

# Nickel Plate Application Denied

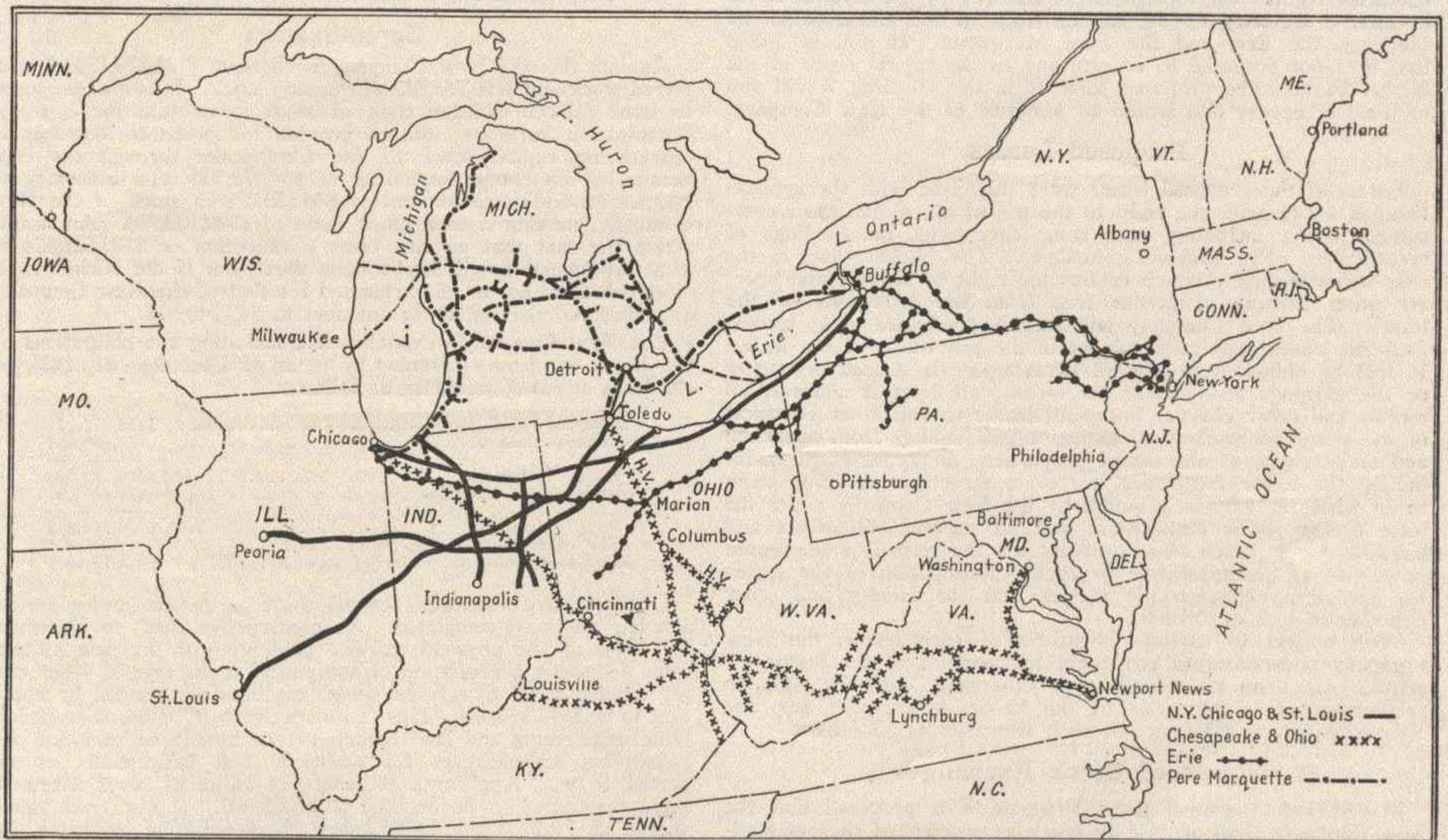
*Commission approved plan from transportation standpoint but objects to financial plan*

WASHINGTON, D. C.

THE Interstate Commerce Commission on March 2 issued its long-awaited decision on the Van Sweringen-Nickel Plate unification application, finding the proposed acquisition of control with a view to ultimate consolidation of the New York, Chicago & St. Louis Railroad, the Chesapeake & Ohio, the Hocking Valley, the Erie, and the Pere Marquette by the New York, Chicago & St. Louis Railway, a newly organized company controlled by Messrs. O. P. and M. J. Van Sweringen, not to be in the public interest except from a transportation standpoint. The commission generally approved the plan

Nickel Plate to connect with Chesapeake & Ohio with the Hocking Valley in Ohio was denied without prejudice to its resubmission by the C. & O.

The decision of the commission was reached by a vote of 7 to 1, as Commissioner Lewis dissented and Commissioners Hall, Taylor and Woodlock did not participate in the disposition of the case. Commissioners Aitchison, Campbell, Eastman and McManamy in concurring opinions did not agree with the finding that the plan would be in the public interest from a transportation standpoint. Commissioner Lewis, while joining in the thought that



The Proposed Nickel Plate System

from a transportation standpoint and as a "step along the right lines in carrying out the policy of Congress" in encouraging the formation of a limited number of railway system, but the considerations, terms and conditions of the proposed acquisition of control of the separate companies, by 999-year leases and by exchange of stock of the new Nickel Plate company for that of the separate companies, were found not to be just and reasonable. The financial structure of the new company, including the plan of issuing a large amount of non-voting preferred stock, and the arrangement by which the Van Sweringens would control its management and operation by control of only 32.85 per cent of the voting stock of the present companies, was disapproved and the application was denied. Following this denial the application of the new company for authority to issue its securities in exchange for those of the other companies was denied and the application for a certificate for the construction of a new line by the

"the equities of certain minority stockholders have not received full recognition," did not favor denial of the petition, saying that the proponents will be entirely free to renew their petition after such revision as they may think meets the objections on which denial is based and that it would be better for the commission to retain control of the matter.

Fundamental objections to the financial aspects of the plan were found by the commission and reference is made to the "utter lack of independent and impartial representation of all stockholders of the Chesapeake & Ohio and Hocking Valley when consideration was given to the plan, "and various provisions of the proposed leases were found objectionable."

