COMMON OWNERSHIP OF TRANSPORT MODES—SOME ANTITRUST POLICY PERSPECTIVES

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Introduction

The talk about common ownership has been going on a long time. The author's experience with such discussions has created two somewhat conflicting impressions on his mind. First, it often seems that everything has been said by someone at some time. Second, it often seems that the major observable effect of the continuing discussion is to add to the total number of words devoted to the subject.

What can one contribute in such a situation? I will here set myself a somewhat modest task. First, I will restate the problem. Second, I will discuss a few aternative solutions available, relating some general concepts of antitrust analysis to some of these alternatives. Last, I will suggest a few thoughts about different methods of arriving at public policy on a problem such as this.

I. A View of the Issue

First let us distinguish the perspectives required of those who would decide an issue such as this for the public, and the perspectives which present themselves to members of the industries involved. Differences between a "public" and a "private" perspective have been known to men since at least the time of Ur. But, as is attested to by the frequency with which people make an issue of the matter, we seem to have a great deal of difficulty in keeping the distinctions clear, and our communities suffer a good deal of mischief from our confusions.

Let us recapitulate relevant private perspectives. They largely consist of desires to enter new and profitable markets, to pick up operations which would bolster those already owned, and to avoid market entry by others. For example, to men managing railroad companies, common ownership may present enticing profit opportunities. The return on investment in trucking is higher than in railroading. The company can be larger, and presumably financially sounder, if it has a wider range of profitable services to offer. Ownership of companies providing services used in conjunction with rail service might result in more efficient integration of such services. Certainly one can understand a manager's

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inclination to think he could make it so in some cases. But whether great efficiency results or not, such ownership would carry the right to the profits. Also, ownership of carriers feeding rail carriers would tend to provide more assurance of rail traffic, despite any disclaimers to the contrary.

There may well be no express malice toward competitors involved in this reasoning, and no monopolistic tendency beyond that inevitably resultant from the run-of-the-mine avarice of mankind, which generally leads those managing any firm to seek to make it grow as much as it profitably can.

Trucking companies, ocean transport companies, and inland waterways companies on occasion have similar yearnings concerning their neighbors' pastures. But also, to truckers and waterway companies, the railroads ambitions present a threat of entry into their markets. Generally, one can expect those in any settled, well populated market to frown on new entry. Transport companies seem to make few exceptions to this rule. Also, carriers in one mode may on occasion fear disadvantage from competitors obtaining an ability to offer a range of services not available to single-mode companies.

The general public may be thought to care little for the pushing and shoving which may result from these conflicting ambitions, except as the outcome of the brawl may effect what it gets from transportation. The public needs results—an optimum mixture of economy, adaptability, and progressiveness. From the standpoint of the general community the ambitions of companies yearning for common ownership may be indulged insofar as extension of common ownership is superior to other available methods in achieving results wanted. If other measures can produce desired results with fewer drawbacks, common ownership appetites must be restrained.

Thus, in the transport industry as in others, those who would expand cannot expect rules to be made with the purpose of satisfying their penchant for expansion, any more than those who object to such expansion can expect the rules to be made to satisfy their penchant for protection. Nor can the modes expect policy to be made to balance off gains and losses between them. The problem, at bottom, is not how the public's servants are to divide its purse, but how to make it bigger. From the public's point of view, gains and losses to individual companies, or to industries, must be considered side effects of the over-all process of meeting community demands.

To put it another way, free and fair opportunity to meet public needs does not entail the right to require the public to accept arrangements designed for the producers' benefits, or to meet their sense of fairness in the rivalry between them.

For the economy as a whole, these propositions have been so long and so pervasively accepted that they form a part of the collective subconscious. The rules are often bent, but rarely does the body politic allow them to be broken for long. In transportation, the long and intimate interaction between government and the producers, and the power of the producers to influence Congressional action, have kneaded into government thinking a tendency to view the resolution of issues as the settlement of contests between the contending transportation interests. In such a frame of mind, regulatory bodies tend to dole out and divide up the opportunity to serve. These tendencies have a number of unfortunate consequences.

If then, intermodal ownership is to be judged on what it will do for the community, not what it will do for the transportation companies, let us examine what advantages intermodal ownership might afford the general community. It seems that claims of efficiency gain from ownership of different forms of transportation describe two major types. One relates to the possibility of combining different modes of transport for movements of freight more efficiently than may practically be done under separate ownerships (e.g., motor, rail, and water carriers moving freight from Chicago to the outskirts of London). The argument in support of this claim implies that under common ownership physical facilities are likely to be coordinated more quickly and efficiently, and operating systems (such as documentation, claims handling, planning of movements) made more efficient and adaptable, than would be likely with a market composed of independent sellers in different modes, assuming an acceptable level of public aid in perfecting market arrangements.[1]

It is easy to conceive of this as a straightforward comparison of the efficiency of a centrally administered organization versus the efficiency of market organization.[2]

1. I think it is useful to conceive of market participants as bringing about collective activity to facilitate market transactions. For example, merchants have been managing trade fairs and other collectively organized markets (e.g., securities exchanges) for centuries. Merchants lead in organizing public ports. Trade associations organize seminars for trade problems. Some have sometimes charged that regulatory agencies tend to become trade management devices, organized largely for industry participants. (E.g. Kolko, *Railroad Regulation, 1877-1916*) It seems there is some truth to the charge, but a measure of assistance to sellers is not necessarily inconsistent with the public interest.

2. In such a comparison, elements other than obvious short term efficiency differentials should be taken into account: e.g., the long term contribution to adaptability and efficiency

The second kind of efficiency claimed is, it seems to me, gain from a single ownership's administrative allocation of traffic between the modes rather than market allocation when each of two or more modes might be used for the total transport movement. The argument in support of this claim can be generalized to the proposition that companies controlling all forms of transport would, if competitive among themselves, seek to maximize the value added potential of each form of transport,[3] and would be more successful in this than would a competitive market. This argument presumes, among other things, either that limitations of management control and government oversight would be slight, or that markets with intermodal competition are not achieving a close allocation, and cannot be made to do so.[4]

So much for the general conceptual framework. Now a brief recapitulation of the way in which the issue has been handled. To date, the body politic has tended to keep ownership of the various modes of transportation largely separate. A recent article by Byron Nupp shows that the Panama Canal Act was passed in 1912 to free water carriers from railroad control, and the Interstate Commerce Commission has generally followed the intent of the legislation, with some exceptions allowed where it appeared the water carrier was supplementary to rather than competitive with the rail carrier.[5] The same article and a 1959 Supreme Court Decision,[6] point out that the ICC has interpreted a provision in the Motor Carrier Act of 1935 prohibiting railroad

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of diversity in open markets; and the argument that the incentive for each mode of transportation to maximize its own profits causes some lag in adjusting operations to optimal coordination patterns.

