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Assuring Adequate Rail Service: The Conflict Between Private Rights and Public Needs

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ASSURING ADEQUATE RAIL SERVICE: THE CONFLICT BETWEEN PRIVATE RIGHTS AND PUBLIC NEEDS

I. INTRODUCTION

During the past decade many of the railroads in the Northeastern and Midwestern sections of the United States have filed for reorganization under section 77 of the Bankruptcy Act.[1] These lines were among the leading passenger and short-distance freight carriers in the nation and, as such, performed a vital transportation function in the regions which they served. However, their operating costs greatly exceeded their revenues, and most of their services were performed at a loss. While some of the losses could have been averted through the use of improved technology,[2] it is unlikely that any method could be found to transform them into profitable businesses.[3] Nevertheless, the economic vitality of the regions served is closely tied to continued rail service,[4] and any major disruption in service would produce drastic results.

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1. 11 U.S.C. § 205 (1970).

2. See "Highballing Along: The Southern Railway Shows a Modern Road Can Cut Costs, Succeed," Wall St. J., Aug. 30, 1976, at 1, col. 6. Ratios comparing railroads' revenues with labor or other costs show that many bankrupt railroads, primarily the Penn Central, lag far behind solvent railroads. Criticism was also lodged against the Penn Central and other similarly situated carriers for their failure to mechanize maintenance and other operating functions. For an examination of the lack of efficiency in one problem-ridden carrier, see J. Daughen & P. Binzen, The Wreck of The Penn Central 70-104 (1971). See generally, Note, The Penn Central Reorganization: A New Look at Section 10 of The Clayton Act, 17 Wm. & Mary L. Rev. 737 (1976).

3. Congress, however, would dispute this point. The Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified at 45 U.S.C. §§ 701-793 (Supp. V, 1975)) [hereinafter cited as 1973 Rail Act] was designed to meet the needs of the financially troubled carriers in the Northeast and Midwest. The Senate Report which accompanied the bill, S. Rep. No. 601, 93d Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3242 (1973), envisions a revitalized system in the near future for which "direct government aid will not be necessary . . . ." Id. at 3254. The goals of the Act also include "the creation, through a process of reorganization, of a financially self-sustaining rail service system in the region." 1973 Rail Act § 206(a)(1), 45 U.S.C. § 716(a)(1) (Supp. IV, 1974), as amended, 45 U.S.C. § 716(a)(1) (Supp. V, 1975).

Similarly, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 [hereinafter cited as 1976 Rail Act], declares as its policy that the railroad industry "will remain viable in the private sector of the economy . . . ." Id. § 101(a), 90 Stat. 33.

More objective observers doubt the railroads' ability to become profitable or even self-sustaining without massive doses of Federal funds. See Rice, Consolidated Rail Corporation: Phoenix or Albatross? 42 I.C.C. Prac. J. 379 (1975), wherein it is suggested that the problem with the Northeastern railroads is their size, and that creating smaller railroads would eliminate the diseconomies of scale inherent in the consolidation.

4. S. Rep. No. 601, 93d Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3242, 3248-51 (1973). The report indicated that if the Penn Central were shut down there would be a "decrease in the rate of economic activity in the region of 5.2%, a decrease in the entire Nation of

The railroads' creditors allege that if the carrier is in reorganization[5] they deserve to have the property of the railroad handled in a manner best suited to protect their interests, whether or not such disposition protects the interests of the public. These creditors claim that their right to just compensation under the fifth amendment[6] is not protected if their interests are not given prior consideration.

Unlike areas of private industry, railroads are not free to enter or leave the carrier business at will, nor are they free to change areas served or rates charged. The regulation of the railroad industry is generally in the hands of the Interstate Commerce Commission (ICC), which controls rates and services provided.[7] When most of the nation's railroads were profitable, the ICC was primarily concerned with assuring that just and reasonable rates were charged.[8] Today, in light of dwindling profits, and the increasing competition from other modes of transportation, the regulatory scheme is geared to assure that the carrier will continue satisfactory service over all its track—or at least that abandonment of service will be limited to areas not harmful to the public interest.[9]

The ICC is often faced with the choice of either permitting necessary service to be terminated, or requiring a carrier to operate while sustaining losses. The creditors of the financially ailing, if not insolvent, railroads are forced to watch their investment diminish if unprofitable service is continued. If the carrier is in section 77 reorganization, the bankruptcy court, subject to regulatory limitations of its equitable powers,[10] must resolve the dilemma

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4%, and a decrease in the GNP for the Nation as a whole of 2.7% after the eighth week of such a shut-down." Id. at 3248.

5. The term "reorganization" is used in railroad bankruptcy proceedings because, as a public utility, a railway cannot be liquidated in the ordinary way, and it "can not be divided up and disposed of piecemeal like a stock of goods. . . . Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest [and thus] reorganization was evidently regarded as the most feasible solution" in railroad bankruptcy proceedings. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 671-72 (1935).

6. U.S. Const., amend. V, states "nor shall private property be taken for public use, without just compensation."

7. The Interstate Commerce Commission, created by the Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, was given power to regulate the flow of commerce between the states. With respect to railroad regulation, the power was primarily one of regulation of rates. The regulation of carrier abandonments and extensions of service was not vested in the Commission until the Transportation Act of Feb. 28, ch. 91, 1920, 41 Stat. 456, 477-78. The regulation of interstate passenger train service terminations was put into the hands of the ICC in 1958. Pub. L. No. 85-625, 72 Stat. 568, 571-72. See Thoms, End of the Line, 15 Loyola L. Rev. 263 (1969).

8. See 49 U.S.C. § 1(5) (1970). The provisions on regulation of railroad rates have been amended somewhat by the 1976 Rail Act § 202, 90 Stat. 34-36. See notes 130-33 infra and accompanying text.

9. See 49 U.S.C. § 1(18) (1970), as amended by the 1976 Rail Act § 801, 90 Stat. 125-27, and 49 U.S.C. § 1a, added by the 1976 Rail Act § 802, 90 Stat. 127-30.

10. Note that even the part of section 77 of the Bankruptcy Act which deals with abandonment by bankrupt carriers, 11 U.S.C. § 205(o) (1970), restricts the use of abandonment to lines which would not "unduly or adversely [affect] the public interest," and then only with the

presented by these conflicting private rights and public needs. This Comment offers a historical analysis of the problems financially troubled railroads face in attempting to terminate unprofitable operations. In addition to analyzing the case law, this Comment will discuss the recent attempts by Congress to legislate solutions of this continuing problem.

II. ABANDONMENTS DISTINGUISHED FROM OTHER TYPES OF SERVICE DISRUPTIONS

Presumably, one of the most effective ways for a railroad to improve its financial position would be for it to eliminate service over unprofitable portions of track. To indefinitely or permanently cease service of all, or a portion of a carrier's trackage constitutes an *abandonment*,[11] and abandonments by interstate carriers are illegal without ICC approval.[12] It is important to recognize that not all stoppages of service constitute abandonments. For example, if a section of track were made impassable by a flood, or other condition beyond the carrier's control, making it necessary to suspend service, this would constitute an *embargo*.[13] A carrier does not need ICC approval to embargo service.[14] The basic distinction between an abandonment and an embargo lies in the intent of the railroad.[15] If the carrier's action enables a court to conclude that the service termination is not "beyond the control of the railroad,"[16] the court can find a *de facto* abandonment as a matter of law, and compel operation until ICC approval is granted.[17]

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approval of the ICC. See also Palmer v. Massachusetts, 308 U.S. 79 (1939), in which the Supreme Court noted that "the authority of the [bankruptcy] court is intertwined with that of the [ICC]." Id. at 87. See also notes 108-115 infra and accompanying text.

11. Although the statutes do not define the term "abandonment," the case law has developed this definition. See I.C.C. v. Chicago & N.W. Transp. Co., 533 F.2d 1025, 1028 (8th Cir. 1976), citing I.C.C. v. Maine Cent. R.R., 505 F.2d 590, 593 (2d Cir. 1974) and I.C.C. v. Chicago, R.I. & P.R.R., 501 F.2d 908, 911 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

12. Abandonments were illegal under 49 U.S.C. § 1(18) (1970) and could be enjoined under 49 U.S.C. § 1(20) (1970). Although the regulatory scheme has been amended somewhat by the 1976 Rail Act, abandonments still require ICC approval and illegal abandonments may be enjoined. 1976 Rail Act §§ 801-02, 90 Stat. 125-30.

13. The term "embargo" is not defined by statute but by case law. See I.C.C. v. Baltimore & A.R.R., 398 F. Supp. 454, 462 (D. Md. 1975), aff'd mem., 537 F.2d 77 (4th Cir.), cert. denied, 97 S. Ct. 159 (1976). See also cases cited in note 11 supra, upon which reliance was placed in the present case.

14. The requirements for establishing an embargo are set forth in 49 C.F.R. § 1006 (1976). The embargo is executed by filing notice with the ICC, and giving general public notice. Id. § 1006.1. Note that once the embargo is in effect, the ICC still has the power to determine its reasonableness. I.C.C. v. Chicago & N.W. Transp. Co., 533 F.2d 1025, 1027 n.2 (8th Cir. 1976).

15. I.C.C. v. Chicago, R.I. & P.R.R., 501 F.2d 908, 911 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975). Embargos were sustained in Myers v. Arkansas & O. Ry., 185 F. Supp. 36, 41 (W.D. Ark. 1960) (flood damage), and in Zirn v. Hanover Bank, 215 F.2d 63, 69 (2d Cir. 1954) (lack of equipment).

16. I.C.C. v. Baltimore & A.R.R., 398 F. Supp. 454, 463 (D. Md. 1975), aff'd mem., 537 F.2d 77 (4th Cir.), cert. denied, 97 S. Ct. 159 (1976).

17. Id. at 464.

The difficulty in distinguishing between an embargo and an abandonment arises in situations where the carrier has, over the years, neglected a section of track, while still providing service over it. Typically, some event makes the track unusable, and the carrier fails to make necessary repairs. This deliberate policy of neglecting track maintenance is responsible for much of the resulting damage. Universally, in such cases the courts have found an abandonment.[18] The courts will permit the carrier to embargo service as long as the carrier is making reasonable efforts to restore the disrupted service.

