

PROGRESS AND DELAY IN RAILROAD REORGANIZATIONS SINCE 1933*

FLORENCE DE HAAS DEMBITZ†

"The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of §77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted. Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Committee to see that they do. Proceedings of this character, involving public and private interests of such magnitude, should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined."¹

Despite these famous words of the Supreme Court of the United States written in 1935 of a remedial statute which became a law on March 3, 1933,² railroad reorganization both under Section 77 and in equity proceedings continues to be characterized primarily by delay.³

Although Section 77 became a law on March 3, 1933, not one Class I railroad has been completely reorganized to date thereunder, despite the fact that 21 Class I railroads or railroad systems (totaling 28 Class I railroads)⁴ have filed petitions under

*The period covered in this article extends from March 3, 1933 to June 1, 1940.

†A.B., 1931, Smith College; LL.B., 1934, Columbia University. Member of the New York Bar; practitioner before Interstate Commerce Commission. Attorney on the staff of the Reconstruction Finance Corporation since 1935 and for the last three years a member of its Railroad Division.

All information contained in this article is available to the general public, primarily at the Interstate Commerce Commission and at the courts of record. Any opinions expressed herein are solely those of the writer and not to be taken as those of the Reconstruction Finance Corporation.

¹Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648, 685 (1935).

²Bankruptcy Act, §77, 47 STAT. 1474 (1933), as amended, 11 U. S. C. §205.

³In order to present a picture of the attempt to reorganize, tables have been prepared entitled: *Table I, Progress and Procedure in Section 77 Reorganizations*, and *Table II, Steam Railroads in Receivership*, showing railroads which have been in these types of reorganization since the enactment of §77 and the progress made toward such reorganization. This study omits electric railroads in receivership, though including them in §77 proceedings, because the 25 electric railways affected are, as a group, unimportant, operating in 1938 or when last operated a total of 1858 miles. For further details, see annual publication, I. C. C. BUREAU OF STATISTICS, SELECTED FINANCIAL AND OPERATING STATISTICS FROM ANNUAL REPORTS OF ELECTRIC RAILWAYS. Because of these tables formal reference throughout is not generally necessary. The court title of railroad reorganization cases under §77 is "In the Matter of XYZ Railroad Company, Debtor." In receivership reorganizations the case names will be found in Table II.

⁴Class I railroads are those having annual operating revenues above \$1,000,000. In 1938 they had 98.60% of total operating revenues of Class I, II and III roads. I. C. C., STATISTICS OF RAILWAYS IN THE UNITED STATES, 1938, p. S-2.

Section 77. In total, 35 steam railroads or railroad systems,⁵ and 5 electric railroads have filed petitions thereunder. Four Class II railroads⁶ and one electric railroad⁷ have been reorganized under the Act, and three small roads⁸ have been abandoned—a process for which Section 77 was of no particular utility.⁹ To put it another way, 465 miles of road operated have been reorganized under Section 77; 62,641 miles of road operated¹⁰ still remain in the hands of the trustees.

Thus barely recited, the accomplishment under the statute would appear meager. Progress, however, has been made, not only towards the effectuation of plans in some of the pending cases,¹¹ but, even more important, toward the solution of fundamental differences which have arisen in the interpretation of the statute.

As shown by various writers on the subject, Section 77 was a hybrid statute, representing various compromises between conflicting views.¹² The large amount of mileage still involved in Section 77 proceedings and amendments to the Act now pending,¹³ make it important¹⁴ to consider to what extent such delays are ascribable

⁵ Railroad statistics expressed in number of roads are always difficult as they depend on how broadly one defines a system. (The I. C. C. generally counts as a separate item those with separate Docket Numbers.)

⁶ Class II railroads are those having annual operating revenues of above \$100,000, but not over \$1,000,000. I. C. C. *op. cit. supra* note 4 at S-2. The four were the Copper Range, Louisiana & N. W., Reader, and Savannah & Atlanta.

⁷ Chicago, South Shore & South Bend.

⁸ East St. Louis, Columbia & Waterloo (electric); Middleburg & Schoharie; and Minarets & Western.

⁹ The two which had formal abandonment proceedings were even given new docket numbers for these proceedings.

¹⁰ Mileage statistics throughout are I. C. C.'s most recent figures, generally Dec. 31, 1938, but occasionally Dec. 31, 1939.

¹¹ The Chicago & E. I., the Chicago G. W. and the Spokane International (all Class I roads) have each had plans approved by their respective courts and votes thereupon taken by the various classes of creditors and stockholders. As to the date when the C. & E. I. reorganization may be expected to be actually finished, however, see the "Report regarding progress of reorganization and probable date of completion," filed with the court on May 9, 1940, estimating (Par. XV) that "after complete agreement has been reached in respect to provisions of . . . [the documents] . . . it will require not less than 90 days to conclude the steps up to the transfer of the trust estate to the New Company and the issue by the New Company of its securities."

¹² See Craven and Fuller, *1935 Amendments to the Railroad Bankruptcy Law* (1936) 49 HARV. L. REV. 1254; Friendly, *Amendment of the Railroad Reorganization Act* (1936) 36 COL. L. REV. 27; Shields, *Procedural Delays in Recent Amendments to the Railroad Bankruptcy Act* (1936) 21 ST. LOUIS L. REV. 317; Wehle, *Railroad Reorganization under §77 of the Bankruptcy Act; New Legislation Suggested* (1934) 44 YALE L. J. 197; *Amendments to Railroad Reorganization Act* (1935) 3 U. OF CHI. L. REV. 63.

¹³ There were pending at the beginning of the 3d Session of the 76th Congress, or introduced during it, the following bills which would directly affect railroad reorganization under §77.

	<i>Subject</i>	<i>Status</i>
S. 1660	Reorganization of I. C. C.; affect I. C. C. procedure.	To Sen. Com. on Interstate Commerce.
S. 1869	R. R. Reorganization; create R. R. Reorganization Court; amends §77.	Passed by Senate; Hearings in H. R. Com. on Judiciary.
S. 2009	General Transportation Bill; affect I. C. C. procedure.	Passed by Senate. Amended and passed by House. Conference app'd, July 7, '39.
S. 2569	Priority of Claims; amends §77.	To Sen. Com. on Judiciary.
H. R. 2531	General Transportation Bill; creates R. R. Reorganization Ct.; amends §77.	To H. R. Com. on Interstate & Foreign Commerce.
H. R. 4862	General Transportation Bill; creates R. R. Reorganization Ct.; amends §77.	To H. R. Com. on Interstate and Foreign Commerce.

to the Act's failure to express clearly its controlling intent, as well as to its structural peculiarities.

In the main, controversy as to the meaning of the Act has revolved about two major issues. The first of these—whether plans of reorganization effectuated under Section 77 must meet the requirements of the rule in the *Boyd* case—would appear to have been definitely determined by the Interstate Commerce Commission and in the district courts so far as plans have been passed upon though it has not yet come before the Supreme Court.¹⁵ The second—to what extent in the formulation of plans the Commission and the courts are compelled by the statute to disregard the wishes of security holders—continues in dispute. Uncertainties as to how these major issues would eventually be settled have been important factors making for delay. But an even more important factor, at least until comparatively recently, has been the unreadiness of the parties to reorganize. The result has been proceedings which continue on their weary way without visible conclusion.

The vastness of the property investment which, meanwhile, is being administered by the courts,¹⁶ shows the extent of the recourse to Section 77 and the importance of this subject not merely to the financial community but as a ponderable in our present economic dilemma.

In view of this lack of progress under Section 77, it is not surprising to ascertain that since March 3, 1933, out of 58 steam railroads that have been in equity receivership,¹⁷ only two¹⁸ transferred to Section 77, although it is reported others are considering such change.¹⁹ During this period, out of 13 Class I roads under equity receivership, only one has been reorganized²⁰—and two other reorganizations²¹ are nearing completion. Thus broadly speaking the accomplishments under Section 77 and under equity receivership are about even and leave little to boast about with

H. R. 6369	R. R. Reorganization; supersedes H. R. 5182; creates R. R. Reorganization Court; amends §77.	To H. R. Com. on Judiciary.
H. R. 8962	Preferred claims; amends §77.	To H. R. Com. on Judiciary.
H. R. 9447	R. R. Reorganizations; amends §77.	H. R. Com. on Jud. (substitute for S. 1869).

¹⁴ The matter is of particular interest in view of the recent direction by the Judicial Conference of the Senior Federal Circuit Court Judges to the Director of the Administrative Office of the United States Courts, to circulate a questionnaire to all Bankruptcy Courts on the Administration of the Bankruptcy Act. The results of this investigation may produce or suggest amendments. *N. Y. Times*, Feb. 1, 1940, p. 31. The Director's office reports that the answers have been turned over to the Attorney General's Committee on Bankruptcy Administration.

¹⁵ This issue is discussed *infra* p. 411.

¹⁶ On Dec. 31, 1938, 71 steam railways (excluding switching and terminal companies), operating 61,590 miles of road, with an investment in road and equipment of \$4,756,359,191, were in the hands of trustees under §77. I. C. C. Bureau of Statistics, Statement No. 3945, Nov. 1939, p. 6.

¹⁷ See Table II, *infra* p. 419.

¹⁸ St. Louis-San Francisco and Savannah & Atlanta. The Arkansas Vy. Interurban and the Kansas City, Kaw Valley & Western, both electric railroads, also transferred from receivership to §77.

¹⁹ It would not be surprising if by the time this article actually is published the Seaboard and the Florida East Coast should transfer to §77; see p. 406, *infra*.

²⁰ Missouri & North Arkansas, but see note 87, *infra*

²¹ Norfolk Southern and Mobile & Ohio.

respect to either. Equity receiverships are, however, a less important problem, accounting for only 15,297 steam-operated and 535 electric-operated mileage at present. The situation is serious when one appreciates that between Section 77 trusteeships and receiverships 77,925 miles, or 30.64% of the total operated mileage, are in the hands of the courts.

Partly because of this delay in both types of reorganization, at the end of the second session of the 76th Congress the Railroad Readjustment Act was passed²² providing a *fait accompli* method of reorganization for roads which have not been in Section 77 or equity receivership for 10 years,²³ which file petitions by July 31, 1940,²⁴ and which appear to be in only temporary financial embarrassment so that a kind of moratorium or "adjustment," rather than a thoroughgoing reorganization, may be appropriate. In the year it has been available six railroads²⁵ have attempted to use its provisions. Further consideration of the progress of these six reorganizations is omitted here as they are discussed elsewhere in this issue.^{25a}

The extraordinary lack of progress in railroad reorganization in the last seven years makes it particularly desirable to view the attempts to reorganize at closer hand.

RECOURSE TO SECTION 77 AS A METHOD OF REORGANIZATION

1. *The Debtor's Plan*

As soon as the court approves the petition as properly filed, and a copy is sent to the Interstate Commerce Commission, and the trustees have been appointed by the court and approved by the Commission,²⁶ the next business on hand is the filing of a plan of reorganization by the debtor. Despite the statutory admonition that the debtor shall file a plan within six months,²⁷ the 25 debtors who have filed plans have taken an average of 14 months from the petition's approval. In four cases the trustees have fulfilled the debtor's duty by filing plans, but apparently with reluctance, as the average time taken is 27 months. In eight cases where the six-months period has elapsed no plan has been filed by debtor or his trustee. In the six of these eight cases that were started after the enactment of the six months rule, the average duration of these proceedings (to May 31, 1940) has been 23 months. Thus, the debtor, or the trustee in its stead, has filed plans in an average of about 1½ years—and in six other cases has already delayed for an average of about two years—not a very impressive record as to the efficacy of statutory admonitions.

However, if the filing of a debtor's plan meant real progress and reorganization were close at hand, the periods would not seem so long. Concededly writing a good reorganization plan is not an easy job. But three fifths of all the debtors subsequently

²² Pub. L. No. 242, 76th Cong., 3d. Sess., approved by President July 28, 1939.

²³ Ch. XV, §710.

²⁴ Ch. XV, §755.

²⁵ Baltimore & Ohio; Chicago, Memphis & Gulf; Lehigh Valley; Montana, Wyoming & Southern; Peoria & Eastern; and Wichita Falls & Southern.

