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THE INTERSTATE COMMERCE COMMISSION

THE
INTERSTATE COMMERCE
COMMISSION

A STUDY IN ADMINISTRATIVE LAW
AND PROCEDURE

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PART TWO

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FOREWORD

THE Legal Research Committee of the Commonwealth Fund has continued the work, begun about ten years ago, of an examination of the field of administrative law. It was intended to secure a general survey of administrative powers revealing, so far as the face of legislation can reveal it, the extent to which administrative control has, by modern legislation, been in fact conferred. It was intended to follow this with a series of special studies disclosing the actual workings of carefully selected administrative organs, it being deemed that such intensive studies in administrative law and practice are the prerequisite to an appraisal of what administrative law really does and a guide to what ought yet to be done. Two notable contributions have been made. The general survey above referred to resulted in the publication of the study by Professor Ernst Freund, *Administrative Powers Over Persons and Property*. The first of the intensive studies was that of *The Federal Trade Commission*, by Gerard C. Henderson. There now follows a special study of *The Interstate Commerce Commission*, by Professor I. L. Sharfman. This is the result of research continued for more than five years past. It will consist of four volumes, of which the second is now published. While the study has been conducted under the auspices of the Legal Research Committee and is published by the Commonwealth Fund, the author has been allowed entire freedom and the responsibility for the opinions expressed is fully and solely his own.

September, 1931.

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INTRODUCTORY NOTE

BROADLY speaking, the jurisdiction of an administrative tribunal charged with control over commerce or industry comprehends the entire complex of power which that body lawfully exercises. It embraces not only the kinds of enterprises subject to regulation and, under our dual form of government, the territorial extent of these enterprises, but the limits of the general authority which is invoked and the specific directions through which this authority is asserted. It might even include, perhaps, the procedural processes whereby this entire sweep of power is enforced. In such an approach, an inquiry into jurisdictional scope would traverse the entire field of the tribunal's activity. For purposes of analysis and appraisal, however, it is desirable that the problem of jurisdiction be more narrowly conceived. With reference to railroad and public service commissions, it is generally confined to the classes of utilities subject to control and to the state or interstate character of the services which they render. Section 1 of the Interstate Commerce Act, for example, which specifies the carriers and the commerce to which the statute applies, is commonly designated "the jurisdictional section." In examining the scope of the Commission's jurisdiction, as asserted in practice, we shall necessarily be concerned with the principal types of utilities, especially in their interrelationships, over which the Commission exercises some measure of power, and with the legal and practical problems arising from the numerous intimate contacts between intrastate and interstate commerce. But the character of the Commission's authority—of its administrative power as such—may likewise be deemed an essential manifestation of its jurisdictional scope. This authority springs from its general status as an administrative agency—from the statutory structure as a whole, rather than from any distinct grant of power—and involves the Commission's relationship to both the Congress and the courts, as well as the important practical issue of the maintenance of administrative independence. An analysis of the extent and limits of this administrative power will throw light upon the Commission's status in the regulatory scheme, and will thus provide a necessary background for our subsequent survey

of the character of its activities and of the safeguards against arbitrary or improper determinations provided by its organization and procedure.

In this volume, then, on the scope of the Commission's jurisdiction, we shall deal, successively, with railroad regulation and the control of allied utilities, with the assertion of federal power over intrastate commerce, and with the exercise of administrative discretion.

CHAPTER VIII

RAILROAD REGULATION AND THE CONTROL OF
ALLIED UTILITIES

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CHAPTER VIII
RAILROAD REGULATION AND THE CONTROL OF
ALLIED UTILITIES

THROUGHOUT the history of the Interstate Commerce Commission, its work has been predominantly concerned with railroad regulation. The Act to Regulate Commerce was originally passed to meet the evils embraced by the so-called railroad problem, and most of its subsequent amendments and supplements have been primarily designed to strengthen the Commission's effectiveness as an agency of railroad control. Whatever aspect of the regulative process we may examine, we shall find the Commission's activity and determinations in the railroad field the most enlightening source of data bearing upon its administrative status and tendencies. We have noted, however, in tracing the development of the legislative structure, that the Commission's jurisdiction was extended, from time to time, to utilities other than railroads. The present Interstate Commerce Act applies to common carriers engaged in the transportation of passengers or property, or in the transmission of intelligence; and the "common carriers" thus brought under the Commission's jurisdiction expressly include not only railroads, but carriers by water (under specified conditions), express companies, pipe-line companies, sleeping-car companies, and telegraph, telephone, and cable companies. It is true, of course, that public service undertakings constitute a general class of business enterprises subject to extraordinary common-law obligations;¹ and that even the principles of control developed under the modern system of commission regulation are, on the whole, equally applicable to all the utilities over which jurisdiction has been asserted.² Under these circumstances it may very plausibly be contended that the character of the power and activity of the Commission in the railroad field, which involves the performance of all of its major tasks, is sufficiently representative of its administrative func-

¹ See Bruce Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment* (commonly cited as *Wyman on Public Service Corporations*), 2 vols. (1911).

² See Henry C. Spurr, *Guiding Principles of Public Service Regulation*, Vol. 1 (1924), Vol. 2 (1925), Vol. 3 (1926).

tions and processes to render unnecessary any distinct treatment of its relationship to other utilities. There are at least two significant considerations, however, that necessitate this excursion beyond the field of railroad control. First, it will contribute to a more complete grasp of the extent of the Commission's tasks. Since the very magnitude of the Commission's administrative burden, as it has developed through the years, interposes serious obstacles to the realization of maximum effectiveness, the mere time and effort involved in the regulation of carriers other than railroads should emphasize its difficulties as a functioning body. Second, and more important, it will disclose some of the problems encountered by the Commission in the exercise of its primary powers of railroad regulation. Most of the carriers subject to the Commission's jurisdiction, in whole or in part, are engaged in the performance of some phase of the transportation function. The fact that the services involved are frequently rendered by diverse agencies is largely the result of historical accident. The services themselves are either complementary to those rendered by the railroads or in competition with them. Full control of the transportation function, therefore, depends not only upon railroad regulation, but upon the assertion of jurisdiction over carriers other than railroads; and railroad adjustments themselves are frequently molded by the policies and practices of other transportation agencies. In other words, the relationship between railroad control and the control of allied utilities constitutes a significant factor in fashioning the character and tendencies of the Commission's determinations. There is the added problem, moreover, that in numerous cases no clear-cut separation exists between transportation and industry, either in ownership of facilities or in actual operations. The course of rail carriage frequently involves the use of "private cars," and transportation services are often performed by business concerns, for outsiders as well as for themselves, through "industrial railroads" or "tap lines" under their control whose status as *bona fide* common carriers or as mere plant facilities raises difficult controversial issues. The nature and scope of the Commission's jurisdiction in these circumstances bears directly upon the effectiveness of its railroad rate control. The present chapter, therefore, is devoted to a survey of jurisdiction in terms of the kinds of carriers and services over which regulatory power is being exercised.

§1. RAILROADS

Common carriers engaged in the transportation of passengers or property by railroad constitute the primary agencies subject to the Commission's control. The entire range of power conferred upon the Commission is generally applicable to railroads, and its jurisdiction attaches to all of their physical facilities and to all transportation services rendered by them. The facilities and services thus embraced expressly include all bridges, car floats, lighters, and ferries operated in connection with any railroad; all the road in use, whether owned or operated under contract or lease; all switches, spurs, tracks, terminals, and terminal facilities of every kind "used or necessary" in the transportation of persons or property; all freight depots, yards, and grounds "used or necessary" in the transportation or delivery of property; locomotives, cars, and other vehicles; all instrumentalities of shipment or carriage irrespective of ownership or contract; and all services in connection with the receipt, delivery, elevation, transfer in transit, ventilation, refrigeration, storage, and handling of property transported. The enumeration is sufficiently exhaustive to enable the Commission to reach, without difficulty, the property and business of all carriers by railroad engaged in interstate commerce. There is ample evidence of this complete jurisdictional scope over railroads in all aspects of the Commission's activity. It is necessary to note only whether transportation "by railroad" has been narrowly or liberally construed by the Commission. How far has the Commission asserted authority over transportation agencies not expressly mentioned in the Act?

One important group of contested issues has arisen in connection with the limits of railroad terminal facilities—whether various services, supplementing the line-haul of the carriers and performed by companies separately organized, are subject to the Commission's control. The Commission's attitude in these circumstances, supported by the courts, has been determined by the realities of the transportation situation rather than by the formal character of inter-company arrangements. Thus, for example, without seeking to extend its jurisdiction arbitrarily, the Commission has assumed control over stockyard companies, declaring them to be common carriers engaged in interstate commerce and constituting in fact the terminals for receipt

and delivery of live stock of the railroads utilizing them.³ Similarly, wharfage companies, though separately organized and apparently not engaged in transportation as such, were held to fall within the Commission's jurisdiction, in so far as they constitute a necessary link in the chain of interstate commerce. The Commission quite soundly asserted that it "is not concluded by the form but looks to the substance of the relations between corporations engaged in interstate commerce."⁴ But the Commission has sought to keep within the

³ *Live Stock Loading and Unloading Charges*, 52 I.C.C. 209 (1919), 58 I.C.C. 164 (1920). In the latter proceeding, the Commission reversed its original finding that the loading and unloading of live stock at the Chicago stockyards is a duty of the shipper, and recognizing that this duty devolves upon the carriers, it held that the collection of separate charges for these services was an unlawful practice. It adhered to its former finding, however, that the stockyard company, in providing terminal facilities for the railroads, is a common carrier subject to its jurisdiction, and asserted its right to regulate the charges that the stockyard company may impose upon the line-haul carriers. "Standing alone," said the Commission, "the stockyards could not readily be availed of by shippers. Were it not for the tracks of the Junction company delivery of cattle in carloads would not be possible. It requires the line-haul carriers, the Junction company, and the stockyard company to make the stockyards an effective agency of interstate commerce. Under this state of facts we are of opinion and find that the stockyards are in effect terminals of the line-haul carriers, the Junction company, and the stockyard company" (pp. 167-168). And without passing upon the reasonableness of the loading and unloading charges involved in the instant proceeding, the Commission said: "The apprehensions of the line haul carriers that the stockyard company may make any charge it pleases, which they will be required to pay, are not well founded. Upon their complaint or upon the complaint of any party, we can examine any of the charges which make up the sum of the through charges, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through routes and joint rates and the divisions thereof, or otherwise, as the facts may warrant" (p. 167). These conclusions were in conformity with the views of the Supreme Court in an earlier proceeding, in which the Commission sought to compel the stockyard company to file tariffs and reports. *United States v. Union Stock Yard*, 226 U.S. 286 (1912), reversing as to the stockyard company the decision of the Commerce Court in 192 Fed. 330 (1911).

⁴ *Eichenberg v. Southern Pacific Co.*, 14 I.C.C. 250, 266 (1908). The Commission supported its judgment in these words (p. 265): "It is true that the different corporations under consideration are operating under separate and distinct charters, but, nevertheless, they constitute a single system. To complete that system the Terminal Company is a necessary part. Shipments over the Southern Pacific System, not for export, but from and to different states in the Union, all pass over the docks of the Terminal Company. It is conceded that the railroad companies carrying interstate shipments to and from Galveston though owned by the Southern Pacific Company are subject to our jurisdiction, but the contention is made that the point where the railroad lines end and the tracks of the Terminal Company begin is the point beyond which the power of the Commission does not extend. We can not yield assent to this proposition. The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally through the organization of separate

bounds of its statutory authority, and has refrained from extending its jurisdiction to transportation agencies not expressly mentioned in the Act unless they perform a service integrally related to that rendered by the railroad carriers. It has held, for example, that the provisions of the Act do not apply to transportation by team or wagon, when these facilities are operated by arrangement with a railroad carrier as a means of extending the territorial limits of its line.⁵ A similar conclusion was reached with regard to a company, under railroad control, affording transportation by stagecoach as a supplement to the railroad service of the principal carrier.⁶ More significantly, local transfer companies of passengers and baggage, though admittedly common carriers exercising important functions in the movement of the stream of interstate commerce and performing services often rendered by connecting belt-line railroads, have been held to fall without the scope of the Commission's jurisdiction.⁷ The Commission recog-

corporations, to exempt all their terminals and terminal facilities from our regulating authority." But compare *Wharfage, Handling, and Storage Charges*, 59 I.C.C. 488 (1930), in which the Commission held that the city of Norfolk, Virginia, in providing terminal facilities used in connection with interstate and foreign commerce, is not a common carrier subject to the Interstate Commerce Act.

⁵ *Cary v. Eureka Springs R. Co.*, 7 I.C.R. 286, 310 (1897): "The provisions of said act do not apply to transportation by team or wagon, and neither the joint tariffs, nor the arrangement of defendants with the Harrison Transportation Company, make them joint carriers."

⁶ *Wylie v. Northern P. R. Co.*, 11 I.C.R. 145 (1905). The Commission found that the stagecoach company was not engaged in the transportation of passengers or property "by railroad," and that the railroad company and the stagecoach company were not competent to form through routes and establish joint rates. A carrier subject to the Act may state separately in its tariff the charges of connecting road services; and in one instance, with three commissioners dissenting, the quoting of proportional rates lower than local rates, to be used with proper safeguards in combination with the rates of motor carriers, was permitted. *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539, 549-553 (1924). As part of a proposed general scheme of interstate motor-carrier regulation the Commission later recommended: "Railroads, whether steam or electric, and water carriers, subject to the interstate commerce act, and their motor carrier operations should be authorized, but not required by law at this time, to participate in joint rates and through routes with common-carrier motor-bus or motor-truck lines holding certificates of convenience and necessity from some regulatory body, and such rates should be made subject to the provisions of the interstate commerce act." *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 745-746 (1928). When a railroad extends its lines by means of motor-carrier subsidiaries, federal certification is not required under the Act. *Jaloff v. Spokane, P. & S. Ry. Co.*, 152 I.C.C. 758 (1929).

⁷ *Exchange of Free Transportation*, 12 I.C.R. 39, 42 (1907): "Aside from the pipe lines and sleeping car and express companies, which are named in a specific and separate clause, the only common carriers to which the provisions of the act apply . . . are those engaged in the transportation of passengers or property 'wholly by railroad

nizes its jurisdiction as a purely statutory jurisdiction. Transfer companies, as such, are not embraced in the Act. Congress has enumerated the specific kinds of interstate carriers subject to regulation; the Commission has not felt free to extend its authority beyond this express statutory enumeration. Only when the facilities furnished are operated in connection with the terminal services of a railroad or other carrier subject to the Act does the Commission assume jurisdiction, and then only of the transportation service involved rather than of the outside agencies as such.⁸ The problem has become acute in recent years through railroad use of the facilities of motor-truck companies for auxiliary services. Standing alone, the term "transportation," as used in the Act, is broad enough to include every form of motor-truck service. It embraces all instrumentalities and facilities of shipment and carriage, and all services in connection with receipt, delivery, and transfer in transit of the property transported. But the meaning of "transportation" is conditioned upon the facilities being furnished and the services being rendered by carriers subject to the Act. Motor-truck companies are not "railroads," and hence are with-

or partly by railroad and partly by water.' And certainly the petitioner [the Frank Parmelee Company, engaged in carrying, by means of omnibuses and express wagons, passengers and their baggage between railroad stations and hotels and private residences in the city of Chicago] is engaged in transportation neither by rail nor by water. It is said, however, that the service performed by the petitioner in transferring passengers and baggage in its omnibuses and express wagons across the city of Chicago from the arriving to the departing train is the same service that would be performed by a connecting belt railroad, if the transfer from one station to the other were made in that way, as it doubtless is in some cases. In its results the service is the same in each case. But in one case the carrier is a rail line and in the other an omnibus line. The former is included within the act and is subject to all its provisions. The latter is omitted, and by necessary implication is excluded altogether from the effects of the act." In so far as the service rendered has been undertaken by the railroad, it is subject to the Commission's control, though performed by the transfer company; but the transfer company itself is not subject to the Act. Compare *Cosby v. Richmond Transfer Co.*, 23 I.C.C. 72, 74 (1912): "Has Congress intended to give this Commission jurisdiction over local baggage transfer agencies? In answering this question we turn first to the provisions of the act, and in the second place inquire whether the railroad itself undertakes to give this service of gathering and delivering baggage at residences. To the first question we can find no other answer than that the language of the act, while extremely broad, cannot fairly be interpreted to bring such agencies within our jurisdiction; and to the second question we think the answer must be that the railroad does not undertake to provide this service, but rather, for the accommodation of its passengers, permits a transfer agency to use its trains to solicit business, and to check baggage at residences."

⁸ See *St. Louis Terminal Case*, 34 I.C.C. 453 (1915).

out the scope of the Commission's control. That does not mean, however, that all of their *services* are likewise beyond control. The term "railroad" embraces terminal facilities of every kind used or necessary in the transportation of persons or property. Motor-truck services, therefore, when properly constituting railroad terminal facilities, fall within the ambit of the Commission's regulatory power; only when such services constitute a line-haul extension beyond railroad terminal districts are they entirely removed from the operation of the provisions of the Act.⁹ The Commission, in all these circumstances, has

⁹ *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539, 547 (1924): "While motor-truck or wagon transfer companies are not common carriers subject to the act, truck or wagon transfer services performed in connection with terminal services of a common carrier subject to the act, or with transfer of freight in transit at an intermediate point by such common carriers, are subject to our jurisdiction. Such service is a part of a transportation service by a carrier over which we have jurisdiction. . . . We have no jurisdiction over the line-haul rates of motor-truck companies operated as an extension of the lines of rail or water carriers. In many cases it is difficult to distinguish between a line-haul service and a terminal service, and we have always decided each case upon its merits in that respect." Quite outside of terminal areas, but in a way that does not extend their lines but is rather an integral part of existing service, a number of railroads have substituted motor trucks for way or peddler freight trains in the line-haul movement of freight at rail rates between rail stations. The Commission recognized this development in the instant proceeding, but the matter of its authority was not before it for determination (p. 550).

The increasing use of road vehicles by railroads in their terminal operations has produced a number of situations requiring the Commission's attention. While the employment of motor trucks in inter-line transfers is commonly only an operating question, occasionally changes are proposed which involve a rearrangement of joint rates and through routes. *Rates from New England*, 146 I.C.C. 429 (1928). The Commission gave early approval to the operation of off-track stations in *St. Louis Terminal Case*, 34 I.C.C. 453 (1915), but the practice of the cooperating railroads of employing a single transfer company for this purpose awaited sanction in a later proceeding. *Transfer in St. Louis and East St. Louis by Dray and Truck*, 155 I.C.C. 129 (1929). Detecting the possibility of abuse in existing relationships with transfer companies, Commissioner Eastman pointed out that the Commission lacked the necessary authority to control them (pp. 164-167). Constructive station service, involving the movement of goods direct to consignee, though with railroad responsibility and rates applying only up to a defined point in the movement, was approved, but two commissioners dissented on the ground that railroads cannot perform their full duty at such stations (pp. 151-159, 170-171). Similar issues were involved in an investigation of practices on Manhattan Island; but in this case constructive station service, as carried on, and certain other uses of motor trucks, were pronounced in violation of sections 2 and 3 of the Act and incompatible with section 15a. *Constructive and Off-Track Freight Stations*, 156 I.C.C. 205 (1929). The motor truck has stimulated agitation for railroad collection and delivery of freight, of which two earlier instances were discontinued with the Commission's consent. *Washington, D.C., Store-Door Delivery*, 27 I.C.C. 347 (1913); *Merchants & Manufacturers Assn. v. B. & O. R. R. Co.*, 30 I.C.C. 388 (1914). While the Commission has stated that there is nothing in the Act to prevent store-door de-

sought to render its railroad control complete and effective, but without asserting jurisdiction beyond express statutory limits.

But the statute does not specify the kinds of railroads subject to the Act, and the Commission early encountered the debatable issue as to whether its jurisdiction is confined to steam railroads, or embraces also electric railways. There can be no question that the Act to Regulate Commerce was designed primarily to meet the evils that had arisen in connection with the practices of steam railroads. The language of the statute, however, is couched in general terms. It applies to common carriers "by railroad," without differentiating between railroads operated by steam and those utilizing electricity or any other available motive power. Assuming that there is no basis for distinction because of differences in motive power, are *all* interstate electric railways subject to the Act, whether performing an interurban freight and passenger service that is comparable to, and frequently in competition with, that rendered by steam railroads, or furnishing an essentially different "street car" service?¹⁰ The Commission, relying upon the generality of the language of the Act, assumed jurisdiction of all electrics engaged in interstate commerce, including street railways rendering urban and suburban service. It first asserted this authority over an electric road lying partly in the District of Columbia and partly in the State of Maryland which was constructed upon the public highways and was essentially a street railroad engaged in the transportation of urban and suburban passengers.¹¹ Such roads, it

livery, *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 547, it took occasion further to assert in the *Manhattan* case that it is without authority to require such service (156 I.C.C., at p. 233). In the same general category belongs the growing practice of handling less-than-carload freight in standard containers loaded by shippers—frequently freight-forwarding companies—and moving by truck and specially constructed freight cars. An investigation of their use has been undertaken by the Commission. Docket No. 21723. In passenger service the creation of off-track stations is significant chiefly for its bearing upon the competitive position of railroads. A petition for specific examination of this practice has been denied by the Commission in I. & S. Docket No. 3416; but it will be covered in a comprehensive investigation, undertaken during 1930, of the interrelationships of motor and rail carriers. *Coordination of Motor Transportation*, Docket No. 23400.

¹⁰ In *Louisville & Portland R. R. Co. v. Louisville City Ry. Co.*, 2 Duvall 175 (1865), the Court of Appeals of Kentucky declared that "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." Quoted by Justice Lamar in *Omaha Street Ry. v. I.C.C.*, 230 U.S. 324 (1913).

¹¹ *Wilson v. Rock Creek R. Co.*, 7 I.C.R. 83 (1897).

found, are within the scope of its jurisdiction, despite the fact that they probably were not within the express contemplation of Congress when the statute was enacted. "We cannot sustain defendant's contention that the Act to Regulate Commerce applies only to the ordinary steam railways by which interstate traffic is mainly carried, and that street surface roads for urban and suburban passenger travel are exempt from its provisions. It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads and their dealings with the public. But the terms of the statute in this regard are broad and general, and it contains no exception indicating a design to exclude from its operation those interstate roads which are constructed upon public highways, to provide the means for local passenger transportation in the streets of towns and cities and their various suburbs. We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements."¹²

Does this constitute a reasonable interpretation of the Commission's authority? The word "railroad," as used when the Act was passed, did not necessarily include or exclude "street railroads." The courts had placed conflicting constructions upon it in varying cir-

¹² *Ibid.*, p. 88. The jurisdiction thus asserted was applied to street railroads in *West End Improvement Club v. O. & C. B. Ry. & B. Co.*, 17 I.C.C. 239 (1909); *Beall v. W. A. & M. V. Ry. Co.*, 20 I.C.C. 406 (1911); *Citizens of Somerset v. Washington Ry. & Electric Co.*, 22 I.C.C. 187 (1912); *Silvester v. C. & S. Ry.*, 22 I.C.C. 201 (1912). In *C. & M. Elec. R. R. Co. v. Illinois Central R. R. Co.*, 13 I.C.C. 20, 26-27 (1907), in considering an application for the establishment of through routes and joint rates, the Commission made the following pronouncement concerning its general jurisdiction over electric railways: "It is scarcely necessary to add that the apprehension of counsel that the merits of complainant's contention may be prejudiced or obscured by the fact that it is an electric line is without foundation. The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction. Both are subject to the act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us. Moreover, progress in the science of electricity and the rapid increase of new devices for its application have led many practical railroad men to think that we may be measurably near its general use as the chief motive power in transportation."

cumstances.¹³ There was general agreement, however, upon the rule of statutory interpretation that must prevail. As stated by one of the lower federal courts: "The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view."¹⁴ The problem for the Commission, therefore, was to ascertain the probable Congressional intent. The fact that statements had been made in the course of debate upon the Act that it was not intended to apply to "street railways" would not be controlling in the ascertainment of its meaning.¹⁵ The Act must be interpreted in the light of its own terms. The character of the statute, and the evils it was designed to remedy, must determine its jurisdictional scope. Thus recognizing the nature of its task, the Commission was influenced by the following circumstances. The Act was made expressly applicable, without exception, to any common carrier by railroad in interstate commerce. While the abuses responsible for its enactment were largely concerned with the carriage of freight, its incidence was extended throughout to the transportation of passengers as well as of property. Street railways as such, serving single communities and rarely resorting to the prohibited practices, are automatically excluded from the scope of its provisions, because engaged in purely local commerce. When these lines, however, by serving several communities, virtually as interurban roads, engage in interstate commerce, they become subject to federal authority and actually fall within the broad scope of the jurisdictional

¹³ In *Omaha Street Ry. v. I.C.C.*, 230 U.S. 324, 334 (1913), the Supreme Court said: "The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad. But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the state courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens upon railroads. The appellants cite decisions from twelve states holding that in a statute the word 'railroad' does not mean 'street railroad.' The defense cite decisions to the contrary from an equal number of states. The present record discloses a similar disagreement in Federal tribunals."

¹⁴ *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 591 (1898). In its decision in the *Omaha* case, *supra*, the Supreme Court said: "But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute."

¹⁵ *Congressional Record*, Vol. 17, p. 3472.

section of the Act. As interstate carriers of passengers, they may well resort to the same general types of abuse which have characterized the steam railroads. The fact that not all of the requirements of the Act are, in their very nature, applicable to such roads would not exclude them from the Commission's control; many of these requirements are equally inapplicable to common carriers (such as pipe lines, express companies, sleeping-car companies, and water lines) that are specifically mentioned in the Act. On the basis of such considerations, and in conformity with its prior holdings, the Commission assumed jurisdiction in the so-called *Omaha* case.¹⁶ It ordered a reduction in the passenger fares charged by the Omaha and Council Bluffs Street Railway Company between Council Bluffs, Iowa, and Omaha, Nebraska. But the jurisdictional issue was contested in the courts and the Commission's authority in the premises denied.¹⁷ The Supreme Court found that "the company was chartered as a street railroad, and hauls no freight and is doing only business appropriate to a street railroad";¹⁸ and it held that the scope and purpose of the Act indicated that such "street railroads" were not within the legisla-

¹⁶ *West End Improvement Club v. O. & C. B. Ry. & B. Co.*, 17 I.C.C. 239, 245-246 (1909): "Even admitting that in its popular acceptation the word 'railroad' usually applies to standard commercial railroads, we think it plainly evident that it was the intent of the Congress to include within the provisions of the act any and all common carriers engaged in interstate carriage by railroad. No provision of the law is repugnant to that thought, and there are no qualifying words which suggest a different conclusion. The great body of strictly street railways are engaged in serving purely local needs, lie wholly within the confines of a single state, and, by the express terms of the statute, are not within our jurisdiction because not engaged in interstate transportation. It would be a narrow, strained, and illiberal construction to hold that designating an interurban railroad a 'street railway' was sufficient to excuse such railroad, when engaged in interstate transportation, from the operation of the law. So far as the practices of common carriers of passengers are concerned, interurban railroads might as certainly, to the same extent and in the same manner as any other carrier or railroad, cause the abuses denounced by the law; they might discriminate as unjustly and charge as unreasonable fares as the railroads denominated as commercial. It follows that they are within the 'mischief felt and the object and remedy in view.' If interstate, they are clearly outside the jurisdiction of the individual state, and where they are 'common carriers engaged in the transportation of passengers or property,' as specified in the act, we entertain no doubt of their amenability to its provisions."

¹⁷ *Omaha Street Ry. v. I.C.C.*, 230 U.S. 324 (1913), reversing the decision of the Commerce Court in 191 Fed. 40 (1911), which had upheld the Commission, and making permanent the decree of the Circuit Court for the District of Nebraska in 179 Fed. 243 (1910).

¹⁸ The Commission had said (17 I.C.C., at p. 243): "In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not

tive contemplation.¹⁹ While street railroads, in carrying passengers across state lines, are engaged in interstate commerce, it is not "the commerce which Congress had in mind when legislating in 1887," argued the Court, and hence is free from the Commission's control.

But the rule of the *Omaha* case is limited by its own special facts. It excludes from the Commission's jurisdiction street railroads carrying passengers between cities divided by a state line, but it casts no doubt upon the validity of the Commission's general holding that the term "railroad" embraces electric railroads as well as steam railroads. The practical effect of the Supreme Court's decision, therefore, was merely to require a distinction between urban and suburban street railroads on the one hand, and, on the other, interurban roads which, while incidentally using city streets, are primarily engaged in transporting passengers or property in interstate commerce. Accordingly, although the Commission has recognized its want of authority in special circumstances corresponding to those disclosed in the *Omaha* case,²⁰ it has assumed general jurisdiction over interstate electric railroads.²¹ It has regulated their accounts and has required

all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River, and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts."

¹⁹ "Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include street railroad." 230 U.S., at p. 337.

²⁰ See *Depreciation Charges of W. Ry. & E. Co.*, 85 I.C.C. 126 (1923), in which the Commission, in refusing to assume jurisdiction, concluded as follows (p. 129): "The facts in the *Omaha* case are similar to those in the present case. The Washington Railway & Electric Company, together with its subsidiaries, operates a 'local' street railway system which hauls no freight and transports passengers principally 'from street to street' within the city of Washington. As an incident to its street railway business, it conducts a passenger suburban service into Maryland. We believe this transportation system falls within the class of street railways excluded from the act under the decision in the *Omaha* case." But compare *Beall v. W. T. Co.*, 60 I.C.C. 600, 606 (1921).

²¹ In *Jurisdiction over Urban Electric Lines*, 33 I.C.C. 536 (1915), after referring to the *Omaha* decision as "a particular case," the Commission said (p. 539): "It may be that the framers of the various statutes relating to interstate commerce by railroad, under which this Commission operates, were chiefly concerned with the steam railroads, but it would seem that the promotion of safety of interstate travel by electric lines and the prevention of such abuses as may arise in their operation and management are

them to submit reports of finances and operations and accidents.²² It has established through routes between these lines and steam roads.²³ It has prescribed their charges even when engaged in providing only passenger service.²⁴ It has included electric lines in authorizing general increases in freight rates.²⁵ It has asserted its authority to order divisions of joint rates as between these lines and steam roads.²⁶ It has prescribed intrastate passenger fares for electric railroads as a means of removing unjust discrimination against interstate commerce.²⁷

The Commission's sweeping jurisdiction over electrics as thus exerted is based not only upon the generality of the language of the original Act in naming the common carriers to which it applies, but also upon the implications contained in subsequent amendments of its substantive provisions. Some of the powers of the Commission were expressly made inapplicable to various types of electric railroads, and this very exclusion, in specific terms, was reasonably con-

also matters of concern to Congress, and unless it can be more clearly shown that there is something in the purpose of one or the other of the acts that would exclude electric lines, we must continue to hold, with the qualifications resulting from the decision in the *Omaha case* . . . that electric railways engaged in interstate transportation are subject to our jurisdiction."

²² *Jurisdiction over Urban Electric Lines*, 33 I.C.C. 536 (1915). An investigation of the classes of depreciable property of electric-railway companies and of related percentages of depreciation is pending. *Annual Report*, 1930, p. 70.

²³ *C. & M. Elec. R. R. Co. v. Illinois Central R. R. Co.*, 13 I.C.C. 20 (1907); *Cedar Rapids & Iowa City Ry. Co. v. C. & N. W. Ry. Co.*, 13 I.C.C. 250 (1908); *C. & C. Traction Co. v. B. & O. S. W. R. R. Co.*, 20 I.C.C. 486 (1911).

²⁴ *City of Steubenville, Ohio, v. Tri-State R. & E. Co.*, 38 I.C.C. 281 (1916).

²⁵ *Increased Rates, 1920*, 58 I.C.C. 220, 253-254: "The operating costs of these lines have, on the whole, increased in approximately the same ratio as those of steam railroads. In some instances there is competition between the electric lines and the steam railroads. We conclude that the freight rates of electric lines may be increased by the same percentages as are approved herein for trunk lines in the same territory."

²⁶ *Spokane & Eastern Ry. & P. Co. v. S. P. & S. Ry. Co.*, 109 I.C.C. 713 (1926). In this proceeding the complaint was dismissed without prejudice because of the insufficiency of the record for a satisfactory adjustment of divisions, but the Commission said (p. 716): "We are authorized, however, to establish joint rates on traffic interchanged between steam roads and electric lines engaged in the general business of transporting freight, and there is no doubt that upon a proper record we can pass upon the justness, reasonableness, and equitableness of the divisions of the rates for such interchanged traffic."

²⁷ *Beall v. W. T. Co.*, 60 I.C.C. 600 (1921); *Ohio Rates, Fares, and Charges*, 64 I.C.C. 493 (1921); *Ohio and Pennsylvania Rates, Fares, and Charges*, 64 I.C.C. 517 (1921). See also *United States v. Village of Hubbard*, 266 U.S. 474 (1925), reversing the decree of the lower court in 278 Fed. 754 (1922) and upholding the Commission's orders in the last two of the above proceedings.

strued as a confirmation by Congress of the Commission's general assumption of jurisdiction. The Mann-Elkins Act of 1910, for example, provided that the Commission shall not establish any through route, classification or rate "between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."²⁸ This was the first mention of electric railroads in the Act, and was in the form of a specific restriction. In conformity with the Commission's established policy, however, no general distinction was made between railroads operated by steam and those operated by electricity. Similarly, when the scope of the Commission's powers was extended in various directions by the Transportation Act of 1920, electric railways were expressly excluded under certain conditions from the incidence of some of these powers. The Commission's authority to issue certificates of public convenience and necessity for extensions and abandonments was not to apply to street, suburban, or interurban electric railways which are not operated as part of a general steam railroad transportation system.²⁹ The Commission's power over security issues was limited in like fashion.³⁰ The rule of rate-making and the recapture clause, for the determination of a fair return to the carriers, excludes by express terms, first, street or suburban electric railways unless operated as part of a general steam railroad system, and second, interurban electric railways unless, as in the case of street or suburban roads, they are operated as part of a general steam railroad system, or, as an alternative, they are engaged in the general transportation of freight.³¹ The Commission

²⁸ Sec. 15, par. (3). See *Hood Coal Co. v. M. V. T. Co.*, 73 I.C.C. 54, 57 (1922).

²⁹ Sec. 1, par. (22).

³⁰ Sec. 20a, par. (1).

³¹ Sec. 15a, par. (1). See *Application of Section 15a to Electric Rys.*, 86 I.C.C. 751 (1924). Increased participation of electric lines in the carriage of freight, induced largely by motor competition in the passenger field, has led the Commission to state: "Where the functions of an electric line are substantially the same as those of an ordinary steam railroad the public interest would seem to justify the exercise of our jurisdiction in the matters of securities, construction or abandonment, regulation of rates, recapture of excess earnings, and consolidation with other carriers or acquisition of control of one carrier by another, to the same extent as in the case of steam railroads." *Annual Report*, 1928, p. 80. It has, therefore, recommended: "That the present exemption provisions of paragraph (22) of section 1, paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard

has uniformly construed these restrictions as limited to the special powers involved, and hence as strengthening rather than weakening the validity of its exercise of general jurisdiction over electric roads engaged in interstate commerce. In this attitude the Commission has received the full support of the courts.⁸² On the whole, therefore, the Commission is exerting its powers of control over every type of carrier "by railroad" engaged in interstate commerce.

§2. WATER CARRIERS

Carriage by water—in foreign commerce, in the coastal trade, along navigable rivers, through canals, and on the lakes—preceded the development of railroad transportation. With the emergence of the railroad, that instrumentality rapidly established itself as the dominant means of transport, but water carriage continued to play a substantial rôle in moving the nation's commerce, both as a supplement to rail transportation and in competition with it. It is performing an increasingly important service in both of these directions today. Because the highways of transportation by water are free to all, however, the carriers engaged in such transportation have not been subjected to the type of public control exercised over railroads.⁸³ The force of

freight equipment with steam railways and participate in through interstate freight rates with such carriers, provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned." *Annual Reports*: 1928, p. 83; 1929, p. 89; 1930, p. 96.

⁸² In *United States v. Village of Hubbard*, 266 U.S. 474 (1925), in which the question was squarely presented to the Court as to "whether interurban electric railroads engaged in interstate commerce are subject generally to regulation by the Interstate Commerce Commission," Justice Brandeis said: "The basis for the jurisdiction of the Commission over them is the generality of the language of the original act. . . . As the act made no distinction between railroads operated by steam and those operated by electricity, the Commission made none. . . . The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress, which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. . . . These provisions indicate that Congress did not intend to deny the Commission the power to regulate interurban railroads in other respects" (pp. 478-480).

⁸³ In a concurring opinion in *Jurisdiction over Water Carriers*, 15 I.C.C. 205, 213 (1909), Commissioner Cockrell traced the development, up to that time, of the Congressional attitude toward water transportation: "Congress has unrestricted 'power to regulate commerce with foreign nations and between the states and with the Indian tribes.' Why has it limited the jurisdiction of this Commission over foreign commerce

competition has been largely relied upon to produce reasonable and non-discriminatory rates and practices among the water carriers themselves; and these agencies, in so far as they furnish alternative transportation routes, have been deemed to supplement the coercive control of the Commission over railroads, by providing a competitive check upon excessive or unjust rail charges. Reliance upon this competitive check has been especially noteworthy as applied to the trans-continental rail carriers since the opening of the Panama Canal in 1914, as evidenced by the compulsory relinquishment of ownership or control by these carriers of competing water lines plying through the Canal. Neither by the original Act to Regulate Commerce, therefore, nor by any of its subsequent supplements or amendments, has the Commission been intrusted with direct jurisdiction over water carriers.

to the transit of such commerce to and from ports of transshipment and ports of entry, and over coastwise, river, and lake commerce only when such commerce is transported partly by railroad and partly by water under a common control, management, or arrangement for a continuous carriage, or shipment? The answer is that Congress began legislating for the control and regulation of foreign commerce and commerce wholly by water along our coast and on our rivers and lakes at the very first session of the first Congress held under the Constitution, and has ever since, from Congress to Congress, been enacting additional and amendatory legislation deemed necessary for the control and regulation of such commerce, and placed the enforcement of such laws under the Treasury Department up to February 14, 1903, when the control and regulation was transferred to the Department of Commerce and Labor, where it still remains, and has placed such common carriers wholly by water under the antitrust law, leaving them practically uncontrolled or unregulated only as to their rates, fares, and charges, and as to these they are subject to the common law and can only charge reasonable and just rates. In the discussion and passage of the interstate commerce law in 1887 mention was made of these water carriers, and also in the passage of the Hepburn Act they were in the minds of Congress, but yet Congress has not deemed it necessary or best to place them under this Commission. Transportation wholly by water is entirely different from transportation by railroad, or partly by railroad and partly by water. On our coastwise, river, and lake traffic the water is free and ample for all passengers and shippers to use their own vehicles for such transportation, just as on our roads or country highways; but in transportation wholly by railroad or partly by railroad and partly by water, passengers and shippers can not use their own vehicles or means of transportation." But see, for subsequent developments, Shipping Board Act of September 7, 1916 (39 Stat. 738) and Merchant Marine Act of June 5, 1920 (41 Stat. 988). For a discussion of the relationship between the United States Shipping Board and the Interstate Commerce Commission, see the Commission's *Annual Report*, 1921, pp. 11-14, and its report of June 29, 1922, to the Chairman of the Committee on Interstate and Foreign Commerce on H.R. 12021, 67th Cong., 2d Sess. For the Commission's latest recommendations in the premises, see *Annual Report*, 1930, p. 96. See also *Section 28 of Merchant Marine Act*, 88 I.C.C. 645 (1924); *Rail-Lake-and-Rail Rates via Canada*, 96 I.C.C. 633 (1925).

But transportation by water could not be entirely withheld from the Commission's authority without impairing its control over carriers by railroad. It is not possible to segregate all movements of persons and property into separable and independent transport by rail and transport by water. Not only are water carriers and rail carriers frequently under common control or management, but arrangements for through carriage are often made between independently organized railroads and water lines. As a means, therefore, of rendering public control of railroads coextensive with the actual scope of railroad traffic influence, such joint carriage by rail and water was from the very beginning subjected to the Commission's regulatory jurisdiction. In due course, moreover, as a means of stimulating water transportation and promoting competition between rail and water carriers, the Commission was empowered to establish the physical connections essential to through carriage and to regulate the terms and conditions of the joint transportation service that might result from the exercise of its powers. Furthermore, in conformity with the basic Congressional purpose of relying upon competitive adjustments as between rail carriers and carriers by water, it also became necessary to require the separation of common ownership or control of railroads and water lines, in order that competition might be rendered operative in practice, as it was assumed to be operative in the formulation of legislative policy whereby transportation by water as such was withheld from the scope of the Commission's authority. But this separation was not to be achieved by a mere statutory rule, enforceable in the courts. Because the existence or possibility of competition between railroads and water lines is not a simple objective fact which renders railroad control of competing water carriers amenable to rigid legislative prohibition, but is dependent upon a complexity of circumstances peculiar to each particular case, jurisdiction was conferred upon the Commission to determine the facts as to the existence of actual or potential competition, with power to permit the continuance of railroad operation of water lines (other than through the Panama Canal) when deemed in the public interest. The main channels of the Commission's jurisdiction over water carriers, then, are confined, first, to the regulation of transportation of persons or property partly by railroad and partly by water, when both are used under a common

control, management, or arrangement for a continuous carriage or shipment, with power in the Commission itself to establish the conditions of such joint carriage; and second, to the administration of the provisions prohibiting the ownership, control, or operation of water lines by railroads.⁸⁴ Under these circumstances, the Commission's jurisdiction not only fails to embrace the entire field of water transportation,⁸⁵ but it subjects the regulation of rail carriers to the difficulties that flow from the competition of these two agencies, the rates and practices of only one of which are subject to the Commission's control. These difficulties, moreover, are accentuated by the declaration in section 500 of the Transportation Act that it is the policy of Congress "to promote, encourage, and develop water transportation, service, and facilities, and to foster and preserve in full vigor both rail and water transportation." The nature of the Commission's administrative processes under these conditions appears both in the exercise of its limited jurisdiction over water carriers and in its attitude toward railroad rate situations affected, directly or indirectly, by the competition of water lines free from its control.

The Commission's jurisdiction over joint rail and water transport, being conferred by the original Act, was effective for a period of some twenty-five years prior to the establishment of its authority, by the Panama Canal Act, over the relinquishment of railroad ownership or control of competing water lines. Since, however, this prior jurisdiction is but incidental to the exercise of the Commission's powers over railroads, and since the operation of competitive forces constitutes the primary public reliance for control of water transportation, we may properly follow the logical rather than the chronological procedure and note, first, the character of the Commission's assertion of authority in connection with the dissociation of railroads from competing water lines.⁸⁶

⁸⁴ For a detailed analysis of the statutory provisions dealing with the Commission's authority over the relations between rail and water carriers and over the conditions of combined rail-water carriage, see Part I, pp. 105-111.

⁸⁵ In addition to its jurisdiction over joint rail and water transportation, the Commission is empowered to regulate water lines permitted to be owned, controlled, or operated by rail carriers, even in the absence of through transportation service. All water carriers operating through the Panama Canal, however, and all independent water carriers operating elsewhere are free from the Commission's control unless they are used jointly with rail carriers for through carriage or shipment.

⁸⁶ In response to Senate Resolution No. 457, the Commission has summarized the

The basic statutory prohibition is absolute in its terms. A railroad may not own, control, or operate a water line with which it "does or may compete for traffic." The primary function of the Commission, upon application of a railroad company or other carrier, or in the absence of such application, upon its own motion or the request of any shipper, is "to determine questions of fact as to the competition or possibility of competition," by way of enforcement of the statutory prohibition. Since, however, the language of the statute also speaks, in more general tenor, of the filing of applications "for the purpose of determining whether any existing service is in violation of this section," the Commission has assumed jurisdiction to determine whether the prohibited element of ownership or control is present as well as the fact of vitiating competition. It has looked to the substance rather than the form of the control relations between railroad carriers and boat lines, and on this basis it has made findings with regard to the railroad interest in the water carriers involved as a necessary preliminary to its consideration of the existence or possibility of competition.³⁷ This procedure appears to be fully justified, not only in view

results of its administration of paragraphs (9), (10), and (11) of section 5 of the Interstate Commerce Act which are here involved. *Railroad Operation and Control of Water Carriers*, 77 I.C.C. 749 (1923).

³⁷ In *Application of United States Steel Products Co.*, 57 I.C.C. 513, 514 (1920), the Commission squarely assumed jurisdiction of both elements embraced in the statutory prohibition: "We have to determine, first, whether the railroads named 'own, lease, operate, control, or have any interest whatsoever . . .' in said boat lines, and, in the event of an affirmative conclusion, whether the railroads may or do compete for traffic with the boat lines." In this case joint applications were filed by the United States Steel Products Company, nineteen railroad companies, and the United States Steel Corporation. The Steel Corporation owned the stock of the Steel Products Company and of the railroad carriers. The Steel Products Company operated two steamship lines through the Panama Canal, and there was no direct relationship between the railroads and the water lines thus operated. Looking at the realities of the situation, however, the Commission found that the common control exercised by the Steel Corporation constituted a railroad interest in the water carriers within the meaning of the statutory prohibition (pp. 514-515): "The steel corporation is a holding company and owns either the capital stock of the products company and of the applicant railroads or the capital stock of the companies owning said stock. They are all clearly under one common control. There are no directors common to the products company and the applicant railroads, but the chairman of the board and two other directors of the board of the steel corporation are on the board of the products company and there are directors common to the steel corporation and certain of the applicant railroad companies. . . . In view of all these circumstances we deem it unquestionable that the railroad applicants have an interest in the Isthmian Steamship Lines and the New York & South American Line within the meaning of section 5 of the act." The Commission found no violation of the statute because the competition involved between the applicant carriers

of the general intent of the statute to constitute the Commission the primary agency of enforcement, but as a means of avoiding the necessity of additional resort to the courts for the resolution of what is for all practical purposes a single issue.

But the Commission's chief task is concerned with the determination of the existence or possibility of competition between the rail carrier and the water line. In the absence of actual or potential competition, there is no violation of the statute, whether the water lines are operated through the Panama Canal or elsewhere. Upon a finding that the two transportation agencies do or may compete for traffic, the Commission is authorized, as to transportation by water other than through the Panama Canal, to permit a continuance of railroad control or operation of water lines, provided it finds, further, that the service by water is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such continuance of railroad control or operation will neither exclude nor reduce the competition by water. Freedom from the penalties for violation of the statute and the privilege of continued operation of water lines are thus alike dependent upon the Commission's findings as to the existence of actual or potential competition. As in so many of its tasks, the Commission must look to the future as well as to the present—it is called upon to consider not only existing competitive conditions but such conditions as would arise upon the separation of the common control of the rail and water lines. Its determinations, in these circumstances, have necessarily been based upon the

and the steamer lines was held to be "unsubstantial and merely nominal" (p. 517). But compare the following from the partly concurring opinion of Commissioner Hall (p. 519): "The fact of noncompetition thus determined, it becomes immaterial whether 'any railroad company or other carrier subject to the act' does or does not 'own, lease, operate, control, or have any interest whatsoever,' directly or indirectly, in the water carrier or vessel. Two elements, taken together, constitute the unlawfulness under the Panama Canal amendment to section 5 of the interstate commerce act: One is the ownership or interest; the other is the competition. If either element is lacking the statute is not violated. The jurisdiction conferred by the Panama Canal amendment upon the Commission is to determine questions of fact as to the element of competition, not to determine the other questions which enter into the element of ownership, or interest, and which, as I conceive, are properly within the jurisdiction of the courts. The majority undertake to pass on these questions of title or interest. In my opinion this is beyond our province, and the discussion as well as the conclusions expressed are superfluous and unnecessary and should be omitted from the report, even if the conclusions were well founded in law, which I doubt."

particular facts, as to operation and traffic, developed upon the record of each case. By way of general principle, as a controlling guide for effectuating the policy of Congress, it has merely held that the competition which renders common control of rail and water lines unlawful is not a vague, indefinite, remotely possible, but actually improbable, competition, but such a real and substantial rivalry for traffic as might come into existence upon the water carrier being divorced from the railroad.³⁸ "Whether or not there would be a normal, active competition between the rail line and the water line if operating independently of each other is the best practical test of competition."³⁹

In accordance with these guiding considerations, the Commission has found, in many instances, that there is neither actual nor potential competition between the petitioning rail carrier and the water line or vessel under its control, and hence no violation of the statute.⁴⁰ Its findings of fact under these circumstances, without express grant of the applicant's petition, are sufficient to support the maintenance of the *status quo*. Upon a finding of existing or possible competition between the interrelated rail and water carriers, the Commission has denied relief unless both stipulations of the statute—that the service is in the public interest, and that it will neither destroy nor lessen the competition by water—were fulfilled.⁴¹ The most far-reaching

³⁸ *Application S. P. Co. in re Operation S. S. Co.*, 32 I.C.C. 690, 694 (1915).

³⁹ *S. P. Co. Ownership of Oil Steamers*, 37 I.C.C. 528, 536 (1916): "Competition is a question of fact to be determined by the circumstances in each case. It means something more than an occasional movement via a rail line which parallels a water line, where the rail line operates at a serious disadvantage in that it does not and cannot offer rates and service on anything like equal terms with the water line. . . . If petitioner were required to discontinue the service of its oil steamers, this traffic would continue to move via water; the rail transportation would in no wise be increased and a water competitor would be eliminated. The act was not intended to prevent water lines competing with rail carriers, but, on the other hand, it contemplates encouragement of such competition by divorcing the water line from the rail carrier when it is found that the rail line is using the water carrier to stifle competition, or is not operating it in the best interests of the public."

⁴⁰ *Railway Ownership of Boat Line on Lake Tahoe*, 33 I.C.C. 426 (1915); *G. F. & A. Ry. Co. Ownership of Boat Line*, 33 I.C.C. 632 (1915); *Erie R. R. Co. Operation of Lake Keuka Navigation Co.*, 34 I.C.C. 212 (1915); *S. P. Co. Ownership of Oil Steamers*, 37 I.C.C. 528 (1916); *Maine Central Boat Lines*, 40 I.C.C. 272 (1916); *Nashville, Chattanooga & St. Louis Ry. Boats and Barges* (investigation on Commission's own motion), 49 I.C.C. 737 (1918).

⁴¹ See *Ownership of Dulles, Portland & Astoria Navigation Co.*, 33 I.C.C. 462

denial of relief was made in the proceeding in which the railroads were compelled to relinquish control of their water lines on the Great Lakes.⁴² The Commission based its findings of vitiating competition not only upon the fact that the rail and water routes of the petitioning carriers were in some instances, in view of inter-company relations among the various railroads, indirectly parallel and thus served common points,⁴³ but upon the more remote competitive interest of some of the owning railroads which resulted from their participation in through all-rail traffic, from their relationship to fast freight line arrangements, and from their membership in an association of railroads owning boat lines whose general function was to further the interests of their rail traffic at the expense of the water lines.⁴⁴

(1915); *S. P. Co. Ownership of Oil Steamers*, 34 I.C.C. 77 (1915), which was declared, upon rehearing, not to be in violation of the Act (37 I.C.C. 528 [1916]); *S. P. Co. Ownership of Atlantic Steamship Lines*, 58 I.C.C. 67 (1920), which application, upon further hearing, was largely granted (77 I.C.C. 124 [1923]).

⁴² *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 699 (1915). Upon a reconsideration of the issues, in connection with the Lehigh Valley Railroad Company's ownership of the Lehigh Valley Transportation Company, the denial of relief was affirmed in 37 I.C.C. 77 (1915). A bill to prevent the enforcement of the Commission's order was dismissed in the District Court, 234 Fed. 682 (1916), and the decree was affirmed by the Supreme Court in *Lehigh Valley R. R. Co. v. U.S.*, 243 U.S. 412 (1917).

⁴³ "The first controlling question arising under these applications is whether or not . . . there is or may be competition for traffic between the vessels operated and the railroad interested in them. This question would be easily answered in the affirmative if the ports of call were served in common by the boats and by the paralleling rails of the owning railroad. The physical situation would itself establish the case. It appears, though, that no such case is made out on the record here presented, since no two ports of call are served in common by the boats and the paralleling rails of the particular owning railroad entity. It is a fact, however, that in the case of the Pennsylvania Railroad Company, New York Central and Hudson River Railroad Company, Erie Railroad Company, and the Grand Trunk Railway Company of Canada, the railroad entity owning the boats or the interest therein also owns, or has an interest in, other railroad entities whose paralleling rails do serve ports of call in common with the boats. It is urged that this does not establish a case within the meaning of the act and that the act only applies to cases where there is competition, actual or potential, between the boats and the rails actually operated by the owning entity. This position takes no account of the extremely broad language used, to define the character of inter-ownership which the act was meant to reach. . . . The unsoundness of the contention is at once manifest when it is seen how in every case the act could be evaded by a reorganization incorporating the paralleling rails which reach the port of call into a railroad entity distinct from the entity owning the boats, with the real ownership, through stock control, remaining as before." *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 699, 703-705 (1915).

⁴⁴ *Ibid.*, pp. 706-710. Upon a reconsideration of the issues in 37 I.C.C. 77, the

But despite the Commission's view that the statute was designed to restore the conditions which prevailed when rail carriers were neither interested in nor exercised control over water lines, numerous applications for a continuance of common control or operation have been granted by the Commission, on findings that the water service is being operated in the public interest and that its competitive effectiveness will be neither destroyed nor weakened.⁴⁵ The Commission, under these conditions, has not only granted petitions for the continuance of "existing specified service," but has authorized the installation of new water services under railroad control.⁴⁶ In all in-

Commission said (pp. 78-79): "The participation of the railroad company in fast freight lines, joint rates, and through routes, which run parallel to through routes in which the lake line participates, were deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition. The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interests of the all-rail routes."

⁴⁵ See, for example, *Application S. P. Co. in re Operation S. S. Co.*, 32 I.C.C. 690 (1915); *O.-W. R. R. & N. Co. Ownership of Steamboats*, 33 I.C.C. 658 (1915); *S. P. Co. Steamboats on Sacramento River*, 34 I.C.C. 174 (1915); *Steamer Lines on Chesapeake Bay*, 35 I.C.C. 692 (1915); *Ocean Steamship Co. of Savannah*, 37 I.C.C. 422 (1915); *Delaware & Hudson Boat Lines*, 40 I.C.C. 297 (1916); *Boston & Maine Boat Lines*, 40 I.C.C. 565 (1916); *Central Vermont Boat Lines*, 40 I.C.C. 589 (1916); *Steamer Lines from Norfolk to Baltimore and Other Points*, 41 I.C.C. 285 (1916); *S. P. Co. Ownership of Atlantic Steamship Lines*, 43 I.C.C. 168 (1917), 45 I.C.C. 505 (1917), 58 I.C.C. 67 (1920), 77 I.C.C. 124 (1923); *Application of Grand Trunk Ry. Co. of Canada*, 43 I.C.C. 286 (1917); *Steamer Lines on Long Island Sound*, 50 I.C.C. 634 (1918).

⁴⁶ *Ashtabula-Port Maitland Car-Ferry Service*, 40 I.C.C. 143 (1916); *Central Vermont Boat Lines*, 40 I.C.C. 589 (1916); *S. P. Co. Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923); *S. P. Co. Steamboats on Sacramento River*, 102 I.C.C. 658 (1925). While paragraph (11) of section 5, which authorizes the Commission to extend the effective date of the statutory prohibition of common ownership or control, refers only to "existing specified service," the Commission has interpreted the section as a whole, and on this basis it has assumed jurisdiction to authorize the installation of new services. In *S. P. Co. Ownership of Atlantic Steamship Lines*, *supra*, the Commission said (pp. 128-129): "The section provides that applications may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with

stances of favorable action, authority has been granted neither in perpetuity nor for definite periods of time, but always subject to the further orders of the Commission.⁴⁷ While the competing water carriers thus permitted to remain in railroad ownership or control are in all cases required to file their rates and practices with the Commission, and thereupon become subject to the Interstate Commerce Act in the same manner and to the same extent as the rail carriers which dominate them,⁴⁸ the Commission has not sought to extend its jurisdiction by this device, substituting its own policy of positive con-

the provisions of this paragraph.' The word 'paragraph' clearly does not refer to that in which it is used because this paragraph contains no prohibitions. The word 'paragraph' in an act of Congress will be construed to mean 'section' whenever to do so accords with the legislative intent. . . . No order is necessary unless competition does or may exist, and considering the whole section, using the word paragraph to mean section, the intention of the act must be to permit the installation of new operations which are found to be in the public interest; otherwise the language used has no application. The same consideration of advantage to the convenience and commerce of the people which applies to the continuance of an existing service would have equal application to the installation of a new service, and it does not appear that it was the intention of the Congress to permit the continuance of an existing line, but to prohibit the further development of service when traffic offering warrants and it is in the interest of the public." But compare the dissenting opinion of Commissioner Eastman (pp. 138-140), which is based upon a strict interpretation of the language of paragraph (11). The majority view appears to be the more soundly grounded. Not only can the language of the statute with regard to the installation of new service be given effect in no other way than as construed by the Commission, but the practical effect of the adoption of the dissenting view would be merely to postpone the Commission's order until after the service had been installed. The phrase "existing specified service" is not limited by reference to any definite date, but refers, rather, to the time of the application and hearing. It would appear, therefore, that a railroad carrier might itself initiate a new water service, and then petition the Commission to determine the question as to the existence or possibility of competition and to authorize its continuance if deemed in the public interest. In both cases, the Commission's decision is on the merits. The assumption of jurisdiction prior to the installation of the new service possesses the added advantage of forestalling the possibility of futile commitments and unlawful operations.

⁴⁷ *Railroad Operation and Control of Water Carriers*, 77 I.C.C. 749, 751 (1923).

⁴⁸ See, for example, *Rail-and-Water Rates from Atlantic Seaboard*, 63 I.C.C. 267, 275 (1921), and *Reduced Rates from New York Pier*, 81 I.C.C. 312, 330 (1923), in which the Commission held that the Southern Pacific Company's Atlantic Steamship Lines, permitted to be owned and operated by the railroad company in 45 I.C.C. 505 (1917) and 77 I.C.C. 124 (1923), had the status of rail carriers, and that the Commission had the same power over them to fix *minimum* rates as in case of all-rail carriers, despite the provision of section 15, paragraph (3), that the Commission might prescribe only *maximum* through charges when one of the parties to the joint rates is a water carrier. "The rates and practices of the Morgan Line," said the Commission, "are subject to the provisions of the act in the same manner and to the same extent as are those of the railroad controlling it." 63 I.C.C. 267, 275 (1921).

trol for the Congressional mandate of enforced competition.⁴⁹ It has recognized that the dissociation of railroads from water lines might in some instances lead to a discontinuance of the service, to the injury of particular localities and shipping interests, but it has left the question of the relaxation of the terms of the statute under such

⁴⁹ In *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 699 (1915), it was urged on behalf of the railroad carriers that the increased powers of the Commission under the new legislation "confer full jurisdiction to regulate and control the lake line situation, so that the railroads can not in the future so use the boat lines they own as to stifle competition on the great lakes" (p. 711). This effective authority, it was argued, would spring not only from the Commission's power to order physical connections between rail carriers and water lines, to establish through routes and maximum joint rates, and to prescribe maximum proportional rail rates in connection with water carriage, but from the fact that "where there is an extension of the joint service as now operated, the rates, schedules, and practices of the water carriers will have to be filed with the Commission and be subject to the same supervision as that exercised over the railroads in this respect" (p. 712). The Commission found this argument without merit as a ground for authorizing the continuance of railroad control or operation of the boat lines. "The public will enjoy all the benefits contained in the amendment through the enlargement of the Commission's jurisdiction with respect to water transportation, and at the same time, and in addition, there will accrue such benefits as will result when water rates and service are influenced by competition. After divorcement this Commission may still regulate just as fully as under joint control, the through rail-and-water rate, fixing a reasonable maximum. It may also fix the maximum rail proportional of such through rate. It may still require the physical connection between the dock of a water line and the rails of any and all carriers serving a port of interchange" (p. 715). As to the powers of full supervision over the water carriers that would follow an authorization of continued joint control, the Commission did not dignify the contention with a specific reply. These powers are obviously a mere accompaniment of relief, granted on independent grounds, rather than a basis for according relief. Unless the Commission finds that the continuance of joint ownership or operation is in the public interest, it is without jurisdiction to relax the prohibitions of the statute, even though its own powers of positive control in the premises would be increased thereby. The Commission's answer is to be found in its unrestrained condemnation of the stifling of competitive conditions produced by, and likely to continue under, the method of joint control. "These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed" (p. 716).

circumstances for Congressional determination.⁵⁰ The Commission conceives its jurisdiction as primarily concerned with the enforcement of the legislative prohibition of joint control of competitive rail and water carriers; it authorizes the continuance of such control only in exceptional cases, and is then guided by the strict terms of the statute.

What degree of finality attaches to the Commission's findings with respect to the legal status of railroad control or operation of water lines? The statute expressly provides that the orders of the Commission, upon inquiry as to the existence or possibility of competition, shall be final; and as a practical matter the railroads have either relinquished control on their own initiative, in conformity with the prohibitions of the statute, or have proceeded to divorce themselves from their water lines or to continue their operation in accordance with the findings of the Commission. In the one instance, however, growing out of the lake-line applications,⁵¹ in which the validity of the Commission's determination was judicially tested, the language of the Supreme Court clearly suggests that the Commission's findings are final only as to the objective facts which support its conclusion, rather than as to the ultimate fact of the existence or possibility of competition which constitutes the basic element of the offense.⁵²

The subsidiary facts involved in this proceeding were undisputed. The rails of the Lehigh Valley Railroad Company extend from Jersey City to Buffalo. At Buffalo the railroad connects with other rail carriers, and also with the Lehigh Valley Transportation Company, plying boats on the Great Lakes, of which it was the sole stock-

⁵⁰ In its *Annual Report for 1916*, the Commission said (pp. 63-65): "Cases . . . have come forward and are now pending in which the competition is real, substantial, and not denied, but in which there is abundant testimony on behalf of shippers and shipping interests generally in the territory served, frequently not contradicted in any degree, to the effect that the service is in the interest of the public and of advantage to the convenience and commerce of the people, and that a discontinuance thereof would be substantially injurious to them and to their localities instead of working any public benefit. . . . We think that these facts should be brought to the attention of the Congress, so that in the light of those facts it may determine whether or not authority shall be conferred upon the Commission to permit, in such cases and under such circumstances, a continuance of the railroad ownership, control, or operation of the water lines, subject to such further and different orders as the Commission may subsequently enter upon a further hearing and a showing of substantially changed circumstances and conditions." See also *Annual Report, 1917*, p. 54.

⁵¹ 33 I.C.C. 699 (1915); 37 I.C.C. 77 (1915).

⁵² *Lehigh Valley R. R. Co. v. U.S.*, 234 Fed. 682 (1916); 243 U.S. 412 (1917).

holder. The rail line and the water line are not parallel, and except at the interchange port of Buffalo they serve no common points. But while each was physically a mere prolongation of the other, the railroad company participated in through routes and joint rates with other rail carriers to ports served by the boat line, and it was also a member of an association of boat lines which operated to subordinate the interests of the water carriers to those of the rail lines.⁵³ On the basis of these facts the Commission held that the railroad company did or might compete with its boat line and by order denied the applicant's petition for a continuance of common control. After the railroad company had failed to have a suit for the penalty instituted by the Department of Justice, to test the meaning of the statutory prohibition, it brought a bill in the District Court for the Eastern District of Pennsylvania to enjoin the enforcement of the Commission's order. The District Court, three judges sitting, dismissed the bill, and its decree was affirmed by the Supreme Court. The significance of the proceeding lies in the opinion, rather than in the decision, of the Supreme Court. The injunction was denied because of the absence of jurisdiction in the courts to review an order of the Commission denying the relief sought.⁵⁴ Justice Holmes declared that "there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk."⁵⁵ The risk of the imposition of a heavy penalty for each day's violation to which the plaintiff was subject sprang from the terms of the statute rather than from the order of the Commission. In thus holding, the Court was following established precedent for the maintenance of the primacy of the administrative method, and it was giving its approval to the reasoning, rather hesitatingly ventured, of the lower federal tribunal.⁵⁶ But the District Court, though not called upon to do so by the issue of the instant pro-

⁵³ See note 44, *supra*.

⁵⁴ *Procter & Gamble Co. v. U.S.*, 225 U.S. 282 (1912). See Part I, p. 66, note 74.

⁵⁵ 243 U.S., at p. 414.

⁵⁶ "We have serious doubt whether injunction is an appropriate remedy in the present situation. . . . What the Commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued. The order complained of is purely negative, and nothing else is before us." 234 Fed. 682, at pp. 695, 696.

ceeding, considered the case on the merits and held the Commission's findings as to the existence or possibility of competition to be final. The Commission's order is reviewable, argued the Court, only for the purpose of ascertaining whether the fundamental requirements of a hearing had been observed and whether the findings were based upon relevant and substantial evidence; in the absence of arbitrary action, the weight and effect of the evidence are for the determination of the Commission.⁵⁷ Justice Holmes summarily disposed of these contentions. "We assume," he said, "that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission."⁵⁸ The risk to which the railroad is subject, he concluded, "is the same that . . . it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute."⁵⁹

On this basis, it would appear, the Commission's investigations and findings possess no binding significance. We have noted that in many instances the Commission has disposed of applications by finding that the rail and water carriers do not and may not compete for traffic and that the joint control or operation does not, therefore, constitute a violation of the statute. Are railroads so circumstanced still exposed to the penalties for violation, the Commission's findings to be recognized in the courts only to the extent of the objective facts disclosed at the hearing? In other instances, we have seen, the Commission has found real or possible rivalry for traffic and has denied petitions for

⁵⁷ "Its findings are made final, and final they must remain, but with one qualification—certain fundamental rules must have been obeyed. In spite of the statutory declaration of finality, the courts still retain a limited power of supervision—enough to see that the constitutional requirements have been observed. . . . There must have been a 'hearing,' with the essentials involved in that word, and the action of the commission must not have been arbitrary; but in other respects we have no right to review what has been done, or the manner of doing it. We cannot substitute our judgment for the judgment of the commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact. Now the finding, that the plaintiff does or may compete for traffic, is the finding of an ultimate fact, exactly as the finding of discrimination was decided to be in *Meecker v. Railroad Co.*, 236 U.S. 427 . . . ; and the only question that remains is whether such a finding was made without evidence, or by disregarding the evidence plainly and arbitrarily." *Ibid.*, p. 697.

⁵⁸ 243 U.S., at p. 414.

⁵⁹ *Ibid.*

a continuance of common control. May the railroads involved persist in their operation of such competing water lines and be subject to penalty only upon independent determinations of the courts as to the existence or possibility of competition? Under such circumstances, it would seem, the Commission is merely constituted an agency for receiving evidence. It is true that penalty suits for violation are brought by the United States, and that the Commission is not expressly authorized to order a separation of common ownership or control. But not only is provision made for railroad applications to the Commission to determine the existence or possibility of competition and whether any existing service is in violation of the terms of the enactment, but the Commission is empowered to proceed for these purposes on its own motion or upon the request of any shipper; and the Commission's orders in all such cases are expressly declared to be final. It is the obvious intent of Congress to have these issues settled on the merits by the Commission. Without attempting, at this point, to consider the difficult problems that arise in differentiating between "questions of fact" and "questions of law," it may be noted that findings as to the ultimate fact of the existence or possibility of competition are peculiarly adaptable to determination by an expert administrative body charged with special knowledge of transportation conditions and of their effect upon competitive relationships. The nominally concurrent jurisdiction of the Commission and the courts in these circumstances, with no power to order a separation of the prohibited joint control and with the sole sanction against violations consisting of penalties judicially enforced, appears to deprive the administrative findings, as such, of both legal effect and practical significance.

But the Commission's authority with respect to the dissociation of common ownership or control of rail and water lines is merely designed to maintain and stimulate competition. The Commission is also endowed with a considerable measure of positive jurisdiction over water carriers. From the beginning this jurisdiction has been confined to carriers engaged in the transportation of passengers or property partly by rail and partly by water, when both are jointly used for a continuous carriage or shipment. Transportation wholly by water (except, as previously noted, by water lines permitted to

remain under railroad control) has been withheld from the incidence of the Commission's power; and the Commission has uniformly recognized its want of authority over all-water carriage, whether involving port-to-port rates on inland commerce⁶⁰ or ocean rates in foreign commerce.⁶¹

This result was achieved in the first instance by the Commission's narrow construction of the scope of its jurisdiction over water carriers when joint rail-and-water transport is involved. Once a water line, because of a specific transportation arrangement with a railroad company for a through haul, falls within the Commission's regulatory jurisdiction, does the Commission's authority extend to all of the

⁶⁰ *Corona Coal Co. v. Secretary of War*, 69 I.C.C. 389, 391 (1922).