3. It could be argued, using a somewhat simpler approach, that a monopolist with all modes of transport would try to minimize costs, and thus use all modes most efficiently. But at least under current public opinion, this solution would be unacceptable, because of the difficulty of controlling such a monopoly, the losses throught likely to result from sacrifice of diversity and competition, and possible diseconomies of scale. Thus, one must presuppose a substantial measure of competition between the integrated concerns.

4. At least one reason might be suggested for such a failure of the market—interference by public authority, such as the ICC, in an attempt to allocate traffic on the basis of historic market positions, or simply to avoid prejudicing the positions of existent carriers (See Nelson, *Railroad Transportation and Public Policy*, pp. 132-145). One is led to observe that if this has occurred, the proper remedy would be to have such interference cease. To satisfy the conditions stated in text, the misallocation would have to be significant, and the ability to reform the agency's practices insignificant.

5. Nupp, *Regulatory Standards in Common Ownership in Transportation*, 21 pp. 22-25 (1966). A clear discussion of the exceptions is contained in *Illinois Central R. Co.—Control—John J. Hay Co.*, 317 ICC 39, 49-52 (1962). The statutory tests are now contained in 49 USC §(14), (16).

6. *American Trucking Ass'n v. United States*, 369 U.S. 1 (1959); Nupp, 25-30.

ownership of motor carriers unless it can be shown that the motor carrier operations can be used to the advantage to the public, and the acquisition would not unduly prejudice competition, both to restrict railroad acquisition of motor carriers, and to restrict direct investment by railroads in motor carriage to services ancillary to rail services, so as generally to prevent "railroad incursions into the field of motor carrier service."[7] The Federal Aviation Act of 1938 contained a standard substantially the same as the motor carrier standard concerning ownership of air carriers by other modes,[8] and the CAB has tended to interpret the standard in substantially the same way—to prevent ownership by other modes where there is significant competition.[9]

Appendix A shows standards applicable for each of thirty kinds of intermodal acquisitions. As this chart makes clear, the legislative scheme for controlling intermodal acquisitions is neither symmetric nor comprehensive. This is because Congress has enacted explicit standards for intermodal acquisitions only when it was concerned with what appear to be immediate problems—the prevention of railroad domination of other surface modes (motor carriers and water carriers) and the prevention of domination of the fledgling air transport industry by any of the more-developed surface transport industries. Other intermodal joinders have been left either to the usual "public interest" test for ICC intramodal merger control, or to control by the antitrust laws.

The fear of adverse results from one mode's controlling another rests on the judgment that such control would eliminate desirable competition, and stunt the growth of the newer or smaller mode, preventing the realization of its potentials. In retrospect it is hard to know to what extent this fear might have been generated by entrepreneurs who feared the foreclosure of new fields of endeavor, and to what extent it related directly to the needs of the user community. Undoubtedly, each element was involved in the motivations of some of the men who concerned themselves with and voted on the issues.

To the extent this approach was motivated by a fear that under the ownership of another mode, a new form of transportation would not

7. *ATA v. U.S.* supra. The statutory reference is now 49 USC §5(2)(b).

8. 49 USC §1378(b).

9. Nupp, pp. 30-32, and cases cited. The CAB made an exception to allow surface motor carriers to acquire air freight forwarders recently. Apparently the Board was persuaded that motor carriers could feed air freight forwarders a good deal of traffic, and would be unable to dominate air freight forwarding so as to lessen competition between air carriage and surface carriage. See *ABC Air Freight Co. v. CAB*, 391 F.2d 295 (2nd Cir. 1968).

realize its full potentials, it would seem to imply a judgment (1) that the controlling mode's decisions as to which mode to use in given situations would not be as closely in accord with the potentials of these modes of transportation as would the results of a market responding to the competitive initiatives of independent firms; (2) that competition between the modes would produce lower prices and better service than would single control of all the modes; or (3) some combination of these judgments.

Those who seek a modification of these policies often seem to suggest that (1) the size and stage of development of the competing modes are such as to make it unlikely that any one mode can obtain a sufficiently large share of another as to permit it to govern either the degree of intermodal competition which would exist, or the rate and nature of the development of the potentials of the competing mode; or (2) integration will produce efficiencies and new transport arrangements greater than would be lost by whatever degree of prejudice to intermodal competition results from the amount of intermodal ownership allowed to occur.[10]

The case for modifying a policy of strict separation between modes is stronger if major new service potentials can be better exploited by integrated firms than by a market in which the modes are under separate ownership. The advent of containerization seems to many to indicate the existence of such new potentials, at least as to railroading and trucking. But, to be laboriously explicit and repetitive, this view must suppose not merely that containerization offers new prospects for efficiently combining diverse modes on a substantial volume of shipments, but also that allowing intermodal firms will produce more exploitation of these potentials with fewer drawbacks than leaving such exploitation to separately owned modes making arrangments through the market.

II. Discussion of Alternatives

A. A Statement of Alternatives

Major alternatives for public action can be stated in simple terms: either to permit or encourage more inter-modal ownership of some sort; to encourage means of achieving operational integration of modes

10. This proposition can assume that there will be little prejudice to competition, or much. If it assumes all intermodal competition would be eliminated and a limited number of fully integrated firms would control two competitive modes, or all modes, then the assumption would seem to be that integration would produce more efficiency, adaptability, and progressiveness in transportation than would continuation of the intermodal competition involved.

without putting different modes under common ownership; to undertake a combination of the two; or to maintain current policies on common ownership and let things work out as they will.

First, though, it would be useful to determine what kind of inter-modal relationship ought to be encouraged, discouraged, or left to the mercy of the present machinery. Common ownership could cover a great many different arrangements, with different consequences. Generally, the arrangements can be grouped in categories noted before; joinders of firms for the purpose of combining modes on individual movements, and joinders of firms performing parallel transportation movements. This distinction corresponds to the distinction between "horizontal" and "vertical" mergers in antitrust analysis: that is, the distinction between mergers of firms in a competitive relationship, and the merger of firms in a supplier-purchaser relationship (or, in transportation, a traffic interchange relationship.).[11]

Also, it would be well to consider the best way to go about encouraging inter-modal ownership, if some form of it is to be encouraged. Since a great many strategies could be used, I will not try to list every possible approach, but will instead delineate and deal with three general types.