W. A. Colston, vice-president and general counsel of the Nickel Plate, gave out the following comment on the decision:

"The paramount purpose of the Transportation Act is



the establishment and maintenance of an adequate national transportation system. The commission, in the first nineteen and one-half pages of its mimeographed report, finds that the proposed acquisitions of control are in the public interest as accomplishing this purpose, but it denies the applications upon consideration of purely private arrangements between stockholders, of which the commission's jurisdiction is at least doubtful, and as to which the commission indicates no definite exception. This inconsistency is forcefully pointed out in the first part of the dis-

senting report of Commissioner Lewis. The commission does not even say what changes in the private arrangements between stockholders would be acceptable to it and apparently strikes down without suggested remedy the congressional policy of consolidations in a meritorious case which, according to the commission's own finding, was estimated to result in a saving to the transportation system of the nation of more than \$6,000,000 per year."

An abstract of the report by Commissioner Meyer and of the separate opinions follows:

## The Interstate Commerce Commission Report

Control by the New Company is sought to be acquired (1) under lease for 999 years from the lessor companies of the lines of railways and of other properties, owned by them, respectively, and by assignment from each lessor company of the leases whereby such lessor company now operates existing railways of its system not owned by it, or by sublease thereof from such lessor company, and by the assignment of any and all trackage and operating rights over foreign lines; and (2) by the acquisition of at least a majority of the capital stock of the Chesapeake, the Hocking, the Erie and the Pere Marquette. It will be noted that it is not proposed to acquire any of the capital stock of the Nickel Plate. The proposed lease from the Hocking would run to the Chesapeake and would be assigned to the New Company.

### Proposed Leases

Forms of the proposed leases were submitted with the application. They transfer the right to the use of all of the lessor companies' assets, including, with some exceptions, the holdings of securities of other railroad companies. The Nickel Plate is the only lessor company which retains the right to acquire and operate other railway properties free from the provisions of the leases. The New Company will receive the entire gross income from all leased properties subject to the provisions of the leases. It will be obligated to pay all taxes upon the leased properties or the earnings and income therefrom; all interest charges, all rentals and other charges under all leases to and other contracts of the lessor companies; all expenses and liability from operation and maintenance of the leased properties; all expenses of maintaining the lessor companies' corporate structures enabling them to do whatever may be required by the New Company under the lease or by public authorities; and all current obligations and liabilities.\* \* \* Each lease provides for the return of the leased properties at the expiration or earlier termination of the lease; for accounting between the parties, and for reentry and other remedies in case of default.

With respect to capital obligations of each lessor, the New Company undertakes to pay them for account of the lessor, or provide for them by refunding or otherwise, with the right to reimbursement in securities of the lessor company at par, the New Company to take care of such securities as all others.

### Proposed Stock Exchanges

In addition to control through leases, it is proposed that the New Company shall acquire as much as possible of the outstanding capital stock of each of the lessor companies, with the exception of the Nickel Plate, by the exchange therefor of stock to be issued by the New Company. For this purpose the New Company will issue 6 per cent cumulative preferred stock and common stock, but the preferred stock is to have voting rights only upon certain rather remote contingencies. The terms of the proposed exchange are made part of the leases and require the New Company to issue to the stockholders of the lessor companies, at their option, in exchange for their shares, stock of the New Company at the following ratios:

For 100 shares of	New company's shares	
	Preferred	Common
Chesapeake preferred.....	115	....
Chesapeake common.....	55	55
Hocking common.....	50	50
Erie 1st and 2d preferred.....	50	....
Erie common.....	....	40
Pere Marquette prior preference.....	100	....
Pere Marquette preferred.....	90	....
Pere Marquette common.....	....	85

No proposal is made for an exchange of stock with the stockholders of the Nickel Plate, but it is proposed to issue to the Nickel Plate itself capital stock of the New Company equal in amount and kind to the outstanding capital stock of the Nickel Plate.

The outstanding capital stock of the lessor companies affected by the plan is as follows:

	Preferred	Common
Chesapeake .....	\$12,561,700	\$65,425,725
Hocking .....	.....	11,000,000
Erie .....	63,904,400	112,481,900
Pere Marquette.....	23,622,000	45,046,000
Nickel Plate.....	25,865,666	30,404,464
	\$125,960,766	\$264,360,089
Total preferred and common.....		\$390,320,855

### Capitalization

Against this the New Company is to issue \$131,715,120 of preferred stock and \$150,753,523 of common stock. It is also proposed to issue \$50,000 of each class of stock to be sold for cash for organization purposes; and to provide for probable increases in outstanding capital stock of the Chesapeake through the conversion of its bonds amounting to \$38,073,500 it is necessary to reserve an additional amount of \$46,534,278 in stock of the New Company, making a total stock issue of \$329,102,920. Applicants stress the fact that on this basis a reduction of \$103,521,824 in total capitalization will be brought about, but if the Nickel Plate stock which is not to be exchanged for that of the New Company is considered the reduction amounts to \$47,249,694.

The New Company's capitalization, including the obligations of the lessor companies assumed by it, as of December 21, 1924, on the basis outlined, would be as follows:

Preferred stock.....	\$155,032,259
Common stock.....	174,070,661
Total stock.....	\$329,102,920
Funded debt.....	621,822,920
Total .....	\$950,905,812
Ratio of funded debt to stock.....	1.9 to 1
Ratio of common to preferred stock.....	1.12 to 1

Our tentative valuations of all those properties under section 19a has not been completed. A "constructive cost" to December 31, 1924, of the physical railway properties of the new system, after deducting depreciation of equipment at the rate of 4 per cent per annum down to salvage value, has been ascertained by applicant to be \$991,550,474. This "constructive cost" is based on underlying engineering and land reports of our bureau of valuation and subsequent expenditures for additions and betterments as reported to us. Applicants estimate the value of other assets of these companies to be at least \$140,000,000. If our final values should not fall substantially below these tentative estimates, the proposed aggregate capitalization is conservative.

At the outset two questions raised by interveners representing minority stockholders of the Chesapeake will be disposed of. They first contend that the application for the acquisition of control is not lawfully before us as the application could not be lawfully authorized by a majority of the boards of directors of the Hocking and Chesapeake, or by any meetings of stockholders of these companies so long as substantial control is held by the proponents of the acquisitions. The boards of directors of the several lessor companies have adopted resolutions authorizing and approving the leasing of the properties subject to approval of the stockholders and of governmental authority. Approval has been given by the stockholders at special meetings called to consider the question. But of course the proposed leases have not been executed by the Chesapeake, the Hocking or the New Company. Their approval by the stockholders was conditioned upon consent of the necessary governmental authorities. We have in many cases authorized under paragraph (2) of section 5 acquisition of control by one carrier under leases or other agreements where the contracting parties had directors and officers in common. While this common control must be kept in view in considering other aspects of this case it does not of itself prevent us from exercising our jurisdiction to consider the application on its merits. We are of opinion that the application has been authorized by each of the applicants and is regularly before us for consideration.