⁶¹ *Cosmopolitan Shipping Co. v. Hamburg-Amer. Packet Co.*, 13 I.C.C. 266 (1908), in which the Commission was petitioned to restrain and regulate the practices of ocean carriers engaged in the transportation of property moving on through bills of lading from points in the United States to foreign countries not adjacent to the United States. A demurrer to the complaint was sustained by the Commission on the ground of want of jurisdiction. The Commission first emphasized the fact that all-water carriage is exempt from the provisions of the Act. "An inland movement of export or import traffic is a condition precedent to the attaching of jurisdiction. There may be an unlimited volume of all-water commerce from the American seaboard to the European seaboard, but over such commerce, or the carriers engaged therein, this Commission has no regulating power whatsoever so long as the shipments originate at the seaboard and are not transhipped to the ocean carriers. This exemption appears of great significance in the construction of the law, for the question at once is raised in the mind: Why should Congress distinguish between that foreign commerce which originates at, or is destined to, a seaboard city and that which is sent from, or taken to, an interior point? The answer is found in the fact that Congress has not sought to exercise control over all-water carriage, either transoceanic or inland. The act to regulate commerce arose out of the unjust and discriminatory practices of the rail lines; and all other carriers, when entirely independent thereof, were exempted from the restrictions imposed by this act and denied its benefits. Indeed, it may be said that the primary purpose of the law, judging from the reports and debates of Congress prior to and succeeding the enactment of the act of 1887, was to regulate rail carriers; but for the purpose of successful regulation of these it was found necessary that water carriers operated in connection with rail carriers should be made subject to the same regulating power. Accordingly it has been the uniform interpretation of the law that an all-water carrier engaged in carrying freight originating at New York or at New Orleans may engage in such traffic between such ports without filing its rates with this Commission, and so may the steamships plying between Seattle and San Francisco, or the carrier which transports freight from Duluth to Chicago on the Great Lakes, or the river carrier from Memphis to New Orleans; but if such water carriers are controlled or managed by the same corporation as controls or manages a rail line, or if between a rail and a water line there is an arrangement for continuous carriage, then such water line becomes subject to all the provisions mandatory and prohibitory of the act to regulate commerce" (p. 270). But even the existence of a rail-and-water arrangement for continuous carriage (such as prevailed in this proceeding from the use of through bills of lading)

interstate traffic of the water line, or is it limited to that portion only which is carried partly by railroad and partly by water under such common arrangement? As early as 1909, by a four to three decision, the Commission, reversing a previous administrative ruling, held that interstate carriers by water are subject to the Act only with respect to the traffic jointly transported with rail carriers and that they are

does not, it held, subject the ocean carriers involved to the Commission's jurisdiction. After a careful analysis of the history of the Act and the nature of its various provisions, the Commission concluded that its power over carriers engaged in commerce to and from a non-adjacent foreign country begins at the port of entry on import traffic and ends at the port of transshipment on export traffic. "On foreign commerce to a nonadjacent country the jurisdiction of the Commission over the carriers therein engaged ends at the seaboard" (p. 279).

It must be noted, however, that subsequent additions were made to the Commission's authority over water carriers in foreign commerce. Section 25 of the Act, added by the 1920 legislation, provided that every common carrier by water in foreign commerce whose vessels are registered under the laws of the United States shall file with the Commission schedules of information for each vessel intended to load general cargo. This information was to include ports of loading, dates for receipt of freight and dates of sailing, routes and itineraries to be followed, and ports of call to which cargoes will be carried. The Commission was authorized to make regulations governing the submission of these data, and it was required to publish the substance of the schedules and to furnish these publications to the railroads as a means of keeping shipping communities adequately informed. The Commission early found that these shipping lists, largely because of the fluctuating character of the data involved, were "of little if any practicable benefit to the shippers," and recommended that it be relieved of its duties in the premises. *Annual Report*, 1923, pp. 25-28. This recommendation was adopted by Pub. Act No. 41, 69th Cong., and on July 1, 1926, the publication of the shipping lists was discontinued. *Annual Report*, 1926, p. 45. But section 25 also provided for the issuance by railroads of through bills of lading to foreign destinations when space at previously ascertained rates is reserved on vessels as specified in the statute, and the Commission was required to prescribe the form of such through bills of lading. Prior to the enactment of this section, the Commission, on the basis of its existing authority, had prescribed uniform bills of lading for both domestic and export traffic. *Bills of Lading*, 52 I.C.C. 671 (1919). In *Alaska Steamship Co. v. U.S.*, 259 Fed. 713 (1919), the Commission's order was enjoined for want of jurisdiction. On appeal, the Supreme Court held that the case had been rendered moot by the passage of the Transportation Act, and hence reversed the order of the district court, reserving to complainants the right to attack future orders prescribing bills of lading under the new legislation. 253 U.S. 113 (1920). In *Export Bill of Lading*, 64 I.C.C. 347 (1921), the Commission prescribed the form and substance of through export bills of lading to be issued by railroads in the transportation of property in connection with ocean carriers operating vessels under United States registry from points in the United States to points in non-adjacent foreign countries. See also *Domestic Bill of Lading and Live Stock Contract*, 64 I.C.C. 357 (1921), in which the Commission prescribed, in conformity with the requirements of the 1920 legislation, the form and substance of domestic bills of lading to be used for the transportation of shipments to adjacent foreign countries, including such transportation in foreign commerce by water carriers operating vessels under United States registry.

exempt from its provisions with respect to all other traffic.⁶² There was some ambiguity in the language of the jurisdictional provision. The Commission's power over water carriers was not expressly conferred only *in so far as or to such extent as* they transport traffic under a common control, management, or arrangement with railroad carriers; its jurisdiction was established, and made applicable to the rail and water carriers involved rather than to the transportation as such, *when* carriage is effected partly by rail and partly by water under a common arrangement. Under the language of the statute either construction might have been achieved without resort to unreasonable or arbitrary interpretation. The majority reached its restrictive conclusion in reliance upon the legislative intent, as evidenced by the primary purpose of the Act to regulate railroad transportation.⁶³ Furthermore, the Commission argued, the subjection to control of all the interstate traffic of a water line engaged in any degree of joint carriage with a rail line would burden such water line in competition with independent water carriers entirely free from control, and "might force water carriers to withdraw from their port-to-port business or from their arrangements for through carriage in connection with railroads."⁶⁴ Such an outcome would hamper the flow of com-

⁶² *Jurisdiction over Water Carriers*, 15 I.C.C. 205. On May 4, 1908 (*Conference Rulings, Bulletin No. 2*), the Commission had announced that a steamboat line could not establish joint rates and through routes with a railroad company on particular traffic without subjecting all of its interstate traffic to the Commission's jurisdiction under the Act to Regulate Commerce. This administrative ruling was reversed by the above proceeding.

⁶³ "Looking at the history of the enactment . . . there can be no doubt that the main purpose of the act was to regulate transportation by railroad; that the regulation of water lines was merely incidental and collateral, and was included in order that the regulation of railroads might be effective and not virtually nullified by arrangements between railroads and water lines. It is not necessary to recite the reasons which induced the legislation; it is sufficient to determine the intention of the law-making body." *Ibid.*, p. 207.

⁶⁴ *Ibid.*, pp. 208-209. By way of explanation the Commission continued, through Chairman Knapp: "If one water carrier by becoming a party to a joint rate with a railroad is thereby required to publish and adhere to its rates between ports, it could not hope to compete with a carrier which is not required to publish and maintain its rates, and the result would be that the actual operation of the law, instead of tending to promote and facilitate commerce, would tend rather to its injury by making unprofitable the instrumentalities provided for the carriage of that commerce. Under such a construction of the law there would exist the commercial anomaly of two water carriers between the same ports attempting to secure the transportation of competitive traffic, the one bound to observe and collect rates which it had published thirty days in advance, the other able to make any rate which would secure the traffic; one

merce rather than promote or facilitate its development; and the very possibility of such results renders the assumption of broad jurisdictional authority beyond the scope of legislative contemplation. The minority commissioners, on the other hand, reached an opposite conclusion, both as to Congressional intent and as to transportation consequences. The Commission was largely established, they contended, to prevent unjust railroad discrimination between persons and localities; and in order to attain this object it was deemed necessary to extend its jurisdiction to water lines operating under a common arrangement with rail carriers. If the Commission's jurisdiction over such water lines is restricted to rail-and-water carriage, their port-to-port rates might be effectively used as a means of favoritism and discriminatory adjustments.⁶⁵ Neither group of contentions lacked sub-

within the law and subject to severe penalties for its violation, the other without the law and governed only by its business interest. That the Congress intended to produce such a condition—to create in a commercial sense a favored class of water carriers not subject to the act—and penalize other water carriers for their attempt to facilitate commerce by joining in through routes with rail carriers, seems unreasonable and might well be held unconstitutional, as depriving the latter class of carriers of the equal protection of the law.”

⁶⁵ The dissenting opinion not only met the majority view on its own grounds, but laid primary emphasis upon the tendency to discrimination that might be generated by the Commission's restrictive interpretation. Commissioner Clark, speaking also on behalf of Commissioner Clements and Commissioner Harlan, argued in reply that the outcome feared by the majority was one of the alternatives contemplated by Congress. "It is true that enforcement of the Commission's ruling of May 4, 1908, 'might force water carriers to withdraw either from their port-to-port business or from their arrangements for through carriage in connection with railroads.' It seems that that is exactly what the Congress intended they should do—either be amenable to the act or excluded from its terms; and inasmuch as the water carrier is left free to elect whether or not it will enter into any arrangement with a rail carrier, it is difficult to see how the act can be construed as having created 'in a commercial sense a favored class of water carriers not subject to the act' " (pp. 216-217). But the minority also adduced positive considerations for the more liberal construction of the jurisdictional section. "Publicity of rates and nondiscriminatory application of rates are the foundation and corner stone of the act. If all the rates are published and both carriers and shippers are bound thereby, no carrier and no shipper is discriminated against, unless with intent, and there is no difficulty about proving the purpose or intent of deviation therefrom. If a part of the rates need not be published and carrier and shipper are as to those rates free to contract for transportation under any terms which they may agree upon and to move that traffic between the same points and in connection with the traffic of the same shipper which is moved under rates that by law are required to be published and observed, an effort to prove intent to evade the law on part of either carrier or shipper, or to fix responsibility or liability upon either of them for unlawful discrimination or for departure from, or evasion of, the intent of the law, or of the conditions which it undertakes to impose upon both carriers and shippers, will be idle and futile. . . . The construction given to this provision of the act by the majority of the Commission

stantial merit. But while there was ample basis for the Commission's decision, it is questionable whether so close and important an issue should have been foreclosed against judicial determination. By resolving all doubt against its own jurisdiction, the Commission deliberately relinquished the opportunity for authoritative settlement in the courts. The Commission's uniformly restrained attitude in matters of jurisdiction, through rather strict adherence to express statutory authority, is generally to be commended; but the language of the statute is not self-interpreting, and when legitimate, though inconclusive, grounds exist for the assertion of jurisdiction, self-denying administrative determinations may thwart the legislative intent. There is a wide gap between a grasping extension of administrative authority and the reservation of controversial issues for judicial decision.

But the Commission's withdrawal from control of port-to-port traffic of water carriers otherwise subject to its jurisdiction has been upheld by subsequent Congressional enactment. It is now expressly denied the right "to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water."⁶⁶ But this statutory declaration of the Commission's position, it must be noted, imposes limitations only upon its general jurisdiction and regulatory power. The Commission's practice with regard to the accounts and reports of water carriers subject to its control by virtue

affords an invitation to rail carriers to provide themselves with water connections owned or controlled by themselves and to use them as an agency through which to defeat the prime purpose of this legislation. It seems plain that the Congress intended to leave water carriers free to compete with each other and with rail carriers except when such water carriers see fit to enter into some common ownership, control, or arrangement for through carriage or shipment with a rail carrier, and that when a water carrier does enter into such an arrangement with a rail carrier it subjects all of its interstate transportation to the requirements of the act to regulate commerce" (pp. 215-216, 217-218).

⁶⁶ Sec. 15, par. (3). The stipulation is added that "any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." It may be noted, also, that the Commission's jurisdiction has been further restricted even in the case of rail-and-water carriage. The mere absorption by a water line, out of its port-to-port rates or out of its through proportional rates, of switching or allied charges incurred by a rail carrier does not subject the carrier by water to the provisions of the Act; and the issuance by a rail carrier of a through bill of lading covering shipments by rail and water in foreign commerce does not constitute "an arrangement for continuous carriage or shipment" within the meaning of the Act. Sec. 1, par. (2) (c); Sec. 25, par. (5).

of common arrangements with rail carriers—its requirements embracing not only detailed information concerning interstate rail-and-water shipments, but like data concerning port-to-port traffic, state and interstate—has been upheld by the courts and has not been disturbed by subsequent legislation.⁶⁷

Moreover, even the Commission's general jurisdiction over water lines, which arises from the existence of common arrangements with rail carriers, is not entirely dependent upon the voluntary agreement of the transportation agencies involved in participating in joint rail-and-water traffic. The Commission's power to establish through routes and joint rates is expressly made applicable when one of the carriers is a water line,⁶⁸ and this authority has been repeatedly as-

⁶⁷ Despite the Commission's ruling that water carriers are subject to its jurisdiction only in so far as they are operated under a common control or arrangement with rail lines for continuous carriage in interstate commerce, its requirements as to accounts and reports cover the entire business of such water carriers. In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912), the Supreme Court, reversing the judgment of the Commerce Court in 190 Fed. 943, completely upheld the Commission's practice. In conformity with the Commission's views, a distinction was drawn between the scope of regulatory jurisdiction and the power to secure information as a basis for regulating the carriers expressly embraced, and it was found that the provisions of section 20 of the Act, whose constitutionality was sustained, provided adequate support for the full disclosures required by the Commission. "We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued by the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business" (p. 217). See also *Clyde Steamship Company v. U.S.*, 281 U.S. 744 (1930).

⁶⁸ Sec. 15, par. (3).

served.⁶⁹ The common arrangements which are essential to control may thus be brought into being by the Commission itself, even in the absence of any prior jurisdiction over the water carriers concerned.⁷⁰ Nor does the fact that satisfactory through routes are already in existence constitute a bar against this assertion of the Commission's power to bring water carriers within the scope of its jurisdiction.⁷¹ Recognizing that the promotion of free commercial intercourse constitutes the basic purpose of its power to order through routes and joint rates,

⁶⁹ *Bowling Green Protective Assn. v. E. & B. G. P. Co.*, 31 I.C.C. 301, 306 (1914), and cases cited.

⁷⁰ In *Decatur Navigation Co. v. L. & N. R. R. Co.*, 31 I.C.C. 281 (1914), this jurisdictional issue was squarely presented to the Commission. The defendants contended that the power to establish through routes and joint rates under section 15 was limited to carriers subject to the Act as defined in section 1. Since there was no common control, management, or arrangement for continuous carriage between the complainant water line and the defendant rail carriers, it was urged that no duty rested upon them to provide through routes and no power resided in the Commission to order their establishment. The Commission, in rejecting this contention, characterized it as "a rather novel interpretation" of the statutory provisions. "The Commission has frequently compelled the establishment of through routes and joint rates between rail carriers and water carriers with which latter the roads were previously entirely unconnected. . . . A natural waterway, improved by the expenditure of public funds, should be thrown open as far as possible to the free and unrestricted use of all those who desire to avail themselves of it. . . . A navigable river is a public highway, a natural avenue of commerce, and the public interests demand that its advantages be utilized to the fullest extent. It is true that the act to regulate commerce, in giving to this Commission authority to establish through routes and joint rates, was not intended to require us to establish such through routes and joint rates whenever requested to do so, without regard to the peculiar-circumstances of each case. In view of the fact that the act was designed to promote the free movement of interstate commerce, and bearing in mind that a large river is a natural artery of commerce, it would seem that any responsible common carrier operating on the river in question would be prima facie warranted in requesting this Commission to allow that carrier to participate to the fullest possible extent in the interstate traffic originating on that river" (pp. 287-288).

⁷¹ In *Flour City S. S. Co. v. L. V. R. R. Co.*, 24 I.C.C. 179 (1912), the Commission, after noting that it is the theory of the statute "that carriers should freely interchange freight between their respective lines to the end that interstate commerce may move without interruption or delay" (p. 184), and that Congress plainly intended "that every reasonable and proper facility shall be extended equally by a carrier to all of its connections" (p. 185), concluded as follows: "Prior to 1910 our power to establish through routes was limited to instances in which no satisfactory through route existed. The elimination of this limitation placed within the discretion of this Commission the establishment of additional through routes. In the exercise of this discretion the existence of through routes capable of adequately and expeditiously handling all traffic offered is entitled to much consideration, but no longer constitutes a barrier to another through route. The lower charge proposed to be made via the new route, we leave for consideration when we come to fix the joint rate. All we here hold is that it is within the power of this Commission to establish an additional route in connection with the complainant steamship company provided that company is such a common carrier as

the Commission has consistently employed this grant of authority as a means of encouraging the fullest utilization of water facilities and of preventing unjust discrimination against particular water carriers.⁷³ In pursuing these ends it has not permitted the interests of the rail carriers to dominate the situation. It has condemned, for example, as discriminatory against a complaining boat line and against shippers desiring to use its facilities, the restriction of proportional rates to all-rail connections;⁷³ and by way of affirmative encouragement of transportation by water, it has not desisted from establishing through rail-and-water routes which short-haul the rail carrier.⁷⁴

is contemplated by the law" (p. 185). And in *Gulf Atlantic Steamship Co. v. A. C. L. R. R. Co.*, 46 I.C.C. 309 (1917), in comparing the proceeding with the *Decatur Navigation Company* case (note 70, *supra*) upon which reliance was placed by the complainants, the Commission said (p. 312): "There is one distinction to be noted, however, in that, in that case it was clearly shown that the service of the existing boat line was far from satisfactory to shippers, whereas in the case at bar the evidence on this score is conflicting. Without determining whether unchallenged excellence of service would warrant us in declining to open a competitive route, the situation here disclosed does not justify us in sanctioning an arrangement restricting the field and excluding therefrom a line which seeks entry upon the same basis as that enjoyed by its competitor."

⁷³ See, for example, *Pacific Navigation Co. v. Southern Pacific Co.*, 31 I.C.C. 472 (1914); *Gulf Atlantic Steamship Co. v. A. C. L. R. R. Co.*, 46 I.C.C. 309 (1917); *Colonial Navigation Co. v. N. Y., N. H. & H. R. R. Co.*, 50 I.C.C. 625 (1918); *White Star Line v. N. Y. C. R. R. Co.*, 83 I.C.C. 473 (1923). The rationale of the Commission's policy was explained as follows in the first of these proceedings: "If rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate on the water and who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business. The spirit of the act to regulate commerce is to maintain the freedom of our ports and to allow boat lines to engage in traffic upon equal terms. To permit the rail carriers serving a port to favor one boat line or another would destroy the freedom of competition between boat lines which the act is intended to preserve, and would practically close ports to all but the favored vessels" (pp. 479-480).

⁷⁴ *Chattanooga Packet Co. v. I. C. R. R. Co.*, 33 I.C.C. 384 (1915). The Commission also emphasized the effect of such practices upon the maintenance of water competition. "If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters" (p. 392).

⁷⁵ *Baltimore & Carolina S. S. Co. v. A. C. L. R. R. Co.*, 49 I.C.C. 176 (1918). Prior to 1920, section 15 contained the limitation that in establishing a through route "the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad." But the Panama Canal Act, in amending section 6, authorized the Commission to establish through routes and joint rates between rail and water lines without express restriction and without reference to the limitation of section 15. Since the powers conferred by this amendment were granted "in addition to the jurisdiction given by the act to regulate commerce,"

This extensiveness of the Commission's jurisdiction, which is independent of the existence of voluntary rail-and-water traffic arrangements, is derived not only from its general authority to embrace water lines in the establishment of through routes, but from the special powers over rail-and-water carriage conferred upon it by the Panama Canal Act of 1912. Provision was there made, it may be recalled, that when property is or may be transported by rail and water from point to point in the United States, and not entirely within the limits of a

the Commission did not deem itself restrained against short-hauling railroad carriers. Chairman Hall said (pp. 183-184): "The Congress was here dealing specifically with rail and water carriers and must be presumed to have expressed its intent. It gave no indication of intent to limit our power to instances where the rail carriers would not be short hauled. This interpretation best comports with the manifest intent to encourage transportation by water, and under any other construction a port could be closed to through transportation by water and rail because it was not the terminus of the rail carrier. . . . The limitation in section 15 refers specifically to railroads and apparently was intended to insure to the originating rail line as large a share as possible of the movement of freight by rail. That the limitation should be projected into section 6 so as to force a shipper to move his property by rail when he wishes to send it a portion of the way by water is utterly inconsistent with the policy of the Congress manifested in the passage of the Panama Canal Act, the federal shipping act, and the improvement of rivers and harbors." Furthermore, the Transportation Act, 1920, expressly removed the limitation against short-hauling "where one of the carriers is a water line," and the Commission has condemned the imposition of local rail charges as divisions for the hauls to and from ports under such circumstances, because such charges, by stimulating long-haul rail carriage and discouraging transportation by water, constitute an indirect means of thwarting the legislative intent. *United States War Department v. A. & S. Ry. Co.*, 77 I.C.C. 317 (1923). In the words of Commissioner Eastman (pp. 355-356): "While the law does not permit us to require rail carriers to establish through routes which result in the short-hauling of one carrier which has a reasonably direct route of its own, it is, perhaps, not a necessary conclusion, when such routes and joint rates are established, that local rates are fair divisions for the carrier which is short-hauled. However, the law now authorizes us to require the establishment of through rail-and-water routes and joint rates which short-haul a rail carrier, and the reasons are evident. If a water route were dependent for feeders upon rail lines which can deliver traffic to it without short-hauling themselves, it would draw little traffic from the interior except at ports, like St. Louis, which happen to be a meeting point of rail lines serving different territories. . . . It follows, whatever may be the case as between rail lines, that joint rates over rail-and-water routes ought to be divided without regard to the extent to which rail carriers may be short-hauled, and not upon a plan designed to discourage or render impracticable the use of such joint rates. The record shows that the exaction by rail lines of their local rates as divisions under such circumstances has for its admitted purpose the protection of the long haul. In other words, it is a means of accomplishing indirectly what Congress, in the law respecting the establishment of through routes and joint rates, has sought to prevent." The principles governing the division of joint rates between rail and water lines were developed further in two rehearings of this case: 151 I.C.C. 91 (1929) and 155 I.C.C. 343 (1929). See also *Divisions of Freight Rates*, 156 I.C.C. 94, 101 (1929).

single state, the Commission shall have jurisdiction over the common carriers engaged in such transportation in various particulars, in addition to its prior powers under the Act to Regulate Commerce.⁷⁶ This additional jurisdiction is very broad in its scope. It empowers the Commission, without limitation, to establish through routes and joint rates over such rail and water lines; to determine the terms and conditions under which these lines shall be operated in handling the traffic embraced; to establish maximum proportional rates by rail to and from the ports of the water carriers; to determine to what traffic, in connection with what vessels, and upon what terms and conditions these proportional rates shall apply.⁷⁶ Furthermore, the Commission may order the establishment of physical connection between the lines of the rail carrier and the dock of the water carrier, thereby rendering possible, in all practicable instances, the performance of the through rail-and-water service to which its powers extend. Physically, therefore, as well as from an operating standpoint, the Commission may itself create the common arrangements for continuous carriage or shipment with rail lines which are generally held to constitute the basis of its jurisdiction over water carriers. Only recently have the full possibilities of these powers been recognized; their significance will appear from an analysis of the facts, issues, and outcome of this proceeding.⁷⁷

The State of New York owns and controls the Erie Barge Canal, including docks, wharves, and terminals used in connection with it. The Erie Basin terminal, situated upon the harbor at Buffalo, is adjacent to the right of way of the New York Central Railroad Company, whose main line parallels the barge canal between Buffalo and New York City and which serves, directly or through its connections, many important traffic points. The terminal includes piers and equipment for loading and unloading freight and considerable railway

⁷⁶ These provisions of the Panama Canal Act now appear as section 6, par. (13), of the Interstate Commerce Act. For a general survey of their nature and significance, with special reference to the limitation against short-hauling and to their applicability to passenger service, see *Colonial Navigation Co. v. N. Y., N. H. & H. R. R. Co.*, 50 I.C.C. 625, 627-632 (1918). See also Part I, pp. 105-111.

⁷⁶ See *Baltimore & Carolina S. S. Co. v. A. C. L. R. R. Co.*, 49 I.C.C. 176 (1918).

⁷⁷ *State of New York v. N. Y. C. R. R. Co.*, 95 I.C.C. 119 (1924); *United States v. N. Y. Cent. R. R.*, 272 U.S. 457 (1926), reversing the judgment of the District Court for the Northern District of New York in 13 Fed. (2d) 200.

trackage for switching and storage. The State owns no barges or rolling stock, and it does not operate the canal or engage in the transportation of merchandise. The waterway and its facilities are open to free public use, however, and about three-quarters of the traffic passing through the canal is interstate in character. In May, 1919, under a contract between the Director-General of Railroads and the State of New York, physical connection was established between the state-owned railroad tracks within the terminal and the adjacent New York Central tracks. In order that traffic might be interchanged between the rail lines and the canal, at this terminal, a rail transportation service must be furnished over the physical connection thus established and switching and spotting operations must be performed over the public terminal tracks. The State possessed no facilities for this purpose, nor was it engaged in the conduct of transportation. The New York Central's refusal to perform this service, largely as a means of preventing the diversion of rail traffic to the canal, precluded the interchange of freight between the rail carriers and the canal carriers at Buffalo. The State of New York first sought relief through its own Public Service Commission, under statutory provisions substantially identical with those of the federal law. The administrative relief was granted, but the New York Supreme Court, on appeal, vacated the state commission's order, on the ground that Congress had assumed exclusive jurisdiction in the premises.⁷⁸ This decision

⁷⁸ *People ex rel. N. Y. C. R. R. Co. v. P. S. Comm.*, 198 App. Div. 436, 442 (1921): "Congress having exerted its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the state, and the power of the state to regulate such connections and the operation of them ceases to exist; when the federal government has exercised its power, it covers the whole field, and even if, in certain details, the state act differs from the federal act, such state act is still inoperative." It should be noted, however, that on the merits the New York court found no legal barrier to this assertion of power. "No provision of the state or federal Constitution is violated by the enactment of the statute or by the order of the Public Service Commission. The service required to be rendered by the relator is a part of transportation which railroads may be required to perform. The order is a regulation of the business of the corporation, and is not an appropriation of its property for the use of the state or of another. . . . For the services rendered the relator is to be compensated. Neither the rolling stock, nor the men furnished, are taken from the possession and control of the relator. The order is made by the Public Service Commission, under the authority of the statute and after a full hearing of which the relator had notice and at which the relator attended and was heard. The due process of law provision and the just compensation provision of the Constitutions are not violated"

was affirmed, without opinion, by the New York Court of Appeals,⁷⁹ and a petition for a writ of certiorari to review the federal question involved was denied by the United States Supreme Court.⁸⁰ Complaint was thereupon filed with the Interstate Commerce Commission. The State of New York and its Superintendent of Public Works were the only complainants, and the New York Central Railroad Company was the sole defendant. The Commission was requested, under the powers conferred upon it by the Panama Canal Act,⁸¹ to require the defendant railroad company to furnish transportation service between the Erie Basin terminal and shippers located on its own tracks or on those of its rail connections, such service to embrace an interchange of all traffic, state and interstate, between the rail lines and the barge canal. Since the physical connection between the defendant's line and the terminal tracks was already in existence, the relief sought was confined to a prayer that the New York Central furnish motive power and rolling stock and perform the necessary transportation service and incidental operations over the connecting and terminal tracks. The Commission assumed jurisdiction, found it "in the public interest that defendant should perform the transportation and operating services" requested by the New York authorities, and entered an order to this effect; but the Commission's assertion of power disclosed sharp divergence of opinion among its own membership,⁸² and its disposition of the issues awaited the approval of the Supreme Court.⁸³

The contention upon which primary reliance was placed by the defendants was that the Commission's jurisdiction could not attach unless, in addition to the rail carrier complained against, there ap-

(p. 440). A transcript of the proceedings before the state commission was subsequently introduced in evidence at the hearings before the Interstate Commerce Commission.

⁷⁹ 232 N.Y. 606 (1922).

⁸⁰ 258 U.S. 621 (1922).

⁸¹ Sec. 6, par. (13), of the Interstate Commerce Act.

⁸² Chairman Hall, in an elaborate dissenting opinion (which was concurred in by Commissioner Potter), said: "The manifest importance of this case, both in itself and as a precedent, and my conviction that the conclusions and order of the majority are irreconcilable with the statutory provisions upon which they purport to rest, have prompted this expression of dissent"; and Commissioner Eastman, recognizing that "certain of the conclusions reached in the dissenting opinion are of such far-reaching importance that they merit most careful consideration," filed a separate concurring opinion. *State of New York v. N. Y. C. R. R. Co.*, 95 I.C.C. 119, 136-148, 130-136.

⁸³ *United States v. N. Y. Cent. R. R.*, 272 U.S. 457 (1926).

peared before it, as a party to the complaint, a water carrier with which the interchange of traffic was to be effected. In other words, the right to establish the connecting service as such, to be subsequently utilized by water carriers operating on the canal, was denied to the Commission. We have noted that the State of New York, through its appropriate official, was the only complainant. Two canal carriers, it is true, had intervened in the course of the hearings, but there was no evidence that these carriers were engaged in interstate commerce, and they sought no relief specifically applicable to themselves. Technically, therefore, it was urged that the complaint must be dismissed for want of necessary parties. The Commission was empowered to facilitate through carriage by rail and water, but without the parties to such carriage before it, its authority in the premises could not lawfully be exercised. This claim, and the reasoning upon which it is based, was strongly supported in the dissenting opinion.⁸⁴

⁸⁴ Chairman Hall said (95 I.C.C., at p. 145): "As already observed, the object of paragraph (13) is that traffic may move by *rail and water*. When that end is sought through an exercise of jurisdiction on our part, it is in terms to be attained through an exercise of that jurisdiction which we shall have over the through 'transportation' and over the 'carriers, both by rail and by water,' which are to comprise the necessary through route. Unless and until we have jurisdiction of both common carriers, the carrier by rail and the carrier by water, we have jurisdiction over neither in the particulars set forth in paragraph (13). It is for the establishment of a through route, partly by rail and partly by water, that we are to act, if we act at all. That is the unmistakable intentment of the paragraph. Only such action as would accomplish that end would or could promote the manifest legislative intent. Even apart from what the act itself requires, it would not be in the public interest to exact such service from a common carrier by rail without appropriate assurance of the requisite participation by some certain common carrier or carriers by water. It is not made to appear that either of the canal lines which intervened in this proceeding holds itself out or seeks to participate in through transportation subject to the act, including the foregoing provisions, or is now a common carrier by water subject thereto; and, as no other carrier by water is a party, the proceeding must be dismissed for lack of necessary parties." This construction of the Commission's statutory power was affirmed by the lower court. 13 Fed. (2d) 200. The Supreme Court summarized the finding as follows (272 U.S., at p. 461): "In granting the injunction, the district court disregarded the intervention of the two canal carriers on the ground that they were not shown to be engaged in interstate commerce. Section 6, par. 13, of the amended Interstate Commerce Act insofar as it confers authority on the commission to order the operation of the connecting tracks and to determine the sum to be 'paid to or by either carrier' was construed to require the presence of two carriers before the commission subject to its jurisdiction. It therefore held that the commission was without jurisdiction to grant the relief sought because there were not two carriers before it, and further, that the complainant, a sovereign State, as owner of the terminal but not a carrier, was beyond its regulatory powers, and presumably could not invoke its jurisdiction."

But the Commission found itself subject to no such limitation. It was empowered, under the Panama Canal amendment, to do a number of distinct things: to order physical connection between the rail lines and the dock at which traffic is to be interchanged; to establish through routes and maximum joint rates between the rail and water lines; to prescribe rail-line proportional rates to and from the port at which the transportation by water begins or ends. Only the establishment of through routes and joint rates necessarily involves the direct participation in the proceeding of a water carrier as well as a rail carrier. The authority over physical connections and over proportional rates may, by its very terms, be asserted solely against rail carriers. The instant petition merely requested the performance of a rail transportation service; no action was required of the canal carriers and no power was invoked involving the adjustment of financial or operating relationships between the defendant railroad and any carrier by water. The majority of the Commission, therefore, found no barrier, because of lack of necessary parties, against its assumption of jurisdiction;⁸⁸ and the Supreme Court, after directing attention to

⁸⁸ Commissioner McChord, speaking for the majority, said (95 I.C.C., at p. 129): "It is to be observed that the presence in any case of a common carrier by water is an essential element only in an establishment of through routes and joint rates. In the nature of things, for such a purpose the presence of a rail line and a water line would be necessary. In an establishment of rail-line proportional rates we may also designate the vessels in connection with which they are to apply, but that is not obligatory. But neither through routes and joint rates nor proportional rates are here sought. All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the terminal tracks the operating service necessary to an interchange of traffic at the terminal. Under the terms of the statute our power to require it is distinct and complete. Under another section of the act we have power to require a railroad to extend its line, and for obvious reasons this includes authority to require the carrier to operate the extension. So, our power to require this defendant rail line to construct or connect with the terminal tracks necessarily includes the power to require that line to perform the operating service. That power is expressly invoked in this case, and nothing is asked of the canal lines." Compare also the following from Commissioner Eastman's concurring opinion (at pp. 134-135): "Examination of paragraph (13) of section 6 shows that it contemplates alternative methods of conducting the rail-and-water transportation. Under one method, the rail and water lines join in through routes and joint rates. Under the other method, no such through routes and joint rates are established, but the rail line is required to move traffic to and from the docks, charging either local or proportional rates for this service. Subdivision (c) specifically empowers us to require the establishment of such proportional rates. This power is not invoked here, but, if it were invoked, clearly it would be necessary to name only the rail line as a defendant. The same is true of subdivision (a), which empowers us to require the establishment

the fact that complaints under the Interstate Commerce Act might be brought by a state as well as by a carrier, and that the Commission might even proceed without complaint, on its own initiative, likewise concluded that the Commission possessed the necessary power to make the order under attack.⁸⁶

and operation of a physical connection between the rail and water lines. Under this subdivision, complaint may be directed against either the rail line or the water line or against both. No reason appears why complaint should not be directed against the rail line alone, if it can be shown that public convenience and necessity require that the physical connection be established or operated by the rail carrier. This is precisely what is shown by the record in this case. The State of New York has laid rails connecting the New York Central tracks with the docks. No water line is equipped to operate over these rails, or could so equip itself without disproportionate expense. The New York Central is so equipped and can operate over these rails, which the State has laid, as readily as it now operates over many other similar spur-track connections in Buffalo. In prescribing the 'terms and conditions upon which these connecting tracks shall be operated,' we have only prescribed that they shall be operated by the New York Central. Other terms and conditions are, for the present, left to be agreed upon by that railroad and the State. The railroad can hardly complain of this arrangement, for it is left free to publish such tariff charges for the service as it sees fit, subject to subsequent protest or complaint. The State might conceivably be aggrieved, for the compensation, if any, which it shall receive for the use of its property is left undetermined. However, the State has not asked that we fix such compensation. Since no property of water lines is to be used and since no new service is to be required of them, they do not enter into the problem."

⁸⁶ In the words of Justice Stone: "We may assume, without deciding, that the commission may not determine the amount to be paid to or by either carrier concerned without having both before it. But the commission is not required by the terms of the statute to make such a determination and here it did not do so. A determination with respect to construction costs was not necessary since the physical connection had already been established. There could be no need for directing a contribution of operating expenses since the rail carrier was ordered to furnish the entire car service. It was free to establish such rates as it deemed reasonable, subject to review by the commission if necessary. The only parties concerned in the order actually made were those before the commission: appellee, which was required to furnish the service, and the State of New York, whose terminal facilities were thus to be used. To have required the presence of one or more canal carriers before the commission for the purpose of making this order would have been an idle ceremony. The construction of the Act contended for is unwarranted by its language and incompatible with its purpose to create an administrative body with authority to facilitate the interchange of interstate traffic between rail and water carriers, by a less formal procedure than prevails in courts of law. We conclude that the commission had authority to make the order and that its findings were supported by the evidence" (272 U.S., at p. 463). The Supreme Court also supported the Commission in denying merit to the claim that the sweep of its order constituted an unlawful interference with intrastate commerce. About three-quarters of the water traffic involved was admittedly interstate in character. Because of this fact, and because the state and interstate movements were inextricably interwoven, the New York Central had itself insisted upon the exclusiveness of the federal jurisdiction (when the state commission's order was under review), and its position was upheld by the state courts (198 App. Div. 436; 232 N.Y. 606). The restriction of the Commission's order,

But the divergence of view within the Commission was not confined to the rather narrow question of whether water carriers must be made formal parties to every proceeding involving the establishment of a connecting transportation service by rail. The requirement of such service provides the requisite physical basis for joint carriage by rail and water, and hence provides a means for extending the Commission's jurisdiction to water carriers otherwise exempt from its regulatory power. The basic issue was whether the Commission is empowered, through its own action in the premises, to bring carriers by water within the range of its control, or whether its authority over the establishment and operation of physical connections, and over the through routes and joint rates that would naturally follow, is restricted to water carriers which, because they are under common management or control with a rail carrier or because they have voluntarily entered into some arrangement for continuous rail-and-water carriage, are already subject to the Act. The grant of power to the Commission is conditioned upon the transportation being by "a common carrier or carriers." According to the reasoning of the dissenting opinion, the carriers thus referred to are those which are embraced within the Commission's jurisdiction by section 1 of the Act. In the

under these circumstances, to the performance of an interstate transportation service would not only leave an open gap in the regulative process but would render the observance of such order practically impossible. "Indeed, it seems to me that, in view of the manner in which possible action by the Public Service Commission of New York with respect to the intrastate service has been eliminated," concluded Commissioner Eastman, "we should be derelict in our duty if we did not attempt to cover the entire field by our order" (95 I.C.C., at p. 136). The Supreme Court disposed of the issue as follows: "The commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as 'the commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated' intended to confer upon the commission power to regulate the entire stream of commerce. Where as here interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. . . . An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce would make compliance with the commission's orders impossible and defeat the purpose of the Act" (272 U.S., at p. 464).

absence, therefore, of existing common control or joint carriage, water lines are not amenable to the regulating authority of the Commission. "It should be observed," insisted Chairman Hall, "as lying at the root of the present inquiry, that whether or not a carrier is a common carrier subject to the act depends upon what it is, or does, or holds itself out to do, and not upon what we do. No authority is given to us, anywhere, to lay hold upon a carrier which is not subject to the act and convert it by some order or requirement of ours into a common carrier subject to the act, bound by our order."⁸⁷ The water carriers, as well as the rail lines, according to this view, must fall within the express statutory jurisdiction of the Commission, independently of the exertion of its authority.⁸⁸

But this legalistic interpretation did not commend itself to the Commission. It was swayed by the plain tenor of the statutory provisions and by the manifest intent of the Panama Canal amendment. As in other parts of the Act, the phrase "common carrier" is not expressly restricted by the limitations of section 1; and the authority conferred upon the Commission by the 1912 legislation in the several specified "particulars" is granted "in addition to the jurisdiction given by the Act to regulate commerce."⁸⁹ As a practical matter, moreover, the restrictive construction contended for would reduce the law, in the words of Commissioner Eastman, "almost to a nullity and certainly

⁸⁷ 95 I.C.C., at p. 141.

⁸⁸ "We can make no orders which are enforceable except against common carriers subject to the act. Private carriers are not subject to the act. Common carriers by vehicles on highways, or by air craft, are not subject to the act. Common carriers by railroad engaged exclusively in intrastate commerce are not subject to the act. Whether and to what extent common carriers by water are subject to the act is the subject now before us. . . . What, then, are these water carriers upon which paragraph (13) is to operate? Are they common carriers subject to the act, or, at least, must they be such, as is the defendant rail carrier, when we essay exercise of the jurisdiction given in these particulars by requiring the rail carrier, or the water carrier, or both, to do this thing or that included among the 'particulars'? Nothing in the wording of the paragraph indicates that the two kinds of carriers are to stand before us on a different footing. We can only 'require' by order. If the rail carrier were not subject to the act the naming of it in this paragraph would not make it amenable to our order, and the same would seem to be equally true of the water carrier. Both must be there, and alike amenable to order, if we are to be free to exercise the jurisdiction conferred. . . . From beginning to end of the act is manifested the intent of Congress that carriers by water shall not be subject to the provisions of the act, and thus to our jurisdiction, unless they make with rail carriers an arrangement for continuous carriage or shipment in interstate or foreign commerce." *Ibid.*, pp. 141-142.

⁸⁹ See Commissioner Eastman's concurring opinion, pp. 132-133.

to an absurdity.⁸⁰ The conditions would seldom arise for the exercise of the Commission's powers; the very existence of common control or joint carriage with rail lines would largely accomplish the ends designed to be achieved by the legislative enactment. And there would be no meaning in restricting the power to require physical connection and operation to circumstances under which such connection and operation are already in being. The intent of the enactment was to facilitate the development of water traffic through the establishment of rail connections.⁸¹ Toward this end, mandatory power was conferred upon the Commission, to be exercised in the public interest. It was no mere gesture, designed to maintain the *status quo* as molded by the carriers themselves. The endowment of the Commission with jurisdiction when property "may be transported" by rail and water obviously contemplates administrative action, requiring connecting service, as one of the means whereby the literal possibility of combined rail-and-water transportation may be brought about.

This interpretation, which was not questioned by the Supreme Court, clothes the Commission with extensive jurisdiction over water carriers. It practically obliterates the jurisdictional limitation of section 1; for the Commission is itself free to create the conditions essential to joint carriage by rail and water upon which the exercise of its authority depends. The implications of the Commission's construction are strikingly voiced, though by way of protest, in the dissenting opinion. "[For] it would make our jurisdiction in these additional particulars, and also under the entire act, extend to all common carriers of property by water in interstate commerce, whether subject to the act or not. At one gulp it swallows all these carriers by water, whether on river or canal, the Great Lakes or the high seas, many of them already subject to the shipping act, 1916, and the merchant

⁸⁰ *Ibid.*, p. 132.

⁸¹ Compare the following from H. R. Report No. 423, 62d Cong., 2d Sess., March 16, 1912: "This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal, the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to people living many hundreds of miles inland from both coasts."

marine act, 1920. They are not subject to our act, and do not desire to be, but when the conditions coincide they would be brought perforce and against their will within our jurisdiction. . . . Thus, everything that the act requires of common carriers by water subject to the act we may call upon these water carriers to perform. They must file with us and strictly observe their tariffs. Their rates must be just, reasonable, and free from unjust discrimination, undue prejudice, or undue preference. Complaints against them for violation of the act may be heard and determined by us. With our orders they must comply."⁸²

This jurisdiction over water carriers is subject to one limitation, however, which imposes a serious hampering influence upon the exercise of the Commission's power, both as against the water lines themselves, and in the regulation of railroad rates which must be adjusted to the pressure of water competition. In establishing through routes where one of the carriers is a water line, and in fixing joint rail-and-water rates, the Commission is expressly restricted to prescribing *maximum* rates, fares, and charges.⁸³ Not only are the all-water carriers as such entirely free from the Commission's control, but even as to joint rail-and-water carriage it is without power to prevent reductions in charges. Its authority to prescribe *minimum* as well as maximum rates,⁸⁴ and thus to establish the exact charges governing freight traffic, is specifically made inapplicable under such circumstances. Control of the competitive influence of water carriers is thereby

⁸² 95 I.C.C., at pp. 142-143. In order further to expedite the development of inland water transport, Congress, through the Denison Act of May 29, 1928 (45 Stat. 978), so amended section 3(e) of the Inland Waterways Corporation Act (43 Stat. 360) that common carriers on the Warrior and Mississippi rivers, including the Inland Waterways Corporation, may apply to the Commission and obtain certificates of public convenience and necessity; whereupon the Commission is directed to require all connecting common carriers to join with such water lines in establishing through routes, joint rates, reasonable minimum differentials between these joint rates and all-rail rates, and equitable divisions of such joint rates. This amendment has been interpreted as authorizing the grant of such certificates and the issuance of such orders without prior public hearings. *Procedure under Barge Line Act*, 148 I.C.C. 129 (1928). For the disposition of applications under the Denison Act, see *Through Routes and Joint Rates*, 153 I.C.C. 129 (1929), 156 I.C.C. 141 (1929), 156 I.C.C. 724 (1929), 161 I.C.C. 207 (1930), 163 I.C.C. 716 (1930), 167 I.C.C. 385 (1930); *Through Routes and Rates with Beardslee Launch*, 165 I.C.C. 200 (1930); *Application of Mississippi Valley B. L. Co.*, 167 I.C.C. 41 (1930). See also *Annual Reports*: 1929, p. 78; 1930, pp. 72-73.

⁸³ Sec. 15, pars. (1) and (3).

⁸⁴ See Part I, pp. 197-201.

placed beyond the scope of the Commission's jurisdiction. The Commission is faced with the difficult problem of effectuating the policy of Congress "to foster and preserve in full vigor both rail and water transportation" under a system of one-sided control. Railroad rates, because of their complete dominance by the Commission, can be prevented from serving as instruments for the destruction of water competition; and when such rates are once voluntarily reduced, their subsequent increase must be justified by the carriers on grounds of "changed conditions other than the elimination of water competition."⁹⁵ Ample power is thus available to check the undue development of rail traffic at the expense of water carriers. But the boat lines, both in all-water transport and in joint rail-and-water carriage, are subject to no limitations other than their own interests, immediate or ultimate, with regard to the lower level of their charges and to the inroads which they may make upon the traffic of the railroads. Under competitive conditions the rail carriers, in order to secure a reasonable proportion of the business, must meet the tariffs established by the water lines; and they must assume the risk of loss of revenue even upon traffic in hand, through the freedom of their competitors further to reduce the rates by water and thereby to reestablish the prior apportionment of the available freight offerings. The fact of water competition constitutes a significant consideration in the Commission's adjustment of railroad rates, but the nature and course of that competition must merely be accepted as a conditioning factor, free from its regulatory power. In these circumstances the Commission may be thwarted in its efforts to protect the rail carriers and tends to encounter serious difficulties in attempting to coordinate rail and water transportation.

The most striking emergence of these difficulties has occurred in connection with applications for relief from the long-and-short-haul clause in transcontinental rate adjustments. The pressing problem, stated in general terms, has been whether west-bound rates to Pacific coast terminals might properly be lower than the rates to intermediate points, and if so, to what extent and from what points of origin. The practices of the railroads, as developed under conditions of free competition, had been not only to impose extensive discriminations

⁹⁵ See *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 557 (1919).

against intermountain territory (the intermediate charges being fixed in most instances by adding to the through rate the local rate back to the intermediate point), but the low rates to coast terminals were blanketed over a very wide originating area (generally being the same for the entire territory east of the Missouri River, regardless of whether the point of origin was on the Atlantic seaboard or up to more than 1,500 miles inland). The alleged justification for these practices was the pressure of water competition. The Commission's original determinations, upon the rehabilitation of the long-and-short-haul clause in 1910,⁹⁶ recognized the potency of water competition and accorded fourth-section relief,⁹⁷ although the excess of the intermediate short-haul rates over the long-haul terminal rates was substantially reduced, and such excess as was authorized was graded on a percentage basis, depending upon the zone of origin of the traffic and corresponding to the effectiveness of the competitive influence of water transportation operative in each zone.⁹⁸ The opening, soon thereafter, of the coast-to-coast route through the Panama Canal intensified the competition by water in the movement of certain low-grade commodities, and this development led the Commission to authorize further reductions in rates to coast terminals, without corresponding reductions to intermediate points.⁹⁹ Under pressure of water competition, therefore, the percentage relationships previously established were, as to the particular commodities embraced by the order, destroyed. Then followed the closing of the Panama Canal because of slides and, upon its reopening, the diversion of tonnage to trans-Atlantic service because of the shipping demands of the war. As a result of these developments, coast-to-coast water competition became negligible in volume and feeble in effect. Under these circumstances the Commission first rescinded, in whole or in part, a number of its earlier fourth-section orders;¹⁰⁰ and subsequently, upon

⁹⁶ See Part I, pp. 54-58.

⁹⁷ *Railroad Commission of Nevada v. S. P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane v. N. P. Ry. Co.*, 21 I.C.C. 400 (1911).

⁹⁸ This exercise of power was upheld by the Supreme Court in *Intermountain Rate Cases*, 234 U.S. 476 (1914), reversing the decree of the Commerce Court in 191 Fed. 856 (1911).

⁹⁹ *Commodity Rates to Pacific Coast Terminals*, 32 I.C.C. 611 (1915), 34 I.C.C. 13 (1915).

¹⁰⁰ *Reopening Fourth Section Applications*, 40 I.C.C. 35 (1916).

a finding that no existing competitive necessity arising from water transportation between the two coasts warranted the rail carriers in maintaining lower rates from eastern defined territories to the Pacific coast than to intermediate points, it withdrew all the relief it had previously granted in the matter of long-and-short-haul violations.¹⁰¹ The mere interruption of service through the Canal, though admittedly involving no permanent elimination of water competition, was deemed sufficient to deprive the Pacific coast terminals of the special advantages flowing from their strategic location.¹⁰² Once the slate was thus cleared, as of March 15, 1918, and in view of the more rigid requirements of the Transportation Act,¹⁰³ it has been increasingly difficult for the railroads to secure relief from the prohibitions of the fourth section, despite the restoration of vigorous water competition. Although the canal carriers had made sharp inroads upon the revenues of the transcontinental lines, and were enjoying a greater intercoastal movement of traffic than at any time in the history of the Canal, the Commission denied the principal applications of the

¹⁰¹ *Transcontinental Rates*, 46 I.C.C. 236 (1917). See also *Transcontinental Commodity Rates*, 48 I.C.C. 79 (1918), in which the carriers were authorized to remove the preëxisting discrimination against intermediate points by increasing their rates to the coast terminals.

¹⁰² The Commission anticipated the 1920 amendment of the fourth section whereby it was not to grant relief "on account of merely potential water competition not actually in existence." Compare the following from Commissioner Harlan's dissenting opinion in *Transcontinental Rates*, 46 I.C.C. 236, 278-281 (1917): "Although it 'has suffered an interruption,' the majority report reassuringly predicts that 'this service' through the canal 'will be reestablished' in time. It points out also that 'the canal and the oceans are still available for commerce' at this time. Nevertheless, so far as its present influence on the coast to coast commerce is concerned, the majority look upon the Panama Canal as a negligible quantity. To this view of the present relation of that great national enterprise to the commerce of the country I am unable to give my assent. Case after case may be cited from the reported decisions of the Commission where actual water competition had altogether ceased and the continuance of such rate relationships was nevertheless sanctioned and approved because of the potential competition growing out of the availability of an open water route. This principle is here set aside, as I read the majority report, with the result that the established trade and commercial relationships of the coast cities, in the commodities and merchandise affected by the rate adjustments required under the report, may be torn up by the roots. . . . In my judgment rates and trade relations, based on conditions so permanent and enduring as the coast to coast water route through the Panama Canal, ought to be stable and secure against needless fluctuations, and I see no warrant either in the law or upon the record for now throwing both into sudden and violent confusion because of purely abnormal and temporary conditions."

¹⁰³ See Part I, pp. 203-207.

rail carriers for the establishment of lower rates to Pacific coast terminals than to intermediate points.¹⁰⁴

In large measure the constant agitation with regard to transcontinental rates, as briefly outlined above, has arisen from the dynamic character of the traffic situation. While rate stability is highly desirable, it would be secured at too great a sacrifice of legitimate interests if rail charges were not flexibly adjusted to the demands of changing transportation conditions. It must be kept in mind, too, that the course of water competition has by no means been the sole controlling factor in the determinations of the Commission. This has been especially true in connection with the more recent applications, since the competitive influence of the Panama Canal was restored. In the 1922 proceeding, the failure of the rail carriers to establish affirmatively, to the satisfaction of the Commission, that the proposed long-haul rates were "reasonably compensatory" (at least in the sense that they would not impose any undue burden on other traffic and would not impair the fair return on railroad property as a whole) was perhaps the dominant factor in the denial of relief.¹⁰⁵ In the 1926 proceeding, the Commission's adverse decision was largely influenced by the fact that the depressed rates were chiefly sought because of the exigencies of "market competition," rather than as a result of direct rivalry for traffic by alternative transportation agencies.¹⁰⁶ In removing the flagrant maladjustments that had been arbi-

¹⁰⁴ *Transcontinental Cases of 1922*, 74 I.C.C. 48 (1922); *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421 (1926).

¹⁰⁵ *Transcontinental Cases of 1922*, 74 I.C.C. 48, especially at pp. 76-83.

¹⁰⁶ *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421, especially at pp. 436-437. Compare also the following from Chairman Eastman's separate concurring opinion (pp. 439-440): "Relief from the fourth section is sought in this case chiefly because of what is called market competition. Broadly speaking, there is no carrier competition between the origin territory in question and the Pacific coast which makes it necessary to depress the rates, but relief is sought because competing territories of production in the East are so located that by use of the ships operating through the canal they can reach the Pacific coast more cheaply. In a separate expression of opinion in *Paper and Paper Articles to New Orleans*, 88 I.C.C. 345, 351-353, I gave my views as to market competition as a basis for fourth-section relief. Without repeating all that was there said, I indicated that while we may lawfully grant relief because of such competition, we have discretion to grant or deny, and I expressed the opinion that we ought in all cases to deny relief where market competition is offered as the justification. Among other things I said that 'the theory of market competition, if followed consistently, will inevitably lead to all manner of cross-hauling and wasteful competition for which the country must in the end pay.'"

trarily built up by the railroads through blanket reference to the pressure of water competition, the Commission has made a notable approach toward the goal of rationalizing the transcontinental rate structure. But in view of the Congressional pronouncement that both rail and water transportation must be maintained in full vigor, the task still remains of coördinating, on a more positive basis, the traffic influence of the rail carriers and the water lines, and securing thereby reasonable stability in rate adjustments and the most efficient utilization of rail and water facilities. The chief obstacle to the achievement of this end, as previously indicated, lies in the Commission's want of controlling jurisdiction over the competitive conduct of water carriers. To a great extent this want of jurisdiction has been at the root of the long process of inconclusive controversy.

The Commission directed attention to this difficulty as early as 1917, while competition through the Canal was dormant and negligible. "Competition involves a striving between or among two or more persons or organizations for the same object. There can exist no even-handed striving between two persons when one is bound and the other is free, and the maximum of real and effective competition can not exist between these boat lines and rail lines when one side is free promptly to make any rate it desires, while the other is so restricted by statutory requirement as to be unable to take the necessary steps for the prompt protection of its business."¹⁰⁷ In the latest of the proceedings considered above, after the restoration of aggressive competition by water, the controlling character of these circumstances was accorded repeated recognition.¹⁰⁸ The dissenting opinion voiced alarm lest the water carriers be permitted to attain monopolistic power.¹⁰⁹ Even the majority of the Commission laid special stress

¹⁰⁷ *Transcontinental Rates*, 46 I.C.C. 236, at p. 277.

¹⁰⁸ *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421 (1926).

¹⁰⁹ In an elaborate expression of dissent, joined in by Commissioners Meyer and Aitchison, Commissioner Esch said (at pp. 464-465): "The majority report refers to the fact that the additional traffic which might be gained by the rail lines would be taken from the ships. The record indicates, however, that it would be largely traffic which has been diverted from the rail lines to the ships during the last few years. If the railroads are not permitted to make rates which will enable them to compete with the water lines, the latter will make still further inroads on the traffic of the rail lines until the ships obtain a virtual monopoly of all the traffic which they are in a position to handle. Section 500 of the transportation act, 1920, declares the policy of Congress 'to foster and preserve in full vigor both rail and water transportation,' and I do not

upon the fact that the granting of relief to the railroads might be rendered nugatory, and thus result in a loss rather than a gain of revenue to the petitioning carriers, because of the freedom of the water lines and their rail connections to effectuate further reductions in rates.¹¹⁰ And two of the commissioners, while concurring in the result, did so largely because of the "unsettled status of the canal as regards vessel rates on coast-to-coast business."¹¹¹ Their separate ex-

believe it was intended that either the rail or water lines should be given a monopoly of traffic which both may handle. If such had been the intention of Congress, it would not have continued our authority to grant relief from the fourth section because of water competition. . . . It may be that rail and water lines should be subject to the jurisdiction of the same regulatory body . . . , but the rail lines would still need fourth-section relief to meet any rates which would be reasonable for the water lines, and the granting of relief to the rail lines should not be postponed pending such legislation."

¹¹⁰ The Commission said (at p. 438): "The proposed rates on iron and steel articles, from which the applicants hope to obtain their greatest increase in net revenue, might be expected to divert some of the traffic which now originates in the Pittsburgh district if the rail-and-water rates from Pittsburgh remain the same. There is no assurance, however, that the eastern rail carriers and particularly the water lines would permit any substantial diversion of their traffic without making an effort to retain it. They would be urged to take this action by eastern manufacturers whose business would suffer through loss of their Pacific coast trade, and the record shows that in one instance a committee has already been appointed to appeal to them for off-setting rate reductions in the event the proposed rates are permitted to become effective. A slight reduction in the water rate would suffice to retain the advantage to the rail-and-water route, and this would call for further reductions in the rates of the western carriers to bring about the near equalization of the Middle West and eastern markets. On the other hand, if the western carriers were not inclined to meet reductions in the water or rail-and-water rates the competitive situation would remain as it is at present, the revenues of the applicants and the water lines would be unnecessarily reduced, and the Pacific coast shippers would receive the only advantage." Compare also the following from Chairman Eastman's special expression of concurrence (pp. 440-441): "The statement is made in the dissenting opinion that the water lines can not afford to reduce their rates. Doubtless that may be true, but it does not support the conclusion that they would not reduce their rates if the fourth-section relief sought in this case should be granted. The water lines can less afford to lose a substantial volume of traffic. The opportunities for rate shrinkage in the case of the traffic which moves from interior eastern points to the Atlantic coast and thence by canal to the Pacific coast are pointed out in the majority report. This is the traffic, rather than that from the eastern ports, which the western carriers hope to make inroads upon. The charges now applicable to it can be reduced by the eastern rail lines alone, by establishing proportional rates to the ports lower than the present local rates, or by the water lines alone, by establishing similar proportional rates from the ports, or by both sets of lines in conjunction. Moreover reductions can be made in any one of these three ways without corresponding reductions in the local rates applicable to and from the ports. In most cases only a slight reduction would be necessary to tip the balance again in favor of the canal route."

¹¹¹ *Ibid.*, p. 442.

pressions are confined almost exclusively to the need of extending the Commission's jurisdiction to the competing water lines. The argument, as succinctly stated by Commissioner Woodlock, is as follows: "The canal was built with public money for the combined security and benefit of all the people of the United States. It is a new piece of transportation machinery which should be coordinated with, and adjusted to, the existing railroad system of the country, so that the best results may be obtained from both. The public is entitled to the fullest possible exploitation of the legitimate capacity of the canal for economical transport of freight by ships, between the two coasts. Whatever may be that capacity, it should be recognized, appraised, and expressed in the rates on water-borne traffic through the canal. These rates should be stable and public, and should be subject to the same regulatory authority as that which controls the rail rates; otherwise no coordination of rail and water will be possible. Only after prescription of a reasonable *minimum* rate tariff on water-borne traffic between the coasts will it be possible to measure the permanent effect of the canal upon the railroad structure, and to deal with the railroad rate structure intelligently. To attempt to do so at present, with canal rates neither stable nor public, would be but to incur serious risk of wide disturbance in both rail and water rates with consequent unnecessary and uneconomic loss of revenue to all concerned. The first and most necessary step to a proper settlement of the matter is to place the canal rates under the regulative jurisdiction of this commission with a view to prescription of minimum coast-to-coast rates. In my judgment, the Congress should legislate to this effect at as early a date as possible."¹¹²

¹¹² *Ibid.* Commissioner Lewis's concurring opinion is even more emphatic, both in describing the evil and in pointing the remedy (pp. 441-442): "This case emphasizes the necessity of placing the intercoastal water lines under the same regulation as that to which the transcontinental rail lines are subjected. They are here shown in direct competition in and for interstate traffic. The declaration of Congress is that both be maintained in full vigor. The rail lines are placed at a very unfair disadvantage. They are held to rigid restrictive requirements. Their competitors, some of which have most affluent affiliations, may war to the hilt with cut rates without hindrance. There is ample reason afforded by the record before us to forecast that if the railroads were granted fourth-section relief herein prayed, competitive water carriers, if not themselves moved to protect their tonnage, would bend to the demand of industry or sections served. The result would be that the cut made by the land carriers would be met and the flow of traffic would be maintained as at present. The western carriers would

§3. OTHER TRANSPORTATION AGENCIES

Under the original Act to Regulate Commerce the Commission's jurisdiction was confined to transportation wholly by rail or jointly by rail and water; the Hepburn Act of 1906 extended this jurisdiction to certain other transportation agencies. The common carriers subject to control were made to embrace express companies, sleeping-car companies, and persons or corporations engaged in the transportation of oil or other commodities, except water or gas, wholly by pipe line or partly by pipe line and partly by rail or water. Express companies and sleeping-car companies render special services in connection with railroad transportation. They are "contract carriers by rail." The performance of their functions is dependent upon the use of the plant, equipment, and operating organization of the railroads. These functions constitute an integral part of railroad transportation and are rendered by independent companies only through historical accident. The extension of control to express companies and sleeping-car companies, therefore, is but a means of placing the general scope of railroad regulation on a more comprehensive basis. Pipe lines, on the other hand, perform a distinct transportation service, and they have been developed primarily as adjuncts to the petroleum industry. They have come to supplant the railroad, for the most part, in the trans-

be hauling traffic to the ports for a million dollars less than at present, the eastern carriers would be worse off, and the water carriers would also be weaker—all quite contrary to the mandate that both land and water transport be maintained in full vigor. If the water lines should later find it desirable to withdraw their cut rates, they would be quite free to do so. The rail lines, however, would be trapped. Their rates would be held to that low level to which they had been reduced to meet water competition, until the carriers were able to justify increases on the grounds of 'changed conditions other than the elimination of water competition'; and experience has demonstrated upward revision is most difficult to obtain. I fail to see the justice of subjecting one interstate carrier to regulation and leaving the other to sail the seas free to scuttle both itself and its land competitor, or how there can ever be brought about an understanding and solution of this contest until both carriers are placed under one agency of regulation. Such would be a natural corollary of the mandate of Congress that both forms of transportation be maintained in full vigor. The construction of the Panama Canal has created new and grave transportation problems which are becoming acute now that ships that were withdrawn from water service during the war are returning to it and large industries are putting ships into service for the transport of their own wares. Justice to both systems of transport and, more particularly, to shippers and sections of country affected require that proper relationships be established to the end that both systems of transportation may properly develop, and that there may be equitable opportunity in the production and distribution of commodities."

portation of crude oil from wells to refineries. The acquisition of a practical pipe-line monopoly by the Standard Oil Company, together with the unfair methods pursued by that corporation in order to maintain its monopolistic position, led to the inclusion of pipe lines among the carriers subject to the Commission's jurisdiction. Although the Commission was clothed with authority, in general terms, over an additional transportation agency, the extension of jurisdiction was largely aimed against the abuses of monopolistic power in the petroleum industry rather than against the free operation of pipe lines as such. By 1906 the Commission possessed adequate power to remove the flagrant railroad discriminations of which the Standard Oil Company had been one of the most notorious beneficiaries; the added control over pipe lines was designed to eliminate another potent source of abuse which sprang from that company's dominant ownership of essential transportation facilities. But regardless of the diverse circumstances responsible for the explicit inclusion of express companies, sleeping-car companies, and pipe lines among the carriers subject to the Act, the jurisdictional scope of the Commission's authority was very substantially broadened thereby. It is necessary to analyze briefly, with special reference to the nature and significance of the jurisdiction thus conferred, the exertion of the Commission's powers over each of these types of carriers.

Express Companies

The service of providing expedited transport of small freight rendered by independent carriers known as express companies is a distinctive American institution. The actual movement of the goods, except for the auxiliary pick-up and delivery operations, is performed by the rail carriers, and in foreign countries the express service as such is generally performed by the railroads.¹¹⁸ In the United States this service, almost from the beginning, has been farmed out to special business units; but the status of these units as common carriers, the

¹¹⁸ For the history of the Canadian express companies, which are organized as subsidiaries of the railroad corporations, see *Annual Report of Board of Railway Commissioners*, 1911, pp. 240-312. Compare also the discussion of express service and rates, with special reference to Canadian policy and practice, in W. T. Jackman, *Economics of Transportation* (1926), pp. 634-653.

magnitude of the interests embraced by them, the numerous public complaints as to their rates and practices, and the close relationship which they bear to the freight-transport functions of the railroads have served, in due course, to bring them within controlling reach of the federal regulatory processes.¹¹⁴

The Commission threw important light upon the status of express companies, and upon the statutory character of its powers of control, even before it was specifically authorized to regulate them. In the very first year of the Commission's existence the problem was raised as to its jurisdiction over express companies under the original Act to Regulate Commerce.¹¹⁵ After careful deliberation the Commission

¹¹⁴ In the first comprehensive investigation of express companies conducted by the Commission, resulting in one of the most sweepingly constructive determinations in its entire history, Commissioner Lane said: "Last year, 1911, these ten carriers transported over 300,000,000 packages. They operate over 218,013 miles of steam railway in this country, and extend their service over 18,385 miles of steamship and stage lines and 6,665 miles of electric lines. They paid to these rail and other carriers \$69,730,895, and their own expenses, so far as these can be ascertained, arising out of their functions as express companies, were \$64,305,590. These figures suggest the importance of the express company as an institution. It is, moreover, an American invention. Nowhere else save on this continent does the express company as we know it exist. In other and smaller countries similar service is given by the railroads themselves; or the rail carrier, confining itself exclusively to transportation by rail, gives expedited service for small parcels, leaving the gathering and delivering of the packages to independent concerns generally known as forwarders. In the United States, however, the express company, which was originally created to care for the small-package business of an individual railroad line, has now become an invaluable agency in the articulation of the railroad systems of the country for the furnishing of fast passage for small freight. These carriers live by the grace of the railroads, and their existence may be justified only to the extent that their service is more efficient and more reasonable than that which would be given by the railroads themselves." *In re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 380, 384 (1912). Similarly, at a much later date, when the American Railway Express Company and the Southeastern Express Company came to be the sole express carriers in the country, the Committee on Express and Other Contract Carriers by Rail of the National Association of Railroad and Utilities Commissioners said: "Now the express service is not a small nor inconsequential thing; the service performed by the two express companies in this country next to the post office is the nearest universal service in the nation. There are 30,000 express offices, nearly 150,000 employees, operating over 250,000 miles of railroad and steamship lines, and the gross revenue of the companies is about \$1,000,000 per working day. . . . The express pays approximately 50% more money to the Railroads than does the Post Office Department. . . . The express companies were formed in 1838, only ten years after the first railroad was built in this country, and the service has grown along with the railroads until today more waybills are issued by the express companies than by all the railroads in the United States combined. . . . No foreign country enjoys such a service; it is truly an exclusive American institution." *Proceedings*, 1924, pp. 452-453.

¹¹⁵ In April, 1887, the Canadian Express Company, whose business extended into

declined to assume jurisdiction over independent express companies, although it declared the express business, when conducted by rail carriers, to be fully subject to its authority.¹¹⁶ The companies sought to find in the nature of their business a basis for exclusion from the provisions of the Act. The transportation of property, they argued, is not their sole activity. They collect debts, present and protest commercial paper, record instruments of title, enter goods at custom-houses, and perform other functions which are clearly outside the commerce designed to be regulated. But the Commission, pointing to a similar diversification of activity among rail carriers, found no merit in this claim "that since the Act does not apply to all the business of express companies, it should not be taken as applicable to any of it."¹¹⁷ The statute confers jurisdiction over the transportation of

the United States over the Grand Trunk Railway, submitted an inquiry as to whether express companies were subject to the provisions of the Act. The Commission answered in the affirmative, but declared that any company desiring to contest the ruling would be given an opportunity to do so. Three express companies filed their schedules with the Commission. The remaining companies were notified to act in like manner or to submit reasons for failure to comply. Briefs were thereupon filed and oral arguments made by various companies, on the basis of which the Commission finally reached a formal determination. *Re Express Companies*, 1 I.C.R. 22, 317, 448, 451, 456 (1887).

¹¹⁶ *Re Express Companies*, 1 I.C.R. 677 (1887). As to the express business as such, the Commission said (p. 682): "In respect to some of the express companies there can be little, if any, doubt that they are fully subject to the provisions of the Law. When a railroad company itself conducts the parcel traffic on its line by its ordinary transportation staff, or through an independent bureau organized for the purpose, or by means of a combination with other railroad companies in a joint arrangement for the transaction of this so-called express business, it will not be seriously questioned but that this branch of the traffic is subject to the Act to Regulate Commerce as fully as the ordinary freight traffic."

¹¹⁷ *Ibid.*, p. 680. The Commission continued (p. 681): "The Act may very properly apply to the duties of a common carrier in the transportation of persons and property, while leaving other service and business undertaken by the same common carrier unaffected by its provisions. Thus a leading railroad company is authorized to carry on the banking business, and does carry it on; others are owners of real estate, which is sold, rented and otherwise used and disposed of as a branch of their corporate powers; others are large dealers in coal; others own and carry on, either by lease or directly, hotels, pleasure parks, restaurants, etc.; but it has never been suggested that any or all of these outside transactions operated in any way to relieve the railroad companies from the provisions of the Act to Regulate Commerce, so far as the same are applicable to service which the public is entitled to demand from those who assume the position of common carriers of passengers and freight; and in like manner there is no reason apparent, in the case of express companies, why the obligations and restrictions of the Act should not be held effective upon their business, so far as it is applicable thereto, arising from the mere fact that other business is also done by them to which those provisions are inapplicable, or that sometimes a further service than that of transportation is performed in respect to the articles carried."

property, and this jurisdiction cannot be nullified because of the activity of these carriers in business undertakings unrelated to freight transportation. Nor was the Commission influenced by the contention that the Act is a penal statute which must be strictly construed, and that because some of its requirements are manifestly inapplicable to express companies all of them must necessarily possess no validity as against these carriers. The Commission pronounced the statute "highly remedial in its purpose and scope,"¹¹⁸ and it found its basic requirements—that charges must be reasonable, that unjust discriminations and undue preferences are prohibited, that long-and-short-haul violations are unlawful, that schedules of rates must be filed and posted, that annual reports must be submitted—equally applicable, in their general character, to express companies and to railroad companies.¹¹⁹ Both the desirability and the practicability of regulating the express service were amply recognized. Independently organized express companies were held to lie beyond the scope of the Commission's jurisdiction, however, because they were not embraced among the carriers enumerated in the Act. Transportation "wholly by railroad" or "partly by railroad and partly by water" does not describe with sufficient precision the modes of carriage employed by express companies. The nature and extent of the express business were well known to Congress. Failure explicitly to include express companies among the enumerated carriers may reasonably be construed as an intent to omit them from the scope of the Act. Moreover, the evils incident to the conduct of the express business were not among the considerations noted in the legislative investigations which preceded

¹¹⁸ "While this statute contains certain provisions for penalties, in the execution of which the courts will, no doubt, follow the recognized canons of construction, nevertheless the statute as a whole should be regarded as highly remedial in its purpose and scope. It was clearly designed to secure to the public equal and impartial rights and privileges, and to put an end to ancient and well known abuses in the services rendered by common carriers. Such a statute should be construed liberally—fairly, of course, but always with the object in view of reaching as closely as possible the end proposed by the legislative intention, and making the beneficial result desired operative to its greatest available extent." *Ibid.*, p. 681.

