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THE ICC AND RAILROAD FINANCING THROUGH CONDITIONAL SALE CONTRACTS

WITH increasing frequency in the last decade, railroads have turned from equipment trust plans to the simple conditional sale contract for the financing of new equipment purchases.[1] Under the usual equipment trust plan, the manufacturer sells new equipment, normally rolling stock, to a trustee who, in turn, leases it to the railroad.[2] The trustee pays the manufacturer with the railroad's down-payment and with funds obtained from the public sale of equipment trust certificates.[3] The conditional sale works in analogous fashion: the manufacturer sells equipment directly to the railroad and then assigns the conditional sale contract to one or more institutional

1. "At that time [1920] and for many years thereafter conditional sales agreements were not commonly used in railroad financing. . . . They did not come into frequent use until about 15 years ago." Application of the Delaware & Hudson R.R., Case 15719, N.Y. Pub. Serv. Comm., April 16, 1952, p. 5½. For Class I railroads the dollar volume of conditional sale contracts outstanding rose steadily from $89,072,442 at the end of 1943 to $394,062,339 at the end of 1950, an increase of almost 350 percent. During the same period, the amount of equipment trust certificates outstanding increased from $608,176,139 to $1,404,516,751, a rise of approximately 130 percent. ICC, 57 & 64 ANNUAL REPORTS ON THE STATISTICS OF RAILWAYS IN THE UNITED STATES FOR 1943 & 1950, tables 141, 141A (1945, 1952). Prior to 1943 no separate accounts were kept of the amount of conditional sale contracts executed by carriers, suggesting that the volume of such contracts was extremely low. See also Stevenson, *Railroad Equipment Financing*, ANALYSTS JOURNAL, 3d Quarter, 1951, p. 6. See also Communications to YALE LAW JOURNAL from J. B. Hyde, Vice President, Southern Ry., dated April 3, 1952, and R. L. Dearmont, Counsel for Trustee, Missouri Pacific Lines, dated April 24, 1952, on file in Yale Law Library.

Today, many railroads finance a large part of their equipment purchases through conditional sale contracts. In the case of the Delaware & Hudson, for example, "the total of its obligations evidenced by conditional sales agreements will be 28.2% of its total long term indebtedness and greater than the book value of its capital stock." Application of the Delaware & Hudson R.R., *supra*, at 10. See Communications, *supra*.

2. The Philadelphia Plan is the most popular equipment trust device, and is described above in the text. For differences between this plan and the alternative New York Plan, see note 3 *infra*. For the growth and operation of equipment trust financing, see Stevenson, *supra* note 1; FREEMAN & CO., EQUIPMENT TRUSTS (1949); DUNCAN, EQUIPMENT OBLIGATIONS (1924); Dewing, *Railroad Equipment Obligations*, 7 AM. ECON. REV. 353 (1917); DAVIS & BROWNE, CAR TRUSTS IN THE UNITED STATES (1894).

3. Under the Philadelphia Plan, the trust certificates represent pro rata shares of the lease and the equipment. Each certificate holder is entitled to a share of the railroad's "rent" payments, which represent both interest and a partial return of principal. The plan normally contemplates retirement of all certificates within ten or fifteen years; title passes to the railroad with payment of the last installment of "rent." The road usually guarantees the certificates in order to qualify them under the "legal investment" laws of various states. The New York Plan achieves the same result through a different mechanism: the road gives a conditional sale contract to the manufacturer, who then assigns it to the trustee; the trustee uses the proceeds from the sale of trust certificates

investors.[4] Both devices avoid "after acquired property" clauses in outstanding mortgage bonds, which usually give the prior bondholders a first claim on newly purchased equipment.[5] Since the trustee or the conditional seller's assignee retains title until the road completes payments, he can regain possession of the equipment if the road defaults.[6] The low risk to investors [7] under either device permits railroads to borrow money at relatively low interest rates.[8] But the simplicity of the conditional sale avoids the administrative expense and delay involved in the public sale of trust certificates.[9] And with

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to pay the manufacturer; the road's payments are thus labelled "installments" rather than "rent."

The Pennsylvania Railroad, when it originated equipment trust financing, could not use the New York Plan, since Pennsylvania law at that time provided no recording protection for conditional sale contracts. The inertia of the investing public has apparently been responsible for the continued dominance of the Philadelphia over the New York Plan.

