Issues of Cost Recovery in the Debate Over Competitive Access

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I. INTRODUCTION

Competitive access is a term that has come to be applied to the availability of facilities owned by one railroad for services provided by or in conjunction with another railroad. A debate has arisen over the terms and circumstances of access, with the proponents of access generally seeking the installation of intramodal rail competition.[1]

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1. The debate arises against the backdrop of increasing intermodal competition, competition which seriously weakened the rail industry and led to the deregulatory measures of the Staggers Rail Act of 1980 ("Staggers Act"). Pub. L. No. 96-448. A purpose of this law was to enhance rail-truck competition. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79, 80 (1980) (Reprinted in 1980 U.S. Code Cong. & Ad. News 4110-4111). Whether access by one railroad to the facilities of another can or should be compelled in the presence of truck competition is a question beyond the scope of this article, but a serious question nonetheless.

The access issue is, in part, a stepchild of deregulation, which provided railroads with an expanded ability to dislodge themselves from the involuntary and uneconomic system of equalized joint rates, prescribed divisions, and below-cost switching charges.[2] For the first time, carriers could price their services in accordance with cost and market demand.[3] The framers of the legislation hoped through deregulation to encourage more efficient routing, more profitable traffic for railroads and lower total costs to shippers.[4]

Deregulation was bound to and did result in the dislocation of railroads that were disadvantaged by their location, route structure, cost structure, or marketing abilities.[5] Such companies now find themselves uncompetitive in markets which they once were able to serve profitably only as a result of agency-enforced practices of holding down switching charges and equalizing all rates between any two points at a level that protected the least efficient carrier.[6]

These carriers have sought, in the name of "competitive access," to recapture traffic by forcing efficient carriers to subsidize their participation

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2. In the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 45 U.S.C. §§ 801-803) ("4R Act"), Congress amended old section 15(3) of the Interstate Commerce Act to set forth specific factors to be considered in an investigation proceeding in determining whether a joint rate cancellation is in the public interest. *See* 49 U.S.C. § 10705(e) (1982). In the Staggers Act, in order to alleviate the major problem caused by "a proliferation of uneconomic routes protected by the archaic 'commercial closing' doctrine" (H.R. Rep. No. 1430, 96th Cong., 2d Sess. 111 (1980) (reprinted in 1980 U.S. Code Cong. & Ad. News 4143), Congress added additional joint rate cancellation and surcharge flexibility. *See* 49 U.S.C. § 10705a (1982).

3. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 (1980) (reprinted in 1980 U.S. Code Cong. & Ad. News 4111). ("Modernization of economic regulation of railroads, with greater reliance on the market place is essential to achieve maximum utilization of railroads, to save energy and to combat inflation.")

4. "Two of the major problems caused by the existing joint rate system are too low rate divisions and a proliferation of uneconomic routes. . . . The Conferees intend that the [Act] will alleviate these problems . . . by assuring that a carrier . . . will be able . . . to either earn revenues . . . equal to or exceeding 110 percent of . . . variable costs or to close routes not providing this level of earnings. . . .

[E]xisting remedies, assuming the [Interstate Commerce] Commission chooses to administer them in order to realize the revenue adequacy goals of the act, should be adequate to remedy other joint route and division problems." H.R. Rep. No. 1430, 96th Cong., 2d Sess., 111, 112 (1980). (Reprinted in 1980 U.S. Code Cong. & Ad. News 4143, 4144).

5. In Western Railroads—Agreement, 364 I.C.C. 635, 649-50 (1981), the Interstate Commerce Commission indicated that some dislocation was the expected result of achieving a more competitive rail industry:

> To the extent that our definition of practicably participate will result in the loss of some routes and a consequent reduction in the number of routing options available to shippers, that effect is outweighed by the desirability of more efficient routing . . . . We acknowledge the possibility that certain carriers may lose some business which they now enjoy under open routings as bridge carriers. This outcome is, however, contemplated by the SRA's general thrust in favor of efficiency in carrier operations.

6. *See generally*, T. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY Ch. 2 (1983).

in inefficient routes. Likewise, many shippers who enjoyed regulated rates upon certain routes at less than full economic costs are seeking the same thing.

These efforts prevent competitive access and produce anticompetitive results.[7] Correctly designed and rationally applied, competitive access achieves the opposite result: it concentrates traffic over the most efficient route and allows carriers and shippers alike to share in the benefits of that efficiency.

In this context, access can arise in a variety of forms: inter-carrier rate agreements, proportional rates, switching, or operating rights that allow multiple carriers (or shippers) to operate over the same track.

This article discusses the economics of voluntary and involuntary access, particularly where joint use of a single set of tracks is at issue. In that connection, the article raises an issue that has been little debated: the potential that labor protection[8] costs, whether imposed by the Interstate Commerce Commission or arising under collective bargaining agreements, could significantly distort the economics (and, therefore, the availability) of access.

II. THE COMPETITIVE ACCESS DEBATE SO FAR

A. *THE ROLE OF THE INTERSTATE COMMERCE COMMISSION IN COMPETITIVE ACCESS*

The initial forum for the competitive access debate was the Interstate Commerce Commission ("Commission"). Carriers first exercised the new freedom afforded by deregulation to enact surcharges[9] and cancel joint rates,[10] actions directed largely at freeing carriers from the provision of service that was palpably unprofitable. The Commission generally endorsed such practices as the means by which to bring greater efficiency to the routing and pricing structure of the industry.[11] Consistent with Con-

7. In Joint Line Cancellation on Soda Ash by Union Pacific, 365 I.C.C. 951, 970 (1982), the Commission, in response to the contention that equalized joint rates should be restored to promote competition, responded that such restoration would not lead to "real competition," and termed competition under the former system, "artificially induced and unrelated to transportation costs."

8. The term "labor protection" is used to refer to payments required by either statute or contract to be made to displaced or dismissed railroad employees.

9. 49 U.S.C. § 10705a (1982). *See, e.g.*, Conrail Surcharge on Pulpboard, 362 I.C.C. 740 (1980).

10. *See supra*, note 4; *see also, e.g.*, Minneapolis, N. & S. Ry. v. I.C.C., 707 F.2d 984 (8th Cir. 1983); Cancellation of participation in Single-Factor Joint Rates on Grains, Conrail, Oct. 1981, 365 I.C.C. 804 (1982); Family Lines Rail System—Unilateral Cancellation of Joint Rates, 365 I.C.C. 464 (1981), *aff'd sub nom.* Southern Ry. v. I.C.C., 681 F.2d 29 (D.C. Cir. 1982).

11. *See supra*, notes 4 and 5; *see also, e.g.*, Docket No. 39176 (Sub-No. 1) Pittsburgh & Lake Erie R.R. v. Consolidation Rail Corp., (unprinted) April 3, 1985, *aff'd* Pittsburgh & Lake Erie

gressional intent that railroads achieve revenue adequacy,[12] carriers also began to increase switching charges to cover the costs of providing such services.[13]

Carriers whose inefficiency was protected by the equalized rate structure objected.[14] Shippers who were subsidized by uneconomically low rates in the former structure also objected.[15]

Initially, the Commission declined to interfere, finding that the railroads' actions were consistent with the Staggers Act mandate.[16] In response to the continued outcry over the various forms of independent pricing undertaken by the railroads, the Commission later initiated a rulemaking to determine the standards that would govern the cancellation of through routes and joint rates and the prescription of through routes, through rates, and reciprocal switching.[17] While compromises in the standards adopted by the Commission were unavoidable, the importance

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R.R. v. I.C.C., No. 85-1312 (D.C. Cir. Aug. 8, 1986); Restructured Rates on Grain and Grain products, Conrail, 365 I.C.C. 635 (1982); Joint Line Cancellation on Soda Ash By Union Pacific R.R., 365 I.C.C. 951 (1982).