It might be argued that a suspension of service resulting from the deteriorating financial condition of a railroad could give rise to a permissible embargo with service remaining suspended until the railroad could find the requisite funding to continue operation. This was the railroad's contention in *Meyers v. Jay Street Connecting Railroad,*[19] where the carrier applied for ICC approval to abandon all its service. When no immediate decision was forthcoming, the financially deteriorating railroad announced that it would embargo all service.[20] The plaintiff shippers obtained an injunction against the railroad,[21] and the Second Circuit, finding no difference between this so-called "embargo" and a complete abandonment of service, held that statutory provisions against abandonments without ICC approval were applicable.[22] Therefore, it is clear that the use of an embargo where the disruption of service is related to long-range financial decline is not feasible. Hence, financially troubled lines are forced to seek relief in the abandonment procedure.

III. The Development of the Case Law

A. *The* Brooks-Scanlon *Doctrine*

Initially, the Supreme Court developed a line of cases which offered railroads some relief from the burdens of unprofitable service. The first of these cases, *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*,[23] involved an appeal from a judgment of the Supreme Court of Louisiana which upheld an order by the Louisiana Railroad Commission compelling the carrier to continue operations. The Louisiana court noted that the enterprise, taken as a whole, was profitable, and observed that one branch of a business

18. This fact pattern was present in I.C.C. v. Chicago & N.W. Transp. Co., 533 F.2d 1025 (8th Cir. 1976) (cessation of service solely because the tracks failed to meet minimum federal safety requirements held to constitute a de facto abandonment). Accord, I.C.C. v. Maine Cent. R.R., 505 F.2d 590 (2d Cir. 1974) (failure to repair rain damage within a reasonable time); I.C.C. v. Chicago, R.I. & P.R.R., 501 F.2d 908 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1976) (cessation of service due to improper track maintenance); I.C.C. v. Baltimore & A.R.R., 398 F. Supp. 454 (D. Md. 1975), aff'd mem., 537 F.2d 77 (4th Cir.), cert. denied, 97 S. Ct. 159 (1976) (suspension lasted beyond the time in which the carrier could have reasonably repaired hurricane damage).

19. 259 F.2d 532 (2d Cir. 1958).

20. Its current liquid assets were estimated to be about $400. Id. at 534.

21. Id.

22. Id. at 535.

23. 251 U.S. 396 (1920).

might be compelled to operate at a loss if the entire business remained profitable.[24] The Supreme Court reversed, holding that "[a] carrier cannot be compelled to carry on even a branch of [its] business at a loss, much less the whole business of carriage."[25] In *Brooks-Scanlon*, the plaintiff never petitioned the state commission for permission to discontinue its railroad service. The Louisiana court held that this inaction left the courts without jurisdiction to deal with the subject.[26] However, the Supreme Court rejected this idea, stating that "the forms required by the local law . . . cannot give the Court or Commission power to do what the Constitution of the United States forbids . . . ."[27]

The *Brooks-Scanlon* reasoning was followed in other cases. In *Bullock v. Railroad Commission of Florida,*[28] the Florida state regulatory agency sought to compel the operation of a foreclosed railroad. The Supreme Court held that this would impose an unfair burden upon the railroad's creditors, observing that investors in a railroad, albeit a public utility, cannot be expected to continue suffering losses if there is no reasonable prospect of future profitable operation.[29]

An argument consistently made in opposition to the termination of railroad services is that the creditors of the carrier, by choosing to invest in a public utility, undertook the risk that there would be continued unprofitable operation and that their rights would be secondary to the public interest. In *Railroad Commission of Texas v. Eastern Texas Railroad,*[30] the Supreme Court rejected this argument, observing that a railroad does not irrevocably devote its property to the public use. Rather, it is in the expectation that the public will patronize the service sufficiently to assure a reasonable rate of return that the service is provided.[31] Hence, continued forced operation at a

24. Brooks-Scanlon Co. v. Railroad Comm'n, 144 La. 1086, 1096, 81 So. 727, 730 (1919), rev'd, 251 U.S. 396 (1920).

25. 251 U.S. at 399, citing Northern Pac. Ry. v. North Dakota, 236 U.S. 585 (1915), and Norfolk & W. Ry. v. West Virginia, 236 U.S. 605 (1915).

In Northern Pacific, the issue raised was whether the state must impose as part of its railroad rate structure uniform rates of return. The Supreme Court held this was not necessary, but also noted that "[t]he public interest cannot be invoked as a justification" for imposing unreasonable burdens on the carrier. 236 U.S. at 595. Arbitrary regulation cannot be justified on the basis of " 'a declaration of public policy.' " Id. at 598.

The Court in Norfolk and Western held that a carrier cannot be compelled to operate at rates below cost. In that case, the state of West Virginia tried to impose passenger rates which would make it unprofitable to carry passengers. The Court held that such a rate structure would constitute confiscation without just compensation under the fourteenth amendment.

26. 144 La. at 1096, 81 So. at 730.

27. 251 U.S. at 400.

28. 254 U.S. 513 (1921).

29. Id. at 520-21. Here, in dicta the Court suggested that if a railroad were to decide that its operation was a failure, it should not petition the state for the right to cease operations. Rather, it should just stop running, as it could do so without the permission of the state. To compel it to continue operation would amount to an unconstitutional taking. Id. at 521.

30. 264 U.S. 79 (1924).

31. Id. at 85.

loss constitutes a public taking without just compensation, and although a state reserves the right to regulate a carrier in the public interest, the railroad may withdraw from public service if the service can only be continued at a loss.[32]

These cases have never been overruled and are still cited as good law today.[33] The point they make is quite explicit. Where continued operation erodes the creditor's estate, such continued operation cannot be constitutionally compelled.

B. *The* Radford-Continental Illinois *Distinction*

In *Louisville Joint Stock Land Bank v. Radford*,[34] the Supreme Court held that the bankruptcy power of Congress is subject to the fifth amendment.[35] *Radford* dealt with the constitutionality of the Frazier-Lemke Act, which permitted a moratorium on farm mortgage claims. The Court found that the mortgagees were unprotected as prior liens were allowed to accumulate,[36] eroding the creditors' interests in violation of the fifth amendment.

Where the delay in repayment would not affect the likelihood that the creditors would be repaid, the Supreme Court has said that the delay would not raise any fifth amendment problem. In *Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island, & Pacific Railway*,[37] the Court was presented with a question concerning a railroad in section 77 reorganization. The bankruptcy court issued a decree enjoining a number of creditors from selling collateral which the debtor railroad had pledged as security for its loans.[38] However, the collateral securing the notes was worth more than the face value of the notes, and the creditors were in no real danger of not being paid.[39] The Court upheld the moratorium because the liens were not impaired, and it did no more than temporarily suspend enforcement.[40]

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32. Id. at 85-86.

33. See, e.g., Lehigh & N.E. Ry. v. I.C.C., 540 F.2d 71, 82 (3d Cir. 1976), cert. denied, 97 S. Ct. 784 (1977) (discussed at notes 123-28 infra and accompanying text); In re Erie Lackawanna Ry., 517 F.2d 893, 898 (6th Cir. 1975); In re Central R.R. of N.J., 485 F.2d 208, 213 (3d Cir. 1973), cert. denied, 414 U.S. 1131 (1974) (discussed at notes 108-15 infra and accompanying text).

34. 295 U.S. 555 (1935).

35. Id. at 589.

36. Id. at 582.

37. 294 U.S. 648 (1935).

38. Id. at 664-65.

39. See id. at 658-59. Notes totaling $17,784,877.58 were secured by collateral worth $56,111,465.85. Id.

40. Id. at 676-77. Subsequent courts have held that a mortgagee could be constitutionally required to release some of the mortgaged funds in exchange for additions or improvements to the creditors' estate, in certain circumstances. See Third Ave. Transit Corp. v. Lehman, 198 F.2d 703 (2d Cir. 1952) (permitting $500,000 to be drawn from the mortgaged funds for working capital in exchange for an interest bearing certificate). Compare Central R.R. of N.J. v. Manufacturers Hanover Trust Co., 421 F.2d 604 (3d Cir. 1970) (compulsory withdrawal of $408,000 from bondholders' account to repair damaged bridge improper without some obligation to repay being imposed). Hence, these cases show that the courts are willing to retain the

It is important to note that in *Continental Illinois* the bankruptcy court concluded that the carrier was reorganizable on an income basis; that is, its operating revenue was sufficient to meet operating costs. The railroad had slipped into reorganization because of its heavy fixed debt, which, if revised, would allow resumption of profitable operations. Hence, in *Continental Illinois*, the problem of carriers which lose money on day-to-day operations was not considered. Where continued operations result in a loss, and subsequent diminution of creditors' interests, reliance upon *Continental Illinois* may be misplaced.

C. *The* New Haven *Line of Cases*

The litigation involving the New York, New Haven, and Hartford Railroad (New Haven) gives some insight into the continuing viability of the *Brooks-Scanlon* doctrine and the *Radford-Continental Illinois* distinction. On July 7, 1961, the New Haven petitioned for section 77 reorganization in the United States District Court for the District of Connecticut. The railroad's financial situation was precarious, and the trustees were forced to borrow funds to meet the payroll.[41] The carrier's situation "did not improve with the passage of time,"[42] and by the end of 1965, the railroad "was on the verge of collapse."[43] On October 11, 1965, the trustees of the New Haven petitioned the ICC to discontinue all interstate passenger train service on March 1, 1966.[44] Such a plan would have had the effect of virtually eliminating the carrier's large commuter rail service. Although the ICC granted the trustees' request for the elimination of some trains, service was ordered continued through the end of 1966, since the Commission noted the public dependence upon New Haven service.[45] Nonetheless, the carrier's financial position continued to deteriorate to the point where it faced imminent shutdown.[46]

At the same time the Pennsylvania and the New York Central railroads

distinction between a mere postponement of the creditors' claims and a potential diminution of the creditors' estate.