For an explanation of the mechanics of equipment trust plans, see Billyou, *Federal Railroad Equipment Legislation*, 64 HARV. L. REV. 608 (1951); Stevenson, *supra* note 1, at 3.

4. For the operation of railroad conditional sale financing, see Stevenson, *supra* note 1, at 4. The assignment of "participations" in conditional sale contracts is quite common. *Ibid.* See, *e.g.*, Application of the Delaware & Hudson R.R., *supra* note 1.

5. Billyou, *supra* note 3, at 608-9. In addition, Section 77(j) of the Bankruptcy Act, 47 STAT. 1480 (1933), as amended, 49 STAT. 922 (1935), 11 U.S.C. § 205(j) (1946), and Section 20b(1) of the Interstate Commerce Act, 62 STAT. 163 (1948), 49 U.S.C. § 20b (Supp. 1952), prevent alteration of the claims of trust certificate holders in railroad reorganizations.

6. The right to repossess may depend on proper recordation, marking of cars, etc., in accordance with state car-trust statutes and the Uniform Conditional Sales Act. See Billyou, *supra* note 3, at 609-10. The difficulty of complying with the car-trust statutes of all states through which rolling stock might pass led to agitation for federal equipment legislation, *id.* at 612, which achieved success in the form of Section 20c of the Interstate Commerce Act. 66 STAT. 724 (1952), 49 U.S.C.A. § 20c (Supp. 1952).

7. In the case of equipment trusts, the railroad's substantial down-payment and a retirement schedule at a rate in excess of the deterioration of the equipment assure to the certificate holder a constant excess of security. See Billyou, *supra* note 3, at 610. Equipment trusts have attained a reputation for iron-clad security; there is only one reported case of default. Stevenson, *supra* note 1, at 4.

8. Between 1943 and 1950, the average interest rate on equipment trust certificates has been from .37 to 2.02 percentage points lower than the average rate for funded bonds. During five of these eight years the average interest rate on conditional sale contracts was slightly lower than for equipment trusts. ICC, 57-64 ANNUAL REPORTS ON THE STATISTICS OF RAILWAYS IN THE UNITED STATES FOR 1943-1950, table 148 (1945-1952).

9. "It takes only about a week to draw, print and execute a Conditional Sale Agreement and an Assignment thereof, whereas it is difficult to work out an Equipment Trust Lease and Agreement in less than six weeks' time. The Conditional Sale Agreement will cost perhaps $200.00 for the printing, whereas in the case of an Equipment Trust covering the issue of say, $2,500,000.00 principal amount of Certificates, the printing of the Agreements, the Application to the I.C.C., the engraving of the Certificates and the documentary stamps that must be purchased with respect to each certificate will cost approximately $5,000.00. In addition, the legal fees connected with the ordinary Equipment

large amounts of capital now concentrated in the hands of institutional investors,[10] conditional sale financing is readily available to railroads.[11] Presumably as a result of these considerations, there has been a significant shift to conditional sale financing, particularly for relatively small and medium size purchases of equipment.[12]

But perhaps the main attraction of conditional sale financing is the lack of Interstate Commerce Commission control.[13] ICC jurisdiction over railroad financing derives from Section 20a of the Interstate Commerce Act, which requires prior Commission approval for the issuance of "any share of capital

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Trust are four or five times as great as the fees paid in connection with the average Conditional Sale." Communication from R. L. Dearmont, *supra* note 1.

In addition, when the market for equipment trusts is weak due to general market conditions or large inventories of trust certificates in dealers' hands, carriers may get better terms through private placement. Communication from J. B. Hyde, *supra* note 1. See also comparison of interest rates of conditional sale contracts and equipment trust certificates, at note 8 *supra*.

10. See Loss, Securities Regulation 402 n.338 (Stud. ed. 1951).

11. The shift to financing through institutional investors led to the birth in 1950 of the so-called Equitable Life Rental Plan. "This plan . . . provides that [Equitable Life Insurance Company] pays 80% of the cost of the equipment to the builder and acquires title to the equipment, which is then leased to the railroad for a period of fifteen years. The rental payment . . . is at a set rate for the first three years and at a reduced rate each three-year period thereafter. This rental is calculated to pay, over a fifteen-year period, the cost of the cars and interest on the amount of funds involved. . . . Among the railroads that have leased equipment under this plan are Atlantic Coast Line, Delaware and Hudson, New York Central, Bangor and Aroostook, Pennsylvania Railroad, and Baltimore and Ohio. Up to the present time about $135 million of equipment has been acquired . . . under this plan." Stevenson, *supra* note 1, at 6.

