however, and is thus involved in transcontinental service only through interline. Navajo does not serve the city of St. Paul. Therefore, the Commission rejected the transcontinental and gateway markets as not constituting an area of effective competition. The "combined" transcontinental and gateway

60. Posthearing Brief for Respondent and Protestant Garrett Freightlines, Inc., at 720-721, Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines, Inc., 122 M.C.C. 345 (1976).

61. *Id.* at 718-719.

62. *Id.* at 722-723.

63. *Id.* at 724-725.

market was likewise rejected on the grounds that it "was improperly tailored to suit the facts of [the] proceedings."[64] The Commission accepted only the city pairs as constituting the relevant geographic markets, since Garrett and Navajo were direct competitors for traffic between each city pair.

3. Substantial Lessening of Competition

The purpose of the Clayton Act is to arrest anticompetitive conduct in its incipiency. Thus, it is not necessary to show that past conduct violated the antitrust laws, nor that future conduct is certain to violate the antitrust laws; it is only necessary to show that present conduct creates the *potential* for substantially lessening competition.[65] This potential must be considered in each geographic market, i.e., the four city pairs.

As previously stated, to assess the impact upon competition of Navajo's interest in Garrett, the Commission determined the present *market shares* and *market concentration* in each of the four city pairs and the effect a Navajo acquisition of Garrett would have upon market shares and concentration. In arriving at these ratios the Commission considered traffic that originated in one of the city pairs regardless of its ultimate destination, and traffic that was destined for one of the city pairs regardless of its origin. The Department alleged that a combined Navajo and Garrett would dominate between 12.5% and 55% of the traffic moving to, from, or between the city pairs.[66] The Commission concluded that "any operation of Navajo and Garrett in a combined interest has the potential to increase competitive concentration in each of the involved markets."[67]

In assessing the probable impact upon competition the Commission employed a two-level approach. The first level assumed that Navajo's holdings in Garrett would remain at 26% and the second presumed that Navajo would eventually achieve control of Garrett. In regard to the first, the Commission reiterated that a finding of control is not a prerequisite to a § 7 violation. However, the same evidence showing a lack of control over Garrett—the hostility of Garrett's management, Navajo's lack of veto power, and a thwarting of more than 26% Navajo stock ownership—also convinced the Commission that the 26% stock interest, *standing alone*, did not prove cooperation between Garrett and Navajo that would create the potential for a substantial lessening of competition.[68] This is true even

64. 122 M.C.C. at 373.

65. United States v. E.I. duPont deNemours & Co., 353 U.S. 586, 589 (1957).

66. Reply Brief for Department of Justice to Exceptions to the Initial Decision of the Administrative Law Judge at 32, Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines, Inc., 122 M.C.C. 345 (1976).

67. 122 M.C.C. at 377 (emphasis added).

68. *Id.*

though Navajo's 26% stock interest amounted to an investment exceeding $5,000,000. In regard to the second presumption, the Commission concluded that because Navajo had manifested an intent to acquire control of Garrett, and because it manifested no contrary intent for the future, it was *probable* that Navajo would gain control of Garrett at some future time. The Commission held:

> It is not one single factor but the entire series of events and practices set forth in great detail in the record in these proceedings which leads us to conclude that it is likely, and in fact probable, that Navajo will in the future increase its percentage of Garrett stock, obtain a controlling interest in Garrett and if Navajo chooses, merge the two carriers, if remedial action is not taken. If a change in the status quo is not imposed upon Navajo and Garrett, these carriers have no reasonable choice but to seek common ground, as they are inextricably bound together.[69]

This conclusion was reached despite the fact that Navajo had proposed the creation of a ten-year voting trust for its stock and had agreed to accept a ten-year prohibition on purchases of Garrett stock, and despite the fact that its § 5(2) application had been denied. This portion of the decision needs to be analyzed in greater depth because there are steps in the Commission's analysis which appear to make the finding of a § 7 violation impossible.

The Commission certainly appears to hold that the probability of the acquisition of additional shares by Navajo is the basis for its finding of a § 7 violation. It should be pointed out, however, that this presumption of probable future acquisition is not a *sine qua non* for the finding of a § 7 violation but was necessitated solely by the Commission's reasoning in this case. Rather than supporting the finding of a § 7 violation, though, it is this presumption which actually makes such a finding impossible.

There is unequivocal case law standing for the proposition that a § 7 violation may occur where only a minority interest in a competitor is acquired.[70] In fact, the Department's arguments were founded upon just such a case, *Hamilton Watch Co. v. Benrus Watch Co.*[71] The facts in that case were remarkably similar to the *Navajo* case. Benrus had acquired approximately 24% of the outstanding stock of Hamilton and was thereby

69. *Id.* at 378.

