

Antitrust and the Crisis of '07

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The current financial crisis is not without precedent. In the past, as now, financial panics and developing crises can require that actions be taken in haste. The response to one such crisis, during antitrust's formative era, shows that actions taken in emergencies may produce consequences and generate controversy for years to come—however necessary they may be (or appear to be) at the time.

On October 21, 1907, the Knickerbocker Trust failed. Federal insurance was decades away, so depositors who could not withdraw their savings lost them. Other banks and brokerage firms threatened to fail in turn, taking depositors' and investors' assets with them. There was as yet no central bank (the Federal Reserve Board would be created in 1914), so a private financier with no official capacity stepped into the breach; J.P. Morgan organized other financiers and effectively directed the national response. Supporting Morgan in his efforts were President Theodore Roosevelt and TR's Treasury Secretary, George Cortelyou. To stem the crisis, Cortelyou added \$25 million in federal funds (over half a billion current dollars) to a pool of money that Morgan deposited in threatened institutions to prop them up.¹

From the perspective of antitrust, the pairing of Presidential trustbuster with private trust builder seems incongruous—particularly since TR's first step toward earning the trustbuster title was his successful challenge, brought in 1902, to Morgan's Northern Securities trust.² Because of the actions taken by Morgan that were credited with ending the crisis, moreover, antitrust would be at the core of subsequent controversy. Namely, in early November 1907, Morgan devised a plan that would shore up a tottering investment house, Moore and Schley, by replacing the firm's holdings in the Tennessee Coal & Iron Co. (TC&I) with more solid assets in U.S. Steel. But, this meant the acquisition of TC&I by U.S. Steel, which could raise substantial antitrust concerns. So, on November 4, Morgan sent his representatives to meet TR. Morgan was seeking what TR called a "harbor of safety" for the acquisition, and TR effectively granted that harbor.³ As a result, the quintessential Morgan trust, U.S. Steel, proceeded to purchase a large Southern competitor.

From the perspective of TR's involvement, as I have explored in greater detail elsewhere,⁴ many of the incongruities disappear on closer examination. Yet a broader point still holds: actions authorized in a crisis atmosphere, however merited they may be by actual or perceived circum-

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¹ JEAN STROUSE, MORGAN 573–96 (1999). There has been more than 22-fold inflation since 1913, the first year for which CPI-U data is available. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.txt> (Nov. 19, 2008).

² N. Sec. Co. v. United States, 193 U.S. 197 (1904).

³ *Hearings before the Committee on Investigation of United States Steel Corporation*, H.R. Rep. No. 12, at 1391 (1911) [hereinafter *1911 Hearings*].

⁴ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 15–27 (2003).

stances, may have broad ramifications later. The effects of the TC&I acquisition were particularly dramatic; they would ripple, in the next thirteen years, through Presidential politics, Congressional hearings, and, finally, a seminal Supreme Court decision. TR's tacit approval of the TC&I acquisition in 1907 would provide one basis for the Court, in 1920, to reject an important element of the government's broad challenge to U.S. Steel. And the government's loss in the U.S. Steel case at least signaled, and may have contributed to, a significant dampening of merger challenges for years to come.

TR and Morgan

TR was elected Vice President when William McKinley won his second term in 1900. He became President when McKinley was assassinated seven months into that term; was reelected in 1904 (the first Vice President to thus ascend to the Presidency and later secure reelection in his own right); declined to run in 1908 (in deference to a two-term tradition not yet enshrined in the Constitution); became disillusioned in the years that followed with his hand-picked successor, William Howard Taft; challenged Taft for the Republican nomination in 1912; and, failing in that effort, mounted a third-party challenge under the banner of the newly created Progressive Party, securing more votes than Taft and paving the way for Woodrow Wilson's election.