12. Communication to Yale Law Journal from R. T. Cubbage, Corporation Counsel, Chicago, Burlington & Quincy R.R., dated April 10, 1952, on file in Yale Law Library. When large amounts of equipment are purchased, however, equipment trusts ensure lower interest rates because of the certificates' easy marketability. *Ibid.* In addition, while equipment trusts may be retired over a term of ten or fifteen years, it is difficult to arrange a conditional sale extending beyond seven or eight years. Communication from R. L. Dearmont, *supra* note 1.

13. "The [ICC] on June 21, 1939, . . . expressed the opinion that a conditional-sale contract was not a security within the meaning of section 20a of the Interstate Commerce Act and therefore it had no jurisdiction over the execution thereof. Thereafter many railroads, as indicated in their annual reports to this Commission, purchased a large number of units of equipment, the cost of which amounted to a very substantial sum, under conditional-sale contracts and lease agreements. By these methods, the railroads in many instances avoided the making of initial cash payments in respect of the purchase price of the equipment. . . . They also avoided our scrutiny of the reasonableness of the prices to be paid for the equipment. . . ." Chicago, B. & Q.R.R., 254 I.C.C. 175, 180 (1943). See note 25 *infra*. And see testimony of J. H. Nuelle, President of the D. & H., referred to in Application of the Delaware & Hudson, *supra* note 1, at 4-5, to the effect that avoidance of the down-payment usually required by the ICC was a dominant motive in using the unregulated conditional sale contract.

stock or any bond or other evidence of . . . indebtedness . . . (. . . collectively termed 'securities')."[14] Under this section, the ICC has controlled the issuance of bonds,[15] notes,[16] and equipment trust certificates.[17] Yet the Commission has long held that conditional sale contracts, although admittedly "evidences of indebtedness," are not "securities" within the meaning of 20a,[18] because such contracts are neither negotiable nor quasi-negotiable.[19] This rationale for refusing to assume jurisdiction of conditional sale financing appears unsound since the Act itself does not state, nor does its legislative history indicate,

14. 41 STAT. 494 (1920), 49 U.S.C. § 20a (1946). The Act requires that the "security" be for "some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service" and which is "reasonably necessary and appropriate for such purpose." *Ibid.* The Commission has broad discretionary authority to determine when a proposed issue meets the statute's requirements. For the ICC's early performance under this section, see 3A SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 502-617 (1935).

"Securities issued without the Commission's authorization or contrary to the terms or conditions prescribed are void. Any person acquiring such securities may hold liable for damages the carrier, its directors, officers, attorneys, or any agents who participated in the issuance and sale of the securities." LOCKLIN, RAILROAD REGULATION SINCE 1920, p. 115 (1928).

15. *E.g.*, Chicago, B. & Q.R.R., 257 I.C.C. 295 (1944).

16. *E.g.*, Kansas City So. Ry., 261 I.C.C. 490 (1945).

17. *E.g.*, Southern Pac. Co., 217 I.C.C. 500 (1936); Chicago & E. Ill. Ry., 217 I.C.C. 439 (1936); Chicago, M., St. P. & P.R.R., 212 I.C.C. 459 (1936).

Section 20a of the Interstate Commerce Act empowers the ICC to regulate the railroad's assumption of "any obligation or liability as lessor, lessee, guarantor . . . in respect of the securities of any other person. . . ." 41 STAT. 494 (1920), 49 U.S.C. § 20a (1946). The railroad's role as lessee or guarantor in connection with the certificates issued by the trustee is the basis for ICC jurisdiction. See the above-cited cases.

18. Lehigh Valley R.R. Conditional Sale Contract, 233 I.C.C. 359 (1939); Texas & Pac. Ry., 271 I.C.C. 230 (1948); Norfolk So. Ry. Receivers' Notes, 207 I.C.C. 121 (1935).

Notes issued in connection with a conditional sale contract are clearly within the ICC's jurisdiction. During World War II this was frequently done so that the amount of the contracts could be included in the road's invested capital base for excess profits tax purposes. Stevenson, *supra* note 1, at 4.