41. New Haven Inclusion Cases, 399 U.S. 392, 403-04 (1970).

42. Id. at 404.

43. Id. at 405.

44. Id. at 406.

45. New York, N.H. & H.R.R., Discontinuance of All Interstate Passenger Trains, 327 I.C.C. 151, 224-25 (1966).

46. New Haven Inclusion Cases, 399 U.S. 392, 407 (1970), citing Pennsylvania R.R.—Merger—New York Central R.R., 331 I.C.C. 643, 653 (1967) ("Second Supplemental Report"). The interim operation of New Haven service between the end of 1968 and the time of the Pennsylvania-New York Central merger was to be financed in part by a loan from the Pennsylvania and New York Central railroads to the New Haven trustees. 331 I.C.C. at 702, 743. Through the use of a loan, rather than a lease of New Haven property to the Pennsylvania and New York Central urged by the bondholders, the estate continued to be eroded through 1967 and 1968 as the bondholders absorbed losses. New notes were given prior claim over the old notes. The ICC, adhering to its usual position that the bondholders, by choosing to invest in a railroad, were forced to absorb any losses sustained in the public interest, did not find merit in the bondholders' claims. Id. at 703-07. See also Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25, 53-63 (1968) ("Fourth Supplemental Report").

sought ICC approval for their proposed merger. The ICC conditioned the merger on the inclusion of the New Haven railroad.[47] The merger plan was approved in 1967 by the ICC[48] and certified to the New Haven bankruptcy court in 1968.[49] The bondholders immediately raised their objections to the ICC plan, partly on the ground of insufficient valuation of New Haven properties in determining the Penn Central purchase price, and also on the ground that continued, forced deficit operation of the New Haven in the public interest constituted a taking of the creditors' property without just compensation.[50] The court recognized that it could not determine precisely the extent to which the bondholders' interests could be constitutionally invaded to maintain railroad operations pending reorganization.[51] Nevertheless, it found that "the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property . . . without just compensation . . . and is therefore constitutionally impermissible. . . ."[52] The bankruptcy court concluded that *Continental Illinois* was limited to situations in which the bondholders' estate is not being eroded by operating expenses. In the New Haven situation, continued operations were clearly eroding the bondholders' estate, and the bankruptcy court was willing to put a limit on the period of time in which the erosion would be allowed to continue.[53]

A strict interpretation of *Brooks-Scanlon* and *Continental Illinois* would have given the court the power to authorize immediate termination of service. However, the bankruptcy court was willing to compel service for a reasonable time in order to allow completion of merger plans. Nevertheless, the court indicated a willingness to end service, irrespective of the public need, at a later date.[54]

A service termination was avoided when the newly-merged Penn Central took over the New Haven operations on December 31, 1968.[55] In 1969, a revised ICC plan was submitted to the bankruptcy court, and again the bondholders objected on the same grounds. Action was also commenced in the Southern District of New York on the revaluation issue. Again, the bankruptcy court adhered to the *Brooks-Scanlon* and *Continental Illinois* viewpoint. It specifically repudiated the ICC contention that *Brooks-Scanlon* was overruled, holding that it and subsequent cases "are still applicable and determinative,"[56] and that any further erosion of the debtor's estate would be

47. Pennsylvania R.R.—Merger—New York Central R.R., 327 I.C.C. 475, 524 (1966).

48. Pennsylvania R.R.—Merger—New York Central R.R., 331 I.C.C. 643, 742-44 (1967) ("Second Supplemental Report").

49. In re New York, N.H. & H.R.R., 289 F. Supp. 451, 453 (D. Conn. 1968).

50. Id. at 453-54.

51. Id. at 459.

52. Id.

53. Id. at 460.

54. Id. at 458-59.

55. New Haven Inclusion Cases, 399 U.S. 392, 416 (1970).

56. In re New York, N.H. & H.R.R., 304 F. Supp. 793, 804 (D. Conn. 1969), aff'd in part and vacated and remanded in part sub nom. New Haven Inclusion Cases, 399 U.S. 392 (1970).

violative of the fifth amendment.[57] On this issue, and on the issue of valuation of the New Haven's assets, the case was appealed to the Supreme Court.

The Supreme Court noted that the value of the bondholders' interests had been greatly depressed by the continued deficit operations,[58] but held that there was "no constitutional bar to that result. The rights of the bondholders are not absolute."[59]

The fundamental issue raised by *New Haven* is whether or not the *Brooks-Scanlon* line of cases was overruled. It has been suggested that the language used in *New Haven* dealt a death blow to the takings clause of the fifth amendment, at least where public transportation is concerned.[60] In this regard, *New Haven* might better be confined to its facts. Its result can be rationalized on the theory that the public interest in maintaining service was so compelling that the traditional dogma of creditors' rights was simply unworkable. Nevertheless, *New Haven* represents a distinct break with the traditional view of creditors' rights in rail reorganizations. Despite the Court's reliance on *Continental Illinois,*[61] it is clear that in *New Haven* there was significant erosion of the creditors' estate not present in *Continental Illinois*. Both *Continental Illinois* and *Reconstruction Finance Co. v. Denver & Rio Grande Western Railroad*, relied upon by the *New Haven* Court as support for limiting the bondholders' fifth amendment rights,[62] involved different circumstances, namely, carriers which were able to provide day-to-day service

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57. 304 F. Supp. at 801. The ICC order in question here would have continued the operating losses to be imposed upon the bondholders of the New Haven from the reorganization in 1961 through the end of 1968. Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25 (1968) ("Fourth Supplemental Report"). The reorganization court estimated the losses as in excess of $60 million. 304 F. Supp. at 800.

58. New Haven Inclusion Cases, 399 U.S. 392, 490 (1970).

59. Id. at 491. The Court relied upon the Penn-Central and N & W Inclusion Cases, 389 U.S. 486 (1968), which said: "[t]he public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders . . . ." 389 U.S. at 511. The Court in New Haven also relied upon Reconstruction Fin. Corp. v. Denver & R.G.W.R.R., 328 U.S. 495, 535-36 (1946), in which it held that while the bondholders cannot be called upon to sacrifice their property in order that a "depression-proof" railroad be created, those who chose to invest in a public utility have undertaken an obligation to the public, assuming the risk that the public interest will weigh heavily in railroad reorganizations.

This reasoning is similar to the ICC rationale in Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25, 55-56 (1968) ("Fourth Supplemental Report"), wherein the ICC stated that Brooks-Scanlon was overruled sub silentio by Colorado v. United States, 271 U.S. 153 (1926). This contention was flatly rejected by the District Court. In re New York, N.H. & H.R.R., 304 F. Supp. 793, 803 (D. Conn. 1969), aff'd in part and vacated and remanded in part sub nom. New Haven Inclusion Cases, 399 U.S. 392 (1970). The Supreme Court in New Haven cited neither Colorado nor any of the Brooks-Scanlon line of cases.

60. See Note, Takings and The Public Interest in Railroad Reorganization, 82 Yale L.J. 1004, 1021-22 (1973).

61. See 399 U.S. at 490-91.

62. See note 59 supra.

without a loss. In the New Haven situation, heavy losses occurred each day the railroad operated.

IV. The Statutory Response

A. *The Rail Passenger Service Act of 1970*

Based upon the assumption that "modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system [and] that the public convenience and necessity require the continuance and improvement of such service,"[63] Congress, in 1970, passed the Rail Passenger Service Act.[64] The Act set up a public corporation to operate the nation's long-distance passenger lines[65] (Amtrak). The nation's railroads joined this service voluntarily[66] and paid a fee to do so.[67] All but four of the nation's passenger carriers joined.[68]

This Act provided that unless a carrier chose to join Amtrak it could not "discontinue any intercity passenger train whatsoever prior to January 1, 1975."[69] The apparent purpose of this provision was to coerce carriers into joining the Amtrak system, since joining Amtrak would eliminate future intercity passenger service losses. However, not joining would cut off the usual means of discontinuing passenger service through ICC approval for more than four years. One commentator noted that this provision would probably be unconstitutional were it not for the *New Haven* precedent.[70]

63. Rail Passenger Service Act of 1970, § 101, 45 U.S.C. § 501 (1970).

64. Rail Passenger Service Act of 1970, 84 Stat. 1328 (codified at 45 U.S.C. §§ 501-644 (1970)) [hereinafter cited as 1970 Rail Act].

65. 1970 Rail Act § 301, 45 U.S.C. § 541 (1970). The Act deals only with long-distance passenger service; it is not concerned with commuter rail service, defined as "characterized by reduced fare, multiple-ride and commutation tickets." Id. § 102, 45 U.S.C. § 502 (Supp. V, 1975). By this limitation, the Act is of limited impact on many of the Northeast corridor carriers, such as the Penn Central, Erie Lackawanna, and Central Railroad of New Jersey, whose losses are in large part the result ot their commuter rail service, which would not be assumed by Amtrak.

66. 1970 Rail Act § 401(a)(1), 45 U.S.C. § 561(a)(1) (Supp. V, 1975). Any railroad which joined Amtrak was free to terminate its long-distance passenger service, provided notice of termination was given in accordance with 49 U.S.C. § 13(a)(1) (1970).

67. The fee was based upon the carrier's 1969 passenger service losses—the greater the loss, the higher the fee. 1970 Rail Act § 401(a)(3), 45 U.S.C. § 561(a)(3) (1970).

68. The four carriers which had intercity rail passenger service and did not choose to join Amtrak were the Southern Railway, the Georgia Railroad, the Denver and Rio Grande Western Railroad, and the Chicago, Rock Island, and Pacific Railroad. Only the Southern provided any significant service.

69. 1970 Rail Act § 404(a), 45 U.S.C. § 564(a) (1970). In the original Act, the service assumed by Amtrak need be continued only through July 1, 1973. This date has been subsequently changed. 1970 Rail Act § 404(b)(1), 45 U.S.C. § 564(b)(1) (1970), as amended, 45 U.S.C. § 564(b)(1) (Supp. V, 1975).