70. American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1975); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

71. 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953). In his opening statement Mr. Steve Charno of the Department of Justice stated:

> Our primary application of section 7 of the Clayton Act, and the order of our proof, and the manner in which our evidence is organized, are all outlined in a single judicial opinion . . . . This is the opinion in *Hamilton Watch versus Benrus*".

Record at 408-09, Navajo Freight Lines, Inc.—Investigation of Control—Garrett Freightlines, Inc., 122 M.C.C. 345 (1976).

entitled to elect one member to Hamilton's board of directors. The stock acquisition and impending takeover was shown to have considerably lessened Hamilton's competitive position. The court found that Benrus's minority interest in Hamilton violated § 7:

> [T]he acquisition if made only with intent to obtain minority representation constituted a violation of Section 7: having in mind the probable effect on the relevant 'line of commerce' of the competitive practices of these two competitors and the practical considerations that confront the board of directors of any corporation in a competitive enterprise, I think it fairly inferable that minority representation, because of the opportunity thereby afforded to persuade or to compel a relaxation of the full vigor of Hamilton's competitive effort would come within the ban of Section 7.[72]

Unlike the court in *Hamilton*, however, the Commission declared that Navajo's "intrusion alone [could] not be viewed in a vacuum".[73] Due to the hostility of Garrett and the effectiveness of the voting trust in preventing future Navajo acquisition of shares, the Commission concluded that Navajo's intrusion was not sufficient standing alone, to compel a finding that Navajo could convince Garrett to relax the "full vigor" of its competitive efforts. In other words, if the status quo were maintained Navajo could not compel Garrett to cooperate in substantially lessening competition. By coming to this conclusion, the Commission foreclosed the possibility of applying the *Hamilton* rationale to hold that Navajo's minority interest in Garrett, standing alone, constituted a violation of § 7. The Commission had to postulate a probable change in the status quo to support the finding of a § 7 violation. Therefore, they declared that it was "probable" that Navajo would, in the future, increase its interest in Garrett and by virtue of its increased interest compel Garrett to seek a "common ground."

There are severe problems with this presumption. From the legal point of view, both case law and the statute itself support the contention that the present status of the parties must be the basis for a finding of probable future anticompetitive conduct. The Commission cites no authority supporting its assumption that there can be a *contingent* violation of § 7, *i.e.*, that § 7 can be violated where the potential for anticompetitive conduct is itself dependent upon the happening of a future event. The Commission's logical flaw is its dependence on a double set of probabilities, namely, its inference of *potential* anticompetitive conduct resulting from the *probability* of future control. Rather, if the present conduct of the parties does not present the potential for anticompetitive cooperation then no § 7 violation has occurred.[74] This is the conclusion

72. 114 F. Supp. at 317 (emphasis added).

73. 122 M.C.C. at 381.

74. This is supported by the decision in United States v. E.I. duPont deNemours & Co., 353 U.S. 586, 598 (1957), where the court said: "[P]roof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement . . . ."

reached by Commissioner Brown, in partial dissent, where he states:

> The overall tone of the majority report conveys more of a feeling that a violation of section 7 could occur at any time, than of a firm conviction that it has occurred.[75]

Factually, there are even more problems with the Commission's stance. The Commission does not explain how Navajo is to continue acquiring shares of Garrett with the aim of ultimately achieving control when its § 5(2) application has been disapproved. To achieve the control the Commission sees as inevitable would be a direct violation of the § 5(2) disapproval. Certainly the Commission was not suggesting that it might later be compelled to approve the very control it had disapproved in this proceeding.[76]

In summary, the Commission could have relied upon case law for the principle that a minority stock acquisition can violate § 7 by creating the necessity for the two corporations involved to seek a common ground. Instead, they chose not to view the Navajo/Garrett situation in a vacuum but to consider the hostility between the two companies as making cooperation impossible. Had the Commission proceeded in the same vein, it would not have viewed the probability of Navajo control in a vacuum. Had the Commission been consistent it would have acknowledged that unless and until Navajo acquired a greater share of Garrett or otherwise caused Garrett to seek a common ground there was no violation of § 7.

One explanation for this seeming anomaly may be found in the statutory scheme under which the Commission was working. While it is true that the ICC has the power to order divestiture under § 5(8) of the Interstate Commerce Act,[77] this power is not available until a finding of control has been made. When, as here, the Commission makes a determination that control has not been accomplished, its only divestiture powers are found in its Clayton Act authority. Theoretically, a § 5(2) disapproval will have no effect on this power. Thus, the Commission avoids giving the false impression that a § 5(2) disapproval may allow one to avoid a § 7 violation.

This need to find a § 7 violation in order to cause Navajo to divest itself of Garrett stock does not, however, justify the Commission's *non sequitur* in its § 7 analysis. Nor does it explain why the Commission concludes:

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75. 122 M.C.C. at 390-91.

