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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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STATEMENT OF
OLIVER W. KRUEGER, ASSOCIATE DIRECTOR
COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
THE INTERSTATE COMMERCE COMMISSION'S JURISDICTION OVER
RAILROAD HOLDING COMPANIES AND EVALUATION OF
PROPOSED RAIL MERGERS
MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:
WE APPRECIATE THE OPPORTUNITY TO BE HERE TODAY AT YOUR
REQUEST TO DISCUSS THE INTERSTATE COMMERCE COMMISSION'S (ICC'S)
(1) JURISDICTION OVER AND MONITORING OF RAILROAD COMPANIES,
INCLUDING THE ACQUISITION OF THE BURLINGTON NORTHERN RAILROAD
BY A HOLDING COMPANY, (2) ABILITY TO REVIEW MERGER APPLICATIONS
DESPITE STAFF REDUCTIONS, AND (3) PREPARATION AND USE OF POST-
MERGER STUDIES TO ASSESS PROPOSED MERGER APPLICATIONS.
ICC HAS LIMITED JURISDICTION OVER ACQUISITION
OF CARRIERS BY HOLDING COMPANIES

UNDER THE INTERSTATE COMMERCE ACT, ICC DOES NOT HAVE JURIS-
DICTION OVER THE ACQUISITION OF A SINGLE RAIL CARRIER BY A



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NON-CARRIER, SUCH AS A HOLDING COMPANY. ICC'S JURISDICTION APPLIES ONLY WHEN A HOLDING COMPANY IS ACQUIRING CONTROL OF AT LEAST TWO CARRIERS, OR WHERE A HOLDING COMPANY ALREADY CONTROLS ONE CARRIER AND SEEKS TO ACQUIRE ANOTHER. ICC HAS RULED THAT A RAIL SYSTEM COMPRISED OF A NUMBER OF RAIL CARRIERS BUT OPERATED AND MANAGED AS A SINGLE SYSTEM WOULD BE CONSIDERED A SINGLE CARRIER--CALLED THE "SINGLE SYSTEM DOCTRINE." ICC'S RATIONALE FOR EXCLUDING SUCH SYSTEMS FROM ITS JURISDICTION IS THAT THE NON-CARRIER ACQUIRING CONTROL OF AN EXISTING, SINGLE INTEGRATED CARRIER SYSTEM INVOLVES ONLY A CHANGE IN STOCK OWNERSHIP AND THE INSERTION OF A NEW CORPORATE ENTITY AT THE TOP AND DOES NOT OTHERWISE ALTER THE OPERATIONS OF THE AFFILIATED CARRIERS.

ICC APPLIED THE SINGLE SYSTEM DOCTRINE WHEN DECIDING THAT IT DID NOT HAVE JURISDICTION OVER BURLINGTON NORTHERN, INC.'S CREATION OF A HOLDING COMPANY IN 1981. THE HOLDING COMPANY WAS FORMED TO OWN BOTH ITS TRANSPORTATION AND NON-TRANSPORTATION COMPANIES AND ASSETS. THIS WAS TO PROVIDE GREATER FLEXIBILITY IN FINANCING NON-TRANSPORTATION BUSINESS ACTIVITIES INVOLVING THE ISSUANCE OF SECURITIES TO DEVELOP NATURAL RESOURCES OWNED BY THE RAILROAD AND ITS SUBSIDIARIES. ACCORDING TO AN ICC STUDY, THIS IS A COMMON REASON FOR FORMING HOLDING COMPANIES.

ICC WAS REQUESTED TO EXERT ITS JURISDICTION OVER THE PROPOSED FORMATION OF THE BURLINGTON NORTHERN HOLDING COMPANY ON THE BASIS THAT IT INVOLVED THE ACQUISITION OF AT LEAST TWO CARRIERS. IN ITS JUNE 5, 1981, DECISION, ICC DENIED THE PETITIONS STATING THAT

BURLINGTON NORTHERN, INC.'S, FORMATION OF A HOLDING COMPANY FITS WITHIN THE SINGLE SYSTEM DOCTRINE. ICC SAID THAT BURLINGTON NORTHERN, INC., OPERATES ALL OF ITS COMPANIES--BOTH RAIL AND NON-RAIL TRANSPORTATION SUBSIDIARIES--AS AN INTEGRATED TRANSPORTATION SYSTEM UNDER ITS DIRECT CONTROL AND MANAGEMENT. ICC CITED SPECIFIC EXAMPLES THAT SHOWED BURLINGTON NORTHERN OPERATES AS A SINGLE SYSTEM.

