

FINANCE DOCKET NO. 26371¹

NORTH WESTERN EMPLOYEES TRANSPORTATION CORPORATION—PURCHASE—CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Decided March 10, 1972

1. In Finance Docket No. 26371, (a) found that the present and future public convenience and necessity require operation in interstate and foreign commerce by the North Western Employees Transportation Company of the existing lines of railroad of the Chicago and North Western Railway Company and certain of its carrier subsidiaries; and (b) purchase by said North Western Employees Transportation Corporation of the assets of Chicago and North Western Railway Company and certain of its subsidiaries, and in connection with the latter transaction; (1) acquisition of the trackage rights, leases, contracts, or other joint use arrangements, owned by vendors in or over the lines of other railroads; (2) acquisition of control through stock ownership or otherwise of other carriers, as the vendors may possess; (3) purchase by North Western Employees Transportation Company of the motor carrier operating rights of the Chicago and North Western Railway Company and subsidiaries; and (4) acquisition of control of vendee by Robert E. Brooker, Richard M. Freeman, and Larry S. Provo for a period of 10 years from closing date; found to be in the public interest. Conditions prescribed.
2. In Finance Docket No. 26372, requisite statutory findings made for the granting of authority to North Western Employees Transportation Corporation Company (A) to issue not exceeding 300,000 shares of class A common stock of \$50 par value and not exceeding 3 shares of class T common stock of the same par value; (B) to assume obligations and liabilities in respect to the securities issued, assumed, or guaranteed by the vendors above in furtherance of the transactions described in 1 above; (C) to incur obligation to the Chicago and North Western Railway Company in the amount of \$14,285,715; (D) to assume obligation and liability to purchase first-mortgage series A bonds of Chicago, Saint Paul, Minneapolis and Omaha Railway Company, (E) to enter into an agreement with Manufacturers Hanover Trust Company, trustee, relating to the first mortgage of Chicago, Saint Paul, Minneapolis and Omaha Railway Company; and (F) to enter into a mortgage and security agreement. Conditions prescribed.
3. Issuance of certificate and order deferred.

¹This report also embraces Finance Docket No. 26372, North Western Employees Transportation Corporation Issuance of Securities and Assumption of Obligation and Liability.

Louis T. Duerinck, Richard E. Freeman, Stuart F. Gassner, Ben W. Heineman, George M. Hollander, Eldon S. Olson, Earl E. Pollock, Robert K. Seaks, Alan H. Silberman, and Edward K. Wheeler for applicants.

Stephen L. Babcock, Stuart S. Ball, Kenneth J. Benda, Thomas Cassidy, Henry C. Darmstadter, Glen L. Derge, Otis J. Downen, Peter A. Fasseas, Jeremiah D. Finnegan, John E. Haley, Harold C. Heublein, James B. Lund, Gordon P. MacDougall, William G. Mahoney, William J. McDonald, Frank B. Means, Raymond K. Merrill, Emil J. Mueller, C. Harold Peterson, Timothy C. Quinn, Jr., Samuel Rubenstein, Harvey Scharn, William J. Scott, William E. Torkelsen, Y. D. Wada, Joseph S. Wager, and Dick A. Witt for protestants and interveners.

Carolyn Cox Stitt for United States Department of Transportation.

Bernard A. Gould and Gordon A. Phillips for Bureau of Enforcement, Interstate Commerce Commission.

REPORT OF THE COMMISSION

MURPHY, *Commissioner*:

Exceptions to the report and recommended order of the hearing examiner were filed by North Western Employees Transportation Corporation (Netco); Kendall Laughlin; PC&W Railway Co., and Railroad Improvement Association (PC&W); Elizabeth Wager; the State of Illinois and the Illinois Commerce Commission; and the Bureau of Enforcement of this Commission (Bureau of Enforcement). Replies to the exceptions were filed by Netco, Bureau of Enforcement, Burlington Northern, Inc. (BN), and McDowell-Wellman Engineering Company. Our conclusions differ in some respects from those of the examiner.

THE APPLICATIONS

By application filed October 6, 1970, as amended, Netco, a corporation organized for the purpose of acquiring and operating lines of railroad in interstate or foreign commerce, seeks authority under section 5(2) of the act (a) to purchase the assets of Chicago and North Western Railway Company (CNW) and certain of CNW's subsidiaries, hereinafter referred to as "the selling subsidiaries",² and in

²Chicago, St. Paul, Minneapolis, and Omaha Railway Company (Omaha); Railroad Properties, Incorporated (RPI); NW Properties, Inc. (NWPI); and Northwest Properties Co. (NPCO).

connection therewith, (b) to acquire operating authorities, leases of, and contracts to operate properties of other carriers, and trackage rights over, and joint ownership in and use of, lines of railroad owned and operated by other carriers, and terminals incidental thereto; (c) to control through stock ownership or otherwise such carriers as CNW and *the selling subsidiaries* may possess, and (d) to purchase the motor carrier operating rights of CNW. Authority is also sought under the same section for Robert E. Brooker, Richard M. Freeman, and Larry S. Provo to acquire control of Netco, through management, for a period of 10 years. At, or soon after, consummation of the foregoing transactions, Netco's corporate name will be changed to Chicago and Northwestern Transportation Company, while the names of CNW and *the selling subsidiaries* will be changed sufficiently to permit operations under their present names by Netco without confusion.

By separate application filed the same date in Finance Docket No. 26372, Netco requests under section 20a of the act authority (1) to issue 300,000 shares of class A common stock of the par value of \$50 each and 3 shares of class T common stock also of \$50 par value; (2) to assume obligations and liabilities in respect of securities issued, assumed, or guaranteed by CNW and *the selling subsidiaries* as set forth in the appendix; (3) for authority to incur obligation to CNW in the amount of \$14,285,715; and (4) to incur obligation to purchase first-mortgage series A bonds and to enter transactions related thereto. Netco has been organized for the express purpose of serving as the vehicle for the purchase of CNW's transportation assets by the present employees of CNW and the operation of those assets in interstate and foreign commerce by an employee-owned carrier. Upon consummation of these transactions, Netco will become the Nation's first employee-owned operator of a major railroad system.

Public hearings have been held at which, in addition to the parties filing exceptions and replies above, several carriers, Federal, State and local government agencies, business, civic, and railway employee organizations appeared in support of or in opposition to the application or as their respective interest might appear. Certain protestants and intervenors did not present evidence or did not take a definite position at the hearing.³ Briefs were filed by applicant, State of Wisconsin and the Wisconsin Public Service Commission,

³Green Bay Area Chamber of Commerce, Burren Transfer Company, Elgin Storage and Transfer Company, Gumprecht Trucking Company, Liberty Trucking Company, and United States Department of Transportation.

Soo Line Railroad Co., Wisconsin Department of Transportation, Bureau of Enforcement, and the Illinois Commerce Commission.

The Public Service Commission of South Dakota, the Iowa Commerce Commission, and the Missouri Public Service Commission intervened at the close of the hearing in support of the Netco proposals. The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers and Station Employees, The Wisconsin Department of Transportation and the National Industrial Traffic League also support the applications. The Railroad Shippers and Consignees Protective Association Inc.; Denver and Rio Grande Western Railroad Company; Soo Line Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad; and Union Pacific Railroad either oppose the applications or request conditions to protect their respective interests.⁴

Northwest Industries, Inc. (Industries), owns approximately 99.4 percent of the total shares of CNW's outstanding stock. Although it is not a party to these proceedings, its president was made available for questioning at the hearing. He testified that in order to avoid a charge that he and Industries were unloading a "lemon" on their employees, he made an independent analysis of Netco's financial viability. Based upon this independent analysis of the terms and conditions of the purchase, he determined that CNW's railroad in the hands of Netco would remain only marginally profitable but would still be more viable than if it were to be retained by Industries.

Facts relating to the financial condition of Netco and CNW, their operations, the terms and conditions of the transaction proposed, and the testimony of other witnesses in support of and in opposition to the transaction are set forth in the hearing examiner's report. Certain excerpts from the hearing examiner's report are appended hereto. We adopt these excerpts as our own, and except from time to time, for clarity of discussion, there is no need for further detailed description of these matters herein.

AGREEMENT FOR SALE OF ASSETS

Assets to be acquired by Netco.—Generally the Agreement for the Sale of Assets (*the Agreement*) entered into on October 5, 1970, between CNW and Netco provides for the purchase by Netco of sub-

⁴By letter dated October 22, 1971, Soo Line states that its need for conditions has been rendered moot by the payment in full on October 1, 1971, of the St. Paul Union Depot Company mortgage, and that it has no further interest in this proceeding.

stantially all of the trackage and other operating rights together with the assets of CNW and *the selling subsidiaries* except certain property not pertaining to railroad transportation, as follows:

- (1) The capital stock of Velsicol Chemical Corporation and Michigan Chemical Corporation;
- (2) A Hawker-Siddely airplane owned by CNW;
- (3) The shares of capital stock of any corporation the assets of which are purchased by Netco or a subsidiary;
- (4) Any rights of CNW or its subsidiaries to income tax refunds, deductions or credits;
- (5) Omaha's First Mortgage Bonds;
- (6) Any rights of CNW under Securities Contract 40;⁵
- (7) Cash, commercial paper or accounts receivable in an aggregate amount equal to (a) unpaid principal and accrued interest on the closing date of intercompany debt to nontransportation affiliates; (b) any amounts received by CNW after the date of *the Agreement* and on or prior to closing date as dividends from Velsicol Chemical Corporation or Michigan Chemical Corporation; and (c) any unpaid accrued interest on closing date on CNW's indebtedness pursuant to Securities Contract 40 and any excess unpaid principal on closing date of such indebtedness over \$14,285,715; and
- (8) Certain office space, equipment and records, as set forth in *the Agreement*.

In addition, Netco also would acquire control of such carriers as CNW and *the selling subsidiaries* it may possess. As part of the transaction Netco proposes to organize a wholly owned subsidiary, Newco, which would acquire the assets of NW Equipment Co. (Equipco), a wholly owned subsidiary of CNW owning railcars under conditional sales arrangements.

Consideration to be paid.—The purchase price to be paid for the assets involved in *the Agreement* is (1) the assumption by Netco of all debts, obligations, and liabilities of CNW, *the selling subsidiaries* and Equipco, except those limited or excluded in *the Agreement*, totaling \$414,894,000 as of December 31, 1970; including assumption of liability under the Omaha first-mortgage series A bonds totaling \$19,040,000, to be retired over a 20-year period;⁶ and (2) in

⁵ Securities Contract 40 is a loan agreement between CNW and the First National Bank of Chicago secured by a pledge of the stock of Velsicol Chemical Corporation owned by CNW in a principal amount of \$20 million payable in equal annual installments \$2,857,143 each on May 29 of each of the years 1971 through 1977, inclusive. In lieu of Netco assuming this obligation, *the Agreement* provides that CNW will remain solely liable on the debt, and Netco will pay CNW the annual installments due each year with interest at 7 1/4 percent.

⁶ The Omaha bonds carry interest at the rate of 5 percent per annum and are owned by CNW. Not later than the consummation of the proposed transaction, (1) all interest accrued to date of consummation on all Omaha first-mortgage bonds will be canceled; (2) all of said Omaha bonds, except for \$19,040,000 principal amount thereof to be assumed by Netco, will be canceled; and (3) Netco will enter into an agreement with Manufacturers Hanover Trust Company as prescribed in *the Agreement*, relating to the Omaha first mortgage.

lieu of assumption of obligations of CNW under Securities Contract 40, the sum of \$14,285,715 to be paid to CNW over a 5-year period.