¹¹⁹ "There seems to be no good reason," concluded the Commission, "why all these beneficial requirements could not properly apply to the transportation of freight by express companies; nor is it claimed by them that these rules could not be properly enforced in respect to their business; in fact, it is generally claimed that they are already observed, and if such be the case their statutory annunciation would be no hardship and would present no impropriety." *Ibid.*

the enactment of the statute; and the language of the Act, distinctively applicable to railroad transportation, was so framed as to be rather inapt if intended, in addition, to be relied upon in connection with the operations of express carriers. The requirement, for example, for the posting by a carrier of schedules of rates in force "upon its railroad," and the prohibition of agreements "for the pooling of freights of different and competing railroads" clearly did not contemplate the activities and relationships of independently organized express companies. These companies acquire transportation rights by contract, but they neither own nor operate any railroad lines. The Commission declined to assume jurisdiction, then, because it deemed such self-denial, however restrictive from the standpoint of reaching the entire express traffic of the railroads, to be in accord with the declared legislative intent.¹²⁰ This early determination is significant, apart from its historical interest, not alone because it analyzed, as a basis for future Congressional policy, the intimate relationship of the express business to the freight-carrying functions of the railroads, but because it first disclosed the admirably restrained view of the Commission, consistently adhered to in numerous subsequent proceedings of varied character, that its jurisdiction is a strictly statutory jurisdiction.

With the amendment of 1906, the jurisdictional issue was largely foreclosed. Express companies were specifically named among the carriers subject to the Act, and hence were brought within the Commission's jurisdiction to the same extent as though they had been included in the original legislation.¹²¹ Their tariffs must be published

¹²⁰ "A careful examination of the history and the language of the Act to Regulate Commerce has brought the Commission to the conclusion that the independent express companies are not included among the common carriers declared to be subject to its provisions as they now stand. The fact that a part of the express business of the country is, as above shown, within the Act, while another and a much larger part of the same business is not so described as to be embraced in the same statute, clearly points out the necessity of further legislative action. Either the entire express business should be left wholly on one side or it should all be included." *Ibid.*, p. 683. See also *Annual Report*, 1887, pp. 11-15.

¹²¹ See *American Express Co. v. U.S.*, 212 U.S. 522 (1909). The specific question at issue was stated by the court as follows (p. 529): "Does the interstate commerce law prohibit express companies from giving free transportation of personal packages to their officers and employees, and to the officers and employees of other transportation companies in exchange for passes issued by the latter to the officers and employees of the express companies?" The Court held that the Act, in prohibiting departures from

and filed, their accounts must conform to those prescribed, and regular and special reports of their traffic and financial operations must be submitted. While the Commission, in the beginning, made no attempt to formulate a comprehensive system of rates and regulations for the express business, it repeatedly asserted its authority over the level of express charges¹²² and sought to adjust tariff relationships and service practices on an equitable basis.¹²³ Upon complaint of individuals, trade associations, commercial bodies, and governmental agencies, the Commission exercised its powers of control along the same general channels in which it was seeking to restrain the railroad carriers.

The sweep of the Commission's jurisdiction over express companies is limited only by the general scope of the Act, by the specific exemptions of particular sections, and by the language of special provisions. The scope of the Act, for example, whether applied to railroads, express companies, or other carriers, does not extend to the award of damages by the Commission for breach of contract in the performance of the transportation function. The grant of repara-

the published tariffs, does not permit the free express carriage of goods under such conditions, the exceptions enumerated in the proviso to section 1 being expressly limited to the carriage of passengers. In conformity with this decision, and despite the further proviso of the 1910 amendment authorizing the use of "franks," or their interchange, by the officers and employees of telegraph, telephone, and cable lines, the Commission, by Conference Ruling 513 of July 20, 1917, held that express companies may not carry property either for their own officers and employees or for the officers and employees of other carriers except at their legally published rates. This ruling was formally affirmed by the Commission in *Legality of Express Franks*, 50 I.C.C. 599 (1918), 69 I.C.C. 627 (1922). Upon the main issue of the applicability of the Act to express companies, even though organized as joint stock associations and despite the fact that they are not specifically mentioned in the penalty provisions, see also *United States v. Adams Express Co.*, 229 U.S. 381 (1913).

¹²² See, for example, *Society American Florists v. U.S. Express Co.*, 12 I.C.R. 120 (1907); *Kindel v. Adams Express Co.*, 13 I.C.C. 475 (1908); *Reynolds v. Southern Express Co.*, 13 I.C.C. 536 (1908); *Sanford v. Western Express Co.*, 16 I.C.C. 32 (1909); *Maricopa County Commercial Club v. Wells Fargo & Co.*, 16 I.C.C. 182 (1909); *Boise Commercial Club v. Adams Express Co.*, 17 I.C.C. 115 (1909); *Arizona Railway Commission v. Wells Fargo & Co.*, 20 I.C.C. 571 (1911); *Bridgeman-Russell Co. v. Great Northern Express Co.*, 22 I.C.C. 573 (1912).

¹²³ See, for example, *Phillips v. New York & Boston Despatch Express Co.*, 15 I.C.C. 631 (1909); *California Commercial Asso. v. Wells Fargo & Co.*, 16 I.C.C. 458 (1909); *Strauss v. American Express Co.*, 19 I.C.C. 112 (1910); *Douglas Shoe Co. v. Adams Express Co.*, 19 I.C.C. 539 (1910); *Millinery Jobbers Asso. v. American Express Co.*, 20 I.C.C. 498 (1911); *California Commercial Asso. v. Wells Fargo & Co.*, 21 I.C.C. 300 (1911).

tion, because of the imposition of unreasonable or discriminatory charges, arises from violations of the Act and is incidental to the exercise of the Commission's powers of rate regulation; but a shipper may suffer loss or damage because of the negligence of the carrier or its breach of the transport agreement, without infringement upon the provisions of the Act and without right to invoke the authority of the Commission.¹²⁴ Such limitations upon the Commission's jurisdiction are not grounded in any special stipulations of the Act and are not distinctively applicable to express companies.

But the statute itself, explicitly or by implication, excludes express companies from the incidence of some of its important provisions. The 1920 legislation, it will be recalled, added to the Act two new sections of far-reaching significance—section 15a, enunciating a rule of rate-making and providing for the recapture of excess earnings,¹²⁵ and section 20a, endowing the Commission with authority to regulate the issuance of securities.¹²⁶ Neither of these sections is applicable to express companies. These carriers are explicitly excluded from the operation of the rule of rate-making and the recapture clause;¹²⁷ and

¹²⁴ Accordingly, the duty to make safe and prompt delivery of goods being a common-law duty enforceable in the courts, the Commission has declined to entertain a complaint for recovery of damages sustained through failure of an express company to deliver a shipment promptly at a designated unloading station. "It was not intended by the Congress that the Commission should supplant and take the place of the courts with respect to that large class of complaints that may arise out of the failure of carriers to carry out their contracts of transportation promptly and safely, and properly to perform their duties as common carriers in the handling of shipments entrusted to them for carriage from one point to another. As to all such claims . . . the Commission is without authority to afford redress." *Blume & Co. v. Wells Fargo & Co.*, 15 I.C.C. 53, 54 (1909). The Commission differentiated between such damage claims and petitions for reparation which spring from violations of the Act. "It is a violation of the provisions of the act for a common carrier to demand and collect an unlawful or discriminatory rate, and of complaints based on such violations the Commission has full jurisdiction and may afford redress by establishing reasonable rates to govern future shipments and awarding reparation with respect to past shipments. The Commission may also require carriers to desist from unlawful preferences and otherwise regulate the rates and practices of carriers; but with respect to the performance by carriers for the shipping public of their general duties as common carriers other than those covered by the act, the Commission is wholly without authority. Breaches of duty in that respect, such as the loss of or damage to property in transit, the failure to make delivery safely and with reasonable despatch in accordance with the contract, express or implied, which a carrier enters into when accepting a shipment for carriage, are matters that are solely within the jurisdiction of the courts" (p. 55).

¹²⁵ See Part I, pp. 207-216.

¹²⁶ See Part I, pp. 189-195.

¹²⁷ Sec. 15a, par. (1).

the regulation of security issues is confined to carriers "by railroad."¹²⁸ The new policies embraced in these enactments were induced by the exigencies of the developing railroad situation—primarily by the growing impairment of railroad credit—and hence were restricted to railroad carriers.

Similarly, the language of other provisions of the Act has been so construed as to render inapplicable to express companies duties and privileges that are clearly operative in the case of railroads. It is made the duty of "every carrier by railroad" to furnish safe and adequate car service, and the Commission is empowered to require such carriers to provide themselves with facilities for such car service.¹²⁹ The Commission has held, however, that an express company is not a "carrier by railroad," and consequently it has declared itself without authority to require express companies to provide necessary refrigerator equipment.¹³⁰ In like manner, through construction of the term "carrier by railroad," express companies have been denied the protection of

¹²⁸ Sec. 20a, par. (1).

¹²⁹ Sec. 1, pars. (11) and (21).

¹³⁰ *Oyler & Son v. American Ry. Express Co.*, 83 I.C.C. 160, 162 (1923). In *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I.C.C. 52 (1915), the Commission held that the Act as then existing empowered it to require carriers to furnish all necessary equipment upon reasonable request. In accordance with this ruling, the Commission, in *Pennsylvania Paraffine Works v. P. R. R. Co.*, 34 I.C.C. 179 (1915), ordered the defendant railroad to furnish a sufficient number of tank cars for the shipment of petroleum products. The validity of this order was judicially tested, and in *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916), the Supreme Court decided that no power resided in the Commission to order the acquisition of facilities. On the basis of this decision, the Commission held, in *R. R. Commissioners of Florida v. Southern Express Co.*, 44 I.C.C. 645 (1917), that it was without authority, in the absence of discrimination, to order carriers to acquire refrigerator cars for use in express service. The defendants in this proceeding were express companies, but the issue, as in all the prior proceedings, was as to the existence of any such power over service rather than as to its applicability to particular types of carriers. By section 1, paragraph (21), as amended by the Transportation Act, the Commission was finally clothed with power to order the acquisition of facilities, but this power was expressly confined to carriers "by railroad." In the principal case, therefore (*Oyler & Son v. American Ry. Express Co.*, *supra*), the Commission's holding was based upon want of jurisdiction over express companies in this regard. The Commission said (p. 162): "In *R. R. Commissioners of Florida v. Southern Express Co.*, . . . we found that we were without authority to require the carriers to acquire refrigerator cars for use in express service. Although the law has been changed since that decision, the provision of the interstate commerce act under which we may require common carriers to equip themselves with adequate facilities for performing their car service applies only to common carriers by railroad. In the instant proceeding the express company is the sole defendant. In *Southeastern Express Co. v. American Ry. Express Co.*, 78 I.C.C. 126, 129, in construing another section of the act we held that the express company is not a carrier by railroad. We reach the same conclusion here."

the Act against being compelled to short-haul themselves. The Commission is empowered to establish through routes and joint rates, "applicable to the transportation of passengers or property."¹⁸¹ This authority, as thus broadly conferred, has been construed to include express traffic and to embrace express carriers.¹⁸² But the prohibition against compulsory short-hauling, as a limitation upon the Commission's power, is specifically imposed only with respect to any "carrier by railroad."¹⁸³ The Commission, relying upon the authority of the Supreme Court as well as upon its own independent conclusion that express companies, though possessing contractual rights for shipping goods over railroads, are not carriers by railroad, has found the limitation against short-hauling upon its power of establishing through routes to be inapplicable to express companies.¹⁸⁴ This holding has been fully sustained by the courts, on the basis both of principle and precedent.¹⁸⁵

¹⁸¹ Sec. 15, par. (3).

¹⁸² *Southeastern Express Co. v. American Ry. Express Co.*, 78 I.C.C. 126, 129 (1923).

¹⁸³ Section 15, paragraph (4), directs the Commission, in establishing through routes, not to require "any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." This limitation against short-hauling is not applicable, even in the case of railroads, "where one of the carriers is a water line." See note 74, *supra*.

¹⁸⁴ *Southeastern Express Co. v. American Ry. Express Co.*, 78 I.C.C. 126, 130 (1923): "The express company does not own or operate lines of railroad. In its business the separate lines of each railroad are not observed, but by contract the express company operates as a unit over the lines of the various companies. Section 15(4) by its terms refers to 'carriers by railroad,' and does not include express companies." The Commission referred with approval to the decision of the Supreme Court in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), in which the term "carrier by railroad," as used in the Employers' Liability Act of April 22, 1908 (35 Stat. 65), was held not to include express companies. The Court had said (pp. 187-188): "In our opinion the words 'common carrier by railroad' . . . mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptance of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad . . . and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown." Among the citations referred to by the Court was the Commission's decision in *Re Express Companies*, 1 I.C.R. 677 (1887). See pp. 60-63, *supra*.

¹⁸⁵ *United States v. American Ry. Exp. Co.*, 265 U.S. 425 (1924). Justice Brandeis, speaking for a unanimous Court, presented many weighty considerations in support

But these restrictions, and others of similar character, create no serious impairment of the Commission's general jurisdiction over express companies. Because the Interstate Commerce Act in its present form is the outcome of a long series of legislative enactments rather than a single unified statute, because the railroads, as from the beginning, constitute the primary transportation agencies subject to its provisions, and because there are distinctive differences between types of carriers which prevent some of the stipulations of the statute from being equally applicable to all of them, the Commission's jurisdiction over express companies does not embrace every power conferred by the Act in its entirety. The basic aim of the regulatory scheme, how-

of the conclusion that an express company is not a carrier by railroad and that the limitation with respect to short-hauling is not operative in the case of express companies. He said (pp. 431-434): "An express company has no railroad. It is served by many railroads, as it is served by water lines, by motor trucks and by horses and wagons. Moreover, the language of paragraph 4 prescribes aptly a single railroad system, but not a system of express routes extending over many separate railroad systems. Practically every express company has had, as the American has now, routes over many separate railroad systems. However numerous the railroads used, all the routes are parts of a single express system. If an express company is a 'carrier by railroad,' 'the entire length of its railroad' must, as the American argues, be construed to mean the entire length of all the lines of the railroads within the United States over which it has routes. Such a construction would, if adopted, tend to give permanency to an existing monopoly although it failed to give adequate service. For it would deprive the Commission of power to foster the competition found necessary to secure such service. There is nothing in Transportation Act, 1920, which evinces an intention on the part of Congress to accomplish such a purpose. The natural meaning of the term 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad. The term is not found in the original Act to Regulate Commerce which was applicable only to carriers 'engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water.' When the amendment of 1906 extended the Commission's jurisdiction to express companies, sleeping car companies and pipe lines, and that of 1910 extended its jurisdiction to telegraph, telephone and cable companies, occasion for differentiating between carriers arose; as some of the provisions of the Act to Regulate Commerce were obviously not applicable to all the classes of carriers which had been made subject to regulation. But to what extent its provisions should be applied to any class was left, by those amendments, largely to construction. In Transportation Act, 1920, the phrase 'carrier by railroad' seems to have been systematically employed to designate sections of the Interstate Commerce Act which apply only to carriers operating railroads. The term was introduced by it in paragraph 4 in place of the word 'company' which had been used in the amendment of 1910. The purpose of the substitution was to make it clearer that the prohibition against compelling a carrier to short-haul its traffic was limited to railroads. The same phrase had been adopted in the Federal Employers' Liability Act. . . . As used in that Act, it was held . . . not to include independent express companies doing business over railroads. In Section 15(4) of Transportation Act, 1920, it should be given the same meaning." (The illuminating footnotes of the learned Justice are omitted.)

ever, as applied to all carriers, is to further the maintenance of reasonable and non-discriminatory rates and practices. For the attainment of this end, with reference to the express service, the Commission possesses ample authority.

The broad scope and complete adequacy of this jurisdiction were clearly established in the first comprehensive investigation of express companies conducted by the Commission.¹⁸⁶ All of the thirteen express companies then operating in the United States were made parties to the proceeding, and their problems were dealt with as general problems of the express service, on a national basis.¹⁸⁷ The Commission's inquiry was exhaustive,¹⁸⁸ and it deemed it necessary, in its

¹⁸⁶ *In re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 380 (1912), 28 I.C.C. 131 (1913).

¹⁸⁷ In the first of its reports (24 I.C.C. 380), the Commission explained the thrust of its undertaking as follows (pp. 387-388): "A survey of the express situation in this country has brought us to the conclusion that there is but one proper view to take of the matter. The act to regulate commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The act also by name recognizes the express company as a carrier subject to our jurisdiction. We must therefore regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own. The traffic which they move should flow with the greatest possible celerity between all portions of our country, and whatever artificial barriers have been raised by the existence of separate express companies should be broken down and the rates made or practices followed should neither rest upon the foundation of a railroad's preference nor of an express company's opportunity. Our sole concern, therefore, has been to discover in what regard the express companies as existing were delinquent in rendering the service which they purported to give, or which should be given under reasonable, just, and nondiscriminatory rates, and to discover what remedy could be applied under this law."

¹⁸⁸ In an Appendix to its original report (24 I.C.C., at pp. 435-525), the Commission presents an analysis and statement of the more important facts and figures gathered in the course of the investigation. In the opinion itself, Commissioner Lane summarized the character of the evidence as follows (*ibid.*, pp. 383-384): "The record in this matter has been so extensive as to forbid a review of the many questions involved and the character of the inquiry introduced. It may be said in general, however, that we have given consideration to the financial affairs of these companies; the character of their organizations; the relationship which they enjoy with the railroads; the extent and nature of the property which they own; the character of their service; the basis of their rate systems; the cost of their operations; the manner in which their rates are stated; the relation of the service which they give to that extended by the railroads in the carriage of freight by freight trains; the relationship between the rates established in different sections of the country for the same service by express; the similarities and dissimilarities obtaining as between the express service in the United States and similar service in foreign countries, together with a comparison of the rates in foreign countries with those extended in this country; and other questions analogous or related to these."

findings, "not only to criticize and correct existing rules and rates, but to build from the very bottom by outlining a national system of stating rates, a rational classification of express freight, and to enter into the minutiae of the billing, routing, and other details."¹³⁹ The Commission's action was more sweeping and more boldly forward-looking than any it has ever taken in the railway field, and yet it met with the ready acceptance of the carriers and encountered no obstacles through judicial interference. It not only accomplished a complete overhauling of express charges and practices—"a revolution and renovation in the methods and rates of express companies"¹⁴⁰—but it disclosed the possibilities of constructive action which inhere in its jurisdiction over other carriers.¹⁴¹ None the less, the Commission's assertion of authority was grounded in no mere theoretical analysis and resulted in no mere formulation of abstract principles. The evils disclosed by the record were so fundamental that a radical recasting of the entire system of rates and practices of express companies was inevitable;¹⁴² and the Commission, while making every effort through painstaking inquiry and prolonged conference with the carriers to secure agreement upon all important aspects of the revision of policy and practice, did not shrink from exercising its mandatory power for the establishment, in elaborate detail, of the new system of charges and regulations.¹⁴³

The comprehensive character and far-reaching significance of the Commission's determination will appear from a summary survey of the chief causes of complaint and of the nature of the principal remedies prescribed. Both the difficulties encountered by shippers

¹³⁹ *Ibid.*, p. 389.

¹⁴⁰ *Annual Report, 1912*, p. 3.

¹⁴¹ The Commission's own characterization of its decision is fully justified. "This is probably the most important single piece of work ever done by the Commission, and is an illustration of the kind of constructive work by which this body can be of most assistance, both to the shipping public and to the carriers." *Ibid.*

¹⁴² In concluding its original report (24 I.C.C. 380), the Commission said (at p. 432): "The test of the express company as a public utility is at hand. Certainly it is not deniable that the express company has to no slight degree lost the confidence of the people it serves and is regarded now as only upon probation. To help it to a greater degree of usefulness and to preserve it as a public agency we have conducted this inquiry, reaching as it has down to the most elemental practices of the carriers and broadening into a sea of infinite detail. . . . The great mass of criticism went to the heart of real delinquencies in the service given or the rules or rates of the carriers. . . ."

¹⁴³ See the Commission's supplemental report, 28 I.C.C. 131 (1913).

and the relief provided by the Commission, though embracing almost every aspect of the express business, were concerned, essentially, with the service practices of the carriers, with their rules governing the classification of express matter, with their methods of rate making and the level of charges. The Commission grouped the complaints which served as the basis of its findings and order into a number of distinct classes. A mere indication of their general tenor will disclose sufficiently the sweeping character of the attack upon the prevailing conduct of the express service and the consequent necessity for drastic action. There was testimony from all sections of the country of the double collection of lawful charges. There were numerous departures from the legal rates, by way both of overcharges and undercharges, resulting largely from erroneous interpretation of rate schedules and effecting, though often unintentionally, serious discriminations between shippers. The companies frequently neglected or refused to deliver shipments outside of arbitrarily established "free delivery limits," neither consignor nor consignee having any previous notice or information concerning the territorial bounds to which this privilege was applicable. Though "expedition is the very soul of the express business," shipments were often sent by round-about routes, as a means of lengthening the haul of the receiving carrier, thereby causing delay in delivery and involving the imposition of excessive charges. The rights of shippers under the transportation contract were unduly curtailed and their recognition unnecessarily delayed. Express receipts, for example, were alleged to contain improper limiting conditions and to discourage the presentation of claims for loss or damage of goods in transit; and there were thousands of complaints of indefensible delay in the settlement of such claims, and even, though less frequently, in the return of C.O.D. collections to consignors of express shipments. The more important of these difficulties—particularly those involving inequalities in the burden of charges—sprang largely from the complexities of the classification and rate structure. The classification practices of the express companies, the outgrowth of early competitive conditions which had been crystallized into vested rights for special interests, were so confusing as to conceal numerous discriminations and to mystify the ordinary shipper. Similarly, the methods of stating rates were so complicated

and obscure "that neither shippers nor expressmen know the express rates of the country, nor can experts be certain that the rates they quote are certainly the lawful rates, so many are the conflicting rules, routes, and scales."¹⁴⁴ Finally, there was widespread complaint against the absolute and relative adjustment of charges even as published—against the unreasonableness of the rates in themselves, especially upon small packages, and against their discriminatory effect as between localities. In the light of such a record, involving the entire express business of the United States, there was ample occasion for the full exercise of the Commission's jurisdiction over express companies; and the Commission utilized the occasion to institute a complete revision of policy and a highly constructive experiment in rate making.

The Commission's requirements were designed to meet all of the significant evils disclosed in the record, and hence touched upon the more important express practices as well as upon the problem of express charges. The rules and regulations prescribed, with a view to simplification of methods and the removal of unjust burdens from the shipper, are largely technical in character and need not be elaborated here. It is sufficient to note that the Commission's order, in effecting a drastic reformation of the entire express service, not only established schedules of rates and a new system of rate making but asserted authority over numerous details of management. A few specific illustrations will reflect the general nature of the Commission's action with regard to express practices. As a means of bringing certainty and uniformity of treatment for express traffic, and as a necessary instrument for the revised rate-making processes, the publication of a directory of express stations was ordered, fixing the locations according to "block numbers" as described by the Commis-

¹⁴⁴ 24 I.C.C., at p. 413. The Commission continued: "There are some thirty-five thousand express stations in the United States. To separately state the rates from each one of these stations to each of the others requires the statement of over 600,000,000 rates. The ordinary express agent is lost in the attempt to find a rate. With files of all the tariffs of all the express companies at their command, the rate clerks of this Commission find it difficult and uncertain work to find the lowest legal rates applicable to shipments moving between two points, particularly when there are many possible routes and transfer points via which the company may move. It is small wonder, therefore, that so many overcharges and undercharges result. The loss of time, loss of revenue, and lack of efficiency resulting from this system of rates are incalculable."

sion. The carriers were also required jointly to publish and file a statement defining precisely the limits of pick-up and delivery service accorded at local stations, so that arbitrary variations in terminal privileges might be openly outlawed. In order to prevent illegal overcharges and double collections, a uniform system of billing was prescribed, including instructions for the attachment of waybills and labels, the contents and even the colors of which were determined by the Commission. To remove the misleading terms and unduly restrictive conditions of the transportation agreement that had caused dissatisfaction among shippers, the carriers were ordered to discontinue the use of the prevailing express receipt and to substitute therefor a form of document newly prescribed. Most significant from the standpoint of service, and exercising an indirect influence upon the level of charges, was the requirement designed to remove the delays and burdens of circuitous routing of shipments. The carriers were directed to establish, publish, and file joint through routes, "reaching all cities and towns accessible to each other by the shortest route measured in time," and to accord to consignors the right to designate the routes by which specific shipments shall move. Onerous rules and archaic practices were thus eliminated. The Commission so modified the customary methods of the companies as to adjust the conduct of the express service (essentially a freight service by passenger train with supplementary terminal operations and intermediate care rendered by independent forwarders) to the dominant interests of the shipping public.

But the most constructive and enduring of the Commission's determinations were concerned with the problem of rates. As an indispensable basis for the new rate policy, it was necessary to remove the confusion and maladjustments of the traditional express classification. Accordingly, the Commission established but two classes of traffic for purposes of rating—general merchandise, and foods and beverages. The merchandise rate—the standard first-class charge—was to be the only base rate. All other rates were to be quoted as some multiple or fraction of this rate. The second-class rate, applicable to articles of food and drink—the one great class of exceptions specifically recognized—was to be no higher than 75 per cent of the merchandise rate. In addition, the carriers were authorized, as a

means of meeting traffic needs and developing industry, to make lower rates by special commodity tariffs, but these rates were to be based "on conditions of service" and were likewise to be stated as percentages of the merchandise scale. In this way the classification of express matter was simplified and the hidden sources of discrimination removed. With the new classification as a starting-point, the Commission completely overhauled the methods of stating rates. Its goal was the achievement of simplicity—so that "one who is not an expert in the reading of tariffs may know what rate he should be charged"—as a foundation for the building of an equitable rate structure. The United States was divided into 950 blocks, each formed by one degree of latitude and longitude. The blocks were numbered consecutively in series, and rates were thereafter to be stated as applying from block to block (all stations within each block to be grouped as common points) instead of from point to point.¹⁴⁵ The number of possible rates for the country as a whole was thereby reduced from over 600,000,000 to less than 345,000. In order further to restrict the volume of rates to be handled by each local agent, the carriers were required to publish separate and distinct tariffs to apply from each block to all other blocks.¹⁴⁶ Moreover, standard rate scales were established for packages weighing from one to one hundred pounds and the number of the applicable scale indicated for carriage

¹⁴⁵ For the purpose of stating short-haul rates between nearby points, each block was further divided into sub-blocks or squares. "We recognize that such a system of stating rates between blocks will not be equitable as between points situated near to each other in adjoining blocks. For this purpose we have devised a method of stating rates between points in adjoining blocks. . . . Each one of these large blocks in turn is subdivided into 16 smaller blocks which are called sub-blocks or squares. This is done so that points near each other within adjoining blocks shall not bear the full measure of the rates between the two most distant points in those blocks. Rates are stated from each of these sub-blocks to each of the sub-blocks within a radius of two blocks, or approximately 100 miles." 24 I.C.C., at pp. 417-418. See also Appendix, pp. 528, 532-533, 536-541.

¹⁴⁶ "There being 120 blocks in which there are no railroads or express stations, the total number of blocks between which rates are to be made are 830. It is manifestly unnecessary that the rates between all blocks shall be published in one tariff and in the hands of each express agent. It is sufficient that the express agent at every station shall know what rates apply between his block and each one of the other blocks. There being but 830 blocks, a single sheet of paper will give reference to every block number in the United States, and alongside of this block number will be published the number of the scale of rates applying between the block of origin and the block of destination." *Ibid.*, p. 414.

from each block to every other block, so that finding a specific charge was rendered a matter of ready and precise determination. By noting the scale number applicable from block of origin to block of destination and referring to the rates provided in that scale for packages of varying weights, the prescribed charge for the particular shipment was definitely ascertainable. "A single sheet, stating the block numbers and the scale rates applicable thereto, together with the regular printed set of scales, will furnish all the rates between all the points in the United States. . . ."¹⁴⁷

This new method of stating rates was but the foundation, however, for prescribing rate schedules. The existing system of express rates had been attacked as unreasonably high and unjustly discriminatory. The Commission found the indictment to be sustained. "The standard merchandise rates," said the Commission, "have been found to be discriminatory as between localities and unreasonable in themselves with respect to the points dealt with in our order. They have been the product of an unregulated growth, in which certain of the larger cities have gained an undue advantage and preference. A burden that is excessive and unjustifiable has rested upon the packages of smaller weight which the express carrier was especially created to transport.

¹⁴⁷ *Ibid.*, p. 417. By way of concrete illustration, the Commission described as follows the processes involved in determining an express charge on a particular shipment: "At the head of the tariff sheet will appear the number of the initial block. Assume that this is block No. 952 in which is the City of New York. Below will be published the numbers of all the other blocks, and opposite each block number will be the scale of rates applicable between Block No. 952 and each of the other blocks in the country. A shipper, then, wishing to know the rate on a 10-pound package from New York to San Francisco, would first turn to San Francisco in the Directory of Stations and find the number of the block in which San Francisco is located (No. 1203). Turning, then, to the single-sheet tariff which shows the rate between Block No. 952 and all other blocks in the country, he would find Block 1203, and opposite 1203 would be the scale number applicable to packages of all sizes up to 100 pounds between New York and San Francisco. Scale 198, let us assume, is the scale applicable between these points. Then by looking at this scale he would find that the rate upon a 10-pound package, New York to San Francisco, was \$1.22. This would be the rate by all routes by all express companies. It would be the rate from all stations within the Block No. 952. It would be the rate to all stations in Block No. 1203. The rate might be made to change by the carriers themselves, or through the orders of this Commission, but the block number would not change. The only tariff that it would be necessary to reprint would be that which stated the scale number applying between the two blocks, for with the change in a rate a new scale number would be substituted. Thus there would be a permanent basis established for stating rates from which it would be unnecessary to deviate so long as the block system itself was adhered to."

The railroad company in 'farming out' this branch of its service upon a percentage contract basis has created an inevitable tendency to increase parcel rates. There has been no uniformity in the application of any system or basis or scale of rates with reference to points similarly situated even within the same territory, and no reasonable relation is suggested in the rates fixed between the service given by the railroad in the carriage of a parcel and that given by the express company in its terminal service.¹⁴⁸ The Commission, by its order fixing just, reasonable, and non-discriminatory rates, sought to eradicate all of these basic defects.¹⁴⁹ Express charges were stated in terms of the small package, for the carriage of which the express service was distinctively developed. The authorized rates were designed to provide full compensation for the combined service of both railroad and express company, but without the arbitrary exploitation or burdensome inequalities of the old schedules. Each tariff was constructed as an aggregate of the three essential cost elements which enter into the performance of the service: an express-terminal allowance for collection and delivery, which did not vary with weight or distance; a rail-terminal allowance, which varied with weight but not with distance; and a haulage allowance for rail transportation (stated in terms of 100 pounds, because the property is moved as bulked freight), which varied with both weight and distance. Essentially, therefore, a scientifically formulated distance tariff was established. As a recognition, however, of variations in density of traffic and population and in railroad operating expenses in different sections of the country, the United States was subdivided into five grand zones which reflected these variations in operating and traffic conditions; and the haulage factor covering rail transportation was varied in the different zones, being made to correspond roughly to

¹⁴⁸ *Ibid.*, pp. 433-434.

¹⁴⁹ "For the correction of these evils," said the Commission, "there has appeared to be but one remedy, the construction of a rate system that should cover the United States. This has been a task of unprecedented magnitude and difficulty. We have sought for all possible light upon this subject both in Europe and in America and have arrived at conclusions which are set forth in our order as to what just, reasonable, and non-discriminatory rates would be. Our effort has been to make certain that ample compensation shall be allowed upon a reasonable basis for the full service given; to the railroad for its passenger-train movement, and to the express company for all that it does both for the railroad and for the shipper." *Ibid.*, p. 434.

differences in the average level of freight charges operative in each zone. In establishing rates on this basis, the Commission was guided by no one standard of reasonableness.¹⁶⁰ While the process of determining express charges was apparently reduced to a formula,¹⁶¹ the actual rates were so fixed as to reflect all the equities of the situation as between the railroads, the express companies, and the shipping public. Because of lack of uniformity or principle in the old schedules,

¹⁶⁰ The Commission, after careful analysis, rejected in turn property value, capitalization, and earnings as a controlling rate base. It also found that the adjustment of express charges by definite relation to prevailing freight rates "would be a patch work of incongruities and unjustifiable discriminations." While it recognized the existence of a much closer relationship between express charges and passenger rates, it likewise refused to accept such a basis "as in anywise conclusive or determinative of the express rate." The scale of graduated charges established by the express companies the Commission characterized as "unreasonable, discriminatory, and arbitrary" and as "the richest example . . . of a tariff based exclusively upon the theory that the charge should be what the traffic will bear"; but it declined to prescribe blanket rates—"to construct a tariff of rates upon packages that would blanket the country after the fashion of the postage stamp"—and adopted, instead, the zone system of making rates, as indicated above. The guiding considerations of its rate policy were then summarized as follows (pp. 431-432):

"1. That express rates should be made primarily to meet the need of the great body of our people and should therefore be stated in terms that represent the small packages which the express company is intended to carry rather than by the 100 pounds as freight rates are stated.

"2. That in the fixing of its rates an express company should not be allowed to charge more than a railroad company if the latter undertook to, and did, give the same service.

"3. That it is proper for the government to treat the express company as a freight forwarder by passenger train, giving supplemental service at each terminus, and intermediate care.

"4. That an express rate may not be based upon the monopoly right of the express company to be the exclusive freight forwarder over one or more lines of railroad.

"5. That the rate should not include more than a reasonable compensation for the service given, even though such compensation falls below that which the railroad exacts as a minimum for the carriage of 100 pounds of freight.

"6. That it is unreasonable to fix as rapid a decline in express rates for long distances as is made by the railroads in their freight rates, express service in this respect being more analogous to passenger than to freight service.

"7. That in compounding the express rate the railroad should be allowed a compensation for bulked freight moved upon a passenger train as to which it is relieved by contract from all liability for loss or damage and is without expense for the furnishing of a receipt, the billing, the bookkeeping, and a great number of other general expenses.

"8. That the rate should include a return to the express company which will compensate it with profit for the expense of the service which it gives, there being added thereto in the formation of the total rate the proper charge which it may reasonably make for the service which the railroad gives, as stated in the preceding paragraph."

¹⁶¹ In *Express Rates*, 1922, 83 I.C.C. 606 (1923), "the formula of express rates and charges," as developed in the Commission's original proceeding (24 I.C.C. 380), is explained in considerable detail (pp. 612-620).

some charges, particularly on the heavier shipments, were increased; on the whole, however, substantial reductions in rates were effected. Above all, the slate was cleared and a rational and publicly-established system of charges created a totally new starting-point for the conduct of the express service.

This sweeping exercise of the Commission's jurisdiction has largely removed the necessity for constant readjustment of rates and practices. From the standpoint of the Commission's activity, the express business has assumed a degree of stability which is distinctly lacking in the railroad field. The number of express proceedings is relatively small, and they are chiefly designed to correct maladjustments which inevitably emerge because of the diversities of business practice, the nation-wide scope of the express service, and the dynamic character of the industrial situation. Most of the complaints deal with minor practices or with specific cases of excessive charges or discriminatory relationships, and they involve, for the most part, mere applications of the Commission's general orders, growing out of its original express investigation and its supplementary inquiries of comprehensive character.¹⁵² But because the regulative process, if it is to be responsive to changing circumstances and conditions, must necessarily operate as a continuing process, a few major revisions of policy have also been effected. The established level of express charges, for example, like that of railroad rates, could not withstand the controlling external forces of the war and post-war period. A series of rate increases, largely on a percentage basis, was authorized by the Com-

¹⁵² See, for example, *Parlin & Orendorff Plow Co. v. U.S. Express Co.*, 26 I.C.C. 561 (1913); *Acme Portland Cement Co. v. American Express Co.*, 28 I.C.C. 316 (1913); *Brackett Co. v. Great Northern Express Co.*, 29 I.C.C. 667 (1914); *National Assn. Ice Cream Manufacturers v. Express Co.*, 33 I.C.C. 411 (1915); *Farness Co. v. American Express Co.*, 42 I.C.C. 645 (1916); *Davies Spur, Wash., Express Rates*, 43 I.C.C. 143 (1917); *Express Charges on Empty Fish Cars*, 50 I.C.C. 24 (1918); *Electric Controller & Manufacturing Co. v. American Express Co.*, 50 I.C.C. 243 (1918); *Providence Fruit & Produce Exchange v. Express Co.*, 51 I.C.C. 167 (1918); *Northwestern Trading Co. v. Adams Express Co.*, 51 I.C.C. 211 (1918), 52 I.C.C. 552 (1919); *Redmond v. Adams Express Co.*, 53 I.C.C. 39 (1919); *Lyons Co. v. Adams Express Co.*, 53 I.C.C. 633 (1919); *Booth Fisheries Co. v. American Express Co.*, 53 I.C.C. 735 (1919); *New Albany Box & Basket Co. v. Express Co.*, 56 I.C.C. 720 (1920); *White Bros. & Crum Co. v. Director General*, 57 I.C.C. 511 (1920); *National Industrial Traffic League v. Express Co.*, 58 I.C.C. 304 (1920); *Oyler & Son v. American Ry. Express Co.*, 59 I.C.C. 656 (1920); *Armour & Co. v. Director General*, 60 I.C.C. 663 (1921); *Viscose Co. v. American Ry. Express Co.*, 62 I.C.C. 32 (1921).

mission.¹⁶³ The horizontal method of these increases, coupled with the fact that not all of them were adopted by the state authorities,¹⁶⁴

¹⁶³ The first of the increases, estimated to enlarge gross revenues by 3.86 per cent, was authorized in *Express Rates, Practices, Accounts, and Revenues*, 35 I.C.C. 3 (1915), upon rehearing of the original proceeding. The original order (24 I.C.C. 380, and 28 I.C.C. 131) was modified by permitting a transposition of the 20-cent express-terminal and the 25-cent rail-terminal allowances, thereby increasing slightly the rates on packages weighing less than 100 pounds. The need of additional revenue was established by a year's experience with the rate system promulgated by the Commission rather than by any extraordinary external circumstances. The Commission said (p. 13): "The investigation which resulted in our original order was most exhaustive. The present plan has given very general satisfaction and has provoked but little complaint. Petitioners have cooperated earnestly and fairly in an effort to make the new plan a success and to secure uniformity of rates for state and interstate business. If they are, in face of these efforts, operating at a loss under rates prescribed by us, and it clearly appears that they are, they are entitled to reasonable relief promptly, and without awaiting the result of another general investigation that would consume two or three years." But the remaining rate increases were the direct outcome of war conditions. In *Proposed Increases in Express Rates*, 50 I.C.C. 385 (1918), a 10 per cent advance in interstate rates was granted. The Commission acted favorably upon the carriers' application because of convincing evidence "that many of the conditions which have operated to reduce the net earnings of the railroads have affected the express companies in like manner; that emergencies have made necessary the shipment of articles by express that heretofore have moved by freight, and for the handling of which the express companies are not adequately equipped; that the lack of facilities to handle an unexpected and unprecedented volume of traffic requiring expedited movement has resulted in serious congestion; that the increased traffic and the attraction of employees to other lines of business have necessitated the employment of many inexperienced men and the use of unsuitable equipment; and that under these conditions the service has deteriorated and the ratio of operating expenses to revenues has increased to such an extent that their aggregate earnings on domestic traffic under the present rates are insufficient to meet operating expenses" (pp. 385-386). But the increase thus authorized was entirely absorbed by wage increases, and further wage increases were in prospect. Accordingly, by General Order No. 56, the Director-General of Railroads again raised express charges, by various changes in the existing level, these modifications being estimated to yield an additional increase of 8 per cent. The Commission reported upon this plan in *Increase in Express Rates*, 51 I.C.C. 263 (1918). Upon the termination of Federal Control, as a result of mounting costs of operation and the wage orders of the newly established Railroad Labor Board, further increases in express charges became necessary. In *Express Rates, 1920*, 58 I.C.C. 281, 707, an aggregate increase of 26 per cent was authorized (except that the rates on milk and cream were to be equalized with those contemporaneously applied by the railroads between the same points) — a 12.5 per cent increase being granted in the first of these proceedings, and a 13.5 per cent increase in the second. The full amount of these increases was to accrue to the express carrier (the American Railway Express Company), instead of being shared with the railroads under the then existing contracts.

¹⁶⁴ The difficulties resulting from the relationship of state and interstate express rates were first elaborately discussed by the Commission in *Sounders & Co. v. Southern Express Co.*, 18 I.C.C. 415 (1910). It found the intrastate rates prescribed by the Alabama Railroad Commission from Mobile, Ala., to Alabama markets to be discriminatory against the interstate traffic from Pensacola, Fla., to the same markets;

tended to produce maladjustments in the rate structure and to create

but it did not deem itself possessed of power to remedy the situation under existing statutes. After the Commission had established its comprehensive system of interstate express rates (24 I.C.C. 380; 28 I.C.C. 131; 35 I.C.C. 3), the vast majority of the states adopted the system for intrastate charges. The State of South Dakota, however, adhered to a schedule of express rates fixed by its Board of Railroad Commissioners that were about 40 per cent lower than those established under the block and zone system for interstate traffic. In *Traffic Bureau v. American Express Co.*, 39 I.C.C. 703 (1916), the Commission found the relationship of rates prevailing between Sioux City, Iowa, and certain South Dakota points and those prevailing intrastate to these South Dakota points to be unduly discriminatory against Sioux City, and that the state rates were too low to be made a reasonable measure of the interstate rates. Accordingly, relying upon its authority to remove such discrimination established in the *Shreveport* case (23 I.C.C. 31; 234 U.S. 342), the Commission ordered the defendants to cease and desist from these unlawful preferences, so as to remove the restrictions upon shipments in interstate commerce and the shrinkage of the express carriers' profits. The Commission's holding was fully sustained by the Supreme Court in *American Express Co. v. Caldwell*, 244 U.S. 617 (1917). But with further rate increases (see note 153, *supra*), there was a growing reluctance among the states to adopt the interstate charges for intrastate traffic, both because they were believed to be excessive and because they were alleged to involve inequalities between localities. Of the advances authorized in *Express Rates, 1920*, 58 I.C.C. 281, 707, for example, the Commission said, in *Express Rates, 1922*, 83 I.C.C. 606 (1923), at p. 621: "In some of the States none of the latter increases were approved intrastate, in others the 12.5 per cent increase was authorized, and in still others the full 26 per cent increase was authorized." Numerous proceedings were pending before the Commission to raise state rates to the level of interstate charges. To avoid prolonged litigation, it was felt necessary to undertake a comprehensive revision of the rate structure. Compare the following from the report of the Committee on Express and Other Contract Carriers by Rail of the National Association of Railroad and Utilities Commissioners, *Proceedings, 1923*, pp. 437-438: "It will be remembered that at the time of the last convention of this Association there were pending before the Interstate Commerce Commission some thirteen cases in which the American Railway Express Company had invoked the powers of the Interstate Commerce Commission under the Transportation Act of 1920, to raise state rates notwithstanding the refusal of the commissioners of these thirteen states to allow such increases. . . . It was therefore gratifying to the members of this Association that Commissioner McChord, at that time Chairman of the Interstate Commerce Commission, appeared before the convention at Detroit in 1922 and suggested a plan of cooperation between the state commissions and the Interstate Commission in the hearing and decision of the proceeding which was inaugurated by the Interstate Commerce Commission in July, 1922, looking toward a complete review and possible revision of interstate express rates. Parenthetically, it may be added that such review and revision of the interstate rates had been urged by the representatives of the thirteen states involved in the State Rate Cases as the most logical basis for an ultimate settlement. In other words, the states contended that the interstate rates were unreasonable, both because they were too high in many instances, and because they presented many inequalities and inequities between localities and between the rate zones. . . ." Compare also the following episode in connection with the argument of the state rate cases: "After the state cases had been heard and submitted during 1921 and 1922, the Interstate Commerce Commission called for oral argument for May 3rd and 4th, 1922. During the argument of our General Solicitor, John E. Benton, he was interrupted by one of the Commissioners who inquired 'what is the matter with the express and what

a necessity for comprehensive revision.¹⁶⁵ Upon the termination of Federal Control, the Commission was also called upon to authorize the consolidation of express carriers into the American Railway Express Company,¹⁶⁶ and to approve the uniform contract entered into between this company and the railroads.¹⁶⁷ This unification of the

would you do if you were us? The question was a large one, and the reply was left to Hon. Hugh Gordon, Attorney for the California Railroad Commission, who advised the inquiring Commissioner that in his opinion the express rate formula had been entirely destroyed by the various and devious methods of increases not in conformity with the formula. Gen. Gordon suggested that the Interstate Commerce Commission should begin upon its own motion an investigation into the rates of the Express Company prevailing at that time. This the Commission did on July 6th, 1922." *Proceedings*, 1924, p. 455.

¹⁶⁵ See *Express Classification, 1920*, 59 I.C.C. 265 (1920), in which various additions, cancellations, and changes in classification were approved, and especially *Express Rates, 1922*, 83 I.C.C. 606 (1923), 89 I.C.C. 297 (1924), the comprehensive investigation referred to in note 154, *supra*. In the latter proceeding, which combined an investigation on the Commission's own motion of the propriety of prevailing express rates and a petition of the American Railway Express Company for increases in charges, a very elaborate inquiry was conducted into the entire rate structure and financial status of the express business. The record comprised some 6,000 pages of testimony and almost 300 voluminous exhibits. The proposed increases in rates were denied, the cost studies submitted by the carrier being found unconvincing; but the existing rate relationships were thoroughly recast, although without reducing the average level of express charges. The Commission's chief purpose was to eliminate discriminations and to establish a more equitable spread of rates as between the various zones. The block system of stating rates, as originally promulgated, as well as the method of constructing rates on the basis of a combined express-terminal factor, rail-terminal factor, and haulage factor were retained. In order, however, to bring about a greater coincidence between the rate zones and the accounting groups under the uniform contract between the express company and the railroads, three rate zones were delimited in place of the five zones previously established. The newly prescribed rates, formulated after close cooperation with the state commissions, were adopted by all of the states. See National Association of Railroad and Utilities Commissioners, *Proceedings*, 1925, p. 89.

¹⁶⁶ *Consolidation of Express Companies*, 59 I.C.C. 459 (1920). The Commission's jurisdiction was based upon the express stipulations of section 5, paragraph (7) of the amended statute.

¹⁶⁷ *Express Contract, 1920*, 59 I.C.C. 518 (1920). The Commission assumed jurisdiction under section 5, paragraph (1), of the amended statute, because it held that since Article V of the proposed contract between the express company and the railroads (for the determination of "the amount to be paid to the Rail Company by the Express Company as compensation for the privileges covered by this contract") involved the distribution of express transportation revenues and expenses by groups of railroads, it was a pooling arrangement, "prescribing the division of 'net proceeds of the earnings of such railroads' otherwise than according to individual performance" (p. 521). The Commission approved the proposed grouping of the roads for the purpose of the express service and the manner of dividing earnings between the express carrier and the railroad lines, but it withheld all opinion concerning the propriety of the substantive provisions of Article V or of any other part of the contract as beyond the scope of its authority. But compare the vigorous dissenting opinion of Commissioner Eastman

express business still further expanded the scope of the Commission's proceedings and correspondingly diminished their number. But while the most significant of the Commission's determinations deal with the express service as a whole, on a national basis, special situations have not been neglected.¹⁵⁸ The most troublesome difficulties encountered by the Commission have arisen chiefly from the voluntary contractual relationships between the express and rail carriers, rather than from any want of jurisdiction over the express service as such.¹⁵⁹

(pp. 523-528), concurred in by Commissioners Aitchison, Woolley, and McChord, in which, pointing out that the terms of the contract are unduly burdensome to the railroads—that "the risk of the business is fastened upon the rail lines, and they become, in effect, the financial backers of the express company" (p. 526)—he was "unable to find basis for the conclusion that Article V will result in better service to the public or economy of operation on the part of either the railroads or the express company, or that it is in the public interest." "Instead of approving this contract . . .," he continued, "it would be far preferable that the express company and the railroads should be advised to proceed at once to do what should have been done before, and that is to work out a logical method for determining the compensation which should fairly be paid to the rail lines for their services in connection with the express business" (pp. 527-528).

¹⁵⁸ See, for example, *Southeastern Express Co. v. American Ry. Express Co.*, 78 I.C.C. 126 (1923), 81 I.C.C. 247 (1923), in which specific through routes and joint rates between points on the lines of the two companies were prescribed, and the right of shippers to designate the routing of express traffic was recognized and defined; and various minor proceedings involving the adjustment of particular rates, classifications, and practices: *Rating on Flavoring Extracts*, 64 I.C.C. 53 (1921); *Weights on Berries in Pony Refrigerators*, 64 I.C.C. 610 (1921); *Express Class Rates between United States and Canada*, 68 I.C.C. 20 (1922); *East Springfield Citizens' Club v. American Ry. Express Co.*, 68 I.C.C. 482 (1922); *Actual Mileage to Determine Rates on Milk*, 69 I.C.C. 90 (1922); *Express Rates on Cake*, 74 I.C.C. 234 (1922); *Express Rates on Milk and Cream*, 74 I.C.C. 427 (1922), 88 I.C.C. 687, 696 (1924); *Attendants with Race Horses*, 89 I.C.C. 689 (1924).

¹⁵⁹ The division of income between the express companies and the railroads has always been determined by voluntary agreement, which traditionally allowed to the railroads a fixed percentage of the gross operating revenue from express service. Originally individual contracts were made between particular express companies and particular railroads, and the percentage stipulated as compensation for the services rendered by the rail lines varied widely, reflecting the relative bargaining power, in each instance, of the railroad company and the express company. No attempt was made to ascertain, on any rational basis, the cost to the railroad of rendering the express service, so that rate increases on express matter automatically redounded to the advantage of the rail lines, whether or not they were underpaid or needed additional revenue, and corresponding decreases inevitably restricted railroad revenue, even when the prevailing compensation to the railroad was but fair and reasonable and such restriction might impose unjust burdens on other types of rail traffic. During the period of Federal Control, the Director-General negotiated a single contract with the American Railway Express Company (into which the business of the then existing companies had been consolidated), but the compensation of the railroads continued to be adjusted as a percentage of gross operating revenue—49.75 per cent was reserved to the express

Sleeping-Car Companies

The status of sleeping-car companies, from the standpoint of the Commission's jurisdiction, can be disposed of very briefly. Like the

carrier, and 50.25 per cent was paid to the Director-General for rail service. The difficulties of regulating express rates under such circumstances still remained. In *Increase in Express Rates*, 51 I.C.C. 263 (1918), for example, the Director-General, in order to provide needed additional revenue for the express carrier, proposed a plan of rate increases that was calculated to yield, in gross revenue, approximately twice the needed amount, because of the necessity, under the contract, of sharing the increase with the railroads. This situation led the Commission to comment as follows (p. 268): "No question of needed additional revenue for the railroads has been presented or suggested here. It seems appropriate to point out that for the purpose of securing some twelve million dollars of needed additional revenue for the express company the proposed increased express rates will yield an additional total revenue of some twenty-four million dollars. Increasing the rates by one-half of the extent proposed would, if the entire revenue from the increase accrued to the express company, secure the additional revenue which it needs. Contracts between express companies and railroads have long provided, as does the one between the express company and the Director General, that the compensation of the railroad shall be a certain percentage of the gross revenue of the express company. It results from this that it is impossible to reduce the rates of the express company without taking money from the railroad company and impossible to increase the rates of the express company without giving additional revenue to the railroad company. This basis of compensation is certainly not scientific, and under it the express company does not pay the railroad company for the service which the railroad performs upon any demonstrably appropriate basis. The railroads have been and are compensated by the United States Government for transporting the mails on the basis of the weight carried or of the space occupied in the cars or trains. A similar basis of charges by the railroad company to the express company would, we think, be preferable to the basis now and heretofore employed, and would obviate the embarrassments and inequities to which we have referred as growing out of the past and present basis of contract. The question of a different basis of compensation from the express company to the railroads is well worthy of study." When, upon the termination of Federal Control, the Commission was called upon to authorize further rate increases, it encountered the same difficulty. In *Express Rates, 1920*, 58 I.C.C. 281 (1920), the Commission reverted to its previous comment "upon the desirability of some revision of the contract bases hitherto obtaining whereby additional revenues needed solely for the express service could be obtained without a double assessment upon shippers" (p. 294). Accordingly, it denied the increases as proposed. "If granted as proposed," the Commission said, "one-half of the additional gross revenue would accrue to the carriers over whose lines the respondent operates, and this record is barren of evidence showing need or warrant for augmentation of the revenues of carriers other than respondent" (p. 296). The 12.5 per cent increase granted in this proceeding, as well as the 13.5 per cent increase granted in the supplementary proceeding (58 I.C.C. 707), were authorized, without order, but with the following pronouncement (p. 296): "We think that the full amount of these increases should accrue to respondent and we assume that the other carriers will join respondent in so arranging, by revision of contracts or agreements or in some other manner." The failure of the railroads to institute any logical basis of compensation for their services in moving express traffic, as previously suggested by the Commission, was largely responsible for the condemnation of the contract between the American Railway Express Company and the railroads in Commissioner Eastman's dissent in *Express Contract, 1920*, 59 I.C.C. 518,

service of express carriers, the service rendered by such companies supplements the transportation activities of the railroads, except that

523-528. See note 157, *supra*. The problem arose once more in *Express Rates, 1922*, 83 I.C.C. 606 (1923), 89 I.C.C. 297 (1924). The express carrier's petition for rate increases was virtually made on behalf of the railroads, the prevailing return to the express company being admittedly ample and sufficient. The need of additional revenue for the rail lines was supported by data developed in connection with the proceeding in *Railway-Mail Pay*, 56 I.C.C. 1 (1919). The Commission found that this cost study, prepared for a special purpose seven years earlier, did not establish the cost of the express service to the railroads, and hence the petition for rate increases was denied. Commissioner Eastman, in a separate opinion concurring in part with the majority, returned to the attack upon the express contract. "So favorable [to the express company] did the contract prove," he declared, "that in the second year of its operation the express company made a voluntary additional payment of \$1,700,000 to the railroads in order that its profits might not substantially exceed 8 per cent. Later the contract was amended, so that there might be less opportunity for excessive profits; but it still remains true that the express company is virtually insured a reasonable return and that the risk of the business is upon the rail lines. The result is that in the instant proceeding we have a carrier seeking an increase in rates, not for its own benefit, for it concedes that it needs no increase, but in order that other carriers which are in its pay may not suffer financially from a contract into which they voluntarily entered. Obviously, the situation is anomalous and fraught with danger so long as the express company remains an ostensibly independent corporation. For their own protection it would seem that the railroads ought jointly to purchase and hold its stock." 89 I.C.C., at p. 320. But Commissioner Eastman's strictures upon the express contract were primarily designed to focus attention upon the unscientific character of the prevailing compensation standard and upon the need of ascertaining the cost to the railroads of rendering the express service. "It seems to me," he concluded, "that the failure of the railroads over a long period of years to make any study whatever of this question of cost is little less than shocking. They should remedy this defect with the utmost expedition, and, in order that question as to the results obtained may be minimized, they should seek the cooperation, in the study, of this commission and the State commissions."

With the existing contracts expiring February 28, 1929, the Commission authorized a new corporation, the Railway Express Agency, Inc., to issue 1,000 shares of stock and \$32,000,000 of bonds, and to use the proceeds to purchase the properties of the American Railway Express Company; and at the same time it authorized 86 railroad companies, doing nearly 98 per cent of the express business of the country, to acquire control of the Railway Express Agency through purchase of its stock on the basis of an allotment reflecting the division of express business among them during the period 1923-26. Under the proposed agreement, which was to be open to 300 short lines previously parties to express contracts, the Agency was to apportion express traffic with reference to its previous division as well as to the requirements of service, and earnings were to be divided upon the basis of gross business handled. This contract was but slightly different from that of 1920, but earnings under it would stay with the railroads. For purposes of rate making Commissioner Eastman again stressed the necessity of ascertaining the cost of conducting the express business "either by sporadic cost studies or by a revision of railroad accounting so that this cost will currently be segregated from the railroad costs instead of being mixed inextricably with them." *Securities and Acquisition of Control of Railway Express Agency*, 150 I.C.C. 423, 435 (1929).

it involves special facilities for the movement of passengers rather than of property. Sleeping and parlor cars are operated over the railroad lines and constitute an important part of modern passenger service. The performance of the transportation function as such is broadened to include the provision of a bed or seat for the exclusive use of the passenger, together with other auxiliary services akin to those rendered by an innkeeper. Since only a small percentage of all travelers find it necessary or desirable to utilize these special facilities, there would be need of distinct regulation of this aspect of the passenger service even if the facilities were generally owned and furnished by the railroad carriers themselves. In fact, however, this special service is rendered on behalf of all the railroads, with few exceptions, by a single outside corporation—by the independently organized and controlled Pullman Company. For this reason the sleeping- and parlor-car service has come to be generically designated as the Pullman service. The Pullman Company, like the agency directly responsible for the express service, is a contract carrier by rail.¹⁰⁰ While the char-

¹⁰⁰ In *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925), the principal terms of the prevailing contracts between the rail carriers and the Pullman Company were summarized as follows (at pp. 474-475): "Respondents have contracts with the Pullman Company covering the operation of the cars owned by that company. These contracts usually provide that the railroad shall haul the Pullman cars, provide facilities for storage and airing of bedding and linen, make repairs necessitated by causes arising outside of the cars or from negligence of railroad employees, clean the outside of the cars, furnish lubrication, ice, water, heat, and light, and, except at large terminals, furnish agents to sell Pullman tickets. Most of these expenses also arise in connection with coach operation. The Pullman Company provides the necessary capital investment in cars and other equipment, bears the expense of running repairs and depreciation due to wear and obsolescence, provides necessary car attendants, cleans the inside of the cars, and meets laundry expenses and cost of repairs necessitated by causes arising inside of the cars or from negligence of Pullman employees. The contracts vary materially in the matter of participation by respondents in revenue accruing from the Pullman charges proper. In some cases there is no participation by the railroad, but usually the contracts provide that the Pullman Company will retain all collections up to amounts ranging from \$7,250 to \$9,300 per car per annum in the case of standard sleeping and parlor cars, and from \$4,700 to \$8,000 in the case of tourist cars; that the railroad shall receive the first \$1,500 beyond these earnings; and that any excess beyond \$1,500 shall be divided equally between the railroad and the Pullman Company. Some of the smaller roads pay the Pullman Company mileage charges ranging from 1 cent to 4 cents per car-mile. The contracts of the New York Central, Pennsylvania, and New Haven system lines are exceptions to the usual form. These railroads, instead of participating in earnings in the manner above indicated, receive from the Pullman Company a payment of \$700 per annum per car for the average number of steel Pullman cars used on their lines, and in addition the

acter of the subsisting contractual relationships is not without influence in any determination of the propriety of the special charges, the primary governmental concern, as in case of all services subject to its control, is that just and reasonable rates and practices be maintained for the Pullman service as such. Toward this end ample authority has been expressly conferred upon the Commission. Not only are sleeping-car companies specifically embraced among the carriers subject to the provisions of the Interstate Commerce Act, but the "transportation" to which the Commission's authority extends is made to include all instrumentalities and facilities of shipment or carriage, irrespective of ownership or contract. Both the carrier and its business (aside from manufacturing operations and other outside activities) are fully within the reach of the Commission's power.¹⁶¹ Under these circumstances, no important jurisdictional issue has arisen either before the Commission or in the courts with respect to the Pullman service. It is but necessary to indicate the general direction of the Commission's assertion of authority over this service, with special reference to its bearing upon the tasks of railroad regulation.

Perhaps the Commission's most significant activity in relation to sleeping-car companies has been concerned with the promulgation of accounts and reports for these carriers.¹⁶² Publicity of operations, enforced through the Commission's general administrative power, has

New York Central and Pennsylvania are reimbursed by the Pullman Company for furnishing heat, light, lubrication, ice, and water. The New Haven is reimbursed for a large part, if not all, of these expenses."

¹⁶¹ Many of the provisions of the Act, like those, for example, dealing with railroad consolidation, are by their very terms inapplicable to sleeping-car companies. In some cases, moreover, sleeping-car companies are expressly exempted from the operation of the Commission's authority. By section 152, paragraph (1), sleeping-car companies are specifically excluded from the burdens and benefits of the rule of rate-making and the recapture clause.

¹⁶² Immediately upon the enactment of the Hepburn amendments, the Commission recognized its authority in this field and took steps to carry it into effect. *Annual Report*, 1906, p. 62. A classification of operating expenses and operating revenues became effective July 1, 1910, and forms were prepared for annual reports, for monthly statements of revenues and expenses, and for special reports. In due course the prescribed classifications also embraced an accounting system for the manufacturing plants of sleeping-car companies, and the accounts as a whole were elaborated and perfected. See *Annual Reports*: 1910, pp. 30-31; 1912, pp. 35-36. For a recent statistical summary of the results of operations of the Pullman Company, see *Annual Report*, 1929, p. 136. An investigation of the classes of depreciable property of sleeping-car companies and of the related percentages of depreciation is pending. *Annual Report*, 1930, p. 70.

constituted the chief safeguard against abuse. The contested proceedings, arising either through formal complaint or upon the Commission's own motion, have been strikingly few. The Commission's mandatory power over Pullman rates and practices has largely served as a potential protection against improper adjustments rather than as an actively functioning instrument. But its unquestioned possession of adequate authority has been clearly established. Its determinations have embraced orders as to the reasonableness of existing charges in and of themselves and as to the relationships of the prevailing rates for different types of Pullman service.¹⁶³ Through piecemeal efforts, in the light of the limited record developed in support of specific complaints, the Commission has sought to remove rate maladjustments.¹⁶⁴ It has also assumed jurisdiction in a few proceedings in-

¹⁶³ In *Lofus v. Pullman Co.*, 18 I.C.C. 135 (1910), the lawfulness of sleeping-car rates between St. Paul, Minn., and certain other points was challenged. All of the prevailing rates involved were alleged to be unreasonable, and the imposition of identical charges for upper berths and lower berths was declared to be discriminatory. The Commission granted relief in both directions. Some reductions in lower berth rates were ordered, and differentials were established between the charges for lowers and for uppers. Upon rehearing (20 I.C.C. 21), the Commission modified its original order, chiefly by accepting a 20 per cent differential between upper and lower berths in place of the 25 per cent differential it had previously established. In connection with this rehearing the Pullman Company proposed a new schedule of rates applicable throughout the United States, whereby a large number of reductions in lower berth charges was introduced and the principle of charging a distinctly smaller amount for uppers than for lowers was definitely recognized. In modifying its original order, however, the Commission expressly declared that this modification was not to be construed as a determination of the reasonableness of the entire new schedule thus proposed. See also *Oklahoma v. Pullman Co.*, 20 I.C.C. 25 (1910), involving the reasonableness of rates for upper berths in the states of Oklahoma, Kansas, Indiana, and Arkansas, in which the Commission, in accordance with its holding in the above proceeding, directed the Pullman Company to fix its rates upon upper berths at not more than 80 per cent of the applicable charge for lower berths whenever such lower berth charges are \$1.75 or over, and to fix the upper berth rate at not more than \$1.25 whenever the charges for lower berths are \$1.50, but again without specific approval of the general reductions in lower berth charges proposed by the Pullman Company.

¹⁶⁴ The Commission has formulated no comprehensive principles for the determination of Pullman charges. The prevailing rates have been deemed to be *prima facie* reasonable, and the burden has been placed upon complainants to establish their right to relief. The usual method of rate comparisons has been chiefly relied upon. But in *Commercial Club of Sioux Falls v. Pullman Co.*, 31 I.C.C. 654 (1914), for example, the Commission rejected distance as the controlling factor (pp. 657-658): "The value to the passenger of sleeping-car occupancy can not be gauged by exactly the same standards as passenger transportation by day. To the latter, mileage, in the absence of unusual conditions, may be applied as a fair rule of the value of the service. The bare service of transportation to the occupant of a sleeping car, however, has been covered in the first instance by the passenger fare paid. The value of the occupancy of a sleep-

volving the adequacy or equality of sleeping-car service provided for particular persons or localities.¹⁶⁵ But the most controversial issues have arisen in connection with the imposition of extra passenger charges, accruing entirely to the railroads, upon those using the Pullman service. In such proceedings the propriety of the sleeping-car

ing car over and above the value of being carried a certain distance is found primarily in obtaining a night's rest under as comfortable conditions as compatible with railroad travel, essentially a night's lodgings; and secondly in the keeping intact for the transaction of business the daylight hours which otherwise would be spent in covering distance. If the physical conditions under which transportation is conducted were invariably the same, if the speed of sleeping cars were uniformly the same, if the traffic density on all sleeping-car lines were the same, and if detraining during the night imposed no discomfort, mileage might possibly be taken as a measure of the value of sleeping-car occupancy. But it then would be a fair test because it would roughly measure the advantage of a night's occupancy of the sleeper to the passenger and the cost of service to the carrier. What the patron of a sleeper seeks first is a night's rest, and for this he pays as he would for a hotel room, for a unit service, and this service is approximately the same whether the car be hauled 200 or 300 miles during the sleeping hours. Whether a berth has been in use 4 hours or 10 hours, as a rule it can not again during the same night be made a source of revenue to the carrier. Hence, berth-mile rates are of little comparative value, and are not controlling in fixing rates for the occupancy of sleeping cars." For another basis of comparison, which places primary emphasis upon the relationship between general passenger rates and those resulting from use of the Pullman service, note the following from the dissenting opinion of Chairman Knapp in *Lofius v. Pullman Co.*, 18 I.C.C. 135, at pp. 138-139: "The real question in all cases is whether unreasonable charges are exacted from the public for any service or facility which a railroad is bound to provide or undertakes to provide; and this question, as applied to sleeping-car rates, must be determined almost wholly by comparison, because there is no other helpful or even available test. What sleeping cars cost, or how much they earn, or what profits are derived from their operation, seems to me of little bearing upon the reasonableness of the charges in question. The facts of controlling weight and the only fair basis of judgment, as I think, are found by comparing sleeping-car accommodations with day-coach accommodations and what it costs to travel in sleeping cars with what it costs to travel in day coaches. When this comparison is made it becomes evident, to my mind at least, that the transportation charges now paid by passengers in sleeping cars are *relatively lower* than the charges paid by other passengers. The difference in the value of the service is greater than the difference in charge. The railroads in effect furnish two kinds of passenger cars, differing very materially in comfort, convenience, and safety, and passengers may take one kind or the other as they choose at the different rates provided. Now, what *ought* to be paid by passengers who elect to take the superior car *in comparison* with what *must* be paid by passengers who take the inferior car because, for the most part, they feel obliged to travel as cheaply as possible? Holding, as I do, that the *relation* between sleeping-car and day-coach rates is the vital matter of concern to the public, and believing that the present differences are of doubtful justice to the day-coach passenger, I can not vote to reduce sleeping-car charges, particularly lower-berth charges, and thereby increase the relative advantages now enjoyed by sleeping-car passengers."

¹⁶⁵ In *Corporation Commission of Oklahoma v. A. T. & S. F. Ry. Co.*, 25 I.C.C. 120 (1912), the Commission denied a petition for the restoration of sleeping-car service which had been formerly maintained; in *Rules and Regulations Governing*

rate *per se* is not in controversy. The increased revenue, whether collected directly by the rail carrier as a transportation charge or levied as an additional tariff upon space in sleeping or parlor cars, is provided exclusively for the benefit of the railroads. The Pullman service merely constitutes the cause or furnishes the occasion for the extra impost on passenger transportation. Yet the added charges thus collected are not only of importance to the railroads, because the revenue which they yield may be essential to the adequate support of the passenger service, but they are of vital concern to the Pullman Company, because the burden they impose may discourage the use of its special facilities. Substantial interests are thus at stake for both types of carrier; and the Commission is confronted with the task of adjusting each class of charges and molding their interrelationships on a reasonable basis. The proceedings which have brought these matters to issue disclose the intimate contact which exists between the service rendered by the railroad companies and that furnished by the sleeping-car companies, and they emphasize the essential unity of the regulative process as applied to transportation.