^{25a} See Will, *The Voluntary Adjustment of Railroad Obligations*, *infra*.

²⁶ This follows rapidly in most cases.

²⁷ §77(d). This subsection, limiting the debtor's time to six months, "unless such time is extended by the judge . . . for cause shown" was not enacted until August 27, 1935 (49 STAT. 911); prior to then the Act provided "debtor shall present a plan" (47 STAT. 1474).

became so aware of the inadequacies of their plans as to file amendments thereto. And in three fifths of all the proceedings in which debtor filed a plan, other parties have been sufficiently convinced of the inadequacies of debtor's plan to file plans of their own. Furthermore even casual inspection reveals that many of debtor's plans were merely technical fulfillment of its statutory duty.²⁸

Judging on the basis of the Commission's own language in its final reports, the debtor's plan as modified by the Commission has been the basis of its final report in six out of 25 cases, *viz.*, *Chicago & Eastern Illinois*,²⁹ *Chicago, South Shore & South Bend*,³⁰ *Copper Range*,³¹ *Kansas City, Kaw Valley & Western*,³² *Louisiana & North West*,³³ and *Reader*.³⁴ Some of these "modifications" have been important—the most characteristic being the substitution of preferred stock for bonds.

A basic reason why the statutory admonition directing the *debtor* to file a plan has not been more effective in providing useful plans, is the number of debtors who as stockholders³⁵ have an equity which is valueless and therefore can have no interest in the reorganized company. In 12³⁶ of the 18 reorganizations which have so far reached final report, the Commission has found the common stock valueless. In such cases the debtor, attempting to allocate to its stockholders some interest in the reorganized company, might well be expected to have written a plan at variance with practical reorganization. However, both the Debtor's plan in the *Kansas City, Kaw Valley & Western* and Debtor's Amended Plan of January 1, 1939 in the *New Haven* actually provided that the stockholders be given nothing. Findings that the common stock is without value—made, incidentally, in the final report for every Class I road except the Erie—have not been made by Commission with any pleasure. It has expressed itself as "deeply sympathetic" with an attempt to find some method whereby the present stockholders might receive a continuing interest.³⁷

The Commission has the power to reject, without holding hearings, a plan found by it to be "*prima facie* impracticable,"³⁸ but it has used this power only once.³⁹ In

²⁸ See especially the original Debtor's plan filed in the Chicago & N. W. R. R. Reorganization, which was based on market value and even failed to apply that odd test with any degree of logic.

²⁹ 230 I. C. C. 199, 234 (1938) (Debtor's modified plan of Feb. 15, 1937, written in agreement with other parties).

³⁰ 212 I. C. C. 547, 568 (1936).

³¹ 212 I. C. C. 479, 489 (1936).

³² 221 I. C. C. 15, 24 (1937).

³³ 224 I. C. C. 58, 81 (1937).

³⁴ 221 I. C. C. 190, 197-198 (1937). The Commission also based its report on plan adopted by the Debtor in the Savannah & Atlanta Ry. Reorg., 224 I. C. C. 197, 218 (1937).

³⁵ In the Missouri Pacific a distinction has been attempted between Debtors and Stockholders—but there can be no question that most Debtors' plans including that of the Missouri Pacific—have been drawn by the representatives of the old stockholders with their interest in mind.

³⁶ Chicago & E. I. Ry. Reorg., 230 I. C. C. 199, 233 (1938); Chicago & N. W. Ry. Reorg., 236 *id.* 575, 637 (1939); Chicago, G. W. R. R. Reorg., 228 *id.* 585, 626 (1938); Chicago, M., St. P. & P. R. R. Reorg. (Feb. 2, 1940) mimeo. rep. at 148; Denver & R. G. R. R. Reorg., 233 I. C. C. 515, 580 (1939); Kansas City, K. V. & W. 221 *id.* 15, 24 (1937); Missouri P. R. R. Reorg., 239 *id.* 7, 132 (1940); New York, N. H. & H. R. R. Reorg. (March 22, 1940) mimeo. rep. at 132; Oregon P. & E. Ry. Reorg., 233 I. C. C. 187, 194 (1939); Savannah & A. R. R. Reorg., 224 *id.* 197, 215 (1937); Spokane Intern'l Ry. Reorg., 228 *id.* 387, 403 (1938); Western P. R. R. Reorg., 230 *id.* 61, 101 (1938).

³⁷ Chicago & N. W. Ry. Reorg., 236 I. C. C. 575, 637-638 (1939). ³⁸ §77(d).

³⁹ Chicago, R. I. & P. Ry. Reorg., 212 I. C. C. 89 (1935), finding plan to consolidate Rock Island, St. Louis-San Francisco, and Chicago & E. I. impracticable.

two other cases, however, the Commission has found itself able to eliminate hearings, once by refusing to reopen records to allow the filing of a new plan,⁴⁰ and once by denying leave to file a plan.⁴¹

The Commission four times has entered reports both refusing either to adopt the plans before it or to write one of its own, but without prejudice to the continuation of the proceedings.⁴² In a fifth reorganization an examiner's proposed report recommending refusal to adopt a plan apparently was accepted as sufficiently adequate by all parties, for plans were subsequently amended, further hearings held and a second examiner's report recommending a plan eventually issued.⁴³

In none of these decisions did the Commission recommend dismissal of the proceedings. In two proceedings—the *Arkansas Valley Interurban* and the *Chicago, Indianapolis & Louisville* reorganizations—the Commission's reports make it clear that it sees little possibility of financial reorganization under any plan;⁴⁴ and in the *New York, Ontario & Western* it sees little hope under present operating conditions.⁴⁵ Yet the Commission preferred to temporize—to give every opportunity for changing circumstances to save these roads. The Arkansas Valley has now been sold;⁴⁶ the C. I. & L. and the N. Y. O. & W. are still awaiting decision as to reorganization, sale or abandonment.

2. Procedure on Plan before the Commission

A debtor's or some other plan being presented, there then begins—typically, some months later—the holding of hearings before the Interstate Commerce Commission on the plan or plans. The period covered by the hearings themselves has varied from one day for the entire hearing⁴⁷ to five years and eight months between the opening and closing day.⁴⁸ It is safe to say, on the basis of the records of the five one-day cases, that no one-day hearing ever covered the presentation of a plan for a complex road or in a contested case. In the complex and protracted cases, the characteristic experience appears to have been that the first hearing adjourned, after the introduction of the evidence then at hand, to allow preparation of further factual material and possibly to permit preparation for cross examination, rebuttal testimony, etc., not covered at the hearing. On subsequent hearings the gradual production of segregation studies, earnings formulas, and most particularly the bringing up to date of the earnings

⁴⁰ Chicago & N. W. Ry. Reorg., 230 I. C. C. 548 (1939).

⁴¹ St. Louis-S. F. Ry. Reorg., order, July 20, 1937, finding proponent of plan was not such a party in interest as could file a plan as a matter of right.

⁴² Arkansas Vy. Interurban Ry. Reorg., 224 I. C. C. 120 (1937); St. Louis-S. F. Ry. Reorg., 233 *id.* 335 (1939); Chicago, I. & L. Ry. Reorg., 221 *id.* 199 (1939); New York, O. & W. Ry. Reorg., I. C. C., May 14, 1940.

⁴³ New York, N. H. & H. R. R. Reorg., Fin. Doc. No. 10992, Proposed Report of June 13, 1938, recommends refusal to adopt any plan; that of Nov. 17, 1939 recommends a plan.

⁴⁴ Arkansas Vy. Interurban Ry. Reorg., 224 I. C. C. 120, 125-126 (1937); Chicago, I. & L. Ry. Reorg., 233 I. C. C. 335, 348-349 (1939).

⁴⁵ New York, O. & W. Ry. Reorg. (May 14, 1940), mimeo. rep. at p. 5.

⁴⁶ Sale approved by I. C. C., March 26, 1940, under §4 proceedings.

⁴⁷ Chicago S. S. & S. B.; Copper Range; Kansas City, K. V. & W.; Oregon, P. & E.; and Reader.

⁴⁸ St. Louis-San Francisco Ry.

statements of the debtor, proved the necessity of amendment to the plans to reconcile them with the developing record of facts. Further adjournments, further amendments, have followed.

After the hearings on the plans and the filing or waiver of briefs, it becomes the Commission's duty to file a proposed report. At least, this proposed report procedure has been followed in all but one case which reached this stage.⁴⁹ It has taken an average of seven months from the hearing's closing until the filing of the examiner's proposed report. This includes the period in which the briefs are filed, but presumably the examiner is already at work assembling the descriptive material with which the Commission customarily begins its Finance Division reports. In four of the large reorganizations the examiner has taken a year or more to hand down his proposed report.⁵⁰

In almost every case in which an examiner's proposed report has been rendered, exceptions have been filed, and argument before Division 4 or the Commission was held in all but five cases which reached this stage.

3. *The Commission's Report*

Out of the 17 proposed report cases on which the Commission has passed, it has in its own language "differed" in its conclusions from those of its examiners in five,⁵¹ "differed somewhat" in its conclusions from those of its examiners in eight,⁵² and has not discussed the examiner's report in four.

Of the 18 cases in which the Commission has issued a final report, petitions have been filed for modification in 11 and the time for filing has not run in one more. Thus an attempt to secure modification of the Commission's final report may be described as a characteristic part of the procedure. These petitions have been granted at least in seven cases,⁵³ denied in two cases,⁵⁴ and two petitions are not yet decided.⁵⁵ The Commission has actually modified ten of its 18 final reports (twice because of court disapproval,⁵⁶ seven times on petitions,⁵⁷ and once on its

⁴⁹ Reader R. R. Reorg., in which the Commission issued its Final Report after hearings.

⁵⁰ Chicago & N. W.; Chicago R. I. & P.; Denver & R. G. W., and Missouri Pacific. Reasons for this delay are discussed *infra*, p. 414.

⁵¹ Akron, C. & Y. R. R. Reorg., 228 I. C. C. 645 (1938); Chicago & N. W. Ry. Reorg., 236 *id.* 575 (1939); Denver & R. G. W. R. R. Reorg., 233 *id.* 515 (1939) Spokane Intern'l Ry. Reorg., 228 *id.* 387 (1938); Chicago, M., St. P. & P. R. R. Reorg. (Feb. 2, 1940) mimeo. rep. at 1.

⁵² Or "differed in certain particulars" or "in some respects": Chicago G. W. R. R. Reorg., 228 I. C. C. 585 (1938); Chicago S. S. & S. B. R. R. Reorg., 212 *id.*, 547 (1936); Louisiana & N. W. Ry. Reorg., 224 *id.* 58 (1937); Missouri P. R. R. Reorg., 239 *id.* 8 (1940); Oregon P. & E. R. R. Reorg., 233 *id.* 187 (1939); Savannah & A. R. R. Reorg., 224 *id.* 197 (1937); Western P. R. R. Reorg., 230 *id.* 61 (1938); Erie R. R. Reorg. (April 6, 1940) mimeo. rep. at 1.

⁵³ Chicago & E. I.; Chicago & N. W.; Chicago S. S. & S. B.; Denver & R. G. W.; Missouri Pacific; Spokane Intern'l; and Western Pacific.

⁵⁴ Chicago G. W.; Louisiana & N. W. (Petition for modification of Western Pacific Amended Report denied.)

⁵⁵ Chicago, M., St. P. & P.; New York, N. H. & H.

⁵⁶ Kansas City, K. V. & W.; Louisiana & N. W.

⁵⁷ Chicago & E. I.; Chicago & N. W.; Chicago S. S. & S. B.; Denver & R. G. W.; Missouri Pacific; Spokane Intern'l; and Western Pacific. Actually the C. & E. I. report was amended three times, but two were minor.

own motion⁵⁸). Time is not yet run for either filing or deciding petitions in three additional cases.⁵⁹

In this wise, in the 18 cases reaching final reports, a shade under four years has elapsed for the average time between the filing of the original petition and the rendering of the final report as amended (to date). It must be appreciated that there is a normal tendency for the difficult cases to linger; for instance, no final report has yet been handed down in the *Rock Island* or the *Frisco* reorganizations, both 1933 petitions. On the other hand there is the definite increase in tempo in Commission work. Thus this four year average for its part in a Section 77 reorganization is probably a fair figure.