Leases also fall outside ICC jurisdiction unless secured by notes. Notes of Lake Erie, F. & C.R.R., 99 I.C.C. 404 (1925). *But cf.* Application of Illinois Cent. R.R., 71 I.C.C. 406 (1922), where the Commission called the lease an installment purchase and held it to be an evidence of indebtedness. Usually, however, installment purchases do not require ICC approval. Application of Grand T.W. Ry., 70 I.C.C. 554 (1921); Application of Louisiana Ry. & Nav. Co., 67 I.C.C. 808 (1921).

19. "Considering the provisions of section 20a as a whole . . . it appears that the provisions were intended to apply to instruments negotiable or quasi-negotiable in character. . . . It may be admitted that a contract of sale which contains provisions for payment is in a broad sense of the term an evidence of indebtedness . . . but it will hardly be contended that [it is a security] within the meaning of section 20a." Lehigh Valley R.R. Conditional Sale Contract, 233 I.C.C. 359, 365-6 (1939).

that negotiability was the intended touchstone of Commission jurisdiction.[20] A more probable explanation of the ICC's original stand is that the then trifling dollar volume of conditional sale contracts made regulation appear wholly unnecessary.[21]

In view of the growing importance of conditional sale financing, the continued absence of ICC regulation seems unwise. Commission control aims to protect investors by preventing the dissipation of railroad resources through improper financing.[22] The public also benefits, since unduly high fixed charges, which result from unwise financing, may lead to raised rates and impaired service.[23] And if conditional sale contracts are left unregulated, it is clear that railroads may freely incur fixed charges far in excess of an amount which is safe in proportion to operating revenues.[24] Roads have already used conditional sale financing to avoid the down-payment usually required by the ICC under equipment trust plans.[25] Without a down-payment, investors presumably will demand higher interest rates to compensate for the greater risk

20. Those portions of the legislative history of the Transportation Act of 1920 relevant to Section 20a are collected in MACVEAGH, THE TRANSPORTATION ACT 1920, pp. 481-501 (1923).

Negotiability, at best, provides an uncertain standard in view of conflicting case law. See Sinykin, *Extension of the Concept of Negotiability*, 8 WIS. L. REV. 272 (1933). Some courts have even given conditional sale contracts certain attributes of negotiability. *E.g.*, Abingdon Bank & Trust Co. v. Shipplett-Moloney Co., 316 Ill. App. 79, 43 N.E.2d 857 (1942); Commercial Credit Co. v. Barney Motor Co., 10 Cal.2d 718, 76 P.2d 1181 (1938). See Kripke, *Chattel Paper as a Negotiable Specialty under the Uniform Commercial Code*, 59 YALE L.J. 1209 (1950).

21. See notes 1, 13 *supra*.

22. "While . . . the Commission's authority was designed, indirectly, to protect the investing public against dissipation of railroad resources through faulty or dishonest financing, its dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit." 1 SHARFMAN, *op. cit. supra* note 14, at 190. And see speech by Rep. Esch, Chairman of the House Committee on Interstate and Foreign Commerce, 58 CONG. REC. 8312, 8317, 8318 (1919).

23. See 1 SHARFMAN, *op. cit. supra* note 14, at 86-7. For the effect of improper capitalization on rates and service, see BONBRIGHT, RAILROAD CAPITALIZATION 13-44, 156-68 (1920).

24. "In the absence of any power to regulate these obligations there would be no check upon excessive financing costs in connection with their negotiation and no overall control upon the total amount of a company's long-term fixed charges." Application of the Delaware & Hudson R.R., *supra* note 1, at 10.