Because the propriety of the extra transportation charge is primarily involved under these circumstances, the rail carriers have generally appeared as the principal respondents. Initially the question presented to the Commission was whether the common railroad practice of requiring more than a single fare for the exclusive use of a Pullman compartment or drawing-room is just and reasonable. The problem emerged as a result of specific complaints, and the Commission consistently upheld the rules assailed, on the ground, chiefly, of the greater value of such service to the passenger and its greater cost to the carrier.¹⁰⁰ These determinations were expressly applicable only

Checking of Baggage, 35 I.C.C. 157 (1915), the Commission found not to be justified rules proposed by the Pennsylvania and the Baltimore and Ohio railroads prohibiting the through checking of baggage and the sale of through parlor and sleeping-car accommodations on combination tickets covering independent transportation by these lines and by foreign connecting lines; in *Crosby v. St. L.-S. Ry. Co.*, 112 I.C.C. 239 (1926), and in *Harden v. Pullman Co.*, 120 I.C.C. 359 (1926), the Commission dealt with alleged discriminations against colored passengers through refusal to furnish them Pullman accommodations.

¹⁰⁰ In *Moely v. Atchison, Topeka & Santa Fe Ry. Co.*, 33 I.C.C. 521 (1915), the complaint against the tariff rule requiring a minimum of one and one-half first-class tickets for the exclusive use of a compartment on certain "limited" trains was dismissed. The burden of proof was upon the complainant, and he was held not to have

to the extra passenger charges imposed in connection with the use of compartments and drawing-rooms and provided authoritative support for the voluntary policies of the carriers. While the practice, as thus approved, was very generally resorted to by the railroads,¹⁶⁷ it aroused comparatively little opposition on part either of the traveling public or of the Pullman Company. Sharp attention began to be focused upon the issue only when surcharges were affirmatively authorized by the Commission and were extended to the use of every type of Pullman service. When, upon the termination of Federal Control and immediately preceding the expiration of the transitional guaranty period, it became necessary to increase the flow of railroad revenue, the Commission utilized the device of the surcharge as a means, in part, of providing additional income from passenger service. An order was entered, over the opposition of the Pullman Company, authorizing the levy of a surcharge upon passengers in sleeping and parlor cars to the amount of 50 per cent of the charge for space in such cars, the surcharge to be collected in connection with the charge for space but to accrue to the rail carriers.¹⁶⁸ The provision of ade-

shown the rule to be unreasonable. In *Railroad Commission of Nevada v. S. P. Co.*, 36 I.C.C. 250 (1915), the Commission found the rules fixing the minimum transportation charges at two fares for exclusive use of drawing-rooms and at one and one-half fares for use of compartments to be reasonable, and similarly dismissed the complaint. Since no such extra transportation charges had been imposed by the Southern Pacific Company prior to July, 1913, the rules at issue effected an increase in passenger rates subsequent to January 1, 1910, and in accordance with the provisions of the Mann-Elkins Act the burden was upon the carrier to justify the increased rates. The Commission, accepting the carrier's representations as to the higher costs of such service and its greater value, found that the reasonableness of these extra charges had been affirmatively established. See also *Carter v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 43 I.C.C. 51 (1917).

¹⁶⁷ In *Railroad Commission of Nevada v. S. P. Co.* (note 166, *supra*), the Commission said (p. 250): "Similar rules are maintained for interstate traffic by nearly every railroad in the country and were allowed to go into effect over protests."

¹⁶⁸ *Increased Rates, 1920*, 58 I.C.C. 220, 242. During Federal Control, the Director-General of Railroads, in addition to advancing passenger rates to a minimum of 3 cents per mile, provided for the collection of an extra one-half cent per mile upon the purchase of Pullman space. General Order No. 28, May 25, 1918. This surcharge, which amounted to 16 $\frac{2}{3}$ per cent of the passenger fare, was in effect from June 10, 1918, to November 30, 1918. In *Increased Rates, 1920, supra*, a further advance of 20 per cent in passenger fares (to 3.6 cents per mile) was authorized, and the surcharge was reestablished on the terms indicated above, both adjustments becoming effective August 26, 1920. In opposing the reestablishment of the surcharge, the Pullman Company urged that its collection reduces travel in sleeping and parlor cars. The Commission found that this contention was not sustained by the record: "Figures quoted above

quate passenger revenue for the railroads was thus organically intertwined with the charges for Pullman service. The first obstacle encountered in the execution of this policy sprang from the refusal of many of the states to apply the surcharge on intrastate traffic. In most instances this refusal was but one aspect of the conflict between state and federal authority over the intrastate application of the basic passenger fares authorized by the Commission;¹⁶⁹ in a few cases the increased passenger fares were approved by the state authorities, but the surcharges were not accepted, or, after acceptance, were canceled by legislative enactment or administrative order.¹⁷⁰ In all these proceedings the Commission found that in so far as the intrastate charges for occupancy of space in sleeping and parlor cars required by state authority were lower than the interstate charges which it had authorized, they were unduly preferential of intrastate passengers, unreasonably prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Accordingly, in these numerous cases, the Commission prescribed the surcharges as well as the basic passenger fares for purely intrastate traffic,¹⁷¹ and the assertion of this power was sweepingly upheld by the Supreme Court.¹⁷² The surcharge was thereby rendered almost universally operative.

in this report indicate that the total number of passenger miles in 1918, notwithstanding that the surcharge was in effect for half the year, increased 8 per cent over the previous year and were greater than in any year prior thereto, which indicates that travel on the whole was not materially affected by the surcharge" (p. 241).

¹⁶⁹ See *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I.C.C. 290 (1920), and the proceedings following (Vols. 59 and 60, *passim*), which involved the application of the interstate rates, fares, and charges authorized by the Commission on intrastate traffic in the states of Illinois, Wisconsin, Iowa, Montana, Ohio, Michigan, Indiana, Texas, Louisiana, and Nevada.

¹⁷⁰ See *Surcharge for Sleeping Car Service in Alabama*, 62 I.C.C. 153 (1921); *Surcharge in Sleeping or Parlor Cars in Georgia*, 69 I.C.C. 623 (1922); *Surcharge for Sleeping or Parlor Cars in N.C.*, 102 I.C.C. 537 (1925).

¹⁷¹ In *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925), the Commission said (pp. 471-472): "We . . . prescribed both the basic passenger fare and the surcharge as reasonable for intrastate application in many states, the surcharge in at least 14 states. At present it is applicable interstate throughout the country and to all Pullman travel intrastate except in North Carolina, South Carolina, and West Virginia." But compare *Wichita Falls & Southern Passenger Fares and Charges*, 83 I.C.C. 603 (1923), in which the Commission found no showing on the record "of substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce" such as would warrant us in entering the order sought" (p. 605).

¹⁷² *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922).

On the merits of the policy, however, opposition continued. When, toward the end of 1921, as a means of meeting the situation caused by the sharp business depression, the Commission instituted a comprehensive investigation as to whether, and to what extent, railroad rates might be reduced, the Pullman Company sought the removal of the surcharge, on the ground that it tended to reduce travel in sleeping and parlor cars. Once more the Commission found no support for this contention in the record.¹⁷³ Both in this proceeding and in the earlier ones, however, the problem of the surcharge was largely treated as a subordinate if not a collateral matter, arising solely in connection with the adequacy of the total passenger revenue of the rail carriers, and it received practically no consideration in its relationship to the Pullman charges as such or to the aggregate burden upon the passenger service.¹⁷⁴ This more comprehensive question, as well as the reasonableness of the Pullman rates themselves, has now been brought to issue, although no final determination has yet been made by the Commission on this inclusive basis.¹⁷⁵ The imposition

¹⁷³ *Reduced Rates, 1922*, 68 I.C.C. 676 (1922). While a sharp decline in Pullman travel followed the application of the surcharge, the fluctuations in the number of Pullman passengers paralleled closely the fluctuations in the total number of revenue passengers carried. The Commission's finding was as follows (p. 729): "The record indicates that travel in sleeping and parlor cars has not decreased in substantially greater ratio than travel generally, and does not warrant a conclusion that the decrease in travel in sleeping and parlor cars is traceable to the surcharge."

¹⁷⁴ In his dissenting opinion in *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925), Commissioner Campbell said (p. 482): "In my judgment the surcharge is wrong in principle and should be abolished. It was established in *Increased Rates, 1920* . . . as an expedient way of raising additional revenue then needed to meet wage increases authorized by the United States Labor Board subsequent to the termination of the hearings in that case. There was no hearing at that time on the reasonableness of the charge and no order from us that it be established. Its propriety as a permanent charge was not considered."

¹⁷⁵ In *Order of United Commercial Travelers of America v. Pullman Co.*, Docket No. 11567, the reasonableness of the charges for accommodations in sleeping and parlor cars was the primary subject of inquiry. In the course of the hearings, however, it appeared that the collection of the surcharge accruing to the rail carriers constituted one important cause of complaint. Accordingly the Commission instituted an investigation under Docket No. 14785, with which the original No. 11567 was consolidated, into the propriety and reasonableness of both the surcharge and the Pullman rates throughout the United States. The Pullman Company and all the rail carriers were made respondents. Hearings were held in various parts of the country, and state authorities and commercial and other private organizations were represented. The contractual relations between the rail carriers and the Pullman Company were included within the scope of the inquiry, and the Commission entered upon a general examination of the Pullman Company accounts "in order that both the surcharge and the

of the prevailing surcharge, for the benefit of the railroads, was again found not to be unreasonable;¹⁷⁶ but despite this conclusion on the limited issue, the Commission disclosed the intimate relationship which exists between the surcharge, the basic passenger fare, and the Pullman rate, and it recognized that its immediate determination did not entirely dispose of the difficulties involved.¹⁷⁷ Indeed, the Commission expressly insisted that the surcharge "ought not to be regarded as an independent third charge upon the passenger,"¹⁷⁸ and

Pullman charge proper might be considered together." Because the investigation on this comprehensive basis might be unduly prolonged, however, the issue as to the surcharge was argued and submitted separately. The Commission's decision as to the surcharge was rendered January 26, 1925 (95 I.C.C. 469), but no final disposition has yet been made of No. 11567 and related cases involving the reasonableness of Pullman rates.

¹⁷⁶ *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925). The Commission found that the instant record fully substantiated its earlier conclusions that the surcharge did not result in a reduction of travel in Pullman cars; and it presented with approval the contentions of the rail carriers that the cost of transporting passengers in Pullman cars is greater than in coaches, and that the superior accommodations and additional service justify higher rates.

¹⁷⁷ Immediately preceding its finding that the surcharge is not unreasonable, the Commission clearly indicated the limited scope of its determination: "Whether or not the total which is now paid by the passenger, including basic railroad fare, surcharge, and Pullman charge, is too great we can not now determine. That question must be left for consideration when the record covering the remainder of this investigation has been completed." *Ibid.*, p. 479.

¹⁷⁸ *Ibid.*, p. 478. In support of its position, the Commission continued: "It was devised as a simple and convenient method for computing an addition to the basic passenger fare for those who ride in Pullman cars, and is thus equivalent to an increase in the rate per mile. Where the basic fare is 3.6 cents per mile, the surcharge adds 10 per cent and brings the fare up to about 3.96 cents per mile. The Pullman passenger pays to the rail carrier, on the average, less than 4 cents per mile as against the 3.6 cents paid by the passenger in the coach. The subject has been enmeshed in needless complexity. Respondents furnish transportation. The Pullman Company furnishes a bed or special seat and service akin to that of an innkeeper. The Pullman Company should collect charges sufficient to cover the cost of its service and a reasonable return on the value of the property devoted by it to the public use. Respondents should collect charges sufficient to cover the cost of their transportation service and a like reasonable return. The value of the service to the recipient should also be given due weight. It is said that when a passenger has paid for his railroad ticket and also for his Pullman ticket he has paid for everything he receives. But if he desires exclusive right to occupancy of a private car, a sleeping car, or a parlor car, the usual tariff requirement of 25 full railroad fares is generally conceded to be proper. If he wants a drawing room or a compartment to himself he must pay two railroad fares in addition to the Pullman Company's charges. . . . The principle is not different when, in effect, one and one-tenth passenger fares are collected from the passenger who has the reserved right to exclusive use of a designated arm chair in a parlor car or a designated double seat and a berth in a sleeping car. The rail carrier undertakes to do and does more for him than it does for the passenger in a day coach and the difference in the

it justified its collection, despite the absence of reliable comparative cost data as between Pullman traffic and coach traffic,¹⁷⁹ because it felt "that at least there is less warrant for eliminating the surcharge than for reducing the basic passenger fare."¹⁸⁰ In fact it was argued not only that the reduction in the carriers' revenues which would result from the removal of the surcharge ought more properly to be made available for the benefit of the passenger service as a whole, but that the need of decreases in freight rates in various parts of the country was even more pressing and hence constituted a still more

value of the service abundantly justifies the difference of one-tenth in fare. Whether this tenth be collected in the form of a surcharge, computed on the Pullman charge but accruing to the rail carrier, as at present, or whether it take the form of an extra ticket, representing the same one-tenth, or of a special ticket representing one and one-tenth fares, is immaterial as bearing upon the reasonableness of the charge in essence."

¹⁷⁹ "In this case we have no reliable cost figures. It is true that the record contains the results of a study made by a statistical analyst in our employ. This study was not intended as an accurate cost ascertainment, but as a comparative study of operating expenses. Considering the manner in which expenses have been divided, subdivided, and apportioned on the basis of doubtful data and arbitrary assumptions in an effort to arrive at the relative car-mile expenses of handling Pullman traffic and coach traffic it is clear that the results can not be accepted as determinative." *Ibid.*, pp. 477-478.

¹⁸⁰ While the Commission stressed cost to the carrier and value to the passenger as constituting, in principle, the basic factors in the case, it seems to have been influenced also by more general ethical considerations. "When the time comes," said the Commission, "for requiring the railroads to accept less passenger revenue than they now receive, those who experience the relative discomforts of ordinary coach travel, many of them because they must count the pennies, rather than those who select the most expensive and luxurious form of transportation which modern railroads afford, are clearly entitled to prior consideration." *Ibid.*, p. 478. Compare also the following from the separate expression of Commissioner Lewis (p. 480): "There are fundamental readjustments for which the \$35,000,000 to \$40,000,000 should be conserved. In passenger transportation, reductions when made should be in the basic 3.6-cent fare, which would apply to Pullman and coach travelers alike. Indeed, to reduce the passenger fare of the traveler who gets more transportation and, as a rule, can pay for more, and not to reduce the fare of the traveler who sometimes gets very little and whose ability to pay often makes it impossible to patronize the superservice, would seem to be a form of rank discrimination." The real issue, of course, involves economic rather than ethical considerations—it is whether the charges for each type of service are reasonable, in and of themselves and in relationship to each other. Moreover, even the argument from capacity to pay is by no means one-sided. We may note, for example, the following from Commissioner Campbell's dissenting opinion (p. 484): "The Pullman car, at least the standard sleeping car, is a necessity in traveling—not a luxury. It is a mistaken notion that the Pullman service is used only by the well-to-do. The poor man should have a place to sleep just as much as the rich man, but the higher the charges are made the greater will be the number who will be deprived of this essential service. Especially is the Pullman service a necessity to the business man who must travel, and the record indicates that if the charges are lowered a greater number of this class of travelers will use the Pullman service."

appropriate outlet for any downward readjustment of income from transportation.¹⁸¹ The surcharge, then, though collected by the Pullman Company in connection with its special services, was clearly shown to be related to the general level of passenger fares and even, more remotely, to the entire range of railroad rates. The dissenting commissioners, moreover, while conceding that extra services are rendered in the carriage of Pullman traffic, contended that these services should be paid for in the Pullman charges rather than in the transportation rates. "This is proper," asserted Commissioner Campbell, "because any extra expense to which the railroads are put in handling the Pullman cars arises not by reason of the haulage of the passenger, but by reason of the haulage of the facilities which enable the Pullman Company to furnish the special services which it holds itself out to furnish."¹⁸² The reasonableness of the Pullman charges proper is thus inevitably brought in issue, as well as the propriety of the contractual arrangements between the Pullman Company and the rail carriers.¹⁸³ Either an increase in Pullman rates or a reappror-

¹⁸¹ This line of reasoning was especially urged in the concurring opinion of Commissioner Lewis. He concluded this aspect of his discussion as follows (pp. 480-481): "It is true that there is not before us in this case the matter of reducing or adjusting other rates and charges, but the digression is justified by reason of there being urged on us broad considerations of public policy and justice to patrons of transportation. There is also the fact that if there is to be piecemeal cutting of rates, fares, and charges of many millions of dollars here and there, there will remain less financial margin for the more fundamental adjustments that must sooner or later come. It is a time to conserve carrier revenues for adequate development of transportation facilities and the reduction of rates for vital services, and not to dissipate them in granting relief that is not very greatly needed, and where a very small extra charge for an extra transportation service is equitable."

¹⁸² *Ibid.*, pp. 482-488, 483. Commissioner Cox joined in this dissent. Compare also the following from Commissioner McManamy's separate dissenting opinion (p. 489): "The majority justify the propriety of the surcharge because of the increased weight and cost per passenger of the Pullman car and because of the additional service rendered. Granting that there is an extra cost and service, it does not follow that the surcharge as a transportation charge is proper. It is true that the total service which Pullman passengers receive is superior to and more expensive than that furnished passengers in day coaches. Respondents [the railroads], however, furnish only the transportation service, for which the basic fare is 3.6 cents per mile . . . and which is not in issue. The increased cost and weight of car and the additional service rendered are all made necessary by and are a part of that for which the passenger pays the Pullman Company. This extra expense is a part of the cost of such service, for which the Pullman Company should pay." Commissioner McChord also dissented, without separate expression.

¹⁸³ Commissioner McManamy, for example, concluded as follows (p. 490): "The Pullman charges are now before us in another proceeding. If they are not on a proper

tionment of existing Pullman revenues, rather than the maintenance of the surcharge, may constitute the most equitable and satisfactory expedient for according the rail carriers full compensation for the passenger service rendered by them in connection with Pullman traffic.

But regardless of the ultimate merit of these conflicting contentions and the divergent conclusions drawn therefrom, it is obvious that the regulative process involved is in essence a single process. The provision of the special Pullman facilities by a separate carrier organized as a distinct corporate entity renders the performance of the regulative task somewhat more difficult, but it does not substantially alter the basic unity of the practical situation. More intimately even than in case of the express service, the Commission's jurisdiction over sleeping-car companies is indispensable to its adequate control of the rail carriers, and the actual exercise of its powers impinges, at every turn, upon the rights, duties, and interests of the railroads.

Pipe-Line Companies

The Commission's powers over pipe lines, to a greater extent than its powers over sleeping-car companies or any of the other carriers subject to its jurisdiction, have remained in most respects unexercised. We have already noted that the extension of jurisdiction to

basis they can be adjusted. If under the terms of their contracts with the Pullman Company respondents are inadequately compensated for hauling Pullman cars the contracts should be revised. The surcharge, admittedly a makeshift, unsatisfactory to the public and to the Pullman Company, and not justified by any transportation service which respondents render for the passenger who pays it, should be abolished." Commissioner Campbell emphasized especially the significance of the Pullman contracts in any sound resolution of the issue: "If the railroads are not properly compensated under their contracts with the Pullman Company they should be directed to revise the contracts rather than given permission to continue to exact the surcharge from the public. Improvidence in the making of the contracts constitutes no justification for continuance of the surcharge. . . . Upon argument and in brief counsel for the eastern railroads urged that section 15a of the interstate commerce act is a mandatory direction to us to so adjust rates as to provide the standard return as therein provided for, and the fact that certain of the roads are not making the standard return stands as an obstacle in the way of removing the surcharge. Arguments of this character are being pressed upon us constantly in cases of this kind, without being coupled with any showing as to the efficiency and economy of operation. Some are disposed to look upon section 15a as a mandate, but paragraph 2 of that section places a responsibility upon the carriers as well as the commission, and improvident contracts have no place in the realm of efficient operation" (pp. 483, 488).

pipe lines was primarily induced by developing abuses in the petroleum industry, in so far as they were attributable to monopolistic control of these carriers, rather than by maladjustments in the operation of the pipe lines as such.¹⁸⁴ This significant consideration is evidenced not only by the fact that the immediate cause of the inclusion of pipe lines among the carriers subject to the provisions of the Act to Regulate Commerce was a report of the Commissioner of Corporations on certain aspects of the petroleum industry,¹⁸⁵ but by the further fact that a number of subsequent official investigations into this general field have been conducted by agencies other than the Interstate Commerce Commission.¹⁸⁶ Only a single industry is involved, over which no direct control has been conferred upon the Commission; and the major problem in connection with the pipe lines serving that industry has merely concerned their legal recognition as common carriers, as a means of rendering their facilities available to all shippers. Under these circumstances the Commission's activities have been confined within very narrow limits.

¹⁸⁴ See pp. 58-59, *supra*.

¹⁸⁵ *Report of the Commissioner of Corporations on the Transportation of Petroleum* (May 3, 1906). The Commission has described as follows the direct relationship between this report and the enactment of the pipe-line amendment: "Pipe lines as facilities of interstate commerce were not included in the bill introduced in the Fifty-ninth Congress, first session, which became the basis of the 1906 revision of the act to regulate commerce. Nor, indeed, had such carriers been mentioned in the public hearings held before the Senate Committee on Interstate Commerce during 1905. It was not until May 4, 1906, when the bill had for several months been before Congress, that pipe lines were injected into it. On that date Senator Lodge, of Massachusetts, offered an amendment whereby pipe lines, engaged in the transportation of oil or other commodity, except natural gas or water for municipal purposes, were included in the act. It is proper to observe that Senator Lodge's modified amendment was offered only a few moments after the receipt by the Senate of the special message from the President transmitting the summary of the report by the Commissioner of the Bureau of Corporations in the Department of Commerce and Labor, on the subject of transportation and freight rates in connection with the oil industry—a report of an investigation undertaken in accordance with a House resolution. This summary and the Commissioner of Corporations complete report, which latter was transmitted to the Senate on May 17, 1906, contained an extended recital of the conditions against which the Lodge amendment was aimed." *In the Matter of Pipe Lines*, 24 I.C.C. 1 (1912), at p. 4.

¹⁸⁶ See, for example, *Report of the Commissioner of Corporations on the Petroleum Industry* (Part I, May 20, 1907, and Part II, August 5, 1907); *Report of the Federal Trade Commission on Pipe-Line Transportation of Petroleum* (February 28, 1916); *Report of the Federal Trade Commission on the Price of Gasoline in 1915* (April 11, 1917).

Despite the rather extensive operations of the pipe-line companies subject to control,¹⁸⁷ little occasion has arisen for regulating the rates and practices of these carriers, either on complaint or on the Commission's own motion.¹⁸⁸ Once the common-carrier status of these

¹⁸⁷ For a statistical summary of the results of these operations for the five-year period, 1921-25, see the Commission's *Annual Report* for 1926, p. 32. For the year 1925, the number of miles of pipe line operated was 70,009; their operating revenues were \$164,644,740; their operating expenses were \$80,231,636; their operating income was \$70,965,545; their net income was \$88,495,026.

¹⁸⁸ As far as the writer is able to discover, *Brundred Bros. v. P. P. L. Co.*, 68 I.C.C. 458 (1922), is the only proceeding in which pipe-line rates and practices have been given any extended consideration. The complainants were engaged in producing, purchasing, and selling crude oil. The defendants operated connecting pipe lines from the midcontinent and other oil fields to eastern points. The complaint alleged that the rates charged for the transportation of crude oil from points in Kansas, Oklahoma, and Texas to certain points in Pennsylvania were excessive, and that the tariff rule of the carriers requiring minimum tenders of 100,000 barrels for shipment was unreasonable. The Commission found the rates under attack to be reasonable, but it reduced the minimum tender requirement to 10,000 barrels. Its finding in the matter of charges, which was limited to the specific issues involved and was not to prejudice "any conclusion which may be reached upon a broader record as to the reasonableness of the defendants' rates generally" (p. 466), was based upon the usual considerations—rate comparisons, carriers' earnings, changes in operating expenses, the special hazards of the business. The Commission concluded (p. 462): "Defendants have shown that the increased rates in issue are reasonable as compared with other rates for pipe-line service. If defendants' earnings are excessive such fact might require a general reduction in all of their rates, but we would not be warranted in requiring any reduction in these particular rates below the level of the other rates. We, of course, can not pass upon the reasonableness of all of defendants' rates under the issues and upon the record in this case." As to the minimum-tender requirement, the Commission was largely influenced by the need of rendering the pipe lines available to small as well as to large shippers, so that the common-carrier status impressed upon them by law might not in practice be negated. Its specific determination was avowedly experimental in character. The Commission said (p. 466): "The transportation of oil by pipe line is essentially a bulk business, and that fact must not be lost sight of in determining the issue now under consideration. The pipe lines cannot be successfully operated on a dribble basis, and there is a reasonable minimum below which they should not be required to accept oil for transportation. But the minimum must be reasonable, and it is clear that that fixed by defendants does not square with the law in this respect. Rather it reserves the pipe lines to a few large shippers and essentially deprives the lines of the common-carrier status with which they were impressed by the interstate commerce act. We are practically without precedent upon which to base our determination of a reasonable minimum, and the reasonableness of any minimum can only be verified by actual experience. We believe that a minimum of 10,000 barrels would be sufficiently low to enable complainants, also producers or groups of producers, and refiners or others to utilize the pipe lines, and that it would be sufficiently high to mitigate the operating difficulties mentioned by defendants. Experience will prove whether such a minimum will effectuate the intent of the law that the pipe lines shall be open to the use of all as common carriers, subject only to such reasonable regulations as may be

companies had been legislatively declared,¹⁸⁰ administratively applied,¹⁸⁰ and judicially upheld,¹⁸¹ the enforcement of publicity has constituted, for all practical purposes, the exclusive mode of control. They have been required to file their schedules of rates and charges,¹⁸² to adhere to prescribed accounting methods,¹⁸³ and to submit reports of their operations.¹⁸⁴ Significant data have also been made available by the Commission through special investigation,¹⁸⁵ but no regula-

necessary to their efficient operation." Prior to the above case, in *Crude Petroleum Oil from Kansas and Oklahoma*, 59 I.C.C. 483 (1920), the Commission had ordered canceled a schedule filed by some of the same respondents as in that case proposing to withdraw a joint rate between some of the same points of origin and destination. Aside from these proceedings, however, pipe-line rates and practices as such have not been formally contested. The reasonableness of railroad rates on petroleum oil and its products has, of course, often come to issue. See, for example, *Midcontinent Oil Rates*, 36 I.C.C. 109 (1915). The problem has also arisen as to how far such rail rates must be adjusted to the pressure of pipe-line competition. In *Winona Oil Co. v. Director General*, 57 I.C.C. 152, 154 (1920), the Commission said: "The complainant contends that we should take into consideration this pipe-line competition in passing upon the rates here under attack. We may not, however, require rail carriers to reduce rates that are not shown to be unreasonable in and of themselves in order that the users of such rates may better compete with others who are in a position to utilize the less costly service of pipe lines."

¹⁸⁰ Hepburn Act of June 29, 1906, 34 Stat. 584.

¹⁸⁰ In *the Matter of Pipe Lines*, 24 I.C.C. 1 (1912).

¹⁸¹ *Pipe Line Cases*, 234 U.S. 548 (1914), reversing, except as to one company, the decree of the Commerce Court in 204 Fed. 798 (1913).

¹⁸² The issue as to whether all pipe lines were declared to be common carriers and as to whether such declaration was constitutionally valid (dealt with in 24 I.C.C. 1, 204 Fed. 798, and 234 U.S. 548) arose from an order of the Commission requiring pipe-line companies to file schedules of their rates and charges for the interstate transportation of oil by pipe line.

¹⁸³ See *Annual Reports*: 1906, p. 62; 1910, p. 31; 1912, p. 35.

¹⁸⁴ *Ibid.*; also, 1919, p. 37; 1925, p. 33; 1926, p. 32.

¹⁸⁵ *Conditions Affecting Crude Petroleum*, 36 I.C.C. 429 (1915). This investigation was made in response to Senate Resolution No. 442, of September 28, 1914. A comprehensive inquiry was contemplated concerning the conditions affecting the production, transportation, and marketing of crude petroleum. Much of the desired information, however, was obtainable only from the records of producing, purchasing, manufacturing, refining, and other industrial companies—which companies were under the jurisdiction of the Federal Trade Commission, and the records of which were being examined by that body in its parallel extensive investigation of the oil industry under Senate Resolutions No. 109 and No. 457. Accordingly, the Interstate Commerce Commission merely gathered such information as it could secure from the pipe-line companies themselves, through the exercise of its authority to examine the accounts, records, and memoranda of common carriers engaged in the transportation of oil by pipe line. The data which it set forth in its report related primarily, first, to the subsisting intercorporate relations between the various pipe-line companies and between the pipe-line companies and industrial concerns engaged in the production, purchase, or

tory action has followed. The mere existence of mandatory power over these carriers, together with the promulgation of the usual publicity requirements, have apparently sufficed to keep the pipe-line companies within the bounds of public interest.

But even the mere possession of this basic authority over pipe-line companies was not conceded to the Commission without sharp controversy. The jurisdictional issue that was raised concerned both the sweep and the validity of the pipe-line amendment. Section 1 of the Act to Regulate Commerce, as amended in 1906, asserted jurisdiction over any corporation or person engaged in the transportation of oil in interstate commerce by means of pipe lines, who, it was added, "shall be considered and held to be common carriers within the meaning and purpose" of the Act.¹⁹⁶ The first conflict arose in the matter of statutory construction. Did the concluding clause confine the Commission's jurisdiction to pipe lines that were technically common carriers, by virtue of their own conduct, or did it impress upon all pipe lines engaged in interstate transportation the status of common carriers and subject them to control? It appeared from the record¹⁹⁷ that most of the pipe lines did not hold themselves out as common carriers. They purchased the oil before transporting it, and they disposed of it by sale after transportation. "They claim," said the Commission, "to be dealers in oil who use their pipe lines solely to convey their own property from state to state."¹⁹⁸ Despite these circumstances, the Commission encountered no difficulty in finding a clear Congressional intent that all the pipe lines carrying oil from state to state shall be

sale of oil, and second, to the circumstances surrounding the discontinuance of the running and purchase of crude oil in 1914.

¹⁹⁶ Section 1 of the Interstate Commerce Act, as amended in 1920, omits the concluding clause. The Act is made applicable to common carriers engaged in the transportation of oil by pipe line; and the term "common carrier" is defined to include all pipe-line companies. The provision, both as originally enacted and as now stated, also includes the transportation by pipe line of commodities other than oil, except water and natural or artificial gas. For a discussion of the need of federal regulation of the transportation and sale of natural gas, see National Association of Railroad and Utilities Commissioners, *Proceedings*: 1924, pp. 100-101; 1930, pp. 64-73. The long-distance movement of natural gas has increased enormously. A bill (S. 5030) creating a new commission to regulate it was introduced December 3, 1930, by Senator Capper of Kansas.

¹⁹⁷ *In the Matter of Pipe Lines*, 24 I.C.C. 1 (1912).

¹⁹⁸ *Ibid.*, p. 3.

deemed to be common carriers, regardless of their previous status. The obligations of common carriers subject to the Act were impressed upon them, even though they were built over privately acquired rights of way, and even though, by resorting to the policy of refusing to carry oil unless it was first sold to them, they were apparently engaged in transporting only their own oil.¹⁹⁹ The new provision sought to meet these very situations. This construction, declared the Commission, reflected the plain meaning of the terms of the amendment and was fully confirmed by its legislative history.²⁰⁰ The propriety of this interpretation, in face of the language of the provision and the circumstances surrounding its use, can scarcely be

¹⁹⁹ Similarly, the Commission found that this traffic was not divested of its interstate character by the device of placing the ownership of the pipe lines in different corporations in each of the states through which they passed and of transferring title to the oil being transported to each of these corporations as it entered into its pipes at the state line. This "change of title, breakage of bulk, stoppage in transit, or whatever it may be that happens at these stateline points," declared the Commission, "is not made in good faith for some necessary purpose" (p. 6). Accordingly, it violates both the letter and the spirit of section 7 of the Act, which provides that no such tactics "shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination." This claim of the carriers also failed to meet the tests of purely intrastate traffic as established by the Supreme Court in *Cin., N. O. & Tex. Pac. Ry. v. I.C.C.*, 162 U.S. 184, 192 (1896), and in the later case of *Dostier v. Alabama*, 218 U.S. 124 (1910), in which the Court had said (p. 128): "What is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed." Finally, argued the Commission, entirely apart from questions of law, it is physically impossible to locate pumping stations or relay stations upon *state lines*. "Consider a line in its geometrical capacity, possessing only length, but neither breadth nor thickness, and contemplate the absurdity of such a line being the location of a pumping station, with its equipment of engines, boilers, tanks, and accessories. Moreover, the record shows that these locations on the state lines exist only in the intent of the pipe-line companies—in fact, they are generally several hundred feet away from the line" (p. 7).

²⁰⁰ *Ibid.*, pp. 4-6. Suggestions had been offered in the Senate for restricting the amendment to such pipe lines as "carry for the public," but the objections to such restriction were successfully sustained. In view of the practice of the pipe lines of buying the oil at the wells, the limitation of jurisdiction to those engaged in "transportation for hire" or in "transportation for the public" would have rendered the enactment entirely futile. While some doubt was expressed as to the constitutional validity of embracing *all* pipe lines in interstate commerce, there was complete agreement in the legislative debate that this was the intent of the amendment. "Throughout the discussion," said the Commission by way of conclusion, "there is abundant evidence that Congress passed this act for the purpose of subjecting all interstate pipe lines carrying oil to federal regulation, and took this action consciously, in the presence of the very constitutional question now raised as to its power" (p. 6).

questioned. Both the Commerce Court²⁰¹ and the Supreme Court²⁰² sweepingly affirmed its soundness.

But the question still remained as to whether such a broad assertion of power was constitutionally valid. The respondents had contended for a narrow construction as a means of bringing the enactment within the legal scope of legislative authority. Congress, they urged, did not possess the power to transform private carriers into public carriers by statutory declaration, and hence it must have intended to assert jurisdiction over those pipe lines only that had held themselves out as common carriers. Such a construction, it was insisted, was the

²⁰¹ In denying the contention of the respondents that the Act was made applicable only to such pipe lines as were common carriers when the amendment was adopted or became such thereafter through voluntary action, the Commerce Court said: "To our apprehension the meaning of this amendment is not open to serious question. It is a clear and comprehensive declaration, in no respect indefinite or incomplete. The concluding phrase is not a limitation or restriction, but, on the contrary, was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act. . . . So far as the debates in Congress when this amendment was pending may be resorted to for any purpose, they tend strongly to confirm the conclusion above expressed. We are convinced from an examination of what was then said, particularly in the Senate, that Congress undertook and intended by this amendment to make common carriers of and to subject to the provisions of the act as such the owners of private pipe lines, who were not common carriers, and who used their respective pipe lines, and had always used them, solely for the transportation of their own oil, in carrying on their private business; and it is equally clear that Congress enacted the amendment with full knowledge that the question of its constitutionality was involved." *Prairie Oil & Gas Co. v. U.S.*, 204 Fed. 798 (1913), at pp. 805, 806.

²⁰² In this respect the Supreme Court was in entire agreement with both the Commission and the Commerce Court. Speaking through Justice Holmes, the Court said: "The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Co. and its co-operating companies were not so engaged, no one was. It not only would be a sacrifice of fact to form, but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. . . . Its evident purpose was to bring within its scope pipe lines that, although not technically common carriers, yet were carrying all oil offered, if only the offerors would sell at their price." *Pipe Line Cases*, 234 U.S. 548 (1914), at pp. 559-560.

only safe construction—that is, the only interpretation of the statute that would not render it repugnant to the constitutional limitations of due process. But the Commission, relying upon sound legal doctrine and wise administrative practice, did not find it necessary to consider the question of constitutionality. It eliminated the constitutional issue in determining the sweep of the amendment, because there was no doubt as to the meaning and intent of the provision; it did not shrink from enforcing the amendment as thus broadly construed, because the issue of constitutional validity was solely a matter for the courts. "If there was doubt in our minds as to the purpose of Congress," said the Commission, "it would be proper to resolve that doubt upon the side of constitutional safety, but it seems quite manifest to us, from the history of this amendment to the act and from its language, that Congress intended to convert the interstate oil pipe lines of the country into common carriers. Whether Congress could lawfully so act is a matter for the courts judicially to decide. The Interstate Commerce Commission is an administrative body which may not presume to annul by interpretation an act of the federal legislature."²⁰³ When the issue came to the courts, the constitutional validity of the amendment was judicially upheld, but not without initial conflict of authority. The Commerce Court held the amendment to be unconstitutional and the Commission's order invalid. The argument proceeded upon purely legalistic grounds. The respondents were private pipe lines engaged in carrying their own oil. The statute subjected to regulation all persons and corporations using pipe lines for interstate transportation. It thus attempted to convert private businesses into public callings and to impose public duties upon private enterprises. This constituted a taking of property without due process of law and exceeded the powers of Congress.²⁰⁴ The Supreme Court,

²⁰³ 24 I.C.C., at pp. 3-4.

²⁰⁴ Note, for example, the following (204 Fed., at pp. 807, 808): "It does not undertake to regulate the business in which these private pipe line companies are and always have been engaged. Indeed, it assumes that the legal status of such companies . . . was that of persons pursuing a private occupation; and it attempts by a legislative declaration to make that private occupation a public calling and to impose upon those who pursue it the duties and obligations of common carriers. . . . Thus the owner of a private pipe line which was built upon private rights of way, and which has been used solely for the transportation of his own oil, is required to open and extend its use to whomsoever may desire its enjoyment, no matter with what resulting

on the other hand, in reversing the decree of the Commerce Court, looked behind the technical form of the arrangements to their practical substance. The ownership of the oil by the carrying companies was not deemed conclusive against these pipe lines being engaged in transportation and in interstate commerce. In fact, if not in appearance, the pipe lines were interstate common carriers, transporting all the oil offered. They assumed the outward guise of private enterprises only through the device of compelling the sale of the oil to themselves before accepting it for interstate transportation. The effect of the statute, then, was merely to require those who were common carriers in substance to become so in form also. The practical alternative open to the pipe lines was not to withdraw from the transportation service, but to cease requiring a sale of the shipper's oil as a condition of rendering that service. Under the circumstances prevailing in all but one of the proceedings there was no invalid interference with private business.²⁰⁸

inconvenience and injury to himself. . . . Is it [the amendment] not at variance with any reasonable conception of the rights and immunities of private property and the conditions under which it may be taken for public use? How can the conclusion be avoided that it operates and must operate to deprive the petitioners of their property without due process of law and to take that property without just compensation?" But compare the dissenting opinion of Judge Mack, pp. 821-826.

²⁰⁸ "So far as the statute contemplates future pipe lines," said the Court, "and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But . . . those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view." 234 U.S., at p. 561. That the Court was influenced by the realities of the situation, and sanctioned no arbitrary imposition of the common-carrier status, is evidenced by its differential treatment of the Uncle Sam Oil Company. The decree of the Commerce Court was reversed as to all of the respondents except this one. In this case the company owned oil wells in Oklahoma and a refinery in Kansas, with a pipe line between the two which it used for the sole purpose of transferring oil from its own wells to its own refinery. This company, the Court held, was not engaged in transportation as such. The transportation of the oil by pipe line was a mere incident to its use. "When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end" (p. 562).

On the basis of this determination, the Commission now possesses a large reservoir of power over pipe-line companies. Though largely unexercised, this power constitutes a further expression of the broad scope of the Commission's jurisdiction in the transportation field.

§4. TRANSMISSION AGENCIES

We have examined the jurisdictional scope of the Commission's authority, as defined by statute and as exercised in practice, over railroads, water carriers, express, sleeping-car, and pipe-line companies. These agencies, all of which are engaged in some type or aspect of the transportation of persons or property, furnish the principal services over which federal power has been asserted and constitute the chief utilities subject to the Commission's administrative control. Under modern statutes as under the common law, and in the federal as well as in the local sphere, the regulatory process was first applied in the field of transportation, and that field, as transformed in method and influence by revolutionary technical advances, has remained the prime object of governmental concern. But the public service industries have been a flexible and expanding group. In response to changing social and economic conditions, the category of common-law public callings underwent numerous changes of content;³⁰⁶ and, similarly, the public services subject to modern commission regulation have varied with time and place and surrounding circumstances.³⁰⁷ Many of the newer utilities have been brought within the scope of public control by analogy to common carriage and the enterprises closely related to it. Telegraph companies, for example, have been deemed to occupy the same relation to commerce as carriers of messages that railroads do as carriers of goods; and the same reasoning may be equally applied to telephone companies and other transmission agencies. In the public use of such instruments of commerce, therefore, these companies have been held to be subject to the regulating power of Congress with reference to their interstate and foreign business.³⁰⁸ But, as in case of the railroads, state control preceded

³⁰⁶ See Bruce Wyman, *op. cit.*, Vol. 1, chap. 1.

³⁰⁷ See Henry C. Spurr, *op. cit.*, Vol. 1, pp. 17-30.

³⁰⁸ See *Pennsylv. Tel. Co. v. West. Tel. Co.*, 96 U.S. 1 (1877); *Telegraph Co. v. Texas*, 105 U.S. 460 (1882); *West. Un. Tel. Co. v. Crovo*, 220 U.S. 364 (1911).

federal action. Prior to 1910 regulatory power over telephone and telegraph companies, like that over the more essentially local utilities, was exercised exclusively by the state legislatures and administrative tribunals. Until the passage of the Mann-Elkins law of that year, federal authority, under the Act to Regulate Commerce, was confined to railroads and to the other specified carriers of persons and property previously noted. Even as to interstate commerce, the Commission occupied solely the field of transportation. With that amendment, however, interstate communication also came under its control. Its jurisdiction was extended to transmission agencies. The provisions of the statute were made applicable to telephone, telegraph, and cable companies, whether wire or wireless, and these companies were declared to be common carriers within the meaning and purposes of the enactment.²⁰⁹ These agencies for the transmission of messages constitute the final class of carriers subject to the Commission's regulatory power. A brief survey is necessary of the nature and scope of this additional jurisdiction.

The jurisdictional section of the Act confers power over these transmission agencies with the same generality of terms as is used in connection with railroads and the other transportation agencies. The only express limitation, as in case of the carriers embraced by earlier legislation, concerns the interstate character of the services subject to control. This restriction has naturally conditioned the Commission's activity.²¹⁰ But while jurisdiction is thus conferred upon the Commis-

²⁰⁹ Section 1, as amended June 18, 1910 (36 Stat. 539). As amended in 1920 (41 Stat. 456), the provisions of the Interstate Commerce Act are made to apply to common carriers engaged in the transmission of intelligence by wire or wireless; the term "common carrier" is defined to include telephone, telegraph, and cable companies; and the term "transmission" is defined to include "the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted. . . ." Sec. 1, pars. (1) (c), (3).

²¹⁰ In *Local Commercial Telephone Service in Pittsburgh, Pa.*, 27 I.C.C. 622 (1913), the Commission, in response to informal protests, instituted a proceeding on its own motion as to whether the protestants were being subjected to undue prejudice in violation of the Act. Prior to April 1, 1911, subscribers had received unlimited local service at a fixed sum per annum. This contract was then discontinued, and new subscribers were offered a contract for a limited number of calls at a fixed sum, with a specific charge for each additional call. It was alleged that the aggregate annual charges under

sion in general terms, not all the specific provisions of the Act, which have been formulated with primary reference to rail carriers, are couched in language sufficiently broad or explicit to embrace transmission agencies. Some of the provisions against discrimination, for example, were plainly made applicable only to the transportation of passengers or property.²¹¹ Of more fundamental importance, the requirements of the Act as to publishing, filing, and posting of rates,

the new contract were greater than the annual flat rate under the old contract, to the undue disadvantage of the new subscribers. It was established, however, that the local calls were not counted against either the limited or the unlimited service subscribers in levying charges for interstate calls. "It therefore appears," concluded the Commission, "that the discrimination complained of does not affect the interstate transmission service participated in by respondent company, which would be necessary to be shown before this Commission would have jurisdiction of the matter. The case may arise in which unreasonableness or discrimination in telephone charges or services will so affect interstate transmission as to fall within the Commission's regulating powers . . ., but it seems clear that this is not such a case. It is manifest that in the present case whatever recourse protestants have, if any, must be secured through local or state authority" (p. 624). Similarly, in *Malone v. New York Telephone Co.*, 40 I.C.C. 185 (1916), in passing upon the reasonableness of a through telephone rate which exceeded the aggregate of the intermediate charges, the Commission held that "purely intrastate rates can not lawfully be included among the rates aggregated unless they are available for interstate application" (p. 188). On the other hand, in *Huntington Engineering Co. v. C. & P. Tel. Co.*, 112 I.C.C. 377 (1926), the Commission denied a motion to dismiss a complaint for want of jurisdiction because of the alleged absence of interstate matters. The issue was as to the reasonableness of the defendant's regulation requiring a cash deposit as security for the payment of bills for telephone service. The defendant admitted that it was an interstate carrier, but argued "that complainant is a subscriber to its local exchange service within the Huntington local exchange area, which is wholly intrastate, that the matter complained of is primarily applicable to and arises out of this service, and that it does not affect or burden the interstate transmission service of defendant to an extent that would warrant this commission taking jurisdiction" (p. 378). In reply, the Commission declared that any rule or regulation affecting or obstructing interstate commerce is within its jurisdiction, and that the telephone services involved were partly interstate. A mere statement of the essential facts was sufficient to dispose of this aspect of the proceeding; for the defendant admitted that more than 10 per cent of its total revenue was derived from interstate business, that during a specified period 11.28 per cent of the total charges paid by the complainant was for interstate service, and that during the same period 14.9 per cent of the toll messages originated by the complainant were interstate messages.

²¹¹ *Unrepeated Message Case*, 44 I.C.C. 670, 673-674 (1917): "But some of the provisions of the act, notably sections 2 and 4, that were neither modified nor amplified but were left unchanged by the amendatory legislation in question, have been found inapplicable in their present form to telephone and telegraph companies." On the inapplicability of section 4 to the transmission of messages, see also *Whitaker v. Western Union Telegraph Co.*, 59 I.C.C. 286, 289 (1920). It should be noted, on the other hand, that section 2 was so amended by the Transportation Act, 1920, as to include the transmission of intelligence.

charges, and regulations were likewise restricted to carriers engaged in the transportation of passengers or property.²¹² At the very commencement of its jurisdiction over transmission agencies, the Commission recognized this as a serious defect in the law,²¹³ and recommended to Congress that the statute be so modified "as to require telephone, telegraph, and cable companies to publish, file, and post schedules of their interstate charges in such manner and to such extent as may be required by the Commission."²¹⁴ But this recommendation has evoked no response, and the transmission agencies subject to the Commission's control are not required to file their tariffs.²¹⁵

Despite these limitations, however, the Commission is endowed with broad powers over telephone, telegraph, and cable companies. The basic provisions of the Act are clearly applicable to these carriers, and they provide an adequate structure for effective control of the interstate transmission of messages.²¹⁶ While initiative in fixing charges and establishing rules is entirely with the carriers, these rates and regulations must comply with the standards of reasonableness and equality prescribed by the Act and are subject to change under the mandatory authority of the Commission.²¹⁷ It is expressly de-

²¹² The terms of section 6, decided the Commission, "are too definite to permit us to extend their application by construction to telephone and telegraph companies; and, although the rates, charges, rules, and regulations of such companies may be stated more briefly perhaps, and with less expense, than the rates and regulations of any other class of carriers under our jurisdiction, we have not felt . . . that authority has been given to the Commission under Section 6 to require such companies to comply with its provisions when fixing and establishing their rates and charges." *Unrepeated Message Case, supra*, at p. 674.

²¹³ In its *Annual Report* for 1911, the Commission said (p. 6): "The foundation of efficient regulation, both as to the reasonableness of rates and undue discrimination, rests in lawfully established charges, and it would seem that such lawfully established charges should be contained in officially filed schedules, which would be binding upon the telephone, telegraph, and cable companies and those for whom such companies perform service."

²¹⁴ *Ibid.* See also *Annual Reports*: 1912, p. 4; 1913, p. 3; 1915, p. 12.

²¹⁵ *Huntington Engineering Co. v. C. & P. Tel. Co.*, 112 I.C.C. 377, 378 (1926).

²¹⁶ In its preliminary administrative ruling as to the applicability of the Act to telephone, telegraph, and cable companies, the Commission found that these companies were subject to the provisions of sections 1, 3, 15, and 20, "in so far as the terms thereof appropriately apply to such companies." *Annual Report*, 1911, p. 5. This ruling, as will appear, has been fully sustained in formal proceedings.

²¹⁷ *Shoemaker v. C. & P. Telephone Co.*, 20 I.C.C. 614 (1911); *White v. Western Union Telegraph Co.*, 33 I.C.C. 500 (1915); *Malone v. New York Telephone Co.*, 40 I.C.C. 185 (1916); *Unrepeated Message Case*, 44 I.C.C. 670 (1917); *Commercial Cable Co. v. Western Union Telegraph Co.*, 45 I.C.C. 33 (1917); *Private Wire Con-*

clared that all charges made for any service in the transmission of intelligence must be just and reasonable; and the prohibition against undue preferences is made binding upon all carriers subject to the Commission's jurisdiction. For the enforcement of these standards, the Commission is authorized, either on complaint or upon its own motion, to prescribe reasonable and non-discriminatory rates, classifications, regulations, and practices, in the transmission of messages as in the transportation of persons and property, from which determinations it is made unlawful for the carriers to depart.²¹⁸ Finally, the provisions as to accounts and reports are broadly applicable to all carriers subject to the Act, and the Commission, from the beginning, has utilized them for enforcing publicity and for securing necessary data for the intelligent exercise of its regulatory power over telephone, telegraph, and cable companies.²¹⁹ On this basis, the Commis-

tracts, 50 I.C.C. 731 (1918); *Whitaker v. Western Union Telegraph Co.*, 59 I.C.C. 286 (1920); *Postal Telegraph-Cable Co. v. W. U. Telegraph Co.*, 59 I.C.C. 512 (1920); *Limitations of Liability in Transmitting Telegrams*, 61 I.C.C. 541 (1921); *Consolidated Press Assn. v. W. U. T. Co.*, 73 I.C.C. 479 (1922); *Davis v. W. U. Tel. Co.*, 88 I.C.C. 489 (1924); *Huntington Engineering Co. v. C. & P. Tel. Co.*, 112 I.C.C. 377 (1926).

²¹⁸ Prior to 1920, the Commission encountered some difficulty in removing undue preferences because of its lack of authority to prescribe minimum rates. In *Private Wire Contracts*, 50 I.C.C. 731 (1918), the complainants sought to have the private-wire charges increased as a means of effecting removal of the alleged discrimination against the service rendered over public wires. Entirely apart from the substantive merits of the controversy—that is, granting discrimination, whether the public-wire charges should be lowered or the private-wire charges raised—the Commission pleaded lack of power to order the respondents to increase the rates at issue for private-wire service (pp. 761, 765). In this regard, however, the Commission's want of authority was not distinctively applicable to transmission agencies. Similar difficulties had been encountered, up to that time, with respect to rail carriers. *Kansas City Transportation Bureau v. A. T. & S. F. Ry. Co.*, 15 I.C.C. 491, 497 (1909); *Merchants Cotton Press & Storage Co. v. I. C. R. R. Co.*, 17 I.C.C. 98, 102 (1909); *Investigation and Suspension Docket* 93, 23 I.C.C. 652, 655 (1912); *Boileau v. P. & L. E. R. Co.*, 24 I.C.C. 129, 133 (1912); *Galloway Coal Co. v. A. G. S. R. R. Co.*, 40 I.C.C. 311, 315 (1916). See also Part I, pp. 197-201. By the Transportation Act of 1920, however, the Commission was clothed with power to prescribe minimum as well as maximum charges, and this increased authority was made expressly applicable to the transmission of messages as well as to the transportation of persons and property. Sec. 15, par. (1).

²¹⁹ See *Annual Reports*: 1912, p. 36; 1913, p. 41; 1916, pp. 39-40. Paragraph (5) of section 20, as amended by the Transportation Act, requires the Commission to prescribe for carriers subject to the Act the classes of property for which depreciation may properly be charged to operating expenses and the percentage of depreciation applicable to each of such classes of property. The tentative exercise of this power (in No. 14700 upon the depreciation charges of telephone companies, and in No. 15100 upon the depreciation charges of steam-railroad companies) gave rise to a sharp conflict of

sion has rightly declared that its control "over the rates, charges and practices of telephone and telegraph companies is and has been regarded . . . as being almost as complete and comprehensive as it is over the rates and practices of the several other classes of carriers that are subject to our jurisdiction. In other words, no embarrassment or difficulty has been found in applying the general provisions of the act, as well as many of its details, to common carriers serving the public in the transmission of messages over telephone and telegraph lines between interstate points."²²⁰

In practice, however, there has been no extensive exercise of these broad powers, either on complaint or on the Commission's own initiative. In the course of the past two decades, a small number of scattered telephone proceedings and a slightly larger number of telegraph cases constitute the entire record of the Commission's activity.²²¹ In considerable measure this circumstance is doubtless due to the fact that these transmission agencies, and particularly the tele-

views as between the telephone companies, which favor the use of depreciation accounting, and the steam-railroad, gas, and electric-light companies, which oppose the making of depreciation charges and the setting up of depreciation reserves. The state commissions, whose cooperation in the telephone proceeding was invoked by the Interstate Commerce Commission, also raised the collateral question as to whether the exercise of this power by the federal tribunal may not virtually deprive them of their jurisdiction over telephone companies, whose business is overwhelmingly intrastate in character. See National Association of Railroad and Utilities Commissioners, *Proceedings*: 1922, pp. 226 *et seq.*; 1923, pp. 299-308, 457-461; 1924, pp. 242, 408-412. In 1923, the Association, by resolution, instructed its Committee on State and Federal Legislation "to take such action as may be required to secure the amendment of the Interstate Commerce Act so that the jurisdiction to fix the depreciation charges, by telephone companies, shall clearly rest with the various state commissions, as it did prior to the enactment of the Transportation Act of 1920." *Ibid.*, 1923, p. 302. In the following year the Association unanimously adopted the following resolution: "That we urge upon Congress amendment to paragraph (5), section 20, of the Interstate Commerce Act, specifically to provide that the provisions thereof relating to depreciation accounting, and the rate of depreciation to be set up, shall not apply to telephone properties within states, the major part of the revenues derived from which is from intrastate transactions." *Ibid.*, 1924, p. 242. In the meantime the Commission held public hearings on the basis of its tentative reports (which had been made on March 10, 1923, and August 23, 1923, respectively), and after the two proceedings had been jointly assigned for argument before the entire Commission, an elaborate report was issued ordering depreciation accounting, as prescribed, to become effective January 1, 1928. These proceedings were again reopened, however, and the Commission's orders, as modified, were finally made effective as of January 1, 1933. *Telephone and Railroad Depreciation Charges*, 118 I.C.C. 295 (1926), 177 I.C.C. 351 (1931).

²²⁰ *Unrepeated Message Case*, 44 I.C.C. 670 (1917), at p. 673.

²²¹ In *Private Wire Contracts*, 50 I.C.C. 731 (1918), the Commission said (p. 765):

phone companies, are predominantly engaged in intrastate business.²²² There is the significant fact, also, that the tradition among users of utility services of resorting to the Commission for relief, which has been so firmly and extensively developed in the transportation field, is largely lacking among telephone and telegraph patrons, and that the Commission itself, because of this very paucity of complaints, does not maintain the intimate and continuous contact with the business of transmission agencies which might naturally lead to independent investigations. It is not unreasonable to assume, furthermore, that the Commission's relative inactivity reflects enlightened policy among these carriers in the sphere of interstate commerce. In any event, while the Commission appears to possess undoubted powers of far-reaching control, it has found little occasion to exercise them.

There have been no general determinations, for example, with regard to the level of charges for the transmission of messages. In the few instances in which the reasonableness of rates has come to issue, the complaints have concerned narrowly confined situations and the record has failed to disclose sufficient grounds for interference with established charges.²²³ More has been accomplished in the elimina-

"Few complaints concerning the rates and service of the three respondents have been filed with us, and consequently this field of regulation has been little touched." Since the three respondents involved were the American Telephone & Telegraph Company, the Western Union Telegraph Company, and the Postal Telegraph-Cable Company, it is obvious that the Commission's dictum was applicable to virtually the entire business of transmitting interstate messages. This situation has continued essentially unchanged.

²²² It has been estimated that 95 to 97 per cent of the revenue of the telephone companies comes from intrastate business, and that from 90 to 95 per cent of their property is located "within the various states, in the different municipalities." National Association of Railroad and Utilities Commissioners, *Proceedings*, 1923, p. 303. In *Telephone and Railroad Depreciation Charges*, 118 I.C.C. 295 (1926), the Commission recognized this sweeping predominance of intrastate business in the following words (p. 332): "Nor, as far as we are aware, has any exception been taken to the assertion of the committee representing the National Association of Railway and Utilities Commissioners that the great bulk of telephone business consists of intrastate local community service; that the interstate business is largely toll service; and that it constitutes an insignificant fraction of the total business."

²²³ A brief description of the principal proceedings involving rate reasonableness will indicate the practical insignificance of this aspect of the Commission's exercise of authority. In *White v. Western Union Telegraph Co.*, 33 I.C.C. 500 (1915), the standard rates for the transmission of telegraph messages from New York to San Francisco and of cable messages from New York to points in England were attacked as unreasonable

tion of discriminatory adjustments and in the approval or promulgation of principles and practices designed to maintain equitable relationships, both between the transmission agencies and the public users of their service and among the transmission agencies themselves. In the very first proceeding involving the exercise of the Commission's jurisdiction over these carriers, the standard of equality of treatment for rate-payers was held to be as fundamentally applicable to telephone and telegraph companies as it is to rail carriers.²²⁴ In

and unjustly discriminatory. The complaint was dismissed on both counts, and reparation was denied. The chief ground of attack was the simultaneous maintenance of lower telegraph rates for press dispatches and of lower cable rates for deferred messages, resulting, it was alleged, in undue discrimination. The Commission found that the circumstances surrounding the transmission of these varying types of messages were sufficiently different to justify the maintenance of classified charges. On the question of reasonableness, in and of itself, although "exhibits were introduced and some testimony given tending to show the earnings of defendant, its affiliation with other like companies, the history of its telegraph and cable rates, and many other things more or less relevant to this proceeding" (p. 501), the record was found not to be sufficiently clear and convincing to justify a reduction in the standard charges or to provide a basis for determining what the relation should be between the regular and special rates. In *Malone v. New York Telephone Co.*, 40 I.C.C. 185 (1916), involving the reasonableness of the rates charged for three telephone conversations between Flushing, New York, and Canaan, New Hampshire, the Commission found that to the extent that the combination through rates included a charge for terminal service that was not performed they were unreasonable; but on the record the Commission did not feel warranted in entering an order for the future. In *Commercial Cable Co. v. Western Union Telegraph Co.*, 45 I.C.C. 33 (1917), while holding that the defendant's refusal to accord the same rates for deferred cable messages to the complainant as to the complainant's competitor constituted unjust discrimination, the Commission found no controlling evidence in the record as to the reasonableness *per se* of the rates at issue. Finally, in *Whitaker v. Western Union Telegraph Co.*, 59 I.C.C. 286 (1920), a nominal opportunity presented itself for a comprehensive rate investigation, but the circumstances surrounding the complaints properly led to their dismissal. The complainant alleged that the telegraph rates for the "usual ten-word fast message" between specified points were unreasonable, unjustly discriminatory, and unduly prejudicial, in violation of the Act, and requested the Commission to establish reasonable rates for the future in lieu thereof; and he further alleged that "perhaps thousands" of other instances of unreasonable and discriminatory rates "are shown by data in the possession of the Commission," and prayed that the Commission's general jurisdiction over this class of cases be invoked. A vague and general statement by the complainant was the only testimony offered in support of the allegations, and there was some evidence that the proceedings bore some relationship to the complainant's desire to sell an invention to the defendants and were designed to be vexatious. In dismissing the complaints, the Commission said (p. 289): "The complainant not having made even a prima facie case, we decline his final suggestion to institute inquiries under our broad authority as to the reasonableness and fairness of the defendants' rates. The breadth of those powers suggests that they should not be used capriciously or vexatiously."

²²⁴ *Shoemaker v. C. & P. Telephone Co.*, 20 I.C.C. 614, 618-620 (1911).

ordering a telephone company to desist from charging lower rates to old subscribers than to similarly situated new subscribers, the Commission declared: "Being a public servant, subject to the provisions of a law that forbids undue preferences and unjust discriminations on any grounds whatsoever, it is manifest that nothing but a difference in the service rendered or in the facilities furnished will justify any difference in the charges exacted. . . ."²²⁶ The Commission has likewise assumed jurisdiction over service practices which might result in unjust discrimination against particular persons or localities,²²⁸ and it has condemned inequitable treatment accorded to connecting or competing transmission agencies.²²⁷

²²⁶ *Ibid.*, p. 621. The Commission held that even if the contracts with the old subscribers were valid when made they could not, after Congress had undertaken to regulate telephone rates, justify the violation of the provisions against undue discrimination. See *Armour Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908); *Louisville & Nashville R. R. Co. v. Motley*, 219 U.S. 467 (1911).

²²⁸ In *Davis v. W. U. Tel. Co.*, 88 I.C.C. 489 (1924), the failure of the defendant to establish an independent telegraph office in an Ohio village and the imposition by the carrier of a special charge for telephoning messages to and from this village were found, under the prevailing circumstances, not to constitute unjust discrimination and undue prejudice. In *Huntington Engineering Co. v. C. & P. Tel. Co.*, 112 I.C.C. 377 (1926), the defendant's regulation requiring a "suitable" cash deposit from subscribers who fail to pay their bills promptly was held to be defective for want of definiteness, but the amount of deposit actually required from the complainant was found to be neither unreasonable nor unduly prejudicial.

²²⁷ In *Commercial Cable Co. v. Western Union Telegraph Co.*, 45 I.C.C. 33 (1917), the Commission found that the charges imposed by the defendant upon the Commercial Cable Company, the complainant, for transmitting deferred cable messages originating in South America over its land lines were unjustly discriminatory, both as to the past and for the future, to the extent that they exceeded the charges imposed for a like service upon the Central & South American Telegraph Company, a competitor of the complainant. The Commission sought to maintain the principle of rate equality, and also to prevent the emergence of unwarranted competitive advantage. The Commission said (p. 38): "The two companies from which the defendant receives South American cable messages at New York, the complainant and the South American Company, are independent companies. Apparently the only difference between them, so far as the defendant is concerned, is that it has friendly relations with the South American Company, the result of years of close association and mutual assistance, while it has no such relations with complainant. It is hardly necessary to observe that the existence of friendly relations in the one instance and their apparent absence in the other can not be accepted by us as such a difference in conditions as to justify a difference in charges which otherwise would be condemned as unlawful." In *Postal Telegraph-Cable Co. v. W. U. Telegraph Co.*, 59 I.C.C. 512 (1920), the Commission found "that the Western Union's practice of refusing to extend credit for tolls on messages transferred to that company by the Postal for transmission, while extending credit on messages when tendered otherwise than through the Postal, including those of the same senders, is an unreasonable practice, in violation of the act and section 15 thereof, and

But perhaps the Commission's most far-reaching assertion of power has been manifested in the proceedings involving the reasonableness of the classifications of messages and services initiated by the carriers. In this connection its jurisdictional scope has embraced not only the rates and practices of interstate transmission agencies, but also the rules, regulations, conditions and restrictions affecting these rates and practices. The classification of telegraph charges into repeated, unrepeated, and special value rates, with variations in liability for negligent transmission in each case, has been held to be expressly authorized by the Act and subject to regulation by the Commission.²²⁸

that a reasonable practice would be to extend credit to the Postal, or to the senders, on messages transferred by the latter company, to the same extent that the credit is accorded by the Western Union on messages delivered directly to it by the senders" (p. 517). That the Commission was seeking to eliminate an unfair competitive practice, rather than to prescribe credit regulations or to interfere unduly with the right of the carrier to select its credit customers, is evidenced by the following pronouncement: "This is not a case in which the Western Union merely refuses credit to a particular concern. It does not deny credit to the Postal as a customer; it denies it to that company only as the medium of transfer of messages, even though the senders are themselves otherwise accorded credit. It does so, not because it deems either the Postal or the senders irresponsible, but solely in an effort to make it inexpedient for the Postal to accept such messages, and thus hamper its activities as a competitor. As it will accept for transmission on credit messages received from senders otherwise than through the medium of the Postal, but not when transferred by that company, and admittedly would accept on credit the Postal's own messages, the only possible inference is, a desire to discredit and injure the Postal. Applied in this way, with this obviously sinister purpose, the practice complained of is unreasonable in the last degree" (p. 516).

²²⁸ *Unrepeated Message Case*, 44 I.C.C. 670 (1917). The complainants suffered loss because of error in the transmission of an unrepeated interstate telegraph message, and sought to recover damages in the state courts. The defense of the telegraph company was, first, that the court could award only nominal damages as specified in the contract for unrepeated messages, and second, that the validity of this limitation of liability was solely for the determination of the Interstate Commerce Commission in the exercise of its authority over the rates and practices of interstate telegraph companies. The case was, therefore, held in abeyance, pending the Commission's ruling as to its jurisdiction, and, assuming it has jurisdiction, as to the propriety of such restriction of liability. The Commission found that it was vested with ample authority in the premises, and that the rates and restrictions involved were not shown to be unreasonable. In dismissing the complaint, it summarized its holdings as follows (p. 679): "Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are

Similarly, the maintenance of private-wire telegraphic service, at special rates, has been recognized by the Commission to constitute a just and reasonable classification.²²⁰ Even in these situations, however,

not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful." On the question of the legality of such contract stipulations by telegraph companies for exemption from full liability for errors or delays in the transmission of messages, the Commission has had explicit judicial support. *Primrose v. Western Union Telegraph*, 154 U.S. 1 (1894); *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27 (1919). In the latter case, in which incidental reference was made to the above proceeding of the Commission, the Supreme Court not only held that telegraph companies had the right, subject to the Commission's control, to establish special rates for unrepeat messages and to fix reasonable limitations of liability in connection with the charging of such rates, but it expressly upheld the Commission's controlling jurisdiction in these matters. "In the first place," said the Court, "as it is apparent on the face of the act of 1910 that it was intended to control telegraph companies by the act to regulate commerce, we think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws" (p. 30). In this connection, compare the following dicta from the Commission's report in the *Unrepeated Message Case* (p. 677): "It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some state courts would apparently meet with success, while if laid in the courts of other states would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that . . . the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."

²²⁰ *Private Wire Contracts*, 50 I.C.C. 731 (1918). Section 1 of the Act provides "that messages by telegraph, telephone, or cable . . . may be classified into day, night, repeated, unrepeat, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." Since private-wire service is not specifically mentioned, its lawfulness depends upon whether it may properly be included among "such other classes as are just and reasonable" which the carriers are empowered to establish. While the Commission refused to recognize the propriety of this classification, and of the relatively low rates attached thereto, on the theory that a wholesale service is being rendered or on the assumption that it is a surplus or by-product service, it concluded that this leased-wire service, "stripped of certain abuses," is sufficiently different from the other classes of service furnished by telegraph companies to justify a distinct classification.

while sweeping jurisdiction was asserted, the Commission's actual determinations have but touched the fringes of the regulative process. Aside from general approval of the established classifications, reasonable rules have been prescribed for telegraph companies with regard to the limitation of their liability for negligence in the transmission or delivery of repeated, unrepeatd, and valued messages,²⁸⁰ and the elimination of certain abuses in connection with the private-wire telegraphic service has been recommended.²⁸¹ But the charges them-

and it found that the established practice was not shown to be unduly prejudicial to the users of the public telegraph service. With regard to private-wire telephonic service, on the other hand, the Commission was "unable to perceive any essential differences between this and the toll service rendered the general public" (p. 765), except on the wholesale theory which it had repeatedly condemned as inapplicable to common carriers, and hence concluded that it is not a just and reasonable classification.

²⁸⁰ *Limitations of Liability in Transmitting Telegrams*, 61 I.C.C. 541 (1921). This was a general investigation, and the record in the *Unrepeated Message Case* was made part of the proceeding. All common carriers engaged in the transmission of interstate telegraph messages were made respondents. It appeared that some of the companies, notably the Western Union, were not adhering to their published rules in the settlement of damage claims. "To secure and retain the good will of the public," said the Commission, "and to encourage a more liberal use of its facilities the Western Union makes it a point to adjust as promptly as possible at least a large percentage of meritorious claims presented to it, regardless of the class of message and of the admonition in the former report that its rules, as part of the rates, must be as strictly observed as the rates themselves" (p. 545). While the Commission condemned this practice, it deemed this voluntary liberality on part of the Western Union, which was handling 75 per cent or more of the telegraph business of the country, strong evidence that the prevailing rules were unreasonable. On the entire record it found a substantial revision of these rules necessary. "All other common carriers subject to the act have been made fully liable for their errors or negligence, notwithstanding attempted limitations by contracts, rules, or otherwise, except in instances where they have been expressly authorized by this Commission to maintain varying rates dependent upon the declared or agreed value of the article transported; and the record herein offers no sound reason why telegraph companies should longer be permitted to avoid liability for their errors or negligence or to limit it to the nominal amounts now provided for in their rules" (p. 549). Accordingly, the existing rules were declared to be unreasonable, and new rules were prescribed: the maximum liability for messages transmitted at the unrepeatd rate was fixed at not less than \$500; the maximum liability for messages transmitted at the repeated rate was fixed at \$5,000; and the liability for valued messages was limited "to the value stated in writing by the sender of the message at the time it is offered for transmission upon payment of the repeated rate plus one-tenth of 1 per cent of the stated value in excess of \$5000" (p. 550).