### Plan Not a "Consolidation"

The second question raised by interveners is that we are without authority under paragraph (2) of section 5 of the act to approve the application for unified control and operation in the manner proposed, as they contend it is in effect a consolidation of the carriers into a single system for ownership and operation. It seems only necessary to refer to many other cases where we have held that control effected by means similar to those proposed here did not constitute a consolidation into single system for ownership and operation as contemplated in paragraph (2) of section 5. We therefore conclude that we have jurisdiction under paragraph (2) of section 5 to consider this application.

### The Question of Public Interest

We come now to the principal questions in this proceeding (1) are the proposed acquisitions of control in the public interest; and (2) are the considerations, terms and conditions of the proposed acquisitions of control just and reasonable.

There will be included in the system of the New Company approximately 9,160 miles of road (including trackage rights) in the United States, and 337 miles in the Dominion of Canada. The main lines of the system will extend from the Atlantic ports of New York and Newport News to connections with the principal western, northwestern and southwestern railroads at the important gateways of Chicago, Peoria and St. Louis.

### Advantages from a Transportation Standpoint

The applicants enumerate various advantages to the public through the proposed unification of operations, among which may be mentioned the following: Unification will make possible a fuller utilization of terminals and more rapid, satisfactory and frequent service. Shop facilities will be used to the maximum capacity, as a result of distribution of work to shops best qualified by capacity and equipment to perform it. There are 36 points of interchange between the lines of the lessor companies, at each of which there is joint interchange, inspection and record. The delays incident to this inspection and record will be eliminated and movement through most of the points will be continuous. Consolidation of revenue and distribution of costs will make practicable new and additional through routes. The Pere Marquette car ferries across Lake Michigan operate throughout the year and favorable interchange arrangements are in effect with the northwestern lines at Milwaukee, Manitowoc and Kewaunee. For the first time these routes will be connected by a single system with most of the important cities in central and truck line territories.

Movement of coal from mines on the Chesapeake and the Hocking can be better controlled and expedited, particularly with respect to the return of empties, an important factor in coal movements. In central territory Nickel Plate, Erie and Pere Marquette are the only important carriers which have substantially no bituminous coal production on their lines. Erie has some on its lines in Pennsylvania. On the other hand Chesapeake and Hocking are primarily coal carriers and the unification of all five will result in the new company resting on a border traffic base. The tendency of this will be to increase the financial stability of the entire system which in turn will tend to insure a higher quality of service. The New York Central, Pennsylvania and Baltimore & Ohio systems, the principal competitors of the New Company in central territory, serve large coal areas. Unified operation will result in a better distribution of iron and steel products, automobiles and various other manufactured products produced on the lines of the lessor companies, as they can be handled by a one-line haul throughout an extensive territory. Strengthening of the traffic relations of the Chesapeake will be beneficial to the port of Hampton Roads. One of the most important factors in the unified system will be the movement of traffic over the most economical routes, having regard to density of traffic, congestion at terminals, and grades.

Altogether it is estimated that the proposed unified operation would result in annual savings of more than \$6,000,000. Many, if not all, of the savings are not dependent upon unification in the exact manner proposed here but could be brought about if control were only by stock ownership, or in many cases by inter-company contracts providing for the use of such joint facilities as it is proposed the unified system will establish. But that is not to say that the things mentioned can not more certainly and easily be brought about when the lines are under one management and control.

Without unification it is said that the Chesapeake would have to spend over \$23,000,000 in revising its Chicago division, and the Erie nearly \$32,000,000 in revising its lines between Marion and Meadville and between Kennedy and Steamburg, N. Y., a total of about \$55,000,000. As against this capital expenditure it will be necessary in the near future, in order to provide for the increased traffic, to complete the double-tracking of the Nickel Plate's line between Lima and Brocton, N. Y., at a cost of over \$8,000,000.

Reference is made to the fact that the Erie, Chesapeake, Pere Marquette and Nickel Plate compete to some extent with each other. But we believe that it is unquestionable that the chief and by far the strongest competitors for traffic between Chicago and the west, on the one hand, and New York and Atlantic Seaboard, on the other, are the New York Central, Pennsylvania and Baltimore & Ohio systems. The system proposed would create a fourth powerful competitor of the three systems named, which have long been strongly entrenched in the territory. There has been no serious suggestion that they be disrupted.

### The Commission's Tentative Plan

#### Not an Inflexible Guide

In compliance with the mandate of paragraph (4) of section 5, the commission on August 3, 1921, promulgated a tentative plan for the consolidation of the railway properties of the United States into a limited number of systems. This tentative plan provided for either nine or eight systems in the eastern region according as the New England lines were or were not grouped in a separate system. The principal carriers in those systems were as follows:

1. New York Central and its subsidiaries, except the Lake Erie & Western, Ohio Central Lines and Indiana Harbor Belt; Western Maryland; Rutland; and, alternatively, Boston & Maine, Maine Central and Bangor & Aroostook.
2. Pennsylvania and its subsidiaries, but specifically excluding Norfolk & Western.
3. Baltimore & Ohio; Reading; Jersey Central; Monon; and, alternatively, New Haven.
4. Erie; Delaware & Hudson; Lackawanna; Bessemer & Lake Erie, and Wabash east of Mississippi River.
5. Nickel Plate and properties since consolidated into present Nickel Plate; Lehigh Valley; Wheeling & Lake Erie, and Bessemer & Lake Erie, alternatively with system No. 4.
6. Pere Marquette; Ann Arbor; and Detroit, Toledo & Ironton.
7. New Haven; New York, Ontario & Western; Boston & Maine; Maine Central; and Bangor & Aroostook.
8. Chesapeake & Ohio; Hocking Valley; and Virginian.
9. Norfolk & Western and Ohio Central Lines.

