THE FEDERAL MARITIME COMMISSION—LATE BLOOMER IN REGULATING MERGER, CONSOLIDATION AND ACQUISITION

HAROLD E. MESIROW*

Today, the Federal Maritime Commission is as active a regulator of corporate mergers, consolidations and acquisitions as any regulatory agency. This, however, has not always been the case. Until 1962 the Commission had been quiescent in this area to an extreme. From 1916 when the Commission was created by the Shipping Act, 1916,[1] until 1962 when it asserted jurisdiction over the consolidation of the common carrier fleets of Isbrandtsen Company, Inc., and American Export Lines, Inc.,[2] there is no record of the Commission ever having publicly or formally acted on the matter of merger, consolidation or acquisition. The Commission's Bureau of Hearing Counsel specifically noted in its brief in the 1962 *Isbrandtsen-Export* case that:

> "We are aware of no case in which the Board took Section 15 action to approve or disapprove any consolidation, merger, or acquisition of control during the years from 1916 up to the outbreak of World War II. It is possible that the question was never formally presented to the Board, but it is hard to believe that during the two-and-one-half decades between 1916 and 1941 no such transactions took place."

And nowhere is there any record of the Commission's having attempted to assert its jurisdiction during those prewar years. Moreover, during the later 1940's and the decade of the 50's several consolidations of sizable companies[3] did in fact take place, but there is no evidence that the companies involved sought formal approval of the Commission pursuant to Section 15, or that the Commission sought to interject itself to any degree into such matters.[4]

* Member, Hydeman & Mason, Washington, D.C.; A.B., George Washington University (1954); LL.B., George Washington University (1957).

1. 39 Stat. 728 (1916), 46 U.S.C. Sections 801-842 (1958).

2. *Agreement No. 8555 between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc.*, 7 F.M.C. 125 (1962).

3. For example, in this period States Steamship Company absorbed Pacific Transport Lines, Moore-MacCormack Line absorbed Pacific-Argentina-Brazil Line and Seas Shipping Co., and United States Line absorbed South Atlantic Steamship Co.

4. There can be no question but that the agency was aware of at least those consolidations involving subsidized U.S.-flag carriers, as the Commission in its then dual capacity of administering the Merchant Marine Act of 1936 and the Shipping Act had to

In truth, there has been no published or other public explanation for the Commission's inaction in this field. No doubt, this stemmed in some measure from the fact that the Shipping Act, which the Commission is charged with administering, does not state in express terms that all mergers, consolidations, etc., involving carriers subject to the Act must be approved by the agency.[5] Rather, because of the peculiar problems of the international shipping trade caused by the unique organizations known as "steamship conferences" and the sophisticated anti-competitive devices they developed,[6] Congress in enacting the Shipping Act couched the Commission's authority over anti-competitive activities in relatively broad terms. Thus, Section 15 of the Act[7] provides, in pertinent part:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
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> "The Commission shall by order, after notice and hearing,

consider the effect of those transactions upon involved subsidy contracts. It may be that in passing upon approval of such transactions under affected subsidy contracts, the Commission did give its blessing under the Shipping Act, but if so it could only have been in an *in camera* manner.

5. In contrast, the Interstate Commerce Act and the Federal Aviation Act specifically confer jurisdiction over mergers. See 41 Stat. 480 (1920), 49 U.S.C. Section 5 (1959),and 72 Stat.767 (1958), 49 U.S.C. Section 137 (1959), respectively.

6. These "conferences" are essentially ratemaking organizations. They and their anti-competitive devices have been popular subjects themselves for treatises and law review articles over the years.

7. 39 Stat. 733 (1916) (later amended by 72 Stat. 763), 47 U.S.C. Section 814 (1959).

> disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

A fresh observer would undoubtedly be quick to comment that the language of Section 15 clearly appears to embrace mergers, consolidations and the like, particularly in its reference to agreements "controlling, regulating, preventing, or destroying competition." There has been, however, a strong dispute over that point which was not settled until the Ninth Circuit specifically ruled in 1968 that the Commission has jurisdiction under Section 15 to consider merger agreements.[8] The protracted fight against such a ruling was led first by the Commission's own Bureau of Hearing Counsel, which was subsequently joined by the Department of Justice and carrier opponents of particular proposed mergers or consolidations. A prime basis for their fight lay in the fact that Commission approval under Section 15 of any agreement carries with it exemption from the antitrust laws.[9]

It was in all probability the desire of the parties to the *Isbrandtsen-Export* consolidation to obtain such antitrust immunity which sent them to the Commission in 1960 seeking approval under Section 15 of their complicated agreement, the net effect of which was to bring their common carrier fleets under common ownership. That transaction involved two of the bigger U.S.-flag lines which were in direct competition on one of the major United States foreign trade routes. The filing of that agreement actually marked the beginning of active, public involvement by the Commission in merger, consolidation and acquisition endeavors of the steamship industry. And presumably to insure that

8. *Matson Navigation Co. v. Federal Maritime Commission*, 405 F.2d 796 (9th Cir. 1968).

9. "Every agreement, modification, or cancellation lawful under this section or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other pruposes,' and amendments and Acts supplementary thereto."

involvement by the Commission, Isbrandtsen and Export added to their transaction an agreement not to compete, which on the basis of past Commission action clearly brought their agreement before the Commission.

While the *Isbrandtsen-Export* case and, indeed, the sparse litigation involving consolidation efforts which followed, dwelt more on the matter of Commission jurisdiction than any other issue, they provide a good insight into how the Commission has reached its present posture as a vigilant and active overseer of carrier attempts at consolidation.

Interestingly enough, despite the fact that it had never formally, specifically treated with its jurisdiction over carrier agreements covering consolidation, and despite the great emphasis placed on the question of jurisdiction by its Bureau of Hearing Counsel, the Commission was quite perfunctory in its initial consideration of the issue.[10] Hearing Counsel's principal argument[11] was that the Commission lacked jurisdiction as there was no specific statutory language establishing Commission jurisdiction, as had been the practice of Congress,[12] citing and quoting at length from the legislative history of the Act.[13] The Commission in its initial decision, after noting (1) that Isbrandtsen and Export competed directly in service between U.S. Atlantic and Gulf Ports and ports in Southwest Asia and Africa on the Red Sea and Gulf of Aden, and (2) that the effect of the agreement would be to eliminate competition between them, claimed jurisdiction, stating simply that:

> "That clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555.[5]

10. The case was heard by an Examiner, after which the Commission required the record to be certified to it for initial decision, which was rendered on November 27, 1961, and published at 7 F.M.C. 15.

11. Among the fringe arguments raised was the claim that there was no way the Commission could regulate consolidations involving foreign steamship lines, which are under its general jurisdiction because they operate in the foreign commerce of the United States. The Commission did not meet this argument here, but did note in the *AML-APL-PEEL* case, *infra*, that it recognized it could not control foreign mergers. The Commission stated: "A reasonable construction of section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers." (11 F.M.C. 53 at 58).

12. See footnote 5, *supra*.

13. Particularly the report of the Alexander committee investigation into shipping activities. House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations, H.R. Doc. No. 805, 63d Cong., 2d Sess., popularly known as the "Alexander Report."

"[5] We hold that Congress means what it says. Congress (by section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify '*every* agreement . . . controlling, regulating, preventing, or destroying competition'. To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny,* would constitute statutory *amendment* masquerading as statutory *construction.* We are not authorized anywise, with respect to particular types of agreements, (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do."[14]

With jurisdiction disposed of, the Commission turned to the substance of the transaction, to which it applied the traditional statutory criteria set forth in Section 15. Its approval of the consolidation was, however, basically on a public interest approach and grounded primarily upon a determination that:

> "To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means."[15]

There was no consideration of traditional antitrust questions, *per se.* The Commission simply found that the consolidation would provide such efficiency, and would not harm Prudential Line, the U.S.-flag carrier with which Isbrandtsen-Export competed, stating the latter finding in conformance only with the requisites of Section 15.