Throughout, Roosevelt fit curiously into the "trustbuster" title that he earned through his administration's litigation. Congress had passed the Sherman Act in 1890, but its use had been infrequent and often unsuccessful, and, despite the Act, a merger wave had dramatically increased industrial concentration between 1898 and 1902.⁵ Roosevelt did expand antitrust prosecutions. The forty-four cases his administration brought in nearly eight years were far more than the eighteen brought by prior administrations (including only three cases during McKinley's tenure), and included broad challenges to the meat packers, the Standard Oil Company, and the American Tobacco Company.⁶ Yet Roosevelt repeatedly expressed disdain for "anti-trust" law as he understood it. In his first annual message to Congress, months after taking office, he gave notice that much "legislation directed at the trusts would have been exceedingly mischievous had it not also been entirely ineffective;" his prescription was that "concentration should be, not prohibited, but supervised and within reasonable limits controlled."⁷

If antitrust were the only tool with which TR could address industrial concentration in the short term, he would use it. But, when his administration challenged the Northern Securities consolidation in 1902, TR's underlying goal may well have been to get industry's attention and establish the government's primacy, as a prelude to the supervisory program that he contemplated.⁸ Further, the suit against one Morgan interest was soon followed by improved working relations with oth-

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⁵ See *id.* at 6–11.

⁶ COMMERCE CLEARING HOUSE, THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES 67–82 (1952) [hereinafter *Federal Antitrust Laws*].

⁷ 1901 Annual Message to Congress, 14 COMP. MESSAGES & PAPERS OF THE PRESIDENTS 6641, 6647, 6648 (1909) [hereinafter *MESSAGES*]. This version of the set is available on *HeinOnline*, and the Annual Messages of the Presidents to Congress, in particular, can be accessed at <http://www.presidency.ucsb.edu/sou.php>.

⁸ See 1905 Annual Message to Congress, 15 MESSAGES, *supra* note 7, at 6973, 6975–76 (1913) (most marked result of successful antitrust cases was the "moral effect of the prosecutions; but it is increasingly evident that there will be a very insufficient beneficial result in the way of economic change. . . . What is needed is not sweeping prohibition of every arrangement, good or bad, which may tend to restrict competition, but such adequate supervision and regulation as will prevent any restriction of competition from being to the detriment of the public.").

ers. By 1905, Roosevelt, for example, reached a “gentlemen’s agreement” with U.S. Steel’s Elbert Gary at a meeting arranged by James Garfield, the first head of the Bureau of Corporations; the arrangement (which was later extended to Morgan’s International Harvester Company), gave Morgan’s trust a chance to correct problems without court orders.⁹

TR’s hostility to antitrust would, if anything, grow over the years. Although Standard Oil was challenged under his watch, by 1911 (months before the Supreme Court resolved the case) he wrote admiringly about the German government’s thorough regulation of the firms who shared Germany’s monopoly over the world’s known potash deposits—the government regulated price, output, and wages—and he urged that, rather than facing dissolution, Standard Oil could also be placed under comparable government control.¹⁰ By 1912, he named George Perkins, an (admittedly atypical) Morgan partner who had been involved in implementing the “gentleman’s agreements,” as Executive Chairman of his Progressive Party.

The Tennessee Coal and Iron Takeover

During the 1907 crisis, Morgan sought to prop up Moore and Schley, a large, endangered brokerage house with substantial assets in TC&I, a large Southern competitor to U.S. Steel.¹¹ Morgan’s plan was that U.S. Steel would acquire TC&I and, thus, Moore and Schley would substitute for its TC&I stock the more solid shares of U.S. Steel. First, though, Morgan sought TR’s acquiescence, and TR, along with his Secretary of State, met with two Morgan representatives. TR memorialized the results of that meeting, in the presence of its participants, in the form of a letter to the absent Attorney General. By 1920, that letter would be reprinted, among other places, in Congressional testimony and a Supreme Court decision. It read as follows:

November 4, 1907

My Dear Mr. Attorney General:

