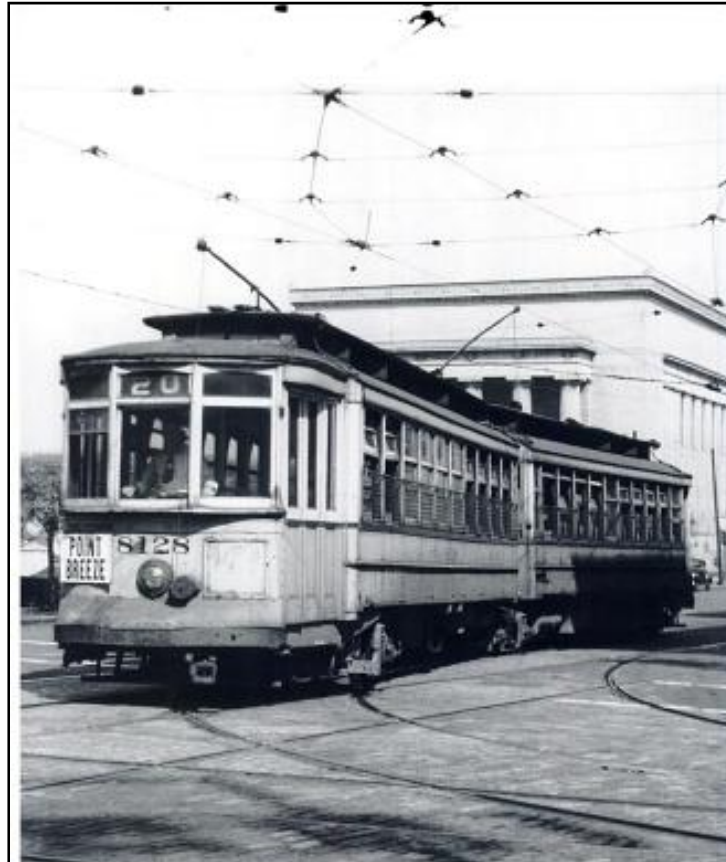


# *Warren v. Fitzgerald*, 189 Md. 476 (1947)

A crossroads in Baltimore's mass transit history



1946 Streetcar at Fayette and Holiday Streets.<sup>1</sup>

Emily Jaskot

JD Candidate, May 2011

University of Maryland School of Law

Legal History Seminar: Baltimore's Environmental History

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<sup>1</sup> Herbert Harwood, Baltimore Streetcars: The Postwar Years. (Baltimore: The Johns Hopkins University Press, 2003), 6.

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## Introduction

In 1943, trolley ridership was at an all time high in Baltimore. The Baltimore Transit Company experienced record profits, and company leadership expected to continue to expand trolley service in and around the city. By 1947, the company had completely changed course and was in the process of abandoning 170 of its 312 miles of trolley track line and nearly half of its trolley routes, at a loss of more than 21 million dollars. The trolleys were to be replaced with new diesel buses. In 1963 the last streetcar ran in Baltimore.

The Circuit Court and Court of Appeals case *Warren v. Fitzgerald* details a shareholder's legal challenge to this decision by the Officers and Directors of the Baltimore Transit Company in 1947, in which the Mayor and City Council of Baltimore intervened as a defendant. Before looking into the details of the case, however, it is useful to explore why this case is worth consideration in the expanse of Baltimore's legal and environmental history. A quote from the Evening Sun in November, 1944, gives a suggestion:

“The importance to the community of an adequate and efficient transportation service can scarcely be exaggerated. It is intimately related to industry, trade, and individual welfare. It can enhance or depreciate land values, promote or retard urban growth, preserve or blight downtown retail centers. The convenience and comfort of intracity transport is a large factor in almost everything a community does.”<sup>2</sup>

This quote establishes two reasons why the case merits study. First, it shows that there was a contemporary awareness among private individuals of the importance of having an adequate mass transit system in Baltimore. Second, by listing the sectors of society a public transportation system touches, it indicates why government, private industry, and the riding public would each have a stake in what that transportation looks like, who it serves, and how much it costs.

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<sup>2</sup> Editorial, *Baltimore Evening Sun*, November 14, 1944

In addition, other cities were aware of these changes taking place in Baltimore's transportation systems, and were interested because they were dealing with some of the same issues. In late summer 1946, Mayor Theodore McKeldin received letters from the Mayor of Richmond and the City Solicitor of Milwaukee inquiring about the city's planned conversion from trolley to bus lines. Both letters brought up questions of how the city was or would be paid for granting permission to the transit company to use the streets.<sup>3</sup> This demonstrates that Baltimore was not the only market involved in a conversion from trolley to bus, and shows that in those cities, too, municipal authorities, private companies, and riders were involved in the changes.

Finally, the question of how and why buses replaced streetcars as the dominant form of mass transit in Baltimore after WWII has implications for current transit issues. Streetcar enthusiasts and a growing number of city transit planners encourage metropolitan areas to implement streetcar systems today. They typically point to Portland, Oregon as an illustration of just how influential a successful streetcar system can be; the city's downtown revitalization has been attributed, in large part, to a streetcar loop built in the past decade which serves the downtown and few key commuter areas. In addition, in October of this year, President Obama pledged to give 75million dollars in federal funds to Portland to expand its streetcar network<sup>4</sup>. In 2008 at least 40 cities were exploring streetcar plans to "spur economic development, ease traffic congestion, and draw young professionals and empty-nest baby boomers back from the suburbs."<sup>5</sup> This trend naturally leads one to contemplate what Baltimore's downtown might look like if it had similar infrastructure and to why it does not have one now.

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<sup>3</sup> Baltimore City Archives, Mayor McKeldin Files (Legal Matters) Letter from Richmond Mayor W.C. Herbert July 2, 1946; Letter from Milwaukee City Solicitor, J.L. Bednarek, September 3, 1946, File S22, L2.

<sup>4</sup> Colin Milner. "Funding a Desire Named Streetcar." *Green Inc Blog, New York Times*. October 15, 2009. <http://greeninc.blogs.nytimes.com/2009/10/26/funding-a-desire-named-streetcar/>

<sup>5</sup> Bob Driehaus. "Downtowns across the US see streetcars in their future." *New York Times*, August 13, 2008. <http://www.nytimes.com/2008/08/14/us/14streetcar.html>.

The Baltimore Transit Company and the mass transit system it provided in Baltimore occupied a place at an intersection of interests between the officers, directors, and shareholders of a private corporation, municipal and state level governments, and the riding public. Any change in the character of transportation it provided necessarily involved and implicated the three groups. *Warren v. Fitzgerald* demonstrates how a company providing mass transit is a unique corporate form because the interests of one of these participants cannot be elevated over the interests of the others. Shareholder power, limited to begin with, is eroded further when a corporation does not exist solely to maximize shareholder profit but is required to provide a service to the citizens of the municipality, as well. Thus, *Warren v. Fitzgerald* was bound to be a story of disappointment for the shareholder plaintiff and a compromise for all parties involved.

This Essay will first discuss the historical context of the Baltimore Transit Company and related transportation issues in Baltimore. It will then describe aspects of *Warren v. Fitzgerald* in detail, including the parties involved in the case, the arguments presented by those parties, and the ultimate decisions at both the Circuit Court and Court of Appeals levels. Finally, the Essay will address what happened after the court's decision.

### **Historical Context: Brief History of Transit in Baltimore**

Before the private automobile was widely available, the streetcar created the opportunity for suburban expansion and, at the same time, a dependency upon some mode of daily transportation to move large numbers of people from the suburbs to the city. Streetcars were introduced and embraced by metropolitan areas around the US in the late nineteenth century.<sup>6</sup> “One of the primary contributions of nineteenth century transportation... technology was to preserve the centralized

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<sup>6</sup> The first electrically powered streetcar in the country was actually built in Baltimore in 1885. However, the technology used here was unsuccessful, and the type of service adopted nationwide was created by an inventor in Richmond, VA. Herbert H. Harwood. Baltimore Streetcars, the Postwar years. (Baltimore: The Johns Hopkins University Press. 2003), vii.

communication of the walking city on a vastly enlarged scale.”<sup>7</sup> A person can walk about 3 miles in one hour, so before streetcars, only shops and offices within that distance were within easy communication with each other.<sup>8</sup> As streetcars increased distances that could be traveled in the same amount of time, the network of instant communication expanded, and enabling cities to grow.

This new form of transportation also allowed and encouraged citizens to live further from the crowded city centers where commerce and industry required them to spend their days. In Baltimore, streetcar service, which provided more regular cars and more frequent stops than railroads, allowed communities of summer homes to become year-round homes for commuters.<sup>9</sup> New suburban house building also moved with the streetcar network as it was expanded into territory newly annexed by the City.<sup>10</sup> The linear tracks of the streetcar system encouraged home-building in parallel lines of development, which allowed populations to form a habit of economic rise and outward migration from city to suburb.<sup>11</sup> Streetcar service allowed cities to expand and grow and, because of the increased distances and shift in lifestyle they created, had become an integral part of the community by the turn of the twentieth century.

While public transportation is often synonymous with government today, this was not the case at the turn of the century. In 1899, United Railways and Electric Company of Baltimore (hereinafter UR&E) was incorporated. UR&E’s creation marked the consolidation of all the private streetcar lines in Baltimore under the ownership and control of a single corporation, which was common for the period. The late nineteenth century saw a “vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization,” and an

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<sup>7</sup>Bass Warner, Sam. Streetcar Suburbs. (Boston: Harvard University Press, 1978), 16.