12. H.R. Rep. No. 1430 96th Cong., 2d Sess. 80 (1980) (Reprinted in 1980 U.S. Code Cong. & Ad. News 4111). ("The overall purpose of the Act is to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system.") 49 U.S.C. § 10704(a) (1982).

The Commission acknowledged the need for railroads to achieve revenue adequacy in several proceedings. *See, e.g*, Standards of R.R., Revenue Adequacy, 364 I.C.C. 803 (1981), *aff'd sub nom.* Bessemer and Lake Erie R.R. v. I.C.C., 691 F.2d 1104 (3d Cir. 1982), *cert. denied*, 462 U.S. 1110, 1111 (1983); Coal Rate Guidelines—Nationwide, 364 I.C.C. 360 (1980).

13. *See, e.g.*, Increased Minimum Switching, Conrail, March 1983, S.B. No. 71021-1 (decision not to suspend dated March 16, 1983; decision not to investigate dated March 18, 1983).

14. *See*, Standards for Intramodal Rail Competition, slip op. (I.C.C. July 7, 1983).

15. *See, e.g.*, Standards for Intramodal Rail Competition, slip op. (I.C.C. July 7, 1983) (National Industrial Transportation League Petition seeking to initiate rulemaking to circumscribe joint rate cancellations denied); Chlorine Institute, Inc. v. Atchison T. & S. F. Ry., I.C.C. No. 39176.

16. In Standards for Intramodal Rail Competition, slip op. at 9, 11 (I.C.C. July 7, 1983), the Commission observed:

> As a general proposition, the actions [i.e., widespread railroad rate restructuring] comport with the Staggers Act mandate. That is, rail carriers are no longer acting in concert, offering equal opportunities for all regardless of location, management efficiency or other variables, but instead are being operated as individual businesses, run to make the most of what each has to offer the shipping public.
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> To the extent that recent changes to the joint rate structure reflect inherent or developed advantages one carrier may have over another, such as a shorter or more efficient single line route, they are changes that the Staggers Act encourages, as they ultimately produce a more efficient and competitive industry.

The Commission acknowledged that in individual circumstances the actions taken by a railroad could have an anticompetitive impact, but the Commission concluded that such circumstances could properly be evaluated only on a case-by-case basis.

17. Standards for Intramodal Rail Competition, slip op. (I.C.C. July 7, 1983), order initiating rulemaking served March 28, 1985; decision served October 31, 1985, *appeals docketed*, Nos. 85-1761 and 85-1845 (D.C. Cir. Nov. 19, 1985, and Dec. 27, 1985).

of the new rules is that they focused on preservation or enhancement of efficiency and competition,[18] not the preservation or enhancement of particular competitors.[19]

As direct attacks failed against actions that were in effect reasonable rate increases, a new dimension crept into the debate. This dimension involved requests for physical use of one carrier's track by another carrier or shipper. This was a new issue, not specifically addressed by the Commission's decision in *Standards for Intramodel Rail Competition*.[20]

Carriers have long had the statutory ability to enter into voluntary trackage rights agreements[21] and, on behalf of themselves or shippers, have been allowed to ask the Commission to compel access to the terminal facilities of another railroad.[22] The Staggers Act extended the Commission's authority to compel access by means of reciprocal switching as well.[23] Only in recent history however, has there been widespread attention to the notion of physical access as a means to defeat rates whose levels meet the maximum rate reasonableness criteria.[24]

For these and other reasons, the Commission, to date, has struggled to determine the context in which the grant of access to terminals is appropriate.[25] This uncertainty also is apparent in its treatment of requests

18. Standards for Intramodal Rail Competition, slip op. (I.C.C. July 7, 1983).

19. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). (The distinction between protecting competition and protecting competitors is well recognized in antitrust doctrine).

20. The issue of what standards should govern the Commission's grant of physical access to terminals under 49 U.S.C. § 11103(a) (1982) was raised by Railroads Against Monopoly and Chemical Manufacturers Association in Standards for Intramodal Rail Competition, slip op. (I.C.C. July 7, 1983), but was not embodied in the regulations adopted by the Commission.

21. 49 U.S.C. § 11343 (1982).

22. 49 U.S.C. § 11103(a) (1982).

23. 49 U.S.C. § 11103(c)(1) (1982).

24. The issue raised by such requests for access intended to defeat lawful rates is whether, and if so, when, a rate that meets the maximum rate reasonable criteria can nonetheless be anticompetitive. If this issue is resolved in the affirmative, it must be determined whether relief should come in the form of a lower rate or a grant of access. *See infra*, discussion at n.26.

25. In certain of the post-Staggers Act access cases brought under section 11103, the petitioner has sought reciprocal switching and terminal access either jointly or in the alternative. In Midtec Paper Corp. v. Chicago & N.W. Transp., No. 39021, (I.C.C. July 3, 1985), the Commission reversed a Review Board decision that Soo Line serve Midtec's plant located on the CNW. The Commission rejected the argument that relief under sections 11103(a) and (c) was available concurrently and that reciprocal switching should be available on demand to shippers served solely by one carrier. The Commission stated that there must be evidence that service is inadequate to justify such relief. Moreover, it found that the compelled-access provisions of the Act were not to be used to remedy rates that the shipper believed to be too high, in the absence of a demonstration of market dominance. In its decision, the Commission overruled the holding of Delaware and Hudson Ry. v. Consolidated Rail Corp., 367 I.C.C. 718 (1983), that only intramodal rail competition could be considered in determining the need for competitive rail service under Section 11103(c)(1).

The Commission served its decision in *Midtec* prior to completion of the Standards for In-

for reciprocal switching.[26] The Commission has recently raised the question of the relationship between switching rates and the underlying question of access.[27]

The Commission's power to compel joint use of terminal facilities (including main-line track for a "reasonable distance" outside the terminal)[28] involves the direct use of the owning carrier's facilities, and the Commission must have compelling reasons for so ordering.[29] The Inter-

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tramodal Rail Competition proceeding. The decision was appealed to the District of Columbia Circuit, Midtec Paper Corp. v. United States, No. 85-1476 (D.C. Cir. July 20, 1985). Shortly thereafter the Commission announced its intention to file a Motion to Remand with the court (Oct. 31, 1985). In an order dated April 29, 1986, the court granted in part and denied in part the Commission's order, choosing to retain jurisdiction over the issue of joint use of terminal facilities and remanding the issue of reciprocal switching. The Commission's request for rehearing seeking to have the matter remanded in its entirety initially was denied (D.C. Cir. June 4, 1985), but ultimately was granted in an order served July 11, 1986. On October 9, 1986, the Commission once again voted to deny Midtec access.

In Central States Enterprises, Inc. v. Seaboard C.L.R.R., No. 38891, slip op. (I.C.C. July 6, 1983), the Commission reversed a Review Board's grant of reciprocal switching which would have allowed Southern Railway to serve Central States' Camilla, Georgia, grain elevator located on Seaboard. Central States had sought access through either reciprocal switching or use of Seaboard's terminal facilities. The Commission found relief inappropriate in the absence of a demonstration by Central States that Seaboard's service was inadequate or its rates were unreasonable. The Seventh Circuit Court of Appeals has upheld the Commission. Central States Enterprises, Inc. v. I.C.C., 780 F.2d 664 (7th Cir. 1985).