Judge E. H. Gary and Mr. H. C. Frick, on behalf of the Steel Corporation, have just called upon me. They state that there is a certain business firm (the name of which I have not been told) which will undoubtedly fail this week if help is not given. Among its assets are a majority of the securities of the Tennessee Coal Co. Application has been urgently made to the Steel Corporation to purchase this stock as the only means of avoiding a failure. Judge Gary and Mr. Frick informed that as a mere business transaction they do not care to purchase the stock; that under ordinary circumstances they would not consider purchasing the stock, because but little benefit will come to the Steel Corporation from the purchase; that they are aware that the purchase will be used as a handle for attack upon them on the ground that they are striving to secure a monopoly of the business and prevent competition—not that this would represent what could honestly be said, but what might recklessly and untruthfully be said.

⁹ Robert H. Wiebe, *The House of Morgan and the Executive, 1905–1913*, 65 AM. HIST. REV. 49, 51–54 (1959). The Bureau of Corporations, and the Department of Commerce and Labor in which it was lodged, were created at TR’s behest in 1903. In 1914, the Bureau would be absorbed into the newly created Federal Trade Commission.

¹⁰ Theodore Roosevelt, *Nationalism and Special Privilege*, 97 OUTLOOK 145, 147–48 (Jan. 28, 1911).

¹¹ According to Jean Strouse, Moore and Schley “had played a leading role in the promotion of industrial mergers between 1898 and 1902—second in prominence only to the House of Morgan. It was for years the largest brokerage on Wall Street.” STROUSE, *supra* note 1, at 582. TC&I, despite its problems, had been one of the industrials included in the Dow Jones average since that average began in 1896. *Id.* at 585.

They further informed me that, as a matter of fact, the policy of the company has been to decline to acquire more than 60 percent of the steel properties, and that this purpose has been persevered in for several years past, with the object of preventing these accusations, and, as a matter of fact, their proportion of steel properties has slightly decreased, so that it is below this 60 percent, and the acquisition of the property in question will not raise it above 60 percent. But they feel that is immensely to their interest, as to the interest of every responsible business man, to try to prevent a panic and general industry trial smash-up at this time, and that they are willing to go into this transaction, which they would not otherwise go into, because it seems the opinion of those best fitted to express judgment in New York that it will be an important factor in preventing a break that might be ruinous; and that this has been urged upon them by the combination of the most responsible bankers in New York who are now thus engaged in endeavoring to save the situation. But they asserted they did not wish to do this if I stated that it ought not to be done. I answered that while, of course, I could not advise them to take the action proposed, I felt it no public duty of mind to interpose any objections.¹²

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U.S. Steel's concerns about antitrust were well founded. However uncertain the antitrust enterprise was when U.S. Steel was created in 1901, TR's administration subsequently had sued one Morgan interest in 1902, and, in 1906, it had sued Standard Oil as well. The consolidation that created U.S. Steel had brought together multiple firms, many of which were themselves the product of recent consolidations; it apparently absorbed what had formerly been approximately 180 independent concerns.¹³ At the outset, it had a 66 percent share of national ingot production, a percentage that (except during the war years) would decline relatively consistently drop until it reached 33 percent in 1934. Thomas McCraw and Forest Reinhart argue that the firm was "losing to win," deliberately sacrificing market share in an attempt, which ultimately succeeded, to fend off a successful antitrust challenge.¹⁴ In 1907, perhaps as part of the "gentlemen's agreement," U.S. Steel effectively sought a premerger review—something quite rare in the days before the 1976 Hart-Scott-Rodino Antitrust Improvements Act. More to the point, it sought a "harbor of safety." And, though (then as now) the Sherman Act did not give an unchallenged merger legal immunity, TR did what he could.

On the political and legal plane, the core of much subsequent controversy regarding the acquisition turned on a simple question: Was TR hoodwinked? The acquisition was widely credited with stabilizing the market, and to that extent seemed to have served the public well. But it also served Morgan well—and a substantial element of controversy was whether Morgan had known at the time how well it might serve him.