Restrictions and limitations.—In section 9.2 of *the Agreement* Netco agrees to certain restrictions and limitations for a period of up to 10 years. After consummation of the involved transaction Netco agrees to pay no dividends or make any distribution except stock dividends for a period of 5 years after consummation. During the next succeeding 5-year period, dividends of no more than 8 percent per annum on paid-in capital and surplus may be paid to the extent that consolidated net income for 1 year exceeds \$25 million. Furthermore, these dividends can be paid only if after giving effect to the payment, consolidated current assets will be at least 110 percent of consolidated current liabilities. The stated purpose of this restriction is to prohibit the use of funds needed for capital improvements, debt reduction, and maintenance, from being used for payment of dividends.

The Agreement provides for the establishment of a contingency fund by Netco of up to \$15 million with funds (1) received as a result of the Transcontinental Division decision;⁷ (2) from sale of Alton and Southern Railway Company common stock in a proceeding now pending in Finance Docket Nos. 26426 and 26427; and (3) from net receipts from any sale of Chicago Terminal facilities or related air rights. Any amounts collected from these sources in excess of \$15 million and the income earned from the contingency fund will be available to Netco without restriction. The \$15 million may be withdrawn from the fund during the first 5 years of operation only when in the opinion of Netco and CNW, it is required on account of extraordinary circumstances which might affect Netco's ability to render proper transportation services.

Netco also agrees to limit its power of incurring nontransportation related debt and its power to acquire and merge with nontransportation subsidiaries. These restrictions extend for 10 years following the consummation date of the proposed transaction or to the date upon which Omaha first-mortgage bonds no longer remain outstanding, whichever date is later.

Netco will give CNW and Indenture of Mortgage and Security Agreement as security for the performance of its obligations under *the Agreement*. The security agreement will create a lien upon all of

⁷ *Akron, C. & Y. R. Co. v. Atchison, T. & S. F. Ry. Co.*, 321 I.C.C. 17 (1963) and 322 I.C.C. 491 (1963); *Chicago & N. W. R. Co. v. A. T. & S. F. R. Co.*, 387 U.S. 326 (1969).

Netco's assets and property. This lien is subject to the prior lien of other mortgages and obligations to be assumed by Netco.

JURISDICTION

The examiner's discussion of the jurisdictional issues involved herein and his conclusions thereon are set forth in the excerpts from his report which we have adopted and appended to this report. As the hearing examiner recites, both the Illinois Commerce Commission and the Union Pacific Railroad (UP) originally challenged our jurisdiction over these transactions, but he found that because Netco as a result of this transaction will, among other things, acquire the vendors' leases of, and trackage or joint use rights over, the lines of other railroads (transactions requiring our prior authorizations under section 5(2) of the act) we have jurisdiction in accordance with *Boston & Maine Corp. Merger*, 320 I.C.C. 290; *Providence & Worcester Co.—Merger*, 334 I.C.C. 293; and *Southern Pacific Transportation Co.—Merger*, 334 I.C.C. 866.

No exceptions were filed by UP to the hearing examiner's findings. However, on exceptions, the Illinois Commerce Commission, without advancing any further arguments or contentions than it had previously advanced, adopted the position with respect to our jurisdiction that it had assumed at the hearing and on brief. As indicated in the appendix, the Illinois Commission argues that the instant transactions are not within the scope of section 5(2) under the decision of the United States Supreme Court in *County of Marin v. United States*, 356 U.S. 412 (1958); that jurisdiction over the transactions is conferred upon the Illinois Commission by Illinois statute; that under a recent decision of the Illinois appellate court, the Illinois Commission has jurisdiction over real estate transactions within the State of public utilities; and that most of the assets involved are located within Illinois and its citizens stand to be most affected by the transactions.

The railroad lines involved here extend approximately 11,373 miles through 11 Midwestern States; from Chicago to Lander, Wyo.; from Chicago to northern Michigan, Wisconsin, Minnesota, and South Dakota; and from Chicago through Iowa to Kansas City, Mo. In our opinion, the Illinois Commission cannot seriously contend that the railroad system involved is not an interstate system subject to our jurisdiction, regardless of whatever State the bulk of its assets may be located or in whatever State the statutes or court decisions may be to the contrary.

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We are charged by the national transportation policy of the Congress with the duty of "developing, coordinating, and preserving a national transportation system *** adequate to meet the needs of the commerce of the United States, ***." We would be extremely derelict in our duty under this congressional charge if we did not claim jurisdiction where possible over a transaction involving the life or, conceivably, the death of one of the Nation's major railroad systems. In fact, were we to adopt the position of the Illinois Commission it is doubtful whether we would ever have jurisdiction over a section 5(2) transaction. All that would be necessary would be for the parties concerned to determine the locus of the majority of the assets involved and then carry out their transaction under whatever statutes and decisions were there in force.

The *County of Marin* case, *supra*, cited by the Illinois Commission, involved the spin-off of a portion of a carrier's franchises and properties to a wholly owned noncarrier subsidiary for operation in what, in the Court's language, on page 418 of its decision, "amounts to little more than a paper transaction" and which, therefore, did not require the approval and authorization of this Commission. The *County of Marin* case can have no applicability here where all the operating franchises of the carrier (including various rights in or acquired from other carriers) and certain assets involved are to be purchased by a new corporation that is not now, nor intended to be in the foreseeable future, a subsidiary or affiliate of the vendor.

We agree with the hearing examiner's findings that we have jurisdiction over these transactions under section 5(2) of the act. However, his findings of jurisdiction do not completely meet the requirements of this case since section 5(2) though encompassing the purchase of the properties of two or more carriers, does not deal with the licensing of a noncarrier applicant such as Netco, that has never performed common carrier service. See *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 548.

As was pointed out in the *Iowa Term.* case, *supra*, however, this Commission has consistently entertained applications by noncarrier corporations, under section 1(18) of the act, proposing to engage in railroad operations. The application in this proceeding was, as in the *Iowa Term.* case, *supra*, filed under section 5(2) of the act but, as in that case, our consideration of the application need not be restricted solely within the confines of that section. In these circumstances, sections 1(18) and 5(2) are complementary, not mutually exclusive. Together the two sections, with the securities provisions of the act,

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provide the base for our regulation of railroad financial matters. With the exception of the section 1(18) publication requirements prescribed in 49 CFR 1120.4 all the requirements of both sections have been met and all of the information necessary to decide the instant case under either or both sections is present here. Our authorizations herein will, however, be withheld until Netco has complied with the above stated publication regulation, which we should not disregard. See *Mississippi Valley Barge Line Company v. United States*, 252 F. Supp. 162 (1966).

Publication at this point is a technical matter which cannot be waived, because it is specifically required by statute. That there has been actual notice of this transaction by all concerned is evidenced by the wide publicity it has been given and by the active participation in the proceeding by governmental representatives, shipper groups, and numerous others. Compliance with the publication regulation by Netco is not to be taken, therefore, as an opportunity for further protests to these applications. All parties with an interest in these proceedings have been afforded ample opportunity to be heard. The record herein is sufficient for a decision on the merits of the applications, and, therefore, no further protests under section 1(18) will be considered.

Clayton Act considerations.—As discussed in the appendix hereto, another jurisdictional question was raised by UP which contended that the transactions herein violate the provisions of the Clayton Act and, as a consequence, there is an absolute bar to our approval of the applicant's proposals. The hearing examiner fully considered and discussed UP's contentions in this respect and found that the Clayton Act does not bar our consideration or approval of the transactions proposed here. No exceptions have been filed to his findings on this matter and, as indicated by our inclusion of this portion of the hearing examiner's report in the appendix hereto, we adopt his findings concerning the Clayton Act as our own.

HEARING EXAMINER'S RECOMMENDATIONS

After an extensive analysis of Netco's financial prospects, the hearing examiner although expressing doubt that Netco would be anything but a marginal railroad with an erratic earnings potential, found that the proposed transactions, appropriately conditioned, are in the public interest and not in violation of the Clayton Act. He recommended approval of the transactions.

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To protect existing routes and channels of trade with other rail carriers, the hearing examiner recommended imposition of the so-called *standard traffic conditions* first imposed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492. No objections have been raised to these conditions. We believe them to be adequate for the purpose for which they are intended, and we will impose them hereinafter as our condition No. 1.

For the benefit of railroad employees, the hearing examiner recommended imposition of the same employee protective conditions set forth in *New Orleans Union Passenger Terminal Case*, 282, I.C.C. 271, as modified with respect to their arbitration provisions in *Southern Pacific Transportation Co.—Merger*, 334 I.C.C. 866. Although, as the hearing examiner pointed out, that there appears to be little likelihood of an adverse effect on railway employees, we will impose the modified *New Orleans conditions*, as condition No. 2 herein to satisfy the provisions of section 5(2)(f) of the act.

EXCEPTIONS TO HEARING EXAMINER'S REPORT

PC&W.—This organization is composed of shippers located on, or served by, the Minneapolis Industrial Railway (MIR), a subsidiary of CNW. The MIR properties are included in the assets to be acquired here by Netco. On March 18, 1970, in *Minneapolis Industrial Ry. Co. Abandonment*, 338 I.C.C. 610, MIR received permission to abandon 104.16 miles of its railroad between Golden Valley and Gluek, Minn., subject to a condition that a portion of the line in the vicinity of Hutchinson, Minn., be sold to the Great Northern Railway Company. MIR was required to retain the 104.16 miles of line in service until Great Northern commences operation over the Hutchinson trackage. Petitions filed by protestants to the abandonment were denied by the Commission as was a petition for a finding that the abandonment was of general transportation importance. A group of protestants, of which the shippers represented by PC&W were apparently members, instituted an action against the abandonment in the United States District Court for the District of Minnesota, Civil Action File No. 4-70 Civil 564. The court ruled against the protestants on September 16, 1971. On November 8, 1971, CNW stated that in view of the litigation in the case Burlington Northern, the Great Northern's successor, is reluctant to commence the construction necessary to institute operations at Hutchinson and requested an extension of time in which to con-

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summate the abandonment. By order dated December 2, 1971, the consummation date was extended to January 12, 1973, and the line is still in operation presumably with continuing deficits by MIR.

PC&W was denied leave to intervene in the abandonment case by order dated November 10, 1971. By order of the same date its application filed April 14, 1971, in Finance Docket No. 26612 for permission to acquire and operate the MIR line to be abandoned and its application filed May 25, 1971, in Finance Docket No. 26656 for authority to acquire trackage rights over the line were dismissed for the reason that PC&W had not entered into the necessary contracts with MIR and/or CNW to accomplish the transactions for which authority was sought. MIR and CNW had protested the applications.

In the instant case, PC&W, after appearing at the prehearing conference and at the hearing, sought leave on June 3, 1971, to intervene in the proceedings to seek a condition requiring the MIR line to be sold through competitive bidding. A formal petition for leave to intervene in a Commission proceeding is required by 49 CFR 1100.73 for parties seeking affirmative relief such as PC&W seeks here. By order dated September 3, 1971, PC&W's petition for leave to intervene was denied on the grounds that it was not timely filed; that it would unduly broaden the issues in these proceedings, and that it would present an issue not here pertinent, with no good cause therefor having been shown. As previously stated, PC&W has filed exceptions to the hearing examiner's report in which, among other things, it contends that it should be allowed to intervene in these proceedings. Netco requests that PC&W's exceptions be dismissed on the grounds that PC&W has no standing in this proceeding and if permitted to participate further, its pleadings would only reargue issues which the Commission, in denying PC&W's petition for leave to intervene, has already held beyond the scope of the present proceeding. PC&W has replied to the Netco request to dismiss.

The relief sought by PC&W is in no way pertinent to the application of Netco to acquire and operate the assets of CNW. The condition sought by PC&W would unduly broaden the issues presented here, especially since the abandonment matter has been fully and exhaustively litigated in other proceedings undertaken specifically to deal therewith. In our opinion the order of September 3, 1971, denying PC&W leave to intervene, was properly issued and is confirmed. PC&W is not a railroad and, thus, has no statutory entitlement to file a petition for inclusion herein. It has no standing in this case and its exceptions to the hearing examiner's report here-

in are dismissed without any further consideration thereof on our part.