The carriers covered by the present application were placed in four separate systems. Since that time several changes have taken place in the corporate relationship of several of the carriers in the eastern group, with the approval of the commission where necessary, to wit: The New York Central has acquired further control of the Cleveland, Cincinnati, Chicago & St. Louis, and has made the Ohio Central lines an integral part of its system by means of what practically amount to perpetual leases. The Pennsylvania has leased for 999 years several of its most important subsidiaries, and has consolidated others under state laws. The stock of the Central of New Jersey formerly held by the Reading Company has been placed in the hands of trustees appointed by the District Court for the eastern district of Pennsylvania, following the decision of the United States Supreme Court in *United States v. Reading Co.*, 253 U. S. 23. The final disposition of this stock has been deferred pending consolidation proceedings, but by the terms of the decree the court may at any time enter an order for the sale of the stock. New York, Chicago & St. Louis, Lake Erie & Western, and Toledo, St. Louis & Western have been consolidated and now comprise the present Nickel Plate, one of the applicants, which, as before stated, has a one-half interest in the Detroit & Toledo Shore Line. The Wabash has acquired control of the Ann Arbor.

Nearly all of the above transactions were passed upon by us. Most of them were applications under paragraph (2) of section 5, the one under which the present application was filed, or were applications under section 20(a) to effectuate some previous action taken under the state laws. In addition the Norfolk & Western is now before us seeking authority to acquire control of the Virginian and we are advised that the Delaware & Hudson proposes to lease the Buffalo, Rochester & Pittsburg, subject to our approval of course. In many of the instances where we approved acquisition of control, such groupings were contrary to the tentative plan. We have never considered that plan as an inflexible guide to our actions under these provisions of the statute. On the contrary, although consolidations must be in conformity with our complete plan when promulgated, it is evident that it was not the intent of Congress that even the complete plan should be considered as an inflexible guide, as we are empowered at any time after its promulgation, upon our own motion or upon application, to reopen the subject for such changes or modifications as in our judgment will promote the public interest. As we stated at that time, the tentative plan was put forward in order to elicit a full record upon which the plan to be ultimately adopted can rest, and without prejudgment of any matters which may be presented upon that record. Furthermore, we are here dealing with acquisitions, not consolidations, although the latter are the ultimate end sought.

### Defects in Eastern Systems of Tentative Plan

At the hearings upon the tentative plan there was no advocacy of it by any witness who expressed any general opinion concern-



ing the various proposed eastern systems. It was obvious that there was a great disparity in the mileage, property investment and traffic of the several proposed systems. Special criticism was directed against systems Nos. 4 and 5 on the ground that those systems would not have either the financial strength or the traffic advantages which would be necessary to enable them to compete, particularly with the New York Central and Pennsylvania.

The several systems were not sufficiently widely diversified in geography, traffic, and access to important centers of production and distribution to enable them to reach that stable condition of earning capacity which would be necessary if the systems established were to earn substantially the same rate of return.

As before stated, the different parts of the New York Central and Pennsylvania systems have been brought more closely together by various means with our approval. In the case of the Ohio Central lines the tentative plan proposed them as an outlet to the lakes for the Norfolk & Western. It now has such an outlet, as well as a wide western outlet, in connection with the Pennsylvania. It is true that in approving applications under paragraph (2) of section 5 we have generally said that such approval was not to be considered as indicating our conclusion in the matter of consolidation. But on the other hand, for the purposes of dealing with this application, we must consider the New York Central and Pennsylvania as they stand, together with the further fact that the latter still has a large interest in Norfolk & Western.

### Proposed System Would Compete with Three Large Systems

Applicants contend that their proposal will result in better balanced competition than is possible by the separate components of the system. No important city will be deprived of railroad competition by the proposed unification and, while traffic will be routed so as to avoid congested terminals and otherwise improve and expedite service and reduce operating costs, there is no indication that any existing route will be closed. On the contrary, from stipulations of record affecting weaker connections, a much different spirit has been manifested.

In revenue ton-miles per mile of road operated, the proposed system was third in 1923, being exceeded by the Pennsylvania and Baltimore & Ohio, and first in 1924. In total operating revenues it was third (exceeding Baltimore & Ohio) and in railway operating revenues per mile of road fourth, in 1923 and 1924. In total net railway operating income it was third, and in net railway operating income per mile of line, fourth in 1923 and 1924. In both years it had the smallest average revenue per ton mile, but the greatest average haul per revenue ton. Its total investment in road and equipment was greater than that of Baltimore & Ohio at the end of 1923 and 1924, though less per mile of line than any of the other three systems. In percentage of net railway operating income to investment in road and equipment it ranked third in 1923 (exceeding Pennsylvania) and second in 1924 (New York Central being first.)

The following comparison is limited to the four systems named and shows results for 1924, the investment in road and equipment being as of December 31, 1924:

	Miles of line operated	Investment in road and equipment	Operating revenues	Net railway operating income	Percentage of income upon book investment
Proposed system.	9,213	1,228,863,070	340,364,052	59,273,642	4.823
N. Y. C. ....	12,093	1,878,762,969	588,171,010	107,988,738	5.748
Pa. ....	11,379	2,246,661,561	693,718,881	84,127,203	3.745
B. & O. ....	5,316	795,447,338	227,084,805	37,773,163	4.749

### A Step Toward Carrying Out the Policy of Congress

From the above discussion it seems clear that the proposed unification is a step along the right lines in carrying out the policy of Congress, as expressed in section 5 of the act, of encouraging the formation of a limited number of systems, which, as it affects the eastern territory, outside of New England, and considering the railway situation in that district today, dominated as it is by three long established systems, would result in nearly all of the principal producing and consuming centers of the territory being served by two or more and in many instances by all of the limited number of systems. Mileage, property investment, gross earnings and net railway operating income would be more nearly equalized than is possible in the case of the present number of systems, or even the number proposed in the tentative plan. The systems would more nearly approach an equality of opportunity to serve the public throughout the territory, to provide adequate facilities and to make necessary extensions from time to time with reasonable expectation of securing additional traffic. A greater amount of actual and effective competition in service may be assured by a limited number of well articulated systems than by a greater number of systems less complete.

Other meritorious groupings of these carriers might be proposed but viewing the grouping presented in this application strictly

from a transportation standpoint, we find that the proposed acquisitions of control are in the public interest.

### Financial Terms and Conditions

Acquisitions of control upon the considerations, terms and conditions proposed were vigorously opposed by interveners, one of whom as a stockholders' committee, representing 143,325 shares of Chesapeake, known as the Scott committee, voted against approval of the proposed lease at a stockholders' meeting held on March 30, 1925. The Hocking interveners represent 11,590 shares of Hocking stock, of approximately 53.5 per cent of the minority stock of the company.