ICC'S DECISION WAS APPEALED. IN FEBRUARY 1982, THE U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT UPHELD THE SINGLE SYSTEM DOCTRINE, STATING: "ALTHOUGH THIS INTERPRETATION OF THE PHRASE '2 CARRIERS' IS BY NO MEANS THE ONLY POSSIBLE ONE, NOR NECESSARILY THE CONSTRUCTION WE WOULD ADOPT IF WE WERE FREE TO DECIDE THE QUESTION INDEPENDENTLY, IT IS NOT UNREASONABLE, AND WE THEREFORE DEFER TO THE COMMISSION'S VIEW OF ITS OWN GOVERNING STATUTE, ESPECIALLY SINCE THIS CONSTRUCTION HAS BEEN CONSISTENTLY ADHERED TO OVER A LONG PERIOD OF TIME." THE COURT OF APPEALS RETURNED THE CASE TO ICC TO DETERMINE WHETHER BURLINGTON NORTHERN, INC'S, INTERESTS IN TERMINAL AND SWITCHING COMPANIES TAKE THIS CASE OUT OF THE SINGLE-SYSTEM DOCTRINE--AN ISSUE WHICH ICC DID NOT ADDRESS IN ITS DECISION.

ANOTHER TRANSACTION INVOLVING BURLINGTON NORTHERN WHICH ICC DETERMINED WAS NOT WITHIN ITS JURISDICTION AND THEREFORE DID NOT REQUIRE ITS APPROVAL WAS THE PROPOSED MERGER OF THE COLORADO AND SOUTHERN RAILWAY COMPANY INTO THE BURLINGTON NORTHERN RAILROAD COMPANY. BEFORE THIS MERGER, BURLINGTON NORTHERN OWNED A VAST MAJORITY OF THE OUTSTANDING STOCK IN COLORADO AND SOUTHERN AND THEREBY CONTROLLED IT.

IN OCTOBER 1981, BURLINGTON NORTHERN RAILROAD NOTIFIED ICC OF THE PROPOSED MERGER WITH THE COLORADO SOUTHERN RAILWAY. THE BURLINGTON NORTHERN CITED SEVERAL REASONS FOR THE MERGER INCLUDING THE SIMPLIFICATION OF CORPORATE OPERATIONS AND CONSOLIDATION OF OUTSTANDING DEBT. ON DECEMBER 28, 1981, ICC DECIDED THE MERGER WAS EXEMPT FROM ITS JURISDICTION BECAUSE THE TRANSACTION FITS WITHIN ICC'S EXEMPTION FOR TRANSACTIONS WITHIN A CORPORATE FAMILY THAT DO NOT ADVERSELY AFFECT SERVICE, OR RESULT IN SIGNIFICANT OPERATIONAL OR COMPETITIVE BALANCE CHANGES. WE BELIEVE THE EXEMPTION IN THIS CASE IS CONSISTENT WITH THE RATIONALE UNDERLYING THE SINGLE SYSTEM DOCTRINE.

ICC'S MONITORING OF RAILROAD HOLDING COMPANIES

ICC, IN A 1977 REPORT TO THE CONGRESS, STATED THAT THE OPPORTUNITY EXISTS FOR HOLDING COMPANIES CONTROLLING RAILROADS' SYSTEMS OPERATIONS TO MAKE USE OF THE RAILROADS' INCOME, PROPERTY, AND OTHER ASSETS FOR NON-RAIL PURPOSES TO THE POSSIBLE DETRIMENT OF THE RAILROADS. METHODS THAT COULD BE USED BY THE HOLDING COMPANIES INCLUDE TRANSFER OF RAILROADS' NON-TRANSPORTATION ASSETS TO THE HOLDING COMPANY, ISSUING SECURITIES BACKED BY RAILROADS' ASSETS, ISSUING DIVIDENDS FROM RAILROADS' REVENUES, AND BORROWING MONIES FROM ITS RAILROAD SUBSIDIARIES. ICC'S REPORT INDICATED THAT RATHER THAN REQUESTING INCREASED JURISDICTION IT WOULD, WHEN CONDUCTING AUDITS OF RAIL CARRIERS' RECORDS, IDENTIFY ANY

TRANSACTIONS WHICH MIGHT HAVE A SIGNIFICANT ADVERSE IMPACT UPON THE RAILROAD AND COMPEL THE COMPANIES TO REPORT TO ICC PERTINENT INFORMATION REGARDING RAILROAD-RELATED OPERATIONS.