76. Even in cases where there was no prior disapproval, the Commission has reversed the earlier trend of retroactively approving § 5(5) violations by virtue of § 5(2) approvals. Alleghany Corp.—Control and Purchase—Jones Motor Co., Inc., and Control—Erie Trucking Co., 109 M.C.C. 333 (1970).

77. 122 M.C.C. at 391 (Commissioner Brown, dissenting in part, citing Gilbertville Trucking Co. v. United States, 317 U.S. 115, 129-30 (1962)).

> Our analysis of the evidence of record supports the . . . finding . . . that substantial adverse competitive effects in the four city pair markets will result from Navajo's purchase and continued ownership of 26 percent of Garrett's stock, and that a violation of section 7 exists which must be remedied.[78]

This conclusion meets the technical requirements for a § 7 violation but is contradicted by earlier language in the decision.

One other aspect of the Commission's approach, which can be viewed apart from the Commission's probability rationale, should be noted. This is its method for computing the degree of anticompetitive impact arising from Navajo/Garrett cooperation should it in fact occur. The Commission concluded that such cooperation would have the effect of decreasing competition and increasing market concentration. The Department of Justice argued that this fact alone established a violation of § 7 by virtue of the "presumption of illegality" doctrine developed in earlier cases.[79] Under this doctrine a merger or acquisition

> which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[80]

Navajo, on the other hand, argued that recent Supreme Court decisions[81] have foreclosed the "mechanical application" of § 7 based upon market share data and also that the highly regulated nature of the motor carrier industry made unlikely a substantial lessening of competition.

The Commission took a position between the two proposals. It stated that market shares and market concentration alone are not conclusive of substantial anticompetitive consequences, but that the effects of regulation upon competition must be considered as one relevant factor in the economics of the particular situation.[82] This is in keeping with the frame of reference announced in the *Brown Shoe* decision:

> Congress indicated plainly that a merger had to be functionally viewed, in the context if its particular industry . . . .
>
> * * * *
>
> Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its

78. 122 M.C.C. at 380.
79. Citing, United States v. General Dynamics Corp., 415 U.S. 486 (1974).
80. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1962).
81. Principally, United States v. General Dynamics Corp., 415 U.S. 486 (1974).
82. 122 M.C.C. at 379.

structure, history and probably future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[83]

4. *Exemptions and Remedy*

The Commission found that Navajo did not qualify for either of the exemptions under § 7.[84] First, it was decided that Navajo did not hold Garrett stock solely for investment because Navajo utilized its voting power to seat two members on Garrett's Board of Directors. Second, in light of the Commission's finding that Navajo and Garrett were competitors in the four city pairs, the Commission found that Navajo failed to qaulify for the "no substantial competition" exemption.

Finally, having determined that Navajo's interest in Garrett would in the future create the potential for a substantial lessening of competition, the Commission determined that divestiture was the only appropriate remedy. This finding is in keeping with the case law development of § 7 enforcement.[85]

CONCLUSION

There is a wind of increased antitrust enforcement blowing through the regulated industries. Motor carriers would be well advised to take note of the changing climate. The ICC has always had the power to enforce § 7 of the Clayton Act against regulated carriers. Due at least in part to its statutory directive to "foster sound economic conditions in transportation and among the several carriers" while developing a national transportation system,[86] however, the Commission has focused more on its licensing and consolidation authority than on its antitrust powers. Many were led to believe that because of the highly regulated nature of the transportation industry, common carriers were exempt from the application of the antitrust laws. The Commission itself has fostered this belief in the past by retroactively approving acquisitions of control by one carrier of another effected in violation of § 5(5) of the Interstate Commerce Act. This policy of retroactive approval has been reversed in recent cases. A change in the Commission's view of anticompetitive conduct can be seen as underlying this shift in policy. Thus, enforcement of the Clayton Act, initiated with or without the prompting of the Department of Justice, may well be the policy of the future. The *Navajo* decision is currently on appeal to the Seventh Circuit.

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83. Brown Shoe Co. v. United States, 370 U.S. 294, 322-323, n.38 (1962) (emphasis added).

84. *See* note 17 *supra*.

85. United States v. E.I. duPont deNemours & Co., 366 U.S. 316, 330-331 (1961).

86. Act of Sept. 18, 1940 § 1, 54 STAT. 899 (1940) (uncodified Preamble to Interstate Commerce Act).

Even if the Commission is reversed because of its analytical method, however, its new attitude will not likely change. We certainly will hear again these words of the Commission:

> As § 7 of the Clayton Act forms a part of the Commission's regulatory umbrella, we are required to use its provisions, as well as our licensing and consolidation authority, to deter anticompetitive activities.[87]

Teryl R. Gorrell

87. 122 M.C.C. at 380.