<sup>8</sup> id

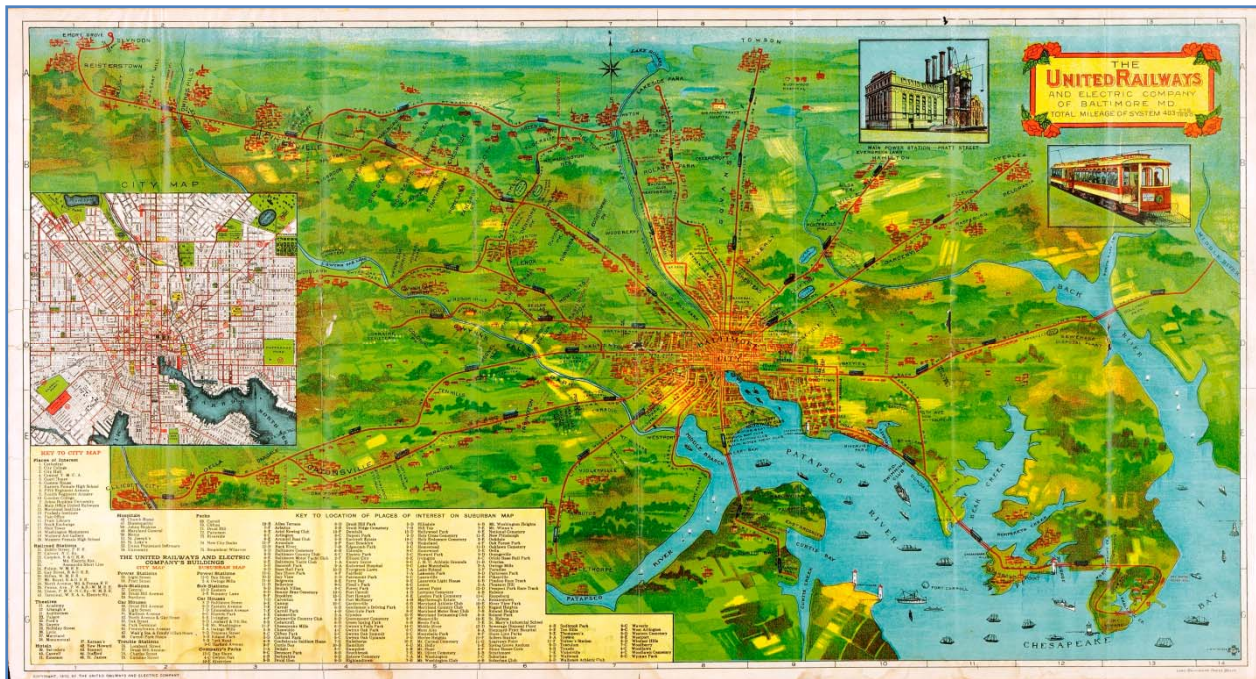
<sup>9</sup> Sherry Olson, Baltimore, the Building of an American City. (Baltimore: The Johns Hopkins University Press, 1980), 212.

<sup>10</sup> id. 218

<sup>11</sup> Bass Warner 1978, 66

increase in the practice of combining separate entities into trusts.<sup>12</sup> A widespread public impression existed that these corporations' power would be exerted to oppress individuals and to injure the general public. In response to these conditions, Congress enacted the Sherman Anti Trust Act 1890, aimed at preventing practices that create monopolies and restrict the course of trade.

In the context of mass transit in Baltimore, the consolidation which formed UR&E is notable because it obliged the city to grant the right to lay track and maintain and operate a streetcar system to a single company. The UR&E streetcar monopoly both allowed the private interests to become more cohesive and concentrated, and allowed the City to become more entwined with the provision of mass transit in Baltimore. The development of *Warren v. Fitzgerald* will also show that the concerns that led to the creation of the anti-trust laws were not unfounded; one of the major players in the case, National City Lines, would be convicted under the Sherman Act 50 years later.



UR&E Trolley Map, 1910.<sup>13</sup>

<sup>12</sup> *Standard Oil Co of New Jersey v. U.S.*, 221 U.S. 1, 50 (1911)

<sup>13</sup> available at

<https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/32592/Trolley%20Map%20of%20Baltimore.jpg?sequence=2>

UR&E's charter did not contain a provision identifying an express corporate purpose.<sup>14</sup> However, UR&E (which would become the Baltimore Transit Company, the corporation at issue in the case) was exclusively engaged in the business of furnishing transportation services in Baltimore City. Several years later, in 1926, the Baltimore Coach Company was formed by an agreement of consolidation by several existing bus companies with a purpose of transport passengers in Baltimore via automobiles, motor cars, and trucks. From the date of its incorporation, it was a wholly owned subsidiary of UR&E and, later, the BTC.<sup>15</sup>

### **City and State Government involvement in Mass Transit**

In Baltimore, the government was directly involved in the function of the transit company. As stated, the City granted rights of way on city streets, the right and power to lay track<sup>16</sup>, and the opportunity to provide a transit service for a profit. In addition, state regulatory oversight existed through the Public Service Commission (hereinafter PSC). The business of a common carrier, like the BTC, was subject to PSC regulation and control.<sup>17</sup> The Commission had the power to set a “just and reasonable rate of a common carrier company.”<sup>18</sup> When the transit company was not profitable and decided to address the issue by raising fares, the transit company needed to petition and receive PSC approval. If PSC denied the petition, the transit company could appeal in the court system.

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<sup>14</sup> Stipulation as to Charter of the Baltimore Transit Company #4, 1 *as presented in* BALTIMORE CITY CIRCUIT COURT (Equity Papers A, Miscellaneous) Warren v. Fitzgerald, et al., 1947, box no. 1625, no. A29809 ½ MSA T 53-5214, 3/9/13/7. (hereinafter Circuit Court Equity Papers)  
[http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa\\_sc5458\\_000051\\_003508-2.pdf](http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa_sc5458_000051_003508-2.pdf)

<sup>15</sup> Stipulation as to Charter of the Baltimore Transit Company #7-8, 5-6, Circuit Court Equity Papers.

<sup>16</sup> *Warren v Fitzgerald* 189 Md. 476, 486 (1948)

<sup>17</sup> Md. Ann. Code art. 23 § (1939)

<sup>18</sup> Md. Ann. Code art. 23 § (1939)



This happened on multiple occasions with each of the incarnations of the transit company because “the PSC possesse[d] a wide discretion to approve or disapprove a particular rate schedule.”<sup>19</sup>

UR&E petitioned the PSC to increase fares several times. In 1929, the PSC approved a fare increase, but in a lesser amount than requested. UR&E brought suit against the PSC, which reached the Supreme Court on appeal. The court held that the rate of return UR&E would receive on the approved fare was so inadequate as to be a deprivation of property without due process.<sup>20</sup> The opinion stated that “the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property.”<sup>21</sup> The court determined that the rate would need to be higher to induce investors to invest capital in the enterprise or to allow the company to find money in the market for its operations.

Years later, the Maryland Court of Appeals, reviewing a similar denial of a rate increase, addressed the fact that the players involved must be flexible and keep in mind the true reason for the transit system. “The maintenance of an efficient transportation system is a public necessity. If it is to survive in private hands, all of the interested parties must cooperate to solve the financial problems involved.”<sup>22</sup>

A public transit company’s operations are consistently impacted by City and State governmental oversight. The court in that case, though, directed the government and the company to keep in mind the end goal of providing a service to the public. By implication, then, the public’s interest would have an influence on the transit company’s survival. As Circuit Court Judge Tucker would say in *Warren v. Fitzgerald*, “anything in the way of transportation [which is] favorable to the traveling

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<sup>19</sup> *Baltimore Transit Co. v. Hessey*, 196 Md. 141, 145 (1950). on whether the BTC may increase fares from 12.5 to 15 cents per ride.

<sup>20</sup> *United Rys. & Electric Co. of Baltimore v West et al., Public Service Commission of Maryland*, 280 U.S. 234, 252 (1929)

<sup>21</sup> *United Rys. & Electric Co of Baltimore*, 180 U.S. at 249

<sup>22</sup> *Baltimore Transit Co.*, 196 Md. at 152.

public would indirectly be favorable to the transportation company, insofar as number of passengers are concerned.”<sup>23</sup> If the transit company offered a service that attracted more riders, the company benefitted from increased ticket sales. The converse was also true; internal or external changes that lured riders away had a negative effect on the transit company. This was most visibly demonstrated by the impact of automobiles on Baltimore’s transit scheme.

### **Automobiles’ Impact on Baltimore**

Between 1920 and 1940, the number of cars in Maryland tripled, from one hundred thousand to three hundred thousand, and at least half of those were in the Baltimore area.<sup>24</sup> The upwardly mobile individuals who had relied on streetcars when they moved to the suburbs to connect them to the city increasingly had private cars. This gradual switch both reduced the number of potential streetcar riders—a concern for the transit company—and added traffic to the streets of downtown Baltimore, which produced a concern for city planners.

The City was necessarily involved in planning traffic and transportation patterns for the city. Increased ownership of private automobiles made this involvement all the more urgent. The first signal that autos might have been the beginning of the end for streetcars was the “great jitney craze during 1914-1916.”<sup>25</sup> Jitneys were regular cars or trucks that had been modified to fit more passengers. They typically used fixed routes, often parallel to streetcar routes, but were an appealing alternative because they were much faster in traffic and were more numerous, and thus more frequent than streetcars. This form of transportation grew rapidly until the PSC issued regulations

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<sup>23</sup> Judge Tucker, Trial Transcript from July 7, 1947, 92. Circuit Court Equity Papers.