(1) Elimination of some or all of the rules governing inter-modal ownership (including both the Interstate Commerce Act rules and the antitrust rules). This could be done with varying degrees of thoroughness; in piecemeal fashion or generally.

(2) Change of some or all of the rules governing inter-modal ownership, including both Interstate Commerce Act rules and antitrust rules. This would allow somewhat more discriminate action. Again, action could be either piecemeal or general.

(3) Encouragement of inter-modal ownership by providing incentive for the creation of such organizational structures. (It seems few are so bold as to utter such a thought; but it is a possible course of action.)

Methods of achieving the results claimed for intermodal integration without inter-modal ownership can be considered under two categories: devices for increasing the efficiency and adaptability of inter-modal shipments using modes under different ownership, and measures to improve the market's allocation of traffic between modes. The first category includes such things as efforts to facilitate the use of single-factor rates and through bills of lading, efforts to provide for

11. A merger can involve both relationships, of course, where either or both of the firms can both compete with and furnish goods (here, traffic) to the other.

satisfactory claims handling when several carriers are involved, the construction of port facilities for containerized traffic, and the encouragement of equipment and document standardization. Measures to improve the allocation of traffic between modes include, most notably, attempts to permit more freedom in competitive pricing for the various modes of transport.

B. Some Implications of Antitrust Law and Policy for the Selection of Alternatives

With this sketch of alternatives behind us, let us consider what guidance antitrust law and policy may provide in searching for judgments concerning whether, and which forms of, inter-modal ownership which might be useful; and, if inter-modal ownership were to be favored over other means of gaining transport efficiency, what means of encouraging such ownership might be chosen.[12]

First, let us consider general features of the antitrust laws.

The antitrust laws favor freedom of activity in the market, by prohibiting defined types of transactions and permitting all others without administrative processing. Administrative screening might be thought justified to permit a more rigorous application of a given test.

12. I suggest this general review of the implications of antitrust policy because of its major role in the economy—it is often described by the Supreme Court as the fundamental economic policy of the nation. The policy seeks to obtain both economic results—progressiveness, efficiency, a good allocation of resources—and political and social results—a society in which economic, social, and political power is not concentrated in few hands, and in which economic and social mobility is afforded by affording a great many opportunities for economic entrepreneurship to the general populace—by preserving markets and industries as free, unconcentrated, and competitive as is consistent with reasonable economies of scale and reasonably efficient forms of economic organization. This approach supposes that regulation is imposed to serve basically the same goals, supplementing competitive market forces where market organization would not be adequately competitive, or would for other reasons fail to achieve the needed results. This implies that competitive forces and regulatory controls are to be used in a complementary fashion. Finally, if this approach is adopted, one is led to the view that the use of government sanction to organize markets with primary reference to the interests of producers—with the result that markets tend to be concentrated unnecessarily, individual producer profits tend to be assured when this is not needed to assure adequate service to the public, business tends to be allocated and apportioned to producers to assure their income expectations when this is not as efficient as market allocation, and unnecessary barriers to entry favoring market incumbents tend to be created—is an evidence of poor government.

It can also be argued that administrative agencies can advantageously be used to achieve refined judgments using complex tests.[13]

Generally, one can conceive of a trade-off between the use of clear-cut rules of general applicability, with little discretion in administration, and reliance on administrative discretion in the integration of a wide variety of considerations. (The "public interest" test is a result of the latter choice.) Many persons favor the former approach where the applicable rules can be formulated in a fashion thought to provide adequate direction. The approach furnishes a relatively free field for businesses, minimizes the extent to which commerce must wait on the Government administrator, provides the body politic a relatively clear and visible indication of what public policy is supposed to be, tends to provide less scope for inconsistent and arbitrary Government action, and tends to economize on the use of Government resources. Further, in practice it has tended to provide less opportunity for companies to channel the administration of a vague standard into a case-by-case accommodation of conflicting interests, rather than consistent application of a general rule designed to facilitate trade.

Second, the antitrust laws distinguish sharply between expansion by acqusitition and expansion by internal growth. Expansion by internal growth subjects the firm to market disciplines which can be avoided by acquisition. If, for example, a railroad wishes to expand trucking operations and does so by direct investment, it must gain business in rivalry with others. Market forces test the efficiency and utility of the operation. If the expansion is made by acquisition, the acquiring firm merely appropriates the market position and the inter-carrier operating arrangements.

Further, the entry of new firms, and the possibility of such entry, have potent pro-competitive effects in markets. But acquisitions of competitors directly lessen competition. Thus, the antitrust laws contain no inhibitions on internal expansion except the prohibition against monopolizing: but do contain stringent prohibitions against acquisitions which may adversely affect competition.[14]

In sum, under the approach adopted in the antitrust laws, the creation

13. Many would doubt this. See Marver Bernstein, *Regulating Business by Independent Commission*, Chapters 4 and 10.

14. Regulatory acts differ in that they typically have relatively permissive merger tests, and usually provide for administrative control of market entry achieved through investment. The differential is thus toward less entry by investment and more by merger—a bias toward less competition.

of inter-modal 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 would do so would be prevented.[15]

Under traditional tests this approach would not be modulated to allow for efficiency gains through cross-modal acquisitions: under a modified standard such as that incorporated in the Bank Merger Act of 1966,[16] efficiency gains could be given some weight.

Now let us consider the method of analyzing competitive effects developed under the antitrust laws, to see what sort of barrier to intermodal acquisitions would accord with the procompetitive policy applied in the Courts.

Because the antitrust laws are designed to preserve competition by a guard-the-gold method—prevent a loss whenever possible—the Government is directed to prevent any reasonably probable substantial loss of competition on any line of commerce in any part of the country. This generally leads to identifying the competition thought to be in danger of extinction, both as to the type of transaction going on and the place where people are doing it—or, to be more refined, the definition of product and geographic markets.

To get a geographic market, one adopts the obvious expedient of finding the places in which the firms are competing.[17] Competition may be considered in terms of substitutability: thus, geographic markets identify the geographic areas where one seller's goods can substitute for the other's.[18] The markets can be small as one city—or as large as the nation.[19] They may be shaped to match the shape of the competing operations.

Several markets can be considered in one case. Also, submarket-

15. This approach need not sacrifice realization of efficiencies, if entry by direct investment is open. Companies can gain efficiencies by establishing their own enterprises. However, intermodal operations and any attendant efficiencies would probably be realized more slowly than if acquisition were allowed.

16. 12 U.S.C. §1828(c)(5).

17. *U.S. v. Pabst. Brewing Co.*, 384 U.S. 546, 549 (1965).