4. The Court's Approval of the Plan

Having now run the gamut of the Commission, the plan of reorganization must clear the hurdle of the court's approval. So far, ten reorganization plans have been approved by the courts.⁶⁰ Inspection of these ten reveals that as a group they are not what might be termed strongly contested cases. And yet one—the *Louisiana & North West*—was first sent back to the Commission with an order disapproving; and in one—the *Akron, Canton & Youngstown*—appeal has been taken from the order of the court approving the plan.⁶¹

The statute demands⁶² that in approving a plan the court find that:

(1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

as well as certain findings regarding expenses and fees.⁶³ In most cases the court appears to have been able to draw these conclusions after opportunity to file objections and a one-day hearing.⁶⁴ In two cases the judge has utilized the statutory provisions to omit the hearing if no objections are filed.⁶⁵ These brief records basing the broad finding required by the statute can only be explained by a conjunction of lightly contested cases and judges relying upon the Commission's judgment. It seems only reasonable that any judge sitting in a railroad proceeding would give great weight to the words of the Interstate Commerce Commission. But the real test of the judicial functioning will come only in a hotly contested case involving a complicated plan.

⁵⁸ Chicago Great Western.

⁵⁹ Erie (time not yet run for filing); Chicago, M., St. P. & P., and New York, N. H. & H. (petition not decided).

⁶⁰ Akron, C. & Y.; Chicago & E. I.; Chicago G. W.; Chicago S. S. & S. B.; Copper Range; Louisiana & N. W.; Oregon P. & E.; Reader; Savannah & Atlanta; and Spokane Intern'l.

⁶¹ Two appeals taken: one by Railroad Credit Corporation, Akron, C. & Y. Ry., debtor, Railroad Credit Corp. v. Hagenbuch and Stewart, Trustees, No. 8524 (C. C. A. 6th), the other by Stroud & Co., representing a group of bondholders.

⁶² §77(e).

⁶³ *Ibid.*

⁶⁴ Two hearing days scheduled only in the Chicago & E. I. R. R. where the court was awaiting a technical correction of the Commission to the plan.

⁶⁵ Chicago, S. S. & S. B., and Oregon P. & E., relying on §77(e). In the Akron, C. & Y., objections were heard before a special master.

5. Voting on the Plan

Of the ten reorganization plans which have been approved by the courts, eight have been accepted by vote of the security holders and confirmed by the courts. A ninth has just been rejected by the vote of two out of nine classes⁶⁶ and the tenth is awaiting the counting of the votes.⁶⁷

The statute only requires the *consent of two thirds of those voting* in each class.⁶⁸ This makes the court's classification important and explains the strategic value of being classified as a single class.⁶⁹ The number of classes voting (excluding classes not given a vote because of the Commission's findings that their interests either are valueless or are not affected)⁷⁰ has varied from one—in the *Oregon Pacific & Eastern*—to nine—in the *Akron, Canton & Youngstown*.⁷¹ An average of 92% of those voting (by principal amount of bonds, amount of claim, or number of shares of stock) have voted in favor of the plan as certified to them by the I. C. C.⁷² However, 92% of those voting represent, on the average, only 71%⁷³ of those eligible to vote. Of the 29 classes voting in these nine reorganizations there were seven classes in which less than 60% voted.⁷⁴ These seven included the three classes of securities most widely held by the investing public: Chicago Great Western first 4's (\$35,544,000 principal amount outstanding, of which 43.69% voted), Chicago Great Western preferred stock (460,735 shares outstanding, of which 53.46% voted), and Chicago & Eastern Illinois general 5's (\$30,709,036 principal amount outstanding, of which 58.07% voted). In each of these three classes, however, more than 99% of the votes cast favored the plan.

In the case of an appeal from the court order approving the plan, the statute is not determinative as to whether the Commission should delay the voting, but apparently leaves this to its discretion.⁷⁵ In the *Akron, Canton & Youngstown* case, some months after the court's order approving the plan⁷⁶ and while the appeal was pending, the Commission ordered⁷⁷ and, despite the petition of debtor,⁷⁸ conducted

⁶⁶ Akron, C. & Y. The Railroad Credit Corporation, a secured noteholder classified as Class A-4, and the common stock (held by a holding company) each voted 100% against the plan. I. C. C. Certificate, May 16, 1940, Fin. Doc. 9923.

⁶⁷ Spokane International. ⁶⁸ §77(e) 3d par.

⁶⁹ In the Missouri Pacific, the notes held by J. P. Morgan & Co., the R. C. C. and the R. F. C. were classified together as a single class. J. P. Morgan & Co. appealed this to the Supreme Court (*cert. den.*, J. P. Morgan & Co. v. Missouri P. R. R., 299 U. S. 604 (1936)) for the very practical reason that the R. F. C. could outvote Morgan & Co. and control the vote of the class. ⁷⁰ §77(e) 2d par.

⁷¹ The large reorganizations will have many more classes—e.g., the Rock Island has been classified in 27 classes. Ct. Order No. 37, Ct. Rec. p. 379 as modified.

⁷² The I. C. C. in certifying the results of voting, has shown for each class the percentage of favorable votes to total valid votes, and the figure shown here is an average of those percentages.

⁷³ Calculated by finding the percentage for each class and averaging these percentages.

⁷⁴ An extreme example has occurred in the Akron, C. & Y. voting where Class A-5 (two Cleveland banks holding \$436,387.24 principal and interest of unsecured notes) failed to vote on the plan. Presumably, if there is no revote the court's finding will have to be the same as if they had objected. The statute contemplates acceptance or rejection, but not failure to vote. §77(e) 3d par.

⁷⁵ §77(e): "If the judge shall approve the plan, he shall file an opinion . . . and shall send a certified copy . . . to the Commission. The plan shall then be submitted by the Commission. . . ."

⁷⁶ Court opinion approving plan, Sept. 28, 1939; court order, Sept. 30, 1939.

⁷⁷ I. C. C. order, Feb. 2, 1940; notice of submission, Feb. 24, 1940.

⁷⁸ Petition of Debtor filed, March 19, 1940; denied by I. C. C., March 28, 1940.

the voting. This decision of the Commission to conduct the voting can only have been motivated by its present desire to avoid delay, or the accusation of having caused delay. Whether it will have succeeded will depend on the outcome of the case on appeal and whether some party succeeds in using the vote's timing as a reason for a revote.

Regardless of the outcome of the Railroad Credit Corporation's appeal in the *Akron* case, it may be that the vote of the stockholders against the plan will be the first to force a judge to consider the exercise of his powers under the Act which permit him to overrule the adverse vote of a class.⁷⁹ How far the judge should or will go under this power is a matter which the next few years will show.

6. *Finishing the Reorganization*

After the vote on the plan and confirmation of the plan by the court⁸⁰ the statute demands:⁸¹ order of the Commission authorizing the issue of new securities; their issue; actual transfer of operations to the reorganized company; and discharge of the trustee. The order of confirmation operates like the discharge in ordinary bankruptcy.⁸² All these details take time and represent a good deal of work in a complicated reorganization—especially the drafting of new mortgage indentures.

As pointed out earlier,⁸³ four Class II railroads and one electric have been completely reorganized under Section §77. The average time from the approval of the petition to the discharge of the trustee by the court⁸⁴ has been 44 months, or 3 $\frac{2}{3}$ years. That the average period will be longer than this is seen from statistics already quoted,⁸⁵ or from the fact that for all the railroads filing petitions the period from the date of filing to February 1, 1940 (or to earlier termination) averaged 49 months, or a little over four years. When one remembers that in this average period only eight proceedings have been terminated, and that this average includes three proceedings started since October 15, 1939,⁸⁶ it is clear that the eventual average time of Section 77 proceedings will be a good deal more than four years.

RECOURSE TO RECEIVERSHIP AS A METHOD OF REORGANIZATION

There is nothing new in railroads going into receivership. Reorganization has been characteristic of American railroad history. From 1933 through June 1940, however, out of 13 Class I railroads in receivership, only one has been purportedly reorganized⁸⁷ and two others have apparently neared completion of their reorganizations.⁸⁸

⁷⁹ §77(c) 3d par.

⁸¹ §77(f).

⁸² *Ibid.*

⁸⁰ §77(c) 3d par.

⁸³ *Supra* p. 394.

⁸⁴ Usually this is the final act of the court and follows the beginning of operations by the reorganized company by an appreciable interval.

⁸⁵ See pp. 396, 398, 399.

⁸⁶ Central R. R. of N. J.; Fort Dodge, D. M. & S.; and Boston Term. Co.

⁸⁷ The Missouri & North Arkansas. *Quaere* whether one can justly term a sale a "reorganization" when the Commission, in approving, said: "The facts of record do not indicate affirmatively that the property can be operated at a profit. . . . If the party or parties who have purchased the property are willing to undertake its operation, we think under the circumstances they should be permitted to do so." 207 I. C. C. 641, 643 (1935).

⁸⁸ Norfolk Southern and Mobile & Ohio.

A total of 58 railroad systems have been in receivership during this period. As of their last classification when operating, these systems comprised 64 roads: 13 Class I, 23 Class II, 19 Class III, 3 "Circular," 1 "Unofficial" and 5 leased lines.⁸⁸ The total operated mileage of these roads (when last operating) was 21,496, about a third as much as the 63,106 that have been in Section 77 proceedings. This quarter of the railroad reorganization problem can not be disregarded when thinking in terms of transportation service, especially to the smaller communities, or in terms of potential development of our reorganization law. While the problem of railroad receivership affects particularly the southern part of the country, it may be seen from Table II that 37 of our 48 states have been served by one or more railroads in receivership in the 1933-1940 period.

There has been much talk of the concentration of the large Section 77 reorganizations in the hands of a few members of the federal judiciary.⁸⁹ The equity receiverships have been divided between the federal and state courts: 27 in federal courts, 22 in state courts, and two have transferred from state to federal courts.⁹¹ The federal district courts in 17 states and the state courts of 15 states have had primary jurisdiction in equity receiverships. Save for federal district courts in Georgia (which have had five cases but now have only two), none of these courts has had more than two equity reorganizations. Thus the dispersion has been wide.⁹²

Of the 64 roads (58 systems) in receivership, 40 were one-state railroads; 43 had an operated mileage of less than 100 miles when last operated. Thus, the story of these receiverships is a story of small roads in financial stress,⁹³ of revenue failing because of competition of other means of transportation, because of sectional depression, and because many were one-industry roads—logging and oil roads, especially—whose industry shrank or vanished. Their waning life can be noted in the abandonment of operations in branch after branch until 13 of the 58 systems have been

⁸⁸ For definitions of Classes I and II, see notes 4 and 6, *supra*. Class III railroads are those having annual operating revenues below \$100,000. "Circular" roads (C) are intrastate roads and roads under construction for which brief circulars are filed. "Unofficial" roads (U) are those for which official returns were not secured. ICC, *STATISTICS OF RAILWAYS IN THE UNITED STATES, 1938*, pp. S-1, S-2 and 213.

⁸⁹ See, e.g., Ex. No. 4, p. 535, and Ex. No. 1, p. 948, in Part I, *Hearing before the Special Subcommittee on Bankruptcy and Reorganization of the House Committee on the Judiciary on S. 1869, 76th Cong., 1st Sess. (1939)*, showing that three federal judges—James Wilkerson, J. P. Barnes and G. H. Moore—have over 50% of the operated mileage of railroads in reorganization in their courts.

⁹¹ There are also seven equity receiverships whose court of primary jurisdiction has not been identified.

⁹² The only feature at all comparable with Section 77 concentration is that one judge, Luther B. Way, has two of the Class I equity reorganizations before him—the Norfolk Southern and the Seaboard Air Line.

⁹³ The practical difficulties of such a situation may be appreciated from the letter of the Auditor and Traffic Manager of the Wilmington, Brunswick & Southern of June 26, 1933 to the I. C. C. Chief Counsel, explaining his failure to file its annual reports: ". . . this Company was placed in the hands of a Receiver March 7, 1933. Prior to receivership, my office force had been reduced to the point that I had to take over the duties of agent at Southport as well as those usually exercised by a superintendent, master mechanic, auditor, claim agent and general manager. Since receivership, I have had to still further reduce my force both in number and salary.