The plan of acquiring control of the lessor companies by lease and stock control heretofore outlined, was proposed by O. P. and M. J. Van Sweringen, hereinafter referred to as the Van Sweringens, under date of August 20, 1924. At that time more than a majority of the members of the boards of directors of the Chesapeake, Hocking and Nickel Plate were common to all three companies, with the same chairman. On August 19, 1924, the board of directors of the Nickel Plate approved the proposal and recommended it to its stockholders. On August 25, 1924, at 2:00 p.m. a directors' meeting of the Chesapeake was held at which similar action was taken. Of the eight directors present and voting for approval of the proposal, five had previously approved it on August 19 as members of the Nickel Plate board. Another director was president and a director of the Chesapeake and Hocking. On August 25, 1924, at 2:20 p.m. (which it will be noted was 20 minutes after the Chesapeake board had been convened) a meeting of the Hocking board of directors was held at which the proposal was approved. Of the nine directors present, seven had just voted in the Chesapeake meeting. On January 20, 1925, the boards of the Chesapeake and Hocking in formal meetings lasting a few minutes approved the proposed leases. At each meeting seven of the nine and ten directors, respectively, voting were also directors of Nickel Plate. On the same day, the articles of incorporation of the New Company were drawn up. All of the incorporators were directors of the Nickel Plate and all except one were directors of the Chesapeake and Hocking.

### Treatment of Minority Stockholders Criticized

A special meeting of the stockholders of the Chesapeake was held on March 30, 1925. The inspectors of election reported that 850,848 shares were outstanding and entitled to vote, and 658,460 shares present or represented at the meeting. Of this number 506,542 shares were voted by the Deposit Committee named in the proposal and 152,918 shares, of which interveners represented 143,323, against approval of the proposed lease. Previous to this meeting interveners had formally requested permission to prepare a list of the stockholders and only after notice was given of intention to apply for a writ of mandamus was such a list furnished. This was done on March 12, or only two weeks before the special meeting. Aside from the legal rights of stockholders, it seems obvious that it is in the public interest that stockholders' lists be readily available to all stockholders, possibly restricted to those holding a minimum amount of stock, under reasonable rules and regulations prescribed by the board of directors. It is not proper for officials of a railway company to inquire regarding the purposes for which a stockholders list may be desired by a stockholders or group of stockholders. Any other course on the part of officials is in violation of their trust relationship to all the stockholders.

The special meeting of stockholders of the Hocking was held on March 28, 1925, at which 106,555 shares of the total of 110,000 shares were represented. Of these 90,665 shares were voted by the deposit committee in favor of the proposal and 15,890 shares against it. This latter amount represented over 73 per cent of minority stock, that is stock other than that owned by the Chesapeake. The record leaves no doubt that the interests dominating the Chesapeake and Hocking, who as we have pointed out, are those controlling the Nickel Plate, used every weapon at their command to crush all opposition to their predetermined course of action, and that there was an utter lack of independent and impartial representation of all of the stockholders of the Chesapeake and Hocking when consideration was being given by their directors to approval of the plan and the terms of the proposed leases. Requests made by stockholders for relevant and material information were met by evasion or refusal. All but two of the directors of the Chesapeake who voted in favor of the plan were vitally interested in the result from a viewpoint far different from that of mere stockholders in the Chesapeake. Of the two exceptions, one represented certain outside interests which immediately bought amounts of Erie and Pere Marquette, and the other was the president of the Chesapeake whose hands were tied.

The contrast between the manner in which the interests of all the stockholders of the Chesapeake and of the Hocking were represented and the manner in which the interests of stockholders



of Pere Marquette and Erie were protected is striking. In the latter two instances dealings were at arm's length. None of the directors of the Erie or of the Pere Marquette were directors of the Nickel Plate. The board of directors of the Erie had the matter under consideration for months, and the minutes of its several committees as well as those of the board itself show that the stockholders of that company had the benefit of the fullest consideration of the proposal and independent advice as to its terms and conditions, and certain amendments and revisions were insisted upon. The chairman of the board and president did not vote upon the question because he considered that he represented all the stockholders and as some of them objected to the proposal he did not deem it proper to commit himself.

A special committee of three directors of Pere Marquette was appointed to study the proposal and its minutes and those of the board of directors show that the stockholders had the benefit of the fullest consideration, as well as independent advice, which resulted in very substantial changes in the terms and conditions of the proposed lease, the rights and preferences to be enjoyed by stockholders of the New Company, and the ratios of stock exchange, the results of negotiations in the latter respect resulting in an increase in the ratio of exchange from 90 to 100 for prior preference, 85 to 90 for preferred, and 70 to 85 for common stock.

Applicants repeatedly and unreservedly invited the criticism and judgment of the commission regarding every feature of the proposal. However, applicants' original plan of presentation does not appear to have contemplated nearly as complete a showing on the record as the importance of the case and the character of the issues fairly required. Much of applicants' evidence appears to have been prepared after the hearings had begun to meet objections made by interveners and suggestions by the presiding commissioner. Great undertakings like this proposal should be supported by a strong and clear affirmative showing which will fairly meet in advance of rebuttal every substantial objection which reasonably can be anticipated.

#### Van Sweringens Control with Minority Interest

One of the proponents of this plan testified that "if we could not control the properties to the extent necessary to assure continuity of policy we did not want to be interested in them." Through their control of 80 per cent of the voting stock of the Vaness Company, a personal holding corporation, the Van Sweringens now control 54.17 per cent of the voting stock of the Nickel Plate, but they control directly or indirectly only 32.85 per cent of all the voting stock of the companies affected by their proposal. But under their plan they will directly or indirectly control, without purchasing a single additional share, 50.93 per cent of the voting stock of the New Company, and thus will effectually control its management and operation. Assuming conversion of Chesapeake's convertible bonds, the percentages would be 29.43 per cent before and 44.12 per cent after the plan became effective, the latter, under modern conditions, being sufficient to effectively control a large corporation.

This is accomplished principally in two ways. The first is to have the New Company issue preferred stock without voting power, except in certain contingencies not material here, in an amount which compares to the common stock as 1 to 1.12.

