May 31, 1955

To Honorable Edmund S. Muskie, Governor of Maine
Re: Railroad Merger

Returned herewith is the correspondence addressed to you from Governor Roberts of Rhode Island.

I have reviewed the provisions of the U. S. Code relating to the proposition put forward by Mr. Donald W. Campbell, chairman of the New England Governors' Committee on Publis Transportation and to the best of my ability I cannot perceive how the suggestion forwarded by the Committee can be carried into effect, in view of the provisionsoof the Code.

In the first instance, it appears that Mr. McGinnis seeks approval from the ICC so that he may be both an officer and a director of more than one carrier, i.e., the Boston & Maine Railroad and the New York, New Haven & Hartford.

Under the provisions of Title 49, U.S.Code, Section 20 a (12), it is unlawful for any person to hold such dual position on the board of more than one carrier unless such holding shall have been authorized by order of the Commission upon demand showing that neither public nor private interests will be adversely affected thereby.

The suggestion is that the Governors intervene in behalf of the States and force a broadening of the issues in the McGinnis petition, so that they will be covered by the provisions of Title 49, U.S.Code, Section 5 (2). Section 5 (2) provides that it shall be lawful for two or more carriers to consolidate, merge or acquire control of another, with the approval of the Commission, meaning the ICC. The statute goes on to set out the manner in which this consent may be obtained and the factors to be considered.

It appears that a condition precedent is a proposal by the carrier or carriers seeking the authority to merge, unify or acquire control and when this is done the Commission must notify the Governor of each State in which any part of the properties of the carrier is situated and so afford them an opportunity to be heard, as well as other interested parties.

Section 5 (4) makes it unlawful for anyone to attempt to acquire control of any carrier by any means other than that set out in paragraph (2), and it further provides in paragraph (7) that the Commission, meaning ICC, is authorized, upon complaint or its own initiative, by notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds that there is an attempt to unify, merge or acquire control by means other than those prescribed by statute, the Commission may apply to the courts for such legal process as is necessary to correct the situation.

It is interesting to note that in the letter by M . Campbell he refers to the four matters which the Commission must weigh,

where a plan is proposed. These matters are set forth in Title 49, U.S.Cose, Section 5 (2) (c).

It would appear to me that there would be no jurisdiction in the Commission to broaden the application of Mr. McGinnis into an inquiry as to whether or not an unlawful merger is being attempted. The reason for this is the apparent necessity for a carrier to file an application asking the ICC to give its consent to a merger, consolidation or acquisition of control.

Although not strictly in point in this matter, the Supreme Court of the United States held in St. Jo Paper Co. v. Atlantic Coast R.R. Co., 347 U.S. 298 at 305, in discussing whether or not in a bankruptcy reorganization under 77 (b) two carriers could be forced into merger unless one of the carriers filed the voluntary application above referred to, and held that they could not be forced into any merger by virtue of a reorganization plan proposed under 77 (b) of the Bankruptcy Act, a voluntary proposal being, in effect, a condition precedent.

The practice in such matters may not strictly follow the statute, but the statute is our only guide, as we have no one in our office with experience in this field.

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Assistant Attorney General

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