The debate began almost immediately. Congress sought to investigate TR's actions even before he left office in March 1909;¹⁵ that January, a defiant TR reported to his son that he had told Congress to press for TC&I documents only if they were prepared to impeach him.¹⁶ TR was again defiant, but in a different way, when he testified in August 1911 before an investigative committee, headed by Representative Augustus Stanley, that the newly Democratic House had established

¹² *1911 Hearings, supra* note 3, at 1370–71. Roosevelt explained that he had not asked the parties to identify the troubled firm because "in a time of panic merely to have a big financial man name a company that is doubtful, if it is repeated may make that company doubtful; and I thought it was just as well that I should not ask." *Id.* at 1373.

¹³ See *United States v. United States Steel Corp.*, 251 U.S. 417, 438–39 (1920).

¹⁴ Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901–1938*, 49 J. ECON. HIST. 593, 598, 611–13 (1989).

¹⁵ Until 1937, the Presidential transition took place in March.

¹⁶ Theodore Roosevelt to Kermit Roosevelt, Jan. 23, 1909, 6 LETTERS OF THEODORE ROOSEVELT 1480, 1481 & n.2 (Elting E. Morison ed. 1954).

months before.¹⁷ The Stanley Committee's hearings drew ten page-one headlines in *The New York Times* by the end of summer and, when TR testified, he waded enthusiastically into the confrontation. Defending the confidence he had placed in Morgan, TR declared that, had he acted differently, he would have been "derelict in my duty" and a "timid and unworthy public officer."¹⁸ Further, he volunteered and strongly defended his view that antitrust was a misguided enterprise when it sought to dissolve, rather than control, firms like the Steel Corporation—and, for good measure, TR again expressed his admiration for the German law by which that government managed its potash cartel.¹⁹

The Taft administration disagreed. Taft was in the midst of an unprecedented antitrust initiative. In the twenty-two months after the Supreme Court decided the Standard Oil case in May 1911, his administration brought fifty-six antitrust cases (more than TR has brought in nearly eight years).²⁰ As part of this wide-ranging initiative, the United States sued U.S. Steel on October 26, 1911, and a significant part of the case challenged the TC&I acquisition. Among the cascade of headlines in *The New York Times* that day was: "Roosevelt Was Deceived."²¹ Taft, curiously, claims not to have read the complaint in advance, and TR, needless to say, was not pleased; indeed, the suit may well have been the decisive factor in his decision to challenge Taft for the White House in the 1912 election.²²

After a bitter contest and battles through the convention, though, Taft secured the Republican nomination in June 1912. TR then abandoned the Republicans and accepted the Progressive nomination on August 6. With timing that was likely not coincidental, the Stanley Committee issued its report (nearly a year after TR's testimony) on August 2.²³

The portion of the report directed at TC&I laid out a comprehensive case against Morgan, his partner George Perkins, and TR. It concluded that TC&I had owned iron ore that was suited to technology that emerged in 1906; that TC&I was well positioned to capitalize on its emerging advantages and had become a "new and virile competitor"; and that U.S. Steel's actions before November 1907 showed that it coveted TC&I.²⁴ Further, the report concluded that any crisis had been resolved before November, and raised the possibility that Perkins (by 1912 actively involved in the Progressive party) had fanned the flames of panic to facilitate the takeover.²⁵ *The New York*

¹⁷ See *Big Trusts Marked for House Inquiry*, N.Y. TIMES, May 4, 1911, at 1.

¹⁸ *1911 Hearings*, *supra* note 3, at 1372.

¹⁹ *Id.* at 1385–86.

²⁰ FEDERAL ANTITRUST LAWS, *supra* note 6, at 87–102. For a discussion of Taft and antitrust, see Winerman, *supra* note 4, at 27–32.

²¹ *Files Suit to Dissolve Steel Trust*, N.Y. TIMES, Oct. 26, 1911, at 1.

²² GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT 288–91* (1958). Mowry concludes that TR, despite his frustration with Taft and his concern that Taft would lead the Republicans to defeat in 1912, was determined to keep out of intraparty hostilities—until the day that the steel suit was filed.