ICC'S MONITORING ACTIVITIES APPEAR LIMITED. ICC MONITORS HOLDING COMPANY RAILROAD-RELATED TRANSACTIONS THROUGH AUDITS OF RAILROAD RECORDS AND REVIEWS OF ACCOUNTING AND SECURITY REPORTS. HOWEVER, THE AUDITS OF RAILROAD RECORDS ARE ONLY CONDUCTED EVERY 2 TO 3 YEARS. IN ADDITION, THE ACCOUNTING AND SECURITIES REPORTS REVIEWED BY ICC DO NOT PROVIDE SUFFICIENT INFORMATION TO IDENTIFY MANY OF THE HOLDING COMPANIES' RAILROAD-RELATED TRANSACTIONS, SUCH AS WHETHER A HOLDING COMPANY ACQUIRING A LOAN USES ITS RAILROAD'S ASSETS AS SECURITY. ALTHOUGH ICC ALSO HAS ACCESS TO THE REPORT THAT HOLDING COMPANIES SUBMIT TO THE SECURITIES AND EXCHANGE COMMISSION, THE REPORT DOES NOT IDENTIFY A RAILROAD'S INVOLVEMENT IN SECURITY ISSUANCES. 1/

ICC OFFICIALS TOLD US THAT THEY DO NOT MONITOR ALL HOLDING COMPANIES' RAIL-RELATED OPERATIONS BECAUSE OF STAFF LIMITATIONS, THE REDIRECTION OF ICC POLICY TOWARD LESS REGULATION, INCLUDING A REDUCTION IN RAILROAD REPORTING REQUIREMENTS, AND THE FACT THAT NO ABUSES ADVERSELY AFFECTING A RAILROAD'S FINANCIAL STABILITY HAVE BEEN IDENTIFIED UNDER THE CURRENT MONITORING SYSTEM. ICC OFFICIALS ALSO SAID THAT EVEN IF AN ABUSE WAS IDENTIFIED THEY DO NOT BELIEVE

1/THE SECURITIES AND EXCHANGE COMMISSION REVIEWS THE REPORT TO ASSURE THE HOLDING COMPANIES' FINANCIAL STATUS IS ACCURATELY PORTRAYED.

ICC HAS THE AUTHORITY TO TERMINATE OR RESTRICT THE TRANSACTION BECAUSE THE SINGLE CARRIER HOLDING COMPANIES ARE EXEMPT FROM ICC'S JURISDICTION UNDER EXISTING LEGISLATION.

WE BELIEVE ICC NEEDS TO MONITOR ALL HOLDING COMPANIES' RAIL-RELATED OPERATIONS BECAUSE THE OPPORTUNITY FOR ABUSE DOES EXIST. ICC'S CURRENT MONITORING EFFORTS PROVIDE LIMITED ASSURANCE THAT IT IS ALERT TO ALL RAILROAD-RELATED TRANSACTIONS BY A HOLDING COMPANY THAT COULD ADVERSELY AFFECT A RAILROAD. ICC NEEDS TO MONITOR SUCH TRANSACTIONS SO THAT POSSIBLE ABUSES ARE IDENTIFIED IN SUFFICIENT TIME TO TAKE APPROPRIATE ACTION, INCLUDING ASKING THE CONGRESS TO INCREASE ITS AUTHORITY.