Financial analysis.—The hearing examiner included in his report his analysis of CNW's financial history for the period from 1965 to 1970. The financial statements he used in making his analysis included the balance sheet of CNW and its transportation subsidiaries as of December 31, 1970; condensed balance sheets as of the end of each calendar year from 1965 through 1970; income statements covering these 6 years; condensed balance sheets of the former Chicago Great Western Railway Company (CGW) as of December 31, 1965, 1966, and 1967, prior to its merger into CNW pursuant to *Chicago & N. W. Ry. Co.—Merger*, 330 I.C.C. 13; and condensed income statements for the same periods, as shown in the appendix hereto. The hearing examiner found that CNW's cumulative ordinary loss for the 6-year period was \$11,185,638 and that its earnings for the period would have been poorer had it not been for the large amount of income it received from nonrecurring and nontransportation services. He also found CNW's operating ratios for 1967, 1968, and 1969 to be higher than the respective average class I western district and all United States railroads during the same periods. His comparison suggested that CNW's operating performance was not equal to other carriers although he disregarded the marked reversal of this trend in 1970. In his opinion during the 6 years in question, CNW was able to service its long-term debt as it matured from funds provided by operations only after adjustments for depreciation. The hearing examiner is unsure of Netco's ability to meet the fixed charges on this debt which it will assume and those on the indebtedness of the Omaha bonds, in view of the fact that at the end of each of the 6 years CNW had a deficit working capital position even though in 1970, as pointed out, there was marked improvement in its profits and operations. The hearing examiner concluded that CNW is a marginal railroad with an earnings record below that of the industry and that Netco faces problems to achieve better results.

Netco, on exceptions, vigorously disputes the hearing examiner's financial analysis and argues that his projections are incorrect, because they fail to consider the advantages of (1) the *Great Western merger*;² (2) the acquisition of the Oaks, N.C., and Crawford, Nebr., gateways as a result of the *Northern Lines merger*; (3) the

²These advantages are asserted by Netco to include higher profits partially due to increased efficiency in operations, the acquisition of the Kansas City gateway, and the nonrecurrence of loss associated with consummating the merger with CGW.

assembling of a new management team; (4) the new time-mileage and incentive methods of computing per diem charges; (5) increased transcontinental divisions; (6) the lack of a lag between rising costs and rate increases; (7) the savings of Netco's proposed abandonment program; and (8) the strengthened traffic relationship with the Canadian National, increasing traffic to and from the Canadian Northwest. Netco argues that its financial analysis and pro forma estimates submitted in rebuttal at the hearing should have been admitted by the examiner and advances specific changes that it believes should be made in the hearing examiner's analysis to correct typographical and clerical errors or to correct the alleged failures in the analysis it asserts above.

We have thoroughly considered the hearing examiner's financial analysis, which we have not excerpted for inclusion in the appendix, except for the balance sheets and income statements previously referred to. The seven points Netco brings out in its exceptions indicate that the employees' operation of the railroad creates potential for developing the CNW into a financially viable carrier. Of particular importance is the merger of the CGW into the CNW which is expected to result in increasing operating efficiencies which have not been fully reflected in the carrier's balance sheets and income statements. In considering all the factors, we are convinced that the proposal, properly conditioned, would afford Netco a reasonable opportunity to create a financially viable railroad.

Other than by Netco, the only exceptions taken to the hearing examiner's report on financial grounds were the exceptions of Kendall Laughlin, a minority holder of 37 shares of CNW's series A, 5-percent preferred stock. Laughlin did not participate in the hearings. He excepts on the grounds that (1) CNW, in order to obtain a tax savings for Industries, is selling its assets at too low a price and, thus, disseizing the public shareholders of their equity in CNW; and (2) the \$50 per share figure set by Netco for its stock is too high. Ground No. (1), above, will be further discussed in connection with the condition requested by Laughlin.

With respect to the sale price of Netco stock, Laughlin contends that \$50 per share is too high a price for the 300,000 shares to be issued. By comparison with the stock of the Milwaukee and the Rock Island, he claims that Netco's stock should sell in the market at about \$18 per share. Netco points out, in reply, however, that his comparison of Netco stock with that of the other two carriers lacks meaning since it does not allow for the quite different amounts of

each stock outstanding. If Netco were to offer 10 times as many shares at only \$5 per share, the per share cost would be lower but the total equity of Netco and the percentage thereof acquired by each employee for the amount invested by him would remain precisely the same.

All things considered, on this record we cannot find that the price of \$50 set by Netco for each share of its stock sold to its employees is not a fair price.

We are faced here with the clear intention of Industries to divest itself of its principal common carrier operations in one way or another. As the hearing examiner pointed out in his report, this is the third such attempt by Industries and we have no doubt but that it will not be the last if the instant transactions fail of consummation.

Industries' president, at the hearing, made it plain that as far as finances are concerned CNW is strictly on its own and can expect no help from Industries which has discovered that investment in nontransportation operations provides a greater return and is, thus, more attractive than investment in CNW.

Industries is contingently liable on very little, if any, of CNW's debt and the Interstate Commerce Act does not confer upon us the power to render it liable. One of the alternatives open to Industries if these transactions are not consummated and CNW's financial structure weakens, is to permit CNW to slide into bankruptcy and possible dissolution, with the consequent detriment to, or entire loss of, its services to what is, economically, one of the important regions of the Nation.

Among other alternatives open to Industries, if these transactions fail, is the sale of CNW's capital stock, rather than just its assets, to another company. If the purchaser of the stock should be a noncarrier which did not control another carrier, we would have absolutely no jurisdiction over the sale and would be unable to approve or disapprove the transaction or impose just and reasonable conditions.

Industries can also sell CNW to another railroad, or if it so chooses, sell it piece by piece to other railroads that might be interested in specific segments and then seek permission to abandon the unattractive portions. Any sales of these natures could be the subject of long proceedings with each railroad in the territory involved seeking to protect itself from the purchase with elaborate traffic conditions, seeking inclusion therein, or objecting entirely to the proposed sale and purchase.

The foregoing are just some of the alternatives open to Industries if these transactions fail and no doubt that company, if it is sufficiently determined to rid itself of CNW can think of others.

Currently, the CNW is controlled by a holding company which has declared in this record that the CNW is strictly on its own financially and can expect no help from its parent. We can only conclude from this statement that Industries does not intend to devote much of its managerial energies toward making the CNW financially sound. In contrast, CNW's present management has expressed its dedication to operating the railroad as a viable efficient carrier. The present management would be the future management of Netco and has demonstrated its ability to effectively operate the carrier by reversing in 1970, CNW's downward economic trend. Approval of the proposal will create a company whose sole interest is operating the railroad, rather than its present parent whose interests are admittedly toward making more attractive investments. Moreover, the proposal will remove the danger of improvident investments by a parent corporation adversely affecting the carrier's financial condition or impairing its ability to perform a common carrier service.

The novel proposal of employee ownership of a major rail carrier raises the prospect of vesting ownership in individuals whose sole interest is in the efficient and economical operation of the carrier. The proposed transfer of ownership to interests whose sole concern will be making a railroad a financial success is a transaction which will inure to the benefit of the public and must be found consistent with the public interest.

We agree with applicant's undisputed contention that by permitting employees to have an ownership interest in the company will induce them to put forth a greater effort since they will, in essence, be working for themselves.

Inasmuch as the considered transaction will not result in a change in management, nor a change in the railroad system, there is no prospect of the proposal changing the current competitive situation.

Upon consideration of the entire record herein, including the hearing examiner's findings and the exceptions and replies thereto, we are unable to find that these transactions do not have a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities. *United States v. Lowden*, 308 U.S. 225, 230 (1939).

In our opinion, the transactions proposed herein are in the public interest and warrant our approval subject to the various terms and conditions discussed in the remaining portions of this report.

TENURE OF TRUSTEES

Netco proposes that it be controlled by three voting trustees during the initial 10 years of its operation. Two of these proposed trustees are the principal authors of the Netco plan and are affiliated with Netco through their involvement in the management of CNW and Industries. Upon consummation of these transactions, the affiliated trustees will resign from all positions they now hold in the Industries' CNW system.⁹ Each trustee would hold one share of Netco's class T common stock, the only stock entitled to vote during the 10-year startup period. The remaining shareholders will, under Netco's proposal, have no vote nor exercise any control over Netco during the startup period. Netco's original applications were supplemented on December 16, 1970, to join its proposed trustees as part applicants.

The applicant states that the purpose of the trusteeship is to insure stability and continuity of management in its early years and to assure preservation of the employee-ownership concept for at least the period of trusteeship. The applicant contends that without the trusteeship, and in view of the relatively small amounts of stock expected to be outstanding, undesirable elements might be able to wrest control from the employees.

None of the parties herein objects to the 10-year period and in our opinion, 10 years is not too lengthy a period for the trustees to control the affairs of Netco. As the hearing examiner pointed out, the two affiliated trustees are essentially railroad oriented and motivated by a desire to improve the CNW operations. To do this, they should have a sufficient period of time uninterrupted by problems other than those connected with operation of the railroad. The applicant also asserts, and we agree, that even though Netco will be an employee-owned organization, it will have to be operated along the lines that corporations are usually operated. There would be no prospects for successful operation during the initial startup period, if it is to be run on a town meeting basis. We believe that the

⁹The proposed trustees are Larry S. Provo and Richard M. Freeman the "affiliated trustees," and Robert E. Brooker, the "outside trustee." At the hearing, Industries' president testified that there is no agreement, direct, indirect, implied or any other type, that the jobs of Netco's officers or employees in Industries would be restored in the unlikely event of Netco's failure.

10-year tenure for the trustees is sufficient for the purpose for which it was intended, and we will hereinafter authorize the trustees to control the assets to be acquired from CNW by Netco for such period.

Though none of the parties objects to the 10-year period, we do not have before us all who are expected to be solicited for the purchase of the Netco stock and who, upon becoming owners, would be precluded from participating in the selection of management for the 10 years. We think it highly undesirable for us, by legal fiat as a condition to approving this transaction, to ensconce in office wholly without restraints for the unusually long period of 10 years a management answerable to no one—neither the owners for the protection of their own personal interests or to a governmental agency for the protection of the public interest.

Undoubtedly the promoters of this enterprise have a special leverage in the contemplated stock sales program for the employees can be reminded of how their very jobs may be dependent upon the success of the enterprise. The coercive force of this element is lacking in the normal sale of stock on the open market. It may succeed in making stockholders of many who might otherwise never be an investor in securities. Yet, once in, these stockholders must be silent for 10 years, trusting in the good faith and competence of the trustees.

There is nothing outside their own self-infused stimulations, to goad or induce the trustees toward sustained high-caliber effort; nothing to check excesses; nothing to test for adequacy of performance. In fact, during the entire period of the trust, Netco management would be almost completely insulated from the normal accountability and other controlling influences to which corporate management in general must respond.

We think trustees should be made responsible to some kind of reckoning during the course of their incumbency. We also believe they should be made removable for good cause such as gross incompetence, conviction of felony, and other things of that nature which would render a continuance in the position of trust unreasonable and inconsistent with the public interest.

Therefore, although we are approving the 10-year trust, our approval is conditioned upon provision for a review by this Commission after 5 years, so that the trustees' stewardship can be critically appraised by anyone having a significant concern with the railroad's service and corporate well being; and a provision for investigation at anytime, upon petition of a trustee, the holders of 10

percent of the outstanding voting stock, an agency of a State government, or at the instance of this Commission on its own motion when continued retention of a trustee is questioned for good cause.

In the event of the need to appoint a successor to one of the named trustees, the approval of this Commission shall first be obtained before any such successor may assume the position of trustee.