26. In Universal Forest Products, Inc. v. Seaboard C.L.R.R., No. 29883 (I.C.C. Dec. 17, 1985), the Commission declined to review directly the merits of a finding by Division 1 of the Commission that refused to grant Southern Railway reciprocal switching to Universal's plant, served exclusively by the Seaboard. Instead, the Commission ordered oral hearings to consider the issue in light of the recent regulations promulgated in Standards for Intramodal for Rail Competition (I.C.C. Oct. 31, 1985).

Southern was never a party to this proceeding, which was one factor in the Division's denial of Universal's request. However, in a subsequent decision, the Commission raised the possibility that reciprocal switching could be made available even if Southern did not participate in the proceeding (I.C.C. April 12, 1986). At present, the proceeding is being held in abeyance while the parties pursue a negotiated settlement (I.C.C. May 27, 1986).

27. In Soo Line R.R. v. Chicago & N.W. Transp., No. 39176 (I.C.C. Dec. 26, 1985), Soo Line challenged the *level* of certain CNW switching charges and argued that such rates should be adjudged by standards different from those applying in line-haul maximum rate reasonableness cases. The Commission denied Soo Line's appeal of an Administrative law Judge's decision that found Soo Line was required, and failed, to prove market dominance and the unreasonableness of the level of the switching rates. *See* Maryland Port Authority—Lawfulness of Switching Charges No., 38899 (I.C.C. March 9, 1984), *appeal denied*, June 18, 1984. The Commission reopened the proceeding and requested the parties to comment on the potential application to the proceeding of the regulations recently adopted in Standards for Intramodal Rail Competition.

Cases such as these are likely to provide a forum for debating the assertion by some that a rate which is less than a reasonable maximum can nonetheless unlawfully restrain efficient competition.

28. 49 U.S.C. § 11103(a) (1982).

29. *See* Jamestown, N.Y., Chamber of Commerce v. Jamestown, Westfield & N.W. R.R., 195 I.C.C. 289, 291 (1933); Denver & R.G.W. R.R. v. Burlington N. R.R., No. 30269, slip op. at 5 (I.C.C. April 24, 1984); Central States Enterprises, Inc. v. Seaboard C.L. R.R., No. 38891, slip op.

state Commerce Act grants the Commission no general authority to compel the grant of trackage rights.[30]

B. *Appeals for Competitive Access Through Federal Legislation*

Unsatisfied with the Commission's handling of the competitive access issues, shippers and carriers have sought additional forums for relief. Now pending before Congress are two pieces of proposed legislation that would substantially affect the circumstances under which physical access could be compelled by the Commission. The "Consumer Rail Equity" or CURE bills[31] seek to amend section 11103 of Title 49 to permit shippers, carriers, and any "other party directly impacted" to gain access to the use of another railroad's facilities.[32] The "Railroad Antimonopoly Act" would amend the Sherman Act to provide an antitrust remedy to shippers and other railroads for a railroad's denial of the use of its "sole facility" under certain circumstances.[33]

Under existing law, shippers and other non-carriers lack legal standing to gain access for themselves. They may negotiate voluntary agreements, however, in their non-common carrier capacity to provide a portion of their own rail transportation outside the purview of the Interstate Commerce Act, and they may act as advocates for the grant of access to carriers.[34] Like carriers, the legitimacy of their attempts to gain access must be determined by economic principles.

III. The Economics of Competitive Access

Regardless of whether it is achieved through establishment of a joint

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at 3 (I.C.C. May 15, 1984), *aff'd* Central States Enterprises, Inc. v. I.C.C., 780 F.2d 664 (7th Cir. 1985).

The standards governing cases seeking the compelled use of terminal facilities also govern reciprocal switching. H.R. Rep. No. 1430 96th Cong., 2d Sess. 116, 117 (1980); Central States Enterprises, Inc. v. I.C.C., 780 F.2d 664 (7th Cir. 1985). However, the Commission has acknowledged that the grant of reciprocal switching is the less intrusive remedy. Midtec v. Chicago & N.W. Transp. Co., No. 39021, slip op. at 3 (I.C.C. August 30, 1983).

30. However, the Commission may order trackage rights under extraordinary circumstances, such as a condition of a merger, 49 U.S.C. § 11134 (1982), or to alleviate a car shortage emergency under 49 U.S.C. § 11123(a) (1982).

31. S. 477, 99th Cong., 1st Sess. (1985); H.R. 4096, 99th Cong., 2d Sess. (1986).

32. Section 9(b) of CURE provides, in part, that any "shipper, receiver or other party directly impacted" may petition the Commission for joint use of terminal facilities.

33. S. 447, 99th Cong., 1st Sess. (1985); H.R. 1140, 99th Cong., 1st Sess. (1985). For the legislative history of H.R. 1140, see H.R. Rep. No. 559, 99th Cong., 2d Sess. (1986).

34. Congress intended that shippers be able to bring actions on behalf of carriers under both sections 11103(a) and (c)(1). Universal Forest Products, Inc. v. Seaboard C.L.R.R., No. 29883, slip op. at 2 (I.C.C. Nov. 12, 1982) *citing* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 67 (1980); City of Milwaukee v. Chicago & N.W. Ry., 283 I.C.C. 311, 314 (1951); *see also*, Midtec v. Chicago & N.W. Transp. Co., *supra*, Central States Enterprises v. United States, *supra*.

rate, reciprocal switching, or use of a terminal facility, access is economically rational (and publicly beneficial) only where it enhances competition, and hence stimulates efficiency. The reason consumers of transportation services seek access either for themselves or for another carrier is the perception that the introduction of an additional competitor will provide the potential for exerting downward pressure on price. As we shall see, downward pressure on price sometimes, but not always, enhances competition and stimulates efficiency.

Similarly, a carrier will be motivated to seek access only where it has the ability to capture traffic as a result of its entry, and thereby enhance its contribution (profit). In the long run, this translates into a requirement that the entrant provide at a lower cost the service now being performed by the owning carrier. A higher-cost entity does not have the ability to do this.

Moreover, truly "competitive" access need not be compelled. As the following discussion illustrates, it is in the economic self-interest of the owning railroad, through the voluntary grant of access, to purchase, or "buy," a portion of the service from a competitor at a cost lower than it can provide, or "make," itself.[35] In such instances, the owning railroad stands to increase its profits by sharing in the cost savings generated by its participation in the more efficient endeavor.[36]

The cost to the carrier of providing service will determine if it is more efficient, and therefore, will control the decision as to whether or not access is economically justified. An essential element of that cost will be the compensation paid the owning railroad for the use of its facilities.

This compensation is an inherent part of the existing statutory scheme.[37] Regardless of whether the access is pursuant to a voluntary agreement or is compelled, the level of compensation should emulate the economics that would control a situation where access is granted voluntarily.[38] The economic issues with respect to each of the forms of access

35. The Commission acknowledged the existence of the economic incentive for a carrier to participate in the more efficient joint service even where the carrier has exclusive access to the origin or destination of a movement. Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceeding, 366 I.C.C. 112, 124-26 (1982), *rev'd on other grounds*, Detroit Toledo & Ironton R.R. v. United States, 725 F.2d 47 (6th Cir. 1984); *see also* Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984) (upholding Commission determination that a railroad with alternative routing will continue to route traffic over through routes so long as it is economically prudent to do so).

36. In those instances where a railroad with market dominance acts irrationally and seeks to exercise its market power to drive its competitors out of business, sufficient recourse exists. *See, e.g.*, 49 U.S.C. §§ 10701a, 10741(b) (1982).

37. 49 U.S.C. §§ 11103(a), (b), (c), (1); 49 U.S.C. § 11123(b)(2); 49 U.S.C. § 11124(b)(2) (1982).