There are outstanding 1,000,951 shares of voting preferred stock of the lessor companies. In exchange therefor 687,843 shares of non-voting preferred stock of the New Company will be issued. The New Company will also issue non-voting preferred stock equal in amount to the non-voting preferred stock of the Nickel Plate. Thus the preferred stockholders of Nickel Plate sustain no loss of voting rights, while preferred stockholders of other lessor companies sustain a complete loss of such rights. In addition to that Chesapeake stockholders are offered 55 shares of common and 55 shares of non-voting preferred for each 100 shares of Chesapeake common; while Hocking stockholders, other than the Chesapeake, are offered 50 common and 50 preferred for each 100 shares, thus effecting a further reduction in voting power. It is not proposed to issue any stock of the New Company for Hocking stock owned by Chesapeake, but it is to pass to the New Company under the lease. This stock is pledged to secure some Chesapeake bonds. It is explained that on this account it can not be exchanged for stock of the New Company, but apparently it would not be difficult to provide for such exchange when freed from existing liens, which have at the most only six years to run. It is impossible to determine what, if any, consideration was given to Chesapeake equity in this stock. At the hearing witnesses for applicants stated that in fixing the ratios it was taken into consideration. Upon brief our attention is directed to the premium on Chesapeake's stock in exchange for stock of the New Company as the consideration, but if that is so the amount of the consideration to be paid is either less, on the basis of the amount of Chesapeake stock outstanding at the time of the proposal, or very much greater, on the basis of the amount of Chesapeake stock that will be outstanding after conversion of bonds, than is proposed to be given for stock of the Hocking in the hands of the public.

Adverting to stock control, we have heretofore pointed out that the plan does not contemplate exchange of stock by the Nickel Plate stockholders. They therefore suffer no diminution of their voting power. On the other hand the Nickel Plate, having leased its railroad and received therefor stock of the New Company equal to its own stock, and having exchanged its holdings of Chesapeake and Pere Marquette for stock of the New Company, will in effect be a holding company controlled by the Van Sweringens through their holdings in the Vaness Company. This will give them control of this large transportation system without the necessity of owning an actual majority of even the voting stock, much less all of the stock.

#### Non-Voting Stock Plan Criticized

We can not escape the conclusion that the plan was arranged with the intention of keeping control in the hands of its proponents even though their interest is a minority one in fact. Such an arrangement is not in accord with sound railroad practice. The Nickel Plate is the only railroad of importance in the country in which preferred stockholders do not have the right to vote, and now it is proposed to extend this feature to over \$155,000,000 of new stock of a company comparable with the New York Central, Pennsylvania and Baltimore & Ohio. The common stock of the New Company will not greatly exceed \$174,000,000 out of a total capitalization of over \$950,000,000. We believe it to be self-evident that the public interest requires that the entire body of stockholders of a railroad which is bonded in excess of one half of its investment, and not a powerful few, shall be responsible for its management. This can be done only by giving them the power to control the management. The lethargy of ordinary stockholders in exercising their power to control the management of these large corporations has often been commented on, but nevertheless the power should be in their hands to use as they see fit. It is inimical to the public interest to strip stockholders of their voting power, thus rendering it so much easier to control a great transportation system by a comparatively limited amount of investment.

#### The Trust Agreement

Hovering in the background of this entire question of control in this case is a trust agreement dated January 11, 1924, described by counsel as being in the nature of a last will and testament. Under this agreement the Van Sweringens as owners of 130,000 shares of common (voting) stock of the Vaness Company, and C. L. Bradley and J. R. Nutt, both directors of the Nickel Plate, as owners of 16,250 shares each of the common stock of the Vaness Company, deposited such stock with a trustee, receiving in lieu thereof trust certificates representing "certificates of interest in the common stock" of the Vaness Company proportionate to the number of shares deposited. The stock so deposited constitutes the entire voting stock of the Vaness Company. The certificates issued to Bradley and Nutt and the rights represented thereby are subject to purchase by the Van Sweringens under the terms of an option expressed in the agreement. The certificates are assignable and transferable upon the books of the trustee "subject to the terms and conditions of the agreement." The agreement constitutes and appoints the four gentlemen named "managers" of the trust, which is to continue for 21 years after the death of the last survivor with the right on the part of the survivor to appoint successors to a deceased manager. Without giving further details of this trust agreement, it is sufficient to say that under it the Van Sweringens may divest themselves of all beneficial interest in the Vaness Company stock and still retain voting control of the New Company without direct or indirect ownership of a share of stock therein.

#### Need Directors Who Direct

With respect to the reasonableness of the proposed terms of stock exchange, it is evident that inadequate consideration was given to the terms from the viewpoint of the stockholders of the Chesapeake and Hocking. The president of those two companies was not asked to submit any information or figures bearing on the matter while the plan was under consideration, and had no part in fixing the terms beyond a few general suggestions as to the factors to be considered. He first learned of the proposal from the newspapers and voted to approve it without change. Other directors acted principally on the basis of the balance sheet and income account annexed to the plan and a general inspection of railway and financial manuals and annual reports. They could produce no memoranda or data actually considered by them or by the respective boards although data used by the Erie and Pere Marquette boards were produced. It brings forcibly to mind what we said in *Financial Transactions C., R. I. & P. Ry. Co.*, 36 I.C.C. 43:

This record emphasizes the need of railway directors who actually direct. There are too many passive directors who acquiesce in what is being done without knowledge and without investigation. A director of a railroad is a quasi-public official who occupies a position of trust.



The boards of the Chesapeake and the Hocking appear to have acted as boards of ratification rather than authorization or direction with respect to these matters.

**Ratios of Stock Exchange Not Shown to Be Just and Reasonable**

It is obvious that all of the many elements to be taken into consideration were not so considered when the proposal was being drawn up or else the employment of experts after the commencement of the hearing to compile, adjust and compare earnings, property values, book values, and the like would have been largely unnecessary. The information would have been available at the opening of the hearing. Without going into further details it is sufficient to say that whatever test applicants have used in trying to sustain the predetermined ratios they have not sustained the burden of showing that the ratios are just and reasonable as between the stockholders of the respective lessor companies. The traffic of the Chesapeake and Hocking has increased greatly year by year, and together these two roads now constitute one of the most efficient coal transportation machines in the country and undoubtedly would constitute the backbone of the proposed system. The Hocking earned on its common stock \$16.50 per share in 1923 and \$24 per share in 1924, but dividends of only \$4 per share were paid in each year. The Chesapeake had net income, including its equity in Hocking income, equivalent to \$12.93 per share of common stock in 1923 and \$19.26 in 1924 but dividends of only \$4 were paid each year. Applicants refer to the "judgment of the market place" but it seems only necessary to refer to the prices on the New York Stock Exchange on August 8, 1924, when the proposal was announced, April 17, 1925, ten days after the hearings began, and December 12, 1925. The latter quotations are not of record but we believe we are justified in making note of the prices.