CONDITIONS RECOMMENDED BY THE HEARING EXAMINER

Except for those discussed above, most of the exceptions filed herein concern the conditions the hearing examiner recommends imposing to the authorizations herein or the conditions, requested by participants, which he rejected or failed to recommend. A discussion of these conditions follows:

Conditions applicable to trustees.—Because of their unique and powerful positions and the absence of any control by other shareholders, the examiner recommends that we exercise some control over the trustees. Accordingly, he would condition our authorization to preclude the trustees from serving as officers or directors of any company or organization other than Netco or own any interest, direct or indirect in any other company. His recommended condition would further require our approval be obtained prior to consummation of the trustees' salary and other benefits as well as prior to any subsequent increases in such salaries and benefits during the initial period following consummation.

Netco argues that a prohibition against a trustee serving as an officer, director, or shareholder of another company is entirely too broad and will prevent it from obtaining the services of Brooker or any other qualified outside trustee that may be on the board of directors of other corporations. According to Netco, even Provo would not resign his directorship of Northern Illinois Gas Company in order to retain his Netco trusteeship. Netco suggests that in lieu of the hearing examiner's condition, we adopt a condition it proposes on exceptions that would (1) grandfather positions presently held by the affiliated trustees, i.e., permit the affiliated trustees to continue holding positions as officers or directors of companies that they hold at the time of consummation of the present transaction; (2) put no limitation on the outside trustee; (3) remove the prohibition against the trustees' ability to hold stock as

an investment; and (4) retain our control of trustee's compensation as directors of Netco, but not as officers.

The Bureau of Enforcement, in reply, recognizes the basic soundness of Netco's exception but considers the exception too broad in its sweep. The Bureau contends that we should at least prohibit the trustees from serving as an officer or director of Industries or any of Industries subsidiaries and that this prohibition should apply to both the affiliated and the outside trustees to assure complete divorce of Netco from Industries.

We agree with the hearing examiner that during the period for which the trustees control Netco, adequate safeguards must be imposed to protect the nonvoting shareholders and Netco appears willing to accept a condition for such purpose. However, we agree with Netco that the affiliated trustees need not divest themselves of any investments they might have in other companies, including Industries, before assuming their positions as trustees of Netco. We see no point in requiring the trustees to burn all of their bridges behind them before embarking on the Netco project. We know of no other case where a railroad's management is required, either by public law or agency action, to divest itself of outside investments prior to assuming control of a railroad. We do not believe that the mere ownership of Industries system stock by the trustees would tend to perpetuate the control of Netco by Industries.

Paragraph (a) to condition No. 3 which we will hereinafter impose in the public interest is essentially as proposed on exceptions by Netco for this purpose, modified as suggested by the Bureau of Enforcement to ensure the separation of Netco and Industries. Netco should have no objection to the Bureau of Enforcement's modification in view of the statement made in the application herein to the effect that upon consummation of the proposed transactions, the affiliated trustees will resign all positions with Industries, CNW and their respective affiliates and in view of the fact that the outside trustee apparently has no connection with Industries in any event.

We also agree with the hearing examiner and the Bureau of Enforcement that some control should be retained over the compensation of the trustees as officers of Netco, as well as directors, during the period of the trusteeship. As pointed out by the Bureau of Enforcement, such control will not prove burdensome to Netco while, at the same time it will afford some protection to Netco's shareholders during the period in which they will have no control over the operations of the company in which they have invested. Accordingly, as paragraph (b) of condition No. 3, we will adopt the

positions of the Bureau of Enforcement and the hearing examiner and during the period of trusteeship make subject to our approval the compensation of the trustees, as trustees or in any other capacity with Netco.

Hearing examiner's condition regarding stock prospectus.—In order to provide full information of the details of the terms of this purchase as well as the risks involved to a prospective investor in Netco, the hearing examiner would require that a prospectus be furnished to each investor prior to the purchase of the stock. He recommended that this prospectus conform to the requirements of the Security and Exchange Commission Form S-2 registration statement (Security Act of 1933). In addition he would require a warning as to the speculative nature of the securities to be set forth in bold print on the outside front cover of each prospectus.

As noted by applicant in its exceptions the proper Securities and Exchange Commission form should be Form S-1, instead of Form S-2. Form S-2 is designed for promotional companies which do not intend to have any active subsidiaries. Form S-1 would result in disclosure of all material financial and other information to potential investors. With the substitution of Form S-1 for Form S-2, we will adopt the hearing examiner's proposed condition as our own condition No. 4 herein.

Contingent liability.—The hearing examiner would further condition approval of the transaction upon Industries guaranteeing payment of any obligation presently owed by CNW for a period of 10 years in the event of default in payment by CNW and Netco. It would appear that he proposed this condition, in part, to protect other rail carriers which are jointly liable with CNW on financial obligations of certain terminal depots and car leasing companies.

Netco argues in its exceptions that the hearing examiner's proposed condition is unacceptable to Industries.¹⁰ Netco appended to its exceptions a copy of a letter addressed to Netco's president on September 10, 1971, by the president of Industries. This letter states that the conditions recommended by the hearing examiner have been discussed by Industries' Board of Directors at a regular meeting (without the participation of the president of Netco). According to the letter, Industries' board directed its president to inform Netco that the contingent liability condition and the reservation of jurisdiction condition (hereinafter discussed)

¹⁰Netco points out that some of the hearing examiner's conditions to which it takes exception have no direct impact on it, but are imposed directly on Industries. It maintains that since it cannot accomplish the transactions it proposes if the imposed conditions are unacceptable to Industries, Netco's interest in obtaining acceptable conditions is vital.

recommended by the hearing examiner were wholly unacceptable to Industries and were we to accept the conditions as recommended by the hearing examiner, Industries would terminate the transaction in accordance with the terms of *the Agreement*.

With respect to the contingent liability condition, the letter asserts, and Netco on exceptions agrees, that Industries is not now contingently liable for any of the obligations of CNW; that the new contingent debt for Industries would be at least \$350 million, and if leases, joint facilities, et cetera, were to be included, substantially more; that it would be violative of Industries existing loan agreements for Industries to make such a guarantee and hence beyond its power to do so; and that it would be unreasonable to expect Industries to assume a new obligation of this size in this transaction.

Moreover, according to Industries' letter, the hearing examiner's contingent liability condition would serve no transportation interest, but would only provide a retroactive windfall to the present creditors of CNW, mostly sophisticated institutional investors which did not bargain for any such guarantee at the expense of Industries. The letter points out that none of the large creditors holding long-term debt of CNW opposed the transactions or sought to obtain a guarantee from Industries. The letter asserts that substantially all of the creditors are already secured by mortgage liens, ownership of leased property, or by conditional sales agreements or equipment trust certificates.

Netco claims that it expects to be significantly more viable than CNW by virtue of the enhanced productivity of an employee-owned company, the restrictions on the payment of dividends contained in *the Agreement*, and its concentration on railroading. It contends that present creditors of CNW will be advantaged by Netco's assumption of the debts and that there can be no justification for attempting further enhancement of the security of existing creditors beyond what they ever bargained for or expected to enjoy, particularly since it would abort the proposed transactions.

The Bureau of Enforcement agrees with Netco and Industries that the hearing examiner has gone further than necessary and that the effect of the condition he recommends would be to give unexpected and unrequired additional security to all of the current creditors of CNW. The Bureau asserts that, in the main, the hearing examiner's condition would not accomplish anything to further or maintain the national transportation system, which is our principal concern. It believes, however, that a condition should be imposed to protect the

other railroads jointly liable with CNW in the event of Netco's insolvency.

Mrs. Elizabeth Wager, a bondholder of Minnesota & St. Louis Railway 6-percent bonds, due November 1, 1985, contends that Industries should be required to guarantee her bonds until they are paid. She argues that the term of the guarantee in the examiner's proposed condition should be modified from 10 to 14 years.

BN, in its reply to Netco's exceptions, argues that it and certain other railroads should be protected by Industries from the certainty of bearing CNW's share of large joint liabilities should Netco fail. These liabilities consist of guarantees of bonds issued by station and terminal companies. They also involve employee protective obligations arising out of Amtrak's assumption of passenger operations. BN asserts that it undertook with CNW and other railroads to set up and guarantee the financing of facilities intended to serve commonly the several railroads participating in public transportation service in particular localities. Each railroad, in participating, relied on the continued solvency of the others. It maintains that CNW will have very few assets after Netco's acquisition; therefore, Industries should guarantee these joint obligations.

McDowell-Wellman Engineering Company has filed an action against CNW in the United States District Court seeking \$2,100,000 in damages. It argues that, in order to provide it with a solvent defendant in its court action, the hearing examiner's proposed condition should not be modified.

We agree with Netco and the Bureau of Enforcement that the condition proposed by the examiner would give McDowell-Wellman, Mrs. Wager, and most of the present CNW creditors additional security to which they are not entitled and which the creditors other than Mrs. Wager have not requested. However, we also agree with the Bureau of Enforcement and BN that the rail carriers that are jointly liable with CNW on the obligations of the terminal depots and car leasing companies referred to about should receive some protection. If Netco should fail to meet its share of these obligations, the other carriers would be called upon to assume Netco's debts, and some of these carriers are, themselves, in a weak financial condition.

As an example of the harm that could be wrought by a default by Netco, without a backup guarantee by Industries, the Bureau of Enforcement cites the fact that the Chicago, Milwaukee, St. Paul and Pacific Railroad (Milwaukee) is a joint and several obligor on all but one of the joint obligations of CNW. Milwaukee, Penn Central, and

CNW are guarantors of \$4,475,000 principal amount of Indiana Harbor Belt Railroad's first mortgage 5 1/8-percent bonds. Should Netco default, and with Penn Central already in reorganization, it would be conceivable that Milwaukee would alone be liable for all shares. According to the Bureau of Enforcement, other joint obligations are spread among more companies, but the end result of a Netco default would greatly increase the financial burden on all of the other railroads. Many of these other railroads, like the Milwaukee which has sustained over \$16 million in losses in railway operations over the 1969-70 period, might possibly be pushed over the brink into bankruptcy by a Netco default if Industries were not to guarantee these obligations.

In its reply to exceptions, the Bureau of Enforcement points out that according to Netco's application herein, the obligation of CNW on these joint obligations is \$9,518,000 as of December 31, 1969. In its exceptions, Netco states that the contingent liability of CNW in the St. Paul Union Depot has been discharged by the payment by CNW of over \$2 million. Therefore, the December 1969 figure above can be reduced by at least \$2 million. As of December 31, 1970, CNW's total share due on its remaining joint obligations, with the foregoing \$2 million omitted, was \$5,811,220, plus \$709,000 representing CNW's share of the guaranty of the Illinois Terminal Railroad Company's sinking fund bonds, for a total of \$6,520,220 now outstanding. The Bureau of Enforcement believes that this outstanding amount should be guaranteed by Industries for a 10-year period and it has recommended the imposition of a condition to that effect.

Industries, in the aforementioned letter to Netco, addressed its objections to the broad condition proposed by the hearing examiner and its stated objections to the condition were based on the windfall the condition would provide institutional investors. Industries did not reject, or even specifically discuss, any guarantee of the CNW joint obligations. Therefore, we concur in the Bureau of Enforcement's belief that upon weighing the advantages of the instant transaction against the relatively small amount of the obligations that would be involved, Industries will be willing to make the necessary guarantee.