18. E.g., *Brown Shoe v. U.S.*, 370 U.S. 294 (1961); and *Reynolds Metal Co. v. F.T.C.*, 309, Fed. 223, 226 (1962).

19. E.g., *Brown Shoe supra.*

market relationships can be defined.[20] It is not necessary that the area of competition engage a major fraction of the total operations of either party to the merger.[21] Nor is it necessary that the boundaries of the market be defined with mathematical precision.[22] In transportation, city-pair movements, movements along major parallel routes, transportation within a region, and transportation within the nation as a whole could be considered, if the facts so indicated.

Product markets are defined by the same approaches. An effort is usually made to find the area of effective competition between companies, both present and potential—those of their goods or services which are substitutable.[23] It is not necessary that they compete across the entire range of services—one may locate and measure the product lines in which they do compete.[24] If for example, a large railroad with a broad commodity consist were to propose to merge with a large motor carrier with a broad commodity consist, and the two carriers were in direct and close competition for commodity movements constituting only a fraction of the traffic of each, the merger could be barred.

Thus—to pick examples without intending to imply a limitation of the tests to such situations—the merger could be barred if both of the merger partners were very large and the area of anticompetitive effect, taking into account both geographic and product markets, were to be small in relation to their total operations, and if one carrier were large and the other small, with the anticompetitive effect involving a relatively small part of the large carrier's operations.

It is customary, in antitrust analysis, to attempt to gain an impression of the size of the anticompetitive effect of a proposed merger by determining the percentage shares of merger partners in defined markets. (In transportation, this would sometimes necessitate gaining traffic data of a sort rarely seen at present.) As is evidenced by numerous cases and by merger guidelines issued during a prior administration, combined market shares of less than 10 percent can trigger a finding of illegality in some circumstances.[25]

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20. E.g., *Reynolds Metal Co. v. F.T.C., supra, Pabst Brewing, supra.*

21. E.g., *Brown Shoe, supra,* at p. 337.

22. E.g., *United States v. Kimberly Clark Corp.,* 264 F. Supp. 439, 455 (N.D. Calif., 1967).

23. E.g., *Brown Shoe, supra,* at 325-328.

24. E.g., *United States v. Continental Can,* 378 U.S. 441 (1963).

25. See *Brown Shoe, supra* and *Von's Grocery Co.,* 384 U.S. (1965). The guidelines suggest that in a highly concentrated market (four firms' holding 75 percent or more of

In vertical mergers, the analysis typically focuses on the effect of the merger in tending to prejudice competitors of either the acquiring company or the acquired company in their attempts to bid against one family member for the business of the other.[26] The merger guidelines suggest that an acquisition would encounter opposition whenever it appeared that the acquisition (1) would foreclose access to a significant market for non-integrated competitors on either side of the transaction, or (2) would tend to raise barriers to entry on either side of the transaction (e.g.—assuming an inland surface carrier-water carrier merger—in either surface transportation of a particular type of traffic (e.g., containerized traffic) or the ocean transportation of such traffic).

It has not been necessary to trigger antitrust objection that large market shares be involved. For example, the guidelines suggest that percentages of 10 percent for the "supplying" firm, and 6 percent for the "purchasing" firm would probably give rise to antitrust challenge.

Obviously, the danger of foreclosure is great if either the acquired firm or the acquiring firm has a market position requiring competitors of its affiliated company to rely on it to a significant extent for purchases or sales (in transportation, interline traffic); such as unique access to a limited resource, a lack of competitors of adequate size to supply demand, a unique product or process, or a market protected to a significant degree by entry barriers.

Finally, both the cases and the guidelines lay very heavy stress on avoiding trends toward horizontal market concentration, or trends toward vertical integration likely to leave non-integrated firms at a disadvantage, and to raise barriers to entry.[27]

The foregoing has dealt with the usual forms of intermodal joinders. The growth of "conglomerate" ownership structures poses a newer

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the sales) the following market shares might arouse antitrust challenge:

Acquiring firm	*Acquiring firm*
4%	4% or more
10%	2% " "
15%	1% " "

In a less concentrated market, the shares listed are:

Acquiring firm	*Acquired firm*
5%	5% or more
10%	4% " "
15%	3% " "
20%	2% " "
25%	1% " "

26. E.g., *Brown Shoe, supra, Reynolds Metal, supra,* and *Kimberly Clark, supra.*

27. A great many cases could be cited: *Brown Shoe, Von's* and *Continental Can* are adequate to set out the reasoning and illustrate its application.

form—the lumping of carriers of two or more different modes in a large, varied corporate structure with many other types of enterprise. While the inclusion of carriers on such ownership structures may cause several competitive problems, the problems attendant to putting carriers of different modes in such ownership structures appear likely to be basically the same as those entailed in direct carrier-to-carrier acquisitions. Of course, the "conglomerate" and "intermodal" competitive problems would be additive, thus making it more likely that a transaction might, over all, be thought objectionable. Appendix B contains a note on relationships between conglomerates problems and intermodal ownership patterns.

I will not here attempt any precise delineation of the probable results of a close and careful application of these tests to the transportation industries. However, the reader familiar with transportation can discern without much effort that the net is both loose and fine: many mergers in which companies would be interested[28] would be proscribed; and many mergers (which might be thought to be less attractive)[29] might encounter no hindrance.

One problem though, bears special note. Where there is a substantial degree of concentration on one or both sides of a vertical transaction competitive problems are likely. For example, most routes, cities and ports are served by only a few railroads. A merger of a large Eastern District rail carrier with a large ocean container operator would pose severe foreclosure problems. (Further, the reduction of numbers in rail systems consequent to mergers of parallel lines increases the severity of such market foreclosure problems.)

The antitrust tests, and the policies which lie behind them, are intended to produce over-all market structure results. This is because, over the long term, to a very substantial degree, the structure of markets affects their performance. What general aspects of market structure do these tests bring forward for attention, and what market structure problems do they suggest may be posed by movement toward more intermodal ownership?

The differences in the market structures of the different modes would give rise to substantial problems if major attempts were made to join them. Stated generally, if a large degree of intermodal integration were

28. Because, for example, they would link two large carriers in an end-to-end relationship and foreclose markets for others, or join two large direct competitors who would not be regretful to have in the family most of the previously-competitive traffic.

29. For example, joinder of firms in different parts of the country, or in very different types of transportation (e.g., in barge and air transport).

accomplished by acquisition, either ownership in each mode would be shrunk to the number in the mode with the smallest number; or some carriers would get left out, leaving a transport world part integrated and part not.