	Aug. 8, 1924	Apr. 17, 1925	Dec. 12, 1925
Nickel Plate common.....	110 $\frac{1}{8}$	126 $\frac{3}{8}$	178
Chesapeake common.....	90 $\frac{5}{8}$	91 $\frac{3}{8}$	122

But aside from what has been previously stated, there is another matter which renders it impossible on this record to approve these ratios. We refer to the inclusion of the anthracite coal properties of the Erie. The record is confusing and vague as to their value, and renders it impossible to reach a definite conclusion as to what ratios would be fair.

**Inclusion of Erie Anthracite Properties Objected To**

Section 20a, under which application is made to issue securities, provides that we can make an order authorizing proposed issues of securities or assumption of liability only if we find (a) that the issue or assumption is for some lawful object within the corporate purposes of the applicant 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 (b) is reasonably necessary and appropriate for such purpose. Applicants have made no such showing as to the inclusion of these anthracite properties in the proposed new system. Furthermore the federal courts in several instances have compelled the complete separation of common carriers and their anthracite coal properties.

The New Company does not intend to operate several subsidiaries of the Erie system, said to be unprofitable, although its stockholders in those companies are to be taken over. These subsidiaries have been integral parts of the Erie system for many years and they can not be sloughed off except on a proper affirmative showing. All show corporate deficits as of December 31, 1924, and Erie's assets are distorted to the extent of over \$5,000,000 representing "traffic and car service balances" and "miscellaneous accounts receivable" due from subsidiaries.

The provisions of the leases dealing with the rights of non-assenting stockholders of the lessor companies, other than the Nickel Plate, appear to be designed to coerce all the stockholders into exchanging their stock for that of the New Company upon the terms proposed. The options given them are largely illusory.

**Proper Ratios of Exchange Not for Commission to Prescribe**

Applicants concede not only that we have jurisdiction to pass upon the reasonableness of the considerations, terms and conditions, but request us, particularly with reference to the ratios of stock exchange, to indicate what in our opinion would be just and reasonable. For the reasons heretofore pointed out, it is impossible upon this record, voluminous as it is, to so find. However, the burden of ascertaining or determining proper ratios of exchange should not be cast upon us. If all the stockholders are impartially represented in the preliminary discussions they

should be able to reach an agreement which can secure the approval of substantially all of the stockholders. If all the stockholders of Chesapeake and Hocking had been represented by independent negotiators the transcript of these hearings would read differently and our findings would be different. The burden is upon applicants to justify the justness and reasonableness of the ratios of exchange. Many similar applications will probably be filed in the future and if all of these applicants like the instant ones, should request us to adjudicate their differences in the commercial aspects of buying and selling railroad properties, the law would probably become unworkable because we can not undertake, at the request of parties, virtually to trade in several hundred thousand miles of railroads and at the same time perform our legitimate duties under the law.

In view of the fundamental objections relating to the financial aspects of applicants' proposals pointed out in this report, we do not deem it necessary to discuss many other matters covered by the record. We have considered the latter in so far as they have any material relation to this proceeding. They include the means by which the present Nickel Plate was brought into being and control secured by the Van Sweringens; how the latter secured control of Chesapeake and Hocking; their personal profits, actual and prospective; various transactions in connection with the Cleveland Union terminal; the Ross employment contract; acquisition by the Nickel Plate of terminal properties near Chicago through the medium of the Calumet trust in which the Vaness Company has 89 per cent of the beneficial interest; and the relations between the Van Sweringens and Union Trust Company of Cleveland, J. P. Morgan & Co., The First National Bank and the Guaranty Trust Company of New York.

We therefore find that the considerations, terms and conditions of the proposed acquisitions of control are not just and reasonable. Aside from the transportation aspect the proposed acquisitions of control upon the considerations, terms and conditions proposed have not been shown to be in the public interest. The application must be denied. This action necessitates similar disposition of the application for authority to issue securities.

**Short Lines**

The American Short Line Railroad Association and certain individual carriers intervened for the purpose of securing proper recognition of the interests of short lines connecting with the lines of the lessor companies should the proposed acquisitions be approved. In view of our denial of the applications it will be unnecessary to deal with those interveners. But the importance of the problem of the short lines in their relation to this subject cannot be too strongly emphasized. One of the chief criticisms of the unifications which have been proposed or suggested has been that certain of them do not embrace related weak lines, although the union of the weak with the strong lines is one of the ends which Congress apparently had most definitely in mind. When these unifications are being considered the problem of the short lines whose property in the public interest should be included in the systems proposed cannot be overlooked if it is possible to include them upon reasonable terms. Every applicant should assume the burden of making reasonable provision in its plan for the possible incorporation of every connecting short line now in operation in the territory covered or to be covered by the proposed grouping or unification.

**The Proposed New Line**

With respect to the application in F.D. No. 4643 the record is convincing that the construction of the proposed new line between Gregg and Valley Crossing is necessary to take care of the growing traffic of the Chesapeake. Most of the preliminary work has been done by the Chesapeake and it is amply able to finance the construction. The application of the New Company will be denied without prejudice to resubmission by the Chesapeake. An appropriate order will be entered.

Commissioners Hall, Woodlock, and Taylor did not participate in the disposition of this case.

**Separate Opinions**

EASTMAN, *Chairman*, concurring:

With the result reached, namely, the denial of the application, I am quite in accord. I am also in accord with the finding that "the proposed acquisitions of control upon the consideration, terms and conditions proposed have not been shown to be in the public interest," and with what is said in support of this finding. I am not in accord with the finding that the proposed plan of unification does not involve the consolidation of the carriers into a single system for ownership and operation and that it contemplates merely aquisitions of control which we have jurisdiction to approve under paragraph (2) of section 5 of the act. In dissent from this finding I am authorized to say



that I am joined by Commissioners Campbell and McManamy. Nor am I in accord with the finding that from a transportation standpoint the "proposed acquisitions of control are in the public interest." In my judgment the evidence falls short of establishing that fact. In this view I am authorized to say that I am joined by Commissioner McManamy.