As the Bureau of Enforcement asserts, the amount that should be guaranteed by Industries is not oppressive in view of the tax savings that Industries will enjoy as a result of these transactions and in further view of the fact that Industries expects to be relieved, by the sale of CNW's assets, of a drag on its earnings, on its rate of return,

Chicago and North Western Railway Company and transportation subsidiaries income account for the years ended December 31, 1965, to 1970, inclusive—Continued

	Year ended December 31, 1965	Year ended December 31, 1966	Year ended December 31, 1967	Year ended December 31, 1968	Year ended December 31, 1969	Year ended December 31, 1970
IV. Fixed charges—Continued						
Amortization of discount on funded debt-----	\$51,932	\$45,282	\$40,050	\$34,189	\$36,289	\$48,162
Total fixed charges-----	6,349,109	7,208,145	9,318,010	11,289,264	13,178,328	16,787,762
Income after fixed charges-----	13,257,830	10,286,226	(7,876,963)	(233,918)	(22,511,554)	718,586
V. Other deductions						
Interest on funded debt—contingent-----	3,004,679	1,767,256	1,175,538	329,186	125,888	122,796
Ordinary income-----	10,253,151	8,528,970	(9,052,491)	(363,103)	(22,687,442)	590,790
VI. Extraordinary and prior period items						
Extraordinary items (net) ¹ -----	-----	-----	3,330,524	2,915,535	3,857,129	(5,066,136)
Prior period items (net) ¹ -----	-----	-----	9,578,838	(2,445,000)	-----	-----
Total extraordinary and prior period items-----	-----	-----	12,910,362	470,535	3,857,129	(5,066,136)
Net income-----	10,253,151	8,528,970	3,857,871	(92,568)	(18,780,313)	(4,475,346)

Note: Parentheses denote contra items.
¹Prior to 1967, Extraordinary and prior period items were not shown as separate categories in the ICC Uniform System of Accounts.

Chicago Great Western Railway Co. condensed balance sheets as of
December 31

	1967	1966	1965
	(000 Omitted)		
<i>Assets</i>			
Current assets	\$8,892	\$9,047	\$8,777
Special funds	41	62	51
Investments	3,642	3,624	3,540
Properties less recorded depreciation and amortization	90,790	91,076	89,722
Other assets and deferred charges	883	503	638
Total assets	104,248	104,312	102,728
<i>Liabilities and shareholders' equity</i>			
Current liabilities	6,448	6,108	6,044
Long-term debt due within 1 year	1,245	1,112	998
Long-term debt due after 1 year	16,297	16,893	15,943
Reserves	420	298	193
Other liabilities and deferred credits	797	913	1,043
Total liabilities	25,208	25,324	24,218
<i>Shareholders' equity</i>			
Common stock	22,351	22,362	22,314
Capital surplus	25,871	25,885	25,733
Retained income	30,818	30,741	30,463
Total shareholders' equity	79,040	78,988	78,510
Total liabilities and shareholders' equity	104,248	104,312	102,728

Source: Annual Reports Form A.

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Chicago Great Western Railway Co. condensed income statements

	1967	1966	1965
	(000 omitted)		
Railway operating revenues	\$28,686	\$31,257	\$30,866
Railway operating expenses	23,173	23,655	23,692
Net revenues from railway operations	5,513	7,602	7,174
Railway tax accruals	2,555	2,160	2,266
Railway operating income	2,958	5,442	4,908
Net rents	3,741	3,788	3,618
Net railway operating income or (loss)	(783)	1,659	1,290
Other income	896	621	706
Total income	113	2,280	1,996
Miscellaneous deductions	53	81	34
Income or (loss) available for fixed charges	60	2,119	1,962
Fixed charges	773	680	705
Income or (loss) after fixed charges	(713)	1,519	1,257
Contingent interest	123	123	123
Ordinary income or (loss)	(836)	1,896	1,134
Prior period items (net) ¹	1,827	-----	-----
Net income	991	1,896	1,134

¹ Prior to 1967, prior period items was not shown as a separate category in the ICC Uniform System of Accounts.

Source: Annual Reports Form A.

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DESCRIPTION OF VENDEE

General.—Netco is a newly formed Delaware corporation organized for the precise purpose of purchasing the properties, and operating the rail services, of CNW and its transportation subsidiaries. Netco is not now engaged, nor has it yet been authorized by this Commission to engage, in operations as a rail common carrier. When this transaction is consummated it will, however, become a carrier by railroad subject to the provisions of the act. Vendee was incorporated on March 24, 1970, by Mr. Larry S. Provo who, at that time, was president and a director of CNW as well as a director of the rail's parent, Industries. Today Mr. Provo is, in addition, president and a director of Netco. Mr. Richard M. Freeman, vice president, secretary, and a director of CNW at the time Netco was organized is vice president, secretary, and a director of vendee. Because of the duality of their positions, during the time the negotiations resulting in these applications being filed were under deliberation Messrs. Provo and Freeman absented themselves from the discussions and refrained from any participation therein. Concurrently with consummation of the proposed transactions both will resign their positions with Industries and CNW and devote their attention solely to Netco.

As already mentioned, Netco's initial filing herein was supplemented on December 16, 1970, when, in response to a request from this Commission, it joined as party applicants all three prospective trustees of Netco and identified as the third trustee, Mr. Robert E. Brooker of Chicago, Ill. Netco will have but three directors at the outset and there is no present contemplation of any change.

Corporate structure.—There is no Netco stock currently outstanding or authorized, but applicant seeks authority to issue 300,000 shares of common stock, class A, and three shares of common stock, class T, each with a par value of \$50 per share. The three shares of class T stock will be issued to the three aforementioned directors and trustees who will immediately convey their shares to a trust. Collectively, they will act as trustees of that trust in consonance with the underlying Declaration of Trust and Agreement. Class T common will exist at most for 10 years unless all three shares are simultaneously surrendered for redemption sooner. At the expiration of the 10-year period, class T stock will be redeemed automatically at par. No dividends may be declared or paid on class T common. The holders of class T common will, through the trust, tightly control the fate of Netco for up to 10 years, even though the holding thereof will not entitle them to any interest in the earnings of the company, as all earnings will accrue to the benefit of holders of class A. As claimed in the application,

***this arrangement will permit management to make decisions in the critical early life of the new company solely in the interest of the property. Management will not be unduly influenced by the need to make a net income showing in a particular year at the expense of adequate maintenance, an adequate fleet and adequate service to shippers.

The 300,000 shares of class A common are to be offered for sale at \$50 per share to persons who are employees of CNW, or officers of employee Brotherhoods, subject to a scale graduated according to salary and to the nonemployee director of Netco in a maximum amount of \$100,000.¹ Netco hopes, and indeed anticipates, that a large number and broad cross-section of employees will become stockholders. In this

¹From certain statements on brief it is apparent Netco's legal counsel will also be offered an opportunity to participate.

connection, Netco believes that "with a personal financial stake in the railroad a new spirit will prevail *** [and] the employees *** will have a greater incentive to operate the company efficiently and to provide the best possible service to the public."

During the early years of its life Netco will pay no dividends or other distributions. Imposition of this dividend limitation has been prompted by the desire that in the initial 10-year period of Netco's life substantially all net cash generated will be used to improve the property, to increase the supply of equipment, and for additional working capital.

So, too, has the planned structure of Netco whereby the trustees will have firm control for 10 years been deliberate. This arrangement is founded upon two important considerations. First, the originators of the proposed purchase are essentially railroad-oriented and are said to have as their prime consideration improvements in the railroad. To achieve this, they feel they alone must retain control and preclude the intrusion of outsiders having no real interest in the property as a railroad. And, parenthetically, under the financial framework established, control of this company could be obtained rather inexpensively. Secondly, despite its unique status as an employee-owned organization, it is felt that Netco would have to be run as a corporate entity—and along the lines that corporations are customarily conducted. The corporation, say its trustees, simply could not be efficiently run on a "town hall" basis.

Applicant has made no study of the marketability of its shares of stock, and concedes that after the initial sale to the employees, resales are unimpeded by any restrictions. Though no decision has been reached yet, Netco intends to explore further the listing of this stock within a few years after consummation. It intends to wait until a "track record" has been established. No one, officer or employee, has now a binding commitment to purchase any of this stock, and the estimates—which are just that—of the number of employees who might purchase the stock range from 2,000 to 4,000 in number. At the time of hearing herein CNW had about 13,100 employees on its payroll. On inquiry, it was ascertained that 37 of the 39 officers of CNW indicated a general interest in acquiring Netco stock in an aggregate amount of just over \$900,000. No employee has even been approached by Netco because of "Blue Sky Laws" prohibiting it. There is, in the Agreement For Sale of Assets, a condition that Netco can only consummate the transaction if \$1 million worth of stock is in fact sold. Envisioned, but not yet finalized, is the likelihood that a payroll deduction plan will be established after consummation in order that more employees may, with relative ease, participate in the ownership of this company. Interestingly, Netco does not correlate its future viability to the amount of stock sold in the future. For Netco claims to be viable now. Moreover, whatever amount of stock might be sold in the future will provide Netco with more working capital than it has now or would continue to have under ownership by Industries. This feature of prospective working capital from sales of stock is, in Netco's view, an unusual advantage that the new company will gain from this transaction.

North Western employees Transportation Corporation pro forma statement of income for years 1971-76, adjusted

	1971	1972	1973	1974	1975	Total 5 years
(000 omitted)						
Railway operating revenues	\$329,775	\$333,073	\$336,404	\$339,768	\$343,166	\$1,682,186
Railway operating expenses	251,751	252,712	253,813	255,050	256,427	1,269,753
Net revenue from railway operations	78,024	80,361	82,591	84,718	86,739	412,433
Railway tax accruals	27,704	27,704	27,704	27,704	27,704	138,520
Railway operating income	50,320	52,657	54,887	57,014	59,035	273,913
Equipment rents, net	19,337	20,610	21,390	21,678	21,473	104,488
Joint-facility rents, net	1,571	1,571	1,571	1,571	1,571	7,855
Total rents	20,908	22,181	22,961	23,249	23,044	112,343
Net railway operating income	29,412	30,476	31,926	33,765	35,991	161,570
Other income, net	8,527	4,474	4,981	5,318	5,829	24,129
Income available for fixed charges	32,939	34,950	36,907	39,083	41,820	185,699
Fixed charges	21,590	21,858	21,230	21,457	21,976	107,611
Income after fixed charges	11,349	13,092	15,677	17,626	19,844	78,088
Contingent interest	123	123	123	123	123	615
Ordinary income	11,226	13,469	15,554	17,503	19,721	77,473
Extraordinary items	1,500	1,500	1,500	1,500	1,500	7,500
Net income	12,726	14,969	17,054	19,003	21,221	84,973
Adjustments—increase-(decrease) ¹	1,546	284	(1,198)	(2,705)	(4,292)	(6,415)
Net income, adjusted	14,272	15,203	15,856	16,298	16,929	78,558

¹To eliminate operating revenues and operating expenses attributable to intercity passenger operations and to revise railway tax accruals. Details of computation are shown on appendix H.

North Western employees Transportation Corporation adjustments to appendix G pro forma statement of income for years 1971-75

	1971	1972	1973	1974	1975	Total 5 years
1. Adjustment to eliminate intercity passenger operation:						
Railway operating revenues—per appendix G	\$329,775	\$333,073	\$336,404	\$339,768	\$343,166	\$1,682,186
Railway operating revenues—after elimination of intercity passenger revenues ²	1327,945	331,224	334,536	337,881	341,260	1,672,846
Revenue adjustment	1,830	1,849	1,868	1,887	1,906	9,340
Railway operating expenses—per appendix G	251,751	252,712	253,813	255,050	256,427	1,269,753
Railway operating expenses—after elimination intercity passenger expenses	248,752	249,713	250,814	252,051	253,428	1,254,758
Expense adjustment ³	2,999	2,999	2,999	2,999	2,999	14,995
Net increase in income from eliminating intercity passenger operations	1,169	1,150	1,131	1,112	1,098	5,655
2. Adjustment of railway tax accruals:						
Railway tax accruals—per appendix G	27,704	27,704	27,704	27,704	27,704	138,520
Railway tax accruals as revised by Netco	27,327	28,620	30,033	31,521	33,089	150,590
Net increase or (decrease) in expenses	(377)	916	2,329	3,817	5,385	120,070
Net increase or (decrease) in net income from adjustments (Item 1 minus item 2)	1,546	284	(1,198)	(2,705)	(4,292)	(6,415)

¹Computed as follows:
 1970 revenues used as a basis for 1971 revenues ----- \$326,510
 Less: Intercity passenger revenues included ----- 1,812
 ----- 324,698
 Plus: 1-percent growth in traffic factor ----- 3,247
 ----- 327,945

³In computing railway operating expenses on appendix G, Netco increased expenses by 10 percent of estimated annual increase in revenues. Although revenues are being reduced by this adjustment, no reduction of expenses for this 10-percent increment will be made because the amount of such reduction is very insignificant.