²⁸¹ It appeared, in the first place, that in case of interruption of the service, private wires were restored before the needs of the general public were adequately cared for, and that one of the contracts stipulated that in time of interruption of the private-wire service the public wires could be used by the lessees at half the regular rates. The Commission recognized its lack of control over the operation and physical maintenance of the carriers, but in approving the private-wire service as a just and reasonable classi-

selves have been left undisturbed. No record has yet been developed on the basis of which the Commission has felt justified in fixing rates for the various classes of service or in determining the rate relationships which should prevail between them.²⁸²

The Commission's mandatory authority has thus served, in large measure, as a negative restraining influence rather than as a positive controlling instrument. The infrequency of complaints, under these circumstances, would seem to reflect an absence of serious maladjust-

fiction, it condemned these practices as an unlawful abuse. "We are not to be understood as considering just and reasonable any classification which operates to restrict to a few persons equipment necessary for the efficient service of the public. In this connection it is proper to state that the provisions of the contract of one respondent that in time of interruption to the private wires, the public wires can be used at half the regular rates is unduly preferential and must be eliminated." In the second place, it appeared that so-called "contraband" messages were frequently sent over the private wires—that is, contrary to the provisions of the contracts, messages were transmitted for persons other than the lessees. The Commission distinguished this situation from that involved in the practice of aggregating freight shipments into carload lots and shipping them at carload rates, which had been approved by the Commission and sustained by the Supreme Court in *Forwarders Case*, 220 U.S. 235 (1911), and found the telegraphic practice to constitute an abuse of the private-wire service. "We are of opinion and conclude that respondents are justified in inserting in the contract for private-wire service a provision restricting the use of the instruments and facilities provided to the transmission of messages concerning the business of the lessee or lessees and providing that messages shall not be transmitted for other persons or firms. As shown above such provisions are now embodied in respondents' contracts, but it is said that they are not enforced. . . . So long as a provision remains a part of the contract it should be enforced. This is not to say that we consider it unlawful for two or more persons to unite in securing private-wire service. But where this is done, all should be named as lessees." *Private Wire Contracts*, 50 I.C.C. 731, 763, 764 (1918).

²⁸² Note, for example, the following: "While recognizing the propriety of the so-called Morse private-wire service as a separate class of service available to the public upon reasonable compensation, it is not to be inferred that we approve the existing relation between the charges for such service and those for messages sent through respondents' commercial offices. Whatever may be the defects in the examples set forth earlier in this report they obviously warrant the conclusion that respondents are furnishing the more valuable service as a relatively lower charge contrary to recognized principles of classification. [No italics in original.] . . . As pointed out, however, it is beyond our power to require respondents to increase their charges for private-wire service. And even did such power exist, we can not assume that these charges should be raised rather than that those for the sending of day [*sic*] messages should be reduced. The charges for messages other than by private wire are not in issue. . . . We are convinced of respondents' desire to have their rates just and reasonable in themselves and properly related with respect to the various services performed. They should consider whether or not their rates for Morse private-wire service should be revised." *Ibid.*, pp. 764-765. Because of the additional fact that all the telegraph and telephone systems within the jurisdiction of the United States had just been brought under Federal Control (by the President's Proclamation of July 22, 1918), no order was entered in this proceeding.

ments in the conduct of the interstate transmission agencies. From the standpoint of the Commission's jurisdiction, as exerted in practice, the principal regulatory tasks, as they have manifested themselves in the field of transportation, still remain to a striking degree in the realm of unexercised power.²³⁸

55. AUXILIARY TRANSPORTATION FACILITIES

In concluding our survey of the utilities and services embraced within the scope of the Commission's jurisdiction, it is necessary to examine the nature of the power exercised by the Commission over business interests which are private in character and distinct in ownership and primary function from the various common carriers subject to its direct control. This indirect exercise of power over certain aspects of agricultural, mining, lumbering, and manufacturing enterprises is largely incidental to the enforcement of effective control over rail carriers. It is obvious, of course, that the entire regulatory process operates to protect the shipping public against maladjustments in transportation rates and practices, and thus exerts a potent influence in molding the character and direction of particular economic undertakings and of the general commercial and industrial structure. In this sense the assertion of the Commission's authority impinges upon private interests in every sphere of regulatory activity. We are here concerned with a much narrower and more definite jurisdictional situation. Business enterprises frequently provide facilities and services in aid of the transportation function performed by rail carriers. In order that these facilities and services may not be utilized as means of imposing unreasonable burdens upon the carriers and of effectuating discriminatory adjustments as between shippers, it is essential that they be subject to the Commission's control. Such control constitutes an integral part of any adequate system of railroad regulation.

²³⁸ By the Act of June 10, 1921 (42 Stat. 27), the Commission was empowered to authorize the combination of telephone companies, through merger, stock purchase, or lease agreement, upon a finding, after public hearing, "that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest." Through the issuance of certificates of advantage and public interest, numerous authorizations have been granted by the Commission. See *Finance Reports*, I.C.C. Vols. 70, 71, 72, etc., *passim*.

Inequitable results may flow both from the apportionment of the private facilities thus furnished by the shipper and from the allowances made by the carrier as compensation for the services rendered thereby. These problems have arisen in their simplest form from the use of private cars in connection with the freight traffic of the railroads. We shall analyze, therefore, the scope of the Commission's authority over such use of private cars, in its relationship both to effective control of the railroads and to the question of encroachment upon the rights of private property. But the Commission's jurisdiction over private cars neither exhausts its power in this sphere nor encounters its most difficult tasks. A more complex situation is created when a transportation service is furnished by private business enterprises, either directly or through so-called "industrial railroads" or "tap lines" owned or controlled by them. Not only may the *amount* of the allowances made for such service operate, in the absence of governmental supervision, as a prolific source of personal favoritism, but the question always arises as to whether *any* allowance is justifiable. In other words, before divisions of joint rates are prescribed or the absorption of switching charges is approved under such conditions, a differentiation must be made between services which are essentially shippers' services and those which are carriers' services performed by the shipper, and, on the side of the instruments of transportation, between railroads which are mere plant facilities and those which are *bona fide* common carriers. These tasks have given rise to numerous perplexing problems, with some of which the Commission is still grappling in considerable uncertainty. The proceedings involve judgments upon the character of private business operations as well as upon the relationships which shall prevail between line-haul carriers and those providing ancillary or supplemental transportation services.

In these circumstances the development of the Commission's jurisdiction over private cars and over industrial railroads constitutes a significant expression not only of the sweep of its authority in the regulation of railroads, but of the scope and limitations of administrative action with reference to the property and transportation activities of unregulated business undertakings.

Private Cars

The use of private cars on the railroads dates from the very beginning of transportation by rail.²⁸⁴ The early lines were merely toll roads, the shippers providing the vehicles and the railroad companies the road and motive power. But this conception of rail transportation, and the toll system which it involved, did not long endure. It was soon found that railroad operations could not be safely or efficiently conducted without control by the carriers of the equipment used. By 1845, therefore, the facilities of transportation were furnished by the railroads themselves. It became the duty of the carriers to supply suitable cars. With the growth of traffic, however, and particularly since the early '80's, privately-owned cars, by way of supplement to the general stock of freight cars furnished by the roads, have come into increasingly wide use. For the most part these cars constitute specialized equipment, designed to meet the peculiar needs of particular classes of traffic, "which the carriers could not, or did not, supply."²⁸⁵ They consist of many types, of which the more important are tank cars for the transportation of oil and other liquids, refrigerator cars for the transportation of fruits and meat products, coal cars, and stock cars. These private cars are owned either by shippers, who use them primarily for the carriage of their own products, or by private-car lines, which render them available, at prearranged rentals, both to shippers and to railroads. Significant advantages have accrued from the use of private cars. The need for specialized equipment and for the development of improved facilities has doubtless been met more quickly and more completely than would have been likely if

²⁸⁴ For a brief survey of the origin and development of private cars, see *In the Matter of Private Cars*, 50 I.C.C. 652 (1918), at pp. 656-660.

²⁸⁵ *Ibid.*, p. 657. On January 1, 1913, there were 137,179 cars owned by private interests. On January 1, 1918, about 200,000 cars were held in private ownership, constituting approximately 8 per cent of the total freight cars owned and used by the carriers of the country. *Ibid.*, pp. 660, 673. According to the *Report on Transportation of the Joint Commission of Agricultural Inquiry* (House Report No. 408, 67th Cong., 1st Sess., 1922, p. 237), there was, as of 1921, a total of 225,724 privately-owned cars, constituting about 10 per cent of the aggregate number of freight cars in railroad use. The growth of private equipment is strikingly evidenced by the increase in privately-owned refrigerator cars. On January 1, 1913, an aggregate of 103,508 refrigerator cars were in service, of which 48,926 were owned by the railroads and 54,582 were owned by private interests. By September 1, 1927, the total number of refrigerator cars was in excess of 160,000, of which only 44,529 were owned by the railroads. In

sole reliance had been placed upon the duty of the carriers to provide such equipment and facilities. Through the intervention of private owners, moreover, who are free to distribute their cars as demand warrants, these special types of equipment are more flexibly utilized than if owned by particular carriers in particular sections of the country.²⁸⁶ Finally, the private cars have proved an indispensable adjunct to the efficient operation of the industries which primarily rely upon them.²⁸⁷ But the possibility of flagrant abuse also inheres in the situation. Allowances for the use of private cars may be excessive, to the detriment of the carriers and the general public, and they may serve as rebating devices, to the detriment of competing shippers. Furthermore, the distribution of these cars may be so adjusted as to effect unreasonable discriminations in service. Such abuses have frequently emerged. It is considerations of this character that have called forth the Commission's regulatory processes.

commenting upon these figures the Commission said (*Annual Report, 1927, p. 43*): "It will be noted there has been a decrease of 4,397 in carrier-owned refrigerator cars and an increase of more than 60,000 privately-owned refrigerator cars, thus indicating a strong trend toward private ownership of this type of equipment. The obvious purpose of this is to create a more fluid car supply which, properly administered, will more adequately meet the needs of the seasonal traffic for which such cars are designed." See also *Annual Reports: 1929, p. 54; 1930, p. 51.*

²⁸⁶ "The car lines have forces of experts to watch the crop prospects and to advise as to the needs of particular sections of the country, to secure cars and see that they are on hand for the transportation of all sorts of products in refrigerator cars. If there is a crop failure in one section of the country, the cars are sent to other sections, and are kept actively in use to the highest degree possible." *In the Matter of Private Cars, 50 I.C.C. 652 (1918), at p. 672.*

²⁸⁷ Compare the following unqualified pronouncements of the Commission: "It is clearly established that shippers of petroleum oils, fresh meat, packing-house products, and dairy products could not have done the volume of business they have done in the past, or that their plants were constructed to do, except they had possessed themselves of private cars over which they could exercise, and have exercised, control. The refiner of oil or the meat packer could no more do business on an economical and efficient basis without his private cars than he could without his modern equipped refining or packing plant. The private car part of the business has grown with the rest. Doubtless in the beginning demands were made by these shippers that carriers should supply tank and meat cars but it was quickly demonstrated that business could not be done in the most effective manner were carriers to own or control cars of that kind. As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so. The oil refiner and meat packer demand an adequate supply of cars at all times. It is conceded by shippers that neither an adequate supply nor its efficient distribution can be afforded by carriers. The requirement has been that there shall be the most efficient use of tank and refrigerator cars, which has been one of the results of private ownership. While this has undoubtedly been of benefit to carriers, it has been of incalculable benefit to shippers as well." *Ibid., p. 683.*

The evils resulting from the use of private cars and from the operation of private-car lines were early made matters of serious concern. In an investigation conducted by the Commission in 1889, it appeared that mileage payments for cars owned by private shippers had been used to cover discriminations in rates, and that such payments yielded exorbitant profits on the investment of the car owners.²³⁸ A second investigation was conducted in 1892, and the Commission again found that the use and method of payment for private cars resulted in discriminatory practices and absorbed an undue proportion of the earnings of the carriers.²³⁹ These evils continued, particularly in connection with the refrigeration services furnished by private-car lines, and called forth repeated condemnation from the Commission.²⁴⁰ But there was no clear-cut avenue to relief. The shippers were beyond the Commission's control; the private-car lines, as such, were not embraced within the Commission's jurisdiction; and there was serious question as to whether the special services rendered in connection with the use of private cars were subject to its regulation. Under these circumstances, the Commission, from the beginning, urged upon Congress the need of explicit power in the premises.²⁴¹ Although it expressed the conviction "that the private ownership of cars by

²³⁸ *Annual Report*, 1889, pp. 15-18. "It is an obvious deduction from all the facts," concluded the Commission, "that cars for the various kinds of business done by a carrier should be owned by the carrier itself and furnished to all alike, or, if owned by the shipper, only such reasonable allowance for their use should be made as to permit no advantage to the private owner of cars who is also a shipper, nor afford a margin for paying rebates to other shippers."

²³⁹ *Annual Report*, 1893, pp. 60-67. With regard to the financial burden upon the carriers, the Commission said (p. 63): "The practice is one which yearly saps the revenue of the railroad companies and, while forcing their own equipment to stand idle, burdens such companies with the maintenance of the private cars while on their lines. Some idea of the magnitude of the amounts paid by railroad companies for the use of private cars may be gathered from the figures as shown by the report of the seventeenth annual convention of international car accountants, 1892, wherein it is stated that at the rate of three quarters of a cent per mile they earned during the year 1890 over \$30,666,000 in mileage, while the total cost of the 70,000 private cars in use was about \$91,000,000. At this ratio the cars would pay for themselves in about three years."

²⁴⁰ See *Annual Reports*: 1903, pp. 22-26; 1904, pp. 10-19.

²⁴¹ In its *Annual Report* for 1889 the Commission recommended additional legislation for "the regulation of the payment of car mileage for the use of cars of private companies or individuals" (p. 108). In its *Annual Report* for 1893 it concluded its discussion of private cars in the following words: "Too little is yet known about the particulars of their use to enable the Commission to recommend in detail legislation with regard to private cars used on our railways, but we feel warranted in recommend-

shippers, or by outside concerns which furnish them to shippers, is wrong in principle, because of the unjust and discriminating results which naturally, if not inevitably, attend the use of equipment not owned or absolutely controlled by the carrier," it recommended that "the allowance for the use of private cars should be controlled by the Commission at least to the same extent as the rates of transportation."²⁴²

The necessary power was finally conferred by the Hepburn Act of 1906.²⁴³ First, the transportation subject to the Commission's control was so defined as to embrace, expressly, all cars and other vehicles, irrespective of ownership or contract, and all services in connection with their use; and second, the Commission was empowered, in cases where the owner of property transported furnishes any instrumentality or renders any service connected with transportation, to determine the reasonable maximum charge or allowance to be paid by the carrier for the use of the instrumentality thus furnished or for the performance of the service thus rendered. This jurisdiction was further supplemented by the Car Service Act of 1917²⁴⁴ and by the Transportation Act of 1920.²⁴⁵ In authorizing the Commission to establish reasonable rules, regulations, and practices with respect to car service, these statutes explicitly empowered it to prescribe the compensation to be paid for cars not owned by the carrier. It must be noted, however, that the Commission's jurisdiction was not extended by these provisions over any new or distinct type of transportation agency. The private-car lines as such, for example, are not subject to the Commission's regulatory power.²⁴⁶ Essentially the Commission

ing to Congress a careful consideration of the whole subject, both of private cars and fast-freight lines, and the enactment of such rules and regulations with reference to their use and compensation for their use as it may deem sufficient to guard the public against discrimination and unjust treatment" (p. 67).

²⁴² *Annual Report*, 1903, pp. 25-26. For more detailed suggestions as to needed legislative enactments, with particular reference to the abuses attending the provision of private refrigerator equipment and service, see *Annual Report*, 1904, pp. 18-19. These concrete suggestions were prefaced by the following general declaration (p. 17): "The only way in which a complete remedy can be afforded is by investing this Commission, or some other tribunal, with power to inquire whether these charges are reasonable, and to make them reasonable if found unreasonable."

²⁴³ See Part I, pp. 41-42.

²⁴⁴ See Part I, pp. 236-237.

²⁴⁵ See Part I, pp. 146-147.

²⁴⁶ *Ellis v. I.C.C.*, 237 U.S. 434 (1915). The Commission had instituted an investigation to determine whether or not the allowances paid for the use of private cars,

was merely enabled, through these legislative enactments, to exercise more effective control over the railroads. It is the instrumentalities and services of rail carriage which have been brought under the Commission's full sway; and it is through the control of these instrumentalities and services that the use of private cars and the operation of private-car lines are encompassed by the Commission's jurisdiction. The Commission's powers spring from the carriers' utilization of privately-owned equipment.

If, however, "the private ownership of cars by shippers, or by outside concerns which furnish them to shippers, is wrong in principle,"²⁴⁷ as had been declared by the Commission, the most direct avenue to reform was to discourage such ownership and use of pri-

the practices employed in the handling and icing of such cars, and the minimum weights prescribed for shipment therein, were in violation of the Act to Regulate Commerce. All the rail carriers were made respondents, and all owners and operators of cars were made parties. In the course of the investigation the vice-president of the Armour Car Lines declined to answer certain questions and to produce certain documents (designed to disclose whether the Armour Car Lines were controlled by Armour & Company), as propounded and required by the Commission. The district court ordered the witness to comply. Appeal was taken to the Supreme Court. While the immediate issue merely concerned the procedural question of compulsory testimony, its solution necessarily involved a determination of whether the private-car lines are common carriers subject to the Commission's jurisdiction. In reversing the decision of the lower court, the Supreme Court held that the Armour Car Lines were not such common carriers. "It has no control over motive power or over the movement of the cars that it furnishes . . ." said the Court, "and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be answerable for what they hire from the Armour Car Lines, if they would not be otherwise; but that does not affect the nature of the Armour Car Lines itself" (pp. 443-444). In the light of this conclusion, the Court disposed of the specific issue as follows: "The Armour Car Lines not being subject to regulation by the Commission, its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice" (p. 445). While differences of opinion were possible as to the propriety of the questions as a means of discovering whether unlawful advantages were accruing to Armour & Company (see dissenting opinion of Justice Day), it was conclusively established that the private-car lines as such are not common carriers subject to the Commission's jurisdiction. Similarly, it has been held that such lines are not "carriers by railroad." *Guaranty Claim of C., N. Y. & B. Refrigerator Co.*, 70 I.C.C. 575 (1921), 71 I.C.C. 7 (1922); *Chicago Refrigerator Co. v. I.C.C.*, 265 U.S. 292 (1924).

²⁴⁷ *Annual Report*, 1903, p. 25.

vate cars. Before asserting its power of positive control, therefore, the Commission made an effort to undermine the very basis of private-car ownership. The difficulty lay in finding express statutory authority for the achievement of what it deemed a desirable public end. In the absence of legislative condemnation of the practice, and in view of its widespread and long-continued prevalence, the Commission was clearly without power to prohibit the use of private cars on the railroads.²⁴⁸ Could the same result, or one in the same general direction, be accomplished by enforcing the obligation of the carriers to furnish necessary facilities?

Prior to the Hepburn amendments of 1906, the Commission had determined, in a number of proceedings, that it was without jurisdiction to compel acquisition by the carriers of adequate and proper car equipment.²⁴⁹ It argued, soundly, that the obligation to furnish transportation facilities of various kinds was a common-law obligation, entirely apart from the statute, and that the violation of this duty merely provided a basis for the recovery of damages in the courts. Congress had vested no mandatory power in the Commission to order the railroads to acquire necessary and suitable cars.²⁵⁰ But the

²⁴⁸ In *Scotfield v. Lake Shore & Michigan Southern Ry. Co.*, 2 I.C.R. 67, 77 (1888), the Commission said: "Long prior to and at the time the Act to Regulate Commerce was enacted there was a prevailing general custom and usage among railroads of the United States of renting cars from each other and from mere car-furnishing companies, paying rent for the use of such cars. A like custom and usage then prevailed and has since of the carrier paying rent to the shipper for cars occasionally furnished by the shipper for the transportation of his own goods. . . . It is part of the legislative history of the country that Congress had pending before it for many years in various forms the general subjects which were afterwards enacted into the Act to Regulate Commerce, and that all these matters were made the subject of lengthy and thorough examination by committees of Congress. We must, therefore, presume . . . that Congress must have known at the time the statute was enacted of the existence of each of these customs and usages on the part of carriers of obtaining cars, and neither of them are forbidden by the statute."

²⁴⁹ See, for example, *Scotfield v. Lake Shore & Michigan Southern Ry. Co.*, 2 I.C.R. 67 (1888); *Re Transportation of Fruit*, 10 I.C.R. 360 (1904).

²⁵⁰ In the *Scotfield* case, *supra*, the Commission declared (2 I.C.R., at p. 76): "The law-making power has not taken upon itself the responsibility, nor has it clothed the Interstate Commerce Commission with the power and the responsibility, of directing a carrier to supply itself with any particular equipment or cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom alone it rightfully belongs, and if the carrier fails to do this in such a manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such fail-

1906 legislation led the Commission to reverse its position. The amended statute not only so defined "transportation" as to embrace cars, vehicles, and all other instrumentalities of shipment or carriage, irrespective of ownership or contract, and all services rendered in connection with the property transported—thereby endowing the Commission with regulatory power over private cars and incidental services—but it made it the duty of the carriers "to provide and furnish such transportation upon reasonable request therefor." The Commission construed this enactment as explicitly imposing a positive obligation upon the carriers which was encompassed by its general enforcing authority. Accordingly, it declared itself possessed of power to require carriers to furnish all necessary equipment, whether ordinary or special, upon reasonable request, and in conformity with this holding it ordered a defendant railroad company to acquire a sufficient number of tank cars, as prayed for by complainants.²⁵¹ The Commission recognized the merit of the defendant's contention that there was no Congressional intent to forbid the operation of private-car lines or the ownership of cars by shippers, but insisted that its assumption of jurisdiction would not necessarily involve the abolition of the ownership and use of private cars. The statutory provision "does not require the carriers' ownership of cars, but places upon them the duty to provide cars, which may be cars of their own

ure." And in the *Fruit* case, *supra*, the Commission concluded in these unequivocal terms (10 I.C.R., at 373): "We think that it is the duty of the respondent railroad companies to furnish refrigerator cars for the transportation of this fruit. . . . But this duty does not spring from the Act to Regulate Commerce, nor has this Commission any jurisdiction of that matter. It arises out of the common-law liability of the defendant railway companies as common carriers, and redress for failure to fulfill it must be sought in the courts."

²⁵¹ *Pennsylvania Paraffine Works v. P. R. R. Co.*, 34 I.C.C. 179 (1915). The Commission had first assumed jurisdiction under this amendment in *Vulcan Coal and Mining Co. v. I. C. R. R. Co.*, 33 I.C.C. 52 (1915), which it cited as a precedent for the scope of its power. In the latter proceeding the complainants had sought damages for failure of the defendant to supply coal cars upon reasonable request. The Commission held that the determination of the extent to which there was failure to comply with the duty of furnishing cars is an administrative question of which the Commission alone can take original jurisdiction. In the words of the Commission (pp. 64-65): "In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be

or cars which they have secured in some other manner."²⁵² The assertion of authority to order the acquisition of cars by the carriers would operate to restrict the further extension of the system of private-car ownership rather than to legislate it out of existence.²⁵³ The controlling issue, then, was whether the Commission possessed the necessary power to order a carrier to acquire special equipment such as tank cars. On this issue the courts held that the Commission had exceeded its jurisdiction.²⁵⁴ The 1906 amendment was but declaratory of the common-law obligation to provide facilities, and the remedy for failure to perform this obligation, as prior to the new legislation, lay in the courts and not with the Commission. The Commission's jurisdiction is purely statutory. The carriers' duty to furnish equipment, however it may expand with time and circumstance, does not necessarily involve a corresponding right of compulsion in the Commission. The existence of so extraordinary an admin-

definitely fixed by the statute. It is a question which . . . involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of this tribunal."

²⁵² *Pennsylvania Paraffine Works v. P. R. R. Co.*, *supra*, p. 186.

²⁵³ In explaining the significance of the proceeding, the Commission said: "It is obvious that if defendant is excused from its obligation to provide the equipment necessary to move complainants' products by reason of complainants having in the past provided cars of their own, complainants would always be compelled to supply whatever additional cars were from time to time needed to take care of increases in their business, even though complainants no longer desired to maintain cars of their own. Defendant has refused to increase its supply of tank cars. The question to be decided is not whether the cars supplied by defendant together with those owned by complainants are sufficient to meet complainants' demands, but rather whether complainants may retire from the business of furnishing tank cars for the transportation of oil and henceforth rely entirely upon the railroads to provide this equipment, or whether complainants must in the future continue to take care of the increasing demands of their business by buying additional tank cars." *Ibid.*, p. 184.

²⁵⁴ *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916), affirming the decree of the lower court in 227 Fed. 911 enjoining the Commission's order. The Supreme Court sustained the finding of the district court that there is "nothing in the law which confers upon the Commission power to compel a carrier to acquire facilities which it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities" (p. 918). Whatever the carrier's duty to add to its car equipment, whether in quantity or kind, there was no Congressional intent that this duty be enforced by orders of the Commission. Following this decision, the Commission held, in *R. R. Commissioners of Florida v. Southern Express Co.*, 44 I.C.C. 645 (1917), that it was without authority, in the absence of undue discrimination, to compel carriers to acquire special equipment such as refrigerator cars.

istrative power must be found in express words and not in mere implication.²⁵⁵ Neither in the legislative history of the 1906 amendments nor in the enactments themselves was any intent disclosed to clothe the Commission with power either to prevent the ownership and use of private cars or to order the carriers to acquire equipment and facilities. On the contrary, there was a clear recognition of the operation of private-car lines and the ownership of cars by shippers, and the chief end sought to be achieved was to bring these practices under the Commission's authority, in order that oppressive and discriminatory adjustments might be eliminated.

The Commission's jurisdiction, then, was confined to the regulation of the facilities and services provided by private-car owners and private-car lines. That the scope of this jurisdiction is coextensive with that exercised over the carriers' own services and facilities is evidenced by the sweep of the Commission's inquiry and findings in its single general investigation of private cars.²⁵⁶ The Commission's

²⁵⁵ The Supreme Court referred with approval to the following pronouncement from Commissioner Clark's dissenting opinion (34 I.C.C. 179, 195): "If the act confers upon the Commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the Commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt." It should be noted that no question was raised as to the right of Congress to endow the Commission with such power, however far-reaching its practical effects. The issue was solely one of statutory construction. The problem was not unlike that involved in the *Maximum Freight Rate* case, in which the Supreme Court held the Commission to be without rate-making power under the original Act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479 (1897). In that case the Court said, among other things: "Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future." See Part I, pp. 25-27. As in that instance, too, the statutory defect was remedied by subsequent legislation. Rate-making power was expressly conferred upon the Commission by the Hepburn Act of 1906. See Part I, pp. 45-46. Power to order the acquisition of facilities and the extension of lines was conferred upon the Commission by the Transportation Act of 1920. See Part I, pp. 241-244.

²⁵⁶ In the *Matter of Private Cars*, 50 I.C.C. 652 (1918). This proceeding was instituted, on the Commission's own motion, in 1912. Its disposition was delayed by the controversies as to the scope of the Commission's jurisdiction which resulted in the adverse rulings noted above: *Ellis v. I.C.C.*, 237 U.S. 434 (1915); *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916). The inquiry as finally prosecuted touched upon "all questions with respect to the operation of private cars on all railroads of the

starting-point was an unequivocal pronouncement that "the Congress has . . . recognized the use of privately owned cars in transporting the commerce of the country, and has provided for their control by the Commission through rules and regulations of carriers hauling them."²⁸⁷ It then promulgated general principles and specific directions to govern the use of, and compensation for, private cars and their accessory services by the carriers. The intimate and comprehensive character of the regulatory power exercised by the Commission will be disclosed sufficiently by a mere statement of its conclusions. The Commission found:²⁸⁸

1. That as the situation now exists, and under the circumstances and conditions shown of record, shippers may continue to lease cars to

country." More concretely, special consideration was given to the following matters: to determine "the propriety of a service or separate charge, in addition to the freight rate, when special equipment is transported by carriers; to ascertain, in case a carrier has no equipment of the kind demanded by a shipper, whether the carrier should secure the same from an owner of such car, or whether the shipper should be permitted to make the arrangements with the owner, and thus supply cars for his own use; to determine whether, if private car owners are permitted to continue to furnish cars to shippers and make charges direct to them, the charges so made shall be published in tariffs of carriers; to determine what compensation should be paid by carriers to the car owner, lessor or lessee for the use of cars furnished, and the manner in which charges shall be determined; to ascertain what relation investment in private cars, interest, cost of operation, maintenance and depreciation should bear to the allowance to be paid by the carrier for the use thereof; whether charges for refrigeration should be a stated sum for the service, or named in cents per 100 pounds of freight hauled, or should be based on the cost of the service, including labor, cost and weight of ice and salt, etc.; the propriety of the line-haul carrier performing all refrigeration service and making charges therefor; whether rules and practices of carriers as to minimum weights and charges, mixtures, part lot shipments, return of empty containers, etc., operate to unduly prefer or prejudice any shipper or shippers, or any particular description of traffic; to investigate questions respecting demurrage; and to determine whether the Master Car Builders' Association rules, with respect to private cars, should be filed with the Commission and observed by carriers accordingly." 50 I.C.C., at pp. 670-671.

²⁸⁷ *Ibid.*, p. 672. The Commission relied especially upon the provision of section 15 of the Act to Regulate Commerce that if the owner of property transported furnishes any instrumentality or renders any service in connection with transportation, the Commission is empowered to determine the maximum charge or allowance for the instrumentality so furnished or the service thus rendered; and upon the provision of the Car Service Act of May 29, 1917, authorizing the Commission to establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars and the compensation to be paid for the use of cars not owned by the carriers.

²⁸⁸ *Ibid.*, pp. 709-710. For more specific determinations involving the use of private cars, see, for example, the following: *Armour and Co. v. E. P. & S. W. Co.*, 52 I.C.C. 240 (1919); *Western Petroleum Refiners Assn. v. A. & R. R. Co.*, 66 I.C.C. 58 (1922); *Car Rental Charges on Private Line Cars*, 74 I.C.C. 107 (1922); *Holcombe &*

- transport their shipments from sources independent of carriers by railroad.
2. That a charge in addition to freight rates should not be made for furnishing to shippers refrigerator, tank, or other special type of car, or for transporting their shipments therein, unless the freight rates are predicated on the transportation in another type of car less expensive and not so difficult to operate.
 3. That payments should be made by carriers on the basis of the loaded and empty mileage, and that mileage should be computed on the basis of distance tables without the elimination of mileage through switching districts.
 4. That there should be no increase in the present payment for use of refrigerator cars and so-called meat cars for transportation in that part of the country east of El Paso, Tex., Albuquerque, N. Mex., and Salt Lake City and Ogden, Utah.
 5. That the present payment of $\frac{3}{4}$ cent on the loaded and empty movements for the use of tank cars of all kinds by all carriers by railroad should be increased to 1 cent per mile for the loaded and empty movements; that the increased allowance should be paid for the use of live poultry cars, palace stock cars, heater cars, and that under the facts here shown the increase should not apply to stock cars, coke cars, coal cars, rack cars, flat cars, box cars, or pocket cars, although they may be privately owned or leased.
 6. That carriers should publish in their tariffs a rule that private cars when unloaded at destination, unless otherwise ordered by the owner or lessee, must be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee.
 7. That where carriers own tank cars which are furnished to shippers on request, they shall publish in their tariffs rules for the distribution thereof whereby each shipper who makes reasonable request may receive his proportionate share of available cars.
 8. That re-icing charges on shipments of fresh meats and packing-house products and dairy products should be based on the cost of the ice

Sons v. C. R. R. Co. of N. J., 92 I.C.C. 27 (1924); *International Agricultural Corp. v. A. & W. P. R. R. Co.*, 93 I.C.C. 189 (1924); *Kansas City Structural Steel Co. v. A., T. & S. F. Ry. Co.*, 102 I.C.C. 113 (1925); *Jones Bros. & Co. v. Director General*, 104 I.C.C. 413 (1925); *Paragon Refining Co. v. A. & S. R. R.*, 118 I.C.C. 166 (1926); *Shelly Oil Co. v. M.-K.-T. R. R. Co.*, 123 I.C.C. 517 (1927); *Albert Lea Packing Co. v. C., M. & St. P. Ry. Co.*, 140 I.C.C. 157 (1928), 152 I.C.C. 665 (1929); *Malloy and Dickenson v. M.-K.-T. R. R. Co.*, 140 I.C.C. 576 (1928). On its own motion the Commission has also investigated the use of private passenger cars. *Use of Private Passenger Train Cars*, 155 I.C.C. 775 (1929).

- and salt used, the labor, investment in icing plants, etc., together with a reasonable profit; that the carriers only should perform the service of re-icing and make charges therefor; and that shippers of these products should not be permitted to perform the service of re-icing their own and competitors' shipments en route, either directly or through corporations controlled by them.
9. That tariffs of carriers be so changed that private cars standing on the private tracks of owners shall not be subject to demurrage charges.
 10. That the Master Car Builders Association rules be not filed in tariffs of carriers; and that suggestions made at the hearing as to modifications in rules and practices be adopted by the association.

One matter related to the ownership and use of private cars is deserving of further notice. The apportionment of cars among shippers may effect unjust preferences; hence the Commission possesses power to prescribe reasonable and non-discriminatory rules for car distribution. Every shipper is entitled to receive his fair and proportionate share of available cars, and this guiding principle is as applicable to the supply of private cars as to the stock of the carriers' own equipment. The apparent encroachment upon the rights of private property is subordinated to the duty of equitable performance of the transportation function.

This problem of car distribution has been most acute, and has led to frequently recurring controversies, in connection with the production and shipment of bituminous coal. Because much of the demand for this product is seasonal and the storage of output is impracticable, periodic car shortages are inevitable.³⁸⁹ It became imperative, there-

³⁸⁹ Compare the following from *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U.S. 452, 460 (1910): "Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads, consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points, to be sold after arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped

fore, that equitable car distribution rules be established. The character of these rules, in determining the amount of coal that can be loaded by particular mines, controls the volume of output and continuity of operation of these mines; unjust preferences in the apportionment of cars tends to produce far-reaching industrial consequences. Under such circumstances, not only must just and reasonable mine "ratings" be maintained, so that, in times of shortage, cars may be distributed in conformity with some equitable measure of the capacity of the various mines contending for the inadequate supply of facilities,²⁰⁰ but it is essential that available equipment, as assigned to or appor-

is often used by the shipper or purchaser at the terminal points as a convenient means of storage, or as an instrument for delivery without the expense of breaking bulk, to other and distant points." See, also, as to shortages of box cars for the shipment of grain, *Report on Transportation of the Joint Commission of Agricultural Inquiry*, p. 262.

²⁰⁰ The purpose of the mine "ratings" is to provide a basis for the allotment of cars in time of shortage. According to these "ratings," each mine on a particular line becomes entitled to such proportion of the available cars as its rating bears to the total supply of cars. In the words of the Commission, in *Coal and Oil Investigation*, 31 I.C.C. 193, 217 (1914): "The problem of equitable car distribution is composed of two factors—(1) The ratings of the mines and (2) the actual distribution of equipment in accordance therewith. The purpose of a carrier in fixing ratings for mines on its lines is to determine the basis upon which each shall share in the equipment available for coal loading during the periods when the supply of cars is insufficient to meet all the requirements. At such times it becomes necessary to place some restriction upon all the mines, and in order to do this impartially the practice of rating them and distributing the available equipment pro rata, on the basis of such ratings, has been adopted." Controversy as to methods of rating has centered largely about the question of whether the physical capacity of a mine or its past performance shall constitute the controlling factor. While considerable diversity of practice has prevailed, the Commission has generally favored the adjustment of ratings according to past performance. In *McCaa Coal Co. v. C. & C. Ry. Co.*, 30 I.C.C. 531 (1914), for example, the Commission said (p. 536): "In view of all the facts appearing in this case, it is our opinion and finding that the distribution of coal cars based upon the element of physical capacity is wholly unsatisfactory and works injustice. The best basis for the distribution of cars in this case is the proportionate necessities of the mines, as indicated by past performances, extending over periods of car shortage as well as periods of free distribution. No basis of distribution can be absolutely precise. It is not necessary, however, to imagine anything or to deal in speculations or possibilities. The total shipments of each mine, taken for the two-year period prior to January 1, 1913, divided by the number of 10-hour days the mine actually operated during such period furnishes the actual average daily output over a two-year period during car shortage as well as during free car supply. Such a basis will not permit speculation, but will reflect the operations and possibilities of each mine as truly as they can be ascertained, and such shall be the basis hereafter." See also *Powhatan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I.C.C. 69 (1908), where the "coke-oven basis" of distributing cars was condemned; *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I.C.C. 86 (1908), where a system of rating which took into consideration both physical and commercial capacity

tioned among particular mines, be fairly counted or charged against the established ratings.

It is in connection with the latter procedure—in the actual apportionment of cars in terms of the agreed ratings—that the treatment to be accorded to private cars, which are independently assigned by their owners to specific mines, becomes an important issue. In so far as restrictions are placed upon the free use of such cars, or mines enjoying their use are limited in their claims upon the general supply of equipment, the Commission, as a means of removing discrimination in the apportionment of transportation facilities, is encroaching upon the rights and detracting from the advantages of private-car ownership. It must be noted, however, that private cars constitute but

was held not to be discriminatory; *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I.C.C. 356 (1910), where the contention was not sustained that physical capacity alone constitutes a sound method of rating, but where the practice of combining physical and commercial capacity was upheld; *In re Irregularities in Mine Ratings*, 25 I.C.C. 286 (1912), in which "the hourly production basis for ratings" was approved "upon the facts and under the conditions" there presented. Indeed, in all of these proceedings the determinations were based upon the specific facts of the particular controversy. Not until June 17, 1922, was a general investigation undertaken, on the Commission's own motion, into the propriety of the carriers' mine ratings. In that proceeding the Commission approved, "for a fair trial," the rules established early in 1923 through conferences between the carriers and the mine operators. These rules took into consideration physical conditions, past performance, labor supply, and any other factors influencing the production of coal. *Rules Governing Ratings of Coal Mines*, 95 I.C.C. 309 (1924). The Commission said (p. 324): "The enumeration of elements considered in the determination of ratings makes it obvious that the plan agreed upon . . . cannot properly be termed a 'physical-capacity basis,' nor can it be said that factors other than physical capacity are merely supposed to be considered in making ratings, or that physical capacity really determines the rating, or is necessarily the dominating factor. Indeed, physical capacity . . . in many instances doubtless will have lesser weight than past performance and the labor supply. In addition, provision is made in general terms for the full and appropriate consideration of any other fact which might affect either the probable production or shipment of coal, as a basic factor in the determination of ratings, to the end that the ratings stated may as closely as possible approximate the reasonable maximum bona fide tender of coal for shipment, for which ratings stand as a necessary substitute." The Commission rejected commercial capacity as the controlling factor for the determination of mine ratings. It was argued that such a basis would remove the economic offenses of the coal industry—that it would encourage a more uniform movement of coal throughout the year, and that it would eliminate the inefficient and high-cost mines. But the Commission disclaimed any regulatory jurisdiction over the coal industry. "The object of rating rules is to secure a just and equitable distribution of equipment among those who desire and are prepared to ship, and not to determine who shall or shall not be in a position to produce a commodity to be shipped" (p. 332). But compare the elaborate dissenting opinion of Commissioner Potter (pp. 336-372), stressing the urgency of reforming the bituminous coal industry through the Commission's car distribution rules.

one group of the so-called "assigned cars." Cars belonging to the railroad serving a mine which are used for the carriage of its own fuel and cars belonging to other railroads which are used for the carriage of their fuel are likewise assigned to particular mines. In other words, railroad fuel cars and private cars are equally involved in the assigned car problem, although our primary interest, at this point, is in the Commission's control of the distribution of private cars. Have railroads and shippers the right to assign certain cars to specific mines, and how far must these assigned cars be counted in determining whether, in time of shortage, a particular mine has received its fair distributive share of available equipment?²⁸¹

For many years it was a common practice among the railroads to deliver private cars and railroad fuel cars to specific coal mines as assigned, without counting or charging these cars against the *pro rata* shares of the mines to which they were delivered. Such mines received, in addition, their full share of the general stock of unassigned cars available for commercial loading. The private-car owners thus enjoyed unrestricted use of their equipment, and the railroads, by assuring an ample and stable car supply to particular mines, were enabled to secure their fuel on favorable terms. But this practice, from the standpoint of common-carrier transportation, was obviously prejudicial to mines receiving no assigned cars, and it evoked vigorous protest. The Commission, finding unjust discrimination in this procedure, thereupon asserted its authority to regulate car distribution by promulgating an "assigned car rule."²⁸² Both private cars and

²⁸¹ The various types of cars involved in these controversies are clearly differentiated in the opinion of the Supreme Court in *Assigned Car Cases*, 274 U.S. 564, 568 (1927): "The term assigned cars is used in contra-distinction to system cars. By assigned cars are meant those placed for use at a specified mine for a particular shipper. By system cars are meant those, from time to time on the line, which are being kept available for use at any mine for any shipper. Assigned cars are of two classes. One class of assigned cars consists of private cars. These are cars owned (or leased) by some shipper (or subject to the control of a particular person not a rail-carrier) who delivers them to the railroad for placement at designated mines for loading and transportation as desired by the owner of the cars. Assigned cars of the other class are called railroad fuel cars. These consist wholly of cars owned (or leased) by some carrier, which, instead of being left, like system cars, for use indiscriminately in carrying coal from any mine for any consignor to any consignee, are assigned to a particular mine to carry coal to be used as fuel by a particular carrier."

²⁸² *R. R. Com. of Ohio v. H. V. Ry. Co.*, 12 I.C.R. 398 (1907); *Traer v. Alton R. R. Co.*, 13 I.C.C. 451 (1908).

railroad fuel cars were permitted to be delivered to the mines to which they were assigned, but it was required that such cars be counted against the distributive shares of these mines in the apportionment of system cars. If the assigned cars equaled or exceeded the *pro rata* share of a particular mine, such mine was not to be entitled to any of the unassigned system cars for commercial loading; if, on the other hand, the number of assigned cars was less than the *pro rata* share of a particular mine, such mine was to be entitled to additional system cars, but only to the extent necessary to make up its *pro rata* share.³⁰⁸ This assigned car rule successfully withstood attack

³⁰⁸ In the *Hocking Valley* case, *supra*, in which the treatment to be accorded to private cars and to foreign railroad fuel cars was involved, the Commission said (pp. 409-410): "The total of the foreign railway fuel cars, the private cars and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered." The Commission's conclusion specifically applicable to private cars was as follows (pp. 410-411): "It is admitted that the cars so held under lease are devoted to the exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal-mine operators on the line of defendant company . . . ? This question we are constrained to answer in the affirmative. . . . Assuming that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals, to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars . . . should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars." In the *Traer* case, *supra*, in which there was the additional issue of the treatment to be accorded to the carrier's cars used for the transportation of its own necessary fuel supply, the Commission said (p. 458): "Conceding fully the right of the carrier to use its equipment for the purpose of securing its own fuel supply, even though shippers at the same time desire the use of that equipment, and conceding the right

in the courts,²⁶⁴ and remained the prevailing basis of car distribution for many years.²⁶⁵ Thus recognizing the right of private-car owners to the exclusive use of their equipment (and of railroads to the unlimited assignment of cars for securing their fuel), the Commission, in the interests of equitable car distribution, none the less imposed limitations upon the advantages of private-car ownership (and of the free use of railroad fuel cars). Even when the private cars, or the aggregate of assigned cars, equaled or exceeded the mine's distributive share, it was restricted, because of its exclusive equipment, in the full benefits of the general car supply, by being deprived of additional system cars; and when the private cars, or the aggregate of

of the carrier to secure its fuel supply either from mines which it owns or those whose entire output it purchases, we are led to the conclusion that where a carrier purchases a portion of the output of a mine which is competing with other mines on its lines in commercial markets it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel."

²⁶⁴In *Chicago & A. R. Co. v. I.C.C.*, 173 Fed. 930 (1908), the Commission's order in the *Traer* case was held invalid in so far as it required the carriers to count their own fuel cars against the distributive shares of the mines to which they were delivered. On appeal the Supreme Court reversed this decree. *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U.S. 452 (1910). The basic issue was as to the power of the Commission in the premises, rather than as to the expediency of the rule promulgated by it. The Court found that authority had been lawfully delegated to the Commission over railroad cars, including the carrier's own fuel cars, in time of shortage, as a means of eliminating unjust discrimination. "It may not be doubted that the equipment of a railroad company, engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one" (p. 474). See also *Interstate Commerce Commission v. Chicago R. R.*, 215 U.S. 479 (1910).

²⁶⁵In *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I.C.C. 356 (1910), 23 I.C.C. 186 (1912), the Commission reaffirmed its assigned car rule and held the practices of the defendant carriers to be in violation thereof; and the award of reparation for general damages resulting from the discriminations in car distribution disclosed in this proceeding was sustained by the Supreme Court in *Penna. R. R. v. Clark Coal Co.*, 238 U.S. 456 (1915). In *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923), a comprehensive investigation of the reasonableness of the assigned car rule thus established, the Commission said (p. 527): "The rule thus limiting the permissible assignment of cars either privately or railroad owned without counting them against the distributive share of the mines was definitely established and remained in effect as a rule in a state of repose until the advent of Federal Control over the railroads and over the production, distribution, and price of coal. . . . The rule was accepted as settled, and although never acquiesced in by commercial mine operators as settled on the right basis, was not the subject of any formal complaint to which our attention has been directed down to the period of Federal Control." For the changes in rules introduced under Federal Control, see *ibid.*, pp. 527-528.

assigned cars, fell short of a mine's distributive share, it was entirely deprived of the advantages of exclusive ownership or use, because its claims to additional system cars were restricted to its *pro rata* share.

But preferences were still possible. The assigned cars might exceed a mine's distributive share, and thus operate to the prejudice of competing mines. There was ample evidence of the discriminatory effects of the prevailing practices, and much serious doubt was cast upon the definitiveness of the established regulations.²⁶⁶ Under these circumstances, the Commission entered upon a thorough reconsideration of this entire problem of car distribution, and frankly announcing that "the rule evolved in the early decisions was not the fruition of ripe experience," abolished the "assigned car rule" which it had promulgated, by requiring, for the future, that all cars, whether assigned or unassigned, and including both private cars and railroad fuel cars, be apportioned ratably among the mines of each district or division defined for car distribution purposes.²⁶⁷ An absolute rule

²⁶⁶ The tentative character of the car distribution practices immediately following the *Hocking Valley* and *Traer* decisions was most clearly stated by Commissioner Lane, in his dissenting opinion in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I.C.C. 356 (1910). Although he had joined in the earlier decisions, he commented as follows in the above proceeding (p. 387): "Rules for the distribution of cars in periods of car shortage are of very recent invention, and it has appeared affirmatively in the cases which have been brought before this Commission, as well as in those before the courts, that the whole question of car distribution is in a state of flux; the carriers have not yet devised a code of rules which is satisfactory either to themselves or to their shippers. It is a matter of most general knowledge, brought out and clearly established in the coal investigation made by the Commission some three years since, that the distribution of cars to coal mines has been based largely upon interest, prejudice, and pull. There has been little, if any, pretense that cars were divided among coal mines upon a basis which the law could recognize as fair and nondiscriminatory. Since this investigation it appears that the carriers have been making an honest effort to establish rules which would not be open to objection upon the ground of discrimination, but these rules are as yet but experimental—they do not represent the crystallized experience of years—at present they are but tentative. The preferences which have been shown to owners of private cars and to mines supplying railway fuel show clearly that the carriers are but feeling their way to a basis that will be more equitable than any hitherto obtaining. Instead, therefore, of regarding the rules involved in the cases recently reviewed by the Supreme Court as controlling this Commission, we are justified in saying no more upon this subject than that the views heretofore expressed are the result of such light and experience as we have been able to gain upon a most difficult subject, and are properly subject to amendment at any time."

²⁶⁷ *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923). The Commission's findings were stated as follows (pp. 562-563): "Upon the facts shown of record we find and conclude that in the distribution of cars for transportation of coal among the bituminous coal mines . . . any rule, regulation, or practice . . . whereby

of equality of treatment as between assigned and unassigned cars was thereby established, and all discrimination in car distribution was thereby rendered unlawful. Cars might still be placed at designated mines, but not in excess of each mine's *pro rata* share of available cars. It was recognized to be the duty of the carriers to furnish equipment on an equitable basis, and neither the interests of the roads in securing their own fuel supply nor the interests of private owners of facilities in reaping the advantages of exclusive ownership was per-

private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the *pro rata* allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established . . . for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed . . . to all mines on such district or division on a *pro rata* basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same *pro rata* share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged." To avoid hardship and inefficient use of equipment in special circumstances, the Commission expressly reserved the right, in the exercise of its emergency powers, of "requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide." On further hearing, these conclusions were affirmed by the Commission in 93 I.C.C. 701 (1924).

It should be observed that the Commission's findings in these proceedings constituted a reversal, or, more accurately, a far-reaching modification, of its previous position, rather than a mere application of new statutory provisions. Paragraph (12) of section 1 of the Act, as amended by the 1920 legislation, provides not only that every carrier by railroad shall "make just and reasonable distribution of cars for transportation of coal among the coal mines served by it," but, more specifically, as follows: "During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine." With initiative on this basis vested in the carriers, the Commission is given full powers of review for the establishment of reasonable practices. It was contended that these provisions prohibit, in terms, the assignment of private cars and railroad fuel cars under the rules established in the *Hocking Valley* and *Traer* cases. In *Assignment of Freight Cars*, 57 I.C.C. 760 (1920), in response to Senate Resolution No. 376, the Commission advised Congress "that paragraph (12) of section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley* and *Traer Cases*,

mitted to justify a discriminatory apportionment of cars among the mines bidding for the insufficient stock of equipment in times of shortage.

With regard, specifically, to private cars, the Commission based its determination upon principles of long standing. "Throughout our reports," said the Commission, "we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse or justify

supra. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States" (p. 766). This *ex parte* ruling was affirmed in the principal case. 80 I.C.C., at pp. 529-534. Relying upon the legislative history of the enactment, and upon its own use of substantially identical phraseology in previous proceedings, the Commission declined to construe the words in controversy—"to count each and every car furnished to or used by any such mine for transportation of coal against the mine"—as equivalent to a direction that all cars shall be prorated, whether assigned or unassigned. See, however, Commissioner Eastman's concurring opinion (pp. 563-564), reversing, on this point, the position he had taken in 57 I.C.C. 760 (1920). The assigned car rule was abolished, then, not because it is in terms forbidden by law, but because it was deemed by the Commission not to be just and reasonable and to result in undue preferences as amongst competing coal mines. But compare the dissenting opinions of Commissioners Hall, Daniels, Potter, and Cox in 80 I.C.C., at pp. 564-589; and of Commissioners Hall, Potter, and Cox in 93 I.C.C., at pp. 739-754. The problem was essentially the same as that involved in the determination of mine ratings. See note 260, *supra*. The dissenting commissioners not only desired to protect the railroads in the purchase of their fuel and to encourage the use of private cars, but they were convinced that the assigned car rule is a legitimate instrument for removing the acknowledged evils of the bituminous coal industry. In the words of Commissioner Potter (80 I.C.C., at pp. 584-585): "It must be borne in mind that we have just as much power to authorize and approve *unequal* distribution as we have to require *equal* distribution. The majority report recognizes that the law does not require equal distribution but contemplates that conditions may require unequal distribution. The power is left with us to authorize what, all things considered, we deem just. Only unjust discrimination is to be condemned. Public interest now requires discrimination in the use of cars and that they be assigned to particular mines. Equal distribution among all mines which the majority report requires is exactly what should not be had. What the country and the consumers of coal really require is an unequal distribution which will give the public the benefit of the economical low-cost mines and not compel them to support uneconomical high-cost mines. A sort of zoning is what is needed, perhaps more now than in war times. The proper use of the assigned and private car is a sound, sensible, businesslike method of zoning. Expectation of equal distribution, even more, perhaps, than an unsound rate structure, has brought about the undue expansion in coal production. If the use of cars had been properly restricted, half of the existing mines would not exist. The majority report will make bad conditions worse. Under it the expansion hostile to the public interest may go on, justified, encouraged, supported, and unchecked." However desirable and urgent such a reform of the coal industry may be, it is submitted that an administrative tribunal charged with the regulation of the carriers should not, in the absence of direct legislative mandate, enter upon the uncharted and hazardous task of seeking to reorganize the economic structure.

a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation. Throughout we have recognized that when the carrier permits the use of the private car on its rails, it is responsible for the manner in which the service is conducted in that car, and that the car becomes in all respects as if it were one of the general stock of those owned by the carrier, and subject to the same liabilities and responsibilities as to the use in interstate transportation."²⁸⁸ Again, on rehearing, the Commission asserted its authority in conclusive terms. "The fundamental principle which has governed us in dealing with private cars is that such cars, being paid for by the carriers through allowances to their owners, are to be treated as part of the carrier's equipment, and may not be so used as to bring about unjust discrimination or unreasonable practices. Prior to the *Hocking Valley* and *Traer* decisions private cars were not taken into account at the mines to which they were assigned. Such mines received in addition their full *pro rata* share of system cars in the same manner and to the same extent as if the private cars were nonexistent. By these decisions, however, private-car owners who did not have sufficient private cars for placement at their mines to exceed the distributive share of such mines were deprived of the advantage of ownership of the cars just as private-car owners claim here that they would be deprived of the advantage from the ownership of their cars if the assigned-car rule should be abolished and the placement in excess of the distributive share of the mines be prohibited. The interstate commerce act not only confers authority upon us to restrict the preferential use of private cars as was done in those decisions, but authorizes us to prohibit altogether such preferential use."²⁸⁹

²⁸⁸ 80 I.C.C., at p. 557.

²⁸⁹ 93 I.C.C., at pp. 729-730. It was contended that private cars are essential to insure a regular and adequate coal supply, that their use in times of shortage releases railroad cars for strictly commercial mines, and that the Commission's ruling would eventually destroy this source of equipment. Commissioner Daniels, for example, spoke as follows in his dissent (80 I.C.C., at p. 578): "Instead of prohibiting assigned and private cars their use should be encouraged. The greater the number of assigned and private cars properly used and the fewer the mines at which they are placed, the better for all concerned. If many shippers would provide their own cars, the carrier equipment available for others would be greatly increased, and the price of coal would drop. If this commission would announce the right of shippers to use private cars in

Thus, without asserting any authority over private-car owners as such, and without hindrance by the alleged immunities of private property, the Commission, in its control over the "car service" of the carriers subject to its jurisdiction, has gone the full length in preventing the use of private cars from serving as an instrument of discrimination.²⁷⁰

their own service, . . . and that as thus used they would be protected, private capital would promptly come to the aid of the carriers and provide private cars to an extent which would insure ample equipment for all, reduce coal shortages to a minimum, and serve the public interest in a vital way." In reply to this view, the Commission not only insisted "that particularly in times of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more important to him than a slight addition to his allotment, effectuated by giving his neighbor and competitor a better car supply," but directed attention to its power to order the carriers to acquire adequate facilities (80 I.C.C., at p. 562): "Congress has given the coal consumer a right to demand that adequate transportation facilities be provided by the railroad carriers, and has afforded a remedy for the enforcement of that right. We are now prosecuting an inquiry on our own motion, No. 14489, under the provisions of section 1 of the act, as to the adequacy of the facilities for the performance as common carriers of car service by each of the railroads subject to our jurisdiction, with a view to making an order requiring the respondents to provide themselves with such safe and adequate locomotives and cars as may be warranted by the facts as shown, and as required by law. This power upon our part, and remedy afforded to the shippers, first came into the interstate commerce act as one of the amendments made by the Transportation Act, 1920. The change in the law differentiates the present case from all those in which the assigned-car rule was developed, as prior to February 28, 1920, we had no power to require a carrier to provide itself with reasonable facilities such as equipment, no discrimination being involved." See note 255, *supra*.

²⁷⁰ In *Assigned Car Cases*, 274 U.S. 564 (1927), the Supreme Court, in reversing the lower court's decree in 9 Fed. (2d) 429, sustained the Commission's findings in *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, 93 I.C.C. 701, in every respect. The opinion of Justice Brandeis, speaking for the Court, throws much light upon the Commission's powers and processes in these proceedings. *First*, the Court found no constitutional obstacle to the Commission's assertion of power. "The rule prescribed does not involve a taking of the property of the private car owner. Congress could exclude private cars from interstate railroads. . . . And it may prescribe conditions on which alone they may be used. . . . Limiting their use does not involve regulation of the coal mining industry. Likewise, Congress may prescribe how carrier-owned cars shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation facilities" (p. 575). *Second*, the Court held that Congress has invested the Commission with the necessary power to order a *pro rata* distribution of all cars among coal mines. It was argued, on the one hand, that the statute (paragraph (12), section 1) prescribes the previously established assigned car rule, and, on the other, that it abolishes this rule and substitutes therefor the Commission's new rule of equal distribution. Neither of these claims was upheld. The Commission's position, as we have seen, was this: that the statute does not prescribe a complete rule—that it does not require, in terms, either a *pro rata* distribution of cars or adherence to the rule promulgated in the *Hocking Valley* and *Twee* cases; that its requirement is merely that all cars be counted in the

Industrial Railroads

Private business enterprises, especially in the fields of lumbering, mining, and manufacture of iron and steel products, often own or control small railroad lines as part of their plants, chiefly for the purpose of facilitating the efficient conduct of industrial processes. These "industrial railroads," particularly when employed in manufacturing industries, commonly consist of a network of tracks connecting warehouses and other plant buildings, short spurs extending to one or more trunk-line roads, and such motive power and equipment as are warranted under the circumstances. They serve the industrial concerns with which they are affiliated by switching inbound freight from points of interchange to appropriate locations within the

determination of each mine's *pro rata* share, and that administrative discretion is left to the Commission as to the manner of distribution of the cars. To this view the Court gave its approval: "The Commission's contention is, in our opinion, the sound one. It gives effect to the command that all cars shall be counted; and it leaves full scope both to the duty imposed upon the carriers . . . and to the authority conferred upon the Commission . . . to establish reasonable rules with respect to car service. This construction is consistent also with the legislative history of the provision . . ." (p. 577). *Third*, the Court found the Commission's rule not to be unreasonable. "The argument most strongly urged is that, because the rule prescribes absolute uniformity, regardless of the necessities of the railroad or other consumer, regardless of the ownership of the mine or the cars, regardless of the character of the business done by the mine or its customer, it is necessarily unreasonable, and, hence, that the order is void. But the authority to establish reasonable rules . . . includes power to prescribe a rule of universal application. There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission, . . . or to inquire into the soundness of the reasoning by which its conclusions are reached, . . . or to question the wisdom of regulations which it prescribes. . . . These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' . . . We cannot say that it was arbitrary and unreasonable for the Commission to conclude that good service could be secured by a uniform rule which might be departed from with its consent and that unjust discrimination could not be prevented without such a uniform rule. It acted in the light of a rich experience. It had learned by experience that the existing practices resulted in discrimination and unsatisfactory service. It had learned, also through experience, that the emergency powers conferred by the Transportation Act, 1920, afforded adequate means of supplying the needs, and of averting the possible hardships and losses, of carriers and of private coal consumers, to which the evidence and arguments had been largely directed. For the Commission had had much experience in applying these emergency powers in connection with the distribution of coal cars in times of car shortage, before it prescribed the rule here challenged" (pp. 580-581). *Fourth*, the Court held that the Commission's findings of discrimination were sufficiently supported by the evidence—that its action in prescribing a uniform rule for the future was wholly legislative in character, and as such was not bound by the stricter requirements as to evidence that are applicable in quasi-judicial proceedings. The objection was directed, said the Court, "particularly to the finding that the exist-

plant, by transporting outbound shipments to the trunk lines, and by effecting the necessary movement of materials in the process of manufacture from building to building within the producing area. In many instances these railroads merely constitute departments of industrial concerns, but they are frequently operated as separate corporations, their stock being held by the manufacturing enterprises involved or in their interest. The traffic carried by these roads is very largely that of the owning or controlling companies. Outside business is usually negligible, not only because little opportunity arises to carry non-proprietary freight, but because, "generally speaking, outside business is not solicited but on the contrary is discouraged."²⁷¹ These characteristics vary somewhat in different industries, but for the most part in degree rather than in essence. In the lumber industry, for example,

ing practice in regard to assigned cars results in giving to the mines enjoying assigned cars an unjust and unreasonable share of railroad services and of facilities other than cars. The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical." In finding no merit in this claim, the Court continued: "The argument overlooks the difference in character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under sections 1, 3, and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general" (p. 583). And, finally, the Court found no merit in the contention that the Commission was seeking "to equalize industrial fortune and opportunity." "The object of the rule," said the Court, "was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. . . . The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive of self-interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service" (pp. 583-584).

²⁷¹ *Industrial Railways Case*, 29 I.C.C. 212, 227-228 (1914). Compare, also, the following: "An industrial railway may be defined as an incorporated or unincorporated railway controlled by some manufacturing or mining industry, the major portion of whose traffic is furnished by the controlling company. Such a road is distinguished from a commercial road in that it is not primarily for the sale of transportation; it is distinguished from a purely private track or siding in that the operation of its property gives rise to a service to which some definite payment or allowance may be assigned." *Annual Report*, 1910, p. 33.

the so-called "tap lines" are generally longer, and they tend to attract an increasing proportion of non-proprietary traffic. While lumber mills, like manufacturing plants, are usually situated within reasonable proximity to points of interchange with trunk-line carriers, the logs destined for these mills must often be hauled by tap lines for long distances from the forests; and while these tap lines may have been originally constructed for the sole purpose of facilitating the operations of the owning or controlling lumber companies, they have also come to serve numerous farming communities established along the line of the cleared lands. But from the standpoint of public control—of so adjusting the relationship between these industry-owned roads and the main-line carriers as to prevent switching allowances or rate divisions which result in unjustifiable departures from the published tariffs and in undue preferences to particular shippers—the problem is essentially the same whether the special services are rendered by industrial railroads or by tap lines.

Both the impetus to control in these circumstances and the issues involved in its exercise are incidental to effective regulation of the main-line carriers, rather than an evidence of independent need and assertion of power over the industrial railroads as such, as a means of reaching the activities of private business enterprise. The prime source of difficulty is to be found in such unification of interest between carriers and shippers, through industrial ownership or control of these auxiliary facilities, as tends to divert transportation revenues to favored users of the service. The extension of jurisdiction to industrial railroads is thus grounded in their employment as ready devices for effecting discrimination. It becomes necessary to differentiate between those services rendered by the shipper, whether directly or indirectly, which are essentially shipper services, and those services which are essentially carrier services performed by the shipper or by some affiliated agency on his behalf. Only in the latter case is there a basis for legitimate allowance from the line-haul rate, either as an absorption of a switching charge or as a division of a joint tariff. As an aid toward the elimination of unjustifiable allowances, it is likewise necessary to differentiate between mere plant facilities which happen to be utilized in the movement of goods, and instruments of transportation which are employed in the performance of *bona*

fide carrier functions. There appears to be no legitimate ground for diminishing the transportation charge because of the use of plant facilities designed primarily to further productive efficiency. The determination of these issues involves a judgment as to both the controlling character of this aspect of industrial enterprise and the relationship which shall be permitted to subsist between the main-line carriers and the industry-owned roads which are engaged in furnishing supplemental transportation services. In other words, and more concretely, a decision must be reached under these conditions, first, as to whether any allowance may properly be made to industrial railroads, and second, assuming that a *bona fide* transportation service is being rendered by them, as to the extent of the allowance which may properly be made in the circumstances. A *laissez faire* attitude toward this situation, or failure to resolve these issues on the basis of realities, opens up a wide channel for insidious preferences. Allowances for services which should in any event be performed by the shipper, and allowances which are excessive in amount, even where transportation services are rendered by the shipper or on his behalf which are entitled to compensation, impose a discriminatory burden not only upon those concerns in the industry which fail to receive them, but upon the general shipping public. As far as the immediate industry is concerned, such allowances are but disguised rebates from the published tariffs, extended only to favored establishments, and necessarily upset competitive relationships; as far as the general community is concerned, such allowances tend to raise the level of charges on other commodities, as well as to obstruct the natural course of industrial development, both in the particular field involved and in the economic sphere as a whole. Considerations of this character, centered in the acknowledged necessity of eliminating discriminatory practices, have led the Commission to exercise its regulative authority.²⁷²

²⁷² Note the following as to the status of discrimination even after the law had been strengthened by the Elkins Act of 1903 and by the Hepburn Act of 1906: "The fight against discrimination is by no means won. Those practices still remaining are more insidious and more difficult of extirpation than open rebating, by reason of the fact that they are hidden in contractual arrangements entirely legal except for the effect produced. To speak generally, these arrangements depend for their vice upon some unification of shipper and carrier, by which shippers secure an interest in carriers' profits. Certain divisions with terminal railroads, payments for the use of plant

That far-reaching abuses have actually arisen in connection with the activities of industrial railroads has been disclosed repeatedly by the Commission's investigations. At the outset specific inquiries uncovered the existence of arrangements which could be construed only as devices for effecting unlawful rebates. In one instance a division of 25 per cent of the through rate was paid to an industry-controlled road which owned less than a mile of track and which performed no transportation service.²⁷³ In another case the substitution of rate divisions for switching charges resulted in the payment of as much as \$12.00 per car to industry-owned roads for services which had previously been rendered for a maximum charge of \$3.50.²⁷⁴ Such situa-

facilities, payments to shippers for performing for themselves services not incumbent upon the carrier, arrangements with private car lines, and the ownership of industrial corporations by carrier corporations and of carrier corporations by industrial corporations, are the more prominent and baneful examples of the abuses now continuing." *Annual Report, 1910, p. 11.*

²⁷³ *Re Transportation of Salt from Hutchinson*, 10 I.C.R. 1 (1904). The Hutchinson and Arkansas River Railroad owned this trackage connecting one of the plants of the Hutchinson-Kansas Salt Co. with two trunk-line carriers. Its stock was held in the interest of the Salt Company, which at that time controlled about 60 per cent of the salt-producing capacity of the Kansas field. The carriers entering Hutchinson paid this railroad 25 per cent (but not to exceed 50 cents per ton) of the through rate on all bulk salt shipped to Missouri River points. Although nominally paid to the Railroad, this division was, in effect, a rebate to the Salt Company, and it served to exclude other salt manufacturers in the Kansas area from the Missouri River market. After declaring the arrangement "plainly illegal," the Commission said (at pp. 9-10): "It is possible that the institution as now constituted may be technically a railroad under the laws of Kansas; but looking to the substance, and not the form, it is purely a scheme for the purpose of obtaining a concession in the rate. It owns no equipment; it issues no bill of lading; it performs no service. Its sole function is to absorb one-fourth of the entire rate."

²⁷⁴ *Re Divisions of Joint Rates*, 10 I.C.R. 385 (1904). The findings of the Commission in this investigation, which were deemed "fairly typical" of the conditions prevailing elsewhere than at Chicago, revealed that both the International Harvester Company and the United States Steel Corporation were the recipients of extensive rebates through excessive allowances to terminal railroads under their control. It will suffice to indicate the essential facts of one of the arrangements. The Harvester Company was the sole owner of the capital stock of the Illinois Northern Railroad Co., which consisted of some seventeen miles of track within one of the industrial plant inclosures, a main line of approximately five miles of leased track, and a complement of switching engines and flat cars. Although a freight station was maintained through which this railroad handled less than carload shipments for the general public, its principal business was the performance of switching services between the main-line carriers and its own and other industries located on its track. It appeared that in lieu of a switching charge of not more than \$3.50 per car, which had previously prevailed and which the Commission deemed reasonable, the railroad was receiving a division of 20 per cent of the through rate from nearly all connecting lines, which amounted to \$12.00 per car upon shipments to or beyond Missouri River points. The Commission

tions, moreover, were not spasmodic or unusual. In an extensive general investigation of all classes of industrial railroads which was concluded by the Commission June 30, 1909, it was found that 450 of the 2,208 operating lines of this character covered by the investigation were receiving divisions or allowances from the public carriers, and that the amounts so received aggregated, on a conservative estimate, between \$50,000,000 and \$60,000,000 annually.²⁷⁵ With regard to conditions in the lumbering industry, it appeared that allowances were generally restricted to the incorporated tap lines, and ultimately, to the larger lumber companies having extensive traffic, despite substantial similarity of operating conditions as between the tap lines not receiving allowances and those to which they were extended.²⁷⁶

found that the granting of these excessive allowances by the main-line carriers "sprang, not from motives of generosity or the dictates of justice, but from the desire and expectation to thereby obtain from the International Harvester Company traffic not otherwise obtainable" (p. 394). The vice of the practice was characterized as follows: "The International Harvester Company owns the Illinois Northern Railroad. Whatever profit accrues to that railroad inures to the benefit of the Harvester Company, its owner alone. When any one of these lines leading from Chicago to the Missouri River pays to the Illinois Northern Railroad Company \$12.00 for the performance of a switching service, which is worth reasonably but \$3.00, it gives to the International Harvester Company, the shipper of that carload of merchandise, \$9.00. If these divisions . . . are legal, there is no practical limit to the extent to which the lines granting them may prefer the International Harvester Company over other shippers" (pp. 398-399).