70. See Note, Takings and the Public Interest in Railroad Reorganization, 82 Yale L.J. 1004, 1021 (1973). Another commentator has said: "[t]he penalty for non-participation is continuance of service until 1975, regardless of public need, which raises questions of confiscation. However, the precedents for 'mixed' governmental-private enterprise consortia are too well-established for this

However, the time during which this provision was in force passed without direct challenge.[71]

A related issue was raised in *In re Penn Central Transportation Co.*[72] In that case, bondholders objected to Penn Central's inclusion in the Amtrak system because the bankrupt railroad would be worth more at liquidation value than as a going concern under Amtrak.[73] Recognizing that "the validity of these provisions may be open to question,"[74] the court noted that the trustees could not sustain the huge intercity passenger service losses which would continue if they were forced to litigate.[75] The court's opinion was replete with public policy considerations, and it noted that "[c]learly, every effort should be made to avoid frustrating at the outset this important step toward implementation of such a policy."[76]

Amtrak represented a bold and positive step toward relieving the nation's rail carriers of one of the most financially burdensome portions of their operations—long-distance passenger service. Yet, the provisions dealing with the railroad's right to terminate service are troubling, and little relief from interim erosion of the creditor's interest during reorganization was forthcoming.

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particular issue to impede AMTRAK." Thoms, Amtrak: Rail Renaissance or Requiem?, 49 Chi.-Kent L. Rev. 29, 52 (1972).

71. This is not really so surprising. The ones most likely to raise a challenge to this provision would be one of the four carriers which did not join the Amtrak system, and wished to terminate their service prior to 1975. The largest of the four carriers, the Southern Railway, maintained control over its own passenger service since it operated "showcase" trains as part of its public relations program. See "Highballing Along: The Southern Railway Shows a Modern Road Can Cut Costs, Succeed," Wall St. J., Aug. 30, 1976, at 1, col. 6.

The other three carriers did not join Amtrak because they would have had to pay a high entry fee or found restrictive Amtrak regulations objectionable. See Thoms, Amtrak: Rail Renaissance or Requiem?, 49 Chi.-Kent L. Rev. 29, 49-50 (1972).

After the passage of the 1975 deadline, only the Southern immediately petitioned the ICC for a right to discontinue some of its passenger service. It was given permission to discontinue two of its eight daily trains, and to reduce service on two others. Southern Ry. Co. Changes in Train Service on Trains Nos. 1 and 2, Between Atlanta, Ga. and Birmingham, Ala., 348 I.C.C. 225 (1975).

72. 329 F. Supp. 477 (E.D. Pa. 1971).

73. Id. at 480. "Liquidation value" refers to the value of a railroad's property and real estate if service were terminated and the property sold. "Going concern value" refers to the value of the property as an operating railroad. In this case, the bondholders are complaining that if the Penn Central joins Amtrak, this would impose upon the carrier the (then) lower, "going concern value," as the Amtrak contract presupposes continued railroad operations over the property.

74. Id. at 479.

75. Id.

76. Id. Along these lines the court noted that the Penn Central trains comprise 70% of the trains to be operated by Amtrak and "[w]ithout Penn Central's participation, it would obviously be difficult, if not impossible, for Amtrak to function. It is generally recognized that there is a crying need in this country for a rational unified policy in transportation matters, on a national basis." Id.

B. *The Regional Rail Reorganization Act of 1973*

1. The Structure of the Act

The first comprehensive attempt to deal effectively with the problems of the insolvent Northeast railroads occurred with the passage of the Regional Rail Reorganization Act of 1973 (1973 Rail Act).[77] The declared purpose of this Act was "to salvage the rail services operated by seven insolvent class I railroads in the Midwest and Northeast region of the Nation, which are threatened with cessation, by replacing them with a new and viable rail services system."[78] The Rail Act did not merely subsidize the ailing roads but created an entirely new hierarchy for both ownership and management of much of the regional rail system. The Act created three new organizations: (1) the United States Railway Association, whose function was to formulate the final system plan and issue obligations for its financing;[79] (2) the Consolidated

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77. 1973 Rail Act, 45 U.S.C. §§ 701-41 (Supp. V, 1975). This Act was not Congress' first response to the Northeast rail crisis. It had previously enacted the Emergency Rail Services Act of 1970, Pub. L. No. 91-663, 84 Stat. 1975 (codified at 45 U.S.C. §§ 661-69 (1970)), which authorized the Secretary of Transportation to guarantee up to $125 million in certificates issued by the trustees of railroads in section 77 reorganization. The amount of money authorized in the Act exemplifies its limited scope. It is estimated that the Penn Central alone lost $851 million between the time if filed for reorganization in 1970 and the end of 1973. See Connecticut Gen. Ins. Co. v. United States Ry. Ass'n, 383 F. Supp. 510, 523 (E.D. Pa.), rev'd sub nom. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). While the Penn Central is the largest of the reorganization railroads, there are six other major carriers in reorganization in the Northeast, and it is clear that simple aid or loan guarantee formulas are not the solution to the crisis.

78. S. Rep. No. 601, 93d Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3242 (1973). The ICC classifies railroads as either class I or class II roads. Class I railroads are those which have at least $5 million in annual revenue. At the time of the passage of the 1973 Rail Act, all class I railroads in reorganization (seven) were under the auspices of the Act. In 1975 another class I railroad, the Chicago, Rock Island, and Pacific, filed for section 77 reorganization. See Chicago, R.I. & P.R.R. v. Atchison, T. & S.F. Ry., 537 F.2d 906 (7th Cir. 1976), cert. denied, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977).

79. 1973 Rail Act §§ 201-02, 45 U.S.C. §§ 711-12 (Supp. V, 1975). The preparation of the final system plan is to be achieved through surveys and analysis of existing rail service and traffic patterns, in an attempt to determine present and future rail needs.

The provision describing and outlining the structure and purpose of the final system plan is section 206 of the Act, 45 U.S.C. § 716 (Supp. V, 1975). The goals of the plan include "the creation, through a process of reorganization, of a financially self-sustaining" rail service system, the establishment of service adequate to meet the needs of the region, the improvement of high-speed passenger service in the Northeast corridor, the preservation of spur and terminal routes where possible, the protection of existing track in areas of natural resources (e.g., coal mining regions), making rail service competitive with other modes of transportation, meeting environmental standards, maintaining safety standards, protecting, where needed, short-distance and commuter rail services, and minimizing job losses in the reorganization. 1973 Rail Act § 206(a), 45 U.S.C. § 716(a) (Supp. V, 1975).

Another purpose of the plan is to designate which rail properties are to be included in the plan, which will be operated by the Consolidated Railway Corporation (Conrail), and which will be operated by an existing, profit-making carrier. 1973 Rail Act § 206(c), 45 U.S.C. § 716(c) (Supp. V, 1975). The final system plan will also determine the structure of Conrail, id. § 206(d), 45

Railway Corporation (Conrail), a for-profit corporation designed to acquire track and operate service over the routes designated in the final system plan;[80] and (3) the Rail Services Planning Office of the ICC, which would hear suggestions of interested parties, set standards for terms used throughout the Act, and assist the states in planning support for local rail services.[81]

The statute calls for an implementation timetable.[82] Conveyance of property by the reorganization railroads to Conrail is mandatory[83] and is compensated only by Conrail securities.[84]

Termination and abandonment of service by the reorganization carriers is governed by section 304 of the Act. If the carrier has substantially complied with the Act and has conveyed all or most of its property included in the final system plan to Conrail, it may take advantage of expedited termination procedures.[85]

U.S.C. § 716(d) (Supp. V, 1975), and the value of property conveyed to it. Id. § 206(f), 45 U.S.C. § 716(f) (Supp. V, 1975). The final system plan took effect on April 1, 1976. See N.Y. Times, Apr. 1, 1976, at 43, col. 3.

80. 1973 Rail Act §§ 301-04, 45 U.S.C. §§ 741-44 (Supp. V, 1975). The duties of Conrail are laid out in section 302 of the Act, 45 U.S.C. § 742 (Supp. V, 1975), and include acquiring, maintaining, and rehabilitating rail properties designated under the final system plan and conveyed to it. The provision that Conrail be a "for-profit" corporation is found in 1973 Rail Act § 301(b), 45 U.S.C. § 741(b) (Supp. V, 1975).

81. 1973 Rail Act § 205, 45 U.S.C. § 715 (Supp. V, 1975). The local assistance is in the form of rail service continuation subsidies, governed by Section 402 of the Act, 45 U.S.C. § 762 (Supp. V, 1975). The purpose of this section is to provide assistance to the Northeastern states in order to facilitate continuation of desirable service on track not included in the final system plan. The funds to be expended by the federal government under this section shall not exceed $90 million in each of the first two years after the effective date of the final system plan. 1973 Rail Act § 402(i), 45 U.S.C. § 762(i) (Supp. V, 1975). Under the provisions of section 402, 45 U.S.C. § 762 (Supp. V, 1975), the federal government may contribute up to 70% of the subsidy, with the state governments providing the remainder. The subsidy to be provided shall cover costs of operating adequate and efficient rail service, including maintenance and improvement of track, in accordance with the standards for compensation set by the Rail Services Planning Office under section 205(d)(3) of the 1973 Rail Act, 45 U.S.C. § 715(d)(3) (Supp. V, 1975). See also S. Rep. No. 601, 93d Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3242, 3277-79 (1973).

82. 1973 Rail Act §§ 207-08, 45 U.S.C. §§ 717-18 (Supp. V, 1975). See Note, Regional Rail Reorganization Act of 1973: Was Congress on the Right Track?, 49 St. John's L. Rev. 98, 107 n.59 (1974).

83. 1973 Rail Act § 206(d)(1), 45 U.S.C. § 716(d)(1) (Supp. V, 1975).

84. Id.

85. 1973 Rail Act § 304, 45 U.S.C. § 744 (Supp. V, 1975). Notice must be given to the governor and transportation agencies of the states and regions affected, as well as to shippers or potential shippers who depend upon, or are located near the service to be terminated. The notice must be given no sooner than 30 days after the effective date of the final system plan, and service discontinuance must not occur within 60 days of the notice. 1973 Rail Act § 304(a), 45 U.S.C. § 744(a) (Supp. V, 1975). Abandonment can occur no sooner than 120 days after the service termination. Id. § 304(b), 45 U.S.C. § 744(b) (Supp. V, 1975). These simplified abandonment procedures may be utilized for up to two years after the effective date of the final system plan, or up to two years after the final payment is made under a rail services continuation subsidy, whichever is later. Id. § 304(c)(1), 45 U.S.C. § 744(c)(1) (Supp. V, 1975).