²Amount of revenue shown for each year is 1 percent greater than prior year to reflect estimated annual traffic growth.

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North Western Employees Transportation Corporation pro forma statement of funds for years 1971-75

	1971	1972	1973	1974	1975	Total 5 years
(000 omitted)						
Funds provided:						
Net income	\$12,726	\$14,969	\$17,054	\$19,008	\$21,221	\$84,973
Depreciation	20,155	20,786	21,553	22,454	23,491	108,439
Cost of land sold and salvage on other retirements	4,500	4,500	4,500	4,500	4,500	22,500
Proceeds from financing	12,000	17,000	22,000	29,195	33,916	114,111
Sale of Chicago passenger terminal		8,000				8,000
Contingency fund (see below)					15,000	15,000
Total funds provided	49,381	65,255	65,107	75,152	98,128	353,023
Funds applied:						
Investment in property	21,000	26,000	31,000	36,000	41,000	155,000
Payment of debt, including company bonds reacquired	20,732	26,193	26,781	29,528	29,706	132,940
Investment in trailer train notes	589		589		589	1,767
Other	500	500	500	500	500	2,500
Total funds applied	42,821	52,693	58,870	66,028	71,795	292,207
Increase in funds	6,560	12,562	6,237	9,124	26,333	60,816
Working capital, beginning of period	5,332	11,892	24,454	30,691	39,815	5,332
Working capital, end of period	11,892	24,454	30,691	39,815	66,148	66,148
Contingency fund total consisting of:	14,000	15,000	15,000	15,000		
1. Transcontinental division receivable in 1970, \$6 million						
2. Proceeds from sale of Alton and Southern in 1971, \$8 million						
3. Proceeds from sale of Chicago passenger in 1972 (\$1 million to fund, \$8 million to current assets)						
Total available funds, end of period	26,892	\$39,454	45,691	54,815	66,148	66,148

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North Western Employees Transportation Corporation reconciliation of 1961 and 1967 net income reclassified to conform all years to I.C.C. order of September 22, 1967, to pro forma North Western Employees Transportation Corporation Income Statement—consolidated including noncarrier transportation and land subsidiaries for years 1961-70

Line No.	1961	1962	1963	1964	1965	1966	1967	1968	1969	Total 9 years	1970 forecast	Total 10 years
(000 omitted)												
A. Net income as reported to the I.C.C.												
Chicago and North Western Railway Company	53,030	5(1,501)	26,816	\$6,936	\$10,253	\$8,529	\$3,858	5(92)	5(18,780)	\$21,049		
Chicago Great Western Railway Company	1,152	1,150	1,582	1,504	1,134	1,396	991			8,909		
Total	4,332	(351)	10,398	8,440	11,387	9,925	4,849	(92)	(18,780)	29,958		
B. Restatement of 1961 to 1966 income:												
To restate 1961 to 1966 net income to conform to I.C.C. order of September 12, 1967, regarding segregation of extraordinary and prior period adjustments	2,546	3,707	11,418	13,534	2,666	3,370				37,061		
C. Net income reclassified	6,778	3,356	21,816	21,974	13,853	13,795	6,849	(92)	(18,780)	66,999	2,219	67,218
D. Various adjustments including (1) restatement of prior items to years earned or incurred, (2) inclusion of net income of transportation related subsidiaries, and (3) elimination of intercompany transactions—total	(638)	433	(10,328)	(4,009)	(1,455)	(1,834)	(5,733)	2,557	5,932	(15,069)	3,385	11,684
E. Subtotal Chicago and North Western Consolidated net income on I.C.C. basis (except that prior period items are restated and CW and noncarrier transportation and land subsidiaries are included)	6,090	3,789	11,488	17,971	12,398	11,461	(884)	2,465	(12,848)	51,930	3,604	55,534
F. Less: Dividends from manufacturing subsidiaries					(42)	(83)	(6,083)	(7,882)	(6,081)	(20,171)	(3,081)	(23,252)
G. Subtotal Chicago and North Western income excluding manufacturing subsidiaries	6,090	3,789	11,488	17,971	12,356	11,378	(6,967)	(5,417)	(18,929)	31,759	523	32,282
H. Eliminate Chicago and North Western contingent interest	3,039	3,038	3,038	3,038	3,005	1,767	1,175	206		18,296		18,296
I. Reduce road property depreciation to Netco basis	6,000	6,005	6,000	6,000	6,000	6,000	6,000	6,000	6,000	64,000	6,000	60,000
J. Record interest expense on Omaha bonds	(952)	(923)	(893)	(861)	(828)	(793)	(756)	(718)	(677)	(7,951)	(635)	(8,586)
K. Increase income and retained income to reflect write down to Netco basis of cost of land sold and of nondepreciable retirements:												
Net income	644	1,234	914	945	1,317	1,198	2,319	3,881	5,075	17,427	2,541	19,968
Retained income	2,527	936	2,693	3,776	2,455	507				12,804		12,804
L. Eliminate Chicago and North Western gain on GMSO stock (1963) and loss on CRISP stock (1964) and CW gain on Mid-American Pipe Line stock (1965)			(7,108)	139	(775)					(7,744)		(2,244)
M. Interest on the excess of the aggregate of funds generated by Netco		309	151	122	2,072	3,379	3,539	4,739	5,705	20,046	6,483	26,529
N. Eliminate dividends received on GMSO and RI stock		(183)	(239)	(99)						(521)		(521)
O. Total pro forma Netco consolidated net income on I.C.C. basis with prior period items restated	17,348	14,200	20,984	30,991	26,102	23,426	5,310	8,691	(2,020)	144,166	14,912	159,078

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North Western Employees Transportation Corporation pro forma statement of funds for years 1961-70

	1961	1962	1963	1964	1965	1966	1967	1968	1969	Total 9 years	1970 forecast	Total 10 years	1970 based on CNW actual	Total 10 years based on CNW actual
(000 omitted)														
Funds provided:														
Net income-----	\$17,348	\$13,842	\$20,938	\$31,030	\$26,204	\$23,672	\$5,415	\$8,691	\$(2,826)	\$144,314	\$14,912	\$159,226	\$15,215	\$159,529
Depreciation-----	14,948	14,700	14,925	15,091	13,954	15,392	17,074	18,036	19,344	143,464	19,998	163,462	21,607	165,071
Proceeds from financing-----	12,111	5,373	18,279	19,197	33,176	50,751	48,764	41,094	78,703	307,448	23,016	330,464	20,100	327,548
Cost of land sold, track retirement charges, and salvage from other retire- ments-----	6,033	4,465	7,386	4,293	4,743	6,142	2,081	2,622	3,953	41,718	1,229	42,947	2,070	43,788
Total funds provided-----	50,440	38,380	61,528	69,611	78,077	95,957	73,334	70,443	99,174	636,944	59,155	696,099	58,992	695,936
Funds applied:														
Investment in property-----	22,578	16,980	28,821	33,227	48,309	68,066	53,841	46,896	65,158	383,876	12,237	396,113	18,513	402,389
Repayment of debt-----	20,730	18,073	19,390	18,902	18,358	17,097	19,863	17,929	21,538	171,880	25,505	197,385	28,572	200,452
Purchases of Alton & Southern Railway Company and the Iowa Roads-----								12,411		12,411		12,411		12,411
Dividends-----						160	160	160	160	640	160	800	160	800
Other, net-----	(406)	(1,037)	(734)	884	321	(169)	3,177	1,331	2,267	5,634	(176)	5,458	1,963	7,597
Total funds applied-----	42,902	34,016	47,477	53,013	66,988	85,154	77,041	78,727	89,123	574,441	37,726	612,167	49,208	623,649
Increase (decrease) in funds-----	7,538	4,364	14,051	16,598	11,089	10,803	(3,707)	(8,284)	10,051	62,503	21,429	83,932	9,784	72,287
Working capital, beginning of period-----	14,612	22,150	26,514	40,565	57,163	68,252	79,055	75,348	67,064	14,612	77,116	14,612	77,115	14,612
Working capital, end of period-----	22,150	26,514	40,565	57,163	68,252	79,055	75,348	67,064	77,115	77,115	98,545	98,544	86,899	86,899

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North Western Employees Transportation Corporation pro forma adjusting balance sheet as of December 31, 1970, giving effect to the proposed purchase of assets by Netco

	Actual balance Dec. 31, 1970	Issuance of stock to employees		Balance after issuance of stock	Purchase of assets		Pro forma balance assum- ing sale Dec. 31, 1970
		Debit	Credit		Debit	Credit	
Assets							
Current assets:							
Cash-----					\$7,424,110		\$7,424,110
Temporary cash investments (including \$5.5 million on con- tingency fund)-----		\$2,000,000		\$2,000,000	4,000,000		6,000,000
Accounts receivable and other Alton and Southern Railway common stock under contract of sale (includible on contin- gency fund)-----					49,563,150		49,563,150
Materials and supplies-----					8,000,000		8,000,000
Total current assets-----		2,000,000		2,000,000	87,645,021		89,645,021
Less: Amount includible on contingency fund-----							13,500,000
Total current assets, ad- justed-----							76,145,021
Special funds: Other-----					2,928,862		2,928,862
Contingent-----							13,500,000
Investments-----					12,278,041		12,278,041
Properties:							
Gross transportation property ---	\$151,500	\$28,000			281,531,199		281,708,699
Less: Other elements of invest- ment-----							
Reserves for depreciation and amortization-----							
Net transportation property ---	151,500	28,000		177,500	281,531,199		281,708,699

See footnotes at end of page.

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North Western Employees Transportation Corporation pro forma adjusting balance sheet as of December 31, 1970, giving effect to the proposed purchase of assets by Netco—Continued

	Actual balance Dec. 31, 1970		Issuance of stock to employees		Balance after issuance of stock		Purchase of assets		Pro forma balance assuming sale Dec. 31, 1970	
	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit
Properties:—Continued										
Miscellaneous physical property										
Less reserve for depreciation										
Net miscellaneous physical property										
Total properties	\$151,500		\$25,000		\$177,500		\$281,531,199			\$281,708,699
Other assets and deferred changes							11,861,495			11,861,495
Total assets	151,500		2,026,000		2,177,500		396,244,618			398,422,118
Liabilities and shareholders' equity										
Current liabilities				\$26,000	177,500			\$81,389,532		81,567,032
Long-term debt due within 1 year								15,238,713		15,238,713
Long-term debt due after 1 year:										
Amounts payable to affiliated companies								20,643,767		20,643,767
Other long-term debt								260,154,622		260,154,622
Total								280,798,389		280,798,389
Reserves:										
Pension and welfare reserves								8,240,181		8,240,181
Casualty and other reserves								5,437,716		5,437,716
Total								13,677,897		13,677,897
Other liabilities and deferred credits								5,140,087		5,140,087
Shareholders' equity:										
Common stock				\$2,000,000	2,000,000					2,000,000
Preferred stock										
Capital surplus										
Retained income										
Total				2,000,000	2,000,000					2,000,000
Total liabilities and shareholders' equity				2,026,000	2,177,500			396,244,618		398,422,118

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* Organization expenses.

JURISDICTIONAL ISSUE

Coincidentally with the filing of these applications, there arose a dispute whether this Commission has jurisdiction over the transactions or, if it does, on what particular statutory provision such jurisdiction stands. Netco has contended consistently from the inception of the proceeding that the jurisdiction of this Commission resides in section 5(2)(a) of the act for the reason that:

Netco will acquire the common carrier status of North Western and Omaha and will, as an operating rail carrier, among other things, lease and acquire trackage rights over, and joint use of lines of other railroads.