Both Hearing Counsel and Prudential excepted to the initial decision, evoking from the Commission only a strong defense of its jurisdiction, and no change whatever in its holding on the substance of the agreement. The Commission's reaction to the repeated challenge to its jurisdiction is noteworthy as it can be looked upon as the keystone of the Commission's increasingly active and deeper participation thereafter in carrier consolidation activities. The Commission stated:

> "The exceptions argue that steamship lines are not required to file such agreements with the Commission, thus being left free to

14. 7 F.M.C. 15 at 18.
15. *Id.* at 19.

keep this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed.

"The exceptions argue that such unfiled, unapproved agreements may be carried out by the parties without violating section 15 of the 1916 Act.

"We hold, to the contrary, that carrying out such agreements (unfiled or unapproved) violates section 15, and subjects the parties to penalties of as much as $1,000 for each day the agreements are effective.

"The exceptions argue that the Commission lacks power to approve such agreements (under any conditions whatsoever), even those which are consistent with maritime and antitrust standards and may be expected to have beneficial results.

"We hold, to the contrary, that we have, as the public interest requires us to have, power to approve such agreements, modifying them with safeguards in appropriate cases.

"The exceptions argue that we have no power to disapprove and thereby prevent such agreements, even if they will operate to the detriment of the commerce of the United States, and are contrary to the public interest.

"We cannot agree. The exceptions are overruled. An appropriate order will be entered."[16]

The strong position taken by the Commission in the *Isbrandtsen-Export* case, however, had little effect on its own Bureau of Hearing Counsel which, joined by the Department of Justice[17] and affected carriers, in the very next formal proceeding involving a consolidation agreement again vigorously challenged the Commission's jurisdiction. The decisions of the Commission in that proceeding, *Agreement For Consolidation Or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc.*,[18] are marked not only by detailed discussion and defense by the Commission of its jurisdiction, but also by a much more detailed and considered look into the transaction before it than in the *Isbrandtsen-Export* case.

The proceeding, as its title connotes, involved an agreement to merge entered into by three west coast based carriers—APL, AML and

16. 7 F.M.C. 125 at 131.

17. The Department of Justice in fact participated only on the issue of jurisdiction.

18. 11 F.M.C. 53 (1967), and 11 F.M.C. 81 (1967).

PFEL—operating in the Far East trade. It was protested by States Steamship Company, a major competitor in that trade, and Matson Navigation Company, a carrier only indirectly affected at the time of its protest, but with firm plans to soon become a major competitor in the Far East Trade. Sharing top billing with the issue of jurisdiction was the question of whether the agreement was a complete and final one which could be finally acted upon by the Commission, as the final terms of the merger were not set forth in the agreement, and were to be decided upon at a later date.

Responding to the vigorous attack on its jurisdiction, the Commission disposed of that issue on this occasion with a lengthy consideration of every facet of the matter—from legislative history and general administrative practice to antitrust implications. It thereupon reaffirmed its holding in the *Isbrandtsen-Export* case noting with finality:

> "We find nothing inconsistent with the intent of Congress to include mergers by agreement within the scope of section 15 and our jurisdiction over Agreement 9551 under that section is clear."[19]

It took the Commission somewhat longer to reach the matter of finality of the agreement, first bowing to the position of its then Vice Chairman that the agreement was only "an agreement to agree", but ultimately determining on reconsideration[20] that the agreement was indeed a final one warranting Commission action under Section 15.