38. It is a generally recognized principle that regulation should, to the greatest extent possible, replicate the results of a free competitive market. 1 A. KAHN, THE ECONOMICS OF REGULA-

are discussed below.

A. Joint Rates and Through Routes

The notion that the interest of the owning carrier is best served by routing traffic efficiently, even where that carrier has market power and a competing single-line route, is most clearly illustrated and most widely accepted in the context of joint rates and through routes. Regardless of whether the overall rate is set by demand or by regulation, the cost of moving traffic via the more efficient route will be below that of the less efficient route, enabling participants in the more efficient joint route to share in the cost savings by negotiating mutually acceptable rates and divisions.[39] In this context, this pricing concept has been endorsed by the

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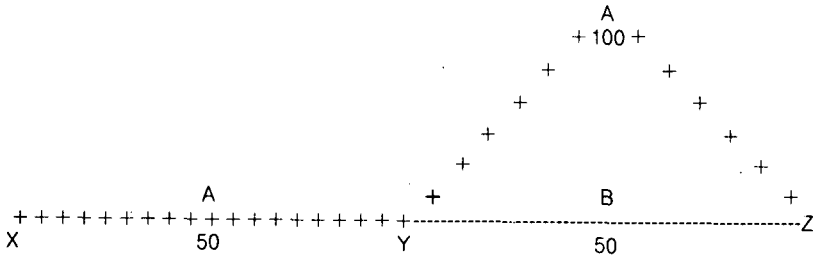
TION 20 (1970), ("The essence of regulation is the explicit replacement of competition with governmental orders as the principal institutional devise for assuring good performance.") ROBICHEK, *Regulation and Modern Finance Theory*, 33 J. Fin. 701 (1978), ("The role of regulation is to act as a substitute for competition.") MYERS, *The Application of Finance Theory to Public Utility Rate Cases*, 3 BELL J. ECON. AND MGMT. SCI. 79 (1972), ("Ideal regulation forces the utility to operate at competitive levels of investment, price, output, and profit.") *See also* WILLIG, *Theory of Network Access Pricing*, in ISSUES IN PUBLIC UTILITY REGULATION, 109-52 (H. Trebing ed. 1979) for a discussion of this principle applied to firms that have the potential to be more than revenue adequate.

39. Assume Railroad A has a choice of circuitous single-line service from Origin X to Destination Z or efficient through service in conjunction with Railroad B through Interchange Y:



As noted on the diagram, the amount of economically variable cost the carrier must cover before it makes a contribution to going concern value is $50 over segment X-Y, $50 over segment Y-Z via Railroad B, and $100 over segment Y-Z via Railroad A.

Assuming, first, a rate level of $150, set by demand or regulation, if Railroad A moves the traffic via its single-line route, it will only just cover its economically variable cost. If, however, it negotiates a joint rate division with Railroad B, or sets a proportional rate, A and B can share the $50 cost saving that results when the traffic moves via the through route.

The same holds true if the rate level is set by demand or regulation at $200. In this situation, A could earn $50 contribution over economically variable cost if the traffic moved over its single-line route, but it still has no incentive to move the traffic that way, so long as it can freely negotiate a division or set of proportionals with Railroad B that allows it to earn more over the more efficient through route. Since the prospect of a $100 contribution is available over the through route, both A and B have a clear financial incentive to negotiate a mutually profitable division or set of proportionals. If they do not, both will lose.

Commission.[40]

There are, however, two common misconceptions about the benefits arising from the availability of access through the voluntary establishment of multi-carrier routing. First, it does not actually introduce another competitor over the non-competitive portion of the route. Instead, access, voluntary or otherwise, assures that competitive rates will prevail for the through route. Second, a competitive rate is not necessarily a lower rate. Rather, it is one set at a level that enables the railroads providing the through service to recover their efficiently incurred total costs. Pricing at this level (like compensation to the owning railroad for access to its facilities) is necessary to ensure the long-term availability of the service.[41]

B. SWITCHING

The fact that railroads in the highly competitive deregulated environment increased switching rates is not surprising,[42] nor is the recent confusion over the relationship between switching rate levels and access.[43] Consistent with the analysis regarding joint rates, there is no economic incentive to decline to offer reciprocal switching where switching rates are set at economic levels. Similarly, the grant or order of reciprocal switching will not result in the physical presence of more than one carrier on routes where previously there was only one. The effect of publishing eco-

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40. Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings, 366 I.C.C. 112, 125 (1982).

41. Total costs include variable and fixed and common costs. 1 A. KAHN, THE ECONOMICS OF REGULATION 20 (1970); W. BAUMOL, J. PANZAR, & R. WILLIG, CONTESTIBLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 269-71 (1982).

42. For decades, railroads performed reciprocal switching with little apparent regard for the costs of those services. Reciprocal switching was viewed as an accommodation that mattered little, so long as railroads provided switching for one another. Eventually, competition and bankruptcy forced carriers to examine each of their charges and the associated costs. Many railroads found that the charges covered only a small fraction of the true current cost of providing switching. Accordingly, individual railroads began to bring their switching rates into line with their costs and the value of the services they provided. The Commission observed that the ongoing rate restructuring was consistent with Congressional intent as embodied in the Staggers Act:

> It is not surprising that one result of this industry about-face on the prior joint rate-open routing practice would be corresponding change in approach to the byproduct of it—reciprocal switching.
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> The rate structure for reciprocal switching was, for many carriers, in need of revision. In part because these rates were rarely, if ever, subject to general rate increases, they tended to be very low and in some cases may not even have covered marginal cost. Therefore, we see carriers critically evaluating the cost and benefits of reciprocal switching on the basis of individual markets. We cannot conclude that this type of behavior is anticompetitive *per se*.

Standards for Intramodal Rail Competition, slip op. at 10 (I.C.C. July 7, 1983).

43. *See* discussion *supra* at 6-7, note 27.

nomic, non-discriminatory switching rates is simply to ensure that the line-haul movement will be handled by the more efficient carrier.

Switching charges should be developed on the same basis as rail services in general. To the extent shipper demand permits, the sum of the revenues from the terminal operations, whether generated by the owning or tenant railroad, must at least cover the total costs (determined on a replacement cost basis) of the terminal in which reciprocal switching service is provided.[44] In the absence of compensation at this level, the facility cannot be operated on a long-term basis.[45]

There have been essentially two types of concerns expressed with respect to the increase in the level of switching rates. The first is that the rates are unreasonably high. Yet, the mechanism for relief for unreasonably high switching rates is already in place. The Commission has held that nothing distinguishes the determination of the reasonableness of a switching rate from that of a line-haul rate, or the method by which that reasonableness is challenged.[46] The second is that increases in switching charges are anticompetitive when set at a level that effects a "price squeeze" on the non-serving carrier by disadvantaging that carrier in competing for the line-haul movement. This can occur as a result of an increase in the switching rate itself or a decrease in the switching carrier's line-haul rate or both. However, this concern ignores the fact that the economic interest of the switching carrier will not be served by such action, since a predatory price squeeze will result in lower earnings for the railroad than if rates were set at a level that permitted both carriers to share in the cost savings of the more efficient route.[47]

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44. Because of differences in the elasticity of demand for various commodities moving through the terminal, the total cost of the facility may not be able to be borne equally by all the traffic using it. The actual switching charges will reflect these variations in demand for the service, requiring different rates for different commodities, and within commodities, different rates for different origins and destinations. WILLIG, *Multiproduct Technology and Market Structure*, 69 AM. ECON. REV. 346-51 (1979); CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE, *supra* at note 41.

45. WILLIG, *Multiproduct Technology and Market Structure*, 69 AM. ECON. REV. 346-51 (1979); CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE, *supra* at note 41.