STAFF REDUCTIONS AND THEIR IMPACT
ON ICC'S MERGER REVIEWS

ICC'S OVERALL STAFF HAS DECREASED BY ABOUT 512 OR ABOUT 25 PERCENT SINCE FISCAL YEAR 1979. THE OFFICE OF TRANSPORTATION ANALYSIS--THE OFFICE RESPONSIBLE FOR ASSISTING ICC ON ITS MERGER ANALYSES AND FOR CONDUCTING POSTMERGER ANALYSES--STAFF YEAR CEILING HAS BEEN REDUCED FROM 92 TO 52 SINCE 1979. THE UNIT WITHIN THE OFFICE RESPONSIBLE FOR ASSISTING IN ICC'S MERGER REVIEWS--THE SECTION OF RESEARCH AND ANALYSIS--CURRENTLY HAS A PROFESSIONAL STAFF OF 14. DESPITE STAFF REDUCTIONS, ICC OFFICIALS BELIEVE THAT SUFFICIENT STAFF EXISTS TO ADEQUATELY REVIEW PROPOSED MERGERS BECAUSE:

--A NUMBER OF ICC'S OFFICES ASSIST IN ANALYZING VARIOUS ASPECTS OF A MERGER. FOR A LARGE MERGER, A TEAM CONSISTING OF REPRESENTATIVES FROM ICC'S OFFICE OF PROCEEDINGS, OFFICE OF HEARINGS, BUREAU OF ACCOUNTS, OFFICE OF COMPLIANCE AND CONSUMER ASSISTANCE, AND OFFICE OF TRANSPORTATION ANALYSIS MAY BE ASSEMBLED. TEAM MEMBERS WORK FULL OR PART TIME ON A MERGER CASE. SINCE NOT ALL MERGERS REQUIRE HIS OFFICE'S INPUT AND THE STAGGERS RAIL ACT REDUCED THE SCOPE OF SOME MERGER REVIEWS, THE DIRECTOR BELIEVES THAT NECESSARY STAFF IS AVAILABLE TO DO SUCH ANALYSES.

--A NUMBER OF THE OFFICE'S DUTIES HAVE BEEN REDUCED OR ELIMINATED. AFTER THE MOTOR CARRIER ACT AND THE STAGGERS RAIL ACT WERE PASSED, WHICH CHANGED THE REGULATIONS IN BOTH THE MOTOR AND RAIL SECTORS, ICC DECIDED IN FISCAL YEAR 1982, TO CHANGE THE OFFICE'S PRIMARY MISSION TO PROVIDING ECONOMIC ANALYSES AND ANALYTICAL SUPPORT FOR ICC'S ACTIVITIES. THE OFFICE HAS RETAINED A PRIMARY FUNCTION OF ASSISTING MERGER ANALYSIS TEAMS AND PROVIDING STAFF SUPPORT FOR REVIEWS OF MERGER APPLICATIONS.

--THE NUMBER OF MAJOR MERGER CASES WHICH REQUIRE A FULL REVIEW IS LIMITED AND WITH RECENT LEGISLATION IS REDUCED EVEN FURTHER. THUS, FEWER STAFF ARE NECESSARY, ON A FULL TIME BASIS, TO ASSIST ON MERGER REVIEWS. SINCE 1979, ICC HAS ONLY RECEIVED SIX MAJOR MERGER PROPOSALS--THREE OF WHICH HAVE YET TO BE DECIDED. EACH OF THESE MERGERS VARIES IN SIZE, COMPLEXITY, AND PUBLIC REACTION AND PARTICIPATION. AS A RESULT, THE STAFF REQUIRED AND THE

LENGTH OF TIME THEY ARE REQUIRED, VARIES FROM MERGER TO MERGER. RATHER THAN COMPROMISE THE QUALITY OF ITS WORK, THE DIRECTOR SAID THAT ICC WOULD CONTRACT FOR SPECIFIC STUDIES IF ICC BECOMES UNEXPECTEDLY FLOODED WITH MERGER PROPOSALS.

ICC NOW BELIEVES THE USEFULNESS OF
POSTMERGER STUDIES IS LIMITED

DURING JUNE 1979 SENATE HEARINGS BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLY, AND BUSINESS RIGHTS, SENATE COMMITTEE ON THE JUDICIARY, FORMER ICC CHAIRMAN O'NEAL TESTIFIED THAT ICC WAS RESPONSIBLE FOR ANALYZING POSTMERGER DATA AND THAT ICC WAS IN THE PROCESS OF CONTRACTING FOR SUCH A STUDY WITH PRINCETON UNIVERSITY.