In turning then to its consideration of the merits of the agreement, the Commission for the first time went far beyond the standard criteria of Section 15 and dwelt at length on the antitrust aspects of the agreement. The attention which the Commission gave these issues can be attributed no doubt to the vigor of the attack upon its jurisdiction and to the holding of the Supreme Court some months earlier in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968) that ". . . in deciding whether to approve an agreement, the Commission is required under Section 15 to consider antitrust implications."[21] Of its antitrust adventure the Commission noted:

> "The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their

19. 11 F.M.C. 53 at 66.
20. 11 F.M.C. 81 (December 21, 1967).
21. 390 U.S. 261 at 274.

> policy . . . The 'public interest' within the meaning of section 15 includes the national policy embodied in the antitrust laws. The problem is one of accommodation of section 15 and the antitrust laws."[22]

The Commission's "accommodation" entailed essentially a weighing of the benefits of the proposed merger with the impact upon competition, following an extensive discussion of Section 7 of the Clayton Act[23] and cases arising thereunder. On balance, the Commission found that the benefits of merger, including administrative economies, stronger management, improved operating efficiency and economies, and better service, outweighed what it deemed only a minor lessening of competition, and the merger was approved.

The Commission's actions in this area were subjected to judicial review for the first time when Matson appealed, attacking the Commission's jurisdiction, and the holding as to finality of the agreement, as well as the merits of the proposed merger. *Matson Navigation Co. v. Federal Maritime Commission, supra.* As noted at the outset of this article, the court there put to rest the jurisdictional question, upholding the Commission's affirmative ruling; and the manner in which it did so added a further stimulus to active and thorough review of merger and consolidation agreements by the Commission in the future. Quoting at length from *Volkswagenwerk*, the court made clear that a merger or consolidation agreement is ". . . the kind of arrangement as to which expert scrutiny [by the Commission] most clearly is to be desired."[24] Its final commentary carried home to the Commission its clear duty in such matters:

> ". . . to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements."[25]

The important role which the court found the Commission to hold in its consideration of jurisdiction was directly responsible for the court's further holding that the Commission had acted not on a final merger

22. 11 F.M.C. 81 at 106.
23. 15 U.S.C. 18.
24. 405 F.2d 796 at 800.
25. *Ibid.*

agreement but on an agreement to agree. Because of the antitrust immunity which Section 15 grants, the court stated that the Commission must consider and act upon not the agreement to agree but rather the "resulting merger arrangement itself that will, by virtue of Commission approval, ultimately enjoy immunity, perhaps beyond reach of any governmental power of divestiture."[26]

Thus, without reaching the question of the merits of the agreement before it, the court remanded the matter to the Commission for further proceedings. The court, however, did indicate that the Commission's consideration of the merits was not as broad as it might be and it provided the Commission with additional "questions" stemming from recent holdings of the Supreme Court,[27] which it felt the Commission should consider in this and future merger cases. Those questions were:

> "The question is presented whether the threat to competition posed by the merger and the consequent interference with antitrust policies is of sufficient substance to bring into play the requirement that it be justified by a serious transportation need or important public benefits.
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> "A second question is presented whether, under any standard, resort to merger is justified in the public interest when the only benefits that cannot as well be achieved by less restrictive and more flexible means (such as cooperative working agreements) would appear to redound to the stockholders rather than to the public."[28]

Unfortunately, the Commission never got the opportunity to review those questions within the context of the AML-APL-PFEL merger, for shortly after the remand the parties to the agreement withdrew it[29] and the Commission discontinued the proceeding.

Some months later the Commission was presented with a new opportunity to exercise its authority in this area when W.R. Grace & Co. and Prudential Lines, Inc., reached an agreement providing for the sale of W.R. Grace's wholly-owned subsidiary, Grace Line, Inc., to

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26. *Id.* at 801.

27. *Penn-Central Merger Cases*, 389 U.S. 486 (1968); *U.S. v. Third National Bank in Nashville*, 390 U.S. 171 (1968); *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968); and the *Volkeswagenwerk* case.