"By working at night and on Sunday, I managed to get up the 1931 figures and to file report about two weeks ago. . . . The Receiver is not in a position to employ extra help. As an earnest of this, he has been able to date to pay me only sixty-one dollars of my May salary." (I. C. C. Stat. Doc., Wilmington, B. & S. R. R.).

entirely abandoned and two are now operated as private roads. Classifying them for tabular purposes was difficult because as they shrank their class characteristically changed.⁹⁴

Of the 13 Class I roads in receivership, the Frisco emerged by going into Section 77 proceedings; the Missouri & North Arkansas by a reorganization sale of whose possibilities the I. C. C. was very dubious;⁹⁵ and the Norfolk Southern and Mobile & Ohio are apparently about to be actually reorganized. The Pittsburgh, Shawmut & Northern has been in receivership proceedings since 1905 so that that status would appear normal and, presumably, preferable. That leaves eight Class I roads—Central of Georgia, Florida East Coast, Georgia & Florida, Minneapolis & St. Louis, Rutland, Seaboard Air Line, Wabash, and Ann Arbor—struggling with receivership procedure, not to mention the smaller roads.

Solely to aid in following the history of railroad reorganizations under classic equity procedure, the following summary of this procedure is given. A petition for receivership was filed in a federal or state court; the court appointed a receiver; ancillary jurisdiction was lodged in other federal or state courts, which might or might not appoint the same receiver. The receiver or receivers then, depending upon the terms of their appointments, had more or less control over the railroad. The leading creditor and equity interests, with or without the assistance of reorganization managers, would try to agree on the terms for the reorganization. Committees were formed, assents solicited, and deposits obtained before the plan was presented to the court. Characteristically, plans were presented to the court only when 90 to 95% of the security holders had approved. Meanwhile, foreclosure decree was obtained, hearing on the upset price and hearing to fix date of sale and actual sale took place. Then the subject of the plan and its fairness first came before the court on the motion to confirm the sale. Clearly, the court was faced with a *fait accompli*.⁹⁶

Since 1920 the Transportation Act⁹⁷ has required equity receiverships (and, subsequently, Section 77 and Chapter XV proceedings) to go before the I. C. C. for approval of the issue of new securities. The same respect for a *fait accompli* which caused judges to hesitate to go too far into a plan (whose real fairness was probably quite difficult for the court to appraise) also swayed the Commission in limiting its consideration under Section 20a proceedings (though no one can doubt the Commission stood in a better position than the court to appraise the workings of the plan before it). One can sympathize with the Commission's dilemma in interpreting in favor of a narrow construction of Section 20a when it had no power to enforce its own plan and disliked further delaying reorganizations, but the results are still to be deprecated. The leading Commission decision on this problem is that approving

⁹⁴ E.g., Fort Smith & Western which was a Class I road in 1934; a Class II road in 1937; and unclassified by 1938.

⁹⁵ See note 87.

⁹⁶ See *Additional Report of the Committee on Interstate Commerce pursuant to S. Res. 71, 76th Cong., 1st Sess. (1939) Rep. No. 25, Pt. 6, pp. 1-25.*

⁹⁷ 49 U. S. C. §20a.

acquisition of capital and issue of securities in the *Chicago, Milwaukee & St. Paul* reorganization in 1928 in which Commissioner Eastman vigorously dissented.⁹⁸

Even the court records of the receivership frequently shed little light on its theoretical objective, *viz.*, reorganization. Thus, the reports of the Receiver of the Central of Georgia made to the court from 1933-1938, inclusive, as well as the regular printed court record of the case, never once mentioned methods, possibilities, of, or hearings on, let alone a plan for, reorganization. On the other hand, the *Minneapolis & St. Louis* receivership (started in 1923) has been productive of many different plans of reorganization varying from dismembering it among the adjacent carriers of the Middle West to reorganizing it as one or as two corporations.

The *fait accompli* procedure has been subject to modifications of late due (1) to the growing tendency of the courts to assume responsibility for the production of the reorganization plan,⁹⁹ especially in the face of inaction by the parties, and (2) to the tendency of the parties to seek the aura of Interstate Commerce Commission approval.

Thus, in the *Seaboard Air Line* reorganization, a special master was appointed this past year—being nine years after the original date of the receivership—to develop a reorganization plan.¹⁰⁰ The order in the *Seaboard* not merely provides for very free intervention following the lead of Section 77,¹⁰¹ but directs the master to bring in a finding almost in the phraseology of Section 77.¹⁰²

Meanwhile, the very interests who used to arrange plans by dickering behind closed doors have been finding difficulty in gaining the consent of security holders and have been encountering a ready mood of the public to analyze and criticize. Therefore, it is becoming the policy of those guiding the large equity receiverships to seek I. C. C. approval at every step—whether or not required by the law—and to urge the Commission to broaden its powers in rendering at least advisory opinions to the courts well in advance of the reorganization plan being a *fait accompli*. Thus, in the *Norfolk Southern*, the 20a application, made before foreclosure, indicated clearly that the plan was not final and that the court and parties would appreciate suggestions of the Commission.¹⁰³ In the *Wabash* reorganization counsel not merely made their 20a applications this early but also expected to file applications with the I. C. C. under 49 U. S. C. §1, paragraphs 18-20 (certificate of public convenience and necessity on acquisition and operation of line); 49 U. S. C. §5 (2) (approval and authorization of acquisition and control of other common carriers through stock

⁹⁸ 131 I. C. C. 673; and see Investigation of Chicago, M. & St. P. Ry., 131 *id.* 615 (1928). See also Comm'r Eastman's dissents in Missouri-K.-T. R. R. Reorg., 76 I. C. C. 84 (1922), and Denver & R. G. W. R. R. Reorg., 90 I. C. C. 141 (1924).

⁹⁹ See, e.g., Order of Judge L. B. Way, Oct. 2, 1939, *Seaboard A. L. Ry. Reorg.*, Ct. Rec. pp. 15355, 15358-59.

¹⁰⁰ *Seaboard A. L. Ry. Reorg.*, original date of rec'ship, Dec. 23, 1930; order app'ing Special Master, Oct. 27, 1939, Ct. Rec. pp. 15429-15436.

¹⁰¹ Order of Judge L. B. Way, Oct. 21, 1939, *Seaboard A. L. Ry. Reorg.*, Ct. Rec. pp. 15429, 15433-34. Compare with §77(e).

¹⁰² *Additional Report*, *supra* note 96, Pt. 6, p. 8.

purchase); 15 U. S. C. §606(g) (3) (I. C. C. approval of compromise settlement of R. F. C. loans whether in Section 77 or equity reorganization); and 11 U. S. C. §205(b) (authority to solicit deposits).¹⁰⁴ In resorting to all these sections, the receivers, their counsel and the protective committee all hoped, in March, 1938, that:

the Commission will proceed as broadly in connection with our plan of reorganization as it would proceed if the matter were under §77, and although they may not have jurisdiction in a strictly legal sense to approve the plan as such, their report on the matter, in the nature of an advisory report to the court, will be very helpful.¹⁰⁵

Thus we see that the simpler procedure of equity reorganization as compared with Section 77 has not assisted the larger and more complicated equity reorganizations in achieving results. Basically the delays of both have been caused not by procedure but by the unwillingness of the parties to reorganize. The difference in appearance lies in the fact that in Section 77 proceedings, while accomplishing little, the parties go through complicated procedural maneuvering building up large records, whereas in receiverships they usually do nothing, as far as the record is concerned. The existence of Section 77 has also contributed to delay in equity proceedings because the potentiality of junior interests transferring proceedings from equity to Section 77, if faced with an unfriendly foreclosure sale, has had to be reckoned with.

In the hands of an active judge and Commission, Section 77 has definite advantages. First, lacking any plan, or lacking a satisfactory plan, the Commission can write its own. Second, reluctant minority interests can be forced to stay in. These handicaps of receiverships are illustrated in the *Wabash* reorganization where on August 14, 1937 the Receivers filed a plan of reorganization which in January 24, 1938 they requested to be withdrawn because of disagreement among creditors. On September 7, 1939 and October 15, 1939 the *Wabash* had hearings scheduled before the I. C. C. on approval of issue of securities, but again requested adjournment. Obviously they could not obtain agreement. The Special Master sitting in the *Seaboard* requested that plans be filed on or before February 1, 1940; but apparently none was filed and the hearing was postponed first to May 21 and then to June 25, 1940. Meanwhile on April 16, 1940, the representatives of the underlying bondholders and of the equipment trusts informed the judge that they were preparing a petition for transfer of the reorganization to a Section 77 proceeding.¹⁰⁶ It will not be surprising if several of the receiverships transfer to Section 77 as the only practical method of reorganization.¹⁰⁷ If in the past decade the entire community financially

¹⁰⁴ *Id.* at 6, 7. Any reorganization in the same circumstances would have to make all those applications, whether or not petitioners were hoping for the same results.

¹⁰⁵ Testimony of N. S. Brown, General Counsel, *Wabash Ry.*, *id.* at 9, or *Hearings*, Pt. XXII, p. 9735, and see, generally, pp. 9731-9741. The plan in question, however, subsequently fell through.

¹⁰⁶ 11 *MOODY'S RAILROADS*, 907 (April 20, 1940).

¹⁰⁷ Mr. R. T. Swaine testifying, with special reference to the *Seaboard*, before the Interstate Commerce Committee on Dec. 13, 1937, Rep. No. 25, Pt. 6, p. 16, or *Hearings*, Pt. XVII, pp. 7240-7241.

interested in the railroads has been unable to view the situation realistically, minorities will probably still be found in that condition.

FACTORS DELAYING REORGANIZATION

While there are many different factors which have actually been responsible for the delay in particular reorganizations, there are certain characteristics common to all reorganizations, and typical in producing delay. These are: a reluctance to face the economic situation of the railroads realistically; the idea that railroads cannot reorganize in times of low earnings; an uncertainty as to some legal questions and a litigious attitude as to many; and an overburdened Interstate Commerce Commission staff.

1. *Reluctance to Face the Economic Situation of the Railroads Realistically*

The economic depression did not affect general railroad earnings until 1931. But by December of that year, even the Interstate Commerce Commission had no realization that the situation was anything but temporary, for it stated "When railroad earnings take a sharp turn upward, as in due time they will, railroad credit will also rise."¹⁰⁸ The Commission soon became more realistic and indeed described Section 77's function in its 1933 Report as follows: "The legislation was responsive to the necessity of reducing the capital obligations and fixed charges of a growing number of railroads. . . ."¹⁰⁹ And it has continued in this view.

It is therefore not surprising that others less conversant with railroad finance and the transportation problem took even longer to appreciate the realities. Debtors, in particular, had a natural if misdirected desire to believe that the fall in the level of railroad earnings was "temporary." The Commission commented in its 1934 Report:¹¹⁰

During the past year no plans of reorganization have been presented formally for our consideration. . . . The proceedings have been delayed . . . by an apparent reluctance on the part of the Debtor corporations to present plans of reorganization. This attitude appears to be attributable largely to a desire to defer determination of the debtors' maximum allowable capitalization until improvement in business conditions shall afford better indication of future earning power. . . . The prompt presentation of plans of reorganization is the greatest need.

When Congress, to facilitate railroad reorganization, placed a burden on the debtor of formulating a plan of reorganization, it was acting in the face of human psychology. A case history of the thinking and motivation behind the formulation of such a plan happens to be available in relation to the Chicago & North Western.¹¹¹

¹⁰⁸ I. C. C., 45TH ANN. REP. (1931) 115.

¹⁰⁹ I. C. C., 47TH ANN. REP. (1933) 22.

¹¹⁰ I. C. C., 48TH ANN. REP. (1934) 18.