<sup>24</sup> Olson 1980, 314

<sup>25</sup> Cliff Slater. “General Motors and the Demise of Streetcars.” Transportation Quarterly 51.3 (1997) 48

governing their maintenance and routes and the Mayor and City Council issued a regulatory ordinance governing their operation.<sup>26</sup>

Following the jitney craze, through a series of traffic studies and reports commissioned by city planners and court officials it became clear, that in Baltimore's downtown cars and trolleys were quite incompatible. Vehicles that did not have to travel on fixed tracks, like buses were a better alternative. As one historian states, by 1930 trolleys "were well on their way to oblivion, though their demise was to be a lingering one."<sup>27</sup>

In 1925 city planners concerned about traffic congestion downtown hired a Chicago firm to make a report and recommendations on improving traffic and streetcar service in Baltimore.<sup>28</sup> The report concluded that two of the major reasons for downtown congestion were the "ever-increasing number of pleasure and commercial motor vehicles without a corresponding increase in roadway space" and the fact that a portion of limited street space was being used for parking vehicles, further reducing the space available for moving vehicles.

To address the congestion, the report recommended a reduction in the number of turns streetcars made in downtown areas, a limit on the number of stops along the streetcar route during rush hour, a prohibition on parking on some streets during rush hour, and the installation of new bus lines in parts of city where transportation was lacking.<sup>29</sup> There is no formal record of the City or UR&E systematically moving to implement these recommendations, though as streetcar ridership continued to decline, more decisive action became necessary.

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<sup>26</sup> Extracts from UR&E Annual Report, 1915, 1. Circuit Court Equity Papers.

<sup>27</sup> Michael Farrell. History of Baltimore's Streetcars. (Sykesville, MD: Greenberg Publishing Co, 1992), 117

<sup>28</sup> Kelker, De Leuw & Co. "Report and Recommendations on the Routing of Street Railway Lines and Methods for the Improvement of Traffic Conditions in the City of Baltimore to Traffic Survey Commission," Chicago, 1926.

<sup>29</sup> id

Until 1935, UR&E owned and operated all the street railway lines in the city of Baltimore and was financially failing.<sup>30</sup> In that year UR&E was reorganized under the Bankruptcy Act and renamed the Baltimore Transit Company (hereinafter BTC).<sup>31</sup> The reorganization plan aimed to reduce the capitalization of the company, issue new securities that would yield returns in line with the company's profits and benefit the "general public by improvement in the entire transportation system of the company."<sup>32</sup> The company was placed under the control and management of a voting trust comprised of prominent, successful business men of Baltimore for ten years. A number of the members of the trust became board members of the BTC at the conclusion of the trust period.

In connection with the reorganization, the court appointed Charles Chase, an engineer from Indianapolis, the Special Master, to produce a study and report on the state and future of traffic in Baltimore<sup>33</sup>. That report announced a radical departure from the status quo. Namely, it stated that it was often uneconomical to maintain and extend trolley rail travel and proposed that trolley service be restricted to the portions of existing lines where traffic is most dense, avoiding the expenses of laying new trolley infrastructure.<sup>34</sup> Instead, it advocated adopting trackless trolley (a free-wheel streetcar that used overhead lines but was not confined to running on streetcar tracks) as a major part of the system and buses in areas which need new or feeder service to existing trolley lines.<sup>35</sup> These forms of transportation, the report stated, avoid the heavy fixed investment in track, overhead, and power facilities, offers flexibility in service when obstacles in the street require

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<sup>30</sup> *United Rys. & Electric Co. of Baltimore*, 280 U.S. at 248

<sup>31</sup> *In re United Railways & Electric Co. of Baltimore's Reorganization*, D.C. 11 F.Supp 717 (1935)

<sup>32</sup> *id* 718

<sup>33</sup> *id* 718

<sup>34</sup> *id* 724

<sup>35</sup> One year earlier, in 1934, Mayor Jackson had created a traffic commission to make recommendations on handling traffic in the city. Whether in response to or independent of UR&E's financial troubles, it is unclear. Rider A, "Traffic Plan," part of P's exhibit 15, Extracts from Annual Reports to be incorporated in the Record. Circuit Court Equity Papers.

detours, and enhances safety of passengers and pedestrians by picking up and discharging passengers at the curb.

The report recognized some of the obstacles to continuing to rely solely on trolleys, but did not recommend a large scale abandonment of the fixed-wheel infrastructure. Still, it is reasonable to argue that the Chase report laid the foundation for conversion plans in the future. The court system adopted it and its' reasoning and recommendations, giving it credibility. In addition, its recommendations were accepted by the Board members who were appointed for the receivership. Since some of those same individuals remained members of the board when the receivership period ended ten years later, and they understood the Chase recommendations as positive for the company, and had been aware of and working towards a conversion to buses for years.<sup>36</sup>

The report also focused on parking, that "privilege which has been allowed to be so greatly abused by the automobile-riding public."<sup>37</sup> To Chase it was clear that drivers were using limited street space to the detriment of those not in cars. The report maintained that parking and congestion in the central business district were making it difficult for the transit company to perform efficiently. The report advocated parking prohibitions on certain blocks and at certain times because "the rights of hundreds of thousands of citizens seeking to use such streets and highways are certainly to be preferred to the convenience of the comparatively few vehicle owners who preempt them for their use."<sup>38</sup> Automobiles' presence in the city presented a constant challenge to the efficient function of mass transportation.

The court system was not the only stakeholder demonstrating an awareness of trolleys' difficulties and the resulting trend away from them. A 1938 Evening Sun editorial stated that fewer

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<sup>36</sup> Joseph P. Healy, Trial Transcript from July 7, 1947, 90. Circuit Court Equity Papers.

<sup>37</sup> *In re United Railways & Electric Co. of Baltimore's Reorganization*, D.C. 11 F.Supp at 726

<sup>38</sup> *In re United Railways & Electric Co. of Baltimore's Reorganization*, D.C. 11 F.Supp at 726

people were riding trolleys each year and that mass transit companies generally felt that the bus and the trackless trolley were the best answer to the “threat of the automobile.”<sup>39</sup> The writer went on to suggest that the acceptance has been somewhat slow in coming because company management was “in the hands of men trained in and even wedded to the trolley idea.”<sup>40</sup> This was a reasonable assertion.

Despite the public, strong, and court-approved recommendations that trolley service be limited, BTC leadership maintained that trolleys were the best form of mass transit. In 1938 the BTC Board, through their annual report, told shareholders that no city over 168 thousand people had shifted to providing transit solely by bus. By simply making that argument, the BTC is indirectly addressing buses growth as a dominant form of mass transit. Even so, the company assured shareholders that streetcar systems remained preferable to buses. Annual reports said: “Coaches are the logical replacement for streetcars under certain conditions, but where riding is heavy, no coach yet developed can carry a passenger as cheaply as a streetcar,”<sup>41</sup> and “no vehicle for surface transportation...can compete with the modern streetcar for long hauls on heavy traveled lines.”<sup>42</sup> Despite these statements, the BTC continued to run bus operations through the Baltimore Coach Company.

During this period, reports also addressed the threat of the automobile. The 1939 BTC annual report to shareholders explained that mass transit continued to be important despite increasing car ownership because it meets the public need of moving large number of people on small city streets.

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<sup>39</sup> Editorial, *Baltimore Evening Sun*, January 30, 1938, as presented in “Baltimore Transit Company” Vertical File 1, Maryland Department of the Enoch Pratt Free Library.

<sup>40</sup> id

<sup>41</sup> Baltimore Transit Company Annual Report, 1937, 19.

<sup>42</sup> Baltimore Transit Company Annual Report, 1938, quoting Board of Street Railway Commissioners of Detroit, 9

“streets and highways of cities are fixed and have capacity for moving a definite and limited number of vehicles per hour. However, the city traffic problem is not the problem of moving vehicles, primarily, but of moving people. One of our streets with a double-track car line can carry 15K people in 1 hour. Without a car line and everybody riding in automobiles that same street could only handle 1/5 that number per hour. Stated another way it would take 5 such streets to handle the same number of people in the same time in automobiles.”<sup>43</sup>

An admitted critique of cars, this did not rule out buses as a suitable form of mass transit.

The company was concerned as ridership continued to fall, and tried to convince its investors that the business would remain viable and valuable.