28. 405 F.2d 796, at 802, footnotes omitted.

29. By letter of March 11, 1969, counsel for the carriers wrote the Commission that:

> "In part because of the further costs and delays of reopened proceedings, the three parties to the agreement have concluded that they do not at this time wish to pursue their merger plans."

Prudential.[30] The agreement (for stock purchase) required the buyer to apply to the Commission for a ruling that no approval of the transaction is required, and if not "obtained promptly" to apply for approval of the agreement. The agreement was filed on July 28, 1969. Although there was no response to the Commission's notice of the filing, published in the Federal Register, the Commission on September 30, 1969, issued on its own an "Order of Investigation". The order is most informative with respect to the Commission's current thinking on mergers and accurately reflects the progression of events following the filing of the *Isbrandtsen-Export* agreement more than nine years ago. First, it unequivocally recites the Commission's jurisdiction over the agreement.[31] It next recites the requests already made by the Commission's Staff for information and justification of the agreement and the responses of the parties. From a reading of the order, the responses evidently afford information similar to that upon which the Commission approved the AML-APL-PFEL agreement. That is, they indicate little competitive impact from the acquisition (as Grace Line and Prudential are not competitive) and significant benefits to the surviving company. The Commission, however, noting its fate before the Ninth Circuit in the *Matson* case, specifically detailed additional information which it required be filed with it "as a minimum" for its consideration of the agreement. Specifically the parties were required to:

> "A. Provide a list of all potential savings;
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> "B. Provide details of all improvements from alleged strengthened management;
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> "C. Provide an estimate of administrative economies including, but not limited to, proposed payroll reductions, combined equipment usage, and effect upon the labor force;
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> "D. Provide all plans for initiation and implementation of improved transportation methods of operations and expenditures needed to accomplish such proposals for each trade area;
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> "E. Explain the effect upon competing carriers in the trades involved, and submit, separately, for each trade route, a listing of all competing carriers including fleet sizes of the foreign and American-flag lines. Provide also, for each trade route, statistical

30. As a part of the agreement, upon completion of the stock acquisition Prudential will sell and transfer to Grace Line, Inc., all its vessels, vessel contracts, subsidy rights, etc.

31. No objection to the Commission's jurisdiction has been raised. The Department of Justice, an active opponent through the court's decision in the *Matson* case, has not even sought to intervene. The Commission's Bureau of Hearing Counsel has also abandoned that fight.

data comparing tonnages carried by respondents and competing carriers (if available) for the preceding three calendar years, i.e., 1966, 1967 and 1968;

"F. Submit copies of any complaints, protests and/or comments, if any, received by respondents with respect to the proposed agreement;

"G. Provide details of conditions in the trades involved which are considered as justification for the proposed agreement; and

"H. Provide details of benefits to be derived by the public arising out of the proposed agreement."

As of this writing, Prudential and Grace have filed in accordance with the order of investigation and the Bureau of Hearing Counsel has replied, taking the position that (1) the parties have complied with the information requirements and, (2) the record before the Commission, including that information, supports approval of the agreement. The matter is now awaiting Commission action. Whatever that action may be, the significant thing is that the Commission by this order has made clear its total involvement in regulating merger, consolidation and acquisition agreements entered into by the steamship industry.

Thus, in the short span of the past decade the Commission has done more in asserting itself as a regulator of steamship line mergers, consolidations and acquisitions than it had done in the previous 44 years of its existence. In short, in the 1960's it had transformed itself from a passive to an active regulator. This change in posture does not mean necessarily that the Commission has become or might become decidedly anti-merger in its outlook. Every indication is rather that it will take a long, hard and searching look at each and every consolidation proposition which comes before it. That can only mean that the proponents of consolidation will very definitely be put to the test in making their case for approval. Such a policy can in the long run only redound to the benefit of the public interest and the shipping industry as well.