Either approach has substantial adverse competitive effects. The shrinkage of a mode which can have an unconcentrated market structure—such as trucking—to the market structure of a mode with a concentrated market structure—such as railroading—would entail massive losses of competition. Tying all or most of one mode—such as railroading—to only a fraction of another—such as either motor carriage or ocean transport—could leave unaffiliated carriers at a substantial disadvantage.[30] Regulatory control could limit the ability of the integrated carriers to favor their affiliated operations. But it could not eliminate this ability. Further, regulatory controls have costs both the cost of the monitoring governmental apparatus, and the cost of restrictions on operating freedom and flexibility attendant to the government supervision.

Finally, unintegrated firms in competition with integrated firms would face the possibility of cross-subsidization between the services with which they are competitive and those with which they would not be competitive. Cross-subsidization can be restrained by regulation to some extent; but, again, only partially, and only at a price.

It would clearly be undesirable to reduce the unconcentrated market structures of some modes to the concentrated structures of others by horizontal acquisitions. It also appears undesirable to allow acquisitions to create large captive interchanges in the interfaces between transport modes; particularly modes with different degress of concentration in their market structures. Nor is it desirable to create substantial opportunities and incentives for cross-subsidization.

Thus, it can be observed with some justification that the market structure results toward which anticompetitive intermodal acquisitions tend do not appear substantially more welcome than the results which the framers of the Clayton Act sought to avoid in the economy as a

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30. This would happen whether the linking came about either by internal expansion or merger. But if it were done by internal expansion, the arrangement would have been market-tested and, in the absence of monopolistic tactics, found to have some efficiency justifications.

This problem would be particularly severe when one or more of the modes involved has high barriers to entry. In such cirumstances, there is less opportunity for the market to provide substitute services for those tied up in ownership links. Unfortunately, there are significant entry barriers in most of the modes; where the economics of the industry do not supply them the Government does.

whole. Very substantial advantages, obtainable in no other more acceptable fashion, would be required to justify pushing far along this path.

There are grounds for some skepticism about claims of such advantages. There is little evidence or reason to suppose that administrative allocation of traffic between modes would produce an allocation more in accord with the relative advantages of each than would a competitive market. The obviously beneficial results of intermodal competition in recent years—both in generating technical and organizational progress and in gradually pressing rates into a closer relationship with costs—suggest that substantial sacrifices of such competition would be harmful. There has been a great deal of discussion concerning advantages of vertical combinations, but little hard documentation. Under an enlightened regulatory regime desirable vertical integration could be managed by investment. Also, there is now precedent for allowing efficiency-generating vertical acquisitions if no major losses of competition would be involved.[31] Numerous parties involved in transportation have been making substantial efforts to create more favorable conditions for end-to-end combination of independently-owned modes for some time: their efforts have had some results, as in piggy-backing, and can be expected to continue to be useful.

In sum, the necessity for anticompetitive acquisitions is not clear. And there is much to say for maintaining active and competitive markets for traffic interchanges: diverse approaches stimulated by competitive pressures can generate progress, and minimize the extent to which large volumes of trade must be corseted within the preferences of one or a few transport entities.

If there is a clear potential for adverse market structure consequences from intermodal acquisitions, and if there is doubt about the existence of major advantages to the public from intermodal acquisitions, there is much to say for applying something like the Clayton Act tests adverted to before, with a good deal of vigor.

To conclude this portion of this article, the foregoing discussion suggests a number of propositions concerning the alternatives outlined at the outset of this section of the paper.

First, where operational integration of different modes could be facilitated either by acquisitions or by other devices of the sort previously described, the alternative devices should be chosen unless clearly excessive in costs.

31. See the Hay case, supra, footnote 5, and the ABC case, supra, p. 87, note 9.

Transportation Law Journal, Vol. 2 [1970], Iss. 1, Art. 8

Second, although there seems little reason to subject intermodal acquisitions without anticompetitive effects to strict surveillance, types of intermodal acquisitions which have anticompetitive effects should be permitted, if at all, only in those cases or categories of cases in which such acquisitions offer major gains not otherwise available. This implies that rules which restrain anticompetitive intermodal acquisitions should be relaxed, if at all, not generally, but only after thorough study and exploration of alternatives reveals, as to each type of intermodal acquisition which may be considered, whether and to what extent such acquisitions must be allowed. Also, this implies that if rules are to be changed, they should be framed with as much precision as is possible, so as to permit the efficiency gains sought with as little sacrifice to competition as is possible.[32] The rules might be framed solely in terms of competitive effects, or framed to take into account, additionally, economies and efficiencies not otherwise obtainable. Also, rules might be framed to refer explicitly to specific types of transaction, stating tests to be applied to that type of transaction.

The problems posed by the differing market structures of the several modes, the degree of concentration in some modes, the barriers to entry in most modes, and the importance of transportation to the economy generally, suggest that detailed inquiry might indicate that the most appropriate course would be to devise comprehensive tests for intermodal mergers which would include an even more stringent competitive standard than now exists in the Clayton Act, with any necessary deviations from the policy provided on an exception basis. This could be justified if (1) generally, intermodal ownership offered little or nothing in transport efficiency, adaptability, and progressiveness that could not be got advantageously by other means, and (2) if under current tests, a series of small mergers which would escape prohibition could in cumulative effect significantly lessen competition either within a given mode or modes, or between modes.[33]

32. Unless substantial changes are made in the operating environment of agencies, which now tends to bias them away from preserving competition and toward protectionism, there is additional reason to seek precision in the tests, and limitations on the agencies' discretion to accommodate carrier interests. (The problem is not unlike those faced in handling ambassadors—requiring, under current conditions, a combination of firm guidelines, a relatively short tether, short tenures, and men both unusually diplomatic and unusually capable of keeping the mother country's interests clear.)

33. Arguably an even more strict approach could be justified—a ban on intermodal acquisitions—if such acquisitions did little or no good, could be harmful, and it was thought advisable to conserve the administrative effort required for case-by-case determination of the probable effects of such acquisitions.

In sum, the broad outlines of market organization in the different modes, taken with the general procompetitive policy of this country, suggest that if legislation were in order, it should probably be of a sort which would ensure the application of a generally strict competitive test for all intermodal acquisitions, and allow for a generally lenient treatment of cross-modal entry by direct investment. If a different approach were taken—more lenient with respect to intermodal acquisitions—a good deal of justification would be required to show that the efficiency gains available in this way, and in no other, clearly exceeded the disadvantages. If different tests were appropriate for different types of acquisitions, bases for the differentiation in policy would be necessary. The nature of the information required for such judgments, and the ways in which decision might be made, will occupy my attention for the remainder of this article.