## **WWII and Beyond**

The BTC’s fortunes temporarily turned when World War II brought the best years the Baltimore Transit Company and its trolley lines had seen in decades. Ridership and receipts were at all time highs.<sup>44</sup>

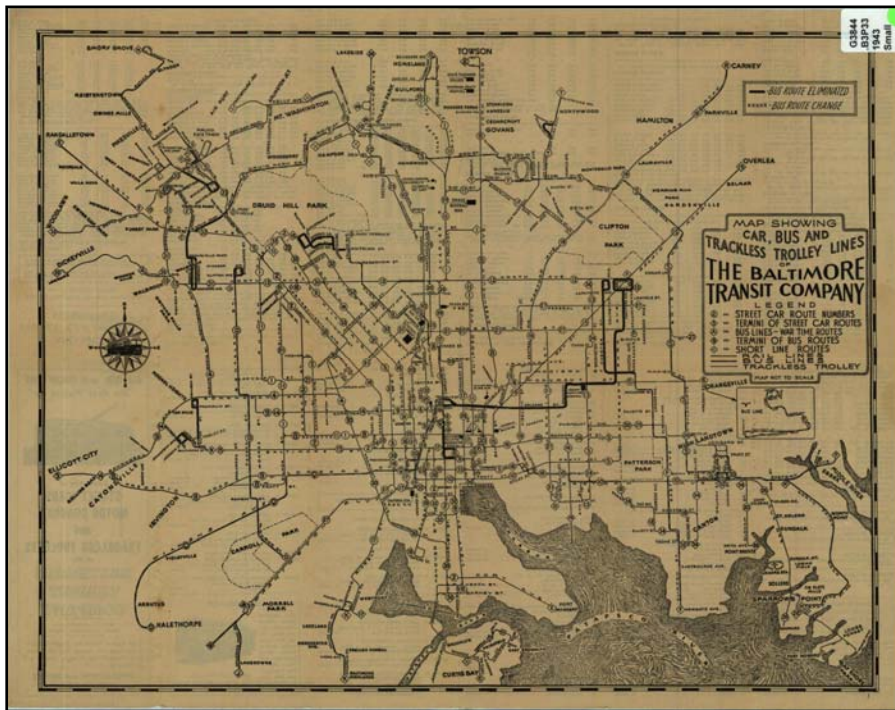
Fortunately the BTC had not put most of their outdated vehicles in storage rather than destroying them, and increased demand during the war years forced them to put old but serviceable cars back into use. Even though ridership was up during the war, the company never forgot that it needed to retain and attract new riders, and looked into new equipment and new paint schemes as effective form of advertising.<sup>45</sup>

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<sup>43</sup> Baltimore Transit Company Annual Report, 1939.

<sup>44</sup> A number of factors during the war contributed to this result, including national mandatory gas and rubber instituted in 1942 and a need to transport workers to Baltimore’s industrial locations. Kevin Mueller. The Best Way to Go: The History of the BTCo. (Baltimore: Kevin Mueller, 1991), 29

<sup>45</sup> Bernard Sachs, George Nixon, and Harold Cox. Baltimore’s Streetcars 1905-1963: the semi-convertible era. (Baltimore: The Baltimore Streetcar Museum, 1984), 90. This is a recurrent theme in public transportation offerings. When the City introduced the concept of the Charm City Circulator in 2009, Kirby Fowler, head of the Downtown Partnership, one of the organizations responsible for proposing the service, said “[the] service is intended to target discretionary riders who have cars and do not need to rely on public transportation ‘you want to be sure you have a high-quality vehicle that will shock people into using transit again.’” New equipment, in this case a hybrid-electric bus only available in 2 cities nationwide it hoped to attract new riders with its new equipment. Annie Linskey, “Baltimore’s much-anticipated free circulator bus is running late,” *Baltimore Sun*, August 23, 2009.



1943 Baltimore Transit Company Map<sup>46</sup>

During the high years of WWII, the BTC contributed large sums to deferred maintenance accounts to set aside money that should have been spent on maintenance that will be saved to perform such maintenance or repairs in the future. As Herbert Fallin, Baltimore’s Budget Director explained, “war production has virtually precluded repairs and replacements which would automatically take place in peacetime.” Because those repairs would need to be done at the conclusion of the war, he advocated that governments “should make possible the accumulation by private business of adequate post-war cash reserves, so that it can convert and expand” in post-war production.<sup>47</sup> Money ordinarily spent for maintenance and equipment be set aside as a deferred maintenance reserve and be recognized by the Treasury as an operating charge in the same manner as if the money actually had been spent.

The amount of money set aside in the BTC’s deferred maintenance fund was substantial, and thus, understandably, attracted attention. At the April 1944 BTC annual meeting, shareholders

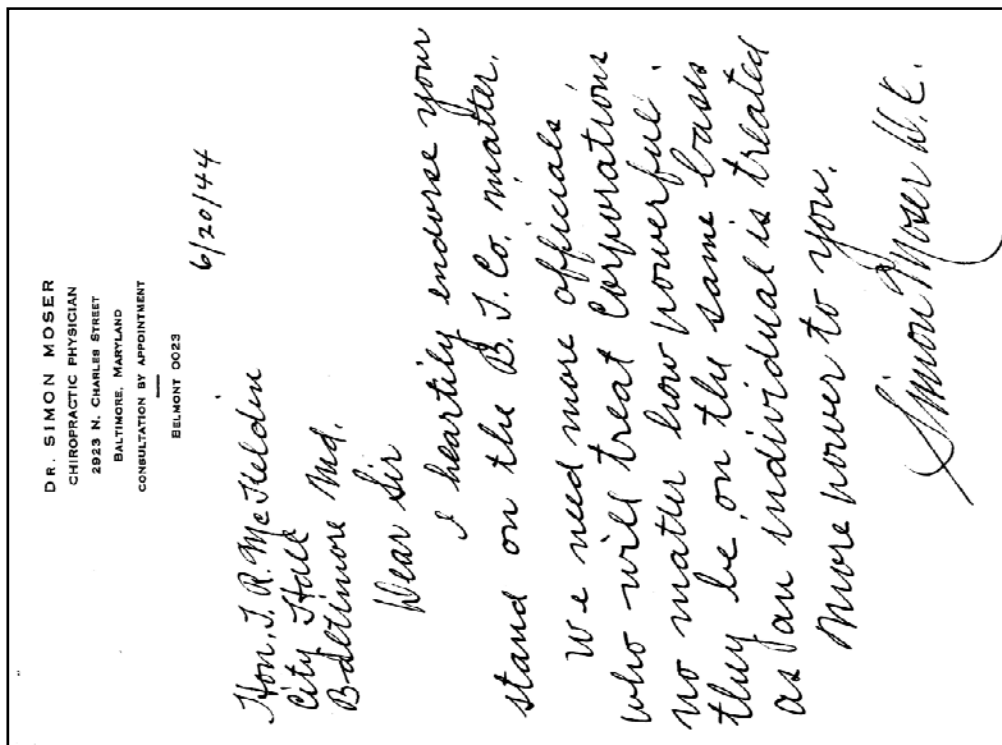
<sup>46</sup> available at [https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/33679/G\\_3844\\_B3P33\\_1943\\_Small\\_.jpg?sequence=4](https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/33679/G_3844_B3P33_1943_Small_.jpg?sequence=4)

<sup>47</sup> “Fallin Urges Baltimore Plan for US; Says government should approve deferred maintenance reserves,” *Baltimore Sun*, June 10, 1944.



criticized the company for setting aside large reserves rather than paying dividends on preferred stock<sup>48</sup>. Mayor McKeldin, on June 19<sup>th</sup>, 1944, sent a letter to the Baltimore Transit Company to notify the company that it had failed to pay taxes on its 1942 and 1943 profits<sup>49</sup>. The city had determined that the BTC owed approximately 900K in back taxes for 1942 and 1943. The transit company denied this claim and offered to pay 145K.<sup>50</sup>

The following day the Mayor received a letter from a Simon Moser, a Baltimore Chiropractor, approving of his stance on the matter of BTC taxes. Moser says “We need more official who will treat corporations, no matter how powerful they be, on the same basis as an individual is treated”<sup>51</sup>. People perceived different treatment for corporations and individuals, and, particularly in this case, did not want corporate interests to be elevated over those of the public.



<sup>48</sup> “Stockholder Hits BTC Fiscal Move; Criticizes Setting Aside of Large Reserve Funds,” *Baltimore Sun*, April 13, 1944.

<sup>49</sup> Baltimore City Archives, Mayor McKeldin Files (Baltimore Transit Company) Letter to Baltimore Transit Company, June 19, 1944, File S22, G1-1005.

<sup>50</sup> In an unreported Baltimore City Circuit Court opinion, on June 8, 1945, Judge Sherbow held that deferred maintenance funds would not be subject to City taxes.

<sup>51</sup> Baltimore City Archives, Mayor McKeldin Files (Baltimore Transit Company) Letter from Simon Moser, June 20, 1944, File S22, G1-1005.

This was also the moment National City Lines (hereinafter NCL), a holding company that owned portions of dozens of transit companies in cities around the US, chose to purchase stock in the BTC. Incorporated in 1936, NCL soon thereafter began securing funds through sale of stock to major bus, oil, and rubber manufacturing companies (General Motors, Firestone Tires, Phillips Oil, and Mack Truck) in exchange for exclusive supply contracts for their products. NCL used the funds to purchase interests in mass transit systems in cities across the US where streetcar systems were struggling to be profitable.<sup>52</sup> Once control of the transit systems was secured, conversions from trolley to bus were instituted and the suppliers' products were to be used in the conversion.<sup>53</sup> In 1944 National City Lines received approval from the PSC to purchase 30% of the total voting rights of stockholders in the company.<sup>54</sup>

With this interest, National City Lines was able to put several prominent figures in the company on the Board of the BTC, and into the position of president, ousting longtime BTC head Bancroft Hill. Hill was President of the BTC from 1936-1944. He was born in Baltimore and worked in the city for most of his life. Early in his career he was involved in railroad work, and later was appointed by Mayor Broening as Harbor Engineer, and helped to create the city's first comprehensive general development plan.<sup>55</sup> Before assuming the role of President, he was an Executive vice president with the BTC. Under his leadership, the BTC annual reports were trolley-centric and contained quotes on the viability of trolleys.