²⁷⁵ *The Tap Line Case*, 23 I.C.C. 277, 278-279 (1912). "In many cases the allowances so received out of the rate are sufficient, and are intended both by the carrier and the industry owning the industrial line to be sufficient, to cover the cost not only of the movement of materials and finished products between the plant and the adjacent trunk lines but the cost of all the operations of the industrial lines for the industry within its plant. In no small number of cases the allowances are sufficient to meet all these costs and to return handsome dividends on the entire investment of the industry in its tracks and equipment. In some cases the amount thus received by a particular industry is so large as to contribute materially to its prosperity as compared with the prosperity of a competitor in the same line of business receiving no such aid." It should be noted, furthermore, that an overwhelming proportion of the revenues derived by industrial lines arose from the carriage of proprietary traffic. The Commission's findings were as follows: "Out of the whole number, but 135 were receiving, according to their own claims, as much as 20 per cent of their traffic from the general public; and there is reason to think that a careful analysis of the figures would materially modify the extent of this outside traffic. In the case of 2,073 lines 80 per cent or more of the traffic was supplied by the controlling industrial company."

²⁷⁶ *Ibid.*, pp. 282-283. Compare the following, for example: "The three principal trunk lines whose tracks extend through the territory in question are the Kansas City Southern, the Iron Mountain, and the Rock Island. As illustrating the extent of the discrimination arising out of the payment of allowances to some tap lines and the failure to make allowances to others, it is well here to state that of 27 tap-line connections of the Kansas City Southern it makes allowances to 15, while 12 receive no

There were also very wide variations in the amount of the allowances made to different tap lines, being governed in large measure by the traffic influence of the controlling lumber company. "The allowances paid," found the Commission, "range from a minimum of three-quarters of a cent to 6 cents per 100 pounds. In the competition of carriers for the traffic allowances as high as 7 cents per 100 pounds have been paid out of a 14-cent rate, where the haul of the tap line was a matter of feet and yards while the haul of the carrier itself approximated 400 miles."²⁷⁷ Similar discriminatory practices were disclosed by the investigation concluded in 1914 concerning allowances to plant railroads in the iron and steel industries east of the Mississippi River.²⁷⁸ Since the requirement that just and equal treatment be accorded to all users of the transportation service, both as a duty of the carriers and as a function of the Commission, lies at the very root of the assertion of regulatory power, it was inevitable, in face of the widespread prevalence of these abuses, that the relationship between the public carriers and the industrial railroads be subjected to scrutiny and control.

allowances. The Iron Mountain has junctions with 90 tap lines, to 63 of which allowances are made; the other 27 have no allowances. The Rock Island is reached by 43 tap lines. Of this number it makes allowances to 33, leaving 10 without allowances" (pp. 283-284).

²⁷⁷ *Ibid.*, p. 283.

²⁷⁸ *Industrial Railways Case*, 29 I.C.C. 212 (1914). Some of the Commission's findings are amply persuasive of the discriminatory character of the arrangements which prevailed: "In the case of 20 incorporated roads described of record, 16 receive allowances and four do not. Of the 10 unincorporated plant railways, three receive allowances and seven do not. . . . These differences in treatment are not the result of different conditions at the plants but grow out of the competition among the carriers for the traffic. In the same district no allowance is paid to one plant railway, a small allowance is made to another, while a large allowance is paid to a third. . . . The lack of uniformity is also shown in that in some cases the trunk lines make no allowances beyond the so-called furnace allowances, while in other cases allowances are made by them on both inbound and outbound shipments ranging from \$1 to \$2.50 per car. In one case they are fixed at \$2.50 per car on inbound material and \$4 a car on the outbound manufactured products. Upon the whole record it may be taken as fully established that the allowances are not regarded as having any relation to the rate or . . . as having been taken into consideration in fixing the rates; they are simply concessions out of the rate to secure the traffic" (pp. 230-231). It should be noted that these allowances were further supplemented by contributions in the form of "per diem reclaims," which not only eliminated demurrage charges but served as an actual source of revenue to the plant railroads, and of "free services," by way of switching and spotting cars within the plant inclosures for industrial purposes. See *ibid.*, pp. 231-234.

In tracing the nature and course of the Commission's regulatory activity with reference to these situations, it is necessary to distinguish between its performance before and after 1906. Prior to the passage of the Hepburn Act, the Commission's powers appeared to be inadequate to reach these abuses effectively. It possessed no express authority over the apportionment of joint rates as between carriers or over payments made to shippers for performing a service of transportation; nor were industrial railroads explicitly included within the scope of its jurisdiction. It was forced, in these premises, to rely exclusively upon the general prohibitions against discriminatory practices and against departures from the published tariffs contained in the original Act to Regulate Commerce and in the Elkins Act. Doubtless almost every case of improper allowance or excessive division was encompassed by these prohibitions; but since the Commission possessed no mandatory rate-making authority, it lacked the power to prescribe, where necessary, reasonable divisions or allowances in place of the preferential adjustments found to prevail. Furthermore, the existing processes for enforcing the Commission's findings were obviously ineffective: only after review and approval by a court of competent jurisdiction were its orders binding. Under these circumstances, the Commission refrained from issuing direct orders designed to remove these discriminatory practices or to establish proper relationships between the public carriers and industrial railroads.²⁷⁹ Its procedure, rather, was to bring such arrangements as it deemed unlawful to the attention of the Department of Justice, and to rely upon voluntary readjustments between the carriers and the industrial lines concerned.²⁸⁰ But the substantive attitude of the Commission was

²⁷⁹ See *Re Transportation of Salt from Hutchinson*, 10 I.C.R. 1 (1904); *Central Yellow Pine Assn. v. V., S. & P. R. Co.*, 10 I.C.R. 193 (1904); *Re Divisions of Joint Rates*, 10 I.C.R. 385 (1904).

²⁸⁰ In the *Hutchinson Salt* case, *supra*, the Commission said (p. 12): "This proceeding is merely one of inquiry, and no order to cease and desist can be made; nor would such an order add anything to the obligation of the statute. . . . So far as these practices may amount to violations of the criminal features of the Act to Regulate Commerce, the statute apparently makes it our duty to bring them to the attention of the United States district attorney for the proper district, who is required to prosecute such violations under the direction of the Attorney General. This, in effect, places the whole matter in the hands of the Department of Justice, and the more direct way seems to be to refer it there in the first instance, which will be done." Similarly, in the *Yellow Pine Association* case, *supra*, the Commission concluded (p. 216): "According

revealed from the outset. Even at this early stage it disclosed unmistakably that in determining whether any allowance or division was proper it would look at the substance and not the outward form of the arrangement. Resort to mere subterfuge as a means of securing rate concessions or of shielding extravagant payments for services actually rendered was expressly condemned.²⁸¹

But in applying this principle to the tap-line situation in the lumber industry²⁸² the Commission expressed views which were subjected to substantial modification in the course of its subsequent experience. Rate divisions with *private* carriers, by way of compensation for the

to the views here expressed, the divisions allowed by the Kansas City Southern and the St. Louis Southwestern, are in violation of law, and those granted by the St. Louis, Iron Mountain and Southern may be. An order in this case would not, however, be the most efficacious means of putting a stop to these illegal practices if continued; the more ready way would be a resort to injunction or criminal proceedings. This complaint will, therefore, be dismissed and such other steps will be taken as may seem necessary after due opportunity has been given the carriers to adjust their tariffs and other arrangements." Finally, in the *Rate Divisions* case, *supra*, the Commission merely made a report on the facts developed, without issuing any order, and with the declaration—"nor would any order apparently add to the prohibition of the statute itself" (p. 404).

²⁸¹ *Re Transportation of Sals from Hutchinson, supra; Re Divisions of Joint Rates, supra*. In the latter proceeding, for example, although the Commission recognized both the common-carrier status of the Illinois Northern Railroad and its right to make and agree upon joint rates, it pronounced the arrangement a mere device for accordng preferential treatment to the International Harvester Company. "It is urged," said the Commission, "that all this is simply an arrangement between two connecting railroads; that there is no negotiation with the shipper, and no payment to the shipper. This is a mere play upon words. The Illinois Northern Railroad Company and the International Harvester Company are one and the same thing. It is entirely immaterial whether this money goes in the first instance into the treasury of the International Harvester Company or that of its creature, the Illinois Northern Railroad Company. That subterfuges of this sort cannot avail has been often decided. . . . The manifest intention of the Act to Regulate Commerce, especially as expressed in the Elkins Bill, is to strike through all pretense, all ingenious device, to the substance of the transaction itself. So viewing this transaction, there is not the slightest doubt that the granting of these divisions is the allowance of a preference to the International Harvester Company, which is in violation of law" (pp. 401, 402).

²⁸² *Central Yellow Pine Asso. v. V., S. & P. R. Co.*, 10 I.C.R. 193 (1904). The complainant was a trade association composed of concerns engaged in the manufacture and handling of yellow pine lumber in Mississippi and Alabama, and the defendant carriers were roads serving a rival area in the states of Arkansas, Louisiana, and Texas. The methods of manufacturing and marketing this lumber appeared to be essentially the same in both areas. While allowances to tap lines for the service of carrying logs to the mill were seldom, if ever, granted by carriers in the complainant's territory, it was the practice of the defendant carriers to make divisions of from one cent to five cents per one hundred pounds with such roads on their lines. These divisions, it was contended, constituted concessions from the published rates and were unlawful.

cost of bringing logs to the mill, by steam railroad as by other means of conveyance, it rightfully declared to be unlawful, as constituting departures from the published tariffs.²⁸³ In the case of *common-carrier* tap lines, however, it recognized the milling-in-transit privilege and held that joint rates might be established with the main-line carriers and the division of these rates determined by agreement.²⁸⁴ No differentiation was made between the proprietary and non-proprietary traffic of such lines, nor was any question raised as to the motives which might have stimulated their organization. After recognizing negatively that the mere fact of common ownership of a tap line and the mill which it serves was not sufficient to divest the line of its common-carrier status, the Commission merely suggested, by way of criteria, that tap lines which are common carriers are required to file tariffs and submit reports and "must obey the law obligatory on such carriers."²⁸⁵ Apparently the Commission's position was this: that the legality of rate divisions with tap lines turns entirely on whether they

²⁸³ Two of the defendants contended that the divisions merely compensated the mill owner for the actual cost of moving his logs to the mill, and that this was a proper means of developing traffic. The Commission pointed out that upon this theory allowances would be equally justified in the case of movement by team and wagon or other means of conveyance. Essentially this contention involved an acceptance of the principle that reductions may be made from the published rates as a means of equalizing the production costs of competing enterprises—a principle which, in application, has "no stopping place." "We are confident," concluded the Commission with regard to allowances to private carriers on this basis, "that under the provisions of the Act to Regulate Commerce no such principle can be applied to the production of this lumber. The defendants publish a certain rate upon lumber from stations upon their lines. That rate they must observe to all shippers alike. They have no right to return a portion of that rate because logs out of which that lumber is manufactured have come there by a steam railroad or a horse railroad, by wagon or other means of conveyance." *Ibid.*, p. 204.

²⁸⁴ But it was also contended that the transportation involved represented a through service at a through rate—the point of origin of the lumber being on the tap line where the logs were taken up, the stop at the mill for manufacture being justified by application of the milling-in-transit principle. To this view the Commission prescribed, provided the tap line is a common carrier. "If the traffic has been brought by a railroad which is a common carrier under the Act to Regulate Commerce," said the Commission, "the two lines may, by contract or arrangement, establish a joint rate from the point of origin to destination, and may agree between themselves as to the divisions of this rate. In such case the two lines are treated as one. The traffic with respect to the line of the defendant does not originate at the point where it is received by it for shipment, and the rate actually applied to the movement of such traffic may differ from the published rate from that point." *Ibid.*, pp. 210-211.

²⁸⁵ *Ibid.*, p. 215.

are common carriers; and that, the milling-in-transit principle being found to be applicable, it was helpless to interfere with the divisions of the through rates agreed upon between the main-line carriers and the common-carrier tap lines. It is interesting to note that this view only served to put the issues more squarely before the Commission several years later.²⁸⁶ The lumber interests were not slow so to alter the formal organization of their tap lines as to meet the requirements for recognition as common carriers. When so recognized, they were not only in position to receive, legally, the divisions which were forced into their hands by the competition of the main-line carriers, but they were also in more strategic circumstances to bargain for the best terms. The development of the abuses previously noted thus remained unchecked, proceeding behind the shield of the law as interpreted by the Commission in the light of its prevailing authority.

The lack of express and positive authority in these circumstances was recognized as a serious source of difficulty, and the Commission urged repeatedly that it be clothed with additional power.²⁸⁷ The Congressional response in this direction was embraced in the Hepburn Act of 1906. The term "railroad" was made to include all switches, spurs, tracks, and terminal facilities, and the term "transportation" was made to cover all instrumentalities of shipment or carriage irrespective of ownership or contract; the Commission was empowered to determine the reasonable maximum charge to be paid by carriers for any service rendered or any instrumentality furnished by shippers in connection with the transportation of their property; and its mandatory rate-making authority was extended to the prescription of switching charges and to the control of divisions of joint rates under specified conditions. It should be observed, however, that these provisions did not confer jurisdiction over industrial railroads as such. These expressions of legislative policy were directed to the achievement of more effective regulation of the public carriers. Only when industrial lines perform the services of common carriers and, meeting the requirements of law, are so recognized by the Commission, do they fall under the full sway of that tribunal; otherwise they are subject to control only in so far as public transportation services are

²⁸⁶ *The Tap Line Case*, 23 I.C.C. 277 (1912).

²⁸⁷ See, for example, *Annual Reports*: 1904, pp. 19-23; 1905, pp. 10-11.

rendered by them for which compensation is claimed, or to the extent that their relationships with the main-line carriers involve, directly or indirectly, the establishment of discriminatory adjustments. Furthermore, the Commission's power to control the apportionment of joint rates, and thereby to prevent excessive divisions, was not on its face unrestricted. It was conditioned upon failure of the carriers to reach voluntary agreement as to divisions—and then only "after hearing on a complaint." More complete authority in the premises awaited later legislation. Not until the passage of the Transportation Act of 1920 was plenary power granted to the Commission, whereby it could proceed on its own initiative, and whereby divisions of joint rates might be prescribed whenever existing divisions are found to be unjust, unreasonable, or unduly preferential as between the participating carriers, or whenever deemed necessary or desirable in the public interest. On the whole, however, the Commission's authority, as extended in 1906, seemed to be ample to reach the abuses which had developed in connection with the activities of industrial railroads. The chief problems, as will appear, centered in the application of existing authority rather than in any want of necessary power.

The primary objective, as in the earlier period, was to eliminate discriminatory practices. For this purpose it was necessary to resolve certain basic issues—to establish some principle of differentiation between industry and transportation, and between industrial facilities and transportation facilities. If the Commission was to exercise its authority to prescribe the reasonable maximum charge to be paid by carriers for services or instrumentalities of transportation furnished by shippers, or if it was to pass upon the propriety of allowances made to industrial railroads for participating in the movement of traffic, it could not avoid a determination as to where the service of transportation, which the public carriers are obligated either to perform themselves or to have performed for them, ends, and where the industrial service, private in character, begins. When shippers, directly or indirectly, actually perform public transportation services, they are unquestionably entitled to receive just compensation therefor; manifestly, however, the payment of compensation by public carriers for services which are primarily bound up with the manufacturing or industrial process constitutes a rebate to the recipients

thereof and imposes a burden on the community through the consequent drain on carrier revenues.

While it is obvious that each situation must be determined by its own facts, the Commission, in considering and resolving this issue, has been able to enunciate general principles of wide applicability, at least for the manufacturing industries. It has held, in effect, that the contract of transportation of a public carrier is fulfilled when such carrier delivers or accepts cars at some reasonably convenient point of interchange; that the movement of cars beyond such point, over a network of plant switching tracks, is an industrial service and not a service of transportation; that the performance of such service by the shipper does not provide a basis for compelling compensation from the carrier.²⁸⁸ These holdings, which constituted a sound and realistic disposition of the controversy, have been appealed to re-

²⁸⁸ *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I.C.C. 237 (1908). The complainant sought to have the Commission fix reasonable compensation for services performed and instrumentalities furnished by it in connection with the transportation of its own property. An intricate internal trackage system, together with motive power and equipment, constituted the instrumentalities furnished; the service rendered consisted in switching loaded and empty cars between its storage tracks, located within the plant inclosure, and its various warehouses, foundries, and buildings. The basic issue before the Commission was whether the service thus performed was a carrier's service or a shipper's service. The complainant contended that the switching service rendered by it was but the equivalent of the spotting of cars by the carrier without charge for other industries, and hence justified "some abatement in the rate in the way of an allowance." In answer, the Commission differentiated sharply between the circumstances under which carriers customarily spot cars for shippers and the conditions disclosed in this proceeding. Ordinarily, it was pointed out, virtually nothing more is done than the placing of cars on sidetracks; furthermore, the carriers reserve the right to use the short switching tracks for storage purposes and for serving other industries as if they were system trackage, and they perform the switching service for the particular industry at their reasonable convenience. The marked contrast of the prevailing conditions was then made apparent. "But here," said the Commission, "we have within the complainant's inclosure an elaborate system of broad-gauge switching tracks 12 miles in length operated both by steam and electric power and a narrow-gauge system 7 miles in length operated by electricity only; and on both systems a very extensive, purely internal switching is conducted by the complainant with its own motive power and crews. The defendants have no right to make any use of these tracks. They are not system tracks even in the qualified sense above mentioned, but are the exclusive tracks of the complainant. And the switching cannot be done by the defendants at their reasonable convenience and whenever an engine is at hand to do it, but only at such time and in such manner as will not interfere with the complainant's switching engines and crews. . . . It [the complainant] assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give

peatedly in the determination of this issue,²⁸⁹ and, after a lapse of ten years, they were declared to reflect the settled position of the Commission.²⁹⁰ Moreover, even the voluntary performance of such services by the carriers without receipt of special compensation, or the willing grant of allowances from the line-haul rate for their performance by the shippers themselves, through industrial railroads or otherwise, was held to be essentially discriminatory and in violation of law.²⁹¹ Despite some significant alterations in general policy subsequently induced by judicial censorship, these determinations repre-

the complainant a reasonably good service in that respect, but simply because the growth of its business to vast proportions, the multiplication of its buildings, and the extension of its switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under obligation to do, but which it does not and could not permit them to do" (pp. 243, 244). Accordingly, the Commission held this service to be a shipper's service rather than a carrier's service, with no obligation on part of the carrier to accord compensation therefor (pp. 244-245).

²⁸⁹ For example: *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I.C.C. 246 (1908); *Crane Iron Works v. C. R. R. Co. of N. J.*, 17 I.C.C. 514 (1910). In *Crane Iron Works v. U.S.*, 209 Fed. 238 (1913), the Commerce Court declared the Commission's distinction "between those operations which constitute a plant facility and the legitimate services of a common carrier . . . to express a sound and wholesome principle" (p. 243).

²⁹⁰ *The Lake Terminal Case*, 50 I.C.C. 489, 500 (1918). The *General Electric* case, averred the Commission, "has repeatedly been cited with approval in other cases before the Commission and must now be accepted as the settled view of the Commission with respect to such conditions as are under consideration here. The case . . . has also had the approval of the courts." See *Top Line Cases*, 234 U.S. 1, 23 (1914); *Los Angeles Switching Case*, 234 U.S. 294, 307, 310 (1914); *Manufacturers Railway Co. v. U.S.*, 246 U.S. 457, 496 (1918).

²⁹¹ The Commission has contrasted explicitly the situation in the *General Electric* case and those following it with that prevailing where the carriers voluntarily perform a plant service without charge or extend allowances for its performance by shippers or by their industrial railroads. In *Industrial Railways Case*, 29 I.C.C. 212 (1914), the Commission said (at p. 230): "It will be observed in the cases cited that the line carriers were declining to perform any service within the plant beyond the interchange point, and we held that no service beyond that point could lawfully be required of them and, therefore, that they could not be required to make an allowance to the industries for doing the service for themselves with their own facilities. The attitude of the carriers before us here is just the reverse. Under the compulsion of the large traffic of these steel and iron plants the line carriers have been forced by the industries to extend their service beyond the interchange tracks and, without charge in addition to the rate, they are either doing the very service within the plants which, in the cases cited, we said the defendant carriers could not be required to do, or they are paying the industries allowances for doing the service within their plants for themselves with their own facilities. They are volunteering a service in excess of their legal obligation of service and are receiving no compensation for it."

sent the Commission's matured conclusions on this aspect of the problem of industrial railroads.²⁹²

But another basic issue has complicated the situation. It concerns the determination of the common-carrier status of industrial roads and of its effect upon their relationship with the main-line carriers. What attributes serve to elevate an industrial railroad to the position of a *bona fide* common carrier, and lacking them, to relegate it to the status of a mere plant facility? From one standpoint this problem may appear to be simply the obverse of the question just considered—the fundamental issue being the same, except that the instrumentalities of transportation, rather than the services rendered, are involved. The settlement of the one issue may seem necessarily to resolve the other: if the service be found to be one of public transportation, the road is a common carrier; if it be held to constitute a private industrial service, the line is a plant facility. But the matter is not as simple as this. An industrial railroad may at once perform both a service of transportation and a plant service. Is it, then, a common carrier? And what allowances, if any, are justified in case of the plant service? Since common carriers may legally receive divisions of the line-haul rate while private carriers may not, this issue has frequently confronted the Commission—particularly since lines consisting primarily of plant facilities have often assumed the formal status of common carriers.

It will be recalled that, prior to 1906, divisions of the line-haul rate

²⁹² That the Commission's position was essentially the same in both situations is evidenced by the comprehensive conclusions in *Industrial Railways Case, supra* (at pp. 236-237): ". . . we find and conclude on the facts of record that . . . all the service by the line carriers beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within or without the plant, is a shipper's service and not a service of transportation which the line carrier may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad, and that the facilities used by the industry in performing the service, whether separately incorporated or not, are plant facilities and plant equipment. We also conclude and find that the delivery of a car by a line carrier upon the exchange track is a delivery to the industry, and that the elimination of demurrage, under the present practices, as a transportation charge against the industry is unlawful and gives the industry so favored an undue and unreasonable preference and advantage. We further find and conclude that undue and unlawful preferences and discriminations arise out of the present practice of the line carriers in performing such services without additional charge and in making allowances therefor out of the rate when performed by the industry or by its plant

with common-carrier tap lines were regarded as lawful, and that compliance with the requirements obligatory on common carriers under the Act was the only criterion suggested as a basis for the determination of status. In scattered proceedings, however, the Commission had also evinced a determination to look to the substance of the prevailing arrangements, and not to deem itself estopped by legal formalities. It now found itself faced with the necessity of applying this mode of attack to the question of common-carrier status on a comprehensive scale. Should the differentiation between lines which are mere plant facilities and those which are *bona fide* common carriers be based upon purely formalistic grounds, or should legal technicalities be subordinated to the actual facts of the situation—to the nature of the services rendered and the circumstances and conditions of operation? It was plain that the use of the former basis would fall far short of achieving equitable adjustments. Numerous concerns had taken pains so to organize their plant railroads as to comply with all formal requirements essential to common-carrier status, even though, in point of fact, they neither performed nor were intended to perform a public transportation service.²⁹³ Under

railway. We further find and conclude upon the record that the line carriers are not compensated for such services in their rates and that the allowances therefor out of the rates are unlawful rebates paid for the traffic, and when performed by the line carriers are unlawful rebates, in service, paid for a like purpose."

²⁹³ Compare, for example, the following development of the various steps by which the stage was set in many instances for the receipt of divisions or allowances: "It has been our observation," said the Commission, "that nearly all the larger industries that use rails and locomotives as an economy in their manufacturing processes are trying to find some basis for exacting tribute from the connecting line carriers in the form of allowances that will provide for the payment of the greater part, if not the entire cost, of operating these plant facilities. Ordinarily the first step in that direction is to incorporate a railroad company under the local law to operate the industrial rails. The next step is to seek some outside shipper to serve, so that there may be some color for the claim that the plant facility is serving the shipping public and is therefore a public carrier with respect to all its operations. If now, when all this has been arranged, the industry has a substantial traffic of its own to use as a means of compulsion, the carriers that reach it soon submit to its exactions and, through divisions or allowances out of their rates, assume the burden of operating the plant railway, giving to the industry, in addition, all the attendant perquisites in the way of *per diem* reclaims and the remission of the demurrage charges that less fortunate shippers have to pay. The line carriers then turn to their general rate schedules, and by increasing other rates lay this burden over upon other shippers. All these arrangements and efforts to serve a few outside shippers, who . . . are ordinarily already reasonably served by the line carriers, are mere devices intended only to afford color of a basis for the demands of the in-

such circumstances, exclusive reliance upon legal criteria of common-carrier status would have served to permit, under shield of the law, the very abuses which the law was designed to eradicate. There were the more difficult cases, too, where a considerable amount of outside traffic had been developed, in which the exercise of careful judgment and nice discrimination, on the basis of the facts disclosed, was essential.²⁹⁴ The questions at issue were not susceptible of solution by reference to any general rule having its basis in mere outward form. The application of any such rule would inevitably result in the emergence of preferential treatment in individual cases; it was necessary that each situation be considered separately and decided on its merits, and that the inquiry should reach below the surface of formal compliance with common-carrier requirements. Such an approach was essential to effective and realistic performance of the Commission's regulatory task. This does not mean, however, that no consideration was given by the Commission to the outward earmarks of common-carrier status. Not only was a holding out as a common carrier deemed necessary, but observance of the provisions of the Act to Regulate Commerce was set up as a prerequisite to recognition as such common carrier.²⁹⁵ But compliance with legal require-

industries upon the line carriers for allowances and divisions out of the published rates, the result of which, as heretofore explained, is to throw their private burdens upon the general shipping public." *Industrial Railways Case*, 29 I.C.C. 212 (1914), at pp. 242-243.

²⁹⁴ In his separate opinion in *Star Grain and Lumber Co. v. A., T. & S. F. Ry. Co.*, 17 I.C.C. 338, 352 (1909), Commissioner Prouty directed special attention to this difficulty: "Many of these so-called 'tap lines' have developed from private logging roads, having none of the incidents of a common carrier. A railroad whose only business twenty years ago was the hauling of logs a few miles to the mill is to-day a hundred miles long and engaged in the transportation of passengers, of express, and of the mails, as well as of logs and of lumber. The difficulty of determining where the private carrier leaves off and where the common carrier begins is what lends embarrassment to the problem before us. Manifestly, a lumber company can not endure its railroad with the habiliments of a common carrier by taking out an act of incorporation, nor by the filing of a tariff, nor by the making of a statistical report to this Commission. The fact that the legislature of the state has granted an act of incorporation with the right of eminent domain, especially if that right has been exercised in the construction of the road, would be significant; but after all it is in each case a question of fact, depending upon the circumstances under which the individual road has been constructed and is being operated."

²⁹⁵ In *Star Grain and Lumber Co. v. A., T. & S. F. Ry. Co.*, *supra*, for example, the Commission said (pp. 343-344): "And certainly we cannot recognize as common carriers, under the act, lines that do not publish tariffs in lawful form, or concur properly in lawful tariffs of other lines in which they are named as parties, or that do

ments, though essential, was not of itself deemed sufficient to establish such common-carrier status as would justify, in all instances, receipt of divisions or allowances from the line-haul rate; the Commission examined the actual conditions of operation and sought to determine, further, whether the line was a common carrier in fact as well as in form, and with reference to the traffic of the affiliated industry as well as of such outside business as it may have developed.²⁹⁶ In essence the Commission was but striving to render the administrative method an effective instrument for the elimination of preferences to particular industries and for removing the burden of industrial costs from the shoulders of the public carriers.²⁹⁷

not file annual reports with this Commission and keep their accounts in accordance with the system prescribed by us. As heretofore stated, we cannot recognize a tap line as a common carrier under this act, and as entitled either to allowances or divisions through rates, that does not in all respects comply with the law. And we hold that allowances or divisions accorded by regular carriers to the so-called tap lines, whether incorporated or not, which do not comply with the requirements of the law in the respects referred to, are unlawful."

²⁹⁶ The view of the Commission was clearly stated in *The Tap Line Case*, 23 I.C.C. 277 (1912), at p. 292: "If there is a holding out as a common carrier for hire, and if there is an ostensible and actual movement of traffic for the public for hire, generally speaking, the status of a common carrier may be said to exist, whether the holding out is by a company or by an individual. But such a holding out and the existence of an actual traffic is not conclusive in all cases. Where the holding out is in furtherance of a plan to secure unlawful advantages and the alleged carrier is able to pick up some traffic that is incidental to that purpose, it must be regarded simply as a cloak or device to effect unlawful results. This commission, in the enforcement of the law, is necessarily bound to ascertain the real purpose and object of the holding out; and in the prevention of preferences and other unlawful consequences it is entitled to and must ascertain the real situation. In other words, whether a company or a person claiming to be a common carrier is a common carrier at all and for all purposes is a question of fact, and whether the service performed for a particular person is a service of transportation or an industrial service is also a question of fact."

²⁹⁷ In conformity with the best traditions of administrative performance, the Commission, as a tribunal informed by knowledge and experience, deemed it its duty to go to the heart of the problem, and not to abdicate its essential powers at the very threshold of the task. It emphasized repeatedly, therefore, that the mere satisfaction of legal requirements by these industrial lines, and their mere holding themselves out as common carriers, did not dispose of the central issue and could not check further inquiry. For example: "But assuming a case where all these matters [compliance with common-carrier obligations under the Act] have been carefully guarded by tariffs properly constructed and a system of accounts conforming to our regulations, must we accept that tap line as a common carrier merely because it calls itself a common carrier, when in fact its so-called line is a mere logging road extending from the mill that really owns it into the forest also owned by the mill, with no public to serve or no traffic other than the logs that have been cut by the mill and are to be manufactured by it into lumber? In other words, as an administrative body, are we to be stopped at the surface of a transportation problem because its form and outward appearance are regular

But when, after extensive investigation, the Commission applied this method of approach to a large number of tap lines in the lumber regions, it found its holdings annulled by judicial decree.²⁹⁸ The issue between the Commission and the courts was sharply drawn. Briefly, the practical problem encountered by the Commission was this: While most of the tap lines had complied with all formal common-carrier requirements and had also developed an appreciable amount of outside traffic, they were found to perform an industrial service for their affiliated lumber companies no less clearly than when, at an earlier period, they served these companies exclusively as departments of the business; under such circumstances, the unqualified recognition of these tap lines as common carriers might justify divisions or allowances on the proprietary portion of their traffic which, in the view of the Commission, would constitute veiled concessions from the lawful rates, while complete denial of common-carrier status would run counter to the facts of their organization and operation and would preclude the receipt of divisions or allowances to which they were justly entitled. Faced by these considerations, the Commission adopted the policy of declaring such roads common carriers with respect to their non-proprietary traffic, but mere plant facilities with respect to their proprietary traffic.²⁹⁹ While the main-line carriers

and not look into and examine its real substance?" Again: "It is sometimes said that the essential characteristic of a common carrier is that it holds itself out as such to the world, and in a certain class of cases some such test has been applied; and where there is a shipping world to which it may hold itself out as a common carrier and which it may serve in that capacity the test suggested may be a proper one. But when we are dealing with a law the underlying principle of which is to forbid preferences, discriminations, and concessions from the legal rates, and when there is no shipping public which the alleged common carrier may serve, and when it is owned or controlled directly or indirectly by a particular industry which needs it as a plant facility and can not successfully conduct its business without it, and when its revenues accrue directly or indirectly to that industry, it leaves this Commission in rather an impotent condition if it must accept the mere form as controlling, and may not look into the actual situation and thus be able to enforce the prohibitions of the act against such preferences and discriminations and departures from lawfully published rates." *Stor Grain and Lumber Co. v. A., T. & S. F. Ry. Co.*, 17 I.C.C. 338 (1909), at p. 344.

²⁹⁸ The Commission's determinations were made in *The Tap Line Case*, 23 I.C.C. 277, 549 (1912). The Commission's order was annulled by the Commerce Court in 209 Fed. 244, 260 (1913), and upon appeal by the Commission, the decree of the Commerce Court was affirmed by the Supreme Court in *Tap Line Cases*, 234 U.S. 1, 29 (1914).

²⁹⁹ The first explicit reference to this policy appeared in *Kaul Lumber Co. v. C. of*

were permitted to extend divisions or allowances from the line-haul rate on the non-proprietary traffic of these tap lines, they were ordered to cease and desist from such payments in connection with the traffic of the proprietary industries. With reference to the proprietary traffic, the assumption of the character of common carriers by the tap lines was held to constitute a mere device for receiving, as rate divisions, the allowances which had previously been received as rebates. In this way the Commission sought to strike through all pretense and to effect non-preferential adjustments. But the Supreme Court would not countenance this twisting of the common-carrier concept and effectively destroyed the entire fabric built up by the Commission. In holding the Commission's order invalid, the Court declared that the test of common-carrier status was to be found, not in the substantive facts disclosed—that is, in the nature of the services rendered by the tap lines and in the conditions of their operation—but in the attendant legal circumstances—that is, in their recognition as common carriers by the states in which they were incorporated and in their

G. Ry. Co., 20 I.C.C. 450 (1911). This proceeding involved a reparation claim by a tap line on the basis of an alleged unreasonable rate advance. The tap line carried both proprietary and non-proprietary traffic and appeared to possess the essential earmarks of a common carrier. In refusing an award of reparation and dismissing the case, the Commission concluded (p. 455): "We believe that all the demands of substantial justice and the true right of the matter compel us to hold that whereas it may be a common carrier with respect to the public at large, in the transportation of logs and other forest products from the forest to the complainant's mill, the services of the . . . Railroad in the transportation from the forest to complainant's mill of these products, which is the basis of this claim, was a plant-facility service for the complaining company." In effect, however, the same stand was taken even earlier in *Crane Iron Works v. C. R. R. Co. of N. J.*, 17 I.C.C. 514 (1910). The Crane Railroad Company, an incorporated industrial line, served the Crane Iron Works and certain other manufacturing concerns by switching cars between their plants and the exchange tracks of the main-line carriers. While the defendant carrier made allowances to the Crane Railroad for handling cars of other industries on its line, it refused to absorb the switching charges to the Iron Works. It was urged that if the Railroad was a common carrier the same allowances must be made with respect to the traffic of the Iron Works as in case of the other industries. In answer, the Commission said (p. 518): "To this reasoning we are unable to assent. In our view of the case the controlling inquiry should be, not the character of the servant which renders the service, but the character of the service rendered." It should be noted, however, that in this case, as in the *Kaul Lumber* case, *supra*, the Commission made no express finding as to the common-carrier status of the industrial line, even as to non-proprietary traffic. In the instant proceeding the Commission said (pp. 519-520): "We do not decide here that the Crane Railroad Company is or is not a common carrier. We simply hold that the service performed by that railroad for the complainant is that of a plant facility, the expense of which should be

holding themselves out as such to the public.³⁰⁰ It followed, therefore, that "the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves,"³⁰¹ and that there was no ground for differentiation between proprietary and non-proprietary traffic. If a tap line is a common carrier and is entitled to divisions or allowances on non-proprietary traffic, it is equally entitled to such divisions or allowances on the traffic of the proprietary industry.³⁰² Through these holdings the Court gave the controlling weight of its approval to the practice prevailing in many lines of enterprise of utilizing industrial railroads as a means of reducing production costs at the expense of transportation revenues. It did recognize, however, both the existence of abuses in connection with these roads and the necessity of their control; and it declared that the Commission, under its general authority to reach all unlawful discriminatory practices, possessed

borne entirely by the complainant and which no railroad under the guise of the absorption of a switching charge may lawfully sustain."

³⁰⁰ Said the Court, through Justice Day: "It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. . . . Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the State. They are so treated by the public authorities of the State. . . . They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers. . . . They are engaged in transportation as that term is defined by the Commerce Act and described in decisions of this court. . . . The Commission itself as to all shippers other than those controlled by the so-called proprietary companies, treated them as common carriers, for it has ordered the trunk lines to reestablish through routes and joint rates as to such traffic." *Tap Line Cases*, 234 U.S. 1, 24, 26-27 (1914).

³⁰¹ *Ibid.*, p. 28.

³⁰² Indeed, the Court found that this differentiation between proprietary and non-proprietary traffic was itself productive of discrimination: "As we have said, the Commission by its order herein required the trunk lines to reestablish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line." *Ibid.*

ample power so to fix the divisions of joint through rates as to nullify rebates and preferences.⁸⁰⁸

Despite the Court's recognition of extensive administrative power in the premises, there can be no question that basic restrictions were imposed upon the Commission through this judicial determination. In holding the tap lines to be mere plant facilities with respect to their proprietary traffic, the Commission had in effect found that the service rendered by them was an industrial service, incumbent upon the lumber companies, rather than a service of transportation, incumbent upon the carriers. The problem was not merely as to whether the prevailing divisions or allowances, either individually or in their interrelationships, were just and reasonable in amount, but as to whether their payment could be permitted in any amount without necessarily imposing burdens upon transportation which should legitimately be borne by industry. It is true that timber and its products were expressly exempted from the provisions of the "commodities clause," which sought to divorce transportation from industry; but the mere propriety of common ownership of lumber mills and tap lines does not justify the use of the tap lines as a means of diverting transportation revenues to the meeting of industrial costs. The Commission's denial of common-carrier status to the tap lines was but an expedient for preventing such diversion, in light of the service which they rendered to their proprietary industries; the Court's reversal, on the

⁸⁰⁸ These pronouncements, which provided a basis for the Commission's subsequent policies, were of especial importance because they recognized, though merely by way of dicta, the Commission's power to prescribe non-discriminatory rate divisions, without the prior establishment of through routes and joint rates and without prior disagreement among the carriers as to divisions. In indicating the lawful sweep of the Commission's jurisdiction in the premises, the Court said (pp. 28-29): "It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences,

other hand, appeared to find complete justification for the practice in the mere assumption of common-carrier status, as judged by the formal tests which were promulgated.⁸⁰⁴ The propriety of participation in joint rates could no longer be questioned; the only issue, with respect to which ample power was declared to reside in the Commission, was whether the divisions or allowances constituting such participation were just and reasonable. The Court concluded, it will be recalled: "If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."⁸⁰⁵ It would be a strained construction of the situation, therefore, to assume that the Commission and the Court were but seeking the same end, through the application of different methods. In reality, legal concepts prevailed over administrative wis-

whatever form they may take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."

⁸⁰⁴ Compare the following from the opinion of the Court: "A perusal of the findings and orders of the Commission makes it apparent that the grounds of decision upon which it proceeded were two, first, that these roads were mere plant facilities, second, that they were not common carriers as to proprietary traffic. The Commission held that before incorporation they were plant facilities and that after incorporation they remained such. What the Commission means by plant facilities may be gathered from a consideration of some of its decisions. In *General Electric Co. v. N. Y. C. and H. R. R. R.* . . . a network of interior switching tracks constructed to meet the necessities of the business, were held to be mere plant facilities. The same principle was applied to the internal trackage of large industrial plants in *Solvay Process Company v. Delaware, Lackawanna and Western R. R. Co.* . . . These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and operated them. But a common carrier performing service as such, regulated and operated under competent authority . . . is no longer a mere appendage of a mill 'but a public institution.' It thus becomes apparent that the real question in these cases is the true character of the roads here involved. Are they plant facilities merely or common carriers with rights and obligations as such?" *Ibid.*, pp. 23-24. Query: would the trackage systems in the *General Electric* and *Solvay Process* cases lose their character of plant facilities with respect to their proprietary industries if, upon extension, they assumed the formal organization of common carriers and held themselves out to serve the public? The issue between the Commission and the Court, it would seem, is sharply raised by this query.

⁸⁰⁵ *Ibid.*, p. 29.

dom, and the policy of regulation was substituted for the policy of prohibition. The new approach is evidenced by the character of the Commission's major proceedings following the Supreme Court's decision; its inadequacy, in many instances, is evidenced by the Commission's continued struggle with the *bona fides* of common-carrier status and with the problem of plant facilities despite the apparent foreclosure of these issues by the Supreme Court.

The Commission's immediate task was to effect such readjustments with respect to the tap lines as the principles of the Supreme Court's decision seemed to require. Accordingly, its original orders were vacated in so far as they related to through routes, joint rates, and divisions; the through routes and joint rates which were in effect prior to May 1, 1912, were reestablished; and maximum switching charges and rate divisions were prescribed. While these allowances have subsequently been changed in amount as circumstances have required, the principles governing their determination have continued to prevail. They represented the net payments which might be made out of the trunk-line rates for the service performed by the tap lines in moving cars to and from the junction points. In the case of mere switching service, payments per car were prescribed; for shipments of over three miles from the junction points, allowances were graded on the basis of distance, in terms of cents per hundred pounds. Thus, while the legitimacy of some participation in joint rates was recognized in all instances, the amounts of the allowances were so regulated as to eliminate such excessive payments as would in any event constitute indirect rebates to the proprietary industries, and such diversity of treatment, as between the various tap lines, as would necessarily issue in preferential adjustments. The service performed, largely as reflected by distance, was made the measure of payment. The allowances thus prescribed were not only to apply for the future, but were made retroactive to May 1, 1912, with provision for the payment of reparations for the intervening period. Furthermore, the trunk lines were required to file copies of their division sheets with respect to the connecting tap lines, and the tap lines were similarly required to file copies of their distance tariffs. In these ways, the Commission, upon recognizing the common-carrier status of these roads,

asserted its regulatory power in thoroughgoing fashion, and this exercise of authority has been expressly upheld by the Supreme Court.⁸⁰⁶

Moreover, the changed situation was deemed by the Commission to apply to the industrial railroads as a class, and not merely to the tap lines which had been directly involved in the original litigation in the courts. The Commission had previously held that a large number of industrial lines in the iron and steel industry were merely plant facilities, performing an industrial service rather than a service of transportation, and that they were not entitled to compensation from the public carriers through divisions of joint rates or otherwise.⁸⁰⁷ Although no order was entered in that proceeding, the line-haul carriers had withdrawn their divisions and allowances in accordance with the Commission's findings. It now became necessary, therefore, to modify the findings of the original report. The Commission again refrained from issuing an order, so that no delay might be experienced through litigation in the courts, but it permitted the old arrangements to be resumed, subject to its subsequent inquiry, in individual cases, as to their propriety.⁸⁰⁸ "We think that in the light of the decision of the Supreme Court in the *Tap Line cases*," said the Commission, "it is our duty to so modify our findings in the original

⁸⁰⁶ The Commission asserted this regulatory authority over tap lines in its Second Supplemental Report, *The Tap Line Case*, 31 I.C.C. 490 (1914). Its order was upheld in *O'Keefe v. U.S.*, 240 U.S. 294 (1916). This proceeding was an appeal from a decree of the District Court for the Eastern District of Louisiana, which had dismissed a bill praying that the Commission's order fixing maximum allowances to tap lines on a distance basis be annulled. The petition was filed by the appellant on behalf of the New Orleans, Texas and Mexico Railroad Company (which had suffered diversion of a large part of its lumber traffic to other main-line carriers as a result of the application of the Commission's order), as a means of enabling it to pay to the tap line a larger amount than that permitted by the Commission, in order that the diversion of traffic to the lines of its competitors might be prevented. It was contended, *inter alia*, that the Commission's order was invalid because divisions of joint rates were fixed in the absence of prior disagreement among the carriers involved as to the amount of these divisions. The Court found that shippers might render transportation services indirectly through intervening corporations, and that the Commission had full authority to prescribe the maximum charges payable therefor by carriers. "We are clear," concluded the Court, "that the Commission had jurisdiction to make the order of July 29, 1914," and other contentions of the appellant were likewise declared without merit.

⁸⁰⁷ *Industrial Railways Case*, 29 I.C.C. 212 (1914).

⁸⁰⁸ This modification of the original findings was made in its Supplemental Report, *Industrial Railways Case*, 32 I.C.C. 129 (1914).

report herein as to permit the trunk line roads, if they so elect, to arrange by agreement with any of the industrial roads mentioned in our former report which are common carriers under the test applied by the Supreme Court in the *Tap Line cases*, and which perform a service of transportation, for a reasonable compensation for such service in the form of switching charges or divisions of joint through rates. Each road that becomes party to such an agreement must file with us immediately upon the consummation thereof a full statement of the arrangement entered into showing specifically the allowances or divisions granted thereby. We shall, in the exercise of the duty pointed out by the Supreme Court, undertake at the earliest available opportunity to inquire carefully into any of these allowances or divisions which may seem to be unwarranted or unreasonable or to effect unjust discrimination.⁸⁰⁹ It will be observed that although, in contradistinction to the tap-line proceeding, no action was here made obligatory upon the trunk-line roads, the same policy was disclosed of recognizing common-carrier status and exercising strict supervision of the arrangements entered into, coupled with an explicit declaration of intention to ferret out irregularities.⁸¹⁰

But as the Commission proceeded with its regulatory tasks, it became necessary once more to go beyond the mere surface of common-carrier status and to probe the essential character of prevailing arrangements and of those for which the Commission's approval was being sought. Before the amount of the allowances could be prescribed in all instances, there was need of establishing whether any allowance was warranted under the peculiar circumstances of each proceeding. This is clearly evidenced by the character of the issues which the Commission deemed to be involved in determinations of the legitimacy of joint-rate arrangements between trunk-line roads and industrial lines. "There must be determined with respect to each of the lines," said the Commission, "first, whether the instrumentality performing the service is a bona fide common carrier; second, whether the service which it performs between the point of inter-

⁸⁰⁹ *Ibid.*, p. 132.

⁸¹⁰ In concluding its report, the Commission said (p. 133): "Each of the industrial railroads is or is not a common carrier. If it is a common carrier, it is entitled to all the rights and subject to all of the limitations provided in the act."

change with the trunk line and point of placement on the line of the industrial road is plant service or public transportation; third, whether a charge should be made for such service in addition to the line-haul rate applicable to or from points on the rails of the trunk line at the junction. With these questions there is to be considered the larger economic problem whether part of the money paid to the trunk line carriers for public transportation service is to be used to defray the expense of particular shippers in conveying their traffic to and from the terminals of the trunk line carriers.⁸¹¹

In the application of these guides, the formal tests of common-carrier status set forth by the Supreme Court did not always prove an adequate means of resolving the difficulties of particular cases. The Commission's emphasis upon the performance of a public transportation service and upon the *bona fides* of the assumption of public obligations, involved going behind the legal requisites which had been found, as a general rule, to be controlling. The Commission has insisted, for example, that the holding out as a common carrier be genuine, as reflected by such facts as reasonable access of the public to the facilities of the industrial line and the freedom of that line from undue subordination to the necessities of the controlling industry.⁸¹² Yet such an approach was compelled by the circumstances

⁸¹¹ *Second Industrial Railways Case*, 34 I.C.C. 596 (1915), at p. 600. This proceeding arose as a result of the withdrawal by the trunk-line carriers in official classification territory, in conformity with the Commission's findings in *Industrial Railways Case*, 29 I.C.C. 212 (1914), from all joint arrangements with industrially-owned lines. Protests were received and formal complaints were filed, and the tariffs canceling such arrangements with industrial lines not involved in the original proceeding were suspended. "Because of the varying nature of the operations of the industrial lines and because each of them must be treated on the particular facts pertaining to it," the Commission laid down general principles for the guidance of those desiring to enter into joint-rate arrangements. An order was entered directing the trunk lines to cancel the suspended tariffs, but otherwise the situation was left to the initiative of the carriers, acting upon the general principles enunciated by the Commission. "The Commission will look to the trunk lines to reform their tariffs and file with this Commission whatever arrangements they may make with the industrial lines here in question in the light of this report. . . . The formal complaints filed in these proceedings raise no issue with respect to any particular rate or rates. They attack, in effect, the principles applied by the carriers in the cancellation of their arrangements with industrial lines. Carriers against which these complaints were filed will be expected to follow the same lines of action herein suggested for the carriers whose tariffs were suspended in this proceeding" (p. 608). For the propriety of imposing charges in addition to the line-haul rate, see *Car Spotting Charges*, 34 I.C.C. 609 (1915).

⁸¹² For example: "The principal test of common carriage is whether there is a

surrounding the operation of many industrial railroads,⁸¹⁸ despite the fact that a broad insistence upon the genuineness of the holding out may be regarded as tantamount to grounding the test of common-carrier status in the nature of the business and the conditions of opera-

bona fide holding out coupled with the ability to carry for hire; . . . and defendant holds itself out to transport live stock for hire between its stockyards and points of connection with the tracks of the trunk lines serving Kansas City whose tracks connect with its own. Ordinarily this would be sufficient to constitute defendant a common carrier of live stock engaged in interstate commerce. . . . It would suffice that defendant is willing to carry for hire; that the carriage is a part of interstate carriage; that locomotives are available for the purpose through an arrangement with the Chicago, Rock Island & Pacific Railway, and that the trunk lines served hold themselves out to carry live stock for the public generally. . . . To be effective, however, the holding out must be genuine, which defendant's holding out is not. Defendant did not expect complainants to avail themselves of the service offered. It expected that complainants would continue to handle their cars to and from defendant's yards for themselves and with their own motive power. It would be impossible for this defendant to directly serve the public. The terms of defendant's arrangement for locomotives . . . are not disclosed, but the indications are that locomotives were to be furnished only if and when requested by defendant, to be paid for only if actually furnished, and the evidence leaves no doubt that complainants can handle their cars for themselves over defendant's tracks more cheaply, conveniently, and expeditiously than defendant can handle them. Although the adequacy of the service and facilities furnished is not a test of common carriage, it may be significant of the bona fides of the holding out. Defendant's real purpose is to secure compensation for the use of its tracks by complainants, and defendant holds itself out to transport complainants' cars solely in order to impose a trackage charge through a published tariff. Under these circumstances defendant's tariff must be stricken from our files." *A., T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92 (1915), at pp. 100-101.

⁸¹⁸ In *Second Industrial Railways Case*, 34 I.C.C. 596 (1915), the Commission, after citing its earlier pronouncement that "the principal test of common carriage is whether there is a bona fide holding out coupled with the ability to carry for hire," made the following declaration (p. 601): "Many of the lines on this record own no cars of their own and in some instances no locomotives, and maintain no stations other than loading and unloading docks within the plant. Their tracks lie wholly on the land of the industry which they serve, and access to them may be obtained only through the permission of the controlling industry. In such circumstances the holding out is not genuine. The public can not avail itself of such a line. Because of the location of many of them it is impossible to serve the public. In other cases there is no public to serve." Again (p. 607): "In a fifth group the following conditions are shown: An industry has plant tracks which could under no conceivable conditions be considered as having any common-carrier characteristics. In order to give to them such a status, a railroad is incorporated, the tracks of the plant are leased to it, and the trunk line grants trackage rights and even leases its rails to the industrially owned railroad corporation. Thereupon the industrial railroad publishes tariffs, files them with this Commission, makes reports, and as a matter of form assumes the appearance of a common carrier subject to the act, and the trunk line affords it divisions out of the rate applicable to the locality for the same service which the industry has previously performed without compensation. The shipper through its incorporated railroad is thus afforded advantages which are denied to other shippers having a smaller volume of traffic. For a trunk line carrier to offer its facilities by lease or trackage rights, to

tion—the practice which, in general terms, had been condemned by the courts.³¹⁴ In shifting from a policy of preventing allowances to industrial railroads to one of regulating them, the Commission did

give an undue advantage to a single shipper, is unquestionably such a device as is condemned by the act."

³¹⁴ The most unmistakable assertion of the Commission's independence was in *The Lake Terminal Case*, 50 I.C.C. 489 (1918). Despite the fact that the Lake Terminal Railroad Company served thirty-three shippers in addition to the proprietary plant and that it was regularly incorporated as a common carrier, it was held by the majority of the Commission to be a plant facility. "In several proceedings before this Commission the facts developed upon the hearings led us to question the bona fides of the holding out by industrial railroads claiming to be common carriers. . . . And unless the mere fact that the Lake Terminal Railroad Company is incorporated under the general railroad law of the state of Ohio . . . is itself sufficient to make it a common carrier in the eye of the law, without regard to its real purpose and actual relation to the tube company, there would seem to be no substantial basis for its claim to the status of a common carrier. The record makes it clear that it does not offer in good faith to serve the general public as a common carrier; that it makes no real effort to secure traffic from the general public; that the general public has no reasonable access to its facilities; and that it can not handle the traffic of the general public as traffic is ordinarily handled by a common carrier; but that its facilities and its services must be and are subordinated to the necessities and accommodated to the requirements of the controlling industry. Its primary purpose and first duty day by day is to serve that particular industry. After carefully weighing all the evidence before us, we find that its daily work for the tube plant at Lorain was during the period of the action, and now is, that of a plant facility" (p. 495). Furthermore, the Commission found that the service performed was a plant service, and not a service of transportation "which may be included in and paid for out of the line rates" (p. 504). Commissioner Hall, Chairman Daniels, and Commissioner McChord dissented. In his dissenting opinion (pp. 504-514), Commissioner Hall attacked the majority findings on many grounds. Basically, however, he insisted that these findings were a repudiation of the Supreme Court's holding in the *Tap Line Cases*, and that they were inconsistent with the Commission's own determinations following that decision. "In view of the Supreme Court's opinion in the *Tap Line Cases*" he said, "we deemed it necessary to modify our conclusions in the *Industrial Railways Case*. . . . Since that time we have considered a series of cases following the *Second Industrial Railways Case*. . . . In these reports we have considered individual roads and have followed the rules for establishing reasonable maximum divisions or switching absorptions. . . . The majority report declares unlawful what we have heretofore found lawful. . . . In essence it is a return to the doctrine originally announced in the *Industrial Railways Case*. . . . and which we abandoned in view of the Supreme Court's opinion" (pp. 510-511). And, in conclusion: "Moreover, under the Supreme Court's decision in the *Tap Line Cases*, our function is to regulate, and not to prohibit, divisions between trunk line and industrial roads. However much we might sympathize with a legislative purpose completely to divorce transportation from industry, no such intent has been evidenced. Our powers are confined to an administration of existing law as interpreted by the courts and do not extend to supplying legislation which Congress has not seen fit to enact" (p. 514). It should be noted, finally, that the Commission itself was not unimpressed by this conflict of views. Commissioner Harlan, speaking for the majority, said (p. 504): "In view of the variance of opinion entertained in the Commission and elsewhere upon

not deem itself foreclosed thereby against exercising its administrative authority in light of the realities disclosed by varying circumstances and conditions.³¹⁵

the many important and difficult questions so frequently arising out of the relations between the trunk line carriers and industries with industrial railways, it seems desirable that the rulings in this case, which . . . presents conditions that are fairly characteristic, should be reviewed by the courts in order that some definite principle may be judicially established by which we may hereafter be guided in such cases as they arise."

³¹⁵In point of fact, however, the conclusions reached by the Commission in the *Lake Terminal Case*, *supra*, were subsequently so modified as to constitute a complete reversal of its position. In the original report the complaints seeking reparation during the non-absorption period were dismissed, on the ground that the service performed by the Lake Terminal Railroad was a plant service and not a service of transportation, and the defendant carriers were ordered to cease and desist from making allowances to this line in the future for such plant service. In 272 Fed. 735 (1918), the District Court for the Northern District of Ohio suspended, during the pendency of the suit, the portion of the Commission's order which related to future allowances. The Commission thereupon vacated this part of its order, and a petition for rehearing and reargument was granted. In *National Tube Co. v. L. T. R. R. Co.*, 55 I.C.C. 469 (1919), the Commission found the Lake Terminal Railroad to be a common carrier, both as to the past transactions involved and for the future, and reparation was awarded for the period of non-absorption of charges by the main-line carriers. Commissioner Hall, now speaking for the majority of the Commission, said (p. 476): "Upon the record we are of opinion and find that the Lake Terminal is, and at all times covered by these cases has been, a common carrier subject to the act to regulate commerce, and may lawfully receive from its trunk line connections divisions of joint rates, or absorptions of switching charges under appropriate tariffs, such divisions or absorptions to be reasonable." And on the reparation issue (p. 482): "We are of opinion and find that complainants made shipments as described and paid and bore the freight charges thereon herein found to have been unreasonable and unduly prejudicial; that they have been damaged thereby in the difference between the transportation charges paid and those that would have accrued at the district rates herein found reasonable; and that they are entitled to reparation with interest." Commissioner Wooley and Commissioner Eastman dissented. In a separate opinion, 56 I.C.C. 272 (1920), Commissioner Eastman declared the issue to turn, not upon whether the Lake Terminal Railroad is a common carrier, but upon the character of the service which it performed—and from this standpoint he concluded that the proceeding was governed by the *General Electric* case and those following it. *Inter alia*, he said (pp. 277-278): "I can not but believe that it is highly important that public tribunals should be able to look beyond the form into the substance—to perceive through the veil of legal fiction the reality which lies beneath. And nowhere is there greater need for such discrimination than in dealing with legally distinct corporations which are nevertheless, by reason of stock ownership, but parts or manifestations of a single entity. It is not too much to say that the great abuses in corporate affairs in this country have been made possible, or have been facilitated, by the creation and multiplication of such subsidiary corporations. . . . In the instant case, while certain property and certain functions have been committed to the ownership and care of a subsidiary or affiliated corporation known as the Lake Terminal Railroad Company, I am unable to believe that the actual situation would in any material respect be changed, so far as

In the vast majority of instances, however, the usual criteria of common-carrier status have been accorded unquestioned recognition,⁸¹⁶ and rate divisions and switching allowances have been permitted to be extended to industrially-controlled roads.⁸¹⁷ The Commission's chief task, in conformity with the judicial definition of its jurisdictional scope, has been to regulate the relationships between main-line carriers and industrial railroads. The payments approved or prescribed in this process of regulation have been designed to

the transportation of cars between the interchange tracks and the various parts of the plant is concerned, if the United States Steel Corporation or the National Tube Company owned the railway and performed the service directly. Nor, by way of comparison, can I believe that the situation at the General Electric plant would in reality be changed if a subsidiary railroad corporation were there created and made the owner and operator of the rails, right of way, cars, and locomotives which the General Electric Company now uses for plant transportation purposes. If the *General Electric, Solway Process*, and *Crane Iron Works Cases* enunciated a sound principle, and I think they did, I am driven to the conclusion that the service performed between the plant loading and unloading points and the interchange tracks by the Lake Terminal Railroad Company is a plant service and is not a service of transportation which may be included in and paid for out of the line rates; and that any allowances or divisions by the line carriers out of the line rates on account of such plant service are unlawful." Finally, he emphasized the far-reaching practical effects of the Commission's determination (pp. 278-279, 280): "The decision of the majority means, in substance, that when an industry grows to such a size that it can not with advantage permit the spotting service at its plant to be performed at the convenience of the trunk lines, and for its own convenience, benefit, and profit takes into its own hands the control of such service, it may still recoup the expense of performing it from the trunk lines by the mere device of creating a subsidiary corporation. It will mean, I doubt not, that we shall be given occasion to award reparation in many like cases to prosperous companies who have suffered no real damage, and that the number of small industrial railroad corporations whose relations with their parent companies we must continually supervise will grow apace. . . . The possibilities of the situation may be indicated by the fact that evidence was herein offered to show that there are now 400 industries located on the trunk lines performing the spotting service with their own power, or with the power of their industrial railroad, and without compensation from the trunk lines."

⁸¹⁶ See, for example, *Piper v. Blair*, 96 I.C.C. 102 (1925); *American Salt and Coal Co. v. C., R. I. & P. Ry. Co.*, 126 I.C.C. 7 (1927).

⁸¹⁷ See, for example, the following supplemental reports of the Commission in the *Second Industrial Railways Case*: *Chicago, West Pullman & Southern R. R. Co.*, 37 I.C.C. 408 (1915); *Indiana Northern Ry.*, 37 I.C.C. 491 (1916); *Lorain & Southern R. R. Co.*, 37 I.C.C. 497 (1915); *Chestnut Ridge Ry.*, 37 I.C.C. 558 (1915); *Moshassuck Valley R. R.*, 37 I.C.C. 566 (1916); *New Jersey, Indiana & Illinois R. R.*, 41 I.C.C. 42 (1916); *Johnstown & Stony Creek R. R. Co.*, 41 I.C.C. 46 (1916); *Northampton & Bath R. R. Co.*, 41 I.C.C. 68 (1916); *Virginia Portland Ry. Co.*, 49 I.C.C. 332 (1918); *Owasco River Ry.*, 53 I.C.C. 104 (1919). See also, among numerous other proceedings, *United States Cast Iron P. & F. Co. v. Director General*, 59 I.C.C. 59 (1920); *Divisions Received by Brimstone R. R. and Canal Co.*, 68 I.C.C. 375 (1922); *Pressed Steel Car Co. v. Director General*, 93 I.C.C. 224 (1924); *Utah Fuel Co. v.*

represent, as far as may be, the actual cost of the service rendered,⁸¹⁸ and cost studies have been increasingly utilized for the purpose.⁸¹⁹ Through such means the Commission has progressively removed discriminatory adjustments, whether arising from excessive allowances to particular industries or from diversity of treatment as between various industrial lines. The processes of regulation have been extended, furthermore, to other practices than those embraced in the control of rate divisions and switching charges. The payment of "per diem reclaims" to industrial lines, involving the elimination of demurrage charges and the extension of frequent contributions, in addition, by way of bonus, had served as an important source of unlawful concession from the published tariffs;⁸²⁰ in due course this abuse was subjected to the Commission's authoritative control.⁸²¹

Director General, 102 I.C.C. 493 (1925); *Allowance for Terminal Switching at DeKalb, Ill.*, 165 I.C.C. 27 (1930).

⁸¹⁸ The more important considerations which have guided the Commission were set forth in *Chicago, West Pullman & Southern R. R. Co.*, 37 I.C.C. 408 (1915).

⁸¹⁹ See *Increased Switching Charges at Detroit*, 91 I.C.C. 82 (1924); *Switching at Kansas City*, 96 I.C.C. 538 (1925); *Switching in Birmingham District*, 100 I.C.C. 763 (1925); *Rates of Peoria & Pekin Union Ry. Co.*, 115 I.C.C. 469 (1926).

⁸²⁰ This practice was first condemned by the Commission in the *Industrial Railways Case*, 29 I.C.C. 212, 231-233 (1914). The abuses involved were incident to the application of the so-called modified per diem agreement. An industrial road on a straight per diem basis was, at that time, required to pay 45 cents a day for each car of a trunk line held upon its rails; those roads, however, which were parties to the modified agreement were privileged to make per diem reclaims against their immediate trunk-line connections for a stipulated number of days. The period—which was based, presumably, on the actual experience of each industrial line in the detention of cars on its rails—ranged from three and one-half to five and one-half days. To illustrate: if a car was detained two days, the per diem charge amounted to 90 cents and would be exactly balanced by a 90-cent reclaim, provided the reclaim period were also two days; but if this period was four days, the reclaim amounted to \$1.80, and the industrial line would be the recipient of a clear bonus of 90 cents. The arrangement involved two discriminatory phases: first, the complete elimination of demurrage charges against the proprietary industry; second, the payment of a reclaim bonus in those instances in which the reclaim period exceeded the number of days for which cars were actually detained. Instead of the 48 hours of free time accorded to ordinary shippers before the application of demurrage charges, the proprietary concerns enjoyed three and one-half to five and one-half days, on the theory that a car in possession of the plant line was not in possession of its proprietary industry; and, in addition, many manufacturing enterprises were the recipients, through their industrial roads, of very substantial reclaim bonuses—exceeding, in one case, \$600,000 annually.

⁸²¹ The use of per diem reclaims as a source of revenue to the proprietary industries appears to have been promptly removed through conference among the line carriers and with these industries, but immunity from demurrage charges persisted for some time. Not until 1921 were the so-called Birmingham-Southern rules prescribed, which were designed to eliminate undue preferences to the proprietary industries. *Bir-*

In case of the lumber tap lines, moreover, there was a significant alteration of policy with regard to the employment of the milling-in-transit privilege;⁸²² and the abuse of the distance scale of allowances prescribed by the Commission, through resort to out-of-line hauls which involved both preferential treatment to particular industries and general economic waste, has been consistently checked.⁸²³

mingham Southern R. R. Co. v. Director General, 61 I.C.C. 551 (1921). For the application of these rules, in original or modified form, in subsequent proceedings, see *Illinois Northern Ry.*, 61 I.C.C. 629 (1921); *Pullman R. R. Co.*, 61 I.C.C. 637 (1921); *Lake Erie & Fort Wayne R. R. Co.*, 78 I.C.C. 475 (1923); *Valley and Siletz R. R. Co. v. S. P. Co.*, 80 I.C.C. 724 (1923); *Lime Rock R. R. Co. v. M. C. R. R. Co.*, 102 I.C.C. 48 (1925).

⁸²² It will be recalled that the Commission had taken the position, in 1904, "that the shipment of the log to the mill and the lumber from the mill may . . . be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered, and that the carrier may make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from that point, and that it may do this by joint arrangement with the carrier bringing the log to the mill, provided that carrier is a common carrier by rail"; and it was declared that this holding extends the application of the milling-in-transit principle "to the extreme limit." *Central Yellow Pine Asso. v. V., S. & P. R. Co.*, 10 I.C.R. 193, 215 (1904). But in *The Tap Line Case*, 23 I.C.C. 277 (1912), the Commission so far modified its stand that it virtually precluded the use of the milling-in-transit privilege. A trunk line was denied the right to "set up a milling-in-transit privilege with a common carrier tap line by which the lumber rate is extended back through the mill point to the tree in the forest unless it pursues the same course with respect to forests on its own line" (p. 298). Since the practice of the trunk lines was to make net rates for log hauls over their own lines, the condition included in the Commission's ruling, as a means of eliminating unlawful preferences, served very largely to render the milling-in-transit privilege no longer applicable. Nor did the Commission recede from this position. In prescribing divisions and allowances for tap lines following the Supreme Court's decision in *Tap Line Cases*, 234 U.S. 1 (1914), the Commission expressly announced its adherence to the conclusions reached in the original report in this matter: "With respect to the milling-in-transit rate on logs as formerly practiced on the tap lines, we adhere to our original conclusion that the rate on lumber at the junction or mill point may not lawfully be extended back to the point on the tap line where the logs originate, and that any division out of the through lumber rate on account of the log haul can not be sanctioned." *The Tap Line Case*, 31 I.C.C. 490, 493 (1914). It should be observed that the approval of the milling-in-transit privilege in these circumstances would doubtless have proved a troublesome source of preferences, particularly since the Commission could no longer utilize the method of denying common-carrier status as a means of preventing its discriminatory application.

⁸²³ Certain of the tap lines attempted to augment their switching charges or rate divisions by resort to out-of-line hauls. Two phases of this situation have been dealt with by the Commission. First, an attempt was made to use the actual rail distance to the connection as determinative of the applicable division when such distance was greater than reasonably necessary. In *Louisiana & Pine Bluff Divisions*, 40 I.C.C. 470 (1916), 53 I.C.C. 475 (1919), the Commission held that a diverted movement of nearly a mile to a track scale could not be included in the determination of switching allowances or divisions as between the tap line and its trunk-line connections. In the

Whether industrial roads are conceived as common carriers not unlike other rail lines or in their special relationship to the proprietary industries primarily served by them, the control exercised by the Commission in all of the foregoing directions is indispensable to the effective performance of its regulatory functions in the field of railroad transportation.

first of these reports, the Commission said (p. 471): "In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out of line haul to the scale track of nearly a mile. Were we to lend our approval to any such arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction." The Commission's ruling was upheld in *Louisiana & P. E. Ry. Co. v. U.S.*, 257 U.S. 114 (1921), affirming the decision of the lower court in 274 Fed. 372 (1921). The Supreme Court, speaking through Justice Brandeis, said (pp. 117-118): "The contention that the order is invalid ignores both the nature of the proceeding before the Commission and the findings upon which the order was made. The proceeding was one to remove unjust discrimination. The Commission's decision is based upon a consideration both of general conditions and the particular situation. It finds that the allowance of over three dollars a car for hauling the car from the Union Sawmill plant to Dollar Junction would result in unjust discrimination. That the finding was supported by evidence we must assume in this proceeding; and not only does plaintiff fail to show that the conclusion reached was arbitrary, but additional findings in the report afford abundant reason why the out-of-line haul to the scales should not be allowed for in fixing the division." *Second*, certain tap lines having access to two or more trunk-line connections attempted to secure increased divisions through the device of hauling shipments from their proprietary mills over unnecessary and circuitous routes before delivery to the main-line carrier. In condemning this practice, the Commission said: "A tap line is entitled only to just compensation for the actual and reasonably necessary services performed by it as a part of the transportation of the traffic from point of origin to destination, and our orders relative to divisions out of the through rates were framed upon this principle in conformity with the decision of the Supreme Court. . . . The out-of-line hauls above described are entirely unnecessary, can not reasonably be considered a part of the service for which the through rates are intended to compensate, result in undue prejudice to tap lines and their proprietary companies which are not so situated that they can resort to similar practices, and unjustly deplete the revenues of the trunk line." Accordingly, the conclusion was reached "that the distances from the junctions which are determinative of the maximum divisions . . . must be measured by the direct route of movement toward final destination, rather than by out-of-line movements of the character in question." *Wasteful Service by Tap Lines*, 53 I.C.C. 656, 662 (1919). For subsequent affirmance and application of these views, see *Oakdale & Gulf Ry. Co.*, 58 I.C.C. 450 (1920); *Wasteful Service by Tap Lines*, 89 I.C.C. 327 (1924). On both aspects of the situation the Commission's conclusions appear to be grounded in sound policy. Not only are the possibilities of preferential treatment of particular tap lines minimized, but substantial economic savings can be effected through the elimination of back-haul and circuitous traffic movements.

§6. SUMMARY AND CONCLUSION

We have traced, in considerable detail, the Commission's exercise of jurisdiction over the various agencies and services subject to its control, with special reference to the relationship between this functioning jurisdiction and the tasks of railroad regulation. The progressive extension of the Commission's jurisdictional scope to its present status, and the numerous specific problems which have been encountered in the course of the Commission's performance, require no further elaboration. It is essential, merely, by way of general appraisal, that we note briefly, on the basis of the analysis as a whole, some of the outstanding tendencies which have characterized this development and some of the more important difficulties which bear upon the Commission's future position as an administrative tribunal.