III. Methods of Reaching A Public Decision on Available Alternatives

There are time honored ways for reaching a decision on matters of this sort. The process usually starts when sundry interests become aware of economic threats or opportunities to which they would like to respond. While opportunity or threat may be clearly peceived, typically the nature of the economic process involved, and the over-all consequences to the community of any given course of action, are seen only dimly at first. The processes and the consequences are apt to be described by interested persons in terms of their effects on the interests of such persons, rather than in any comprehensive and systematic form.[34] If action by the relevant political organization would help or harm some of those interested, they are apt to set about inducing such action.

Often this process proceeds somewhat as follows. Interested parties make public statements of views. Others respond. A sort of loose colloquy evolves—as if a hundred people drifted into and out of a large room, intermittently addressing remarks to sundry among themselves. Occasionally portions of the group clump together to attempt organized discussion. Public officials listen to the babble, step into and out of the clumps, and occasionally make pronouncements. Sometimes the

34. To extend a child's fable, it is as if a group of men find an elephant among them, and set about mounting its back, avoiding its feet, making plans for the sale of its liver, and otherwise weaving webs of thought and action in which to ensnare it, or a part of it, for gain. If they have a political organization, it must react also. It is understandable if at the outset their political organization reacts in a somewhat *ad hoc* fashion, without thoroughly comprehending the elephant's anatomy, or its place in the ecology.

Government will appoint committees to do a somewhat systematic canvass of the persons in the room, and, perhaps, some outside it. If this is done reasonably well, diverse views are sampled. The Committee cogitates, and makes recommendations. (Government agencies often are used to do the work of committees. Their canvasses of the community may be somewhat less systematic, their internal deliberations may, or may not, be more systematic.) If legislation is proposed, Congress invites interested parties to argue their views. Then a law is passed, and we all abide the consequences.

One notable characteristic of this process is its *ad hoc* nature. Legislation tends to be passed, as one Congressman recently put it, when there is a pain on. Granted, systematic legislative structures are built. But, to a considerable extent, they are jerry-built.

Another notable characteristic is that in many of the colloquies preceding action on transportation regulation, public officials have in the past often heard largely the views of a relatively limited portion of the community, the commercial producers, and, usually to a lesser extent, commercial buyers of transport services, who are directly and immediately involved. This arrangement of the sources of information can cause the officials' picture of the problems and of appropriate public action, to be cast largely in the terms of reference of these producers.[35] Such a view, proposed by only a portion of the community, often fails either adequately to describe the issues, or to define a course of conduct of optimum utility to the general community.[36]

The system is not as bad as this sketch may make it appear, of course. We find it much more congenial than the ukase of kings, or the tightly centralised and bureaucratic decision making of some of our Eastern neighbors. The citizenry has muddled through to a good deal of serviceable law, and manages a somewhat irregular but continuing clean-up of past mistakes. Many participants in the public colloquy do try to construct a valid and objective view of what is involved. A widely shared public conscience constrains all who participate to some extent, and tends to keep public actions generally oriented more toward the public

35. See, for example, the observations in Kolko, *Railroad Regulation, 1877-1916*; Jones, *Cases and Materials on Regulated Industries*, pp. 484-504; 732-740.

36. It seems that at this stage of our development most humans feel some compunction to tell the truth, at least when someone may be able to check out their statements, but they habitually prefer to discuss those propositions which favor their interests, and to leave to someone else the task of dealing with other propositions, concerning which, in any event, they would prefer to suspend judgment or belief. Whatever may be said about the ethics involved, the result is often a less than complete representation of the issue.

good than toward our mutual destruction. Also, the collective consciousness of the community seems to have some order and organisation which directs our perception of issues, and our efforts to act on them, in a better than random fashion. Moreover, there are practical virtues in acting *ad hoc*; there is at least some probability that the activity will have immediate effect, rather than being dissipated.

But because men share in the general order-building propensity of living things, and we have generally been progressing of late, there are persistent attempts to make the conceptual framework for considering the interests of the community more comprehensive, systematic, reliable, and valid; and likewise to make the processes of decision more systematic and reliable.

Government agencies have had a share of such persons. And the agencies have reflected, to some extent, the general tendencies just mentioned.

Increasingly, the conceptual constructs of economics are used to give some order and clarity to issues. The tools of this discipline are limited, and, if this fact is not appreciated, limiting. They do not completely supersede older and more general thought structures. But they can serve to organize a great deal of experience in clear, consistent, and reasonably precise forms.

In addition, and in conjunction with this, the trend seems to be toward obtaining "objective" data, which meets increasingly sophisticated standards of reliability and representativeness; and lends itself to careful and orderly methods of analysis.

Those who follow these tendencies reflect an appreciation of the utility of the forms of inquiry used in physical sciences, and a desire to adapt those forms of inquiry to their needs. In the opinion of the author, the distinctive and fruitful forms of inquiry used in the physical sciences include planned, systematic searches for information relevant to the questions involved; widespread sharing and discussion of the information gathered; an attempt to assure reliability of data by various means, including the use of concrete, specific, and often quantified data of a sort which can be verified by others; a systematic examination of alternatives involved in any given problem; the formulation of conceptual (and often mathematical) models to explain processes under consideration; and the testing of the models and their predictions (indeed, views by whatever name described) against objective data to the extent possible. Perhaps most distinctive is the appeal to reliable, objective data.[37]

37. Both lawyers and economists know there is a great deal of ambiguity in the description "reliable, objective data." Such data is a construct. But the description implies

The development of formal models is not limited to explanations of events. It has also been applied to the process of making decisions: that is, models are constructed for putting into a systematic framework possible courses of action, probable results, and means of arriving at useful decisions among possible courses of action.

The attempts to use these methods of inquiry have had uneven results. The issues involved rarely fit completely into the analytical models available. Always, some of the data needed are not available. The men conducting the studies often do not have the storehouse of information and experience needed to make informed judgments when, as is usual, the objective data available take one only part of the way to decision. Too often, the paraphernalia of objective inquiry mask an advocacy merely made more elaborate, not more valid, by carefully selected and carefully arranged arrays of data. Men enamoured of analytical techniques often seem to underestimate the complexity of the economic fabric, and to over-estimate the reach of their tools. But these caveats are like the warnings which accompanied gunpowder and nitroglycerin when introduced—badly used, the tool is dangerous; however used, powerful.