National City Lines replaced BTC President Hill with Fred Nolan in 1944. Nolan was formerly in charge of public transportation systems in Chicago and Los Angeles. Under his

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<sup>52</sup> *United States v. National City Lines, Inc., et. al.*, 186 F.2d 562, 566 (2<sup>nd</sup> Cir. 1951)

<sup>53</sup> *id*

<sup>54</sup> PSC Order 40567, Sept 20, 1944. In the matter of the application of American City Lines, Inc. For authority to purchase shares of the capital stock of the Baltimore Transit Company.

<sup>55</sup> "Lucius S. Storrs to Retire from Presidency of Transit Co.; Bancroft Hill to Succeed Him," *as presented in* "Baltimore Transit Company" Vertical File 1, Maryland Department of the Enoch Pratt Free Library

leadership, the BTC's focus shifted significantly; the 1945 Annual Report to stockholders showed that the company planned to improve its service by replacing the streetcar network with bus service.<sup>56</sup> Nolan's tenure at the BTC was short; Nolan died in 1945 and was succeeded by Claude Gray, another NCL man.

National City Lines interests were firmly entrenched when WWII ended and the transit company's difficulties returned. Streetcars and their tracks had deteriorated due to heavy traffic during the war years, ridership was again on the decline, and financial troubles resumed. In May 1946, the Sun printed four political cartoons by Baltimore Sun cartoonist and illustrator John Stees depicting the sad state of affairs. One shows a horse drawn trolley on 33<sup>rd</sup> street. A man on the sidewalk remarks: "I've been expecting this a long time." Horsecars had become obsolete 50 years earlier.<sup>57</sup> Another shows the packed interior of a trolley car where a man, gritting his teeth, says "If I hear sardines mentioned again, I'll kill somebody."<sup>58</sup> There was popular dissatisfaction with the transit service being provided; the press and the public realized that change needed to happen.



<sup>56</sup> Baltimore Transit Company Annual Report 1945: Better Public Transit for a Growing City.

<sup>57</sup> Gary Helton. *Baltimore's Streetcars and Buses*. (Charleston, SC: Arcadia Publishing, 2008), 7.

<sup>58</sup> John Stees. "Baltimore Murals," *Baltimore Sun*, May 5, 1946.

They did not have to wait long; the BTC's plans for significant service changes were already in the works. Baltimore City ordinance 393, approved in May, 1946, involved a contract between the Mayor and City Council and the BTC and the Baltimore Coach Company regarding the planned conversion from trolley to bus.<sup>59</sup> Under that contract, the BTC was to pay 2.5 million dollars to the City up front, 2 million of which would be set aside specifically for paving, and to pay a 2% tax on gross revenues from bus transportation. This sum would allow the transit company to avoid any future obligation to pave or any section of street over abandoned railway track or remove track. It also removed any prior tax liability accrued during the BTC's boom years during the war. The City was busy implementing other traffic changes around the same time. On June 10, 1946, City Ordinance 515, which proposed to make Calvert and St. Paul, Charles, Cathedral streets one-way, was passed.<sup>60</sup>

Then, on October 9, 1946, The PSC determined that the BTC was "authorized to surrender and abandon electric railway service as operated over ...street railway lines, upon inauguration of motor bus service by the Baltimore Coach Company."<sup>61</sup> This order authorizing a large scale conversion from trolleys to buses was the impetus for the Plaintiffs' suit.

## **Baltimore City Circuit Court**

### **Introduction of Parties**

The Plaintiffs filed the Bill of Complaint in Baltimore City Circuit Court on June 12, 1947, asking the Court for a Writ of Injunction to restrain the Officers and Directors of the Baltimore

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<sup>59</sup> City Council Ordinance 393, approved May 16, 1946. *as presented in* COURT OF APPEALS (Transcript) Warren v. Fitzgerald, 1947, October Term, no. 108, vol. 1-2, MDHR 9974-15, MSA S434-75, 1/67/10/28. (hereinafter Court of Appeals Transcript)  
[http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa\\_sc5458\\_000051\\_003508-6.pdf](http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa_sc5458_000051_003508-6.pdf)

<sup>60</sup> City Council Ordinance 515, approved June 25, 1946. Court of Appeals Transcript.

<sup>61</sup> PSC Order 42685, Oct 9, 1946. In the matter of the application of the Baltimore Transit Company for approval to convert certain of its rail lines to freewheel operation and to reroute certain of its rail lines.

Transit Company from pursuing the conversion plans.<sup>62</sup> The trial was held shortly thereafter on July 7, 8, and 9.

The Plaintiffs in the case, Wilson and Adelaide Warren, were longtime shareholders in the Baltimore Transit Company. Wilson was born in Baltimore City and graduated from Baltimore Polytechnic Institute in 1915. He attended Tri-State College in Indiana where he earned a BS in Civil Engineering. He then moved to Baltimore County in and settled in the Woodlawn area.<sup>63</sup>



In 1957, he unsuccessfully ran for Baltimore County Council in 1957, his first foray into politics. At candidate forums before the election, he said he believed more civil engineers were needed in the Legislature to apply their knowledge to public works.<sup>64</sup>

*Warren v. Fitzgerald* was not the only time Warren was involved in a lawsuit, nor was it the only time he sued the BTC. A Maryland Court of Appeals decision from 1959 reveals that he sued the corporation again as a shareholder, challenging a recapitalization of the company and the valuation of stock declared by appraisers. Again, his suit was unsuccessful.<sup>65</sup> Three years later, Warren's attorney in that case, a Mr. Allewalt, sued Warren for an unpaid balance of a fee for legal services. Warren claimed that Allewalt had inadequately represented him in the case. Again, the court did not find in Warren's favor.<sup>66,67</sup>

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<sup>62</sup> Plaintiff's Bill of Complaint #(a). Circuit Court Equity Papers.

<sup>63</sup> "Candidate for Baltimore County Council, 1<sup>st</sup> District," *Baltimore Evening Sun*, January 16, 1957, as presented in Biographical Card File in Maryland Department of the EPFL, under Warren, Wilson.

<sup>64</sup> "Country Council Candidates Talk," *Baltimore Sun*, January 17, 1957.

<sup>65</sup> *Warren v. Baltimore Transit Co.*, 220 Md. 478 (1959)

<sup>66</sup> *Warren v. Allewalt*, 228 Md. 141 (1962)

<sup>67</sup> Warren found himself before the Court of Appeals on one other occasion, when he appealed a decision by the Department of Employment Security finding him to be an "employer" in his business as a land surveyor, and thus required to pay contributions to the unemployment fund. *Warren v. Board of Appeals, State of Md. Dept. of Employment Sec.*, 226 Md. 1, A.2d 124 (1961)

While the results of future lawsuits and elections do not necessarily establish that Warren was an underdog, he did have a difficult road ahead of him in this case, and the attorney he chose to represent him did little to improve his position. Though he vigorously tried the case, Herbert E. Witz was new to the legal scene in Baltimore. He earned his law degree from the University of Baltimore in 1944 and was admitted to the Maryland Bar the next year, less than two years before he was retained by the Warrens to challenge the BTC's conversion plans.<sup>68</sup> The transcripts of the Circuit Court proceeding reveal that he was less polished than his opposing counsel; his reasons for objecting were frequently questioned by the judge and during the opposing counsel's opening statement, Witz was asked by the court to clarify the arguments he had just made in his own opening statement. However, Judge Tucker was patient with him throughout the trial and gave him the opportunity to make his point.<sup>69</sup>

J. Morfit Mullen was the other attorney for the Plaintiffs. Mullen graduated from Johns Hopkins University in 1899 and the University of Maryland School of Law in 1906.<sup>70</sup> A more experienced practitioner, it appears that his role was mainly to support and advise Witz, as the Circuit Court transcript shows that Witz conducted the majority of the trial. Other than briefly questioning one witness about a single issue, Mullen made no visible impact on the trial.<sup>71</sup>

The Plaintiffs were at a disadvantage from the beginning; they were attacking a corporation's business decision and were facing much more experienced legal practitioners as they

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<sup>68</sup> "Tests for Bar Passed by 29," *Baltimore Sun*, August 20, 1945.

<sup>69</sup> Later in his career, Witz became very involved in civic and philanthropic causes, acting as president of the Roland Park Country School's board, president of the Star Spangled Banner Flag house, the USF Constellation Foundation, and as an executive council member of the Baltimore Area Boy Scouts of America, and a board member of the Baltimore Symphony Orchestra for more than 25 years. Jaques Kelly. "Herbert Edwin Witz, 84, Attorney," *Baltimore Sun*, November 9, 2005.

<sup>70</sup> He volunteered for officer training and served in WWI. During his legal career, he held the post of vice-president and counsel for the Baltimore and Jamaica Trading Company, which imported tropical fruits. He was also an author, writing six books, about Maryland history and his legal career. In his biography of his legal career, *Let Justice Be Done*, Mullen offers insights, opinions, and literary references on the legal field, but does not shed any light on his involvement in this case. "J.M Mullen Dead at 84," *Baltimore Sun*, March 27, 1962.

<sup>71</sup> Roy Fitzgerald, Trial Transcript from July 9, 1947, 291-292. Circuit Court Equity Papers.

did so. Finally, the men Witz called to testify were some of the most respected, veteran business leaders in the community. It would be an uphill battle for the Warrens.