**Commissioner Aitchison**

AITCHISON, *Commissioner*, concurring:

With the finding in the foregoing report that the financial plan presented as a means of carrying out the acquisition of control is not reasonable, and is not in the public interest, I am in accord. The dismissal of the application for approval of acquisition necessarily follows this conclusion. But from the transportation standpoint I would find that the present record establishes that it is not in the public interest that the Chesapeake and Ohio and the Hocking Valley should be taken with the other railroads involved under common control by the New Nickel Plate Company. Commissioner Campbell joins me in the foregoing expression. I concur in the report and order, qualified as herein stated.

**Commissioner Lewis**

LEWIS, *Commissioner*, dissenting:

After much analysis the commission, in dealing with the question of public interest, finds that it would be served by the consolidation proposed. But private interest and what is found to be defects in the financial plan block the way and the petition is denied. I concur in the finding that the public interest as declared by Congress would be served. I further join in the thought that the equities of certain minority stockholders have not received full recognition. I do not, however, favor denial of the petition.

There certainly arise grave doubts as to whether this administrative body, having at most only quasi-judicial power, should attempt to set itself up as a court of equity to pass on various individual claims that arise in consolidation proceedings. But this body is competent and equipped to appraise, and to indicate what it would consider to be "just and reasonable terms and conditions" even as between various groups of security holders. It would certainly be within its scope of its proper activity to indicate what would bring the proposal, found to be in the public interest, into line for its approval.

The presumption is created that if the terms and conditions and financial structure are revised to a satisfactory state not indicated, the proposed consolidation will be approved. There are, however, left a number of issues which were raised and are not passed on. Would they rise to such proportions as to block approval? Among these is the allegation of a community of interest between the Van Sweringens and the New York Central and various banking houses and trust companies, a line of attack vigorously prosecuted for months through the Cleveland Union Terminal and many other companies touched not only by the Van Sweringens personally but also by the Vaness Company. The record on this one issue is very ample and it seems to me that we should make a clear cut finding on this vital matter. Inasmuch as it is found that the proposed new system would be a worthy competitor of the New York Central as well as of the Pennsylvania and Baltimore & Ohio systems, there is an implied failure to connect it up with the New York Central interest, but this is not clearly or affirmatively found.

It is well established in our own minds that the doctrine of *stare decisis* does not prevail in our procedure. Proponents of the consolidation will be entirely free to renew their petition after such revision as they may think meets the objections on which denial is based. It would, however, be much better, it seems to me, for us to retain control of the matter and to lead the way to the realization of those things which we find meet the definitions of public interest set up by Congress in its declaration of a national railroad policy.

APPENDIX

PERCENTAGE OF VOTING STOCK OF CONSTITUENT COMPANIES CONTROLLED BY O. P. AND M. J. VAN SWERINGEN (Before Conversion of C. & O. Bonds.)

	Total shares	Owned by	Shares	Per cent
Chesapeake & Ohio, common	654,147	N. P. R. R....	155,000	23.69
		Vaness Co.....	174,800	26.72
			329,800	50.41
Preferred .....	125,617			
Total.....	779,764		329,800	42.29
Erie Railroad, common....	1,124,819	Vaness Co.....	387,000	34.40
First preferred.....	479,044	Vaness Co.....	24,700	5.15
Second preferred.....	160,000	Vaness Co.....	52,600	32.87
Total.....	1,763,863		464,300	26.33

	Total shares	Owned by	Shares	cent Per
Pere Marquette, common...	450,460	N. P. R. R....	120,000	26.64
		Vaness Co.....	30,000	6.66
			150,000	33.30
Prior:				
Preferred .....	112,000			
Preferred .....	124,290			
Total.....	686,750		150,000	21.8
N. Y., C. & St. L., common	304,064	Vaness Co.....	164,000	54.17
			No Voting Power	
Preferred .....	258,656		164,700	54.17
			88,379	80.35
Hocking Valley, common...	109,995	C. & O. Ry.....		
Total outstanding voting stock, eliminating:				
Non-voting Nickel Plate stock .....	3,644,436		1,197,179	32.85

SUMMARY

	Shares	Per cent
Nickel Plate owns:		
C. & O. common.....	155,000	4.25
P. M. common.....	120,000	3.29
		7.54
Vaness Company owns:		
C. & O. common.....	174,800	4.80
Erie, common.....	387,000	10.62
First preferred.....	24,700	.68
Second preferred.....	52,600	1.44
P. M. common.....	30,000	.82
N. P. common.....	164,700	4.52
		22.88
C. & O. owns:		
H. V. common.....	88,379	2.43
		32.85

PERCENTAGE OF VOTING STOCK OF NEW COMPANY PROPOSED TO BE CONTROLLED BY O. P. & M. J. VAN SWERINGEN (Before Conversion of C. & O. Bonds)

	Preferred	Per cent	Common	Per cent	Total
Proposed issue of new stock.	1,317,988	100.00	1,507,472	100.00	2,824,560
Nickel Plate will receive on account of stock outstanding .....	258,656	19.64	304,064	20.17	562,720
On account of exchange of:					
C. & O. common.....	85,250	6.47	85,250	5.65	170,500
P. M. common.....			102,000	6.77	102,000
Total.....	343,906	26.11	491,314	32.59	735,220
Vaness Corp. will receive on account of exchange of:					
C. & O. common.....	96,140	7.30	96,140	6.38	192,280
P. M. common.....			25,500	1.69	25,500
Erie common.....			154,800	10.27	154,800
First (preferred).....	12,350	.94			12,350
Second (preferred)....	26,300	1.99			26,300
Total .....	134,790	10.23	276,440	18.34	411,230
Total .....	478,696	36.34	767,754	50.93	1,146,450

Vaness Company owns 54.17 per cent of the voting stock of Nickel Plate. O. P. & M. J. Van Sweringen own 80 per cent of the voting stock of the Vaness Company.

**Pennsylvania to Build Eight Electric Locomotives**

SIX electric passenger locomotives and two electric switching locomotives are to be built by the Pennsylvania. Contracts for the motive machinery, controls and other electrical equipment have been awarded to the Westinghouse Electric & Manufacturing Company. This equipment will be shipped to the Juniata shops of the Pennsylvania System at Altoona, where the entire group of eight locomotives are to be built.

The six passenger locomotives with a continuous rating of 3730 horsepower each will be put into operation on the New York division hauling heavy passenger trains between the Pennsylvania Terminal in New York City and Manhattan Transfer. These locomotives are in addition to two others of a similar type placed in service at Manhattan Transfer in 1924. The locomotives were designed by the engineering staff of the motive power de-