¹¹¹ *Hearings before Subcommittee of the Senate Committee on Interstate Commerce, pursuant to S. Res. 71, 75th Cong., 1st Sess. Pt. 25.* This is now available in proof. All references hereafter to "Pt. 25, Ex. No. NW" are to this hearing; in the case of letters, the last names of the writer and the recipient, respectively, are given. Also see *Preliminary Report of the Senate Committee on Interstate Commerce pursuant to S. Res. 71, Rep. No. 25, Pt. 1.* "A Problem in Railroad Reorganization—Reorganization Plans

By February 1935, the President of the Chicago & North Western was willing to admit that earnings were shaky.¹¹² It was clear by April 1, 1935, that the road could not meet all its April and May interest payments. Accordingly, it requested R. F. C.'s indulgence on interest due in April 1935, until September, in order to be able to meet interest on bonds and equipment trusts due May 1, 1935.¹¹³ This was granted.¹¹⁴ Meanwhile the road had applied to the I. C. C. for approval of a two-year extension of \$3,807,583 note due R. F. C. on April 13, 1935. This also was granted.¹¹⁵ The hope to pay all May 1st interest proved optimistic, and it was announced that interest on the convertibles (with a 60-day grace period) would be skipped, but that interest on the other bonded debt and equipment trust would be paid.¹¹⁶

With the same thinking which had led the St. Louis-San Francisco to propose its "Readjustment Managers Plan" in 1932 and which the Baltimore & Ohio was more successful in transmitting into action in 1939-1940, the Chicago & North Western approached various parties¹¹⁷ on the subject of a moratorium plan.¹¹⁸ Reconstruction Finance Corporation agreed to extend its loans for five years if the plan were effective.¹¹⁹ On June 5, 1935 a meeting was held with representatives of the various insurance companies and savings banks concerned, at which the company proposed a general moratorium plan.¹²⁰ A second meeting was held on June 13 and a sub-committee of the group met June 18, 1935.¹²¹ As the plan developed, a petition under Section 77 became part of its machinery. The President of the road appreciated the necessity of filing a petition under §77, although he was still hoping to reorganize under the moratorium plan,¹²² and five days later the Board of Directors voted to file a petition under Section 77.¹²³

Some creditor interests who had agreed in June 1935 to support the plan, realized by December that a new plan was necessary.¹²⁴ The Board of Directors came to appreciate the realistic point of view at least as far as admitting the moratorium plan would not work, as shown in its minutes of January 15, 1936.¹²⁵ Meanwhile, however, the six-months rule was in effect and Debtor had no plan ready for filing. The institutional creditors were friendly to delay.¹²⁶

... The members expressed gratification that you [the Debtor] had come to the conclusion to apply for a six-month's extension of time within which to file a plan of reorganization, and were unanimously of the opinion that the Group should support your prayer for such extension. ...

as Causes of Recurrent Insolvencies," dealing with plans proposed in the Missouri Pacific and Wabash reorganizations.

¹¹² Pt. 25, Ex. No. NW 335 (Sargent-Holt).

¹¹³ *Id.* NW 330 (Cady-Jones).

¹¹⁴ Chicago & N. W. Ry. Reconstruction Loan, 207 I. C. C. 123 (1935).

¹¹⁵ Pt. 25, Ex. No. NW 336 (Sandstedt-Mutual Savings Bk. Ass'n).

¹¹⁶ *Id.* NW 337 (Field-Sargent); 338 (Field-Stedman); 339 (Sargent-Field); 341 (Cady-Jones).

¹¹⁷ *Id.* NW 350 (Memo. May 28, 1935).

¹¹⁸ *Id.* NW 342 (Jones-Sargent).

¹¹⁹ *Id.* NW 343.

¹²⁰ *Id.* NW 344, 345.

¹²¹ *Id.* NW 347 (Sargent-Jones): "It may be necessary to file under Section 77 pending consummation of the Plan, but if so I believe that a plan can be agreed to and submitted within a short period of time."

¹²² *Id.* NW 348 (Res. June 27, 1935).

¹²³ *Id.* NW 350 (Jones-Neu).

¹²⁴ *Id.* NW 351 (recording Finance Committee resolution withdrawing plan).

¹²⁵ *Id.* NW 360 (Walker, Chmn. Gen. Group-Sargent).

This attitude was not at all unique to the C. & N. W.¹²⁷ or to Section 77 reorganizations¹²⁸ though some of the C. & N. W. creditors were bothered about Debtor's unrealistic attitude:¹²⁹

If the C. & N. W. wishes the institutional holders to aid in securing an extension of time in which to file a plan, and expects the aid of the holders in working out a plan and sponsoring it through the various stages, it would seem as though the road would have to be considerably more cooperative than it has been. . . . Their attitude has been one of trying to preserve the equity without dilution, hoping for a turn in events that would leave their control undiminished. If we are to aid in securing an extension of time, they must adopt a more realistic attitude.

Indeed one of the factors in the delay in developing plans has been the failure of the institutional investors, and in particular the insurance companies, to assume the responsibility consistent with their large investment of formulating a constructive reorganization program.¹³⁰

To return to the C. & N. W., extension of filing date of a plan, to June 22, 1936, was obtained;¹³¹ but Debtor continued unhappy over the necessity. Even in May, 1937, its President wrote:¹³²

Personally, I think it is unfortunate that the public authorities are urging us to hasten reorganization. We are making better progress each year in the face of pretty heavy maintenance expenditures in order to be ready for what seems to be a very handsome volume of business in the near future, . . . if matters are not hurried the property will return to its former earning capacity in the near future. If, however, we are forced to a hurried reorganization on the basis of earnings during the depression there is likely to be little equity left for the stockholders. We do not believe that the Commission or the Court will in the final analysis insist upon such procedure.

The Debtor filed a plan on June 26, 1936, just one year after filing its petition in Section 77. Hearings on the plan were scheduled by the Interstate Commerce Commission for September 9, 1936. The institutional creditors were not satisfied with the Debtor's plan, and were annoyed that they had not been consulted until the plan was ready and due for filing.¹³³ As to the possibility of rapid progress from this point, the Mutual Savings Bank Group explained to its members¹³⁴ that perhaps a month's time would be required to prepare for cross-examination, "a reasonable

¹²⁷ "Holders of first mortgage bond issues of large systems like the North Western, Milwaukee, Rock Island, etc. were not desirous of forcing the situation but preferred to await hopefully further improvement of earnings." Lisman, *Railroad Reorganizations and Section 77* (1937) 16 HARV. BUS. REV. 24, 36.

¹²⁸ See Order of Judge L. B. Way in Seaboard A. L. Ry. Reorg., Ct. Rec. p. 16356: "The first of these conferences was held by the Court at Richmond, Virginia, on July 8, 1935 . . . during which it was urged upon the Court by the representatives of security holders that in the light of general business conditions and the level of earnings of the Seaboard properties the time was not propitious to initiate steps looking to a reorganization."

¹²⁹ Pt. 25, Ex. No. NW 391 (Baker-Walker).

¹³⁰ See *Additional Report of the Senate Committee on Interstate Commerce, pursuant to S. Res. 71*, Rep. No. 25, Pt. 2, "A Problem in Railroad Reorganization, Role of Life Insurance Companies," with particular reference to their role in the Missouri Pacific reorganization.

¹³¹ Order No. 63, Ct. Rec. p. 537 (hearing not included in court record).

¹³² Pt. 25, Ex. No. NW 366 (Sargent-Drennan).

¹³³ *Id.* NW 392 (Walker-Burgess).

¹³⁴ *Id.* NW 377 (Memo. Aug. 5, 1936).

time" to prepare a plan, and "until near the end of the year" to complete segregation and other studies. However, this group hoped to induce an early reorganization by pointing out¹³⁵ that the Debtor's equity was steadily fading though the cumulation of deferred and defaulted interest, entitled, it was claimed, to the same treatment as the principal. This theory did not apparently impress the Debtor, for on April 26, 1937, its General Counsel wrote:¹³⁶

. . . We do not feel that it is fair to the creditors, especially those in the lower brackets, to reorganize with these [political and economic] uncertainties confronting us, for if we do it will be necessary to entirely eliminate them from the allocation of securities in the reorganized company.

On December 15, 1937 Debtor amended its plan; the next day the Insurance Committee and Mutual Savings Bank Group filed a plan; hearings on the plans before the I. C. C. were not closed until April 22, 1938; an impressive pile of briefs on the plans was filed in July 1938. In January 1939 the Commission declined to reopen the hearings to consider the consolidation of the C. & N. W. with the Milwaukee and the Chicago & Eastern Illinois;¹³⁷ in April the Examiner issued a proposed report; exception reply and argument was had, and in December 1939¹³⁸ the Commission issued a final report, modified on April 2, 1940.

2. *Low Earnings as a Cause of Delay*

It is often alleged that the slow progress of railroad reorganizations in the last decade was due to low earnings.¹³⁹ As shown in the preceding section, debtors are particularly convinced of this logic. This is a fallacy that has permeated a good deal of railroad reorganization thinking and indeed, because of its ready acceptance, has been a cause of delay. It is perfectly true that until one can reasonably estimate *minimum* earnings, no successful reorganization plan can be achieved. But it is not true that railroad reorganizations must await periods of improved earnings.

In the old days, a railroad reorganization awaited improved earnings because it needed cash to reorganize and could get such cash only from the public, and generally only under improved earnings could it get such cash at less than prohibitive terms. However, in the period since 1933 the R. F. C. has had available for any reorganization ample funds, for which it demands adequate security but which it offers at very reasonable terms.¹⁴⁰ Furthermore, because of the extraordinary injunctive and moratorium features of Section 77, any railroad under it is free to conserve its cash, pay only such bond interest as convenient, and develop its maintenance to a

¹³⁵ *Id.* NW 380 (Bruere-Mutual Savings Bk. Group).

¹³⁶ *Id.* NW 385 (Cady-Jones).

¹³⁷ 230 I. C. C. 548. The Commission, did not consider this proposition, at the date it was suggested, realistic in furthering reorganization.

¹³⁸ 236 I. C. C. 575.

¹³⁹ See, e.g., Lisman, *supra* note 127, at 25.

¹⁴⁰ "Our rate to railroads is 5%. We reduce that to 4 as long as they pay." Testimony of Mr. Jesse H. Jones, *Hearings before House Committee on Banking and Currency on H. R. 4011 and 4012*, 76th Cong., 1st Sess. (1939) 8.

high point.¹⁴¹ Thus many railroads under Section 77 actually have little need for cash as an essential feature in reorganization.¹⁴²

That a depression is a suitable time for a railroad reorganization, Commissioner Eastman, then Federal Co-ordinator, pointed out in remarks accompanying his report filed with Congress on January 20, 1934:

Reorganizations of carriers now or hereafter in insolvency or bankruptcy should be effected as speedily as practicable, and in a manner which will result in a very material reduction in fixed charges. . . . In this connection it is significant to note that some of the most successful reorganizations in railroad history, notably those of the Santa Fe, the Union Pacific, and the Norfolk & Western, were effected in the midst of the financial depression which began in 1893, and that those whose obligations were deferred in those reorganizations later profited the most.

The debtor and the stockholders characteristically forget that every year in reorganization means a piling up of additional unpaid fixed interest charges ahead of the equity—and consequently reduces its value. Actually the debtor has nothing to gain by putting off the evil day. For those reorganizations in Section 77, the Commission has made it very clear that it will not approve reorganization plans designed to perpetuate nonexistent values or plans based upon possible improved earnings of the next year or so, but which could not survive another recession. In its Annual Report of November 1, 1939, the Commission said:¹⁴³

It is true that the earnings of the carriers have increased substantially in recent months, as is elsewhere shown in this report. . . . It is delusive, however, to suppose that this fact will in itself "solve the transportation problem" or render constructive attempts to deal with it unnecessary. We know from past experience that the upswing in business which war brings is temporary and likely to be followed by an aftermath in which conditions may be worse than before.

3. Legal Questions

Section 77 proceedings have naturally been burdened with and delayed by some real problems of statutory interpretation. The primary question has been whether Section 77 was designed as a composition statute or for reorganization plans which should strictly follow the rule of the *Boyd* case.¹⁴⁴

The Commission has definitely determined that the rule of the *Boyd* case applies to Section 77 reorganizations and that Section 77 is not a composition statute.¹⁴⁵

¹⁴¹ "The properties, as such, of the railroads in bankruptcy have generally not suffered from the slowness of the reorganization process. They are in much better physical condition than they were when maintenance was being skimmed in a desperate effort to keep out of bankruptcy, and it has also been possible to do more in the way of modernizing equipment." I. C. C., 52D ANN. REP. (1938) 10.