²³ The *Times* had reported in June that the committee was said to be drafting the report, and delaying its release, to use it more effectively against TR if he ran in the general election as a candidate. *Steel Report Held Up*, N.Y. TIMES, June 20, 1912, at 17. In the month that followed the issuance of the report, Representative Stanley garnered further headlines with other attacks on TR. *E.g.*, *Stanley Shot at Colonel; Says Roosevelt Is Carrying Out the Standard Oil's Pet Policies*, N.Y. TIMES, Aug. 25, 1912, at 1; *Chairman Stanley's Reply; Refers to Roosevelt's Speech as Truculent and Boisterous*, N.Y. TIMES, Sept. 2, 1912, at 3.

²⁴ *Investigation of United States Steel Corporation*, S. Rep. 6-1127, 62d Cong., 2d. Sess. 156–80 (1912).

²⁵ *Id.* at 180–87. The report attributed a run on the Trust Company of America, which helped trigger the Moore and Schley problems, to Perkins; Perkins who had at the time been on U.S. Steel's finance committee. *Id.* at 183. The report did not propose to analyzing Perkins' motives, it said, then added, "It is scarcely credible that Perkins could have intended the ruin of the trust company, and yet we can not surely interpret his meaning. We leave it where the record leaves it—unexplained." *Id.* at 187.

Times reported the challenge in the broadest possible terms: “the insinuation is made that the panic was an artificial one, designed for the benefit of the Steel Corporation.”²⁶

In the coming months, TR lost his bid for the White House, though he secured 27 percent of the popular vote to Taft’s 23 percent.²⁷ He would remain a significant presence on the political scene until he died in 1919, by which time, having returned to the Republican fold, he was a credible contender for the 1920 nomination.²⁸ Meanwhile, the TC&I controversy now played out primarily in the courts, where, in 1915, a four-judge district court unanimously found for U.S. Steel.²⁹ As to the merits of the TC&I acquisition, the district court disagreed with the Stanley Committee. The court concluded that

At the time the Steel Company bought the Tennessee Company, the latter’s production of iron and steel was 1.7 per cent. of the production of the country. That up to that time the Tennessee Company had not been a business success. That it was making rails, which was its principal steel product, at a loss. That its ultimate success was problematic. That such success involved an outlay of upwards of \$25,000,000 to put it on a dividend basis. That it had never really earned any dividends up to the time of its sale. That the whole testimony shows its relation as a successful, substantial competitor with the Steel Company in the volume of its business, the character of its product, and the breadth of its market, was negligible. We are warranted by this testimony, and find the fact to be, that its purchase by the Steel Company in no way tended to monopolize the steel and iron trade, and that it was not bought with the purpose or intent of monopolizing, or attempting to monopolize or restrain, that trade.³⁰

The district court then turned to TR’s actions, quoting in full TR’s 1907 letter and numerous passages from his 1911 testimony.³¹

The case went directly to the Supreme Court for review, although that review was substantially delayed by World War I. There, the company was vindicated on all points in a 4–3 decision. On the specific question of the TC&I acquisition, the Supreme Court focused exclusively on TR’s role:

We may pause here for a moment to notice illustrations of the government of the purpose of the corporation, instancing its acquisition after its formation of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal; but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment, and he testified he was not deceived and that he believed that “the Tennessee Coal & Iron People had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it would be a guaranty that there was value to it.” Such being the emergency, it seems like an extreme accusation to say that the corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards and how? And what was the corporation to do with the property? Let it decay in desuetude, or develop its capabilities and resources? In the development, of course, there would be

²⁶ *Steel Report Blames Morgan*, N.Y. TIMES, Aug. 3, 1912, at 5.

²⁷ The American Presidency Project, Election of 1912, <http://www.presidency.ucsb.edu/showelection.php?year=1912>.