Since the final system plan would not go into effect immediately,[86] assurance of continued, uninterrupted rail service was necessary. Congress had a choice here: (1) it could follow the case law of *Brooks-Scanlon* and *Continental Illinois*, which recognized that carriers could not be compelled to operate indefinitely at a loss without compensation, and therefore, could either subsidize the carriers or could include these interim losses in the purchase price to be paid by Conrail; or (2) it could rely upon *New Haven* and adopt the position that interim erosion of the bondholders' estate is constitutionally permissible. Congress chose the latter option, and section 304(f) of the 1973 Rail Act not only precluded the carriers from recovering their interim losses but also foreclosed to them the usual abandonment option by removing ICC jurisdiction over abandonments under this reorganization plan.[87]

2. The Resulting Litigation

Shortly after enactment, bondholders of the Penn Central Railroad commenced an action to enjoin implementation of certain provisions of the Act.[88] Specifically, they challenged as offensive to procedural due process the Act's requirement that they be paid in securities, rather than in cash, for property conveyed to Conrail.[89] They also challenged section 304(f) of the Act which failed to compensate the creditors for the interim deficit operation of the railroad pending implementation of the final system plan.[90] The court dis-

86. The Act went into effect January 2, 1974. Under §§ 207-08 of the Act, 45 U.S.C. §§ 717-18 (Supp. V, 1975), the United States Railway Association had 420 days in which to promulgate a final system plan. The plan was presented to Congress on July 26, 1975, and went into effect early in 1976 when Congress failed to affirmatively act against it. Hence, there was a span of more than two years between the effective date of the Act, and the conveyance of any rail property to Conrail.

87. 1973 Rail Act § 304(f), 87 Stat. 1008 (codified at 45 U.S.C. § 744(f) (Supp. V, 1975)) provides: "After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the [United States Railway] Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority." Id.

88. Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, 383 F. Supp. 510 (E.D. Pa.), rev'd sub nom. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

89. 1973 Rail Act § 206(d)(1), 45 U.S.C. § 716(d)(1) (Supp. V, 1975). See note 84 supra and accompanying text.

90. 383 F. Supp. at 513. Section 304(f) of the Act is discussed at note 87 supra and accompanying text. A third argument also alleged by the creditors was that the Act violates the geographical uniformity requirement of the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, because it does not apply equally to all regions in the nation, and set up special reorganization procedures for Northeast rail reorganization. The court essentially rejected this contention, noting that all class I railroads in reorganization at the time were covered by the Act, and all carriers under the Act would be treated equally. The court left open the question of whether or not a carrier not covered by the Act could successfully use this argument. 383 F. Supp. at 519-21. But see 383 F. Supp. at 533 (Fullam, J., concurring) in which the geographical uniformity clause objection was accepted as valid.

missed the first contention as premature because the final system plan was not in effect at the time of the action, and too many contingencies existed to decide whether or not this provision would expose the creditors to harm.[91] Hence, the court declined to entertain this issue until the mandatory conveyance to Conrail took place.

The court thought that the interim erosion issue was timely and in analyzing the problem, identified two separate considerations as significant: (1) does the Act, or some other source, intend to compensate for the interim erosion of the debtor's assets resulting from compulsory operation and (2) if there is no compensation, does the interim erosion of the creditors' estate result in a confiscatory taking of private property for public use in violation of the fifth amendment?

In discussing the first problem, the court found that the provisions of the Act itself do not offer any significant recovery for interim losses.[92] The court also concluded that there were no other adequate remedies at law. The United States Railway Association contended that although there was no other adequate remedy under the 1973 Rail Act, a suit could be brought for recovery in the Court of Claims under the Tucker Act.[93] The court concluded that the Tucker Act remedy was not the remedy intended as it was "persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act."[94]

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91. 383 F. Supp. at 517-18. The court noted that before the plaintiffs could be harmed by this provision the following must occur: (1) the Penn Central reorganization court decide that the carrier be reorganized under the Act; (2) the United States Railway Association adopt a final system plan and present it to Congress; (3) the conveyance to Conrail take place only at the direction of the Special Court after the payment of consideration by Conrail. Id. at 518.

92. 383 F. Supp. at 521. The 1973 Rail Act § 213(b), 45 U.S.C. § 723(b) (Supp. IV, 1974), as amended, 45 U.S.C. § 723(b) (Supp. V, 1975), authorized only $85 million for emergency assistance to the railroads. In fact, only $35 million of this sum was actually appropriated by Congress. Additionally, the 1973 Rail Act § 215, 45 U.S.C. § 725 (Supp. IV, 1974), as amended, 45 U.S.C. § 725 (Supp. V, 1975), authorized up to $150 million for the purpose of interim acquisition and maintenance of property which would eventually be conveyed to Conrail. No appropriations were made under this section. 383 F. Supp. at 522. It was generally agreed that unless these funds were immediately made available, a virtual impossibility, there would be significant erosion. Indeed, the funds, even if appropriated in toto, would have a minimal impact on the interim erosion. Id. at 522 n.16, 524.

93. 28 U.S.C. § 1491 (Supp. V, 1975). The Tucker Act confers upon the Court of Claims jurisdiction to render judgment upon any claim against the United States for damages not resulting in tort, based upon the Constitution, an Act of Congress, or a regulation of any executive department. Id.

94. 383 F. Supp. at 528-29. The court found thirteen sections of the 1973 Rail Act which repealed or made inapplicable laws or excluded jurisdiction of courts on subjects regulated by the Act. Other provisions of the Act specifically limited judicial review of determinations under the Act. See 383 F. Supp. at 527-28 n.26, quoting Penn Central Trustees' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, at 6-9. The basic analysis of the court is that since nowhere in the Act did Congress mention a Tucker Act remedy, Congress must have deemed the remedy to be either inadequate or inappropriate.

Finding no adequate remedy to compensate for the interim losses, the court determined that such losses would be constitutionally impermissible. In its conclusion, the court relied upon the analysis of the Penn Central bankruptcy court, noting that the date of unconstitutional erosion " 'is fast approaching, if it has not already arrived.' "[95] It found section 304(f) violative of the fifth amendment, and enjoined the United States Railway Association from enforcing the Act.[96]

On appeal, the Supreme Court consolidated the claims resulting from the 1973 Rail Act into one opinion. The decision in *The Regional Rail Reorganization Act Cases*[97] was contrary in almost every respect to the District Court opinion. While the District Court held that only the interim erosion issue was ripe for adjudication, the Supreme Court held that both the interim erosion and the conveyance taking issues were timely. The Court noted that despite the number of contingencies which would have to be met before the actual conveyance to Conrail would take place, these events were not optional, but mandated by law.[98] However, the Court hedged on the erosion issue, refusing to definitely conclude that section 304(f) was violative of the fifth amendment. It noted that while it had not been determined that erosion of the Penn Central estate had reached unconstitutional dimensions, the bondholders' interests had definitely been eroded through compelled, deficit operations.[99] If there were an unconstitutional diminution of the creditors' estate resulting from the implementation of the Rail Act, the Court held that the Tucker Act provided an adequate remedy.[100] The Court concluded that Congress never even considered this remedy because of its mistaken belief that the Rail Act provided adequate protection against an unconstitutional taking.[101]

Although the Court did not find it necessary to decide whether or not the interim erosion of the creditors' estate had reached unconstitutional dimensions, the language of the opinion suggests that there is a point at which interim erosion may no longer be constitutionally permissible.[102] Whether or not this point has been reached is a question of fact. The Court upheld the right of Congress to legislate such provisions as sections 303 and 304(f) of the Rail Act if there is adequate compensation for losses. This approach is different from the ICC approach that all interim losses sustained in the public interest are constitutionally permissible.[103] It also differs from a strict reading

95. Id. at 525, quoting In re Penn Central Transp. Co., 355 F. Supp. 1343, 1344 (E.D. Pa. 1973). The bankruptcy court in turn relied upon both the Brooks-Scanlon and the New Haven line of cases in supporting the idea that there are limits to serving the public interest which are constitutionally permissible. See 383 F. Supp. at 525 n.23 for a summary of these arguments.

96. 383 F. Supp. at 530.

97. 419 U.S. 102 (1974).

98. Id. at 140-48.

99. Id. at 123-24. The Court noted that interim losses pending good-faith efforts at reorganization in the public interest are constitutionally permissible. Id. at 122-23.

100. Id. at 136.

101. Id. at 128.

102. Id. at 124.

103. See note 59 supra, and notes 159-61 infra and accompanying text.

of *Brooks-Scanlon*, which would permit a carrier to withdraw from service when it no longer finds itself able to operate without sustaining a loss. The fundamental issue is whether or not this opinion represents a departure from *New Haven*. On one level, *New Haven* may be viewed as the most restrictive case in terms of creditors' rights. If such a reading is adopted, it would appear that the *New Haven* rationale is limited by *Regional Rail* to the most extreme circumstances. However, if the Court in *New Haven* merely held that there can be circumstances under which mandated deficit operations pending a good-faith effort at reorganization are permissible, *Regional Rail* is not inconsistent.

3. The Rail Act and Section 77 Reorganization

An important issue raised in *Regional Rail* is the relationship between the 1973 Rail Act, and section 77 of the Bankruptcy Act. The Supreme Court found that the Rail Act "supplemented" section 77.[104] This would indicate that the Rail Act is not inconsistent with former rail reorganization procedures. The salient portion of the Act in this area is section 207(b) which states that reorganization must proceed in accordance with the 1973 Rail Act unless the bankruptcy court finds that reorganization on an income basis within a reasonable time is possible, and that the public interest would be better served by reorganization outside the Rail Act.[105] The argument that this provision violates the geographical uniformity required by the bankruptcy clause of the Constitution[106] was rejected, because the Rail Act provisions applied to every carrier under reorganization and did not create a dual standard.[107]

It has been established that a reorganization court does not have the power to terminate unprofitable rail service without regulatory agency approval. In *In re Central Railroad of New Jersey*,[108] decided in 1973 before the implementation of the Rail Act, it was held that a bankruptcy court is not free to order a partial termination of rail service without regulatory agency approval.[109] The Third Circuit noted that section 77(o) of the Bankruptcy Act states that ICC approval is required for abandonment even by a carrier in reorganization if the agency has jurisdiction over the rail operations in question.[110] If a state agency exercises control over the carrier, this agency's approval is needed before the bankruptcy court can order a service termina-

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104. 419 U.S. at 109.