¹⁴² Note, e.g., refusal of Judge Hincks to authorize issue of equipment trust certificates by Trustees of the New York, N. H. & H., on the ground that counsel for Trustees must show cause why \$1,250,000 of equipment should not be paid for out of "huge cash surplus." N. Y. Times, Jan. 31, 1940.

¹⁴³ I. C. C., 53D ANN. REP. (1939) 5.

¹⁴⁴ Northern Pacific Co. v. Boyd, 228 U. S. 482 (1913).

¹⁴⁵ Following the *Boyd* case generally in its plans, and citing it by name as decisive in: Chicago & E. I. Ry. Reorg., 230 I. C. C. 199, 233 (1938); Denver & R. G. W. R. R. Reorg., 233 *id.* 515, 578 (1939); Missouri P. R. R. Reorg., 239 *id.* 7, 133 (1940); Spokane Intern'l Ry. Reorg., 228 *id.* 387, 402 (1938); Chicago, M., St. P. & R. R. Reorg., Feb. 12, 1940, mimeo. rep. at 148.

Indeed in following the *Boyd* case to its logical conclusion the Commission was ahead of the Supreme Court's *Los Angeles Lumber Products* case,¹⁴⁶ in stating that "the mere fact that creditors and stockholders have agreed upon a plan is not conclusive. One of the requisites is that the plan must not be unfair."¹⁴⁷ So far, only a few scattered district courts have had occasion to pass upon the Commission's legal view, but all have held it correct.¹⁴⁸ In the light of present tendencies—especially the *Lumber Products* case—it would seem to the writer highly probable that the application for the rule of the *Boyd* case will be sustained, if it is tested. The *Western Pacific* reorganization appears, at this writing, to be the most likely for offering such test.

The second broad problem of the statute is the power and duty of the Commission and courts to bind the security holders. This power is Section 77's chief contribution to the development of reorganization law.¹⁴⁹ The act provides that two thirds of those voting in a class may bind the minority and that the court can bind dissenting classes. Furthermore, classes with no equity or whose interest is unaffected do not vote.¹⁵⁰

The *Akron, Canton & Youngstown* reorganization may offer the first use of this power to disregard the vote of security holders¹⁵¹ and thus originate the first test case on the subject. Or, of course, the same basic question may be raised by the stockholders in any of the decisions in which their stock has been found valueless and ruled ineligible to vote at all. Looking at the broad development of the doctrine of the court's responsibility for a fair plan from the days where the court regarded the formulation of the plan as extrajudicial,¹⁵² to the Supreme Court's pronouncements of the last decade that the court must exercise judgment,¹⁵³ culminating in the recent *Los Angeles Lumber Products* decision, it seems probable that the Supreme Court will approve the extension of the court's power appropriate to its view of the court's responsibility.

Naturally, if a test case on either of these major questions is formally started, reorganization will be further delayed.

In addition to these two major problems of statutory interpretation, there have, of course, been many minor problems. But these do not account for the quantity of litigation which has arisen. In the seven years since the enactment of Section 77, seven cases interpreting aspects of this statute have been actually passed upon by the Su-

¹⁴⁶ *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

¹⁴⁷ *Chicago & E. I. Ry. Reorg.*, 230 I. C. C. 199, 233 (1938).

¹⁴⁸ *In re Chicago & E. I. Ry.*, opinion of Judge Barnes (N. D. Ill., June 16, 1939) Ct. Rec. p. 1641; *In re Chicago, G. W. R. R.*, 29 F. Supp. 149 (N. D. Ill., 1939) (*per* Woodward, J., discussing question at some length and holding that §77 is not a composition statute but without citing *Boyd* case by name); *In re New York, N. H. & H. R. R.*, 16 F. Supp. 504 (D. Conn. 1936) (*per* Hincks, J., not passing on final plan); *In re Savannah & Atlanta, Ry.*, opinion of Judge Barrett (S. D. Ga., Feb. 5, 1938) mimeo. at 4.

¹⁴⁹ See Craven & Fuller, *1935 Amendments to the Railroad Bankruptcy Law* (1936) 49 HARV. L. REV. 1254, 1276.

¹⁵⁰ §77(e).

¹⁵¹ See p. 401, *supra*.

¹⁵² *Conley v. International Pump Co.*, 237 Fed. 286 (S. D. N. Y. 1915).

¹⁵³ *National Surety Co. v. Coriell*, 289 U. S. 426 (1933) (opinion below, *Coriell v. White*, 54 F. (2d) 255 (C. C. A. 2d, 1931), is interesting, passing on more than matter brought up on appeal); *First Nat. Bank v. Flershem*, 290 U. S. 504 (1934).

preme Court of the United States,¹⁵⁴ and certiorari has been denied in such cases eleven times.¹⁵⁵ None of these appeals involve a final plan of reorganization.

As an example of what can be done in a single Section 77 reorganization by a group of argumentative attorneys in a highly contested case, more than fourteen separate controversies have arisen in the *Rock Island* reorganization. Three of these have been passed upon by the Supreme Court of the United States, and in a fourth the Supreme Court denied certiorari; three others have gone as far as the circuit court of appeals.

To appreciate the burden of such proceedings it must be remembered that the normal course before appeal of a contested issue in a Section 77 reorganization often includes petitions and answers before the district court, reference to a special master, hearing before special master, briefs, decision of special master, exceptions to decision of special master, hearing before district judge, and decision of district judge. Then if the matter is appealed, there is the usual double filing of petitions for appeal both with district and circuit courts¹⁵⁶ and the rest of the routine of an appeal, complicated by an unusual number of parties both plaintiff and defendant.¹⁵⁷ There is doubt whether much of this litigation need have occurred if the parties had had a willingness to sit around a table and effect fair compromises on conflicting liens, etc. The Commission has already shown that it interprets the rule of the *Boyd* case to permit it to approve such compromises if it deems them fair.¹⁵⁸ Surely the court has the same power.

4. Overburdened Interstate Commerce Commission

It is clear from the principal discussion of the main procedural steps which a Section 77 reorganization will follow before the Interstate Commerce Commission, that not alone does Section 77 provide a complicated procedural setup, but the

¹⁵⁴ *Connecticut Ry. & Ltg. Co. v. Palmer*, 305 U. S. 493 (1939) (New Haven); *Continental Ill. Nat. Bk. & Tr. Co. v. Chicago, R. I. & P. Ry.*, 294 U. S. 648 (1935); *Guaranty Tr. Co. v. Henwood*, 307 U. S. 247 (1939) (St. Louis S. W.); *Lowden v. Northwestern Nat. Bank & Tr. Co.*, 298 U. S. 160 (1936) (Rock Island); *Palmer v. Massachusetts*, 308 U. S. 79 (1939) (New Haven, Old Colony); *Palmer v. Palmer*, 305 U. S. 578 (1939) (New Haven, Old Colony); *U. S. and I. C. C. v. Lowden*, 308 U. S. 225 (1939) (Rock Island).

¹⁵⁵ *Annett v. New York, N. H. & H. R. R.*, 303 U. S. 650 (1938); *Bd. of Directors of St. Francis Levee Dist. v. Kern*, 305 U. S. 647 (1938) (St. Louis-S. F.); *Bd. of Directors, etc. v. Kern*, 302 U. S. 750 (1938) (St. Louis-S. F.); *Henwood v. Guaranty Tr. Co.* 300 U. S. 661 (1937) (St. Louis S. W.); *J. P. Morgan & Co. v. Missouri P. R. R.*, 299 U. S. 604, (1936); *Iowa-Des Moines Nat. Bk. & Tr. Co. v. Lowden*, 299 U. S. 584 (1936) (Rock Island); *Meyer v. Kansas City Southern Ry.* 299 U. S. 607 (1936) (St. Louis S. W.); *Northwestern Nat. Bk. & Tr. Co. v. Lowden*, 299 U. S. 583 (1936) (Rock Island); *Palmer v. Connecticut Ry. & Ltg. Co.*, 305 U. S. 599 (1938) (New Haven); *Palmer v. Palmer*, 305 U. S. 660 (1939) (New Haven); *Thompson v. Terminal Shares*, 306 U. S. 652 (1939) (Missouri Pacific).

¹⁵⁶ Because of desire to be sure appeal is properly taken under §§24a, 24b and 25 of the Bankruptcy Act, 11 U. S. C. §§47a, 47b and 48.

¹⁵⁷ It must also be realized that while the matter is before the courts it may also be argued before the Commission, as §77 provides no clear definition of the proper tribunal or method of preventing such double consideration.

¹⁵⁸ *Kansas City, K. V. & W. R. R. Reorg.*, 236 I. C. C. 137 (1939).

I. C. C., in interpreting the Act, with its usual conservatism, has been extremely careful to provide due process and a hearing at all stages.¹⁵⁹

The actual initial hearings on the plan of reorganization are held before one of the 11 examiners of the Bureau of Finance who sit in these cases. Sitting with the examiner (and actually presiding over the hearing) is usually the Senior Examiner or the Director of the Bureau of Finance or sometimes even a Commissioner. But the primary burden of writing the proposed report apparently falls on the examiner.¹⁶⁰ All but one of these trial examiners are attorneys and several hold both legal and engineering degrees.

As those who have participated in reorganization cases well know, no more complex group of cases has been presented, whether to an administrative or to a purely judicial tribunal. Though the Commission doubtless selected from its staff the examiners best prepared for this work, they, as a group, came to it with a background of I. C. C. railroad experience but not of sitting on complicated reorganization cases. This specialty had to be developed in the course of the reorganizations themselves. This partially accounts for the slowness with which the cases moved in the early years of the statute.¹⁶¹ Indeed, in 1933, and even at the time of the 1935 statutory revision, few appreciated that the task of the examiners and the Commission would be to undertake the burden of writing (and not merely approving or correcting) reorganization plans—especially for the more complicated reorganizations.

Attorneys who are fond of criticizing the I. C. C.'s delay in reorganization cases would do well to consider the fact that a Bureau of Finance composed of 11 examiners, a Senior Examiner, and a Director have attempted to consider 40 railroad reorganization cases as well as do the other work of their Bureau. As shown by the fee applications so far submitted, all counsel who participate in these reorganizations agree that the process is extremely time consuming. The burden on the Commission has been heavy. It has been so heavy that in four major cases it has taken a year or more from the close of the hearings to the issue of the proposed report.¹⁶²

The reorganization bar and its clients might well have asked Congress to give the Commission special funds earmarked for Section 77 cases, if they really desired rapid progress. Instead, inspection of the Appropriation Acts for the Interstate Commerce Commission for 1933-1941 and the hearings thereon show that the cost of its work in reorganization cases has been carried in the general Administrative Expense Account, which has totaled about \$2,500,000 a year throughout the entire period.

¹⁵⁹ See chart "Major Procedural Steps in the Reorganization of Railroads under the Bankruptcy Act," *Hearing before the Special Subcommittee on Bankruptcy and Reorganization of the House Committee on the Judiciary on S. 1869, 76th Cong., 1st Sess. (1939) Pt. 1, p. 534.*

¹⁶⁰ The report is usually signed by the examiner although a few have appeared as proposed reports of the Bureau of Finance. Commission experts in engineering and accounting, as well as his superiors in the Bureau, may assist the examiner.

¹⁶¹ Only one reorganization case reached an Examiner's Proposed Report by 1935, two cases in 1936, and eight in 1937.

¹⁶² See note 50, *supra*.

At no time during the hearings on the Independent Offices Appropriations Bill did anyone suggest adding to the general administrative fund or creating a special fund for the benefit of this work.