In the first place, the unfolding of this aspect of the Commission's performance reveals certain characteristic attitudes which merit unquestioned approval. The most significant of these attitudes are reflected by the Commission's restrained approach in the matter of asserting jurisdiction, and by its emphasis upon substance rather than form in the exercise of acknowledged jurisdiction. In determining the types of utilities subject to its control, the Commission has uniformly recognized that its authority is a purely statutory authority. Though constituted, from the beginning, as the primary instrument for the assertion of federal power over railroad transportation, it has none the less awaited explicit statutory grants before it ventured to reach agencies and services, however closely related to those involved in the conduct of railroad transportation, which were not directly embraced by the terms of its legislative charter. Thus, for example, although express companies and sleeping-car companies utilize the facilities of the rail lines and render services in the movement of persons and property which constitute an integral part of railroad transportation, they were deemed to be subject to regulatory power only after they had been expressly included within the scope of the Commission's jurisdiction. Similar restraint has been exercised in asserting jurisdiction over local-transfer companies and motor-truck companies, which, though concededly engaged in public transportation, merely extend the line-haul of the railroads: only when the facilities furnished by these agencies are employed in connection with

the terminal services of the carriers by railroad has the Commission assumed jurisdiction, and then only of the supplementary services thus rendered rather than of the outside transportation agencies *per se*. The Commission's attitude toward the use of private cars and industrial railroads, in face of the frequent subversion of these instrumentalities to discriminatory ends in connection with the operations of the public carriers, reveals a like reliance upon explicit legislative authority: only upon emergence of an unmistakable Congressional intent to subject these instrumentalities to public control did the Commission attempt to exercise any sweeping and effective jurisdiction in the premises. And if the Commission's approach has been thus restrained in the primary field of railroad transportation, it has been even more definitely grounded in express statutory enactment in connection with alternative or competitive transportation agencies. The assumption of jurisdiction over pipe lines naturally waited upon Congressional action for the inclusion of these carriers within the bounds of regulatory policy; but even as to transportation by water, which was embraced under specified conditions by the original Act to Regulate Commerce and which has exerted a potent influence upon some of the most significant aspects of railroad transportation, the Commission has uniformly restricted itself to the limited channels prescribed by the basic law, however inadequate a means they may have provided for the satisfactory adjustment of vital relationships between rail lines and water carriers. It will be recalled that the Commission initially resolved the statutory ambiguity as to jurisdictional scope against the extension of its authority to all the operations of water lines engaged in some measure of joint carriage with rail lines; and that even now, despite the Commission's ability to bring into being, both physically and from an operating standpoint, the joint arrangements which condition the assumption of jurisdiction, it recognizes its general want of authority over water carriers as such and merely points to the virtual impossibility of coordinating railroad transportation and transportation by water on any constructive basis unless it is endowed with reasonably coextensive power in the two fields. Indeed, in practically all matters of jurisdictional scope, however grave the difficulties springing from restrictions of authority, the Commission has sought relief through the natural pathway of direct

legislative enactment rather than through the overreaching device of strained administrative construction. There has been a conspicuous absence of attempts at arbitrary extension of control to agencies or services not reasonably encompassed by legislative contemplation; and it is significant of the impressiveness of this restraint and of the influence of orderly administrative disclosures that the Commission's informed recommendations for additional power, whether as a means of reaching new types of carriers or by way of perfecting established control, have generally been translated into legislative policy.

But this attitude of restraint must not be construed as indicative of a policy of timid self-denial, without recognition that the generality of legislative provisions necessarily involves resort to interpretative processes, and that it is the function of an administrative tribunal to clothe these provisions with effectiveness in light of the complexities of particular situations. An incisive approach, pursued vigorously, has been equally characteristic of the Commission's performance in these matters. Once free from reasonable doubt as to the propriety of asserting jurisdiction in a given field, the Commission has not permitted the intricacies of corporate relationships or the peculiarities of operating conditions to thwart the exercise of its power. It has been swayed, invariably, by the substance rather than the mere form of developing situations, both in determining the carriers subject to its control and in gauging the measure of its authority with respect to them. On this basis, for example, the Commission has been able to reach stockyard companies and wharfage companies, though not mentioned as carriers subject to the Act and though organized as independent corporations: the circumstance that these companies were in fact providing terminal facilities for the railroads and constituted necessary links in interstate commerce was deemed to be controlling on the jurisdictional issue. It will be recalled, also, that in view of the generality of the language of the Act, the Commission assumed jurisdiction over interstate electric railways long before there was any specific mention of these carriers in the statute; and that the Commission did not shrink from holding that the pipe-line amendment impressed the obligations of common carriers upon all interstate pipe lines, despite the vigorous attack upon this interpretation of the enactment and upon the constitutionality of the legislation as thus

interpreted. But the Commission's emphasis upon realities, with a corresponding repudiation of mere legalism, has been especially noteworthy in connection with the scope of the jurisdiction actually asserted. It will suffice merely to refer, by way of illustration, to a few of the Commission's determinations of this character which have been previously elaborated: to the requirement that the accounts and reports of water carriers subject in any measure to its control embrace complete data as to all operations; the dissociation of railroads from water lines in terms of the substance rather than the outward appearance of the control relations subsisting between them and in response to indirect as well as direct competitive influences; the establishment of connecting rail-and-water service without reference to the parties technically appearing on the record and despite the unwillingness of the rail carriers to supply the necessary operations for joint movement; the complete overhauling, because of basic defects, of the traditional system of express rates and practices; the enforcement of car distribution rules, applicable to private equipment as well as to that of the carriers, designed to remove every form of preference or prejudice, and without the subordination of public ends to the plausible claims of private property rights; the elimination of unjustifiable concessions from the published rates through the use of plant facilities, regardless of their nominal ownership or control, and the regulation of divisions and allowances not only by reference to the criterion of cost, but without sanctioning circuitous routing and other practices calculated to produce discrimination and waste. Only in rare instances, notably in the *Tap Line Cases*, has the course of the Commission's determinations in this sphere been checked or modified by judicial censorship. The general approval of the courts has been grounded in a recognition of the Commission's discretionary authority and of its orderly and informed exercise of that authority. In resorting to the method of incisive analysis and in searching for the realities which underlie outward appearances, the Commission has been achieving the very ends which have stimulated the progressive development of the system of administrative control and has been establishing a high tradition of performance.

When, however, we pass from a consideration of the quality of the Commission's performance to the question of the extent to which

the Commission's authority has been exercised along these lines, the problem of jurisdictional scope raises some very significant issues. In the field of railroads the Commission has unquestionably proceeded vigorously and comprehensively, both in response to complaints and applications, and upon its own motion and initiative. This is apparent in connection with every aspect of the entire inquiry in which we are engaged; and since the controversies arising from the utilization of private cars and industrial lines are largely related to the maintenance of non-discriminatory adjustments on the part of carriers by railroad, the Commission has asserted its power over these facilities with great frequency and in numerous directions. Furthermore, the sweeping reformation of the rates and practices of express companies which has been accomplished provides ample evidence that the Commission has not shrunk from undertaking administrative tasks of tremendous extent and far-reaching consequence in this supplementary transportation field. But with reference to some of the utilities subject to the Commission's jurisdiction—notably in the case of sleeping-car companies, pipe lines, and the transmission agencies—the record of performance has been a rather meager one. In these spheres the mandatory power with which the Commission is clothed appears to have served, in large measure, not as a positive instrument of control, but as a negative restraining influence. While, in the aggregate, a considerable body of complaints has been received and many proceedings have been instituted with reference to these carriers, and the immediately pressing problems involved therein appear to have been met, much of the Commission's authority over sleeping-car companies, pipe lines, and transmission agencies—particularly in connection with the central task of regulating their rates and charges—has remained largely unexercised. There is little persuasive evidence as to the controlling causes of this situation. A variety of influences has doubtless been operative. The Pullman service is deemed to concern a limited class of patrons; the service of the pipe lines is practically confined to a single industry; the service of the transmission agencies, and particularly of the telephone companies, is overwhelmingly intrastate in character. These considerations tend to restrict the occasions for the assertion of regulatory power. But the relative paucity of complaints may also be symptomatic of enlightened policy on part of these car-

riers; or governmental inactivity may reflect remoteness from and ignorance of the real conditions prevailing in these fields. There is little question, too, that the great pressure of the Commission's major tasks, in view of the overburdened character of its calendar of activities, has led in some measure to the neglect or postponement of many of the problems concerned with these agencies, as well as with the coordination of rail and water transport. Whatever the effective causes of this limited record of performance, the result is more significant, from our standpoint, in its bearing upon the propriety of the Commission's jurisdictional scope than in its immediately practical implications. How far does the prevailing sweep of the Commission's jurisdiction, in terms of the agencies and services subject to its control, constitute a sound delimitation of the utility sphere for the impact of its powers? What considerations are relevant in gauging the propriety of proposed extensions of the Commission's jurisdiction to additional utility enterprises?

It seems clear, on the basis both of historical antecedent and current pressure, that the field of transportation has been and must remain the primary objective of the Commission's regulatory activity. A jurisdiction so conceived would embrace not only carriers by railroad, but all other agencies engaged in the movement of persons or property in interstate commerce: it would recognize the organic character of the transportation function and the necessity of a unified approach in the regulatory process. To a large degree this has been the rationale of past extensions of the Commission's jurisdiction. The inclusion, subsequent to the passage of the original Act, of express companies, sleeping-car companies, and pipe lines within the sphere of the Commission's control, the expansion of authority over rail-water relationships, and the explicit assertion of power over private cars and industrial railroads may appear to represent a haphazard process of mere accretion; in fact, however, this enlargement of the Commission's jurisdiction was the inevitable outcome of compelling forces, grounded in the unity of the transportation function and in a vast train of intimate reciprocal relationships subsisting between the various agencies engaged in its performance. This essential unity of the problem and these numerous points of contact between its diverse aspects have been sufficiently indicated in earlier pages.

They point unmistakably to the conclusion that the development of the Commission's jurisdictional scope in these directions, not unlike the expansion of its substantive authority in the regulatory field as a whole, represents the gradual attainment of maturity of power for the exercise of effective control.

But if the transportation of persons and property, viewed as a functional category, is to constitute the basic subject-matter of the Commission's jurisdiction, still further assertions of legislative authority will be necessary. The principal constituents of the American transportation system are: first, railroads, of a number of kinds and including agencies supplementing their service; second, water carriers, engaged in coastwise and inland trade and plying over ocean routes; third, motor carriers, operating not only independently but as adjuncts to movements by rail; and fourth, commercial air services, which are rapidly emerging from the experimental stage.⁸²⁴ The contacts, competitive and otherwise, between these various agencies are intimate and continuous; ultimately, it would seem, control of all these agencies must be centralized in the Commission if fruitful co-ordination is to be achieved. The railroad field has been definitively occupied; air transportation remains largely a matter for the future, though the need of control is beginning to make itself felt. But the limitations upon the Commission's authority over water carriers,⁸²⁵ and the freedom of interstate motor carriers from the impact of federal power,⁸²⁶ have come to constitute pressing public problems. The

⁸²⁴ For recent comprehensive discussions of the prevailing transportation system, see Emory R. Johnson, Grover G. Huebner, and G. Lloyd Wilson, *Principles of Transportation* (1928); and Stuart R. Daggett, *Principles of Inland Transportation* (1928).

⁸²⁵ See, for example, pp. 50-58, *supra*.

⁸²⁶ See *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 (1928). The legal situation was summarized by the Commission as follows (pp. 696-697): "Prior to March 2, 1925, State regulatory bodies generally had assumed, in the absence of any Federal legislation on the subject, regulatory control over the operations of motor busses and motor trucks engaged in interstate commerce, and interstate operators were required to conform to the laws and regulations of the States in or through which they operated. On that date the Supreme Court of the United States handed down decisions holding that State regulatory bodies could not restrict the operation of motor busses or motor trucks engaged in interstate commerce where such regulation was not primarily with a view to safety or to conservation of highways. *Buck v. Kyuykendall*, 267 U.S. 307; *Bush Co. v. Maloy*, 267 U.S. 317. No regulation has been exercised over interstate commerce by motor busses or motor trucks not used in terminal service in connection with rail transportation since these decisions were rendered, and almost immediately thereafter interstate motor-vehicle operations sprang up all over

issue is largely one of preventing an uneconomical use of resources,³²⁷

the country." In state regulatory practice emphasis has been placed chiefly upon the promotion of responsible motor-carrier service and the prevention of uneconomic expansion of the industry, rather than upon the avoidance of unreasonable and discriminatory charges; and the recommendations of the Commission and the legislative proposals already considered by Congress continue this same emphasis. Exclusion of motor trucking from the initial scope of federal control has been recommended; and the predominantly intrastate character of motor transport has made it appear more feasible to vest original jurisdiction over bus lines in joint state boards, than in the Commission, with right of appeal to the latter. *Ibid.*, pp. 745-748; S. 1734 and H. R. 8266, 69th Cong.; H. R. 10288, 71st Cong. For an excellent analysis of the characteristics of motor-carrier transportation, in their relationship to the need of public control, see G. Shorey Peterson, "Motor-Carrier Regulation and its Economic Bases," *Quarterly Journal of Economics*, Vol. 43 (August, 1929), pp. 604-647.

³²⁷ Compare the following, for example, with regard to the impetus to, and objectives of, motor-carrier regulation: "There can be no doubt that the railways will continue to be the principal transportation agency of the country, and that for most of their business the motor vehicle is not an economic substitute. The services which they alone can provide are produced jointly with those for which motor transportation is a desirable substitute; and instances naturally appear where the revenue from both is necessary if the former services are to be continued. If traffic is to be lost by the railroads, some assurance is desirable that the loss is truly a reflection of the superiority of motor transport, and not the result of temporary or unequal competitive conditions, as when motor carriers take the better-paying traffic and leave the rest, run only when traffic is heavy and weather good, or charge uneconomic rates either because of irresponsible competition or because too little is charged for the use of the highways. Even so, many cases appear where both the motor and rail services can not be supported by the traffic, and then it is desirable that a disinterested judgment be rendered as to which service is on the whole the more important to the community. And when rail service is curtailed, means should be at hand to impose the same responsibility as to regular and continuous service upon the motor carriers as has rested upon the railroads." But this point of view, largely sponsored by the rail carriers, is by no means free from possibilities of serious abuse: "The regulation which the railroads desire would make the issuance of certificates to motor carriers depend largely upon the probable effect on railway traffic and revenues, and would stress the service obligations of motor carriers, the adequacy of the rates they are permitted to charge, and the payments they make for the use of roads. The vital position occupied by the railroads argues strongly for the adoption of such a program, or as much of it as is necessary to maintain them in full vigor. At the same time, undue preoccupation with the railroad viewpoint may easily blight in some measure the great achievement and promise of motor transportation. The opportunity and the incentives for motor-carrier development may be diminished; and in the attempt to enforce regulations inherently difficult of enforcement, the industry may be forced into unnatural and uneconomic modes of operation. The difficulties of regulating it seem mostly to arise from the conflicting implications of two necessary angles of approach. From one of these angles motor transportation is envisaged as an important industry in its own right, whose most advantageous development may require at one point or another a deft touch of the hand of public control; such interference, however, being governed by the characteristics of the industry itself and the interest of the public in good motor-transport service at low cost. From the other of these angles motor transportation appears as a late and somewhat obstreperous arrival in the transportation family, whose chief claim to recognition is that it threatens to some extent the position of steam and electric rail operation

and of effectuating a coordinated transportation system.⁸²⁸ The extension of the Commission's jurisdiction to all three of the major transportation agencies, in such measure as the special characteristics of each might require, would not only facilitate a sounder performance of the tasks of railroad regulation, but would provide a basis for the guidance, in the public interest, of the transportation system as a whole.⁸²⁹ Under such unified control artificial obstacles to the main-

and which accordingly must be regulated, not because it has the features of a public service itself, but because it competes with an industry whose nature rebels against the presence of competition." G. Shorey Peterson, *op. cit.*, pp. 623-625.

⁸²⁸ Note the following among the Commission's conclusions: "25. Public policy demands the fostering and preserving in full vigor of motor-vehicle transportation as well as rail and water transportation. Section 500 of the transportation act, 1920, should be amended to include motor-vehicle transportation in the declaration of policy there made. 26. As far as practicable there should be a definite coordination of all existing transportation agencies on land, water and air." *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 (1928), at p. 748. Recognizing the increasing interrelationship of motor and other carriers, the Commission in 1930 undertook further to investigate "the coordination of transportation of passengers and property in commerce by motor vehicle on the public highways by or in connection or in competition with common carriers by rail, water, or rail and water, subject to the Interstate Commerce Act." *Coordination of Motor Transportation*, Docket No. 23400. The Commission has urged, however, that the enactment of legislation for regulating motor carriers should not await the results of this inquiry. *Annual Report*, 1930, p. 76.

⁸²⁹ With the multiplication of alternative agencies, transport capacity has grown faster than traffic, and railroad revenues have been depressed. Of the "threatening financial difficulty" currently confronting the railroads the Commission has said: "This is the effect of the competition of other forms of transportation. With a plant developed to carry a great volume of passenger business, the railways find themselves confronted with a steady lessening of the volume of passenger travel by rail and consequently in gross revenues from that source. The passenger revenue of 1929 was over \$414,000,000 less than that of 1920. It is true that the freight revenue was \$498,000,000 greater in 1929 than in 1920, but the prospect of a continued expansion in freight business to offset the further loss in passenger business is darkened by the competition of water lines, pipe lines, and trucks, and by changes that may check the growth in demand for ton-mileage, such as economy in the use of coal, changes in the location of industry, and the relatively slower growth of population." *Annual Report*, 1930, p. 78. Still more pointedly, the Association of Railway Executives, after calling attention to a 34.2 per cent decline in passenger mileage during the period 1920-29, and an 8.8 per cent increase in ton-mileage compared with 62.2 per cent during the preceding decade, has recommended, *inter alia*, that the Government withdraw its competition and its subsidies in the transportation field; that water carriers be subjected to the Commission's jurisdiction with respect to port-to-port rates, the reasonableness and fairness of charges, the adequacy of service, and the obligation to obtain certificates to operate; that motor carriers, both passenger and freight, be similarly controlled, with additional provision to insure financial responsibility and adequate payment for use of the roads; that pipe-line carriers be subjected to the same restriction as railroads regarding the carriage of commodities in which they are interested; and that railroads be permitted, under proper supervision, to engage in water transportation, and

tenance of equitable rate relationships could be effectively removed, and each of these industries could be permitted to develop its facilities and services as warranted by operating economy and public demand, without wasteful diversion of traffic from one to another, and without obstruction, under the pressure of vested interests, to the community's realization of the legitimate fruits of technical progress and changing conditions.

The extension of the Commission's jurisdiction in these directions does not mean that the same comprehensive system of control which experience has proven to be necessary and practicable in the railroad field should as a matter of course be applied to water and highway carriers. The easy analogy between railroads and these agencies—that they are all engaged in public transportation—provides no adequate justification for such procedure. The points of difference between them, both in organization and operating tendencies, are quite as potent as the points of likeness. The nature of the control to which motor carriers and carriers by water should be subjected must be determined in the light of their distinctive economic characteristics; and these characteristics appear to necessitate a considerably smaller measure of authoritative interference and a much greater degree of reliance on competitive forces than now prevail in case of the railroads. The need of extending the Commission's jurisdiction is grounded primarily in the interrelationship between the services of these agencies and those rendered by the rail carriers; and the chief objective of the control thus proposed is to coordinate their activities with those of the railroads, and to mold such power as may be exercised over them into a harmonious regulatory policy for the transportation system as a whole.

The propriety of maintaining jurisdiction over the transportation of persons and property, whether on the prevailing basis or in expanded form, is not essentially impaired by the Commission's record of limited performance with respect to some of the transportation

be granted fourth-section relief as respects transcontinental traffic. *Declaration of Policy Deemed Necessary to the Continuance of Adequate Transportation Service to the Public*, adopted at a meeting in New York, November 20, 1930. Whatever may be thought of these proposals individually, the recognition they convey of the interrelationship of transportation agencies as a problem of government is highly significant at this juncture.

agencies now subject to its authority, even if this inactivity may be attributed, in some measure, to the pressure of its administrative burden. The overwhelming weight of this pressure, as will appear in due course, is primarily the result of other factors than the variety of transportation agencies subject to control: the magnitude and complexity of the Commission's tasks spring chiefly from the comprehensiveness of its authority over carrier operations and the diversity of regulative methods which must be employed in its exercise. There are many proposed avenues of relief, of varying degrees of soundness, but each must be tested by its probable influence upon the Commission's performance of its central tasks. Curtailment of activity through splitting up the transportation function and removing some of the agencies from the sphere of the Commission's jurisdiction would detract seriously from the completeness and effectiveness of its control over the movement of persons and property.

It is highly desirable, on the other hand, that jurisdictional scope be not extended to fields essentially unrelated to that of transportation. Such extensions of jurisdiction, not unlike the progressive imposition of miscellaneous administrative tasks, involve burdens which outrun the likelihood of adequate performance: not only may the specific powers thus conferred be permitted to lie dormant, but their execution, in view of the vastness of the basic jurisdictional field, may constitute a direct hindrance to prompt and thorough adjustments in the primary sphere of transport. It is decidedly questionable, for example, whether the inclusion of telephone, telegraph, and cable companies within the scope of the Commission's jurisdiction is in consonance with sound policy. It is true that an easy analogy may be drawn between the transportation of persons and property and the transmission of messages; but the two fields, in light of their economic characteristics and operating technique as well as in terms of the services which they render, are fundamentally unrelated. While public service industries as a class, because of the virtual identity of regulatory ends, lend themselves to the centralized control of state commissions within restricted territorial limits, the attempt to turn the federal tribunal, with the interstate commerce of a continent under its supervision, into a full-fledged utilities commission appears to be ill conceived. Such an attempt, however marked by legal symme-

try, ignores the practical requirements for enlightened and effective administration. In point of fact, although the Commission's record of performance affecting the transmission agencies has been rather meager, it does not appear that any widespread abuses have been permitted to flourish in that field, or that such regulatory activity as has prevailed with respect to these agencies has encroached unduly upon more important tasks; and it may be impracticable, after a lapse of more than two decades, to relieve the Commission of this aspect of its jurisdiction. But these circumstances do not vitiate the soundness of the controlling principle, particularly in its application to future policy. Highly significant public problems are emerging in connection with the interstate transmission of electrical energy. If the precedent of the scope of state utility regulation were to be followed in the federal sphere, the Commission, as an established public-service agency of high repute, would be saddled with the new governmental responsibilities which are likely to be assumed in due course. Such action, there is reason to believe, whether in the form of a transfer of the duties of the existing Federal Power Commission or of an independent and more far-reaching assertion of federal authority, would constitute a short-sighted disregard of potent realities. In all probability the effective control of the light and power industry would be retarded, and the administrative difficulties which now characterize the exercise of authority in the field of transportation would be intensified.

The perpendicular massing of transportation agencies under the Commission's unified control is both necessary and practicable; the horizontal extension of jurisdictional scope into unrelated fields would probably prove a feeble instrument for effectuating public policy in those fields, and might, in addition, seriously impair the Commission's efficiency in the performance of its traditional regulatory tasks.

CHAPTER IX

**THE ASSERTION OF POWER OVER INTRASTATE
COMMERCE**

- §1. The Distribution of Power under the Constitution**
- §2. The Influence of Congressional Enactments**
- §3. The Character of the Commission's Performance**
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CHAPTER IX
THE ASSERTION OF POWER OVER INTRASTATE
COMMERCE

THE kinds of commerce, interstate and intrastate, subject to control, as distinct from the kinds of utilities regulated, constitute a further reflection of the scope of the Commission's jurisdiction. Since the Commission is a federal agency, its plenary and exclusive control of interstate carriers may be taken for granted: the nature and extent of its jurisdiction over interstate commerce appears in all aspects of its activity. The significant issues arise because of the close interrelationships between intrastate and interstate commerce, and the consequent necessity for the assertion of federal power over intrastate commerce, as a means of rendering the regulation of interstate commerce effective. While, because of these intimate contacts, there has been a decided trend toward the centralization of authority in the Federal Government in the entire sphere of commercial intercourse and in connection with all regulatory agencies, the Commission's assertion of power over the intrastate commerce and intrastate facilities of interstate carriers constitutes the most striking manifestation of this trend. The activities of the Commission in this direction possess a twofold significance: first, they have contributed in important measure to the evolution of the present status of constitutional distribution of power between the nation and the states in the regulation of carriers; and second, they serve as a concrete and vital expression of the jurisdictional scope of the Commission as a functioning administrative agency. Our primary concern is with the second aspect of these significant developments: our chief interest lies, not in the changing status of constitutional law as such in this sphere, but in the nature and implications of the Commission's policies and practices, whether they have operated as a cause or have emerged as a result of constitutional changes. In order, however, to attain an adequately informed understanding of the principles and processes which have guided the Commission's administrative activities in these matters, it will be necessary, by way of background, to trace the development of the general constitutional doctrines affecting the distribution of power

between the nation and the states, and to survey the character of the more important Congressional enactments, as interpreted by the courts, subordinating the states and their agencies to the superior authority of the Commission. The chief expressions of the Commission's exercise of power over intrastate commerce will then be analyzed and appraised; and consideration will be given to the economic and governmental problems which have arisen in connection with this exercise of power, and to the various expedients, actual and projected, which are designed to meet the practical difficulties of the prevailing situation.

§1. THE DISTRIBUTION OF POWER UNDER THE CONSTITUTION

Throughout the evolution of the existing system of carrier regulation, the assertion of governmental control has been attended by conflicts between state and federal authority. These conflicts, and the legal definition of the jurisdictional domain of the nation and the states in the premises, are but a manifestation of the larger problem of distribution of power which is as old as the Constitution itself.

The exercise of authority under our dual form of government is based upon the provisions of a written constitution proceeding from the original and supreme will of the people. This expression of the "superior paramount law" defines the rights and duties of government, distributes its powers, prescribes the mode of their exercise, and limits their scope in the interest of civil and political liberty. The respective spheres of state and national action in the regulation of commerce are defined by explicit, though general, stipulations. It is provided that Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes,"¹ and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."² While Congress may thus exercise only delegated powers, it is supreme within the sphere of its established jurisdiction, and its enactments therein prevail over all determinations emanating from the states; for it is declared that the "Constitution, and the Laws of the United States which shall be

¹ Art. I, Sec. 8.

² Tenth Amendment.

made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³ The residue of power—that which is not delegated to the National Government nor prohibited to the state governments—embraces practically all authority over persons and property within the territorial limits of the several states. This broad authority was reserved to the states upon the theory that varying social and economic conditions demand legislation and administration by political bodies in intimate contact with local needs and the circumstances immediately surrounding them. The most important of these reserved powers, from the standpoint of common-carrier regulation, is the so-called police power, which, as now commonly construed, embraces the right not only to safeguard public health, morals, and safety, but to promote the general welfare and convenience of the people.⁴ Subject to the limitations of "due process" imposed by the fifth and fourteenth amendments, these constitutional provisions provide the controlling guide for the distribution of power between the nation and the states.

As will be indicated in due course, these provisions, as interpreted and applied by the Supreme Court, contemplate a division of the field

³ Art. VI.

⁴ While there have been numerous instances of narrow construction of the police power, the conception which is coming to prevail is that of "the power of promoting the public welfare by restraining and regulating the use of liberty and property." Ernst Freund, *The Police Power* (1904), Preface, p. iii. As early as 1847, Chief Justice Taney indicated the broad scope of this power: "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion." *License Cases*, 5 How. 504, 583. In 1906, Justice Harlan declared that "the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety," and that the validity of a police regulation "must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose." *C. B. & Q. Ry. v. Drainage Comm'rs.*, 200 U.S. 561, 592. And, in 1911, Justice Holmes made the following forward-looking pronouncement: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111.

of governmental jurisdiction into three zones: the zone in which federal power is exclusive; the zone in which state power is exclusive; the zone in which federal and state power is concurrent. Over those matters which are essentially national in character and require uniformity of regulation, embracing the transportation of passengers and the carriage of goods in the course of which state lines are crossed, exclusive authority appears to rest in the Federal Government. Over matters of local concern, embracing the movement of persons and property wholly within the boundaries of individual states, exclusive authority appears to be vested in the state governments. With regard to matters which permit of diversity of regulation, and which affect interstate commerce only indirectly or incidentally, authority may be exercised concurrently—not in the sense that federal and state power may operate simultaneously, but that the coexistence of a paramount federal power and a subordinate state power is recognized, state action giving way to the actual assertion of federal authority. Exclusive occupancy of the zone of concurrent jurisdiction thus lies within the legislative discretion of Congress; its laws are supreme, and they may operate to restrict the exercise of state authority, as determined by judicial interpretation of the expressed or implied national will reflected in specific enactments. It appears, then, that ultimate authority in the determination of the respective spheres of state and federal action rests with some branch of the National Government: with the Supreme Court, when the issue concerns the scope of power granted to the United States or reserved to the individual states by the Constitution; and with the Congress, in so far as it is free to assert controlling power in the zone of concurrent jurisdiction.

But while the basic constitutional principles can be set forth briefly and simply, their application to the concrete regulatory problems which arise under the intricate and dynamic conditions of modern industry is beset with numerous difficulties. The instrumentalities and services subject to the regulatory process have not accommodated themselves to the artificial political lines which delimit governmental jurisdiction. Mechanical achievements have welded commerce, in large measure, into an indivisible whole; and transportation is of this unitary character in marked degree. Most carriers by railroad are en-

gaged in both intrastate and interstate commerce; and they utilize the same rails, employ the same motive power and equipment, and intrust managerial responsibility to the same organization and personnel with respect to all of their operations. Competitive forces, moreover, frequently render rate relationships as between local and more far-flung transport a matter of controlling significance. Under such circumstances the traditional distinction between intrastate and interstate commerce has not served as a nice reflection of actual business phenomena. The interaction between the divided jurisdictional set-up on the one hand, and the organic character of commercial intercourse on the other, has constituted the chief source of conflict between regulatory agencies. Because of the compelling stress of economic conditions, the sphere of federal power in carrier regulation has been very widely extended: not only does the National Government dominate the field of concurrent jurisdiction, but after a notable struggle Congress and the Commission have been upheld in their effort "to protect the national interest by securing the freedom of interstate commercial intercourse from local control," despite apparent derogation of the traditional sovereignty of the states in matters relating to internal commerce.⁵ In other words, in the delimitation of jurisdiction between the nation and the states, territorial considerations have been subordinated to those of a functional character: especially the processes of rate control have come to be authoritatively recognized as predominantly national in scope. For an adequate understanding of the prevailing status of the distribution of power under the Constitution, it is necessary to trace briefly the evolution of these centralizing tendencies.

The starting-point in this evolutionary process, as in all matters involving the commerce clause of the Constitution, is to be found in the famous opinion of Chief Justice Marshall in *Gibbons v. Ogden*,⁶ decided in 1824. The opinion of the great Chief Justice not only pre-

⁵ *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1914).

⁶ *Wheat*, 1. Ogden had secured an injunction restraining Gibbons from navigating the Hudson River by steamboats licensed for the coasting trade under an Act of Congress of 1793, on the ground that such navigation was an infringement of the exclusive right granted by the State of New York to Livingston and Fulton, and assigned by them to Ogden, to navigate the waters of that state for a period of years. Gibbons contended that the state laws extending the exclusive privilege were repugnant to the Constitution or, at least, in conflict with the Act of Congress. The Court

sented an incisive and illuminating analysis of the meaning of "commerce"⁷ and of "the power to regulate,"⁸ but established basic grounds of differentiation between the spheres of state and federal jurisdiction. The completely internal commerce of the states was held to have been reserved to the authority of the individual states; the power of Congress was held to have been restricted to commercial intercourse embracing the territorial limits of the several states. The crucial determination of the Court was that the actual assertion of power over interstate commerce by the Federal Government excludes its regulation by the states.⁹ The point was left undecided as to whether the power of Congress to regulate interstate commerce is exclusive only when exercised, or whether the states are denied authority over such commerce even in the absence of action by the federal legislature.¹⁰ Not until 1851 was a clear differentiation made between those aspects of interstate commerce over which the power of Congress is exclusive *per se*, and those over which it becomes controlling only when actually asserted. The views of Chief Justice Marshall,¹¹ and other intervening determinations of the Court, had

upheld the contention of *Gibbons*, sustaining Congressional authority to regulate navigation between interstate points, state laws to the contrary notwithstanding.

⁷ Commerce was held to comprehend not only traffic—the buying, selling, and interchange of commodities—but "every species of commercial intercourse," including navigation. This view paved the way for the subsequent application of the commerce clause to railroads. *Ibid.*, p. 193.

⁸ This power was declared to be the power "to prescribe the rule by which commerce is to be governed," which, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Ibid.*, p. 196.

⁹ This principle was affirmed in *Brown v. Maryland*, 12 Wheat. 419 (1827), at pp. 445-449.

¹⁰ Said Chief Justice Marshall in *Gibbons v. Ogden*, *supra*, at p. 200: "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?"

¹¹ It is not clear what position Marshall took upon the exercise of concurrent power over interstate commerce by the states. In the *Gibbons* case, he expressed the view that "inspection laws may have a remote and considerable influence on commerce," but that their source was the reserved power of the states and not the power to regulate commerce (p. 203). In *Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245 (1829), the Court sustained state legislation authorizing the construction of a dam over a navigable creek on the marsh coast of Delaware. The act was recognized as one designed to enhance the value of the adjoining property and to improve the health of the inhabit-

been inconclusive.¹² In the *Cooley* case,¹³ however, controlling princi-

ants, which were clearly valid objects within the reserved powers of the states, "provided they do not come into collision with the powers of the general government." In concluding his opinion Chief Justice Marshall said (p. 252): "We do not think that the act empowering the Black-bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This opinion is often cited as evidence that Marshall recognized the existence of state power to regulate matters of interstate commerce which permit of diversity of control. There is no specific recognition of such power, and the better interpretation would seem to be that he anticipated the distinction subsequently made by the Court between state legislation which regulates interstate commerce and that which merely affects it incidentally.

¹² The question had been considered in the *License Cases*, 5 How. 504 (1847), and in the *Passenger Cases*, 7 How. 283 (1849). In the *License Cases* the Court unanimously upheld judgments of state tribunals affirming the validity of statutes requiring licenses for the sale of liquor, even though imported from without the states. Opinions were prepared by six Justices, and two positions were assumed in support of the statutes: one, that they did not constitute a regulation of interstate or foreign commerce; and the other, that they were valid because not in conflict with existing federal legislation, even if they did constitute such regulation. In supporting the latter view, Chief Justice Taney said (p. 579): "It appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." As a reflection of the growing ascendancy of the doctrine of "states' rights," there appeared to be a clear disposition on the part of some members of the Court to recognize a limited power in the states to regulate interstate commerce. It should be noted, however, that *Peirce v. New Hampshire* was the only one among the *License Cases* involving legislation which applied directly to the import and sale of the liquor in the original package. The holding in this case was overruled in *Leisy v. Hardin*, 135 U.S. 100 (1890). In the *Passenger Cases*, statutes of New York and Massachusetts imposing taxes upon alien passengers arriving in the ports of those states were declared invalid by a five to four decision, on the ground that they were inconsistent with the Constitution and with certain acts of Congress and federal treaties. Here again the Court was divided concerning the exclusiveness of Congressional power over interstate commerce.

¹³ *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851). The issue was here decided in the manner of a compromise between the two divergent views. A Pennsylvania statute required vessels, with certain exceptions, to receive pilots for entering or leaving the port of Philadelphia, half-pilotage being levied upon those failing to obey the law. The facts presented a clear case of state legislation directly affecting interstate and foreign commerce and not in conflict with a federal statute. In upholding the Pennsylvania law, the Court said (p. 320): "It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states."

ples were established¹⁴ which have been followed in numerous decisions.¹⁵ Whether the power to regulate commerce in any given case is vested exclusively in the Federal Government or may be exerted concurrently by the states was made to depend upon the nature of the subject to be regulated. With reference to matters of national character, where uniformity of regulation is essential, Congress possesses exclusive power; with reference to matters of local character, where diversity of regulation is preferable if not imperative, concurrent power may be exercised by the state legislatures. Only in the field of exclusive jurisdiction is state power inoperative even in the face of Congressional inaction;¹⁶ and the question as to whether particular

¹⁴ In the words of Justice Curtis (p. 319): "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that that nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." The rule established in this case had been suggested by Webster as counsel in *Gibbons v. Ogden*, 9 Wheat., at pp. 9-14. See, also, the opinions of Justice Woodbury in the *License Cases*, 5 How., at pp. 624-625, and in the *Passenger Cases*, 7 How., at pp. 559-561.

¹⁵ The doctrine of the *Cooley* case was squarely affirmed in *Gilman v. Philadelphia*, 3 Wall. 713 (1866). "The power to regulate commerce," said Justice Swayne, "covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States" (pp. 726-727). See, also, *Crandall v. State of Nevada*, 6 Wall. 35, 41-43 (1867). For a more elaborated statement of the doctrine, see the opinion of the Court, delivered through Justice Field, in *County of Mobile v. Kimball*, 102 U.S. 691 (1881).

¹⁶ In *County of Mobile v. Kimball*, *supra*, Justice Field said (pp. 698-699): "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature

subjects demand uniformity, or permit of diversity, of control, is left to determinations of the Congress or of the Supreme Court.¹⁷ While the development of these doctrines had its origin in controversies relating to water transportation, the principles evolved are applicable

or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority." The following pronouncement of Justice Bradley in *Robbins v. Shelby Taxing District*, 120 U.S. 489, 493 (1887), stresses the obverse of the foregoing conclusion: "Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only . . . is repugnant to such freedom." For a subsequent affirmation of this doctrine, note the following from the opinion of Chief Justice Fuller in *In re Rahrer*, 140 U.S. 545, 555 (1891): "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States."

¹⁷ The issue may be raised as to who shall determine whether a subject is of local or national character, and whether exclusive or concurrent power is applicable in the premises. When Congress legislates in a given field, the Supreme Court does not question its exercise of discretion, provided the subject concerns interstate commerce. Congressional authority to regulate interstate commerce is viewed as very comprehensive in its nature, and there is seldom doubt as to the legitimacy of the legislative decision to exert this authority. Cases arise, however, concerning matters upon which Congress has not enacted legislation, and where the validity of state laws upon the subject is questioned. In passing upon the constitutionality of such laws, the Court must decide whether the subject involved is one requiring uniformity of regulation or which permits of diversity of control. The Supreme Court, as has already appeared, has not hesitated to do so. It is sometimes contended that this procedure involves judicial law-making. Whatever theoretical merit this contention may possess, alternative courses of action appear to be highly inexpedient. Either the Court must hold all state laws designed to regulate local matters affecting interstate commerce and concerning which no federal action has been taken to be unconstitutional; or Congress must assume the burden of expressly enumerating the various subjects which it deems suitable only for a uniform system of regulation. A further difficulty arises when Congress authorizes state action with regard to subjects of interstate commerce which it regards as better adapted to local than to national control. This procedure is sometimes attacked as an illegitimate delegation of legislative authority, particularly in cases where the Court had previously held state legislation unconstitutional on the ground that the subject requires uniformity of regulation. It would seem, however, that Congress is clothed with sufficient legislative discretion to justify resort to this device, except, perhaps, where the necessity for uniform control is clear beyond doubt. See George G. Reynolds, *The Distribution of Power to Regulate Interstate Carriers between the Nation and the States* (1928), pp. 87-89, 147-155.

to "every species of commercial intercourse" and fully comprehend the field of railroads.¹⁸ Moreover, the transportation of passengers and goods between the states was held, in general terms, to be a subject national in character, admitting of but one uniform system of regulation and subject to the exclusive authority of Congress.¹⁹

But even in the field of interstate transportation of persons and property the doctrine of the exclusiveness of Congressional authority was not applied as a rigid and invariable rule. While the importance of maintaining uniformity of policy in the regulation of such interstate commerce was fully recognized, it was deemed no less important, in the absence of action by Congress, that the powers of the states to protect public health, morals, and safety, to promote the

¹⁸ See *Case of the State Freight Tax*, 15 Wall. 232 (1872), in which a Pennsylvania statute imposing a tax upon interstate freight was held to be repugnant to the commerce clause of the Constitution. In the course of his opinion Justice Strong said (p. 275): "Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. . . . Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted."

¹⁹ In *Case of the State Freight Tax*, *supra*, the Court declared (p. 280): "Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed." The Court has repeatedly enunciated the doctrine that interstate transportation is subject to the exclusive authority of Congress. In *Welton v. State of Missouri*, 91 U.S. 275 (1875), Justice Field said (p. 280): "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation." Again, in *County of Mobile v. Kimball*, 102 U.S. 691 (1881), the same Justice, after distinguishing between those subjects which are national in character and those which are local, continued (p. 697): "Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States." See, also, *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 204 (1885); *Wabash Ry. Co. v. Illinois*, 118 U.S. 557, 574 (1886).

general welfare of their citizens, and to raise revenues for the support of their governments, be not invalidated. Impressed with the necessity of sustaining state enactments under the police power, two means of escape from the fundamental rule were developed: first, the doctrine of exclusive federal authority was found to be subject to exceptions—particular aspects of the general sphere of interstate transportation being deemed to permit or require diversity of regulation; and second, all state legislation impinging upon interstate transportation was not construed as constituting a regulation thereof, or a burden thereon, but was treated, in numerous instances, as a valid exercise of state power which affected interstate commerce only indirectly and incidentally. These developments, by way of "infringement" upon federal authority in this field, will receive brief consideration.²⁰

First, as to interstate transportation matters which have been held to be appropriate to the diversified control of local authority. Perhaps the most striking constituent of this category has concerned the operation of interstate ferries. Such ferries have been declared to be subject to state regulation with respect to rates, service, and ordinary taxation.²¹ The Court found that the authorization and control of

²⁰ The following, from the opinion of Justice Bradley in *Robbins v. Shelby Taxing District*, 120 U.S. 489, 493-494 (1887), provides a general indication of the scope of the concurrent powers of the states as it appears to have developed up to the time of the passage of the Act to Regulate Commerce in 1887: "It is also an established principle . . . that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations or employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein."

²¹ *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885). In this case a tax imposed by the State of Pennsylvania upon a New Jersey corporation transporting passengers and freight by steam ferry from New Jersey to Pennsylvania was held to be illegal and void. In reaching this conclusion, however, the Court said (p. 217): "It is true that, from the earliest period in the history of the government, the States have

these agencies were functions performed by the states since the earliest period of their history, and that the local character of the business amply supported the view that the commerce clause did not *ipso facto* oust the states of jurisdiction.²² It has already been noted that

authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such inter-State ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. . . . That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property." Similarly, in *Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333 (1914), the Supreme Court, in holding invalid the exaction by the city of Sault Ste. Marie of an annual license fee for each boat engaged in ferrying between the United States and Canada, none the less recognized the validity of the normal regulatory power of the states. Relying upon the *Gloucester* case, *supra*, the Court merely held that the power of the state to establish and license ferries "does not go so far as to enable the state to interdict one in the position of the appellee from conducting the commerce in which it is engaged, or justify the state in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent, express or implied" (p. 340). Justice Hughes concluded: "Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists, in the absence of federal action, a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the state could exercise either directly or by delegation" (p. 342).

²² Compare, also, the following from *Conway v. Taylor's Executor*, 1 Black 603 (1862), at p. 635: "There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power." And the Court concluded: "That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively,' we think too clear to admit of doubt." The emphasis, it will be noted, is upon the exclusiveness of state authority rather than upon concurrency of jurisdiction. This position of the Court must be taken to have been abandoned in the *Gloucester* and *Sault Ste. Marie* cases, *supra*.

matters of pilotage were deemed to admit of local control in the absence of conflict with federal action;²³ in due course, also, quarantine regulations,²⁴ harbor improvements,²⁵ and the construction of interstate bridges over navigable rivers,²⁶ were sustained by the Court as subjects permitting of diversity of treatment within the reserved powers of the states. In all these matters it was recognized that the regulation of interstate commerce was involved; but pending the assertion of federal authority, such regulations, if not so severe as to constitute a "burden" upon interstate commerce, were found to lie outside the general principle that interstate transportation requires uniform rules prescribed by Congress. This mode of approach has persisted to the present day.^{26a} Comparatively recent decisions indicate that if the Court is impressed with the necessity of employing local control, state legislation will be sustained. Thus, for example, state regulation of the rates at which natural gas is sold to local consumers, the gas being piped from points without the state, has been held to be valid;²⁷ and

²³ *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851).

²⁴ *Morgan v. Louisiana*, 118 U.S. 455 (1886).

²⁵ *County of Mobile v. Kimball*, 102 U.S. 691 (1881).

²⁶ *Gilman v. Philadelphia*, 3 Wall. 713 (1866).

^{26a} But see *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), in which a state statute requiring that a license be obtained by those selling railroad and steamship tickets was held to be invalid. The Supreme Court, speaking through Justice Butler, held that the act, though primarily designed to prevent fraud upon purchasers of tickets, burdened interstate and foreign commerce, over which Congress has "complete and paramount authority." Justice Holmes, Justice Brandeis, and Justice Stone dissented, both on principle and in reliance upon precedent. Justice Stone declared that this enactment, like many other such interferences with commerce, should be sustained, "not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines" (p. 44).

²⁷ *Penna. Gas Co. v. Pub. Service Comm.*, 252 U.S. 23 (1920). The Court found "that the transmission and sale of natural gas produced in one State, transported by means of pipe-lines and directly furnished to consumers in another State, is interstate commerce" (p. 28), but that "the thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York" (pp. 30-31). On this interpretation of the facts, the Court concluded (p. 31): "This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in

the assertion of state authority over matters specifically excluded from federal jurisdiction by Congressional enactment has been readily upheld, despite their intimate relationship to the field of interstate com-

the public interest and has not been attempted under the superior authority of Congress. It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution." A later decision indicates the difficulty which is often involved in determining whether a specific portion of the transportation, sale, or exchange of commodities between the states demands uniformity of control throughout the nation. In *Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924), the Court held that the sale of natural gas, piped from one state to another, not directly to consumers, but to independent distributing companies, which in turn sell the product locally to consumers, constitutes such interstate commerce as must be free from state interference even in the absence of Congressional action, and that state regulation of the rates charged to the distributing companies involves a direct burden upon interstate commerce. In the words of Justice Sutherland (pp. 309-310): "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned." Furthermore, in *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931), the Court appears to have upheld state action in circumstances corresponding to those disclosed in the *Pennsylvania* case, *supra*, on the ground that purely intrastate commerce was involved. The issue was as to the legality of applying a gross receipts privilege tax to revenue derived from the sale of natural gas in Ohio, about three-quarters of which was piped from without the state. The Court proceeded on the principle that the passage of gas from high-pressure transmission lines to local distribution lines "is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail," and hence it held that the furnishing of gas to consumers "is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state" (p. 471). The *Missouri* case, *supra*, was quoted with approval, but, referring to the *New York* case, upon which appellants relied, Justice Butler declared that "the opinion in that case must be disapproved to the extent that it is in conflict with our decision here" (p. 472). In light of this recent decision, it would seem that the Supreme Court has come to regard state regulations in connection with the sale of natural gas to consumers, even though such gas is transmitted from other states, as falling within the zone of exclusive state jurisdiction rather than in that of concurrent power.

merce.²⁸ Only where the subject of control clearly demands uniformity of policy have the hands of the states been stayed. The states have attempted, for example, to extend their authority to the regulation of interstate motor carriers, by requiring such carriers to secure certificates of convenience and necessity before engaging in the transportation of persons and property on the public highways. The contention that diversity of control is appropriate in these circumstances was held to be without merit; the Court found that such regulation served not only to burden but to obstruct interstate commerce.²⁹

²⁸ *Western and Atlantic v. Public Comm.*, 267 U.S. 493 (1925), involving the validity of the order of a state commission requiring the maintenance of switching service on an industrial side track. In upholding the commission's order, Chief Justice Taft said (p. 497): "It seems to be the contention of the Company that, since 85 per cent of the business done on the side track is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission, and that the state commission is without authority in the premises. Such a claim is in the teeth of the Transportation Act of 1920 . . . which provides that the authority of the commission . . . over the extension or abandonment of interstate railway lines shall not extend to the construction of spur, industrial or side tracks." For controlling distinctions between industrial spurs and extensions, see *Texas & Pac. Ry. v. Gulf Ry.*, 270 U.S. 266 (1926).

²⁹ *Buck v. Kuykendall*, 267 U.S. 307 (1925); *Bush Co. v. Maloy*, 267 U.S. 317 (1925). In the first of these proceedings, a statute of the State of Washington prohibited the use of its highways to common carriers operating auto vehicles between fixed termini or over regular routes, without having first obtained a certificate of convenience and necessity from the Director of Public Works. Buck, a citizen of Washington, desired to operate an auto stage line from Portland, Oregon, to Seattle, Washington, exclusively as a common carrier of through interstate traffic. He obtained the necessary license from the State of Oregon, but he was refused the certificate by the State of Washington, on the ground that Seattle and Portland were already adequately served by connecting steam railroad and auto stage lines. It was contended on behalf of the state that the privilege of using its highways for common-carrier purposes is one to be granted or withheld by the state, that regulation is necessary in the interest of public safety and economy, and that the promotion of good service by excluding unnecessary competing carriers is also within the police power of the state. Justice Brandeis, delivering the opinion of the Court, said (pp. 315-316): "The argument is not sound. It may be assumed that §4 of the state statute [requiring certificates of convenience and necessity] is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. . . . The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is pecu-

Even in the field of motor carriers, however, state enactments have, in the absence of national legislation, been sustained in numerous instances.⁸⁰

But perhaps the more significant aspect of this constitutional development, though by no means sharply separable from the foregoing category, is that in which the Court has held state regulatory enactments to be valid by construing them, not as regulations of, or as burdens upon, interstate commerce, but as affecting such commerce only incidentally. The Court has sought to avoid undue impairment of the police power of the states, and balancing local needs for the legislation at issue against its effects upon freedom of general commercial intercourse, it has sustained state authority where the effect upon interstate commerce is incidental and does not constitute a burden thereon. The most frequent and consistent applications of this principle are to be found in connection with matters of safety and public health. In upholding a state law requiring locomotive engineers to be examined and licensed by state authorities, even when such employees are engaged solely in operating interstate trains, the Court said: "The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kinds of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special

liarily within the province of federal action—the existence of adequate facilities for conducting interstate commerce. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause." In *Bush Co. v. Maloy*, *supra*, a Maryland statute was held unconstitutional on essentially the same grounds.

⁸⁰ See, for example, *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Morris v. Duhy*, 274 U.S. 135 (1927). In the last of these proceedings Chief Justice Taft said (p. 143): "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." See, also, *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 (1928), Appendix A (pp. 750-753), for a brief analysis of "decisions of United States courts affecting interstate commerce by motor vehicles on the public highways."

danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.⁸¹ This doctrine has been applied to a great variety of enactments.⁸² States have been permitted to require locomotive headlights of specified kind and power,⁸³ to prescribe the size of train crews,⁸⁴

⁸¹ *Smith v. Alabama*, 124 U.S. 465 (1888), at p. 482. On the specific issues of the proceeding the Court concluded: "first, that the statute of Alabama . . . is not considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

⁸² Compare the following from *Cleveland Ry. Co. v. Illinois*, 177 U.S. 514, 516 (1900): "Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." For a *résumé* of important types of legislation thus upheld, see *ibid.*, p. 517.

⁸³ *Atlantic Coast Line v. Georgia*, 234 U.S. 280 (1914); *Vandalia R. R. Co. v. Public Service Comm.*, 242 U.S. 255 (1916). By Act of March 4, 1915 (38 Stat. 1192), Congress assumed jurisdiction of this subject with respect to interstate carriers. The above decisions held that, prior to this enactment, the police power of the states extended to the regulation of the character of headlights used on locomotives employed in interstate commerce.

⁸⁴ *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453 (1911). Justice Harlan said (p. 466): "The statute here involved is not in any proper sense a regulation of interstate commerce. . . . Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such

to regulate the speed of trains,⁸⁵ to prohibit passengers from riding on platforms in the absence of specified safeguards,⁸⁶ to order the construction of viaducts and bridges for the elimination of grade crossings.⁸⁷ State legislation designed to safeguard public health has likewise been recognized as a legitimate exercise of the police power,

commerce and for the protection of those engaged in such commerce. . . . Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control."

⁸⁵ *Erb v. Morasch*, 177 U.S. 584 (1900); *Southern Ry. Co. v. King*, 217 U.S. 524 (1910). In the latter proceeding, which went off on a question of pleading, Justice Day, delivering the opinion of the Court, said (pp. 533-534): "It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the State to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact." In *Seaboard Air Line Railway v. Blackwell*, 244 U.S. 310 (1917), the Georgia statute involved in the above proceeding was again presented for consideration, and on the facts specified the Court found "that the statute is a direct burden upon interstate commerce, and, being such, is unlawful" (p. 316). Chief Justice White, Justice Pitney, and Justice Brandeis dissented, on the ground that this exercise of state authority was valid in the absence of Congressional action.

⁸⁶ *South Covington Ry. v. Covington*, 235 U.S. 537 (1915). "We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business and not subjecting the same to unreasonable demands" (p. 548).

⁸⁷ *N. Y. & N. E. R. Co. v. Bristol*, 151 U.S. 556 (1894); *Mo. Pac. Ry. v. Omaha*, 235 U.S. 121 (1914). The problem of the effect of such requirements upon the freedom of interstate commerce has received very little consideration; the Court has largely confined itself to a refutation of the carriers' contentions that they constitute an impairment of contract obligations and a taking of property without due process of law. In the *Nebraska* case, *supra*, the Court said (p. 127): "That a railway company may be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to

despite its incidental effects upon interstate commerce. Thus, for example, sanitary and quarantine regulations have been upheld,⁸⁸ as well as regulations with regard to cleanliness, ventilation, and fumigation.⁸⁹ To the extent that Congress has not asserted its superior authority, such matters, though involving transportation and affecting commerce beyond the territorial limits of the several states, have been freely recognized as lying within the scope of local jurisdiction.

But the exercise of the police power of the states has not been confined to matters of health and safety; it has been extended to the promotion of the general welfare and convenience of the public—involving, in the field of transportation, the regulation of the rates and services of the carrying agencies. It is in this aspect of control that the assertion of concurrent power by the states has been subjected to most definite check, even in the absence of Congressional action, because of its effect upon interstate commerce; and it was the resulting freedom of interstate commerce from all such control that hastened the

share, is well settled by prior adjudications of this court. . . . This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted." Neither the fact that the railroads were constructed prior to the highways, nor that the costs involved are highly burdensome, has been permitted to invalidate legislation requiring the removal of grade crossings in the interests of safety. In *Chi., Mil. & St. Paul Ry. v. Minneapolis*, 232 U.S. 430 (1914), the Court said (p. 438): "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." And in *Eric R. R. Co. v. Public Util. Commrs.*, 254 U.S. 394 (1921), Justice Holmes, speaking for the Court (with Chief Justice Taft, Justice Van Devanter, and Justice McReynolds dissenting), said (pp. 410-411): "If it reasonably can be said that safety requires the change it is for them [the States] to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. . . . To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. . . . If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. . . . Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty."

⁸⁸ *Smith v. St. Louis & Southwestern Ry. Co.*, 181 U.S. 248 (1901).

⁸⁹ *South Covington Ry. v. Covington*, 235 U.S. 537 (1915).

passage of the federal Act to Regulate Commerce and the establishment of the Interstate Commerce Commission.

The question of the scope of state jurisdiction in regulating transportation rates was first adjudicated in the famous *Munn* case⁴⁰ and those following it.⁴¹ The principal issue in these granger cases was whether it is within the police power of the states to prescribe maximum rates and charges, and the Court fully upheld the assertion of legislative authority: the grain elevators and railroads involved were held to be "clothed with a public interest," and no merit was found in the contentions that the statutes constituted an unlawful interference with private enterprise, or an impairment of charter obligations, or a taking of property without due process of law. But the effect of the statutes upon the commercial power of Congress was also raised, and the laws were likewise sustained on the issue of state and federal jurisdiction. The fact that the rates fixed, though confined to services rendered wholly within the limits of particular states, were also applicable to traffic whose origin or destination lay beyond the boundaries of the regulating authority, was not deemed sufficient ground for invalidating the legislation. The traditional doctrine of "mere incidental effect" was found to be controlling in the field of rates as it had been in matters of health and safety. In the *Munn* case, Chief Justice Waite said: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate ju-

⁴⁰ *Munn v. Illinois*, 94 U.S. 113 (1876).

⁴¹ *Chicago R. R. Co. v. Iowa*, 94 U.S. 155 (1876); *Peik v. Chicago Ry. Co.*, 94 U.S. 164 (1876); *Chicago R. R. Co. v. Ackley*, 94 U.S. 179 (1876); *Winona & St. Peter R. R. Co. v. Blake*, 94 U.S. 180 (1876).

risdiction.⁴² The same reasoning was applied in the case of railroads. In the *Peik* case the Chief Justice declared: "The law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."⁴³ By these determinations of the granger cases the Court extended the doctrine of concurrent power which had been laid down a quarter of a century earlier to rather questionable limits. The apparently accepted view that interstate transportation of persons and property is a matter of national character which requires uniformity of regulation, and that Congressional power over this subject is exclusive from the very nature of the grant, was in effect disregarded.

But this position of the Court did not long prevail. Within a decade, in the *Wabash* case,⁴⁴ state regulation of interstate rates, even when accomplished indirectly and as an incident of the control exercised over intrastate rates, was definitely declared to be repugnant to the commerce clause of the Constitution. An Illinois statute prohibited railroads from charging, within the state, the same or higher transportation rates for a given distance than for a longer distance. The defendant railroad made such discrimination between places in the State of Illinois in transporting goods whose ultimate destination was in the State of New York. Conceding that the statute would be valid if construed to apply only to transportation which begins and ends within the boundaries of the State of Illinois,⁴⁵ the Court held

⁴² *Munn v. Illinois*, *supra*, at p. 135.

⁴³ *Peik v. Chicago Ry. Co.*, *supra*, at pp. 177-178. See, also, *Chicago R. R. Co. v. Iowa*, *supra*, at p. 163.

⁴⁴ *Wabash Ry. Co. v. Illinois*, 118 U.S. 557 (1886).

⁴⁵ Said Justice Miller, speaking for the Court: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. . . . The reason for

that as a regulation of commerce among the states it was beyond the scope of local authority, even as to that portion of the haul which lay within its own borders.⁴⁶ The attempt to bring this ruling into accord with the determinations in the granger cases was not altogether successful. It was admitted that the jurisdictional issue had been presented in those cases, and "that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States in the absence of any legislation by Congress on the same subject."⁴⁷ But, argued the Court,

this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. . . . The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce, but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject" (pp. 564-566).

⁴⁶ In concluding its discussion on the merits, the Court said (p. 577): "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it is certainly the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

⁴⁷ *Ibid.*, p. 568. By way of explanation, the Court merely emphasized the impropriety of this position: "By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen States, through which they are carried without change of car or breaking bulk."

the main issue in those cases, which overshadowed all others in importance, was the right of the state to limit rates and charges; the question as to the relationship of the state enactments to the commerce clause "did not receive any very elaborate consideration."⁴⁸ Moreover, a contrary view had been definitely applied prior to the decision in the granger cases, and it is "very difficult to believe that the court consciously intended to overrule" its original determination of the issue "without reference to it in the opinion."⁴⁹ In any event, after an examination of precedents both before and after the granger cases, the conclusion was reached "that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."⁵⁰

The *Wabash* decision established beyond dispute that the regulation of charges for transportation among the states is beyond the scope of the reserved powers of the local authorities.⁵¹ The vital sub-

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 570. The Court placed primary reliance upon the *Case of the State Freights Tax*, 15 Wall. 232 (1872), in which a Pennsylvania statute had been held void, as in conflict with the commerce clause, which imposed a tax "upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State." The statute had been held valid only as to freight the carriage of which began and ended within the borders of the state. This decision, rendered only four years before the granger cases were decided, was deemed by the Court to be directly in point. In the words of Justice Miller: "It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and, in fact, the judgment of the court in the *State Freights Tax Case* rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State."

⁵⁰ *Ibid.*, p. 575.

⁵¹ See, also, *Louisville & Nashville R. R. Co. v. Esbark*, 184 U.S. 27 (1902), in which a long-and-short-haul clause of the Kentucky constitution was declared to be invalid in so far as it is made applicable to or affects interstate commerce—that is, in so far as it "is not confined to a case where the long and short hauls are both within the State of Kentucky, but . . . extends to and embraces a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both of which are within the State" (p. 33). Whether the railroad finds itself compelled to lower the intrastate rates or to increase the interstate rates as a means of removing the discrimination, the state enactment exerts a direct effect upon interstate commerce. In the words of Justice Peckham (p. 41): "The facts of this case have been thus fully referred to for the purpose of showing how

ject of control of interstate rates was placed in its proper category—that is, it was recognized as a subject requiring uniformity of regulation which was committed to the exclusive jurisdiction of Congress. Constitutional doctrine was thus harmonized with economic need. Any system whereby the states could lawfully fix all rates upon the transportation of persons or property within their borders would inevitably have resulted in uncertainty, confusion, and conflict. When the Court broke away from its earlier vacillation on this issue, it set the stage for the effective exercise of governmental power. Although about three-quarters of the total traffic of the railroads was left unregulated,⁵² the necessary legal stimulus was provided for the assertion of federal authority.

§2. THE INFLUENCE OF CONGRESSIONAL ENACTMENTS

The foregoing constitutional doctrines were developed before the Federal Government had entered upon the tasks of carrier regulation. While the supremacy of Congress in the field of interstate commerce had been recognized from the beginning,⁵³ the chief practical

directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

⁵² It should be noted, however, that shippers were not left entirely at the mercy of the carriers, even as to interstate commerce, and despite the absence of Congressional action. Compare the following from *Covington Bridge Co. v. Kentucky*, 154 U.S. 204 (1894), in which a Kentucky statute fixing rates of toll over the bridge of the plaintiff company connecting the states of Ohio and Kentucky was held invalid as an attempted regulation of interstate commerce: "We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case" (p. 222). In other words, only positive control by the states was rendered inoperative; the common-law obligations of public carriers remained.

⁵³ In the *Lottery Case*, 188 U.S. 321 (1903), for example, Justice Harlan, after a survey of the Court's previous decisions involving the commerce clause, indicated the extent of Congressional authority over interstate commerce in much the same language that Chief Justice Marshall had used in *Gibbons v. Ogden*: "They [the cases cited]

problems which faced the Supreme Court from time to time were concerned with the validity of local legislation affecting transportation between the states. On the whole, the early adjudications recognized, in the absence of Congressional action, the existence of a large measure of state authority: subjects permitting of diversity of control were held to fall within the scope of state jurisdiction even though they constituted a regulation of interstate commerce, provided they were not found to burden such commerce; and state legislation which affected interstate commerce only incidentally, not constituting a direct regulation thereof, was likewise sustained, provided no conflict was involved with existing federal enactments in the same sphere. In the crucial matter of rate control, however, the states were found to be without power in so far as their legislative acts embraced interstate commerce, even though the primary objective was to regulate intrastate charges, and despite the fact that the National Government had not yet occupied the field. This determination, as definitively evolved in the *Wabash* case, marks the beginning of a process of centralization of control which has now attained far-reaching scope. Not only has Congress asserted extensively its acknowledged authority over interstate carriers, particularly through the major enactments of 1887, 1906, 1910, and 1920, and through the parallel development of federal safety legislation, but in doing so it has ousted the states of power over interstate situations which had been legitimately exercised prior to its own assumption of regulatory activity, and, even more significantly, as a means of achieving effective regulation of the interstate commerce subject to its control, it has impinged in very substantial measure upon the freedom of the states to regulate matters of purely intrastate commerce. Before we examine the character

show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed" (pp. 352-353).

of the Commission's performance within the bounds of this expanded jurisdiction, it is necessary to note the nature of these Congressional enactments, as interpreted by the courts on the issue of state and federal authority. The detailed provisions of these statutes, as developed historically, have been previously analyzed.⁵⁴ It will suffice, at this juncture, to revert to them very briefly, and on a functional basis: to note the character of the more important Congressional enactments in matters of finance and management, service and facilities, and rates and charges, in their relationship to the so-called reserved powers of the states, and thus to observe the present constitutional scope of the Commission's authority in the field of intrastate commerce.

In matters of finance and management, the powers of the states incidental to the creation of corporations and the regulation of their intrastate business have been sharply curtailed, with corresponding extensions of federal jurisdiction. The Commission's authority under Congressional enactment embraces, for example, control of accounts and reports, security issues, and intercorporate relations. The Commission may require regular and special reports from all carriers subject to the Act, establishing the manner in which they shall be made, and it may prescribe uniform systems of accounts, including the forms of all accounts, records, and memoranda which may lawfully be kept. Because these powers have been held applicable to all of the operations of the carriers under the Commission's control, the assertion of independent state authority in this sphere is precluded.⁵⁵ Similarly, although the states long antedated the Federal Government in the regulation of the issuance of securities by interstate carriers, the

⁵⁴ See Part I, The Legislative Basis of the Commission's Authority.

⁵⁵ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912). In reversing the judgment of the Commerce Court, Justice Day, speaking for the majority, argued as follows (p. 211): "It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible

jurisdiction now conferred upon the Commission is "exclusive and plenary." Carriers may not issue securities or assume obligations without the Commission's approval, "even though permitted by the authority creating the carrier corporation"; and once authorization is granted by the Commission, carriers may proceed "without securing approval other than as specified" in the federal statute. On face of the provisions of section 20a Congress has evinced a clear intent to occupy completely the field of security regulation.⁵⁸ The Commission has

concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. . . . The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction."

⁵⁸ Upon receipt of an application for the issuance of securities, the Commission is required to file a copy thereof with the governor of each state in which the applicant carrier operates; and the state commissions or other appropriate authorities are permitted to make representations before the Commission for the protection of the rights and interests of the several states and their citizens. This participation by the states is of a purely advisory character. Only in so far as the authorized securities to be issued by a carrier must be "for some lawful object within its corporate purposes" may state laws restrict the Commission's authority. Although, in specific instances, the Commission has recognized the limitations of state law, it has done so as a matter of policy, rather than because of an acknowledged want of power. For example: In *Capital Stock of Pittsburgh & West Virginia Ry.*, 82 I.C.C. 704 (1923), in denying an application for authority to sell stock below par, the Commission said (p. 706): "Without determining to what extent our power with respect to an issue of securities is affected by the limitation of a State regulation, it is our thought that in this matter we should be governed by the policy of the State law." Similarly, in *Stock of Castleman Valley R. R.*, 90 I.C.C. 521, 523 (1924), state law was allowed to govern on this issue. It would seem, however, in view of the manifest Congressional intent to endow the Commission with plenary and exclusive control of security issues, that its authorizations would cure defects of corporate power. Compare the following from Kenneth F. Burgess, "Federal Regulation of Railway Management and Finance," *Harvard Law Review*, Vol. 37 (April, 1924), at pp. 724-725: "As to the power of Congress to restrict corporate action of companies in respect to interstate commerce there can be no doubt. In fact, the carrying on of interstate commerce is not a franchise granted by the state, but is a right which exists in the corporation as a citizen of the United States. And Congress may enlarge the corporate capacity in respect to interstate commerce by granting powers or franchises additional to the charter issued by the state. It may even enlarge the corporate capacity of a state corporation in respect to its intrastate transactions by relieving against a charter obligation to charge no more than a specified rate of fare, as a part of its power to remove unjust discrimination against interstate commerce. The Commission's construction of the present Act, however, makes the corporate charter the test of whether the proposed security issue is 'for some lawful object within its corporate purposes.' Congress does not seem to have intended this conclusion, judging by the provision in the other paragraph of the same Act that 'the

proceeded on this basis,⁵⁷ and in so far as its determinations have been subjected to judicial review the constitutional validity of the power under which it operates has been upheld.⁵⁸ Finally, a like centralization of control has been effected in the field of intercorporate relations. Section 5 of the Act authorizes the Commission to permit the pooling of freights or revenues when found to be conducive to better service or economy of operation, to approve unifications through lease or stock ownership when deemed to be in the public interest, and to mold the character of consolidations into single systems for ownership and operation in conformity with "a plan for the consolidation of the railway properties of the continental United States into a limited number of systems" which it is directed to prepare and adopt. These powers, by their very nature, embrace the en-

jurisdiction conferred upon the Commission by this section shall be exclusive and plenary' and that after such approval a carrier may issue securities without any other approval." (Supporting citations have been omitted.)

⁵⁷ See, for example, *Bonds of New York Central R. R.*, 65 I.C.C. 534 (1920).