105. Id. at 109-10. Some of the smaller bankrupt carriers continued reorganization under usual section 77 procedures. See, e.g., In re Boston & Me. Corp., 378 F. Supp. 68 (D. Mass. 1974).

106. U.S. Const. art. I, § 8, cl. 4, gives Congress power "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

107. 419 U.S. at 159.

108. 485 F.2d 208 (3d Cir. 1973), cert. denied, 414 U.S. 1131 (1974).

109. Id. at 213.

110. See note 10 supra.

tion.[111] The court stated that its holding should not be construed so as to preclude a bankruptcy court from allowing ailing railroads to terminate unprofitable service. Rather, it requires that such termination be accomplished by following certain procedures. Thus, even a carrier in reorganization is not free from administrative controls.[112]

The facts raised in *In re Erie Lackawanna Railway*[113] were similar to those in *Central Railroad of New Jersey*. The trustees sought approval of the bankruptcy court to terminate some passenger service without first seeking agency approval. The court could have relied upon section 304(f) of the Rail Act, but since it had not been clearly established that the Erie Lackawanna would be reorganized under the Act, the Sixth Circuit rested its decision on prior case law, and reached the same result as in *Central Railroad of New Jersey*, stating that "[w]hile it has been held that a railroad may not be required to continue its business in the face of confiscatory losses . . . [r]ailroads have not been permitted to use that argument to justify the discontinuance of an unprofitable portion of their operating franchise while continuing to accept the benefits of that portion which they conceive to be advantageous."[114] As noted, under section 304(f) of the Rail Act, the rights of the carriers reorganizing under the Act to terminate service even with agency approval is extremely limited, and less than the rights of profitable carriers which could terminate if they received ICC approval.[115]

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111. 485 F.2d at 212 n.20.

112. Id. at 215. The court recognized that the basic premise that the owner of property retains the right ultimately to withdraw that property from a losing venture remains intact. Nonetheless, this case is distinguished from Brooks-Scanlon and Eastern Texas as those cases involved termination of the entire railroad enterprise, while here, only passenger service was sought to be terminated. Similarly, in the present case there was no appeal to a regulatory agency for relief while in Brooks-Scanlon and Eastern Texas there had been prior contact with an administrative agency. The trustees are precluded from arguing that recourse to an agency first would have resulted in delay and frustration. Id. at 213-15. But see Bullock v. Railroad Comm'n of Fla., 254 U.S. 513, 521 (1921), where in dicta the court found this to be the proper technique. See note 29 supra.

The decision in Central R.R. of N.J. is consistent with an earlier Supreme Court case, Palmer v. Massachusetts, 308 U.S. 79 (1939), in which the Court held that the district court supervising reorganization of a railroad did not have the power to bypass state regulatory procedures. The Court noted that to allow the bankruptcy court to have this power "would violate the traditional respect of Congress for local interests and for the administrative process . . . ." Id. at 88. In Palmer, the trustees applied to the District Court for permission to terminate some passenger service while action before the state regulatory agency was pending.

113. 517 F.2d 893 (6th Cir. 1975).

114. Id. at 898-99 (citations omitted). Reference is made here to the fact that in the Brooks-Scanlon line of cases, the carrier sought to leave the railroad business entirely. See note 112 supra.

115. The criteria for ICC approval of service termination is the public need for the service. The fact that a carrier is or is not operating profitably is not a consideration. See Southern Ry. v. North Carolina, 376 U.S. 93 (1964).

4. Assuring Uninterrupted Service: 49 U.S.C. § 1(16)(b)

Provisions such as section 304(f) were included in the Rail Act to minimize the impact of reorganization upon the users of these carriers and to assure uninterrupted rail service.[116] Another section of the Act, section 601(e), legislated a remedy for a similar problem. Recognizing that there will be instances, despite section 304(f), in which the carrier will cease operations over an important segment of track, section 1(16) of the Interstate Commerce Act was amended to allow the ICC to order one carrier (directed carrier) to operate over the tracks of another carrier (other carrier) which is unable to transport traffic over its own tracks. This may be done when the other carrier cannot transport traffic because: "(1) its cash position makes its continuing operation impossible; (2) it has been ordered to discontinue any service by a court; or (3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section . . . ."[117]

This section was not intended to provide a permanent method for dealing with service cessations, but is an emergency measure. The time period during which the directed carrier's service can be compelled is severely limited by this section,[118] and the ICC has limited its use to situations where a cessation in freight service would result in industry shutdowns, unemployment, or other serious economic distortions.[119] If the compelled operations result in a loss the directed carrier may seek reimbursement from the federal government.[120] Despite this, the railroads have claimed that the formula for their reimbursement is inadequate.[121] If the directed carrier operates over the lines of the other carrier at a profit, the other carrier is entitled to receive rent from the directed carrier. However, no rent need be paid if compelled operations are at a loss.[122] Such a denial of rent raises a fifth amendment question since it deprives the other carrier of just compensation for use of its property. In *Lehigh and New England Railway v. Interstate Commerce Commission*,[123]

116. See S. Rep. No. 601, 93d Cong., 1st Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3242, 3254 (1973).

117. 49 U.S.C. § 1(16)(b) (Supp. V, 1975).

118. "Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days." 49 U.S.C. § 1(16)(b)(A) (Supp. V, 1975).

119. Implementation of Public Law 93-236, Section 601(e), Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement, 348 I.C.C. 251, 261 (1975).

120. 49 U.S.C. § 1(16)(b)(E) (Supp. V, 1975). The ICC outlined procedures to be followed in seeking such Federal subsidies. See generally 49 C.F.R. § 1126 (1976).

121. Some of the objections raised by the carriers are that the reimbursement formula neglects to cover adequately some of the major expenses such as additional costs in obtaining equipment to operate the directed service, costs in raising funds to provide the service, and some necessary maintenance and rehabilitation costs. The immediacy of the directed service order may leave the carrier unprepared to handle the additional burdens it faces. See generally 348 I.C.C. at 252-59.

122. See 49 U.S.C. § 1(16)(b)(E) (Supp. V, 1975).

123. 540 F.2d 71 (3d Cir. 1976), cert. denied, 97 S. Ct. 784 (1977).

which discussed section 1(16)(b), the Third Circuit refused to accept this argument, while recognizing that the line between a taking of property and legitimate regulation is a thin one.[124] The court noted that while service is compelled by the ICC, the Commission does not actually take title to the property, and the rights of the other carrier to sell or dispose of its property are not unusually restricted.[125] Moreover, the burden on the other carrier is no greater than that which is imposed on the directed carrier, which may be compelled to provide service at a loss.[126] The Third Circuit also noted that while the reasoning behind the *Brooks-Scanlon* line of cases is still good law, the rights of railroad owners have never been considered absolute. Therefore, a carrier may be subject to agency regulation, or may be compelled to absorb reasonable interim losses so that a reorganization plan accommodating public and private interests may be devised.[127] Thus, relying upon the reasoning in *New Haven*, the court held that directed service also does not constitute a taking, especially for the limited time provided for in section 1(16)(b).[128]

Lehigh and New England and other cases discussed in this Comment show the premium courts place on maintaining rail service, even if the rights of the creditors are subrogated or diminished. These decisions recognize the existence of creditors' rights, but hold that they are not absolute. This raises the fundamental, and, as yet, unanswered question of who shall bear the ultimate loss.

C. *The Railroad Revitalization and Regulatory Reform Act of 1976*

Even if the carriers presently in reorganization in the Northeast are treated fairly under the 1973 Rail Act, this emergency provision does not offer any hope for the carriers which are not yet bankrupt, but are in a precarious financial situation due to large sections of unprofitable trackage, antiquated and outdated equipment and roadbed, and diminished revenues. The long-range goal to develop a national transportation policy would necessitate a major overhaul of the traditional schemes of railroad regulation and control. On February 5, 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, which set out a broad panoply of objectives "to promote the revitalization of the railroad industry . . . ."[129] The Act sought to make the railroad industry more efficient and viable through ratemaking and regulatory reform, financing improvement, and continuation of needed rail service.[130] This would enable railroads to compete more effectively with

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124. Id. at 81-82.

125. Id. at 84-85. The court noted that in either case, ICC approval is required.

126. Id. at 84.

127. Id. at 82-83, citing New Haven, Continental Illinois, and Reconstruction Finance.

128. Id. at 83. Although Brooks-Scanlon and New Haven are "erosion-taking" cases, and the petitioners here argue that section 1(16)(b) creates a "conveyance-taking," the court noted that under Regional Rail both types of takings would be treated similarly. The Third Circuit disputed the basic assumption that this was a conveyance-taking. Id. at 84.

129. S. Rep. No. 499, 94th Cong., 1st Sess. 1 [hereinafter cited as Senate Report].

130. 1976 Rail Act § 101(a), 90 Stat. 33.

other modes of transportation.[131] Most of the blame for diminished rail performance since World War II was placed upon both the outdated regulatory system and the lack of government investment,[132] which the 1976 Rail Act attempted to remedy. In general, the changes in the rate-making structure were intended to give the carriers greater freedom in setting their own rates. Section 202(a) retains the provision in the Interstate Commerce Act which forbids a carrier from charging an unreasonable rate, but limits the grounds on which such a rate may be found unreasonable. As the Senate Report noted, "[t]he major innovation of this section is that [ICC] regulation of maximum rate levels will apply only when the railroad . . . set[s] market dominance over the service involved. Otherwise, in truly competitive markets the railroads will have freedom, absent discrimination and prejudice, to raise prices as they chose in order to maximize revenues."[133] Section 207 of the 1976 Act gives the ICC the power to exempt a railroad from any or all of the ICC's regulations if such regulation is not necessary to effectuate the goals of any national transportation policy,[134] thus enabling deregulation of those areas having no significant bearing on the national regulatory scheme.[135]

The Act also extensively reforms the ICC, increasing the availability of public input through the creation of a permanent office to help the Commission become more responsive to the public interest.[136] The Rail Services Planning Office, created in the 1973 Rail Act, is retained and established as a permanent office of the ICC.[137] The procedures for rail mergers and consolidations are simplified by encouraging rapid resolution of all merger applications under section 5 of the Interstate Commerce Act.[138] The authors of the Act alleged that delay in approving such mergers was a major cause of many of the bankruptcies in the railroad industry.[139]

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131. 1976 Rail Act § 101(b), 90 Stat. 33. The Senate Report accompanying the bill noted that while fifty years ago the railroads carried two-thirds of the nation's inter-city freight, by 1973 their share had dropped to 39%. Railroad earnings today, after adjusting for inflation, are only three-fourths of their 1947 level. Senate Report, supra note 129, at 2.