A comparison of what the interested citizen does when he wants action may be found in the treatment of the Motor Carriers Act, approved August 9, 1935. The I. C. C. appropriation for the year ending June 30, 1936—the first year of this law—included a special fund of \$1,035,000 for administration of this Act, increased in 1937 to \$1,700,000, and in 1938 to \$2,750,000. For 1940 and 1941 the special fund has been about \$3,600,000 a year. Members of the motor industry, as well as of the Commission, have testified regularly in behalf of these special appropriations. Without at all implying that the Section 77 work might have properly utilized the type of staff or amount of expenditure necessary under the Motor Carriers Act, it is still indicative of the general state of mind that the Section 77 work of the Bureau of Finance was mentioned *en passant* for the first time before the Appropriations Committee at the hearing on the 1939 bill and a little more extensively on December 12, 1939 at the hearing on the 1941 bill.¹⁶³ It is no criticism of the Commission's staff to suggest that the Section 77 cases might have been facilitated, particularly in the early years, by the addition of personnel, especially in the Bureau of Finance.¹⁶⁴

While the basic cause of delay has been the unwillingness of the interested parties to face the problem realistically, it is still true that the more experienced I. C. C., appreciating the situation sooner than the general public, might have forced the pace of the reorganizations. It is perhaps only a skill which comes with years of experience, and a special talent; yet there are judges¹⁶⁵ who are well known for their ability to grasp the salient issues of a case and who can force the pace of a proceeding without infringing on due process or the stricter rules of formal court procedure. Indeed the new federal rules specially provide that the judge may call a conference with the attorneys for just this purpose,¹⁶⁶ though clearly a federal judge or an agency such as the Commission has this power without aid of rule or statute. There is no doubt that the Commission is expert in grasping the salient issues of a reorganization. Looking back over the hearings in many of the large cases, it does appear that the Commission, in its desire to allow all parties to be heard and in its refusal to "suggest the way that anybody shall try his case,"¹⁶⁷ has permitted the

¹⁶³ *Hearings before the Subcommittee of the House Committee on Appropriations, 75th Cong., 2d Sess. (1938) 266, and 76th Cong., 3d Sess. (1939) 259-260.*

¹⁶⁴ Additional personnel of six persons totaling \$6,640 in annual salary—clearly not examiners—were asked for the Bureau of Finance as part of the 1940 appropriation. *Id.*, 76th Cong., 1st Sess. (1939) 266.

¹⁶⁵ *E.g.*, Judge Julian W. Mack or Judge John C. Knox of the U. S. Circuit Court of Appeals.

¹⁶⁶ Federal Rules of Civil Procedure, Rule 16: "In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) The simplification of the issue; . . . (3) The possibilities of obtaining admissions of facts of documents which will avoid unnecessary proof; (4) The limitation of the number of expert witnesses; . . . (6) Such other matters as may aid in the disposition of the action."

¹⁶⁷ Commissioner Porter, in reply to a protest: "We have been sitting here for three days and we have almost got the jitters waiting for someone to come on who is going to talk about the plan and who knows the plan. We really are entitled to that. We were handed things on Monday afternoon or Tuesday morn-

production of mammoth records¹⁶⁸ which wasted a good deal of its own and the parties' time and expense and certainly did not hasten the reorganization.¹⁶⁹

In the hearings for setting maximums on compensation and expenses,¹⁷⁰ the Commission has taken an active stand in informing the parties and insisting upon the presentation of what it considers an adequate record.¹⁷¹ Indeed, for purposes of efficiency it requests (but does not order) the presentation of the exhibits in advance of the hearing. This type of direction regarding the basic information for the record might well have been applied in more of the major reorganization cases. It is not at all intended to suggest that the Commission should adopt strict court rules as to presentation of evidence—frequently themselves a factor of delay—but that it could insist on more precise, directed presentation by witnesses and limit counsel to the issues.

CONCLUSION

As commented, the tempo of the reorganization cases has gradually increased. This is shown most graphically by the fact that out of the 33 final reports or amendments thereof handed down in Section 77 reorganization cases by the Interstate Commerce Commission, three were rendered in 1936, four in 1937, six in 1938, eleven in 1939, and nine in the first five months of 1940.

The burden of Section 77 reorganization work is now, for the first time, beginning to fall on the courts. The judges as a group have gained some familiarity with the procedural technique of Section 77 and from time to time have had to consider operative problems of the railroads, but most have yet to consider for the first time the complexities of a railroad reorganization plan. The Commission found this educational process time consuming, especially in regard to the duties of its examiners. In the only vigorously contested case yet approved by a court, it took a year from the Commission's certification of its record to the court order approving the plan,¹⁷² of which the time for hearings before the special master and for his report occupied six months.¹⁷³ Each judge will have the problem of struggling with his usual duties while disposing of a burdensome railroad reorganization case. Whether to refer the matter to a special master lies within the judge's discretion. But few

ing [now Friday afternoon]. We have come down here trying to understand, and we still don't know the theory of this thing. We just don't know it, and I think it is unfair to keep us in the dark any longer." Chicago, R. I. & P. Ry. Reorg., Trans., pp. 3512-3513.

¹⁶⁸ In the hearing referred to in note 167 it took a plan's proponents eight days to put it in the record—which was already 2958 pages long.

¹⁶⁹ This tendency of attorneys to produce voluminous records and of the bench to be too lenient with them is not, of course, unique to I. C. C. practice. It has been commented on occasion by the bar itself. See especially *Trying Lawsuits Without Yapping* (1936) 19 J. AM. JUD. SOC. 155, 156.

¹⁷⁰ §77(c)(12).

¹⁷¹ See standard letter of Director Sweet, Dec. 16, 1937, "Re: Allowance of compensation and expenses to all parties in Railroad Reorganization Proceedings," circulated to all parties in interest when dates for fee hearings are announced.

¹⁷² Akron, C. & Y. R. R. Reorg., record certified, Oct. 18, 1938, order approving plan, Sept. 29, 1939.

¹⁷³ *Id.*, report of special master, April 15, 1939.

masters or judges will have the opportunity to gradually build up a background from one railroad reorganization case to the next and thus increase the tempo of the cases as the Commission has done.

Some of the judges have already shown their awareness of public criticism regarding the delay in railroad reorganization.¹⁷⁴ But just how fast the proceedings will actually move is a matter of speculation, depending as it does not merely on the cooperation of the judges but also on the litigious mood of the parties.

¹⁷⁴ *E.g.*, Orders of Judge Barnes in Chicago & E. I. R. R. Reorg., April 24, 1940, May 1, 1940 and May 10, 1940, Ct. Rec. pp. 1880-a, 1880-c and 1909, respectively, demanding progress reports; Order of Judge Barnes in Chicago & N. W. Ry. Reorg., Nov. 29, 1939, demanding progress report and suggestions for rapid completion.

TABLE II. STEAM RAILROADS IN RECEIVERSHIP: 1933-JUNE, 1, 1940.¹

RAILROAD (Class and Mileage)	Receiver Appointed	States of Operation	Fed. Court (where Dist. & State Court)	Name of Plaintiff*	Receiver Ended	REMARKS
1. Alabama, Florida & Gulf (III-29) . . .	1.30	Ala., Fla.	M. D. Ala.		7.37	Sale to Ala. & Fla. R. R. See 221 ICC 295
2. Ala. & Western Florida (III-38) . . .	11.36	Fla.	Fla.			19 mi. aband'd, 9.39, F. D. 12368
3. Apache (II-72) . . .	10.31	Ariz.	D. Ariz.	Prescott 1st Mtg. Co.	2.36	Rec'r disch'd, 5.36, F. D. 11805
4. Apalachicola Northern (II-99) . . .	5.32	Fla.	N. D. Fla.		12.36	
5. Bamberg, Ehrhardt & Waltherboro. (III-14) . . .	11.37	S. C.	S. C.			Operations ceased 11.37
6. Boyne City, Gaylord & Alpena (III-8) . . .	11.31	Mich.	Mich.		1.35	Sold to Boyne City R. R.
7. California & Oregon Coast (III-15) . . .	2.25	Ore.	Ore.			Road in "U" class since '36
8. Cape Fear (III-10) . . .	8.37	N. C.	N. C.	Harris	4.38	Operations back to prior status
9. Cape Girardeau North. (III-13) . . .	4.14	Mo.	Mo.	Houck		Dismantled, 1937
10. Carlton & Coast (III-20) . . .	1.40	Ore.	Ore.	Barde		
11. Central of Georgia (I-1,871) . . .	12.32	Ala., Ga.	S. D. Ga.	Ala. Fuel & Iron Co.		
12. Chicago, Attica & South. (II-154) . . .	8.31	Ind.	N. D. Ind.			
13. Chicago, Springfield & St. L. (II-87) . . .	1.30	Ill.	S. D. Ill.			
14. Collins & Glenville (III-24) . . .	6.39	Ga.	Ga.			Fin. trouble denied in '39 rep.
15. Colorado-Kansas (III-23) . . .	7.31	Colo.	Colo.		8.38	Colo. R. R., successor, 9.38
16. Cowitz, Chehalis & Cascade (II-32) . . .	3.32	Wash.	Wash.		5.34	Reorganized
17. Florida East Coast (I-685) . . .	9.31	Fla.	S. D. Fla.	Bankers Trust Co.		H'r'gs on 1st & Ref. Bd. Com. plan
18. Fort Smith & W. (see n. 94, supra) . . .	6.31	Ark., Okla.	W. D. Ark.	Central United Nat. Bank of Cleveland		Property sold; aband'd, 8.39
19. Gainesville & Northwestern (II-36) . . .	11.23	Ga.	N. D. Ga.		9.34	Sold for junk, 9.34
20. Gainesville Midland (II-74) . . .	2.21	Ga.	N. D. Ga.	Robider; Bradlee	3.39	Sold to new corporation, 10.38
21. Georgia & Florida (I-408) . . .	10.29	S. C., Ga., Fla.	S. D. Ga.	New York Trust Co.		
22. Ga. Southwestern & Gulf (II-36) . . .	1.33	Ga.	Ga.			
23. Albany & Northern (L) . . .	1.33	Ga.	Ga.			
24. Jacksonville & Havana (II-60) . . .	2.30	Ill.	S. D. Ill.		10.37	Sold; discontinued, F. D. 11811
25. Kirby Lumber Co. Tram Rd. (C-53) . . .	1.34	Texas	S. D. Texas		7.36	Now private carrier; in §77B
26. Louisiana Southern (II-15) . . .	8.33	La.	La.			
27. Minneapolis & St. Louis (I-1,524) . . .	7.33	Minn., S. D., Ia.	D. Minn.			
28. Missouri & Northern Arkansas (I-365) . . .	5.27	Mo., Ark.	E. D. Ark.		4.35	Sale to Mo. & Ark. Ry. appr'd, 207.641
29. Mobile & Ohio (I-1,180) . . .	6.32	Ala., Miss., Tenn.	S. D. Ala.	Chase Nat. Bank		Spec. Master app'ted 8.39; sale to Gulf, M. & N. proposed
30. Narragansett Pier (III-8) . . .	2.36	R. I.		Hazard	12.37	Rec'r disch'd; bonds extended
31. Nevada Copper Belt (III-30) . . .	4.25	Nev.				Road in class II till 1.40
32. Norfolk Southern (I-805) . . .	7.32	Va., N. C.	E. D. Va.	Central Hanover Bank & Trust Co.		Bdrs. C's filed plans, 8.37, 3.38 ICC appr'd security issues, 1.40
33. North & South (II-41) . . .	7.24	Wyo.	Wyo.			41 mi. aband'd, 4.35, F. D. 10721
34. Northwestern of S. C. (II-81) . . .	10.34	S. C.	E. D. S. C.		12.35	Aband'd, F. D. 10843; cold for junk
35. Pittsburg, Shamut & Northern (I-191) . . .	8.05	N. Y., Pa.	W. D. Pa.			Oldest rail receivership
36. Richmond Cedar Works (C-34) . . .	12.31	Va., N. C.			10.38	Reorg., now private carrier
37. Rio Grande Southern (II-172) . . .	12.29	Colo.	D. Colo.			
38. Rutland (I-407) . . .	5.38	N. Y., Vt.	D. Vt.	New England Coal & Coke Co.		
39. Rutland, Toluca & North. (III-21) . . .	3.31	Ill.	Ill.		5.36	Abandoned, April, 1936
40. St. Louis-San Francisco (I-4,843) . . .	11.32	Ala., Ark., Fla., Kans., Miss., Mo., Okla., Tenn.	E. D. Mo.		5.33	Now in §77 proceedings
41. Sandy River & Rangeley Lakes (II-42) . . .	7.23	Maine	Maine		6.35	Sold, operations ceased, 7.35
42. Santa Fe, San Juan & Northern (II-57) . . .	10.31	N. M.	D. N. M.			Ceased operation, 1933
43. Savannah & Atlanta (II-147) . . .	3.21	Ga.	S. D. Ga.		9.36	Now in §77 proceedings
44. Seaboard Air Line (I-4,317) . . .	12.30	Va., N. C., S. C.	E. D. Va.	Guaranty Trust Co.		Plans due to be filed before Special Master, 6.40
45. Chesterfield & Lancaster (III-33) . . .	4.31	Ga., Ala., Fla.				
46. East & West Coast (L) . . .	2.31					
47. Fla. Western & Northern (L) . . .	2.31					
48. Raleigh & Charleston (II-20) . . .	5.31					
49. Seaboard-All Florida (L) . . .	2.31					
50. Georgia, Fla. & Alabama (L) . . .	11.31					
51. Sierra of California (II-79) . . .	5.32	Cal.	Cal.	Anglo-California Trust Co.	3.37	Sale to Sierra R. R. See 221.45
52. Shelby County (III-9) . . .	11.37	Mo.	Mo.			Aband'd, 3.38, F. D. 11853
53. Shelby Northwestern (III-22) . . .	9.32	Mo.	Mo.			Aband'd, 3.38, F. D. 11854
54. South Dayton (C-1) . . .	1.37	Ohio				Operations discontinued
55. Tallulah Falls (II-57) . . .	6.23	Ga., N. C.	N. W. D. Ga.			Operat'g tho aband't appr'd 7.33
56. Tennessee, Ky. & North. (III-19) . . .	11.33	Tenn.	Tenn.			Aband'd, 12.33, F. D. 10094
57. Tonopah & Goldfield (II-102) . . .	6.32	Nev.	D. Nev.		7.37	Operation continued by Co.
58. Virginia & Truckee (II-68) . . .	4.38	Nev.	D. Nev.			
59. Wabash (I-2,409) . . .	12.31	Mich., Ohio, Ind., Ill., Mo., Ia., Neb., N. Y., Canada	E. D. Mo.	Chase Natl. Bank		Rec'r's plan filed, 7.37, with-drawn, 1.38. ICC hearing adjourned
60. Ann Arbor (I-294) . . .	12.31		N. D. Ohio	The Jennison-Wright Co.		
61. Waco, Beaumont, Trinity & Sabine (II-41) . . .	2.30	Tex.	Tex.			
62. Wichita Northwestern (II-99) . . .	11.22	Kan.				
63. Wilmington, Brunswick & Southern (U-30) . . .	3.33	N. C.				
64. Winchester & Wardenville (III-23) . . .	6.38	Va.		Bank of Romney, W. Va.		
65. Wisconsin Central (L-988) . . .	12.32	Ill., Mich.	D. Minn.	Northwestern Fire & Marine Ins. Co.		Operated by Minn., St. P. & S. S. M. as agent for receiver
66. Yreka Western (III-8) . . .	9.35	Cal.	Cal.	Southern Pacific Co.		Reorg., 8.33; Foreclosure sale 6.35