The Defendants in the case were the Officers and Directors of the Baltimore Transit Company in 1947. The Board at that time consisted of Joseph P. Healy, a retired food wholesaler<sup>72</sup>; Walter F. Perkins, a civil engineer; S. Page Nelson, President of Savings Bank of Baltimore; John Swope, vice president, treasurer, and director of BTC since 1926, A.W. Smith, Jr.; Cookman Boyd, Jr.; John S. Gibbs, Jr., and the Executive Committee which had been delegated authority to conduct day-to-day operations and decisions for the transit company. The Executive Committee in 1947 was similarly comprised of prominent local businessmen and men from out of town.

Harry Baetjer, a member of the Executive Committee and counsel for the BTC in *Warren v. Fitzgerald*, was the youngest brother of Edwin Baetjer, one of the founders of the Baltimore firm Venable, Baetjer, and Howard. He received his BA from Johns Hopkins University and his LLB from the University of Maryland School of Law. He became a partner in the firm in 1917, and had an impressive career at the bar, appearing in 35 cases before the Maryland Court of Appeals. He was incredibly committed to his practice at the firm and rarely missed a day at his desk, which he occupied for over 60 years. He was regarded as an elder statesman of the Republican Party of Maryland and was reportedly consulted by Gov. McKeldin on matters of public importance.<sup>73</sup>

A.H.S. Post, a successful tennis player in his youth, later became a prominent Baltimore banker, and held several positions of financial leadership through his 60 year career.<sup>74</sup> Most notably,

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<sup>72</sup> Healy later became the Maryland State Banking Commissioner. "J.P. Healy Dead at 85," *Baltimore Sun*, February 1, 1969.

<sup>73</sup> Arthur W. Machen, Jr. *A Venerable Assembly: the History of Venable, Baetjer, and Howard 1900-1991*. (Baltimore: DeskTop Publishing Unit of Venable, Baetjer and Howard, 1991)

<sup>74</sup> AHS Post's Rites Today," *Baltimore Sun*, June 7, 1967.

and at the time of the case, he served as President and Chairman of Mercantile Trust Bank, after working his way up through the company.<sup>75</sup>

The “out of town men” on the executive committee all had strong ties to National City Lines. Roy Fitzgerald was President and Director of National City Lines, Frank Reavis was a Director and General Counsel for National City Lines, and Claude Gray, the current president of the BTC, was a former vice president of operations for National City Lines in St. Louis.



On June 27<sup>th</sup>, the Mayor and City Council intervened as a Defendant in the case. The Mayor at time, Theodore McKeldin, relied on City Solicitor Simon Sobeloff to represent the City’s interests. Sobeloff was born in Baltimore and was admitted to the Maryland Bar before graduating from the University of Maryland School of Law, having received one of the highest scores on the examination that year. He then spent much of his renowned career in public service, occupying the positions of Deputy City Solicitor, US Attorney, Baltimore City Solicitor, Chief Judge of the Maryland Court of Appeals, Solicitor General of the US, and Chief Judge of the Forth Circuit.<sup>76</sup>

### **Arguments, Testimony, and Exhibits**

The Plaintiffs’ Complaint alleged several arguments. First, the Plaintiffs argued that the men from National City Lines and that corporation’s outside interests dominated and controlled the BTC Board, constituting a breach of duty of loyalty and good faith to the corporation.<sup>77</sup> In addition, they contended that it was National City Lines’ policy in all cities where it controlled transit companies

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<sup>75</sup> “AHS Post Dies at Age 90 After 60 years as banker,” *Baltimore Sun*, June 6, 1967.

<sup>76</sup> Michael Mayer, Thurgood Marshall Law Library Special Collections, Judge Simon E. Sobeloff. <http://www.law.umaryland.edu/marshall/specialcollections/sobeloff/index.html>

<sup>77</sup> Plaintiff’s Bill of Complaint, #20, 21. Circuit Court Equity Papers.



to use motor buses whenever possible.<sup>78</sup> In support of this, the Plaintiffs argued that a conspiracy existed involving NCL and its supplier corporations. The Plaintiffs introduced contracts between Firestone Tire and Rubber Company and the BTC,<sup>79</sup> General Motors Corporation and the BTC,<sup>80</sup> ACF-Brill Motor Company and the BTC,<sup>81</sup> and agreements between the same companies and National City Lines<sup>82</sup> in an attempt to establish that the National City Lines interests which had purchased and taken control of the BTC had executed exclusive contracts between the corporations that capitalized National City Lines and the Baltimore Transit Company. This, they said, would show that the directors acted with the purpose of creating profits for these supplier companies at the expense of BTC shareholders.

National City Lines had been indicted in California under the Sherman Act on anti-trust charges months before this case went to trial.<sup>83</sup> The indictment dealt directly with these exclusive contracts. However, Judge Tucker summarily dismissed the relevance of those proceedings during the Defense's opening statement.<sup>84</sup> He was able to do so in part because those exclusive contracts were not extended to Baltimore. Frank Reavis, Counsel for NCL testified that those contracts were intended to apply to situations in which NCL controlled the transit system by owning at least 51% of the stock.<sup>85</sup>

The Plaintiffs also argued that, as the abandonment of trolley infrastructure called for by the conversion plan would create an approximate net loss of 24 million dollars for the BTC, the Directors acted in bad faith; they had breached their fiduciary duty by promoting the conversion

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<sup>78</sup> Plaintiff's Bill of Complaint, #13. Circuit Court Equity Papers.

<sup>79</sup> Plaintiff's Exhibit 2, Circuit Court Equity Papers.

<sup>80</sup> Plaintiff's Exhibit 4, Circuit Court Equity Papers.

<sup>81</sup> Plaintiff's Exhibit 5, Circuit Court Equity Papers.

<sup>82</sup> Agreement Between Firestone Tire and Rubber Company and National City Lines, Plaintiff's Exhibit 17 and Agreement between Yellow Truck and Coach and National City Lines, Plaintiff's Exhibit 18, Circuit Court Equity Papers.

<sup>83</sup> Plaintiff's Bill of Complaint # 19. Circuit Court Equity Papers.

<sup>84</sup> Judge Tucker Trial Transcript from July 7, 1947, 17-18. Circuit Court Equity Papers.

<sup>85</sup> Frank Reavis, Trial Transcript from July 8, 1947, 197. Circuit Court Equity Papers.

plan without calling a stockholder meeting. They argued that the Directors needed stockholder approval before going forward with a plan that would be so detrimental to shareholder profits.<sup>86</sup>

Finally, the Plaintiffs challenged the transit company's authority to operate a bus transit system by stating that the BTC's operations were limited to fixed wheel operations. The Plaintiffs argued that the company could not be converted from an operating company, the Baltimore Transit Company, arguably a trolley company, to a holding company whose charter creates a bus company, the Baltimore Coach company.<sup>87</sup>

With the exception of the final two points, the Plaintiff's arguments largely focused on allegations of bad actors and bad actions tied to National City Lines. The Defendants, on the other hand, while denying all NCL-related allegations, shifted the focus of the issues presented to the court. The Defendants forwarded the theory that the interests of the public and the City must be taken into account along with those of the stockholders. Baetjer said in his opening statement: "if a transportation company is to continue to function, it must make changes ... as the art advances and as the requirements of the City or operations make it necessary."<sup>88</sup> In his opening statement, Sobeloff characterized the suit as no "mere family quarrel between a stockholder and his company."<sup>89</sup> Later, Baetjer argued that the Directors of the BTC have a double obligation—to the public and to the stockholders.<sup>90</sup> After the evidence was presented, this was to be the argument that won the day.

Nearly all of the evidence and testimony introduced supported the Defendants' contentions. First, the latest in the series of City-commissioned traffic studies, a 1946 report on the state of

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<sup>86</sup> Plaintiff's Bill of Complaint, #20. Circuit Court Equity Papers.

<sup>87</sup> id

<sup>88</sup> Harry Baetjer Opening Statement, Trial Transcript from July 7, 1947, 13. Circuit Court Equity Papers.

<sup>89</sup> Simon Sobeloff Opening Statement, Trial Transcript from July 7, 1947, 25. Circuit Court Equity Papers.

<sup>90</sup> "BTC Plans in High Court; Arguments heard for and against change to busses," *Baltimore Sun*, December 11, 1947.

transit and traffic in the city by Baltimore's Chief Engineer, Nathan Smith, made many of the same recommendations its predecessors had. His report advocated a switch to one way streets and, more relevantly, that few streetcars be retained except for high density downtown areas, replacing the rest with trackless trolley and buses.<sup>91</sup>

Then, all of the Directors called to the stand, including Healy<sup>92</sup>, Perkins<sup>93</sup>, and Nelson,<sup>94</sup> consistently testified that they knew about the conversion, that it had been in the works for over 10 years, and that they made decisions based upon independent and uncontrolled judgment even though they were aware that Fitzgerald and Reavis were NCL board members. They also testified that the BTC did not have exclusive contracts with any suppliers, and, most importantly, that they believed all their decisions to be in the best interests of the shareholders.

Adrian Hughes, Assistant to the President of the BTC, who had been with the company or its predecessors since 1914, testified during the trial that plans for conversion had been in the works since 1935 as the company planned to modernize operations.<sup>95</sup> He spoke of a pattern of discontinuing rail lines and substituting buses as ridership and cost demanded, and said that when Chief Engineer Smith, published his report, the transit company realized they should coordinate their operations with the city.