132. Senate Report, supra note 129, at 2-3.

133. Id. at 47. "Market dominance" is defined as a lack of effective competition by any mode of transportation. Id. 1976 Rail Act § 202(b), 90 Stat. 35, amending 49 U.S.C. § 1(5) (1970), also states that no rate shall be deemed unreasonable because it is too low if it equals or exceeds variable costs, or it contributes to the going concern value of the carrier.

134. 1976 Rail Act § 207, 90 Stat. 42, adding 49 U.S.C. § 12(1)(b).

135. Senate Report, supra note 129, at 53. Although it would appear that this section gives the ICC extraordinary powers, the Senate Report indicates that there are adequate procedural safeguards in the section to assure that the Commission will not exceed its Congressional mandate. Id.

136. 1976 Rail Act § 304, 90 Stat. 51-53, amending 49 U.S.C. § 27 (1970). This office may be a forerunner to a Consumer Affairs Office, and the Senate Report suggests that if such an agency is created, the Office of Public Counsel may be integrated into the agency, while retaining its expertise in transportation affairs. Senate Report, supra note 129, at 16.

137. 1976 Rail Act § 309, 90 Stat. 57, amending 1973 Rail Act § 205(a), 45 U.S.C. § 715(a) (Supp. V, 1975). For the duties of this Office see discussion at note 81 supra and accompanying text.

138. 1976 Rail Act § 403, 90 Stat. 63-66, amending 49 U.S.C. § 5 (1970).

139. Senate Report, supra note 129, at 18-19. Not everyone would agree with this contention,

Although noting that the Supreme Court has upheld the "basic constitutionality" of the 1973 Rail Act, provided it is used in conjunction with other federal laws and especially the Tucker Act,[140] the 1976 Rail Act introduced some major changes in the system. The most pressing problem under the 1973 Rail Act was that rail properties being conveyed to Conrail were in worse condition than anticipated, and unless these properties were rehabilitated, Conrail would never become an efficient system.[141] The cost of improvements was estimated at $6 billion and these funds could not be generated from rail operations or outside financial sources.[142] Hence, the 1976 Rail Act created a new financing system, relying heavily upon federal loan guarantees to enable Conrail to implement the final system plan. Under the 1973 Rail Act, the United States Railway Association was authorized to issue "bonds, debentures, trust certificates, securities, or other obligations,"[143] up to a statutory limit of $1.5 billion, of which no more than $1 billion could be issued to Conrail.[144] The 1976 Rail Act added a new section to the 1973 Act, authorizing the Association to buy up to $1 billion in debentures issued by Conrail, and up to $1.1 billion in series A preferred Conrail stock.[145] These funds can be used for rail modernization and for refinancing indebtedness expected during Conrail's first few years of operation.

Creditors of the bankrupt carriers had objected to being paid with Conrail securities which were of uncertain, if not doubtful, value.[146] For this reason, section 610 of the 1976 Rail Act completely revised the payment mechanism by creating a new United States Railway Association security, the "Certificate of Value."[147] These certificates would be issued to railroads in reorganization that transfer property to Conrail under the Act. Together with Conrail class B and preferred stock, they would "provide a package of securities that . . . will satisfy the statutory requirement that the transfers and conveyances be accomplished on terms which are 'fair and equitable' and which provide the constitutional minimum . . . ."[148] The certificates would be issued based upon

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however. It has been suggested that the problem with today's railroads is that they are too large. See note 3 supra, and accompanying text. Nonetheless, Congress takes the opposite position, stating that ease in merger regulations will improve and strengthen the rail industry.

140. Senate Report, supra note 129, at 27.

141. Id.

142. Id. at 28.

143. 1973 Rail Act § 210(a), 45 U.S.C. § 720(a) (Supp. V, 1975).

144. 1973 Rail Act § 210(b), 45 U.S.C. § 720(b) (Supp. V, 1975).

145. 1976 Rail Act § 605, 90 Stat. 89-92, adding 45 U.S.C. § 726.

146. Senate Report, supra note 129, at 28.

147. 1976 Rail Act § 610(b), 90 Stat. 104-05, adding 1973 Rail Act § 306(a), 45 U.S.C. § 746(a).

148. Senate Report, supra note 129, at 91. The 1976 Rail Act attempts to define the term "fair and equitable." 1976 Rail Act § 610(b), 90 Stat. 103, adding 1973 Rail Act § 305(e), 45 U.S.C. § 745(e). The definition shows an intention to balance the interests of the creditors of the reorganization railroads, Conrail creditors, and the standards of fairness and equity found in section 77 of the Bankruptcy Act. Needless to say, the definition really adds little to this troublesome problem.

the net liquidation value of the transferred rail properties, and would be subject to review by the Special Reorganization Court.[149]

The Act does not specifically bar a Tucker Act remedy, but the Senate Report indicates that Congress believes that "the certificate of value provides an acceptable substitute for a Tucker Act remedy,"[150] and that ultimately the courts will find the certificate of value to be an acceptable alternative.[151] Whether or not this is a realistic assessment remains to be seen. Although the statute provides that certificates of value shall constitute general obligations of the United States of America,[152] the major issue will more likely be the fair valuation of the property conveyed rather than the assurance of ultimate repayment of the securities.

The basic premise behind Conrail is that by consolidating the bankrupt Northeast railroads into one carrier and eliminating duplicating track and light density lines, the Northeast will be left with one efficient carrier. However, the economies of rural areas often rely upon rail service available to local industry, and the economic balance of such regions would be distorted if such lines, although unprofitable, were abandoned. For this reason the 1976 Rail Act provided for continued and expanded local rail service assistance. For track not included in the final system plan, discontinuance is permitted in accordance with section 304 of the 1973 Rail Act; except that no service may be terminated if a responsible person or government entity offers an assistance payment which covers the difference between revenue and "avoidable costs,"[153] defined in section 802 of the 1976 Rail Act as "all expenses which would be incurred by a carrier in providing a service which would not be incurred . . . if such service were discontinued or . . . abandoned."[154] The Rail Services Planning Office will establish standards by which to determine these costs.[155] As in the 1973 Rail Act, a railroad may not abandon track for a period of two years after the last continuation subsidy is received.[156] It is not unreasonable to expect litigation on this provision as it is likely there would be disagreement on the amount which would constitute a reasonable rate of return to the carrier receiving a continuation subsidy. Thus far, the courts have been willing to accept the regulations of the Rail Services Planning Office as controlling, absent a showing of unfairness.[157] This approach might

149. Senate Report, supra note 129, at 91.

150. Id.

151. Id. at 91-92.

152. 1976 Rail Act § 610(b), 90 Stat. 104, adding 1973 Rail Act § 306(a), 45 U.S.C. § 746(a).

153. 1976 Rail Act § 804, 90 Stat. 135, amending 1973 Rail Act § 304(c)(2), 45 U.S.C. § 744(c)(2) (Supp. V, 1975).

154. 1976 Rail Act § 802, 90 Stat. 130, adding 49 U.S.C. § 1(a)(10)(a).

155. 1973 Rail Act § 205(d)(3), 45 U.S.C. § 715(d)(3) (Supp. V, 1975).

156. 1976 Rail Act § 804, 90 Stat. 134-35, amending 1973 Rail Act § 304(c)(1), 45 U.S.C. § 744(c)(1) (Supp. V, 1975).

157. In Pennsylvania v. I.C.C., 535 F.2d 91 (D.C. Cir.), cert. denied, 97 S. Ct. 99 (1976), the Court of Appeals noted that the Planning Office policy of not compensating for certain expenses, although they were compensated for under the 1970 Rail Act, does not violate constitutional requirements of a fair rate of return. Id. at 94-97.

be used in determining the value of properties conveyed to Conrail. However, the nature and uncertainty of Conrail securities should warrant careful judicial scrutiny.

V. CONCLUSION

The rail crisis of the 1960's and 1970's in the Northeast shows that while a public need for continued service exists, self-sustaining rail service is no longer economically feasible. The traditional approach to the problem, exemplified by the *Brooks-Scanlon* doctrine, was satisfactory to solve the problems of the rail creditors, but failed on public policy grounds, as it would have resulted in wholesale abandonment of needed rail lines. Nevertheless, the courts have continued to adhere to its basic tenet that a carrier cannot be compelled to operate indefinitely at a loss. Various attempts have been made to reconcile the doctrine with modern cases but all these attempts have been deficient.[158] The most realistic approach may be that of the ICC, which has stated that *Brooks-Scanlon* is no longer good law.[159] The ICC has taken the position that the Supreme Court "has never flatly held that a deficit-ridden railroad has an absolute right to abandon, liquidate, and sell [its] parcels,"[160] but that the Commission's power to compel service where there is a public need for it remains intact.[161]

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158. In Note, Conrail and Liquidation Value: Creditors' and Stockholders' Entitlement in the Regional Rail Reorganization, 85 Yale L.J. 371 (1976), it was suggested that the Brooks-Scanlon doctrine is limited to those carriers which have no operating income whatsoever. Id. at 380 & n.31. Although such an interpretation rests upon the facts of the specific cases, this approach disregards the reliance which subsequent courts have placed on a broader interpretation of Brooks-Scanlon, which suggests that Brooks-Scanlon is not as important for what it held, but for what subsequent courts have said that it held.