25. "Many roads have been desirous of conserving cash resources, in view of the substantial amount of equipment to be acquired and other capital expenditures to be made. This has resulted in a trend toward conditional sales contracts providing for no original cash down payment. For example, last year Pennsylvania Railroad placed conditional sales contracts aggregating some $115 million at an average interest cost of 2.92%. In this way the railroad was able to secure the funds with which to buy the equipment, and was not placed in a position of applying to the Interstate Commerce Commission for approval. There is always a question of whether or not the Commission will approve an issue of Philadelphia Plan equipments providing for no original cash down payment." Stevenson, *supra* note 1, at 4. See also note 13 *supra*.

involved, thus increasing the road's fixed charges. The possibility of acquiring equipment without a down-payment may prove too tempting to roads whose limited liquid resources dictate against the assumption of additional fixed charges. Finally, in the absence of competitive bidding and other ICC safeguards there is no assurance that the borrowing road is obtaining the best terms available.[26] In view of these dangers, it is not surprising that the ICC recently asked Congress for authority to supervise conditional sale financing.[27]

If the present gap in ICC regulation remains, state public service commissions may decide to regulate. New York has already done so. In *People v. County Transportation Co.*,[28] the New York Court of Appeals upheld the New York Public Service Commission's assertion of the right to control the conditional sale contracts of small interstate motor carriers incorporated within the state.[29] The court interpreted the New York Public Service Law as requiring state commission approval of such contracts, and upheld the constitutionality of the statute as thus interpreted against the argument that the statute conflicted with the Interstate Commerce Act. The court found no conflict, because (1) the capitalization of the motor carrier in question was too low to bring the carrier within ICC jurisdiction and (2) the ICC did not regulate conditional sale contracts.[30] In a later ruling, the New York Public Service Commission held that conditional sale contracts of interstate railroads incorporated in the state also require its prior approval.[31] In relying on the *County Transportation Co.* case to extend its regulations to large interstate railroad carriers under ICC control, the New York commission necessarily relied on the second ground of the court's holding.[32] The validity of this extension has yet to be

26. See note 13 *supra*. The Commission has controlled the compensation paid to financial middlemen and the price at which securities were to be sold, and has required competitive bidding. The need for such regulation is outlined in 3A SHARFMAN, *op. cit. supra* note 14, at 560-77.

27. "We recommend that section 20a(2), requiring authorization by the Commission of the issuance of securities by certain common carriers and other corporations, be amended by including any contract for the purchase or lease of equipment not to be fully performed within 1 year from the date of the contract." 66 ICC ANN. REP. 147 (1952).

28. 303 N.Y. 391, 103 N.E.2d 421 (1952), *appeal dismissed per curiam*, 343 U.S. 961 (1952).

29. Subdivision 1 of § 62 of the N.Y. Public Service Law provides: "An omnibus corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of New York, may issue stocks, bonds, notes or other evidences of indebtedness payable on demand or at periods of more than twelve months after the date thereof . . . provided and not otherwise that there shall have been secured from the commission an order authorizing such issue." By reference to the legislative history of § 55 of the Public Service Law, from which the wording of § 62 was copied, the Court of Appeals concluded that a conditional sale was an "evidence of indebtedness." 303 N.Y. at 395-6, 103 N.E.2d at 424.

30. 303 N.Y. at 396-7, 103 N.E.2d at 424-5.

31. Application of the Delaware & Hudson R.R., Case 15719, N.Y. Pub. Serv. Comm., April 16, 1952.

32. "Although . . . [the Court of Appeals] could have limited its holding to small bus companies expressly excluded from the requirement for Interstate Commerce Commission

tested in the courts. However, if the extension is held constitutional, other states with similar statutes,[33] usually applicable to all roads operating within the state,[34] may follow New York's lead.

But state control cannot be relied on to provide effective regulation[35] and may, in fact, possess serious drawbacks.[36] The inevitable differences in state regulatory patterns might lead to attempts at avoidance. Roads operating in one state and therefore subject to its jurisdiction could lease equipment purchased by a subsidiary which operates in another state with less stringent surveillance. Even where regulation is not avoided, it may prove ineffective because of the traditionally meager supervisory facilities of many state commissions.[37] Moreover, in addition to the inconvenience of having to secure

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approval, it declined to do so and instead stated that the New York law applied even to the conditional sales agreements of companies whose other securities were subject to Interstate Commerce Commission authorization. Although it is recognized that there are differences between the federal patterns for bus regulation and for railroad regulation the court did not rest its opinion on these differences and we believe that the reasoning of the Court is applicable to support our jurisdiction in this present case." *Id.* at 10-11.