¹All dates in this table are indicated by month and year.
*The defendant in each case is the railroad in receivership.

TABLE I. PROGRESS AND PROCEDURE IN SECTION 77 REORGANIZATIONS¹

RAILROAD (class and operated mileage)	Ct. Approved §77 Petition	Plan Filed by	Date of Filing	Hearings Ended	Exam'r's Pro- posed Report	ICC Final Report	ICC Citation	ICC Certified Record to Ct.	District Ct.	Court Hear- ing on Plan	Ct. Order Ap- proving Plan	PRESENT STATUS (June 1, 1940)
1. Akron, Canton & Youngstown (I-171)	4.33	Trustees	11.36*	1.37	8.37	8.38	228.645	10.38	N. D. Ohio		9.39	CCA decision pending
2. Ala., T. & N. (II-218)	12.34	Debtor	8.35*	6.36	1.37				S. D. Ala.			Awaiting Ex'r's report
3. Ark. V. Inter. (E-58)	7.33	Trustees	3.37	5.37	8.37	11.37†	224.120		D. Kans.			ICC appr'd sale under §4
4. Central of N. J. (I-710)	10.39								D. N. J.			Awaiting filing of plan
5. Chicago & Eastern Illinois (I-927)	4.33	Bdhrs. Debtor	6.34 9.35*	3.37 10.37	12.37	11.38	230.199 1.39 230.571 2.39 230.643 6.39 233.319	2.39	N. D. Ill. E. Div.	4.39 6.39	6.39	Vote cert'd, plan conf'd, issues yet to be appr'd
6. Chicago & North Western (I-8,383)	6.35	Debtor	6.36*	4.38	4.39	12.39	236.575	4.40	N. D. Ill. E. Div.	6.40		Awaiting ct. hearing on plan, ICC h'r'g on fees
7. Chicago Great Western (I-1,505)	2.35	Debtor	9.36*	4.37	1.38	8.38	228.585	5.39	N. D. Ill. E. Div.	6.39	9.39	Vote cert'd, plan conf'd, issues yet to be appr'd
8. Chicago, Indpls. & Louisville (I-549)	12.33	Debtor	5.37	2.38	8.38	6.39†	233.335		N. D. Ill. E. Div.			ICC disappr'd plan, awaiting new plan
9. Chicago, Milwaukee, St. P. & P. (I-10,942)	6.35	Debtor	6.35*	3.38	11.38	1.39†	230.548		N. D. Ill. E. Div.			Petit. to modify final report awaiting decision
10. Chicago, Rock Island & Pac. (I-7,968)	6.33	Pfd. Stk. RIAL Debtor	8.35 6.36 7.36*	7.38	9.39	12.35†	212.89		N. D. Ill. E. Div.			Awaiting ICC final report
11. Chicago, S. Shore & South Bend (E-90)	9.33	Debtor	10.34	11.34	6.35	4.36	212.547	10.36	N. D. Ind. S. B. Div.		12.36	Reorg. complete 4.38. Issues appr'd, 221.605
12. Copper Range (II-107)	3.35	Debtor	7.35	7.35	1.36	4.36	212.479	6.36	W. D. Mich. N. Div.	10.36	10.36	Reorg. complete 6.38. Issues appr'd, 221.315
13. Denver & Rio Grande Western (I-2,580)	11.35	Debtor	7.36	6.37	8.38	7.39	233.515	7.37	D. Colo.	7.40		Awaiting ct. hearing on plan, ICC h'r'g on fees
14. D. S. S. & A. (I-576)	1.37	Ins. Com.	6.37			4.40		4.40	D. Minn. 4 Div.			Awaiting filing of plan
15. E. St. L., C. & W. (E)	10.34								E. D. Ill.			Aband'd, 4.36, 212.533
16. Erie (I-2,463)	1.38	Bdhrs.	10.38*	2.39	8.39	4.40			N. D. Ohio E. Div.			Petit. to modify final report awaiting decision
17. N. J. & N. Y. (I-46)	1.38	Debtor	12.38						D. N. J.			Awaiting hearing on plan
18. N. Y., S. & W. (I-144)	6.37	Debtor	4.38						M. D. Pa.			Awaiting filing of plan
19. W'lec-B. & E. (II-54)	9.37								N. D. N. Y.			Awaiting filing briefs on plan before ICC
20. Fonda, Johnstown & Glo'ville (II-20)	4.33	Lisman C. Bdhrs. Debtor	5.38 3.40 8.40	5.40					S. D. Iowa Cen. Div.			Awaiting Ex'r's report
21. Ft. Dodge, Des Moines & Southern (E-149)	10.39	1st Mtg. Cr. Group. Trustees	2.40 3.40* 4.40*	5.40								
22. Ft. S., S. & R. I. (III-15)	6.38								W. D. Ark.			Awaiting filing of plan
23. Kansas City, Kaw V. & Western (E-35)	5.34	Trustee	3.36	5.36	11.36	2.37	221.15	3.37	D. Kans. 1st Div.	9.38 11.39	1.39*	Ct. action on ICC rev'd final report pending
24. Louisiana & North West (II-99)	4.35	Debtor	4.36	11.36	3.37	10.37	224.58	2.38	S. D. N. Y.	5.38	7.38*	Reorg. complete 10.39. Issues appr'd, 236.255
25. Merid. & B. R. (II-50)	5.33					10.38	230.171		S. D. Miss.			Awaiting filing of plan
26. Middleburgh & Sch.	2.35								N. D. N. Y.			Sold for taxes, 3.37
27. Minarets & Western	3.33								S. D. Cal.			Aband'd 3.34, F.D.10295
28. M.S.P. & S.S.M. (I-4,290)	12.37								D. Minn.			Awaiting filing of plan
29. Missouri Pacific (I-10,218)	3.33	Debtor	7.35*	9.37	10.38	1.40	239.7	4.40	E. D. Mo. E. Div.	7.40		Awaiting ct. hearing on plan, ICC h'r'g on fees
30. New York, New Haven & Hartford (I-1,942)	10.35	Debtor	6.37*	11.37	6.38	3.40			D. Conn.			Petit. to modify final report awaiting ICC h'r'g
31. Old Colony (L)	6.36	Ind. B. C.	9.37	6.39	11.39							
32. Hartford & C. W. (L)	7.36	Old C.-Dr.	9.37*									
33. Prov'd., W. & B. (L)	2.37	Old C. Sh. Ins. Com. H. & C. W. P. W. & B.	10.37 11.37 12.37* 1.38*									
34. Boston & Prov. (L)	8.38	Stk. Com.	7.39	10.39	12.39	3.40			D. Mass.			Petit. to modify final report awaiting ICC h'r'g
35. Boston Terminal (I-13)	11.39	Debtor	8.39 8.39 8.39									
36. N.Y., O. & W. (I-576)	5.37	Old C. Tr. Dr. (Sch.)	5.40 11.40						D. Mass.			Awaiting hearing on plan if held properly filed
37. Oregon, Pacific & Eastern (III-20)	11.37	Debtor	1.39	3.40§	5.40†				S. D., N. Y.			ICC disapp'd first plan
38. Reader (II-22)	5.35	Debtor	1.39	3.40§	5.40†							Vote cert'd, plan conf'd, issues appr'd, 4.40
39. St. Louis-San Francisco (I-4,843)	5.33	Debtor	5.33*	11.38	8.39	3.37†	221.199	5.39	D. Ore.	9.39		Reorg'd. See 221.603
40. St. Louis South Western (I-1,701)	12.35	Debtor	12.36	4.37	2.38				W. D. Ark. E. Div.	4.37	4.37	Awaiting ICC final report
41. St. L., SW. Tex. (I)	12.35	Chase Bk.	3.37						E. D. Mo.			Awaiting decision on §77 (c) (11) investigation of Southern Pacific control
42. Cen. Ark. & E. (L)	12.35	Glines C.	4.37									
43. S. N. & S. Tex. (L)	12.35	So. Pac.	4.37									
44. Savannah & Atlanta (II-147)	9.36	Fgn Bds.	4.37									
45. Spokane Int. (I-164)	8.33	Cred. Gr.	10.36*	3.37	8.37	11.37	224.197	11.37	S. D. Ga. Sav. Div.	2.38	2.38	Reorg. complete, 6.39. Issues appr'd, 230.487
46. Coeur d'Alene & Pend d'Oreille (L)	8.33	Dr. (same)	1.37						E. D. Wash. N. Div.	2.40	3.40	Awaiting cert'n of vote
47. Western Pacific (I-1,208)	8.35	Bdhrs. Trustees	12.36* 9.36	1.37	6.37	6.38	228.387	5.39				
48. Yosemite Valley (II-78)	12.36	James, Cr.	10.36	5.40					N. D. Cal. S. Div.	1.40		ICC decision on fees 3.44 Ct. yet to appr. plan

¹All dates in this table are indicated by month and year.

*Amendments filed later. §Date hearings were begun. †Preliminary report. °Plan disapproved.