It goes on to assert that in comparable factual situations jurisdiction of the character it suggests has been found, citing *Southern Pacific Transportation Co.—Merger*, 334 I.C.C. 866; *Boston & Maine Corp. Merger*, 320 I.C.C. 290; and *Providence & Worcester Co.—Merger*, 334 I.C.C. 293.

Two parties strenuously controvert the Netco jurisdictional claim. Both of them, Illinois Commission and Union Pacific, filed separate motions to dismiss the application. The former stood on the grounds that here was a transaction not involving two or more carriers, but a single carrier system, hence not within the reach of section 5(2). Rather, this petitioner asserted that it in fact has jurisdiction under (a) the statutory authority of Chapter 111-2/3, Section 27(c), Illinois Revised Statutes, 1969, (b) a recent decision of the Appellate Court of the State of Illinois in No. 54817, *Chicago and North Western Railway Company v. Illinois Commerce Commission*, which held that pursuant to the aforementioned Section 27(c) the Illinois Commerce Commission is vested with jurisdiction "to grant or withhold approval of real estate transactions by public utilities," and (c) for the very practical reason that it is in the State of Illinois where substantially all CNW's assets are located and wherein the citizens who stand to be affected reside. In reply Netco contended that Illinois Commission's jurisdictional arguments are faulty for the simple reason that the very statute relied upon is, by its own terms, made inapplicable to transactions which are subject to the Interstate Commerce Commission's jurisdiction.

Upon consideration of the jurisdictional issue thus joined this Commission, in an order served February 16, 1971, pointed out that within the rule established by *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, 549, its jurisdiction "may vest either by virtue of section 5(2) or section 1(18) of the Interstate Commerce Act, and that said jurisdiction may be determined at the close of the hearing dependent upon the factual situation presented." The Commission went on to deny the motion to dismiss without prejudice to a later renewal of the motion.

UP similarly has challenged this Commission's jurisdiction over these transactions. This carrier, by motion dated February 12, 1971, moved (1) to dismiss the application "insofar as they purport to relate to section 5(2)," and (2) to dismiss these applications (a) for failure of Netco to file an application to operate as a regulated carrier; (b) for failure of CNW to file an abandonment application; (c) for failure to join CNW and Industries as necessary parties; and (d) on grounds the entire transaction was conceived in patent violation of the Clayton Act. Arguing in support of its motion, UP avers that Netco itself as a mere corporate shell is seeking to acquire and operate the lines of a railroad, and thus is not subject to section 5(2) which is only applicable where two or more carriers are involved; that the only section of the act applicable to this transaction is section 1(18) where the standards are more stringent than those of

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section 5, and where antitrust immunity does not prevail; that in any event the failure to join indispensable parties such as CNW and Industries as applicants nullifies the application; and that the conceded interlock of directorates between CNW and Industries is a patent violation of section 10 of the Clayton Act, 15 U.S.C. § 20, a violation which this Commission can neither condone nor foster.

* * * * *

These motions to dismiss should be denied inasmuch as it is the opinion of the examiner there is presented here a transaction governed by section 5 of the act, and in particular, section 5(2)(a)(ii). That section reads:

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

As seen from the Agreement For Sale of Assets, Netco will acquire the subsidiaries of CNW as well as their leasehold, trackage and joint use rights in other carriers, and the terminals incident thereto. Viewing this factual setting in light of the *Southern Pacific Transportation Co.* case, *supra*, and the others of like tenor cited by Netco, jurisdiction seems reposed in the Commission, and in section 5. Moreover, it must be borne in mind that section 5 is part of a remedial statute requiring liberal construction to carry out its purposes, and as a consequence the jurisdiction of this Commission should not be lightly disclaimed. To even the casual observer of the rail scene, it should be clear that, where as here, the stakes are vital, the consequences historic, and errors catastrophic, decisions are crucial. In these circumstances the examiner believes the Commission should exercise a judgment, and realizing that this proposal has both attractions and risks, decide.

The governing statute—section 5(2)—states that it is concerned with "transaction" by, or among, carriers. While the act affords no definition of a transaction, once Commission jurisdiction attaches, it attaches to the totality of the proposal for the word "transaction"

appears to be a catchall descriptive term referring to the many different elements involved in *** joint operations. As often described in other contexts it is a word of "flexible meaning" and may comprehend a series of many occurrences.

Smyth v. United States, 293 F. Supp. 387 and the cases cited therein. Clearly then, the entire proposal before the Commission must be considered. Parenthetically, it should be observed as the facts develop, that the court was right on the mark when, in *Watts v. Missouri-Kansas-Texas Railroad Company*, 383 F. 2d 571, 583, it commented that the economics of railroading are far from simplistic as its "congeries have exquisitely tangled complexities."

No more convincing is UP's motion to dismiss for lack of joinder of a necessary party—Industries. In accordance with long-established practice, this Commission requires that the buyer, or those in control of the buyer, be subject to Commission jurisdiction in section 5 acquisitions. *U.S. v. Marshall Transport Co.*, 322 U.S. 31. The buyer here, Netco, has of course subjected itself to our jurisdiction as a party. It is not

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necessary, however, that the Commission have before it the seller in order to exercise its jurisdiction. See *Erie R. Co. Purchase*, 254 I.C.C. 486 (490); and cf. *Black Ball Freight Service v. United States*, 223 F. Supp. 191.

CLAYTON ACT CONSIDERATIONS

At the opening stage of this proceeding UP advanced its assertion the proposed transaction violates the prohibitions of the Clayton Act, and specifically section 10 thereof.⁴ As a consequence it argues there is an absolute bar to approval by this Commission. The argument is composed of several attributes. Relying generally on *United States v. Boston & Maine R.R.*, 380 U.S. 157, and *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, UP sets up as the necessary elements of Clayton Act violation these items:

- (a) a common carrier engaged in commerce;
- (b) an interlock with another corporation; and
- (c) dealings in securities, supplies or other articles of commerce in the aggregate amount of more than \$50,000.

Superimposing the facts in the purchase at hand upon these elements, UP claims that a patent violation of the Clayton Act is discernible. It goes on to argue that Netco's disavowal of Messrs. Provo and Freeman being involved in any negotiations leading up to the proposed transaction is beside the point, for the interlock of these gentlemen in Netco and CNW is the controlling factor; and the good faith or ignorance or lack of intent of the participants is inconsequential, citing *Klinger v. Baltimore and Ohio R. Co.*, 432 F. 2d 506. To cap its case on this issue, UP avers that the holding in *In Re Missouri Pacific R. Co.*, 13 F. Supp. 888, where the court held if competitive bids are not obtained, or even if they cannot be, the Clayton Act "forbids the deal absolutely," is dispositive.

In contravention, Netco replies that *** no "dealings" subject to section 10 have taken place nor, according to the terms of the contract, may any take place unless and until the proposal has been sanctioned by the Commission. Absent Commission approval, no assets will be conveyed.

*** Furthermore, applicant points out that Messrs. Provo and Freeman will terminate their affiliations with Industries and CNW on consummation of the transactions in question.

In the opinion of the examiner, the Clayton Act does not bar Commission consideration, and even approval, of the transaction proposed. "The purpose of section 10 of the Clayton Act is the prevention of mulcting of a carrier's assets by its officers, directors, or employees through the device of causing the carrier to make contracts upon exorbitant or unfavorable terms with other corporations or firms in

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce ***, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission***."

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which such officers, directors, or employees have personal interests greater than their interests in the carrier." (Legislative Recommendation 34, Sixty-Ninth Annual Report of the Interstate Commerce Commission.) As such, it has a limited objective, cf. *Klinger v. Baltimore and Ohio*, supra, concurring expression. Simply put, the law was enacted to prohibit financial injury to a carrier or to impede its ability to serve the public interest. *Minneapolis & St. Louis R. Co. v. United States*, supra. This Clayton Act goal is fully compatible with the very purpose of the Interstate Commerce Act as articulated in its preamble, the National Transportation Policy. The congressional policy there embodied requires this Commission, *inter alia*, to foster sound economic conditions among, to preserve the earning capacity of and to conserve the financial resources possessed by, interstate carriers. Cf. *Texas v. United States*, 292 U.S. 522; *New York Central Securities Corp. v. United States*, 287 U.S. 12; and *McLean Trucking Co. v. U.S.*, 321 U.S. 67. But the paths these laws follow differ. For in passing upon transactions controlled by section 5 of the act, section 5(11)—a more recent and more specific expression of congressional policy than the Clayton Act—makes that section exclusive and plenary, untrammelled by restraints, limitations, and prohibitions of other laws. Important here, that section specifically relieves participants "from the operation of the antitrust laws." Moreover, the Supreme Court has held that the Commission in section 5 proceedings is not bound by the restrictions of the antitrust laws, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154; and that section 10 of the Clayton Act is such an antitrust law, *Minneapolis & St. L. R. Co. v. United States*, supra, especially footnote 12 on page 190. Of course the Commission may not in ascertaining where the public interest lies, ignore the antitrust aspects of a transaction. *Denver & R. G. W. R. Co. v. U.S.*, 387 U.S. 485, and *McLean Trucking Co. v. United States*, supra.

Similarly, the Commission is required to consider anticompetitive issues under the public interest standard of section 20a. *Denver & R. G. W. R. Co.* case, supra. But there is, in section 20a, no comparable provision granting immunity from the antitrust laws that transactions under section 5 enjoy by virtue of section 5(11), even though both sections are governed by the same public interest standard. The evident anomaly emerging when section 5 is placed in juxtaposition with section 20a is, in the opinion of the examiner, attributable to the broad and unique provisions of section 5. An evident purpose underlying enactment of section 5(11) was the appreciation that railroads are closely supervised and regulated so that strictures of antitrust laws need not be applied to them. In the *Minneapolis* case, supra, the Court teaches that this "Commission is not so bound by antitrust laws that it should permit them to 'overbear' what otherwise is in the public interest." Involved here are two applications, inseparably intertwined. The section 20a proceeding is more than a mere issuance of stock to be viewed solely in its own environment. Instead, it is the vehicle for the transfer of control of the assets of the CNW such that the acquiring party Netco, "****may invoke the Commission's power under §5 to immunize the transaction from antitrust restraints" cf. *Denver & R. G. W. R. Co. v. U.S.*, supra, at 497. Indeed the Supreme Court clearly recognized in *McLean Trucking Co.* case, supra, that where a section 5 transaction was the precursor of a securities issuance, the total transaction had antitrust immunity. Surely this is as it should be. Otherwise an applicant could establish that the public interest permitted it to go ahead with a transaction after due consideration of the national antitrust policy, only to be barred from issuing securities which underlie the approved transaction on account of the same antitrust policy.

Also of passing interest in the resolution of the Clayton Act issue here are the practicalities of the situation. Both the author of the principal opinion and the

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concurring judge in *Klinger v. Baltimore and Ohio R. Co.*, 432 F. 2d 506 seem to agree that no competitive bidding was required under section 10 of the Clayton Act where there was evidence that no bid would be likely forthcoming. Such is the case here. This transaction has received notoriety not only from the statutory dictates required by the act, but also from press releases issued by the Commission and widespread coverage in trade journals and newspapers. Despite this, there has been no indication of any interest on behalf of any person or corporation that they would desire to bid competitively for the assets of CNW.⁵

DETAILS OF THE SECTION 20a APPLICATION—FINANCE DOCKET NO. 26372

In the companion proceeding, Finance Docket No. 26372, "North Western Employees Transportation Corporation Issuance of Securities and Assumption of Obligation and Liability," authority is sought under section 20(a) of the act for Netco (1) to issue common stock and to assume obligations and liabilities in respect of securities issued, assumed or guaranteed by CNW and its selling subsidiaries; (2) to incur obligation to CNW in the amount of \$14,285,715; (3) to incur obligation to purchase first-mortgage series A bonds of Chicago, Saint Paul, Minneapolis and Omaha Railway Company; (4) to enter into an agreement with Manufacturers Hanover Trust Company, trustee, relating to the first mortgage of Chicago, Saint Paul, Minneapolis and Omaha Railway Company; and (5) for authority to enter into a mortgage and security agreement which will secure performance of the obligations of Netco.