A recent policy inquiry conducted by the Federal Communications Commission illustrates one attempt to furnish a basis for decision on an important issue by methods at once public, systematic, and analytical. The problem was whether the Federal Communications Commission should regulate the combination of computer with communication operations, and, if so, in what way. The agency first formulated the issues involved in comprehensive and analytic form. It then sought comment from a wide variety of interested parties, including, notably, the entities likely to use the services involved. In stating the issues for comment, the agency indicated with some particularity the sort of information sought. Upon receipt of submissions, it sought systematic analysis by a competent research organization. The results of this analysis were made available for public comment.

The agency did not undertake substantial independent fact gathering using its own staff or a research organization. Nor did it succeed in quantifying as much as would have been desirable the various effects of alternative policies. Its procedures would not necessarily be best for all situations. But the FCC proceeding did produce a more informed, systematic and objective basis for decisions than usually exists.

Should a similarly elaborate program of analysis be created to deal

a particular sort of attitude on the part of the inquirer, and a degree of refinement in the data, which have a good deal of practical meaning.

with intermodal ownership questions? It could be argued that this is not necessary. In the computer-communications case, a major new service for the economy clearly is emerging, and a decision on regulatory ground rules clearly was required. It is not so obvious that intermodal ownership is necessary or appropriate to create major new capabilities in the transport industry.

But if this subject is important enough to generate serious proposals for legislative change, and if changes under consideration would include some which would seem to be likely to have adverse market structure consequences, the subject is worth a thorough, reliable, objective and informed inquiry. The construction of an orderly and adequate regulatory regime requires more than merely generating proposals to accommodate the desires of members of one mode or another for enhanced opportunities, attempting to strike some rough equivalence in the restrictions on different types of carriers, or extending selected elements of some regulatory scheme on the grounds that there is precedent for the action.

There is a more general argument for proceeding to such an inquiry. If the natural course of economic entities is gradually to create more orderly and better integrated systems, it is, arguably, time to go beyond the early, *ad hoc* responses to some salient aspects of intermodal relationships, and to create a more comprehensive and systematic statutory structure. And if this were done, the effort, and its results, should measure up to contemporary standards for evidence and analysis. Otherwise, there would be little point in undertaking it.

In short, if public action is to be taken on the issue of intermodal ownership patterns, the costs and benefits of alternative means of coordinating transport modes should be investigated systematically and thoroughly. The various claimed efficiencies for the types of intermodal ownership under consideration should be precisely identified, the claims systematically investigated, and their dimensions quantified to the full extent feasible. The market structure consequences of each method of creating intermodal ownership structures should be traced out in as much detail as is possible. Claims should be substantiated, to the full extent possible, by objective, reliable data. Such data, and perspectives in which they are organized, should be subject to dispassionate and skeptical analysis. The advantages and disadvantages of different means of governing intermodal relatinships should be fully explored. And the process of analysis and of decision should be made as public as is possible.

To conclude, one of the most charming features of this vigorous society is its wealth of opinion, argument, good intentions, persons sure of their ground, and, more abundantly, persons sure of their interests. As the oldest sector of the economy to be organized and regulated on a national scale, the transportation industry seems particularly rich in these things; indeed, its arguments are often treated as wisdom, its assumptions as settled, and its habits as tradition. New methods of analysis and decision, grasped with some alacrity by more recent arrivals on the scene, must displace a considerable accumulation of baggage to find space in transportation's train of thought. But unless public decision making in this field is to lag in quality some decades behind its progress elsewhere, an effort must be made to meet the best of current standards for such decision making, and even (to think boldly) to improve on them. A resolution of questions raised by pleas for extension of intermodal ownership by acquisitions may or may not furnish occasion for such decision making. But if it doesn't, we are likely to suffer from the result.

APPENDIX A

PATTERN OF REGULATORY CONTROL OVER INTERMODAL ACQUISITIONS

Type of Acquisition	*Regulatory Standard*	*Agency Administering Standard*
1. Motor Carrier Acquisitions of:		
(a) railroads	public interest 49 USC §§5(2), 5(13)	ICC
(b) intercoastal and inland waterways carriers	public interest 49 USC §§5(2), 5(13), 902	ICC
(c) air carriers	public interest, effective use of facilities, protect competition. 49 USC § 1378(b)	CAB
(d) ocean carriers in foreign commerce	none	none
(e) pipelines	none	none
2. Railroad Acquisitions of:		
(a) motor carriers	public interest, effective use of facilities, protect competition. 49 USC §§5(2)(b), 5(13)	ICC
(b) intercoastal and inland water carriers	prohibition on ownership of carriers using Panama Canal; as to others, public interest, effective use of facilities, protect competition. 49 USC §5(14), (16)	ICC
(c) air carriers	public interest, effective use of facilities, protect competition. 49 USC §1378	CAB

Type of Acquisition	*Regulatory Standard*	*Agency Administering Standard*
(d) ocean carriers in foreign commerce	none	none
(e) pipelines	none	none
3. Intercoastal or Inland water carrier acquisitions of:		
(a) rail carriers	public interest 49 USC §§5(2), 5(13), 902	ICC
(b) motor carriers	public interest 49 USC §§5(2), 5(13), 902	ICC
(c) air carriers	public interest, effective use of facilities, protect competition. 49 USC §1378	CAB
(d) ocean carriers	none	none
(e) pipelines	none	none
4. Air Carrier acquisitions of:		
(a) rail carriers	none	none
(b) motor carriers	none	none
(c) inland and intercoastal water carriers	none	none
(d) ocean carriers	none	none
(e) pipelines	none	none
5. Ocean carrier acquisitions of:		
(a) rail carriers	none	none
(b) motor carriers	none	none

Type of Acquisition	*Regulatory Standard*	*Agency Administering Standard*
(c) intercoastal and inland water carriers	none	none
(d) air carriers	public interest, effective use of facilities, protect competition. 49 USC §1378	CAB
(e) pipelines	none	none
6. Pipeline carrier acquisitions of:		
(a) rail carriers	none	none
(b) motor carriers	none	none
(c) intercoastal and inland water carriers	none	none
(d) air carriers	public interest, effective use of facilities, protect competition. 49 USC §1378	CAB
(e) ocean carriers	none	none

APPENDIX B—Note on Relationships Between Anticompetitive Effects in "Conglomeration" of Business Enterprises and Intermodal Ownership Patterns

There has been a good deal of concern that the "conglomerate" corporate structures may have anticompetitive effects which, although less direct than those involved in a conventional horizonal merger, may in combination and in overall scope be of some consequence. Thus the effort of those concerned with antitrust enforcement to attempt to describe types of anticompetitive effect involved.