33. Ariz. Code Ann. § 69-237 (1939); Cal. Pub. Util. Code Ann. § 816 (Deering, 1951); Ga. Code Ann. § 93-414 (1937); Ill. Ann. Stat. c. 111⅔, § 21 (Smith-Hurd, Supp. 1952); Ind Stat. Ann. § 54-501 (Burns, 1951); Me. Rev. Stat. c. 40, § 42 (1944); Md. Ann. Code tit. 78, § 50 (Flack, 1951); Mich. Stat. Ann. § 22.101 (1937); Mo. Rev. Stat. Ann. § 5631 (1942); N.H. Rev. Laws c. 291, § 1 (1942); N.D. Rev. Code § 49-0404 (1943); Ohio Gen. Code Ann. § 614-53 (Page, 1946); R.I. Gen. Laws c. 122, § 58 (1938); Wis. Stat. §§ 184.02, 184.03 (1951). Utah requires approval of every contract for the purchase of new facilities by a public utility operating within the state. Utah Code Ann. tit. 54, § 4-26 (1935).

Some states regulate utility securities but exempt railroads subject to ICC jurisdiction. Conn. Gen. Stat. § 5433 (1949); Va. Code tit. 56, §§ 55, 56 (Michie, 1950). And Pennsylvania specifically excludes conditional sale contracts from the control of its commission. Pa. Stat. Ann. tit. 66, § 1241 (Purdon, 1930).

34. The New York and Massachusetts statutes are applicable only to railroads incorporated in those states. N.Y. Pub. Serv. Law § 55; Mass. Ann. Laws c. 160, § 3 (1932). However, the statutes cited at note 33 *supra* seem to apply to all railroads operating within the states.

35. The New York Public Service Commission has recognized the inherent weakness of state regulation. "The Commission asserts jurisdiction with a realization that its regulation cannot be fully effective. Regulation of one type of financing with no control over others and with little real control over the general operations of the company is certain to be weak. State regulation of an interstate enterprise also always presents possibilities of conflict. . . . [But we] believe that we can discharge [our] obligation in harmony with the Interstate Commerce Commission and the agencies of other states which are similarly concerned." Application of the Delaware & Hudson R.R. *supra* note 31, at 11.

36. One of Congress' purposes in enacting 20a was to avoid the disadvantages of state control. "Without Federal control the carriers would have to be subjected to the diversified requirements of the several States. These requirements have been burdensome to the carriers and resulted in expense and delay. The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." H.R. Rep. No. 456, 66th Cong., 1st Sess. 21 (1919).

37. See Fainsod, *Regulation and Efficiency*, 49 Yale L.J. 1191 (1940).

the approval of several state commissions,[38] railroads may be caught in the pincers of conflicting state regulations. And the objectives of state commissions may conflict with ICC policy aims.[39]

To provide the needed supervision, the ICC should assume jurisdiction. The National Association of Railroad and Utility Commissioners, as well as the ICC, has recommended such a step.[40] And railroads themselves would probably prefer regulation by a single federal agency to the multiple control of state commissions.[41] Since the ICC feels unable to reverse its interpretation of Section 20a, an appropriate amendment seems necessary.

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38. Aside from the applicability of most state laws to all roads operating within the state, see note 34 *supra*, many railroads are incorporated in more than one state. A search of MOODY'S RAILROADS (1951) indicates that there are still over sixty roads multiple-incorporated, *e.g.*, New York, N.H. & H.R.R. (Conn., Mass., R.I.); Northern Cent. Ry. (Md., Pa.); Southern Pac. R.R. (Del., Ky.); and New York Cent. R.R. (N.Y., Ohio, Ill., Ind., Pa., Mich.). This might be done to meet the requirements of state law. See, *e.g.*, TEX REV. CIV. STAT. tit. 18, § 6260 (1925).

39. "If we were to assert jurisdiction here we . . . would be running the risk—if not the certainty—of either impeding the Interstate Commerce Commission in the field that is theirs or even acting in conflict with methods that Commission designed to accomplish the same result." Commissioner Eddy, dissenting, in Application of the Delaware & Hudson R.R., *supra* note 31, at 11. But see note 35 *supra*.

40. The recommended amendment is substantially similar to that urged by the ICC, *supra* note 27. The Association's proposed amendment and resolution favoring its adoption is appended to Application of the Delaware & Hudson R.R., *supra* note 31.

41. See, *e.g.*, Communication to the YALE LAW JOURNAL from A. Ward, General Attorney, Pennsylvania R.R., dated April 4, 1952, on file in Yale Law Library.