²⁸ H.W. BRANDS, T.R.: THE LAST ROMANTIC 807 (1920). See also JOHN MILTON COOPER, THE WARRIOR AND THE PRIEST (1983) (parallel biography of Roosevelt and Woodrow Wilson, including TR’s activities during Wilson’s administration).

²⁹ *United States v. United States Steel Corp.*, 223 F. 55 (D.N.J. 1915), *aff’d*, 251 U.S. 417 (1920).

³⁰ *Id.* at 148.

³¹ *Id.* at 150.

profit to the corporation; but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.³²

TR's acquiescence in the acquisition thus provided a basis for the Court to reject the government's subsequent challenge. William Kovacic has noted that the Court's rejection of the U.S. Steel challenge was one factor, along with a change in executive enforcement policy after 1920, that signaled the end of the first era of deconcentration initiatives.³³

It is hardly clear that the challenge would have succeeded but for that acquiescence. The Court's majority jumped through some curious hoops to vindicate U.S. Steel.³⁴ The war had likely increased the public's tolerance for the large enterprises that mobilized to help win it. Finally, U.S. Steel had a piece of incredible luck. Justice Louis Brandeis was a longstanding adversary of U.S. Steel before he joined the Court,³⁵ and Justice James McReynolds had been Wilson's first Attorney General, while the case was being prosecuted. Neither participated in the decision; had they done so, U.S. Steel almost certainly would have lost.

The TC&I story had unique aspects, and TR's continuing prominence on the political scene after 1907 doubtlessly magnified the continuing importance of the TC&I controversy in the political arena. Still, while the specific importance of the TC&I controversy may have been extended by extraordinary factors, the continuing controversy (now relegated to the realm of historians)³⁶ shows the significance that actions taken in financial crises may assume after the crisis has passed. ●

³² United States v. United States Steel Corp., 251 U.S. 417, 446–47 (1920).

³³ William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1112, 1115–16 (1989). Change may have been somewhat delayed at the Federal Trade Commission because Wilson's appointees (one of them a lame duck Senator confirmed in 1921) were slow to leave; nonetheless, many FTC efforts that began in the early 1920s were later abandoned or rejected by the courts. See Marc Winerman, *History Through Headlines*, 72 ANTITRUST L.J. 871, 877, 878 (2005).

³⁴ Consider the so-called Gary dinners, collective meetings of U.S. Steel and its competitors that began in 1907 and clearly involved unlawful agreements. The court actually cited the existence of illegal conspiracies as favorable to U.S. Steel's position, in that they showed that "[m]onopoly . . . was not achieved" without them. *U.S. Steel*, 251 U.S. at 444. Further, while it then noted that various anticompetitive conspiracies that U.S. Steel organized were, "all of them, it may be, violations of the law," *id.* at 445, the Court dismissed the relevance of those conspiracies because they were abandoned nine months before the suit began.

³⁵ See *Control of Corporations, Persons and Firms Engaged in Interstate Commerce, Report of the Committee on Interstate Commerce, U.S. Senate*, 62d Cong., Pursuant to S. Res. 98 (1911), at 1151–57. Brandeis had listened to George Perkins testify just before his own testimony, and he went on the refute Perkins' glowing characterization of U.S. Steel.

³⁶ See, e.g., Wiebe, *supra* note 9, at 56 ("Caught in a politically and economically dangerous panic he did not understand, he allowed the Morgan men to assume the initiative and therefore lost control of" his agreements with the Morgan interests); STROUSE, *supra* note 1, at 585 (Morgan's efforts to fight the panic generally served his own interests and those of the people he represented, though they also served the interests of others; and, though she does not suggest that Morgan conspired to acquire TC&I, once he was persuaded that the acquisition was worthwhile, and in turn persuaded U.S. Steel's executives, he took care "not to make it a commercial sacrifice."); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* 114–17 (1963) (Though some doubts needed to be resolved before U.S. Steel officials would commit to the transaction, U.S. Steel "increased its ore reserves by 40 per cent and acquired a company worth, at the time, at least four times the purchase price.").