Newly formed, Netco has no stock outstanding. Upon final Commission approval of the purchase in the title proceeding, Netco proposes to issue a total of up to 300,000 shares of common stock, class A (\$50 par value); and 3 shares of common stock class T (\$50 par value). The three shares of class T stock will be issued individually to Messrs. Larry S. Provo, Richard M. Freeman, and Robert E. Brooker, who will immediately convey such stock to a trust. The three named will act as trustees of that trust. Class A common will be offered for sale at \$50 per share to its employees, officers of employee Brotherhoods, and the nonemployee trustee, Robert E. Brooker.⁶ The minimum purchase will be \$500, and no investor will be permitted to buy more than \$100,000 worth of such stock. Investor stock purchases among employees will, however, be limited in relation to annual salary in the following manner:

Annual salary range	Maximum purchase of stock
Under \$10,000-----	\$5,000
\$10,000 to \$19,999-----	10,000
\$20,000 to \$29,999-----	20,000
\$30,000 and over-----	100,000

The relative rights, preferences, and powers of the classes of stock and shareholders of Netco will be as follows:

⁵Shippers on Minneapolis Industrial Railway also alluded to Clayton Act violations as a bar to Commission approval herein. The examiner's findings in this section are deemed equally dispositive of that protestant's contention.

⁶By the time the hearing concluded it was clear that another select group, Netco legal counsel, would also be afforded an opportunity to purchase class A stock.

A. CLASS T COMMON

(1) Voting rights:

Holders of class T common shall have the sole right to vote at all elections of directors of the corporation and, except as provided in paragraph B(1)(a), below, on all other matters submitted to the stockholders of the corporation. On any matter on which class A common is entitled to vote as a class as provided in paragraph B(1)(a), below, class T common shall also vote as a class. Each holder of class T common shall be entitled to one vote per share.

(2) Redemption:

On the date ("Redemption Date") 10 years after the issuance thereof, the corporation shall redeem all outstanding shares of class T common at a price equal to the par value thereof, and all holders of then outstanding class T common shall surrender their shares to the corporation for redemption. Such redemption shall be automatically effected on the Redemption Date without the necessity of any action on the part of the corporation other than the tender of the redemption price to the holders of record of the then outstanding class T common at their addresses as shown on the books of the corporation, and regardless of whether the shares are surrendered on the Redemption Date. Prior to the Redemption Date, the corporation shall redeem at a price equal to the par value thereof, all, but not less than all, of the outstanding shares of class T common within 30 days of its receipt of written request for redemption. Such redemption shall be effective upon the date of tender of the redemption price to the holders of record of the then outstanding class T common at their addresses as shown on the books of the corporation without the necessity of any other action on the part of the corporation and regardless of whether the shares are surrendered on or before the date of such tender. The reissue of class T common following the redemption thereof shall be prohibited, and upon the redemption of the class T common, the authorized capital stock of the corporation shall be deemed, upon the filing of any proper certificate with the secretary of State of Delaware, reduced to the extent of the class T common so redeemed.

(3) Dividends:

Holders of class T common shall not be entitled to receive dividends.

(4) Liquidation:

In the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the corporation, holders of class T common shall, after payment to holders of class A common of the per share par value of the outstanding shares of class A common, be entitled to receive the per share par value of class T common, and shall not share further in the assets of the corporation.

B. CLASS A COMMON

(1) Voting rights:

(a) Prior to the redemption of the outstanding class T common, the holders of class A common shall have no right to vote at any election of directors of the corporation or any other matter submitted to the stockholders of the corporation; except that they shall be entitled to vote as a class upon (i) a proposed amendment to the certificate of incorporation if the amendment would increase or decrease the aggregate number of

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authorized shares of class A common, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences or special rights of the shares of such class so as to affect them adversely; (ii) any proposal for the merger or consolidation of the corporation whether or not the corporation shall be the survivor thereof (except any such merger for which under the Delaware corporation law no vote of any stockholder of the corporation would be required); and (iii) any proposal for the sale, lease, or exchange of all or substantially all of the corporation's property and assets.

(b) After the redemption of the outstanding class T common, each holder of class A common shall be entitled to one vote per share.

(2) Redemption:

The class A common is not subject to redemption.

(3) Dividends:

Holders of class A common shall be entitled to receive such dividends as may be declared by the board of directors out of assets legally available therefor.

(4) Liquidation:

In the event of any voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the corporation, holders of class A common shall, subject to the provision pertaining to class T common, be entitled to share ratably in all assets available for distribution.

From the foregoing it is seen that, while outstanding, class T common will have the sole right to vote for the election of directors and on all other matters submitted to stockholders except that holders of class A common will also be entitled to vote, as a class, on any proposed consolidation, merger (except where Delaware law requires no shareholder approval) or sale, lease, or exchange of substantially all of the assets, and on any proposed amendment to the Certificate of Incorporation which would change the aggregate number of authorized shares of class A common, or change the powers, preferences or special rights of class A common so as to affect them adversely. Class T common is automatically redeemed (at par) if all three shares are surrendered for redemption. On redemption of the class T common, holders of class A common will have exclusive voting rights. After redemption, class T shares may not be reissued. No dividends may be declared or paid on class T common; when declared, dividends shall be payable only to class A shareholders. The limitations on the payment of dividends has already been described in appendix A, above.

No holder of class A or class T shares shall have any preemptive, preferential or other right to purchase or subscribe for any shares of stock of Netco, or any obligations convertible into or carrying options or warrants to purchase any shares of stock of Netco, other than such, if any, as the board of directors of Netco may from time to time determine.

As part of the Agreement for Sale of Assets, Netco will pay to CNW the sum of \$14,285,715 over a period of 5 years in connection with Securities Contract 40, mentioned in appendix A. Authority to incur this obligation is sought also.

Additionally Netco seeks authority to assume obligation with respect to \$19,040,000 principal amount of Chicago, St. Paul, Minneapolis and Omaha Railway Company (Omaha) first-mortgage series A bonds which are to be retired over a period of 20 years. The first-mortgage series A and series B bonds of Omaha were issued 342 I.C.C.

under and pursuant to the first mortgage made by Omaha to Central Union Trust Company of New York (Manufacturers Hanover Trust Company, successor), trustee, under date of May 1, 1929. There are presently issued and outstanding under Omaha's first mortgage \$45,636,000 principal amount of first-mortgage 5-percent bonds, series A, due March 1, 2000, and \$550,000 principal amount of first-mortgage 5-percent bonds, series B, due March 1, 1983, all of which are held by CNW. As approved in 1956, *Chicago, St. P., M. & O. Ry. Co. Lease*, 295 I.C.C. 441, CNW currently operates all of the lines of railroad and other property of Omaha under lease, and as part of the transaction here Netco proposes to purchase from CNW the aforementioned \$19,040,000 principal amount of Omaha first-mortgage series A bonds. These bonds, which are included in the obligations to be assumed by Netco, will be purchased for cash at 100 percent of their principal amount over a 20-year period.

All interest accrued on such bonds to date of consummation of the sale will be canceled. Interest on the unpaid principal of the aforementioned \$19,040,000 of bonds from closing date to date of purchase will be at an annual rate of 5 percent. Netco may purchase any such bonds at any time more than 30 days prior to the date when its purchase of such bonds is required at a price which would produce to a purchaser a yield of 8 percent per annum (compounded on the coupon dates of such bonds) from the date of such purchase to the date on which purchase of such bonds would otherwise be required, together with any unpaid interest accrued thereon from and after the closing date. Upon the purchase of the bonds, Netco will surrender them for cancellation.

CNW owns all of Omaha's outstanding first-mortgage bonds, series A and series B and, except for the aforementioned \$19,040,000 principal amount of Omaha first-mortgage bonds, Series A and series B, together with all coupons for interest thereon, will be surrendered by CNW for cancellation prior to consummation of the proposed transaction.

Finally, as security for performance of the obligations of Netco and Newco, Netco will deliver to CNW and Industries an Indenture of Mortgage and Security Agreement, also described in appendix A.

The proposed issuance of stock and assumption of obligations and liabilities are for the purpose of effecting the proposed purchase by Netco of the assets of CNW and its selling subsidiaries and to enable Netco to conduct, engage in, and carry on transportation in accordance with its corporate purpose. For this reason, Netco asserts that the proposed issuances and assumptions are compatible with the public interest. Additionally, Netco believes the proposed issuance and assumptions are exempt under exceptions (1) and (5) of the competitive bidding requirements set forth in the Commission's report, citing *In Re Competitive Bidding in Sales of Securities*, 257 I.C.C. 129, 164. Alternatively it contends no sales of securities for which competitive bidding is required are involved. In any event, Netco believes they should be exempt under exemption (7) in the above case on the grounds they are part of the transaction for which authorization by the Commission is sought in the related section 5(2) application.

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Netco will assume obligations and liabilities of CNW, as follows:

Description	I.C.C. Finance Docket Number	Date of issue and maturity	Interest rate	Amount to be assumed as of Dec. 31, 1970
<i>Percent</i>				
CNW Ry. Co., first-mortgage bonds, series B.	14858	January 1, 1945 January 1, 1989	3	\$46,394,000
M&St. L. Ry. Co. first-mortgage bonds.	21115	October 1, 1960 November 1, 1985	6	13,006,600
CGW Ry. Co. first-mortgage bonds, series A.	-----	January 1, 1938 January 1, 1988	4	5,803,100
CGW Ry. Co. general income mortgage bonds.	-----	January 1, 1938 January 1, 2038	4 1/2	2,728,800
L&M 4 percent debentures.	19103 19858	January 1, 1956 January 1, 1976	4	138,000
First Equipment Trust of 1956.	19349	June 15, 1956 June 15, 1971	4 3/8	207,000
Second Equipment Trust of 1956.	19499	November 1, 1956 November 1, 1971	5	224,000
Third Equipment Trust of 1956.	19528	November 15, 1956 November 15, 1971	5 1/8	225,000
First Equipment Trust of 1957.	19661	March 15, 1957 March 15, 1972	5 1/2	178,000
Second Equipment Trust of 1957.	19792	July 15, 1957 July 15, 1972	6	300,000
M. & St. L. Equipment Trust of 1957.	19711 21115	May 10, 1957 May 10, 1972	4 1/2	360,000
First Equipment Trust of 1958.	19983	January 1, 1958 January 1, 1973	5 1/4	738,000
Second Equipment Trust of 1958 (first installment).	20335	October 15, 1958 October 15, 1973	5 3/4	375,000
Second Equipment Trust of 1958 (second installment).	20335	October 15, 1958 October 15, 1973	5 1/2	375,000
Second Equipment Trust of 1958 (third installment).	20335	October 15, 1958 October 15, 1973	5 1/4	375,000
M. & St. L. Equipment Trust of 1958.	20258 21115	August 26, 1958 August 26, 1973	4 1/4	420,000
Equipment Trust of 1959.	20460	January 15, 1959 January 15, 1974	5 1/8	880,000
Equipment Trust of 1962.	21964	April 1, 1962 April 1, 1977	5	560,000
Equipment Trust of 1963.	22495	April 15, 1963 April 15, 1978	4 5/8	1,120,000
Conditional or deferred payment contracts:				
<i>The First National Bank of Chicago, Assignee of the Seller:</i>				
Pullman-Standard Car Mfg. Co.	-----	July 1, 1963 November 1, 1978	5 1/4	853,334

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