Concern seems to center on two aspects of the over-all anticompetitive effect—the creation in a large conglomerate merger of multiple anticompetitive potentials; each of which potentials may or may not measure large in either the amount of commerce affected, the degree of anticompetitive potential, or the presently discernible probability of anticompetitive effect, but all of which together constitute substantial anticompetitive potential, and substantial probability of significant anticompetitive effect: and the cumulative effect of large numbers of such mergers, involved in conglomeration on a massive scale, which, it might be argued, might be a significant overall decrease in present and potential competition in the economic system, and concomitant concentration of assets in fewer hands.

In five cases[1] the Department has spelled out the following major types of anticompetitive potential thought likely to result from acquisitions by the large "conglomerate" companies involved:

(1) Elimination of potential competition, including potentials for entry by portions of one party to the transaction into defined lines of commerce in which the other party was engaged, and potentials for entry by both merging entitles into defined lines of commerce in which neither firm was engaged but both firms had the capacity to enter.

(2) Creation of potentials for and likelihood of intra-family trading,

1. *United States v. Ling-Temco-Vought, Inc., Jones & Laughlin Steel Corp., and Jones & Laughlin Industries, Inc.*, Civ. No. 69-438, W.D. Pa., filed April 16, 1969; *United States v. International Telephone and Telepraph Corp.*, Civ. No. 69-C-924, N.D. Ill., filed April 28, 1969; *United States v. Northwest Industries, Inc. and The B.F. Goodrich Co.*, Civ. No. 69-C-1102, N.D. Ill., July 11, 1969; *United States v. International Telephone and Telegraph Corp. and Grinnell Corp.*, Civ. No. 13319, D. Conn., filed August 1, 1969; *United States v. International Telephone and Telegraph Corp. and The Hartford Fire Insurance Co.*, Civ. No. 13320, D. Conn., filed August 1, 1969. These involve the acquisition by Ling-Temco-Vought of the Jones & Laughlin Steel Corp., the acquisition by ITT of Canteen Corp., Hartford Fire Insurance, and Grinnell Corp., and the acquisition by Northwest Industries of stock of Goodrich Tire and Rubber Co.

leading to prejudice to firms competing with members of the family (or, to put it another way, the creation of a number of "vertical" relationships because of the many companies which could sell to and buy from each other under the conglomerate tent); and

(3) Creation or enhancement of potentials for reciprocity effects—the use of the buying power of one or several of the subsidiaries of the conglomerate to induce other companies to buy from one or more of the subsidiaries of the conglomerate, and the tendency of those who deal with a large conglomerate to buy from the conglomerate in the hope that elements of the conglomerate will buy from them.

The Department has argued, in addition, that these anticompetitive effects can in some circumstances tend to entrench in dominant market positions large firms owned by the conglomerates involved, and tend to raise barriers to entry in some of the lines of commerce involved. Also, the Department's cases seem to suggest that inter-industry competition may be lessened by the joinder of firms capable of independent development of products and services which would, over time, engender a significant amount of inter-industry competition. Finally, it has argued that if a relatively small number of conglomerates come to face each other in a large number of markets, replacing independent companies in those markets, they will come to recognize an over-all interrelationship between themselves, and tend to moderate their competitive activities to achieve a generally more comfortable *modus vivendi*.[2]

Obviously, joining a carrier with a conglomerate which is a large user of transportation services might create both vertical foreclosure potentials (in the purchase and sale of transportation), and reciprocity potentials (e.g., you use my carrier and I'll buy your widgets). Less obviously, but certainly conceivably, acquisition of a carrier in some instances might remove the prospect of independent entry into transportation by the acquiring company (either private carriage or common carriage); or remove the prospect of independent entry by the transportation company into lines of commerce in which the non-transportation company is or may be engaged. Conceivably, entry by a large conglomerate into a small transportation market might inhibit the competition of the rivals of the acquired carrier, because of fear of cross subsidization from the conglomerate to its carrier.

The dimensions of the direct elimination of competition involved in a

2. In a recent brief in the *Northwest Industries* case, the Department urges: "What is at stake is whether Section 7 can reach mergers whose impact is not immediate and perceivable in discrete markets . . . but which are of a sort that threaten long-run changes in the pattern of competition in a large proportion of the nation's markets."

"horizontal" intermodal merger, or of foreclosure of transportation markets involved in "vertical" intermodal joinders, would seem to be the same whether the joinder is brought about by a conglomerate or by a direct carrier-carrier transaction. However, the combination of the anticompetitive potentials of the intermodal joinder, the anticompetitive potentials from joinder of a large conglomerate with a carrier, and, conceivably, the anticompetitive potentials of joining two conglomerates, each of which owns a carrier, could result in a larger over-all anticompetitive effect—and therefore deterrent to acquisition—than would result from the intermodal joinder alone.

The joinder of conglomerates with carriers could cause the patterns of court and agency review to appear inconsistent; and might produce court-agency conflicts over jurisdiction. For example, a large conglomerate would be required to get CAB approval for acquiring an air carrier. It could then acquire an ocean carrier and a motor carrier subject only to the antitrust law tests. If it then wished to acquire another air carrier the joinder of all of its operations, including the surface carrier and air carrier operations, with the second air carrier would be subject to CAB review. If it wished to acquire a railroad, the ICC could consider the motor carrier-railroad relationship, but not necessarily any other relationships, and the antitrust laws would seem to govern the joinder of the other operations with the railroad. If between the acquisition of the ocean carrier and the motor carrier the company were to snack on a steel company and a food chain the antitrust laws would be the measure of the legality of its appetite. If allowed, these elements of the corporate structure would be taken into account as above in the subsequent carrier acquisitions.

Now suppose that our conglomerate A, having succeeded in all these acquisitions, wishes to merge with conglomerate B, which has, perhaps miraculously, run a parallel course. What does the CAB consider? What can it immunize from the antitrust laws? Can it immunize any joinder from an ICC prohibition? What does the ICC consider? What can it immunize from the antitrust laws? Can it immunize any transaction it approves from a CAB prohibition?

I will leave the resolution of the proper application of regulatory and antitrust standards in this situation to the reader, in the event a client's interests or his own propensity for puzzles in logic propel him into the maze; should the reader be a law professor, for prophylatic use, with suitable embellishment, in examinations for law students who have betrayed a misguided predilection for trade regulation; or, should the reader be a law student either apprehensive or curious enough to be interested, for an illustration of how the economy constantly obsoletes regulatory law.

Presumably the potentials for complication of regulatory control outlined above will be realized piecemeal. It may be some time before we are forced into constructing an orderly general scheme for such situations.