Gilman Smith, an engineer for a NY firm that was employed by the BTC in 1944 and 1945 to study operations of company and recommend plans for completing a modernization program also testified.<sup>96</sup> His firm concluded that changes in type of vehicle and service routes were essential to

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<sup>91</sup> Defendants' Exhibit 6, Nathan L. Smith Analysis of Traffic Conditions, Etc. Circuit Court Equity Papers.

<sup>92</sup> Joseph Healy, Trial Transcript from July 7, 1947, 52-58. Circuit Court Equity Papers.

<sup>93</sup> Walter Perkins, Trial Transcript from July 7, 1947, 110-113. Circuit Court Equity Papers.

<sup>94</sup> S. Page Nelson, Trial Transcript from July 7, 1947, 155-159. Circuit Court Equity Papers.

<sup>95</sup> Adrian Hughes, Trial Transcript from July 9, 1947, 386-394. Circuit Court Equity Papers.

<sup>96</sup> Gilman Smith, Trial Transcript from July 9, 1947, 415-429. Circuit Court Equity Papers.

creating more rapid and flexible service to the growing community. He also spoke of similar conversions from trolley to bus in other cities' transportation systems.

### **Judge Tucker's Oral Opinion**

Judge John T. Tucker oversaw the Circuit Court trial. Born and raised in Maryland, Tucker attended St. Johns College and graduated from the University of Maryland School of Law. He was employed in private practice in Baltimore for more than 20 years before he was appointed to the Supreme Bench of Baltimore City in 1943. Tucker served on the bench until 1961, when he reached the mandatory retirement age of 70. Tucker was reportedly noted for his judicious temperament and for his careful and conscientious analysis of the many cases heard by him.<sup>97</sup>



At the completion of closing arguments, Judge Tucker immediately issued an oral opinion.<sup>98</sup> In finding for the Defendants, Tucker focused his decision on the how the Directors acted in response to needs of the City and the public, rather than looking at how they did not fulfill the needs of the shareholders. To do so, Tucker found he did not rely exclusively on his legal expertise to decide the case. Tucker found that the Board was not dominated by the NCL executive committee members and that the Board did not breach their

fiduciary duties to the company, though their conduct fell short of best practices.<sup>99</sup> His remarks on the lack of monopolistic exclusive contracts between BTC and supply companies exemplify this. In finding that only the Board members affiliated with NCL knew of contracts between NCL and the supply companies (which also did not apply to the BTC) before the lawsuit was instituted, he said:

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<sup>97</sup> Maryland State Archives Biographical Series, John T. Tucker  
<http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/014300/014360/html/14360bio.html>

<sup>98</sup> Judge John Tucker Oral Opinion, 1. Circuit Court Equity Papers.

<sup>99</sup> id 8

“...it would have been desirable for all the directors of BTC to have been fully informed of the subject, because it seems that the friendly, if not obligatory, relationship of NCL with the equipment and supply companies would have necessitated a most cautious approach to any dealing with the latter to make sure that it was favorable to the best interests of the Baltimore Transit Company.”<sup>100</sup>

In response to the argument that the BTC’s charter established a streetcar company, not a bus company, Tucker found that common sense dictated that the charter did not mean the BTC could operate fixed wheel vehicles or nothing. He reasoned that such a reading would have defeated the interests of stockholders as well as the public if it kept the company from making changes to its operations.<sup>101</sup> The type of transportation the corporation used was of secondary importance to the fact that transportation was provided.<sup>102</sup> The Judge went on to explain that the Baltimore Transit Company was guided, from a realistic and practical standpoint, by the wishes of the City to a great extent.

“...it is dependent upon the will of the Mayor and City Council in obtaining franchise, and subject to taxation by the City. Also, it is subject to supervision, under the statutes of the State, by the Public Service Commission. So the public attitude is one of the many things that must be considered in determining the policy that the company should pursue. If the City insists upon a change in the transportation system of the BTC for the purpose of improving traffic conditions generally, the Board of Directors would naturally give serious consideration to such change, for a failure to make it might result in the operation of a transportation system under public ownership.”<sup>103</sup>

### **The Maryland Court of Appeals**

The Plaintiffs immediately appealed the Circuit Court decision.<sup>104</sup> The Defendants then petitioned the court to advance the case’s hearing date because the issue was time sensitive. The

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<sup>100</sup> id 14-15

<sup>101</sup> id 11

<sup>102</sup> id 12

<sup>103</sup> id 13-14

<sup>104</sup> Order for Appeal, filed July 10, 1947. Circuit Court Equity Papers.

conversion plans had already been vetted and approved by the public through the press and by the PSC, and, the Defendants warned, a delay in implementing those plans could keep the BTC from providing adequate transit service.<sup>105</sup> The Plaintiffs, in their answer to the petition, asked the court to give more time, but the Court agreed with the BTC and the Mayor and City Council, and the case was heard by the Maryland Court of Appeals in the October 1947 term<sup>106</sup>



Judge Charles Markell wrote the opinion in the case. A notable figure in the Maryland legal community, he was born in Baltimore and graduated from Johns Hopkins University and the University of Maryland School of Law. He was in private practice for over forty years and was president of the Maryland State Bar Association before being appointed to the Maryland Court of Appeals. He served on the Court, from 1944 to 1952, briefly taking the role

of Chief Judge.<sup>107</sup> He was succeeded that role by Simon Sobeloff, the former City Solicitor of Baltimore, who was appointed by his longtime friend Theodore McKeldin, then Governor.<sup>108</sup>

Judge Tucker's decision had convinced the Plaintiffs to forgo the bulk of their original arguments at the appellate level. The Plaintiffs did not include the claim that the BTC Board's pursuit of the conversion plans was fraudulent or a breach of their duties in their appellate brief, stating at oral argument that the charges of fraud had not been proved and thus were abandoned.<sup>109</sup> Instead, the only question argued at the appellate level was that the board could not change the corporate function of the company without shareholder approval. The court considered "whether the

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<sup>105</sup> Appellees' Petition to Advance Hearing Date, 2, *as presented in* COURT OF APPEALS (Miscellaneous Papers) Warren v. Fitzgerald, et al., 1947 October Term, no 108, MDHR 10, 205-2 MSA S 397-117, 1/65/8/11. (hereinafter Court of Appeals Miscellaneous Papers)  
[http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa\\_sc5458\\_000051\\_003508-5.pdf](http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa_sc5458_000051_003508-5.pdf)

<sup>106</sup> Appellants' Answer to Appellees' Petition to Advance Hearing Date, Court of Appeals Miscellaneous Papers.

<sup>107</sup> Maryland State Archives Biographical Series

<http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001600/001632/html/1632bio.html>

<sup>108</sup> Michael Mayer, Thurgood Marshall Law Library Special Collections, Judge Simon E. Sobeloff.

<sup>109</sup> *Warren v Fitzgerald* 189 Md. 476, 481 (1948)

conversion from trolley cars to motor buses and from an operating company to a holding company is *ultra vires* of the corporation or its directors”<sup>110</sup> The Plaintiffs argued that the abandonment of \$24,000,000 of assets plus the purchase of new buses at a cost of over ten million dollars more was outside the Director’s discretion in conducting the ordinary business of the corporation.<sup>111</sup> Similarly, they argued that a conversion from streetcars to buses was a change to the business of function for which the company was organized.<sup>112</sup>

The court held that the BTC did have the power to operate motor buses as part of an “integrated system of mass transportation [of] rail cars, trackless trolleys, and motor buses.”<sup>113</sup> The court used established principles of corporate law to arrive at the result. Under Article 23 of the 1939 Maryland Code, a company’s business dealing with the property of a corporation conducted within the ordinary course of business was managed by the Board of Directors. At the same time, fundamental changes to the corporate structure, objects, or purposes were reserved for the stockholders.<sup>114</sup> The court held that the conversion plans dealt with the former, vesting the power to convert a portion of trolley service to bus service with the Directors. Beyond that, the Court did not wade into the business judgment of the Directors; “whether the property is in fact obsolete and whether the conversion is wise are business questions, not reviewable by the courts.”<sup>115</sup> The court maintained that trolleys were merely the greater part of an “integrated whole which comprise[d] both [trolley] cars and buses.”<sup>116</sup>

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<sup>110</sup> id 481

<sup>111</sup> Appellant’s Brief, 1, *as presented in* COURT OF APPEALS (Records and Briefs) Warren v. Fitzgerald, et al., 1947, October Term, no. 108, MSA S1733-1226, 1/27/3/23. (hereinafter Court of Appeals Records and Briefs). [http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa\\_sc5458\\_000051\\_003508-3.pdf](http://www.msa.md.gov/megafile/msa/speccol/sc5300/sc5339/000209/000000/000012/restricted/msa_sc5458_000051_003508-3.pdf)

<sup>112</sup> Appellants’ Brief, 31. Court of Appeals Records and Briefs.