46. *See*, Maryland Post Administration Petition to Determine Lawfulness of Switching Charges No. 38899 (I.C.C. Feb. 24, 1984); Kansas City P & L. Co. v. Kansas City S. R.R., No. 36-401 (Sub-No. 1) (I.C.C. October 22, 1981).

47. "Predation" refers to a course of action undertaken by a firm with market power in which it sacrifices short run profits by lowering prices to drive current and potential competitors out of the market for a period sufficiently long to permit the predator to recoup its initial losses and more, through the monopoly profits made possible by the absence of competition. For predation to be realistic, the suspect firm must be in a position to sacrifice short term profits sufficiently great to undermine the viability of its competitor's operation. Moreover, the competitors must be unable to withstand such pressures, and once driven out, it must be difficult for them to

C. *Operating Rights Over Shared Facilities*

Existing law also permits carriers to gain physical access through operating rights into the terminal facilities of a serving railroad.[48] Proposed legislation, such as the CURE bills, would extend this right beyond carriers to shippers and other interested entities and expand the instances in which this relief was available.[49] Yet, even where an entity obtains physical access over the previously non-competitive portion of the movement, prices for that portion of the service will not be driven below a level that precludes the recovery of the efficiently incurred total costs of the facility being subjected to the access.

Like the determination of the appropriate switching charges, pricing at this level is necessary to ensure reinvestment that will guarantee that the facility will be available in the long run for use by either entity. As a result, the entrant will not be in a position to charge for its services over the shared facility an amount below the level of the efficient cost it must pay to the owning railroad.

Since access achieved under any of the existing or proposed statutory provisions will be sought in the context of existing laws, regulations, and contractual relationships, any additional costs imposed on the owner and the entrant must be factored into the equation in determining whether access is economically justified.

IV. Cost Components of Gaining Access—Compensation to the Owning Railroad

The nature of full compensation to the owning railroad is a critical issue in the competitive access debate. Unless the owning railroad is fully compensated, competitive access will simply be an euphemism for the uneconomic subsidization of the entrant by the owning carrier, ultimately resulting in the owner becoming unable to maintain the facility which is the subject of the access.

The statutory provisions for fixing compensation in cases of compelled access support the concept of full compensation.[50] With respect

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reenter. Only then can the predator be assured of a period of freedom from market pressures in which to regain and exceed the profits it forfeited during the period of predation.

However, an examination of current circumstances in the rail industry readily rules out the likelihood of successful predation by a railroad. Railroads already revenue inadequate are unlikely to be in a position to sacrifice substantial contribution in the short run in the unpromising gamble that they will thereby be enabled to earn and retain monopoly profits in the long run. *See* Chesapeake & Ohio Ry. v. United States, 704 F.2d 373, 377 (7th Cir. 1983); Contestible Markets and the Theory of Industry Structure, at 27, *supra* at note 41.

48. 49 U.S.C. § 11103(a) (1982).

49. *See* discussion *supra* at 7-8, note 31.

50. Congressional enactments of provisions permitting private property to be taken for pub-

to compelled access to terminal facilities, the terms governing compensation are expressly addressed in the Interstate Commerce Act, which provides that if the carriers cannot negotiate "conditions and compensation for use of the facilities," the Commission will set the terms in accordance with the "principle controlling compensation in condemnation proceedings."[51] Moreover, the statute provides that a carrier whose terminal facilities are required to be used by another carrier under section 11103(a) may file a civil action to recover compensation for the use.[52]

Post-Staggers, the Commission has had no occasion to fix compensation in a compelled-access proceeding.[53] The Commission, however, has indicated that the level and nature of compensation in cases of forced access continue to be governed by the standards set forth in *Missouri-Kansas-Texas Railroad v. Kansas City Terminal Ry.*,[54] which held that

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lic use must satisfy the constitutional prohibition of the Fifth Amendment that such taking not be without just compensation. Hastings Commercial Club v. Chicago M. & St. P. Ry., 107 I.C.C. 208, 212 (1926) (*citing* Monongahela Nav. Co. v. United States, 148 U.S. 312, 327 (1893)).

51. 49 U.S.C. § 11103(a) (1982).

52. 49 U.S.C. § 11103(b) (1982). The legislative history of Section 405 of the Act of 1920, which addressed Section 3(4), the predecessor to section 11103(b), indicates that the civil action authorization was intended as a broad measure. The Conference Report states:

> Section 30. It is provided that the Commission, if it is found to be in the public interest and practicable, may require one carrier to allow another to use its terminal facilities, including main line track for a reasonable distance outside of a terminal, on such terms as the carriers may agree upon, or as the Commission may fix, subject to the right, however, of the carrier whose terminal facilities, are thus thrown open to sue for *any* damages sustained or *any* compensation owed.

H.R. Rep. No. 650, 66th Cong., 2nd Sess. (1920) (Conf. Report, H.R. 10453 at 62) (emphasis added).

53. The Commission did have occasion to set the compensation for trackage rights granted in connection with a merger. In Trackage Rights Compensation, F.D. 30,000, slip op. (Sub-Nos. 16, 18, and 25) (I.C.C. August 10, 1984), the Commission set fees for several carriers in connection with its grant of trackage rights intended to ameliorate the anticompetitive effects of the Union Pacific merger with the Missouri Pacific and Western Pacific Railroads. The Commission rejected the use of valuation methods based upon replacement costs and book value and adopted instead a capitalized earnings approach to reflect the potential earnings of the lines over which trackage rights were granted. The approach was designed to reimburse the Union Pacific for (1) variable costs incurred as a result of the users' operation, (2) users' share of maintenance and operation and car-mile percentage use basis, and (3) users' share of an interest rental component representing return on investment on a usage basis.

This is a different approach than that traditionally used by the Commission in fixing compensation in situations of forced access, which the Commission recognized, stating, "this is not to say that . . . the methodology used here is appropriate outside the immediate setting where trackage rights have been imposed to remedy anticompetitive effects of a consolidation." *Id.* at 10.

54. 198 I.C.C. 4 (1933). Prior to its decision in Missouri-K.-T. R.R. v. Kansas City Term. Ry., the Commission addressed the issue of the appropriate level of compensation in Hastings Commercial Club v. Chicago, M. & St. P. Ry., 69 I.C.C. 489 (1922), *rev'd*, 107 I.C.C. 208 (1926), wherein it summarized the then-existing judicial precedent in condemnation proceedings:

> It is difficult to conceive of any "compensation" that is unjust and the word "just" is used evidently to intensify the meaning of the word "compensation," to convey the idea

owning and tenant carriers must share equally both the fixed and variable costs of the shared facility, without regard to their respective levels of its use. The Commission explicitly rejected the idea that compensation, including a reasonable return on the value of the facility, should be based solely on the extent of use: "The major portion of the cost of providing these terminal facilities bears no relation to the amount of use made of them; interest and taxes continue regardless of use."[55] The Commission

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that the equivalent to be rendered for property taken shall be real, substantial, full, ample. As the Supreme Court said in Monongahela Navigation Co. v. United States, supra: . . . But this just compensation, according to Lewis on Eminent Domain, section 684, may be more or it may be less than the mere money value of the property actually taken. The owner must receive a fair indemnity for his loss and "to arrive at the fair indemnity, the interests of the public and of the owner and all the circumstances of the particular appropriation must be taken into consideration."

In United States v. Rogers, 257 Fed. 397, 400, the court said:

Just compensation rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had if his property had not been taken.

In Seaboard Air Line Ry. v. U.S. [sic], 261 U.S. 299, 306, the Supreme Court said: The requirement that "just compensation" shall be paid is comprehensive and includes all elements.