Another attempt by the courts to limit Brooks-Scanlon came in In re Erie Lackawanna Ry. Co., 517 F.2d 893 (6th Cir. 1975), and in In re Central R.R. of N.J., 485 F.2d 208 (3d Cir. 1973), cert. denied, 414 U.S. 1131 (1974) (discussed at notes 108-15 supra and accompanying text), in which the courts interpreted Brooks-Scanlon as limited to those cases in which the railroads have sought to leave the carrier business entirely. Such an interpretation fails in light of Meyers v. Jay St. Connecting R.R., 259 F.2d 532 (2d Cir. 1958) (discussed at notes 19-22 supra and accompanying text), where financial difficulty of itself was not sufficient to permit a suspension of all rail service without ICC approval. The ICC power of regulation of railroad service terminations cannot be lightly regarded, even over carriers leaving the rail business entirely, to the extent which Erie Lackawanna and Central R.R. of N.J. would suggest. During the rail crisis of the 1970's, some carriers, such as the Penn Central, were making no profit on any of their operations, and no doubt would have been happy to liquidate and sell all their assets.

159. Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25, 55-56 (1968) ("Fourth Supplement Report").

160. Id. at 56. Here, the ICC states that the thrust of Brooks-Scanlon "is that a deficit railroad has a right to stop the deficits." Applying this rationale to the modern cases, the distinction is made between the constitutional right to liquidate and the constitutional right not to be required to operate at a perpetual loss. Id. at 56 & n.29.

161. Id. at 57. The rationale is connected with pricing considerations upon conveyance of deficit railroad property. If a carrier does not have an absolute right to abandon and sell its property piecemeal, it follows that upon mandatory conveyance, either to Conrail, or, as in the

In light of the Supreme Court decision in *New Haven*, which ignored *Brooks-Scanlon*, it may be assumed that the doctrine is either dead or at least reduced to virtually meaningless verbiage. The *New Haven* Court's reliance upon *Continental Illinois* to support the idea that postponement of a creditor's claim is constitutionally permissible represents a broadening of the *Continental Illinois* doctrine, because the Court did not distinguish between delay which occurs without a diminution of the creditors' estate, and a delay in which the creditors' interests are significantly decreased. After *New Haven* it very well may be that this distinction is meaningless. Although the *New Haven* Court suggested that there may be a time at which continued operations would result in an unconstitutional taking, the Court did not find that such a point had been reached in six years of compelled deficit operations.[162]

Since *Jay Street* in 1958, it has been established law that a carrier cannot embargo service simply because of financial difficulty. Even where the cause of the service suspension is beyond the carrier's control, the courts will not permit an unreasonable delay in restoring service regardless of the carrier's financial situation.[163]

The bankruptcy courts had recognized that the *New Haven* approach did not offer a real solution, since it was apparent that carriers could not be forced indefinitely to sustain losses.[164] Hence, it became obvious by the early 1970's that Congressional assistance would be necessary. In an attempt to limit the cost of a Northeast rail preservation system, a complete reorganization was found preferable to merely providing operating assistance. The 1973 Rail Act attempted to consolidate the bankrupt carriers into a single viable and profitable system. That Act raised a number of fifth amendment problems which were put aside in the *Regional Rail Reorganization Act Cases* because the Court found an adequate remedy available in the Tucker Act.

One of the major problems with the 1973 Rail Act concerned the payment which the bankrupt carriers were to receive for the mandatory conveyance of their property to Conrail. Under the 1973 Act, only securities were to be received, while under the 1976 Act, the reorganization carriers will also receive certificates of value. The certificates were added in the 1976 Act as an attempt to eliminate the need for a Tucker Act remedy—that is, the fifth amendment conveyance taking problems are now purportedly eliminated. The salient question raised by the 1976 Act is whether the introduction of these certificates will assure the rail creditors that they will receive adequate compensation for their property.

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case of the New Haven, to another carrier, the creditors have no right to receive the price they would have received had the railroad been sold piecemeal.

162. New Haven Inclusion Cases, 399 U.S. 392, 489-95 (1970). See notes 58-59 supra and accompanying text.

163. See Part II supra.

164. See, e.g., In re Penn Central Transp. Co., 355 F. Supp. 1343 (E.D. Pa. 1973); In re New York, N.H. & H.R.R., 304 F. Supp. 793 (D. Conn. 1969), aff'd in part and vacated and remanded in part sub nom. New Haven Inclusion Cases, 399 U.S. 392 (1970); In re New York, N.H. & H.R.R., 289 F. Supp. 451 (D. Conn. 1968).

Today, the creditors of the reorganization railroads are asserting two claims: first, they want to recover the losses sustained because of the compelled, continued operation pending reorganization;[165] second, they seek a fair price for the property conveyed to Conrail. On the first issue, recovery would be permitted if *Brooks-Scanlon* is followed and *New Haven* limited to the most extreme circumstances. However, if *Brooks-Scanlon* is accepted *in toto*, the railroads would have had a right to liquidate, and thus, upon conveyance to Conrail would have been entitled to receive that price for their property which liquidation and subsequent sale would have brought. This value has been estimated by the United States Railway Association to be approximately $685 million.[166]

The creditors of the railroads oppose the fair liquidation value concept and argue that they should be compensated for the value which their property has as a working railroad, including consideration for the positive impact which continued rail service has on the Northeast's economy. This figure may be as high as $14 billion.[167]

The Railway Association's valuation formula is essentially in accord with *Brooks-Scanlon*, but if the *Brooks-Scanlon* doctrine is accepted in full, the Association's position on interim losses would fall. For the creditors to succeed on the interim loss issue, they must surmount the *New Haven* obstacle and have that case limited to its specific facts. However, a victory on that point may be costly if it establishes the railroad's right to receive only the liquidation value as its conveyance price.

Despite the broad language in the Rail Acts which insists that Conrail will be financially successful, many economists have doubted the ultimate viability of the rail reorganization scheme. It is likely that adequate rail service in the Northeast can only be maintained with substantial public support.[168] If this happens, the nation as a whole will be supporting rail service for a relative few. Other modes of transportation may suffer if rail rates are kept artificially low, and service maintained at levels above those which a free-market economy would support. However, if this is not done, those who depend upon the publicly-supported rail service will suffer, and the Northeast's economy—and possibly the country's—will decline. Additionally, it is questionable whether the needed Congressional support for the ever-increasing subsidies can be assured.[169]

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165. The trustees of the Penn Central Railroad are seeking to recover from the government $1 billion in operating losses sustained from October 1, 1973 to the date of conveyance to Conrail, April 1, 1976. See Wall St. J., Nov. 30, 1976, at 16, col. 3.

166. See Wall St. J., June 18, 1976, at 3, col. 2.

167. Id. See Note, Valuation of Conrail Under the Fifth Amendment, 90 Harv. L. Rev. 596, 614-15 (1977), which argues that this "hold up" value should not be compensated for.

168. In the first few months of Conrail operations, losses have been significant. See Wall St. J., Aug. 13, 1976, at 4, col. 1. Political pressure to continue unprofitable local service has been blamed as an important reason for these losses, and threatens the possibility of the ultimate financial success of Conrail. See Wall St. J., Aug. 23, 1976, at 2, col. 2.

169. Amtrak has faced this problem in recent years. As the yearly deficits mount, many members of Congress are questioning whether the support which the government gives Amtrak is

The Rail Acts represent legislation directed toward a specific problem, but they offer a model which could be followed in the event of major service disruptions in other parts of the nation. If one carrier alone goes bankrupt, a *New Haven*-type pattern might be followed, with the creditors of that carrier bearing the loss until another, stronger carrier is able to take over its operations. Actual government intervention is probable only in the event of another major, regional rail failure, something which is unlikely in the near future.

The basic issues raised in the Northeast rail crisis should be repeated in the bankruptcy proceedings of the Chicago, Rock Island, and Pacific Railroad (Rock Island). The Rock Island went into reorganization in 1975. It carries about 13,000 roundtrip passengers daily. In upholding a grant of emergency operating funds to continue passenger service, the bankruptcy court suggested that it would not let continued passenger service operations stand in the way of a successful reorganization.[170] Passenger service has been assured through June, 1977, because of Regional Transportation Authority funding.[171] It is not now clear what will happen after that date. In light of *In re Erie Lackawanna Railway*[172] and *In re Central Railroad of New Jersey*,[173] it is doubtful whether such terminations could be ordered by a bankruptcy court without the approval of a regulatory agency.

The historical development of the cases and statutes surrounding the rail crisis offers a variety of solutions for any threatened service cessation in the public utility area. A liberal reading of the fifth amendment will offer the greatest protection to the investors and creditors, either by allowing a cessation of service to terminate losses, or by assuring adequate compensation in the event of a public taking. Under this analysis, although a reorganization is not a condemnation, the bankruptcy power remains subject to the fifth amendment. If a solution is modeled after *New Haven*, the fifth amendment loses much of its practical significance in that the creditors, by choosing to invest in a public utility, were deemed to be on notice that the public interest would be paramount to theirs. This approach lacks solid constitutional grounds, but is advantageous from the standpoint of the ultimate beneficiary, the public treasury, and represents a modern example of creating constitutional law to meet the public need.

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justified in view of the relatively few people who use it. For a particularly scathing editorial on Amtrak, see Wall St. J., Dec. 28, 1976, at 6, col. 1. Amtrak survives as a national scheme largely because it is still politically unpopular to suggest cuts in Amtrak service in the area which one represents. With no benefits accruing to the South and West from Conrail, it is questionable whether these regions will be as supportive of Conrail as they are of Amtrak.

170. See Wall St. J., July 2, 1976, at 10, col. 4.

171. In re Chicago, R.I. & P.R.R., No. 75-B-2697 (N.D. Ill., Oct. 1, 1976).

172. 517 F.2d 893 (6th Cir. 1975) (discussed at notes 113-15 supra and accompanying text).

173. 485 F.2d 208 (3d Cir. 1973), cert. denied, 414 U.S. 1131 (1974) (discussed at notes 108-12 supra and accompanying text).