<sup>113</sup> Warren, 189 Md. at 488

<sup>114</sup> id

<sup>115</sup> Warren, 189 Md. at 491

<sup>116</sup> id at 490

Unlike the Judge Tucker, The Court of Appeals considered the City's and the PSC's input on which mode(s) of transportation would be best for Baltimore only minimally, as this was a stockholders' suit, construing the contract between stockholders and the corporation in which they had invested.<sup>117</sup>

## **Aftermath**

The resolution of *Warren v. Fitzgerald* in the Defendant's favor marked the approval of the BTC's plan for the conversion from trolleys to buses, but not the end of the difficulties for the BTC or mass transit in Baltimore. In early 1948, the PSC held public hearings on bus and trolley crowding and other transit-related complaints. A January 22<sup>nd</sup> article in the *Evening Sun* recounted complaints at the meetings about "non-local interest" National City Lines being an "absentee" in controlling the company. Nearly 100 people attended the hearings, where complaints ranged from people preferring streetcars to buses, to infrequent and overcrowded service, dissatisfaction with the diesel smoke and fumes on buses.<sup>118</sup> The *Baltimore Sun* reported that the PSC responded by stating "the service furnished by the BTC, including that furnished through its directly owned subsidiary, is not all that it should be. To bring about a substantial improvement is unquestionably the company's responsibility, and the commission will expect the company immediately to take steps that will bring about such improvement."<sup>119</sup>

Two weeks after the hearings, Claude Gray, then President of the BTC, was mysteriously found dead in his apartment. The cause was listed as "asphyxiation due to illuminating gas and gunshot wounds to the chest."<sup>120</sup> His death was ruled a suicide, and a few days later, Auguste

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<sup>117</sup> id at 486

<sup>118</sup> "Transit Hearings." *Evening Sun*. January 21, 1948; "Absentee transit interests hit at hearing." *Evening Sun*. January 22, 1948.

<sup>119</sup> Mueller 1991, 53

<sup>120</sup> "CM Gray's Death Called Suicide." *Evening Sun*. Feb 2, 1948.



Haneke, a Baltimore man, and the first non-NCL director since Bancroft Hill, was named the new president of the BTC.

Suspicious of misconduct on the part of BTC leadership also continued. In 1951, Governor McKeldin created a commission to study and investigate the service provided by the BTC and its ability to supply adequate public transportation to the City of Baltimore in the future.<sup>121</sup> The commission produced two reports, one by the majority of commissioners, which focused on improving public transit. The second, by commissioner Herbert Levy, was far more critical. He reported that the corporation was involved in nepotism, questionable scrap metal sales, and illicit contracts with investors. He viewed the majority report as a whitewash of corruption: it read like it “could have been written by counsel for the Transit Company, and it would not at all surprise this commissioner if such is the case.”<sup>122</sup>

Levy’s suspicions were borne out in subsequent federal litigation against National City Lines. In 1950, the corporation had ownership or control of 46 local transportation systems in 45 cities.<sup>123</sup> The next year they were convicted under the Sherman Anti-Trust Act of conspiring to monopolize part of interstate trade and commerce in the US through the exclusive contracts with its supplier companies, General Motors, Firestone, Standard Oil and Mack.<sup>124</sup>

While Maryland Courts did not find any legal barriers to the contracts in place between the BTC and these supplier companies, their larger business in cars and buses continued to make an impact on Baltimore and other parts of the US. Automobiles’ domination of the transportation landscape continued into the 1950’s. Under President Dwight D. Eisenhower, the Federal Aid Highway Act of

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<sup>121</sup> 1951 Md. Laws ch. 392, 1152

<sup>122</sup> Mueller 1991, 105

<sup>123</sup> *United States* 186 F.2d at 565

<sup>124</sup> *United States* 186 F.2d at 567 “By excluding all bus manufacturers other than [GM] from that part of the market represented by the bus operating companies under their control, the appellees effectively limit the outlets through which busses may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act.”

1956 provided substantial funding for the accelerated construction of a 41,000-mile, national system of interstate and defense highways.<sup>125</sup>

In the end, the private company became a public entity. After the BTC experienced a number of debilitating strikes in which the government intervened,<sup>126</sup> state and public interests were finally elevated over those of the private corporation. In 1962, Maryland created the Metropolitan Transit Authority to regulate public transit and absorbed the transit regulation functions of the PSC, including oversight of the BTC.<sup>127</sup> Then, in 1970, the MTA took over the Baltimore Transit Company.<sup>128</sup>

Seven years earlier the last trolley had run in Baltimore. Trolley buffs, students, and members of the press joined a few people on their way home from the night shift to memorialize the last trolley run and the end of an era in Baltimore.<sup>129</sup> At one point when a No. 8 bus from Towson passed the train, a few passengers shouted “here comes the objectionable form of transportation!,” while others booed and gave a thumbs down. The jeers turned to cheers when they saw the bus was not carrying a single passenger.

## **Analysis**

The Circuit court arguments and decision highlight the tension between private company and public need. The Baltimore Transit Company was a private corporation. The basic purpose of private corporations was and is to maximize profit. However, the fact that the BTC’s business, which was subject to city and state government oversight, was to provide public transportation to Baltimore’s population, created an inextricable link to the attitudes and desires of the riding public.

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<sup>125</sup> National Interstate and Defense Highways Act of 1956, Pub. L. No. 84-627.

<sup>126</sup> Mueller 1991, 125

<sup>127</sup> <http://www.mtmaryland.com>. (accessed December 14, 2009)

<sup>128</sup> id

<sup>129</sup> Richard Levine. “It’s the last ride home for trolley era,” *Baltimore Sun*, November 4, 1963.

Judge Tucker's opinion, in its reliance on common sense and logic rather than established legal principals, shows that the courts did not have a precise way to deal with a corporation which, because of the business in which it was engaged, served several masters. In the case of *Warren v. Fitzgerald*, the shareholders' interests were the last to be served.

That intervention of the Mayor and City Council as a Defendant in the case demonstrates an alignment of the BTC's and City's plans, which created a doubly formidable opponent for the shareholders. The alignment should not have been unforeseen, though. By 1947, the Baltimore City government had been considering the place trolley's fixed-wheel design had in the city's transit future for more than 20 years. The series of studies on traffic in the City were publically available, and, in the case of the Chase report, legally tied to the future of the company. In addition, as the City granted the BTC the capacity to lay track and function as the sole mass transit provider in Baltimore, its continued operations were somewhat dependent upon receiving the City's permission to do so. Practically speaking, the BTC could not have conducted its operations in a manner contrary to city plans.

The case also illustrates how the interests of the BTC could not be separated from the interests of the public. Any problems with public transportation, such as inconvenient stop locations, uncomfortable vehicles, or slow service from traffic problems, had a significant impact on the community of riders. If these problems were not corrected, they would likely lead to a drop in ridership. As former and potential riders continually opted to drive private vehicles rather than ride public transportation, the BTC needed to change to adapt to this increasingly popular form of transportation. One way to do so was to introduce vehicles that conformed to the new traffic patterns cars created. Providing bus service may not have been the only way or the best way to serve the public, but it did attempt to address the problem.

The shareholders, then, were the last stakeholders in BTC operations to have their voices heard. Unfortunately, when they did get their chance, Judge Tucker's dismissal of the allegations of National City Lines wrongdoing and conspiracy lessened their impact even further. Tucker, in his oral opinion, recognized that there may have been some missteps in the transit company's actions in relation to National City Lines. At the same time, he made almost no mention of NCL's purchase of interests in public transit systems around the country. Because of his reliance on the connection of the transit company to the City's plans, he spent a relatively small amount of time dismissing the Plaintiff's arguments about the Directors' ties to National City Lines.

The Courts in *Warren v. Fitzgerald* found that National City Lines did not overtly control the switch from trolleys to buses in Baltimore after WWII. The Second Circuit decision a few years later, though, shows there undoubtedly were ulterior motives to National City Lines' purchase of interests in public transit systems around the country. However, in the context of mass transit in Baltimore, their presence likely only ensured that the conversion from trolleys to buses happened when it did. As the 1925, 1935, and 1946 city-commissioned reports show, the idea that trolleys were incompatible with cars on crowded city streets was not a new concept.

Without the NCL arguments, though, the Plaintiff's appeal to the Circuit Court decision had the life taken out of it. The Court of Appeals answered the question of whether the BTC could choose to abandon trolley lines in favor of buses easily. The Directors of a corporation have the power to make almost any decisions in the ordinary course of company business. From the court's perspective, the BTC Board of Directors could decide to maintain public mass transit in any reasonable form.

As such, Wilson and Adelaide Warren were almost certain to lose in their challenge of the corporate decision to abandon trolley lines and replace them with buses. While the Warrens had the

right, as shareholders, to challenge the company's Directors, they ought to have realized their bid was destined to fail. Shareholder power is inherently limited. As Judge Markell wrote in his opinion: "as a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office."<sup>130</sup> The Warrens would have had to convince the court that changing the type of a portion of the transportation services offered from trolley to bus, when the BTC had been operating buses for decades, was outside of the ordinary course of business.

## **Conclusion**

The Baltimore Transit Company, though a private business owned by private shareholders, was intimately linked to both the traffic plans created by the Baltimore City government and the attitudes and desires of the riding public. The factor that arguably had the largest influence on all of these groups was the rise of the automobile. By the time the Warrens challenged the BTC's large scale conversion from trolleys to buses in 1947, Baltimore's citizens had been eschewing public transportation in all forms in favor of private automobiles for years. The increased presence of cars in the city challenged the company to provide adequate service. At the same time, automobiles drew away riders and encouraged them to leave mass transit by making it less viable.

Maybe in this way, National City Lines, though minimally considered by the Maryland Courts, won the day. There is no way we can accurately measure how the marketing and lobbying efforts of automobile and oil companies like General Motors and Phillips Petroleum actually impacted Americans' transportation choices. It is clear in Baltimore, though, that public transportation – no matter the form—continues to struggle as it competes with Americans' strong preference for the automobile.

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<sup>130</sup> *Warren*, 189 Md. at 489.