IN RESPONSE TO SENATOR BAUCUS' REQUEST, WE INQUIRED IN NOVEMBER 1981 WHETHER THE STUDY REFERRED TO BY THE CHAIRMAN HAD BEEN DONE. ICC INFORMED US THE STUDY HAD NOT BEEN PERFORMED AND WE RELAYED THIS INFORMATION TO THE SENATOR BY LETTER DATED DECEMBER 2, 1981. SUBSEQUENTLY ICC SAID THAT IN SPITE OF ITS EARLIER STATEMENTS TO US, IT HAD FOUND THE STUDY, WHICH IT THEN MADE AVAILABLE. ICC OFFICIALS SAID THEY COULD NOT FIND THE STUDY WHEN WE INITIALLY ASKED BECAUSE THE STUDY PROPOSED BY FORMER CHAIRMAN O'NEAL WAS TO BE BROAD-BASED AND THE STUDY ACTUALLY DONE WAS SUBSTANTIALLY LIMITED IN SCOPE. IN ADDITION, THE STAFF INVOLVED WITH THE STUDY WAS NO LONGER WITH ICC. HOWEVER, AFTER CONFERRING WITH THE FORMER ICC DIRECTOR RESPONSIBLE FOR THE STUDY, ICC OFFICIALS DETERMINED THAT THE NARROWLY SCOPED STUDY WAS THE ONE MENTIONED BY THE FORMER CHAIRMAN.

THE STUDY WAS ISSUED IN THE SPRING OF 1980. HOWEVER, IT DID NOT ACCOMPLISH ICC'S ORIGINAL GOALS OF DETERMINING WHETHER THE BENEFITS OF THE MERGERS REVIEWED WERE REALIZED NOR DID IT PROVIDE INFORMATION THAT COULD BE PROJECTED TO OTHER MERGERS. ACCORDING TO THE OFFICIAL RESPONSIBLE FOR THE STUDY, THE SCOPE WAS REDUCED BECAUSE OF DATA LIMITATIONS. THE STUDY DEVELOPED ONLY EXPECTED RANGES OF TRAFFIC DIVERSION FROM ONE RAILROAD TO THE MERGED RAILROADS. ICC TOLD US IT DID NOT CONVEY THE STUDY'S RESULTS TO THE SUBCOMMITTEE BECAUSE THE FINDINGS WERE LIMITED AND INCONCLUSIVE.

ICC OFFICIALS ACKNOWLEDGED THAT PROPERLY CONDUCTED POST-MERGER STUDIES MAY PROVIDE USEFUL INFORMATION FOR DEVELOPING ITS MERGER POLICIES, BUT QUESTION (1) WHETHER MERGERS ARE SUFFICIENTLY SIMILAR TO USE THE RESULTS OF ONE MERGER TO ASSESS THE POTENTIAL IMPACT OF A PROPOSED MERGER, AND (2) IF DATA ANALYSIS CAN PRODUCE CONCLUSIVE FINDINGS.

ATTORNEYS IN ICC'S OFFICE OF PROCEEDINGS STATED THAT POST-MERGER STUDIES COULD BE SUBMITTED AS EVIDENCE DURING CURRENT MERGER PROCEEDINGS. SINCE EACH MERGER IS DIFFERENT, HOWEVER, EVIDENCE FROM POSTMERGER STUDIES COULD EASILY BE CHALLENGED ON THE GROUNDS THAT THE MERGERS WERE NOT SUFFICIENTLY SIMILAR FOR COMPARISON. THUS, THE FACT THAT OTHER MERGERS DID NOT ACHIEVE THEIR ANTICIPATED BENEFITS WOULD NOT PROVIDE ASSURANCE THAT THE MERGER BEING PROPOSED WOULD NOT ACHIEVE ITS ANTICIPATED BENEFITS.

THESE STUDIES COULD ASSIST ICC'S REVIEWS OF PROPOSED MERGERS,
EITHER BY DEVELOPING METHODS FOR DATA ANALYSIS, OR BY HIGHLIGHT-
ING POLICY ISSUES. HOWEVER, DOING STUDIES MUST BE WEIGHED
AGAINST THEIR COST AND THE POSSIBILITY THAT POSTMERGER STUDIES
MAY NOT PRODUCE USEABLE RESULTS.

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MR. CHAIRMAN, THIS CONCLUDES MY PREPARED STATEMENT. WE ARE
PREPARED TO ANSWER ANY QUESTIONS YOU MAY HAVE AT THIS TIME.