In United States v. Grizzard, 219 U.S. 180, 184, the following discussion appears:

The "just compensation" thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel or single tract of land shall be measured by the loss resulting to him from the appropriation. If . . . the . . . taking of a part . . . has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying only for that actually appropriated and leaving him uncompensated for the depreciation over benefits to this which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part . . . upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value.

107 I.C.C. at 212-13.

The Commission thus rejected the contention that compensation be based solely on the extent of the non-owner's use of the facility, concluding, "determining the amount of just compensation, we must confine ourselves to the loss to be suffered by the Milwaukee." *Id.* at 213-14.

In *Hastings Commercial Club*, the Commission had set out to determine the appropriate level of compensation due the Milwaukee for use of its terminal facilities by the Chicago, Burlington & Quincy Railroad, which had been ordered in a prior proceeding. 69 I.C.C. 489. After determining that the level of compensation owed the Milwaukee far outweighed the revenue earning ability of the less-efficient Burlington, the Commission reversed its earlier order on the grounds that the access was not in the public interest. The court stated:

The cost to be met by the user carrier as compared with the traffic served, is an important element [of the public interest] . . . the record upon which our former report was based contained no evidence as to the compensation on the principles controlling in condemnation proceedings. Fairness demands that the whole question of "public interest" be now reconsidered on the more complete record before us . . . and our previous holding . . . revised and reviewed.

Id. at 216-17.

The Hastings decision, which was relied upon by the Commission in Missouri-Kansas-Texas, was recently cited with approval by the Seventh Circuit in Central States Enterprises v. Interstate Commerce Commission, 780 F.2d 664 (7th Cir. 1985).

55. Missouri-K.-T. R.R., 198 I.C.C. at 10.

found that the numerical basis, "that is, adjustment in relation to the number of users of the terminal regardless of the individual use of those lines . . . affords the just and reasonable method to be applied."[56]

Moreover, the Commission has embraced the principle announced by the Supreme Court in *Boston Chamber of Commerce v. Boston*,[57] that in setting compensation "the question is, What has the owner lost?[sic] not, What has the taker gained?"[58]

While the statutory standards governing the computation of compensation for compelled reciprocal switching are not expressly tied to those of condemnation,[59] the Commission is clear that an owning carrier should be "fully compensated."[60] As discussed above, there is no economic or legal basis for distinguishing the amount of compensation in one access context from another.

It is not clear that the proposed CURE legislation would change this.[61] The CURE legislation[62] would alter the reference to the standards for fixing compensation in condemnation proceedings in Section 11103(a) to provide that, if the carriers are unable to agree, the Commission would establish compensation at a level not to exceed the costs incurred by the owning carrier in making the facilities available, including "both variable costs and an allocated share of fixed costs and a reasonable return."[63]

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56. *Id.* at 9-10.

57. 217 U.S. 189 (1910).

58. *Id.* at 195; Hastings Commercial Club, 107 I.C.C. at 213.

59. 49 U.S.C. § 11103(c)(1) (1982); *Cf.* Western Ky. Trucking Co. v. Louisville & N. R.R., No. 29831, (I.C.C. Oct. 27, 1982) (Review Board of Commission stated that if forced to fix compensation under Section 11103(c), it would apply the principles controlling condemnation proceedings.) *Accord*, Midtec v. Chicago & N.W. Transp. Co. slip op. at 14 (I.C.C. April 26, 1983), *rev'd in part*, (I.C.C. Sept. 9, 1983), *appeal pending*, (D.C. Cir. No. 85-1476 July 20, 1985).

60. *See* Universal Forest Products, Inc. v. Seaboard C.L. R.R. F.D., No. 29983, slip op. at 5-6 (I.C.C. Nov. 8, 1982), *appeal pending*. ("Before the enactment of the Staggers Act, it was notoriously difficult for a railroad to justify switching charges that fully covered its terminal costs and earned it a profit . . . Since passage of the Staggers Act, and its provisions encouraging railroad rate flexibility, the switching carrier should be fully capable of setting its charges at a fully compensatory level."); *see also* Hastings Commercial Club, 107 I.C.C. at 212-13, cited with approval for this proposition by Central States Enterprises v. I.C.C., 780 F.2d 664 (7th Cir. 1985).

61. *See* discussion *infra*, at 17 note 66.

62. Section 9.(b) of the House version and section 7.(b) and 9.(b) of the Senate versions provide in pertinent part:

> Such compensation shall not exceed the costs incurred by the owning carrier in making its facilities available for use by the other carrier (including both variable costs and an allocated share of the fixed costs and a reasonable return, associated with the facilities actually being used by the other carrier).

63. The CURE bill would also require the Commission to establish compensation for reciprocal switching at the prevailing level employed as the Commission's jurisdictional threshold under 49 U.S.C. § 10709(d)(2), unless a carrier demonstrates that some higher level is reasonable and necessary. Section (9)(b)(2) deletes existing section 11103(c)(1) and provides in lieu thereof:

The Railroad Antimonopoly Act would amend the antitrust laws and thus would not disturb the compensation provisions of the Interstate Commerce Act. However, the concept of "just compensation" to the owning railroad is embodied in this bill as well.[64]

We now must turn to one of the most prominent elements of cost, and hence compensation, the cost of displaced labor.

(c)(1) Upon petition of any interested rail carrier, shipper, receiver, or other party directly impacted, the Commission shall establish compensation for reciprocal switching performed by a rail carrier at a level not to exceed the percentage then in effect under section 10709(d)(2) of actual variable costs for such service, unless that carrier demonstrates that a higher level of compensation is reasonable and necessary for such switching service.

64. The amended version of the bill would render railroads that "deny use" of any sole facility to be in violation of the antitrust laws. It defines such "use" as "use by means of obtaining transportation services over it by means of a competing carrier upon reasonable terms *including just compensation* and in accordance with generally accepted principles of operation." Section 9(c)(4)(B) (emphasis added).

The inclusion of the reference to "just compensation" represents a change from an earlier version which provided that rates over the "sole facility" could be "no higher than would yield a fair return on the proportion of the owner rail carrier's prudent investment in the sole railroad facility that the shipper's traffic bears to all traffic using such sole railroad facility."

This provision was strongly criticized by the Department of Justice as not guaranteeing adequate compensation to the owning railroad. In his prepared remarks regarding S. 447 and H.R. 1140, to both the Senate Committee on the Judiciary and the House Subcommittee on Monopolies and Commercial Law, Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, stated:

> If a carrier currently providing rail service at competitive rates is required to grant access over its lines, market distortions will occur unless the trackage right rental rate covers the true cost of providing access to the second carrier. If the rental is set too low, investment in the facility will decrease and service to the shipper will deteriorate. If a court happens to find the terms set by competitive forces to be unreasonable, then the carrier faces not only the prospect of a court-decreed reduction in the rate but also an automatic treble damage penalty for the overcharge. Thus, when regulation is attempted with respect to significant segments of a carrier's trackage, the chances of setting the proper rate are reduced and the adverse impact of the error is increased.
>
> Because shippers can be expected to use the proposed remedies to obtain lower shipping rates, even when the rates are already competitive, the bill also seriously threatens to undercut the goal embodied in the Staggers Act of enabling railroads to earn a competitive rate of return. The history of rate of return regulation generally has been to undercompensate regulated entities for their investments. In particular, the risk of investments tends to be underestimated with the result that the regulated firms earn less than a market rate of return. The effect is to discourage socially beneficial investment. This danger is manifest in H.R. 1140's [S. 447's] requirement that rates can be "no higher than would yield a fair return on the proportion of the owner rail carrier's prudent investment in the sole railroad facility that the shipper's traffic bears to all traffic using such sole railroad facility." The fact that this directive will be enforced by courts that institutionally are not well-suited to make such determinations, and that may reach disparate results, magnifies the potential threat to the railroads' ability to earn a market rate of return.

Railroads—Market Dominance: Hearings on S. 447 before Senate Comm. on Judiciary and Hearings on H.R. 1140 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on Judiciary, 99th Cong., 1st Sess. (1985) (statement of Charles F. Rule, Acting Assistant General, Antitrust Division).

V. Labor Protection[65] Liability as a Component of Cost

Under existing law, owning railroads may incur certain costs that result solely from the grant of access, whether voluntary or compelled. The foregoing discussion makes clear that the owning railroad is entitled to be fully compensated for these costs. To date one potential cost which participants in the access debate have largely ignored is that of liability for labor protection, *i.e.*, liability that may result if the grant of access causes a reduction in the number of employees needed by the owning railroad.[66]

For example, if Railroad A is the sole carrier serving Industry, and Industry desires to provide its own service between its plant and Railroad A's main line, the provision of this service by Industry will make unneces-

65. *See* the definition of the term "labor protection" at Footnote 8, *supra*.

66. Under existing law, if the owning railroad is subject to liability from a reduction in labor due solely to the provision of service by the new entrant, the owning railroad must be compensated for these costs in order to place it in a position equal to that which existed before the access was granted. This is consistent with the spirit of fixing compensation in condemnation proceedings (that the owning railroad be made whole), the standard referenced expressly by Congress in 49 U.S.C. § 11103(a). *See* discussion *supra* at 14, note 56.

Since the labor protective costs would arise solely as a result of the access, they would be, in this instance, purely variable with the access and included in the compensation formula of the proposed CURE bills as well. (*See* discussion *supra* at note 62-63). Regardless of the label, compensation for liability to labor is required to make the owning carrier whole.

The recent decision in Illinois Commerce Comm'n v. I.C.C., 776 F.2d 355 (D.C. Cir. 1985) we believe is incorrect but still is not inconsistent. The Court agreed that labor costs were to be considered avoidable for purposes of determining the propriety of abandoning lines under Section 10903, but not in computing a subsidy under Section 10905 where the labor protection costs would be imposed after the abandonment.

While not controlling in the context of competitive access, the Circuit Court's decision does serve as an example of how the misapplication of the costs of labor protection can distort the economics of a business decision.

The Congressional objective in providing for continued service over a line scheduled for abandonment by permitting interested parties to subsidize its operation was to ensure that railroads would break even. 354 I.C.C. 129, 157 (1976). (During the term of the subsidy the continuance or non-continuance of the operation should be a matter of "economic indifference" to the railroad.)

Notwithstanding this directive, the Court ruled that employee wages may not be considered when computing the amount of the required subsidy, reasoning that (1) during the first year after abandonment the railroad would not save employee wages because it would still have to pay them under the labor protective conditions which the Commission is required to attach; (2) labor protective costs are equal to the labor cost component of providing service; therefore, (3) during the subsidy year, labor costs are not avoidable and should be disregarded.

In the absence of a subsidy offer, the Commission's abandonment certificate includes standard labor conditions. A subsidy places the abandonment on hold and defers payment of labor protection. When the subsidy expires, the Commission then issues the abandonment certificate, and the deferred labor protection costs are paid. In short, a subsidy defers cost; it does not reduce or eliminate them.

The effect of the Court's ruling is to deny the railroad recompense for labor costs incurred solely as a result of the subsidized service. We believe that this result contradicts the assumptions underlying the statutory provision permitting the subsidy.

sary that portion of Railroad A's service. If this results in a reduction in Railroad A's labor force, Railroad A may be subject to liability.

If a competitive access transaction involves the acquisition by a railroad of trackage rights over, or joint ownership in or use of, a railroad line owned or operated by another railroad, the Commission is required by statute to impose labor protective conditions.[67] Accordingly, a displaced or dismissed employee is afforded labor protection for a protective period of up to six years, pursuant to what is known in the industry as the Norfolk & Western conditions.[68] A displaced employee[69] is paid a monthly displacement allowance of the difference between current earnings and the monthly average of the employee's earnings in the twelve-month period immediately preceding the displacement for a period of up to six years.[70] Similarly, a dismissed employee is paid, for up to six years, a monthly dismissal allowance which is equal to one-twelfth of the employee's combined monthly earnings in the twelve-month period prior to dismissal. The employee also may elect to resign and accept a lump-sum separation allowance which, depending upon the employee's length of service, will range in amount from three to twelve months of earnings.[71]

In contrast, the imposition of labor protective conditions is a matter of Commission discretion where Industry (or Railroad B), located in a terminal area, is successful in requiring Railroad A to enter into a reciprocal switching agreement allowing Railroad B to switch Industry's cars. The Commission has such discretion both under existing section 11103(c)(2)[72] and under the proposed amendment of the CURE legislation.

However, not all labor protection costs derive from the Interstate Commerce Act. Some may arise as a result of job stabilization agreements negotiated and agreed to between management and rail labor.

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67. 49 U.S.C. §§ 11343, 11344 and 11347 (1982).

68. Norfolk & W. Ry.—Trackage Rights—Burlington Northern Inc., F.D. 28387, 354 I.C.C. 605 (1978).

69. A displaced employee is one who is continued in service but whose compensation or rules governing his working conditions are adversely affected. 354 I.C.C. at 610.

70. 354 I.C.C. at 610-11.

71. 354 I.C.C. at 612.

72. 49 U.S.C. § 11103(c)(2), which would remain unchanged by CURE, states as follows:

> The Commission may require reciprocal switching agreements entered into by rail carriers pursuant to this subsection to contain provisions for the protection of the interests of employees affected thereby.

There is no similarly express provision granting such discretionary authority to the Commission with respect to compelled access to joint terminal facilities. *See*, Section 11103(a). However, language that would grant the Commission authority to apply "appropriate labor protection provisions" to such grants of access was included in a version of Conrail sale legislation passed by the House Subcommittee on Transportation, Commerce and Tourism (Sec. 207), although ultimately rejected by the full House Committee on Energy and Commerce.

Most frequently, these job stabilization agreements occur as a result of railroad mergers or combinations.

As an example, most of the nation's railroads and rail unions became a party to the Washington Job Protection Agreement of May 21, 1936 ("WJPA").[73] The WJPA was formulated to assuage Congressional concern, as expressed by the passage of the Emergency Transportation Act of 1933, that railroad acquisitions and mergers would create further unemployment at a time when the nation could ill afford it.[74] The WJPA's premise was that the efficiencies of reduced labor costs resulting from consolidations were to be shared between railroads and rail labor.[75] Under the WJPA, employees who are "affected" by a "coordination"[76] of two or more rail carriers are entitled to either a "displacement" or a "coordination" allowance.[77]

The WJPA is still in effect today on most railroads. It has also become the basis for negotiated job stabilization agreements between rail labor and management.[78]

As stated earlier, labor protective conditions can be triggered from three sources. The first two are imposed by the Commission, whether required by statute or imposed at the Commission's discretion. The third source is rail industry agreements that labor and management have negotiated to address rail labor's job stabilization concerns. On occasion, there may be a fourth source for labor protection liability in the form of an applicable collective bargaining agreement that grants exclusive work rights to a particular railroad's employees. The nature and extent of this source of labor protection liability is potentially more burdensome than those previously discussed.[79] Furthermore, under limited circumstances

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73. H.R. Rep. No. 1035, 96th Cong., 2d Sess. (1980).

74. H.R. Rep. No. 1035, 96th Cong., 2d Sess. (1980).

75. H.R. Rep. No. 1035, 96th Cong., 2d Sess. (1980).

76. Section 2(a) of the Washington Job Protection Agreement of 1936 defines "coordination" as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any other operations or services previously performed by them through such separate facilities." *See also* R. Ables, *The History of an Experience Under Railroad Employee Protection Plans*, PRESIDENTIAL RAILROAD COMMISSION, Washington, D.C. February, 1962.

77. Under the WJPA, a displaced employee is entitled to a monthly compensation guarantee for a period not to exceed five years, computed similarly to that under the N&W Conditions, *supra*. If deprived of employment altogether, the employee is entitled to a monthly allowance of sixty percent of the compensation earned in the prior twelve month period, for a period of time ranging from sixty days to five years, depending upon the employee's length of service. In lieu of the coordination allowance, an employee can elect to resign and accept a lump-sum separation allowance which, dependent upon the employee's length of service, will range in amount from three to twelve months of earnings. Washington Job Protection Agreement of 1936, Sec. 6, 7(a) and 9.

78. H.R. Rep. No. 1035, 96th Cong., 2d Sess. (1980).

79. The Railway labor Act authorizes the National Railroad Adjustment Board to award rein-

a federal court may be empowered to issue an injunction pursuant to the Railway Labor Act which would terminate the tenant's access.[80]

The costs of labor protective conditions imposed on competitive access transactions by labor agreements are difficult to predict. After all, there are scores of railroad labor agreements that apply across the country, and no one can guess with confidence how labor and management may have defined the work rights of any particular group of rail employees. Indeed, work rights may differ not only from one railroad to another, but also within a single railroad, especially one that has seen recent merger or consolidation activity.[81] Moreover, it is not clear whether Commission access orders which address the issue of labor protective conditions supersede claims by railroad employees based upon such agreements. The state of the law in this area is unsettled, and rail labor is challenging the Commission's authority to supersede labor agreements.[82] There are very sound reasons to reject the challenge by rail

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statement and back-pay to railroad employees improperly removed from service. Pennsylvania R.R. v. Day, 360 U.S. 548, 552 (1959); Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257 (1965).

80. In Maine Cent. R.R. v. United Transp. Union, United States District Court of Maine, C.A. No. 85-0346-P, the railroad entered into a lease of track with a shipper, enabling the shipper to perform its own switching operations. The United Transportation Union (UTU), representing twelve trainmen who would have been furloughed, requested injunctive relief voiding the lease. With little or no analysis, the District Court found that the lease had no controlling effect over the railroad's relationship with the UTU, and that the railroad had violated its duty under Section 6 of the Railway Labor Act to maintain the "status quo" pending exhaustion of the "major dispute" Railway Labor Act negotiation and mediation procedures. The District Court issued a permanent injunction ordering the railroad to return conditions to the status quo ante, effectively voiding the lease agreement.

In a decision served April 9, 1986 (No. 86-1037), the Court of Appeals reversed the District Court, directing that an injunction be issued in favor of Maine Central. The Court found that the railroad's reliance on past practice to authorize the lease transaction was "arguable," making the dispute a "minor," rather than "major," one under the Railway Labor Act. The reversal of the District Court turned upon the existence of "past practices," which may or may not exist in future similar cases.

"Minor disputes" over labor agreement interpretation are reserved to Adjustment Boards, chaired by neutral arbitrators, under the Railway Labor Act. In contrast, courts interpret labor agreements when presented with "major disputes," *i.e.*, efforts by either the railroad or rail labor to change the "status quo" as to rates of pay, rules, or working conditions. As the Maine Central case illustrates, the line between minor and major disputes, while understandably blurred, is significant. *See* Brotherhood Ry Carmen v. Norfolk & W. Ry., 745 F.2d 370, 374-78 (6th Cir. 1984).

81. Conrail is a good example. When it began operation in 1976, it had over 250 labor agreements covering 25 separate labor organizations. Fortunately, Congress had the foresight to order negotiation of a single agreement for each craft. *See* 45 U.S.C. § 797(g) (1982). However, the impetus for consolidation is generally not available absent special legislation.

82. Rail labor's challenge to the Commission's authority to supersede the Railway Labor Act and collectively bargained agreements was most recently in evidence in its opposition to the Commission's grant of trackage rights to the Missouri-Kansas-Texas Railroad (MKT). These rights were a condition to the October 20, 1982, order which approved the consolidation of the

labor, but the course of litigation over hundreds of different labor agreements cannot be predicted with certainty. Even interim injunctive relief can substantially delay and vitiate the benefits of an access transaction while courts and arbitrators sort out conflicting claims.

It is evident that labor protective costs, whether imposed under the Interstate Commerce Act or applicable labor agreements, can be substantial. Indeed, the effect of such payments is to increase total labor costs for the duration of the protective period, for during this period both the employees of the entity gaining access and the protected employees must be paid. The result is that the cost of access to shippers and the public may well exceed the benefits.

Although many of rail labor's claims for labor protection under the Interstate Commerce Act or pursuant to labor agreement or under the Railway Labor Act's provision for maintenance of the "status quo" are not strong, they do present problems. A challenge by rail labor will delay the resolution of competitive access cases and add greatly to the cost of access. Notwithstanding the merits of rail labor's claims or the source of the claimed labor protection, such costs, if proper, must be borne by the party gaining access.

VI. CONCLUSION

Competitive access is a phrase which connotes low prices, efficiency, and all the benefits of a free market. Hidden within the concept,

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Missouri Pacific (MOPAC) and the Union Pacific (UP) Railroads. The grant of trackage rights to MKT allowed MKT to use its own employees over specified portions of consolidated MOPAC-UP track, subject to employee protective conditions (N&W conditions) for displaced or dismissed employees.

In one challenge, the United Transportation Union and Brotherhood of Locomotive Engineers petitioned a court to vacate that part of the Commission's order pertaining to crew selection. The unions asserted that MOPAC train crews had an established right to crew assignments operating over MOPAC track, that the railroads had unilaterally changed the status quo in violation of the Railway Labor Act, and that the Commission did not have authority under Section 11341 to exempt the grant of trackage rights from the Railway Labor Act. The court remanded the case to the Commission, requiring the Commission to demonstrate that the exemption was "necessary." Brotherhood of Locomotive Engineers v. I.C.C., 761 F.2d 714 (D.C. Cir. 1985). The Commission's orders are still in force. The Supreme Court has granted certiorari in this case. — U.S. —, 106 S. Ct. 1457 (1986).

In a second challenge, the UTU threatened to strike MOPAC, effective April 4, 1983. In response, MOPAC filed a complaint seeking to enjoin the strike. The District Court granted the injunction. Missouri Pac. R.R. v. United Transp. Union, 580 F. Supp. 1490 (D. Mo. 1984). The injunction was subsequently appealed by the UTU. The Eighth Circuit upheld the decision of the District Court, finding that the Commission had exempted the transaction, pursuant to Section 11341(a), from the major dispute requirements of the Railway Labor Act, and that permanent injunctive relief was warranted. The UTU has petitioned the Supreme Court for a writ of certiorari which has not yet been ruled upon. 782 F.2d 107 (8th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054).

however, are the same economic principles which govern all enterprises, regulated or not. Those principles require that facilities used must be paid for in full; otherwise, the facilities will not be maintained. Full compensation in turn requires that all elements of cost be considered, including the cost of labor protection directly imposed by the Interstate Commerce Act or indirectly caused by congressional policies expressed in the Railway Labor Act.

Proponents of competitive access must recognize the reality of labor protection costs and the effects of those costs. Failure to do so will lead to litigation, acrimony, and eventual frustration of the objectives sought to be advanced.