⁵⁸ In *Pittsburgh & W. V. Ry. v. I.C.C.*, 293 Fed. 1001 (1923), the Court of Appeals of the District of Columbia said (p. 1004): "We think the power thus conferred by Congress has a direct relation to commerce and forms an important factor in the general scheme for the regulation of commerce by the railway systems of the country as set forth in the Transportation Act. The power of the Commission to regulate rates for the protection of the public and the carrier alike is settled. If this mutual protection is to be fully administered supervision of the whole matter of the issue of capital stock, investment, and incurring of bonded indebtedness . . . becomes so directly interrelated with the problem of maintaining a just relation between the public and the carrier, that they fall clearly within the constitutional authority of Congress to regulate interstate commerce." See, also, *Whitman v. Northern Cent. Ry. Co.*, 146 Md. 580, 127 Atl. 112 (1924). While the Supreme Court has not directly passed upon the constitutionality of the Commission's authority over the issuance of securities, it has definitely recognized the Commission's controlling jurisdiction in the premises. In *R. R. Comm. v. Southern Pac. Co.*, 264 U.S. 331 (1924), where it was held that the state commission was without power to require three carriers to build an interstate union depot which would involve considerable abandonments and extensions and great expense, without action by the federal tribunal, Chief Justice Taft also referred to the Interstate Commerce Commission's power over securities: "Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would in all probability require the three railways to issue new capital securities and this could not be done without the approval of the Interstate Commerce Commission. To be sure this provision only becomes operative when securities have to be issued and would not, of itself, prevent action by a state commission until such securities are seen to be necessary; but the provision indicates the general congressional plan" (p. 347). In *Venner v. Mich. Cent. R. R. Co.*, 271 U.S. 127 (1926), it was held that a suit to enjoin the issuance of securities authorized by the Commission because of alleged violations of state law could not be maintained in the state courts.

tire business of interstate carriers; and it is expressly provided that carriers affected by the Commission's orders under these powers are relieved from the operation of the anti-trust laws and from all other restraints or prohibitions of state and federal law to the extent necessary to carry out the authority granted by such orders. While a few actual consolidations have been permitted to be effectuated under state law without the Commission's approval,⁵⁹ and while there is some judicial support for the view that resort to the Commission is not mandatory in such cases prior to the promulgation of its final consolidation plan,⁶⁰ the provisions as to acquisitions of control through lease or stock ownership, to which the Commission's effective activity has been largely confined up to this time, have been construed as prohibitory upon the carriers, forbidding combination with-

⁵⁹ *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I.C.C. 581 (1923); *Operation of Lines and Bond Issue by Reading Co.*, 86 I.C.C. 157 (1923); *Acquisition by L. S. & I. R. R.*, 86 I.C.C. 313 (1924); *Acquisition and Stock Issue by P., O. & D. R. R.*, 105 I.C.C. 189 (1925). In the first of these proceedings the Commission said (pp. 585-586): "The tentative consolidation plan of the commission and the showing made in this proceeding support the conclusion that consolidation of the properties and corporations here involved so serves the public interest that impediment would be misfortune. Applicable State laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is designed to facilitate. We can not conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them. Whether State corporations in matters regarding their status as legal entities as distinguished from their participation in interstate commerce may avail themselves of such laws does not depend upon our election or anything we do. Authority in us to withhold approval in the public interest of security issues when State laws permit consolidation does not mean that we may not grant approval when public interest requires that we do so. Furthermore, in the absence of mandatory provisions of a Federal statute we should give full faith and credit to the acts of sovereign States, especially when, as in this case, their action is unanimous." But see the vigorous dissenting opinion of Commissioner Eastman, at pp. 587-595, in which he argued that all consolidations, regardless of state laws, must first receive the approval of the Commission.

⁶⁰ *Snyder v. New York, C. & St. L. R. R. Co.*, 278 U.S. 578 (1929). See Sidney P. Simpson, "The Interstate Commerce Commission and Railroad Consolidation," *Harvard Law Review*, Vol. 43 (Dec., 1929), p. 198, n. 24; and note his conclusion, on principle, as follows (p. 199): "The view that the provisions of section 5 are prohibitory would, however, seem to be the sounder one from a standpoint of policy. The declared purpose of Congress was to provide for the building up of an integrated, balanced, national railroad system. It would seem that Congress was not seeking merely to provide carriers with a way of avoiding the anti-trust laws, but rather contemplated the consolidation of the railroads into a limited number of systems in accordance with a definite plan. If the statute can be construed to carry out this purpose, it should be so construed."

out the Commission's authority, instead of merely serving to enable them to obtain relief from restrictive state and federal legislation.⁶¹ While the constitutional issue, as well as many matters of interpretation, have not been expressly adjudicated, it would seem that complete jurisdiction over unifications has been vested in the Commission, and that state laws, whether involving police regulations or matters of corporate power, have been rendered largely inoperative.⁶²

In the regulation of service and facilities, there has likewise been an extensive assertion of federal authority in derogation of the traditional powers of the states. We have noted that in the absence of Congressional action state legislation in this field had been generally upheld as a legitimate exercise of the police power, despite its impact upon interstate commerce. Since, however, the same plant and equipment are used for both intrastate and interstate traffic and the operations involved are inextricably interblended, there is room, on the whole, for but one controlling authority. Local regulations are bound to yield to the supreme power of the Federal Government over all subjects of interstate commerce. When, therefore, Congress entered this regulatory sphere, the states were in large measure ousted of jurisdiction, even as to matters within their own domain of intrastate commerce. The earliest assertion of federal authority in this connection concerned matters of safety of service; and it is in this field that state enactments have been most sweepingly superseded. The Safety Appliance Acts have not only been held to apply to vehicles used in moving intrastate commerce,⁶³ but to supplant all state regulations covering the same subject-matter;⁶⁴ the Hours of Service

⁶¹ In *Securities Application of Pittsburgh & West Virginia Ry.*, 70 I.C.C. 682 (1921), an application for the issuance of securities in connection with an independent acquisition of control was denied on the ground that such acquisition cannot be lawfully accomplished without the Commission's approval. For a more recent application of the same principle, see *Bonds of Chesapeake & Ohio Railway Co.*, 150 I.C.C. 257 (1929), at p. 260. The same view appears to have been assumed by the Supreme Court in *Chicago Junction Case*, 264 U.S. 258, 267, 271 (1924).

⁶² See Sidney P. Simpson, *op. cit.*, pp. 239-244, on the effect of the Commission's approval of unifications.

⁶³ *Southern Ry. Co. v. U.S.*, 222 U.S. 20 (1911).

⁶⁴ *Southern Ry. Co. v. R. R. Comm., Indiana*, 236 U.S. 439 (1915). In the words of the Court: "The exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. The

Act has been held to be valid despite its indirect regulation of intrastate commerce,⁶⁵ and to have rendered state regulations inoperative, by way of supplement or otherwise, even before its effective date;⁶⁶ the Boiler Inspection Act, as amended, has been held to have occupied the field of regulating locomotive equipment so completely as to preclude state legislation;⁶⁷ and the train-control provisions of the Transportation Act have been applied in similarly sweeping fashion.⁶⁸ In matters of adequacy of service Congress did not assume full jurisdiction till 1920, but the powers now conferred upon the Commission are so broad as to embrace all of the traffic of interstate carriers. The Commission's normal regulation of "car service," and particularly the exercise of its summary powers in the event of car shortage, congestion, or other emergency, generally involves control of the entire plant, all facilities, and the aggregate of operations. In most instances the interests of intrastate and interstate shippers cannot be separated: since all shippers are dependent upon the same car supply, an assignment to one group necessarily reduces the supply available for the other group. In these circumstances federal authority is supreme, and it has been exercised, in coöperation with state agencies, without question.⁶⁹ But perhaps the most striking encroachment upon state power in the field of service has sprung from the Commission's authority over extensions and abandonments. No railroad may extend its line or construct or acquire a new line, or abandon the whole or any part of its line, without first securing from the Commission a certificate of public convenience and necessity; and upon the Commission's au-

States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. . . . Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject" (pp. 446, 447). See, also, Part I, pp. 254-255.

⁶⁵ *Belt & Ohio R. R. v. I.C.C.*, 221 U.S. 612 (1911).

⁶⁶ *Nor. Pac. Ry. v. Washington*, 222 U.S. 370 (1912); *Erie R. R. Co. v. New York*, 233 U.S. 671 (1914). See, also, Part I, pp. 262-265.

⁶⁷ *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926). See, also, Part I, pp. 273-275.

⁶⁸ *Automatic Train-Control Devices*, 69 I.C.C. 258 (1922), 91 I.C.C. 426 (1924), and the numerous cases following. See, also, Part I, pp. 275-281.

⁶⁹ The only saving clause against undue infringement upon state activity is the stipulation that nothing in the federal statute "shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is incon-

thorization the carrier may proceed with the extension or abandonment "without securing approval other than such certificate."⁷⁰ In both extensions and abandonments the lines immediately involved are generally located or to be located within the boundaries of a single state, but their operations affect interstate commerce and the applications for certificates are filed by interstate carriers. Under such conditions the authority of the states is superseded by that of the Federal Government. Extensions wholly within a state have been held to require the Commission's authorization;⁷¹ and the Commission's power

sistent with any lawful order of the Commission made under the provisions of this Act." Sec. 1, par. (17).

⁷⁰ Only the construction and abandonment of "spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation" are excepted from the incidence of the Commission's authority. Sec. 1, par. (22).

⁷¹ *Texas & Pac. Ry. v. Gulf Ry.*, 270 U.S. 266 (1926). The case involved the construction of projected trackage wholly within the state. It was conceded that if such trackage constituted an extension, the Commission's authorization was necessary; in defense of the failure to secure a certificate from the Commission, it was urged that the line was merely an industrial track, over which the Commission has no authority. In disposing of this issue, Justice Brandeis, delivering the opinion of the Court, indicated that the sweep of the Commission's power in the premises is closely related to the general policy of the Transportation Act of 1920. "By that measure," he declared, "Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. . . . When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and

over abandonments has been held not only to extend to lines lying wholly within a state but to embrace their intrastate as well as interstate traffic.⁷² Even where extensions or abandonments are but inci-

effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction" (pp. 277-279). For recognition by a state court of the exclusive authority of the Commission over extensions, see *People v. Illinois Cent. R. R. Co.*, 155 N.E. 841 (1927).

⁷² In *Certificate for Eastern Texas R. R.*, 65 I.C.C. 436 (1920), the Commission authorized the complete abandonment of the line involved, embracing intrastate as well as interstate traffic. On appeal, in *Texas v. Eastern Texas R. R. Co.*, 258 U.S. 204 (1922), the Supreme Court confined the lawful operation of the Commission's certificate to interstate commerce, holding that the provisions of the Transportation Act "should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business" (p. 218). But the relationship between intrastate and interstate commerce is generally too intimate for such limitation of the Commission's authority. For example, in *Abandonment of Branch Line by Colorado & Southern Ry.*, 72 I.C.C. 315 (1922), 82 I.C.C. 310 (1923), 86 I.C.C. 393 (1924), 94 I.C.C. 657, 661 (1924), the Commission issued a certificate permitting the abandonment of a branch line located wholly within the State of Colorado as to its entire business. The Commission said (86 I.C.C. 393, at p. 395): "The protestants contend that paragraphs (18) to (21), . . . in so far as they may attempt to confer exclusive jurisdiction upon us to permit the abandonment of lines of railroad located and doing business wholly within the State of Colorado and engaged in its intrastate commerce, are unconstitutional. The case of *Texas v. Eastern Texas R. R. Co.*, 258 U.S. 204, is relied upon to support such contention. In our opinion the conclusion therein reached does not apply to the facts in the present case. The applicant's lines are not located and doing business wholly within the State of Colorado. The applicant is an interstate carrier, the operating results of the branch line are reflected in its accounts, and it is required to bear or make good the deficits from such operation. It clearly appears that, in the language of the Supreme Court in the case above cited, the large losses sustained in operating the branch line 'would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.' We are of opinion that we have jurisdiction." On appeal, in *Colorado v. U.S.*, 271 U.S. 153 (1926), the main contention of the state was "that the Commission lacks power to authorize the Company to abandon, as respects intrastate traffic, a part of its line lying wholly within the State" (p. 161). The Court found this contention without merit and upheld the Commission's order. In supporting this order as a constitutional exercise of authority Justice Brandeis said (pp. 163, 164, 165-166): "The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote

dental to the legitimate assertion of state power, the exclusive authority of the Commission with respect to them, has been sustained, though without derogation of the state power to which such exercise of authority is incidental.⁷⁸

intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. . . . This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. . . . The exercise of federal power in authorizing abandonments is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. . . . Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

⁷⁸ The Los Angeles passenger terminal controversy, involving, among other things, the scope of the Commission's power over extensions and abandonments, furnishes an unusual example of the interrelated jurisdiction of the Commission and state authorities. This controversy was protracted for more than a decade, and only the general course of its development need be here indicated. In 1921 the Railroad Commission of California ordered the Southern Pacific, the Atchison, and the Los Angeles & Salt Lake to acquire lands and construct a union station in the city of Los Angeles, in accordance with plans to be approved by that commission. This order was held to be invalid by the Supreme Court of California, on the ground that the Transportation Act of 1920 had vested exclusive authority over union stations in the Interstate Commerce Commission. *Atchison Ry. Co. v. Railroad Com.*, 190 Cal. 214 (1922). This judgment was affirmed by the United States Supreme Court, but the scope of the federal decision was not made entirely clear. While the Court stated that the issue before it was "whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920," primary emphasis was placed upon the fact that substantial extensions and abandonments of main tracks were involved in the plan, and that under the circumstances the statute required the Commission's certificate of public convenience and necessity as a condition precedent to the validity of the state commission's order or of action by the carriers. "Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of §402 of the Transportation Act," concluded the Court, "the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission." *R. R. Comm. v. Southern Pac. Co.*, 264 U.S. 331, 341, 348 (1924). Accordingly, upon the filing of a federal complaint by the city of Los Angeles, and after hearing, the Commission found that such track changes and joint use of facilities as the union station plan involved were reasonably required in the public interest, but it concluded that it was "not empowered to require the construction of a union passenger station," and it also withheld the issuance of certificates pending further action by the state commis-

But it is in the field of rates and charges that the most controversial issues have arisen with regard to the distribution of power between the nation and the states; and it is in this field that the centralizing process has achieved its most significant advances. The denial of

sion. "For orderly procedure," said the Commission, "it appears preferable that appropriate certificates in connection with the proceedings now before us should be issued subsequent, rather than prior to, the making of an order by State authority, but that the securing of favorable action on our part be made a prerequisite to the effectiveness of any State order. Such a procedure would enable us to pass upon a specific proposal and obviate the semblance of consenting in advance to construction the extent and expense of which could only be surmised." *Los Angeles Passenger Terminal Cases*, 100 I.C.C. 421, 430, 459 (1925). The California commission thereupon reopened the proceedings and, upon a voluminous record, ordered the construction of the station according to prescribed plans, the order to become effective only after the Interstate Commerce Commission had issued the necessary certificates for extensions and abandonments of track and an order for the construction of the union station. Upon petition to the federal tribunal for such certificates and order, the Commission issued the certificates as prayed for, but, adhering to its original conclusion, once more declared itself without power to require the construction of the union station. *Los Angeles Passenger Terminal Cases*, 122 I.C.C. 489 (1928). This position was fully sustained by the United States Supreme Court, reversing the judgment of the Court of Appeals of the District of Columbia in 34 Fed. (2d) 228. After noting the great cost and far-reaching significance of the proposed construction, the Supreme Court, speaking through Chief Justice Taft, said: "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act." The Supreme Court's earlier decision, in *R. R. Comm. v. Southern Pac. Co.*, *supra*, was distinguished as follows: "But it is said that we have already foreclosed the conclusion in this case by our opinion in 264 U.S. 331. The only issue there presented to this Court, was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. The point in that case was the necessity for the acquiescence of the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held. . . . It was as far as possible from the purpose of the Court in its opinion to indicate its views of the powers which the Commission could exercise adversely to the carriers in compulsory proceedings. They were not before the Court for adjudication." *Interstate Commerce Commission v. Los Angeles*, 280 U.S. 52, 70, 71 (1929). Meanwhile the carriers had petitioned to have the order of the state commission set aside, but it was upheld by the Supreme Court of California in 209 Cal. 460 (1930), and the judgment of the state court was affirmed by the Supreme Court of the United States in *Archison Ry. v. Railroad Comm.*, 283 U.S. 380 (1931). In disposing of the various grounds of attack upon the order, Chief Justice Hughes said *inter alia* (p. 392): "The considerations which led the court [in 280 U.S. 52] to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required."

state authority over *interstate* rates, even in the absence of Congressional action, was a mere beginning; with the actual assumption of federal jurisdiction, state power over *intrastate* rates has been progressively curtailed, in subordination to the exercise of supreme federal authority over interstate commerce, and the Commission is now finding itself vested with large powers of control over purely local rates and charges. This result has been attained despite the express stipulation of the Interstate Commerce Act that its provisions are inapplicable to transportation "wholly within one State." The necessity for this extension of federal power is grounded in the fact that discrimination against persons or localities in interstate commerce and the burdening of interstate commerce as a whole may arise from the relationship between intrastate and interstate rates, whether the intrastate charges are voluntarily fixed by the carriers or imposed under mandate of the state authorities. The specific legislative basis for the Commission's incursion into the domain of intrastate rates is to be found: first, in the prohibitions of section 3 of the Act, operative since the original enactment of 1887, against carriers granting undue preference or advantage to persons or localities or subjecting them to undue prejudice or disadvantage; and, second, in the provisions of section 13 of the Act, as amended by the enactment of 1920, when construed in relationship to the general policy introduced by the new legislation and particularly with reference to the rule of rate-making established by section 15a, whereby the Commission is expressly empowered to prescribe intrastate rates and charges in lieu of those which, upon investigation, it finds to cause "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," which rates and charges, as prescribed by the Commission, are declared to be binding upon the carriers involved in such proceedings, "the law of any State or the decision or order of any State authority to the contrary notwithstanding." We are not concerned, at this point, with the character of the Commission's performance under this grant of authority; our immediate task is to discover the scope of the Commission's power over intrastate rates, as disclosed by a brief analysis of

the outstanding judicial proceedings in which the jurisdictional issue has been authoritatively determined.

The determinations of the Supreme Court in the *Minnesota Rate Cases*⁷⁴ provide the first important step in the evolution of federal power over intrastate rates, although no order of the Commission was involved and the authority of the states was upheld.⁷⁵ In 1906 and 1907 a general reduction of intrastate freight and passenger rates was made by the State of Minnesota, both through acts of the legislature and through orders of the Railroad and Warehouse Commission. Prior to these reductions, border cities in adjoining states (such, for example, as Duluth, Minnesota, and Superior, Wisconsin) were accorded like rates to points within Minnesota. When the new rates were put into effect, the carriers involved reduced many of their interstate rates to the level of the intrastate rates, in order to maintain the previously established parity and thus avoid an adverse effect upon interstate transportation. Without such adjustments, border cities outside the State of Minnesota, lying in the same economic area, could not have maintained their traditional competition with localities within the state. The rate reductions on interstate traffic thus forced upon the carriers were substantial, and exerted a considerable effect upon their operating income.⁷⁶ Thereupon suit was brought by

⁷⁴ 230 U.S. 352 (1913).

⁷⁵ In *Shepard v. Northern Pac. Ry. Co.*, 184 Fed. 765 (1911), the Circuit Court of the United States for the District of Minnesota confirmed the findings of a special master and entered decrees whereby the acts and orders of the state, with the exception of one order as applied to the Minneapolis and St. Louis Railroad Company, were declared to be void, and the enforcement of the prescribed freight and passenger rates was permanently enjoined. In the *Minnesota Rate Cases*, *supra*, the Supreme Court reversed the decrees as applied to the Northern Pacific and Great Northern companies, and affirmed the decree, with modifications, in the case of the Minneapolis and St. Louis Railroad Company. This diversity of result was based entirely on the issue of confiscation, the Court holding that the valuation methods employed did not justify a finding of confiscation in the first two instances, but that in the third, despite some error in the value estimates and calculations, the special facts supported the finding that the rates were confiscatory. But on the issue as to whether the Minnesota rates were an unlawful interference with interstate commerce, the lower court was reversed as to all of the companies and the action of the state was upheld in its entirety.

⁷⁶ Compare the following from the findings of the master, as approved by the Circuit Court and as summarized by Justice Hughes (230 U.S., at pp. 382-384): "The state line of Minnesota on the east and west runs between cities which are in close proximity. Superior, Wisconsin, and Duluth, Minnesota, are side by side at the extremity of Lake Superior. Opposite one another, on the western boundary of the State, lie Grand Forks, North Dakota, and East Grand Forks, Minnesota; Fargo, North

stockholders of the carriers to restrain the enforcement of the intrastate rates prescribed by the Minnesota authorities, on the ground that they so disturbed the previously existing relationship between the intrastate and interstate rates as to discriminate against localities in other states and thus to constitute an unconstitutional interference with interstate commerce.⁷⁷ It was conceded by the state authorities "that the schedules fixed for intrastate transportation necessarily disturbed the equilibrium theretofore existing between the rates on the two classes of business' (state and interstate) 'on the boundary lines'";⁷⁸ but it

Dakota, and Moorhead, Minnesota; and Wahpeton, North Dakota, and Breckenridge, Minnesota. The cities in each pair ship and receive, to and from the same localities, the same kinds of freight. The railroad companies have always put each on a parity with the other in the matter of rates, and if there were a substantial difference it would cause serious injury to the commerce of the city having the higher rate. . . . The maximum class rates fixed by the order of September 6, 1906, were from 20 per cent. to 25 per cent. lower than those theretofore maintained by the Northern Pacific and Great Northern Companies for transportation in Wisconsin, Minnesota and North Dakota, whether such transportation was local to one of these States or was interstate between any two of them. When the Northern Pacific Company, pursuant to this order, installed the new intrastate rates, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates from Duluth. Reduction was also made in the rates between both Duluth and Superior and the above-mentioned points on the western boundary so as to put the border cities in North Dakota on an equal basis with the neighboring cities in Minnesota. This reduction was substantial and, had it not been made, the places adjoining the boundary, but outside the State, could not have competed with those within. Although the Northern Pacific Company thereby suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or suffering substantial destruction of its interstate commerce to these border localities in articles covered by the orders. At the same time, the Great Northern Company made similar reductions, although, in its case, the transportation between Duluth and points in Minnesota was interstate—its line passing through Wisconsin. The reason for these reductions was to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern line and those similarly situated on the line of the Northern Pacific, and to meet the reduced rates on the latter."

⁷⁷ The rates were also attacked on the ground that they were so low as to constitute a taking of property without due process of law, involving, primarily, the validity of the valuation methods employed in determining the rate base. Since the Court upheld the intrastate rates as a proper exercise of the reserved power of the state, the issue as to confiscation came to be the controlling factor in the decision. See note 75, *supra*.

⁷⁸ *Ibid.*, p. 394. The influence of these intrastate rates extended beyond the border cities. To the concession of the appellants, Justice Hughes added: "So also, whatever may be said as to the non-existence of a general or comprehensive system of equitably adjusted rates, it is clear that there are competitive areas crossed by the state line of Minnesota and that the State's requirements altered the existing relation between state and interstate rates as to places within these zones of competition and not merely as to the cities on the boundary of the State." He directed attention, moreover, as bearing

was urged that the legislative acts and administrative orders were within the full competence of the state, under its power to regulate internal commerce, regardless of this effect.⁷⁹ The issue, then, sprang "from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts."⁸⁰ The Court was called upon to determine: first, whether the action of the state imposed a direct burden upon interstate commerce, which would render it invalid even in the absence of federal legislation; and, second, whether it was in conflict

upon the significance of the controversy, to the typical character of the circumstances disclosed by the instant proceeding: "The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. [See, for example, *Missouri Rate Cases*, 230 U.S. 474 (1913).] Differences in particular facts appear, but they cannot be regarded as controlling. A scheme of state rates framed to avoid discrimination between localities within the State, and to provide an harmonious system for intrastate transportation throughout the State, naturally would embrace those places within the State which are on or near the State's boundaries; and, when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to points adjacent to, but across, the state line. Kansas City, Kansas, and Kansas City, Missouri; East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines and in every part of the land competitive districts embrace points in different states" (pp. 394-395).

⁷⁹ The railroad commissioners of eight states, who filed a brief as *amici curiae*, contended that if the doctrine of the lower court were accepted, the power of the states to regulate intrastate rates would be practically destroyed. They argued that "there is practically no movement of traffic between two towns within a State that does not come into competition with some interstate haul" and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." That this criterion constituted an improper infringement upon state authority was also urged by the governors of three states, acting on behalf of the conference of governors of all of the states. In the words of Justice Hughes (pp. 395-396): "They do not seek to belittle the effect of the action of Minnesota on the business between the places named in the findings, but they are convinced that if the principle announced by the Circuit Court is upheld, it can be made to apply by a showing of similar facts in virtually every State. Insisting that, under their reserved power, the right of the States to regulate their own commerce is as clear and broad as that of Congress to regulate interstate commerce, they assail the decision below, not upon the ground that it incorrectly sets forth conditions in Minnesota and adjoining States, but for what they consider to be its plain disregard of the provisions of the Federal Constitution, which establish the relations between the Nation and the States."

⁸⁰ *Ibid.*, p. 396.

with the Act to Regulate Commerce, and thus repugnant to the actual assertion of federal authority.

On both these issues the Court upheld the validity of the Minnesota acts and orders. By their terms they applied exclusively to intrastate rates, and such state power as they involved had long been exercised and sustained. "Was this power, apart from Federal action, subject to the limitation that the State could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected?"⁸¹ After an elaborate examination of precedents, this question was answered in the negative. The fact that the power of Congress to regulate commerce between the states is "plenary and supreme" establishes the immunity of interstate transportation from the direct control of the states; it does not, in the absence of Congressional action, circumscribe their authority over purely internal commerce. This authority is state-wide. "As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State—to the cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carriers for interstate transportation, is to maintain the power in name while denying it in fact. . . . If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."⁸² Was there such an actual assertion of federal authority in the premises? The Act to Regulate Commerce, despite its amendments at various times, expressly excludes transportation "wholly within one State" from the incidence of its provisions. This constitutes a deliberate indication that the scope of federal authority is not to extend to

⁸¹ *Ibid.*, p. 397.

⁸² *Ibid.*, p. 417.

purely intrastate traffic. It is true that the prohibitions of section 3 against undue preferences might be so construed as to render invalid unreasonable discriminations arising from the relationship between intrastate and interstate rates as well as from maladjustments in interstate rates; but under such circumstances, in conformity with the general purpose and method of the Act, a finding of undue preference to localities within the state would first have to be made by the Interstate Commerce Commission.⁸³ The Act itself, without more, certainly did not deprive the states of their state-wide authority to prescribe reasonable rates for purely internal traffic.⁸⁴ The Court appeared to be impressed with the contention that the commingling of intrastate and interstate commerce rendered unified control, irrespective of state lines, desirable;⁸⁵ and there was a clear recognition

⁸³ This mode of approach, which was subsequently utilized by the Commission and came to be the controlling factor in the Court's later determinations upholding federal interference with intrastate rates prescribed by state authority, was disposed of as follows in this proceeding (pp. 419-420): "If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. . . . In the present case, there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review."

⁸⁴ The Court's conclusion was stated without qualification: "Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith" (p. 420).

⁸⁵ "The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that se-

that ample authority is vested in the Federal Government, in its regulation of interstate commerce, to impose restrictions upon the exercise of state power even as to its internal commerce.⁸⁶ "But," concluded Justice Hughes, "these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited

curities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom" (p. 432).

⁸⁶ While Justice Hughes was emphatic in upholding the reserved powers of the states over their internal commerce, he freely acknowledged the validity of Congressional interference in the interests of interstate commerce: "This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere" (p. 399).

through the exertion by Congress of its paramount constitutional power.⁸⁷ The solution of the vital practical problems involved appeared to be shifted to the political forum: the attainment of relief was apparently made to depend upon the enactment of federal legislation expressly occupying the field of intrastate rates in so far as necessary for the removal of discriminations against interstate commerce.⁸⁸

In point of fact, however, the specific issue as to whether discriminations between localities resulting from the relationship between intrastate and interstate rates are subject to the control of the Federal Government was dissolved in favor of the Commission's authority without the enactment of additional legislation. This was achieved in the *Shreveport* case,⁸⁹ in which the validity of an order of the Commission designed to remove such discrimination was sustained by the Supreme Court.⁹⁰ Complaint was filed with the Commission that

⁸⁷ *Ibid.*, pp. 432-433.

⁸⁸ The Supreme Court's decision aroused no inconsiderable concern. Note the following, for example, from John Bauer, "The Minnesota Rate Cases," *Political Science Quarterly*, Vol. 29 (March, 1914), pp. 57-83, at p. 79: "Apparently, as a result of the decision, hereafter in its rate orders, the Commission must have clear regard for the various state regulations, while, rationally, it should pay no attention to state lines, aiming always and everywhere only at reasonableness and the elimination of discrimination. State borders do not furnish adequate grounds for differing rates. Traffic conditions are substantially the same throughout such vast areas as the Northwest. If we actually intend through federal legislation to procure reasonable rates and to do away with discrimination, we must have uniform regulation through wide regions, with proper regard, however, to the inter-relation of different sections of the country. The Commission should not be hampered by the enactments, various and conflicting, of local legislative and regulative bodies." And the following from Hannis Taylor, "The Minnesota Rate Cases," *Harvard Law Review*, Vol. 27 (Nov., 1913), pp. 14-26, at pp. 25-26: "With these emphatic declarations that Congress may, at its pleasure, so exercise 'its paramount constitutional power' as to enact 'a more comprehensive scheme of regulation' of the entire subject matter, such a scheme as may destroy the entire status as defined by existing laws,—the court has transferred the problem of problems from the judicial to the political arena. . . . If the state railroad commissions as a whole should undertake to use their freshly defined powers in a radical and drastic spirit, and in such a way as to disjoint the interstate system of rates as a whole, a more comprehensive and far-reaching interstate commerce act, occupying the entire domain of federal power as defined by the court, might suddenly become a national necessity."

⁸⁹ *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1914).

⁹⁰ The Commission's report and order were made in *Railroad Commission of La. v. St. L. S. W. Ry. Co.*, 23 I.C.C. 31, 46-48 (1912). In *Texas & Pacific Ry. Co. v. U.S.*, 205 Fed. 380 (1913), the Commerce Court held the Commission's order to be valid. In the *Shreveport* case, *supra*, the decree of the Commerce Court was affirmed.

the carriers, in applying intrastate rates prescribed by Texas authority, unjustly discriminated in favor of traffic within the State of Texas as against similar traffic moving between Louisiana and Texas: more specifically, that the rates charged from Dallas and other Texas points into eastern Texas were much lower than those charged from Shreveport into Texas.⁹¹ Upon investigation, the Commission found that this complaint was substantiated—that the carriers maintained “higher rates from Shreveport to points in Texas than are maintained from cities within Texas to such points under substantially similar conditions and circumstances,” and “that thereby an unlawful and undue preference and advantage is given to such Texas cities, and a discrimination that is undue and unlawful is effected against Shreveport.”⁹² For the purpose of removing this discrimination, the carriers were ordered to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas or Houston, or intermediate points, than were being contemporaneously charged for the transportation of such commodity for equal distances from Dallas or Houston toward Shreveport. Since the interstate rates had been held to be reasonable, the required adjustment authorized a disregard of the intrastate rates prescribed by state authority. Was such an order within the competence of the Commission? Its validity was attacked on two grounds: first, that Congress is without authority to

⁹¹ The essential facts were summarized as follows by Justice Hughes (234 U.S., at p. 346): “Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East and West Texas and Houston and Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas and Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 53 miles into Texas from Shreveport. The first class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Texas, 147.7 miles, was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.”

⁹² 23 I.C.C. 31, 46-48, 47.

control intrastate rates, "even to the extent necessary to prevent injurious discrimination against interstate traffic"; and, second, assuming such authority to be vested in Congress, that it had not been exercised—that the Commission exceeded the power conferred upon it by the Act to Regulate Commerce.

Both contentions were found to be without merit. The issue here was the validity of federal action, as it had been that of state action in the *Minnesota* proceeding; and the Court was as sweeping in upholding the authority of Congress over interstate commerce, and its supremacy over conflicting state enactments when actually asserted, as it had been in sustaining the reserved power of the states over purely internal commerce, in the absence of national action. Congressional authority over the instruments of interstate commerce "necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. . . . The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."⁸³ Unjust discrimination against persons and localities is an undeniable evil; when it operates in interstate traffic, Congress may proceed to prevent it. It is immaterial, from the standpoint of the power of Congress, that the discrimination arises from the relationship between intrastate and interstate rates; the fact that the

⁸³ 234 U.S., at pp. 351-352.

instruments of interstate commerce are used "in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention"⁹⁴—indeed, the power to deal with the relationship, as such, between the two classes of rates is necessarily an exclusive federal function, if interstate commerce is to remain unhampered.⁹⁵ Nor, in the performance of this function, is federal authority compelled to operate solely against the interstate rates; it cannot be forced to sacrifice its judgment as to their reasonableness as a means of removing discriminatory adjustments flowing from the prevailing intrastate rates.⁹⁶ Finally, the fact that the controlling intrastate rates are prescribed by state authority, rather than imposed voluntarily by the carriers, does not alter the situation with respect to federal power actually asserted; "for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."⁹⁷ Since, then, it is within the power of Congress to control intrastate rates in these circumstances, the remaining question was whether this power had been

⁹⁴ *Ibid.*, p. 354.

⁹⁵ "It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. . . . It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce" (pp. 354-355).

⁹⁶ "It is also clear," said Justice Hughes, "that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes" (p. 355).

⁹⁷ *Ibid.*, p. 354. It follows, therefore, that even if the provisions against discrimination of the federal statute are construed as imposing prohibitions only upon the voluntary action of the carriers, such provisions would be binding, since the local regulations, having no effect in the circumstances, would exert no compulsion upon the carriers. Compare the following (p. 359): "The further objection is made that the prohibition of section three is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. . . . The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention

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exercised—whether the Commission's order was made in furtherance of authority actually conferred upon that body. In answering this question in the affirmative, the Court found ample support for its conclusion in the sweeping terms of section 3 of the Act prohibiting discrimination against persons, or localities, or particular descriptions of traffic. The prevention of such discrimination was the underlying purpose of the Act, and the language used is broad enough to encompass discriminatory adjustments resulting from the relationship between intrastate and interstate rates.⁸⁸ The provision whereby regulative authority is expressly made inapplicable to transportation "wholly within one State" limits the exercise of federal power over intrastate rates as such; it imposes no limitation upon the Commission in removing discrimination against interstate commerce.⁸⁹ The Commission's finding of such discrimination differentiates this case from the *Minnesota* proceeding. In that proceeding, no action being taken by federal authority, the question was solely as to the reserved

is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement."

⁸⁸ "There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach" (p. 356).

⁸⁹ The Court emphasized the fact that an interstate situation was the essential subject-matter of the proceeding, and that in dealing with interstate commerce the Commission was not subject to the restriction contained in the proviso: "The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one State.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation" (pp. 358-359).

power of the states; in this case, unjust discrimination being expressly found to exist, the question was one as to the adequacy of the Commission's authority in the premises.¹⁰⁰ Since the Commission's power was held to be adequate, the action of the state was necessarily subordinated to its exercise. "We are not unmindful," said Justice Hughes, "of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control."¹⁰¹

The *Shreveport* decision not only established the constitutionality of federal regulation of intrastate rates when necessary or appropriate to the protection of persons or localities in interstate commerce against unjust discrimination, but it found the requisite authority to be vested in the Commission. While the holding was adversely criticized at the time in some quarters as an unwarranted invasion of state authority,¹⁰² the principles by which it was guided have now been recognized as indispensable to the maintenance of the freedom of interstate commerce, unhampered by the rivalry of the states in seeking to further their local interests. The doctrine of the case has been consistently applied,¹⁰³ the only significant limitation imposed upon the Commission's authority being the requirement that its or-

¹⁰⁰ In differentiating this case from the *Minnesota* proceeding, Justice Hughes said (pp. 357-358): "It [Congress] did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States. This was the question recently decided by this court in the *Minnesota Rate Cases*, *supra*. . . . There had been no finding by the Interstate Commerce Commission of any unjust discrimination. The present question, however, was reserved. . . . Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it."

¹⁰¹ *Ibid.*, pp. 359-360.

¹⁰² See, for example, William C. Coleman, "The Evolution of Federal Regulation of Intrastate Rates—The *Shreveport Rate Cases*," *Harvard Law Review*, Vol. 28 (1914), p. 34; "Vanishing Rate-Making Power of the States," *Columbia Law Review*, Vol. 14 (1914), p. 122.

¹⁰³ See, for example, *American Express Co. v. Caldwell*, 244 U.S. 617 (1917); *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U.S. 493 (1918).

ders affecting intrastate rates be definite as to the territory which they cover or the points to which they apply.¹⁰⁴

This extension of the scope of the Commission's jurisdiction, achieved under section 3 of the original Act to Regulate Commerce, was confined by the actual determinations to the removal of discrimination against particular persons or places in interstate commerce. As a result of the 1920 legislation the domain of intrastate rates was much more fully occupied by the Commission. Under the provisions of section 13 as amended by this legislation, the Commission was not only authorized, by way of express enactment of the *Shreveport* principle, to prescribe intrastate rates designed to remove undue discrimination against persons or places, but also "any undue, unreasonable, or unjust discrimination against interstate or foreign

¹⁰⁴In the *American Express* case, *supra*, it was contended that the Commission's order in *Traffic Bureau v. American Express Co.*, 39 I.C.C. 703 (1916), which involved an increase of intrastate rates to the level of interstate charges, was invalid because of indefiniteness as to the territory to which it should apply. The Court found that when the "report" is read as part of the "order," as explicitly required, it is "perfectly clear that the order applies only to the 'points' in competitive territory"; and that "the order although less explicit than desirable is, when read in connection with the railroad map, not lacking in the requisite definiteness" (pp. 626, 627). But Justice Brandeis defined the controlling principle as follows (pp. 625-626): "Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic." As a basis, however, for the Court's actual finding, he added: "Still, *certum est quod certum reddi potest.*" In the *Illinois Central* case, *supra*, the Commission's order in *Business Men's League of St. Louis v. A., T. & S. F. Ry. Co.*, 41 I.C.C. 13 (1916), was held to be inoperative for uncertainty as to intrastate rates established and maintained under state law. Justice Van Devanter, after quoting with approval the above doctrine from the *American Express* case, added (p. 510): "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. . . . This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See, also, *Arkansas Comm. v. Chicago R. R.*, 274 U.S. 597, 603 (1927).

commerce." These provisions, which were brought into use very soon after their enactment, have been so construed as to extend still further the Commission's dominance over intrastate rates. Essentially, intrastate rates are subject to the Commission's control whenever they impose an undue burden upon interstate commerce as a whole: the failure of intrastate traffic to contribute its fair proportionate share to the cost of maintaining an adequate transportation system constitutes a discrimination against interstate commerce which it is within the power of the Commission to remove. In 1920, in the first application, under section 15a, of the rule of rate-making established by the Transportation Act, the Commission authorized the carriers subject to its jurisdiction to effect large increases in both freight and passenger rates.¹⁰⁶ Many of the states declined to authorize an increase of their intrastate charges to the new level of interstate rates established by the Commission;¹⁰⁶ whereupon the carriers petitioned the Commission to exercise its powers, under section 13, to remove the alleged discriminations against interstate commerce.¹⁰⁷ In numerous proceedings the Commission found such discrimination to exist and issued orders requiring the carriers involved to increase their intrastate rates and charges.¹⁰⁸ The validity of the Commission's exercise of power was tested in the courts and fully sustained. A brief analysis of the Supreme Court's decision in the *Wisconsin Passenger Fares*

¹⁰⁶ *Increased Rates, 1920*, 58 I.C.C. 220. The country was divided into four rate-making groups—Eastern, Southern, Western, and Mountain-Pacific. Freight rates were increased 40 per cent in the Eastern group, 25 per cent in the Southern group, 35 per cent in the Western group, 25 per cent in the Mountain-Pacific group, and 33½ per cent between groups, subject to certain readjustments; and passenger fares were increased 20 per cent, together with the requirement of a 50 per cent surcharge on sleeping-car and parlor-car fares to accrue to the rail carriers.

¹⁰⁷ In about one-half of the states the commissions authorized increases corresponding to those effected through *Increased Rates, 1920*. In the remaining states, three declined to authorize any increases in intrastate rates, fares, or charges; seventeen denied increases in passenger fares, but authorized increases in freight rates, in whole or in part; four granted increases in passenger fares, but not the full increases in freight rates; one authorized all the increases except the Pullman surcharge. In thirteen of the seventeen states in which the increases in passenger fares were denied, the denial was based upon want of jurisdiction, since the intrastate fares were fixed by statute. *Annual Report, 1921*, p. 8.

¹⁰⁸ For a list of the proceedings thus instituted, under section 13, upon petition of the carriers, see *ibid.*, pp. 32-34.

¹⁰⁹ See, for example, *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I.C.C. 290 (1920), 64 I.C.C. 55 (1921); *Intrastate Rates within Illinois*, 59 I.C.C. 350 (1920), 60 I.C.C. 92 (1921); *Wisconsin Passenger Fares*, 59 I.C.C. 391 (1920).

case¹⁰⁹ will disclose the scope and rationale of this further extension of the Commission's authority over intrastate rates.

In essence, the facts of the *Wisconsin* case were typical of those prevailing in all of the intrastate rate proceedings growing out of the Commission's general rate increases of 1920. The Wisconsin authorities granted increases in intrastate freight rates corresponding to those ordered by the Commission on interstate traffic, but they denied any increases in intrastate passenger fares and charges. The ground of refusal was the existence of a state statute prescribing a maximum of 2 cents per mile for the transportation of passengers. The Commission, in its investigation, found "that all of the respondent carriers of Wisconsin transported both intrastate and interstate passengers on the same train, with the same service and accommodations; that the state passenger paying the lower rate rode on the same train, in the same car, and perhaps in the same seat with the interstate passenger who paid the higher rate; that the circumstances and conditions were substantially similar for interstate as for intrastate passenger service in Wisconsin; that travelers destined to, or coming from points outside the state found it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare; that undue preference and prejudice were shown by the falling off of sales of tickets from border line points in Minnesota and Michigan to stations in Wisconsin, and by a marked increase in sales of local tickets from corresponding border line points in Wisconsin to stations in Wisconsin; that the evidence as to the practice with respect to passenger fares applied in like manner to the surcharge upon passengers in sleeping and parlor cars and to excess baggage charges."¹¹⁰ The Commission had fixed passenger fares at 3.6 cents per mile as reasonably necessary to fulfil the requirement as to net income specified in section 15a of the Act. The failure of the Wisconsin carriers to secure the 20 per cent increase in intrastate fares was found to involve a direct revenue loss of approximately \$2,400,000 per year if the 3-cent fare established during the war period were continued, and of approximately \$6,000,000 per year if

¹⁰⁹ *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922), sustaining the Commission's order in *Wisconsin Passenger Fares*, 59 I.C.C. 391 (1920).

¹¹⁰ 257 U.S., at pp. 565-566.

the 2-cent fare established by state statute were to become operative. Under these circumstances, the Commission held that undue discrimination was being practiced against persons traveling in interstate commerce and against interstate commerce as a whole; and it ordered, as a means of removing this discrimination, that all intrastate fares and charges be increased to the level prescribed for interstate traffic, with a reservation of the right of the state authorities or of any party in interest to seek a modification of the order as to any specified fares and charges which are not deemed to be so related to the rates on interstate business as to result in unlawful discrimination. The carriers sought to enjoin the Wisconsin Railroad Commission and other state officials from interfering with the fares and charges so ordered by the Commission, and an interlocutory injunction was granted by the District Court.¹¹¹ On appeal, the Supreme Court was called upon to determine: first, whether the state passenger fares created such undue prejudice against persons or places in interstate commerce as to justify the Commission's percentage increase of them all; and, second, whether these state passenger fares created such undue discrimination against interstate commerce as a whole as compelled the Commission to order its removal.

The first issue involved no new principle as to the extent of the Commission's authority over intrastate rates: it was purely a question as to whether, in light of the established facts, the order was appropriate to the circumstances or unduly sweeping. The Court recognized, in conformity with its previous determinations, that discrimination against persons and places in interstate commerce is subject to the Commission's control; but it denied the validity of the order, as a mere assertion of this power, because its terms were all-embracing. The Commission's investigation disclosed discrimination against persons and places "in typical instances numerous enough to justify a general finding against a large class of fares,"¹¹² and such an order, accompanied by a saving clause permitting parties in interest to except themselves from its operation upon a proper showing, would be valid.¹¹³ But the order in this proceeding did not attempt to confine

¹¹¹ *Chicago, Burlington & Quincy Railroad Co. v. Railroad Commission of Wisconsin, Dist. Ct. E. Dist. Wis.* (not reported).

¹¹² 257 U.S., at p. 579.

¹¹³ "Any rule which would require specific proof of discrimination as to each fare

its incidence to any general class of discriminatory situations; its state-wide application included fares between all interior points, regardless of their effect upon persons or places in interstate commerce.¹¹⁴ On these grounds the Court concluded: "We can not sustain the sweep of the order in this case on the showing of discriminations against persons or places alone."¹¹⁵ But the Commission is also authorized, in general terms, to remove undue discrimination "against interstate or foreign commerce." This, held the Court, broadened the scope of the Commission's authority over intrastate rates.¹¹⁶ When construed in light of the "new departure" introduced by the Transportation Act whereby an affirmative duty is imposed upon the Commission so to fix rates as to maintain an adequate railroad service, this power manifestly extends to the removal of substantial disparity between the level of intrastate and interstate charges.¹¹⁷ Such disparity tends

or rate and its effect would completely block the remedial purpose of the statute." *Ibid.* See, also, *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U.S. 493, 508 (1918).

¹¹⁴ In differentiating the instant proceeding from the *Shreveport* and *Illinois Central* cases, *supra*, Chief Justice Taft said (257 U.S., at pp. 579-580): "There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the State to border points. But this order is not so restricted. It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travellers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, can not give the order validity."

¹¹⁵ *Ibid.*, p. 580.

¹¹⁶ It was contended that these words are merely tautological—that is, that they embrace no situations other than those already covered by the words preceding them with reference to discrimination against persons and places. The Court replied: "In view of their apt application to the most important purpose of the legislation we are not at liberty to take such a view. If 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce' are tautological, why are they followed by the phrase 'which is hereby forbidden and declared to be unlawful'? To accompany a meaningless phrase with words of such special emphasis would be unusual" (pp. 586-587). Again, it was urged that the Court itself, in previous decisions, had often used the phrase "unjust discrimination against interstate commerce" when it could only have meant discrimination as between persons and places. To which the Court replied: "But, here, the general words are used after discrimination against persons and localities have [*sic*] been specifically mentioned. The natural inference is that even if they include what has gone before, they mean something more. When we find that they apply include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect" (p. 587).

¹¹⁷ Section 13a, it was conceded by the Court, merely sets up a rule for the guidance

to defeat the purposes of the Act and to impose an undue burden upon interstate commerce. "Intrastate rates and the income from

of the Commission "in the exercise of its power to prescribe just and reasonable rates" and does not, of itself, confer any authority over intrastate rates. "When we turn to paragraph 4, §13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of §15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words" (p. 586). The Court disposed summarily of the contention that the legislative history of the Transportation Act, as evidenced by committee reports and explanatory statements, indicate that Congress did not intend to clothe the Commission with power to remove such discrimination against interstate commerce as springs from a general disparity between the level of interstate rates and that of intrastate rates: "such aids are only admissible to solve doubt and not to create it. For the reasons given we have no doubt in this case" (p. 589). The Court found equally without merit the contention that the valuation of carrier property required under section 15a must be confined to that used in interstate commerce and not embrace the part of the property used in intrastate commerce. Such a construction is in the teeth of the express provision of section 15a, which specifies that the rate of return shall be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." Furthermore: "To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not" (p. 588). In other words, the Commission's duty as to rate making, in so far as it involves the general level of charges and the flow of revenue therefrom, extends to the entire property and business of the carriers, without differentiation as between intrastate and interstate commerce. The effective regulation of interstate commerce, under the plan established by Congress, renders the incidental control of intrastate commerce indispensable. This doctrine was subsequently applied to the matter of recapture of excess earnings. In *Dayton-Goose Creek Ry. v. U.S.*, 263 U.S. 456 (1924), in which the constitutionality of the recapture provisions of the Act was upheld, it was urged upon the Court that the recapture clause, in so far as it reduces net income derived from intrastate rates, is an unlawful invasion of the reserved power of the states. In conformity with the Court's position in the instant proceeding, Chief Justice Taft said (p. 485): "In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. . . . The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable."

them," said Chief Justice Taft, "must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."¹¹⁸ Control over intrastate rates to this end, being "merely incidental to the regulation of interstate commerce and necessary to its efficiency,"¹¹⁹ is neither a violation of the specific proviso of the Act against the assertion of authority over transportation wholly within one state, nor an unconstitutional exercise of federal power.¹²⁰ Intrastate rates as such are not subjected to the Commission's jurisdiction; its authority is confined to the removal of discrimination against interstate commerce. "It is said," declared the Court, "that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient

¹¹⁸ 257 U.S., at pp. 585-586.

¹¹⁹ *Ibid.*, p. 588.

¹²⁰ The state commissions, which were permitted, through counsel, to file briefs as *amici curiae*, contested the constitutional validity of the statute as construed by the Commission and sustained by the Court. After declaring that the principles laid down in previous decisions of the Court "leave no room for discussion on this point," Chief Justice Taft added (pp. 589-590): "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. . . . In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."¹²¹

It appears, then, that in the field of rates and charges, as in that of finance and management and of service and facilities, there has been a striking extension of the scope of the Commission's jurisdiction into the domain of intrastate commerce. The development of Congressional legislation has modified sharply the practical distribution of power as between the nation and the states. Governmental control of matters traditionally deemed to be within the sphere of exclusive local jurisdiction has been subordinated to the assertion of federal authority, in the exercise of the supreme national will over interstate commerce and its instruments. This evolution of statutory enactment and constitutional doctrine has largely reflected the intimate relationship which, because of identity of instrumentalities and interblending of operations, subsists between intrastate and interstate

¹²¹ *Ibid.*, pp. 590-591. In *New York v. U.S.*, 257 U.S. 591 (1922), decided on the same day as the *Wisconsin* case, the Court applied the same doctrines: the evidence was found insufficient to justify the state-wide rate increases ordered by the Commission as a means of removing discrimination against persons and places in interstate commerce; but the Commission was upheld in its authority to order an increase of all the state fares and charges to the level established for interstate commerce as a means of removing discrimination against interstate commerce as a whole. The Commission's exercise of power was held to be valid, despite a charter contract between the State of New York and the New York Central Railroad whereby the carrier was bound not to charge more than two cents a mile for the transportation of passengers between Albany and Buffalo. Interference with this charter provision was not an unconstitutional impairment of the obligation of contracts, since that restriction is imposed upon the states and not upon the Federal Government; nor did it constitute a taking of property without due process of law, since both state legislation and private contracts which obstruct interstate commerce are subject to the power of Congress in the regulation of that commerce. For subsequent judicial determinations involving the general issue of the scope of the Commission's authority over intrastate rates, see *Nashville Ry. v. Tennessee*, 262 U.S. 318 (1923); *United States v. Village of Hubbard*, 266 U.S. 474 (1925); *Chi. Ry. v. Pub. Util. Com.*, 274 U.S. 344 (1927). See, also, Thomas Reed Powell, "Current Conflicts between the Commerce Clause and State Police Power," *Minnesota Law Review*, Vol. 12 (1928), pp. 321, 470, 607.

commerce; and it has constituted a response to the growing need of protecting and fostering commercial intercourse among the states. The Commission has been made the chief repository of federal authority over intrastate commerce in the realm of transportation. The proper balancing of national and local interests, both governmental and economic, is dependent upon the wisdom and restraint with which this authority is exercised. We turn, therefore, to a consideration of the character of the Commission's performance.

§3. THE CHARACTER OF THE COMMISSION'S PERFORMANCE

The foregoing analysis of judicial determinations, in light of the controlling constitutional provisions and statutory enactments, has sought to disclose the legal scope of the Commission's authority over the intrastate operations of interstate carriers. It is our present task to consider the Commission's actual assertion of power over intrastate commerce, within the limits of its jurisdictional scope as thus defined. The large measure of discretionary authority which inheres in the Commission as an administrative agency finds expression in this field as in other aspects of its regulatory activity. While an analysis of its performance in this sphere cannot be entirely divorced from questions of law—since the jurisdictional issue is one essentially legal in character—primary attention will be focused upon problems of policy and practice. An attempt will be made to discover the dominant influences which have guided the Commission's decisions and opinions, with special reference to their bearing upon the twofold goal of achieving effective regulation and maintaining local autonomy. Toward this end we shall examine the more important manifestations of the Commission's attitude in matters of finance and management, service and facilities, and rates and charges.

Finance and Management

The regulation of security issues and the control of combinations constitute the chief aspects of finance and management which have given rise to the jurisdictional issue. In both these fields the legislative provisions appear to vest exclusive authority in the Commission, and there has been a striking absence of judicial determinations restrict-

ing its powers in the interest of the states. To the extent, therefore, that the Commission has accommodated its action to the provisions of state law, the limitations have been self-imposed, as a matter of policy. It is doubtful whether, in these fields, the Commission's restraint has been conducive to the most effective achievement of national purposes or to the safeguarding of essential local interests.

On the basic issue of its authority to regulate the security issues of state railroad corporations, the Commission has naturally followed the plain mandate and intent of the statute, despite opposition from state authorities. It has been contended that the Commission is without jurisdiction because the applicant carrier is a corporation organized and existing under state laws; that the issuance of securities by such carrier involves no federal question; that the state is directly interested in the matter because statutory fees become payable upon its own authorizations. These contentions were summarily disposed of by the declaration that "it is well settled that common carriers by railroad engaged in interstate commerce, although organized and existing as state corporations, are nevertheless subject to our jurisdiction," and by reference to the terms of the statute.¹²² Similarly, in conformity with the express legislative declaration that the jurisdiction conferred upon the Commission is exclusive and plenary, it has declined to withhold approval of an issue pending determination of legality by state authorities under state law, or to condition its approval upon such subsequent investigation and finding of legality.¹²³ Moreover, where the question of its own jurisdiction has not been

¹²² *Bonds of New York Central R. R.*, 65 I.C.C. 534, 539 (1920). The above representations were made on behalf of the states of Ohio and Michigan through their public utilities commissions. See, also, *Bonds of Michigan Central R. R.*, 65 I.C.C. 544 (1920); *Notes and Bonds of C., C., C. & St. L. Ry. Co.*, 65 I.C.C. 549 (1920); *Guaranty of Note by C., C., C. & St. L. Ry. Co.*, 65 I.C.C. 764 (1921); *Guaranty of Note by New York Central R. R.*, 65 I.C.C. 787 (1921); *Guaranty of Note by Michigan Central R. R.*, 65 I.C.C. 790 (1921).

¹²³ *Bond of North Texas & Santa Fe Ry.*, 94 I.C.C. 747, 747-748 (1925). Representations of this character were made by the authorities of the State of Texas in a number of proceedings. See, also, *Bond of Rio Grande, El Paso & Santa Fe R. R.*, 94 I.C.C. 775 (1925); *Bond of South Plains & Santa Fe Ry.*, 94 I.C.C. 780 (1925); *Bond of Texas & Gulf Ry.*, 94 I.C.C. 805 (1925); *Bond of Cane Belt R. R.*, 94 I.C.C. 821 (1925); and the applications of other roads in 99 I.C.C. 18, 31, 101, 427. In all these proceedings the Commission summarily disposed of the protest by reference to its holding in the principal case, and then rendered its opinion on the merits of the application.

involved, the Commission has found it unnecessary to determine whether securities issued under its authorization must also receive the approval of state authorities in order to be valid.¹²⁸⁴ In all these respects the Commission has been carrying out the manifest intent of the statute to subject the issuance of securities by railroad corporations to the control of the federal tribunal, as part of the general plan of regulation established by the Transportation Act. But in considering the merits of applications, the Commission has accorded considerable weight to the limitations imposed by state law, through a rather narrow construction of the statutory requirement that the issue of securities by a carrier must be "for some lawful object within its corporate purposes." Thus, for example, it has been governed by the policy of state law prohibiting the issuance of stock below par,¹²⁸⁵ and by other state regulations.¹²⁸⁶ While there can be no objection to giving effect to state requirements in so far as they approve themselves to the Commission as a matter of policy, it would seem, in the absence of judicial determinations to the contrary, that the Commission, as an administrative agency charged with plenary and exclusive jurisdiction in the premises, should not deem itself bound by the restrictions of state law. Such restrictions are frequently not grounded in

¹²⁸⁴ The statutes of a group of New England states provide that carriers chartered under their laws must obtain approval of the state commissions before securities are issued. In *Stock of Old Colony R. R.*, 124 I.C.C. 239 (1927), the Massachusetts Department of Public Utilities represented that without its approval the proposed issue of stock would not be legally authorized or valid. Its own jurisdiction in the premises being conceded, the Commission did not deem it necessary to decide whether such further approval is essential. See, also, *Stock of N. Y., N. H. & H. R. R.*, 131 I.C.C. 233 (1927). In at least two instances state courts have held that no authorization need be obtained from state authorities in order to validate security issues approved by the Commission. See *People v. New York Central R. R. Co.*, 135 N.E. 967 (1922); *Minneapolis, St. P. & S. M. Ry. Co. v. Railroad Commission*, 197 N.W. 352 (1924).

¹²⁸⁵ *Capital Stock of Pittsburgh & West Virginia Ry.*, 82 I.C.C. 704 (1923); *Stock of Castleman Valley R. R.*, 90 I.C.C. 521 (1924).

¹²⁸⁶ In *Stock of Old Colony R. R.*, 124 I.C.C. 239 (1927), it appeared that the proposed stock issue would increase the applicant's capital stock beyond the amount authorized under state law. Under these circumstances, the Commission's order of approval provided that "this authorization is granted upon the express condition, that said stock shall not be issued until the applicant has taken such legal steps as may be necessary to increase its authorized capital stock to 231,837 shares, and has filed proof of such increase with this commission" (p. 240). See, also, *Securities of S. L.-S. F. Ry.*, 79 I.C.C. 323 (1923), in which the Commission's order in 79 I.C.C. 92 (1923) was modified in order that the carrier might meet the requirements of the Missouri statute with regard to the issuance of bonds for reimbursement of capital expenditures.

the general public interest, with reference to the transportation system as a whole, which constitutes the Commission's primary concern. Representations of the state authorities may properly influence decisions on the merits; but as attempts to safeguard the sovereign rights of the states, they come into conflict with the requirements for effective federal regulation, and without protecting, in this sphere, any essential local interests.

In the field of consolidations and acquisitions of control, which generally necessitate, also, authority for the issuance of securities, the Commission's performance has been more definitely questionable on the issue of state and federal jurisdiction. Despite the broad provisions of the statute conferring authority upon the Commission to mold railroad combinations in the public interest and relieving the carriers affected by its orders from the operation of the anti-trust laws and from all other restraints or prohibitions of state and federal law, the Commission has not consistently recognized the exclusiveness of its jurisdiction in connection with consolidations and acquisitions of control. As clearly provided, mere limitations imposed by the constitutional provisions and statutory enactments of the several states have been held inoperative. In other words, when applications for unification have been filed with the Commission and found in the public interest, the restraints and prohibitions of state law, even when amounting to a lack of corporate capacity, have not been permitted to hamper its assertion of federal authority.¹²⁷ The Commission has

¹²⁷ See, for example, *Construction of Cut-Off for I. C. R. R.*, 82 I.C.C. 100 (1923), 86 I.C.C. 371 (1924); *Clinchfield Railway Lease*, 90 I.C.C. 113 (1924); *Control of International-Great Northern R. R.*, 90 I.C.C. 262 (1924); *Control of El Paso & Southwestern System*, 90 I.C.C. 732 (1924); *Control of Gulf Coast Lines by M. P. R. R.*, 94 I.C.C. 191 (1924); *Control of S. A. & A. P. Ry.*, 94 I.C.C. 701 (1925); *Lease of Line by C. P. Ry.*, 105 I.C.C. 575 (1926); *Control of A. & V. Ry. and V., S. & P. Ry.*, 111 I.C.C. 161 (1926); *Lease of Southern Pacific Lines*, 117 I.C.C. 504 (1926). On the question of the propriety of approving applications found to be in the public interest despite a lack of corporate capacity in the carriers involved, compare the following from Sidney P. Simpson, *op. cit.*, *Harvard Law Review*, Vol. 43 (Dec., 1929), at p. 242: "There is no express language in either paragraph (2) or paragraph (8) of section 5 which deals with the matter, and there has been a great diversity of view with regard thereto. The statute provides for relief from all 'restraints or prohibitions' of state law when the approval of the Commission has been given. It may be argued that this covers the situation where corporate power is expressly negatived by statute. If this be so, it may be contended that it is absurd to say that approval of the Commission does not cure a mere lack of power when it would cure an express denial of such power. The general scheme of the Transportation Act involves giving the Com-

soundly declared: "As an administrative body, charged with the determination of the public interest, it is not for us to question the authority of Congress, but to act in accord with its evident intent, leaving the courts to determine the validity of our action. The statute under which we are proceeding is framed in plain language and contains no condition, either express or necessarily implied, that its administration is subject to the limitations of State authority."¹²⁸ But interference with the Commission's policies may also spring from combinations effected under state law, without resort to the Commission for approval. It would seem to be the intent of the statute, in view of the far-reaching affirmative purposes of the Transportation Act and the character of the specific provisions dealing with intercorporate relations, to subject all consolidations and acquisitions of control to the regulation of federal authority, and thus to render invalid any action of the carriers consummated independently under authority of state legislation. Yet the Commission has permitted consolidations to be effectuated in this manner, in derogation of its own exclusive jurisdiction.

When the problem was first accorded deliberate consideration, the conclusion reached was that the purchase, by one carrier of the property and franchises of another, even though within the corporate capacity of both companies under state law and involving no violation of the federal anti-trust laws, could not be lawfully accomplished without securing the approval of the Commission under the provisions of section 5 of the Act.¹²⁹ It was recognized that these provi-

mission large and plenary powers, and there would seem to be no insuperable obstacle to reading paragraph (8) of section 5 as not only relieving from state police regulations but also from defects of corporate power, whether resulting from state prohibition or state inaction. A contrary view would render unattainable, to a considerable extent, the results which Congress sought in enacting the consolidation provisions of the Transportation Act, one of the chief of which would appear to have been to set up a complete control of unifications in the Interstate Commerce Commission unhampered by conflicting state regulation."

¹²⁸ *Construction of Cut-Off for I. C. R. R.*, 86 I.C.C. 371 (1924), at p. 374.

¹²⁹ *Securities Application of Pittsburgh & West Virginia Ry.*, 70 I.C.C. 682 (1921). This proceeding was an application for authority to issue securities and assume obligations in connection with the purchase by the applicant of the property and franchises of the West Side Belt Railroad Company. The application was denied on the ground that the authority sought was not for a lawful object, in view of the fact that no authority had been obtained under section 5 to effect the acquisition. This holding was made by Division 4, consisting of Commissioners Meyer, Daniels, Eastman, and Potter

sions are subject to a twofold interpretation: first, that applications for federal approval are only permissive, the provisions being merely designed to afford relief from restrictive legislation, state and federal; and second, that such applications are mandatory, the provisions being intended to place complete control of unifications in the hands of the Commission. The contention that the provisions are merely permissive, being in the nature of enabling legislation, was found to be untenable.¹⁸⁰ While there is no express stipulation prohibiting consolidations and acquisitions of control without the Commission's approval, the language of the provisions clearly supports such an interpretation.¹⁸¹ Moreover, the general purposes of the enactment, as evidenced by its legislative history and by its specific requirements, cannot reasonably be construed as having contemplated independent

(who dissented). On rehearing before the full Commission, in 76 I.C.C. 663 (1923), authority to issue the proposed securities was again denied, but on the ground that such overcapitalization would result as would not be in the public interest. It was contended by the applicant that the conclusion reached in the original proceeding with regard to the necessity of securing the Commission's approval for the acquisition was unsound—"that paragraph (2) of Section 5 is permissive rather than mandatory, being in effect an enabling statute to relieve carriers from the operation of State and Federal anti-trust and other restraining or prohibitory laws" (p. 667)—but the Commission found it unnecessary to pass upon the question. Without determining whether the transaction amounted to an actual consolidation, the Commission merely declared that the provision of paragraph (2) "looks to the future and has no application where complete control of one carrier by another already exists" (p. 667), and proceeded to deny the application on the sole ground that undue discrepancy between capital assets and capitalization would result from its approval. For a vigorous critique of the Commission's failure to meet the basic issue, see the dissenting opinions of Commissioner Potter (pp. 669-672) and Commissioner Lewis (pp. 672-673). With regard to acquisitions of control short of actual consolidation, however, the Commission appears to require its own authorization as a condition to granting approval of proposed security issues for reimbursement of expenditures incurred in such acquisitions. See *Bonds of Chesapeake & Ohio Ry. Co.*, 150 I.C.C. 257, 260 (1929).

¹⁸⁰ "If it had been intended that these provisions of section 5 should merely afford a means of escaping from the restraints of the 'anti-trust laws' and other State or Federal statutes, much simpler machinery would have been devised for accomplishing the purpose. The 'plan of consolidation' is incompatible with such an interpretation of the section and embodies a policy of far greater breadth and vision." *Securities Application of Pittsburgh & West Virginia Ry.*, 70 I.C.C. 682 (1921), at p. 688.

¹⁸¹ Paragraph (6), dealing with consolidations, specifies the conditions under which "it shall be lawful" for carriers to consolidate their properties for ownership and operation. The Commission, through Division 4, argued that "this is but another way of saying that consolidations in disregard of these conditions shall be unlawful." Again, paragraph (2) provides that the Commission may authorize acquisitions of control short of actual consolidations upon a finding that such acquisitions "will be in the public interest." It was argued, similarly, that "this is equivalent to saying that authority for the acquisition shall not exist under other conditions." *Ibid.*

action by the carriers, under the varying circumstances of state law, without reference to the comprehensive reorganization of the railroad systems of the country which was explicitly placed under the guidance of the Commission.¹³² The following conclusion, therefore, appears to have been fully justified: "Beyond question, in the development of the transportation act, 1920, as a constructive measure for the solution of the railroad problem, great importance was attached by Congress to the ultimate consolidation of the carriers into a limited number of great systems, well balanced financially and of similar earning power, but competing with each other and maintaining the existing channels of trade and commerce. In our opinion it was the intent of Congress that complete control over the situation should be in our hands, so that the working out of this constructive policy might be safeguarded in every possible way, and so that consolidations or other union of interests might not be effected without our consent."¹³³

¹³² Attention was emphatically directed to the inherent incompatibility of permitting independent action and executing effectively the Congressional mandate with regard to consolidations: "Obviously, the preparation and adoption of a plan of consolidation under such instructions from Congress require deliberate and careful consideration of every railway property of the 'continental United States' from competitive, financial, commercial, and other points of view, so that each such property may with nicety be fitted into its appropriate place in the final scheme. Obviously, also, many consolidations which are not barred by the restraining provisions of the 'anti-trust laws' or other Federal or State statutes may be wholly inconsistent with the plan and destructive of its purpose. Yet, if consolidations of this kind can now be lawfully effected without our approval, the conclusion is inevitable that the carriers may ignore section 5 with impunity under similar circumstances, after the plan has finally been adopted, and thus bring quick disaster to its entire structure. It is impossible to believe that it was the intent of Congress to prescribe with such care the method by which this elaborate and comprehensive program shall be formulated and the principles by which it shall be governed, and at the same time leave open a door by which at any time it may be wrecked." Like reasoning was applied to the matter of acquisitions of control through lease or stock ownership: "And the same may be said of the intent of paragraph (2), for if carriers are permitted to gain control of one another without our approval by means falling short of consolidation and in a manner which is out of harmony with the ultimate plan of consolidation, to that extent the difficulties in the way of the consummation of the plan will be increased and the probability will be diminished that it may ultimately be accomplished through voluntary action of the carriers." *Ibid.*, p. 687.

¹³³ *Ibid.*, pp. 687-688. But compare the following, on rehearing, from the dissenting opinion of Commissioner Potter, who urged that the Commission recognize "the sanction of State laws" and hold it unnecessary for carriers to apply for authority to acquire control or consolidate, when such consolidations or acquisitions of control are authorized and permitted under existing state and federal law: "A statute taking away

In the very matter of consolidation, however, the Commission has completely reversed this position. In an application for the issuance of securities by a consolidated corporation created and existing under state laws, without the Commission's approval, the proposed securities were authorized as for a lawful object in the public interest, with explicit recognition that consolidations may be independently effectuated under appropriate state authority, despite the Commission's broad powers with regard to the reorganization of the railroad system as a whole.¹⁸⁴ In supporting this narrow construction of the statute, the Commission said: "The provisions of the interstate commerce act do not provide for compulsory consolidation. The idea was considered by the Congress and rejected. In view of that rejection it does not seem we should conclude that the Congress intended to prevent voluntary consolidations under available State laws in order thereby to force consolidation under such general plan as we may ultimately adopt. The provisions of the interstate commerce act regarding consolidations have ample purpose without construing them

an existing right must be couched in such definite language as to leave no doubt of the intention of the legislature. If it had been intended to forbid acquisitions of control or consolidations, unless approved or authorized by us, it would have been easy to say so. Congress has experienced no difficulty in definitely expressing its purpose when it has intended to impose restrictions. An attempt by the Congress to nullify State laws and subvert State policies regarding the corporate character and power of State entities by denying state-conferred powers, would raise grave constitutional questions which we may not by vague surmises or assumptions inject into the interstate commerce act. The determination by the Congress how and under what circumstances and to what extent a State corporation may participate in interstate commerce is one thing. It would be a quite different thing for Congress to assert authority to interfere with State laws regarding the formation and consolidation of State corporations so as to make unlawful the exercise of powers granted by State laws." 76 I.C.C. 663 (1923), at p. 671. This view, apparently, finally prevailed with the Commission, at least in so far as actual consolidations are concerned.

¹⁸⁴ *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I.C.C. 581 (1923). The applicant carrier was a consolidated corporation organized under the laws of the states of New York, Pennsylvania, Ohio, Indiana, and Illinois, for the purpose of acquiring the property and franchises of the Nickel Plate, the State Line, the Lake Erie, the Fort Wayne, and the Clover Leaf, and of operating these properties in intrastate and interstate commerce. Pursuant to the laws of the states above named, the constituent companies entered into an agreement and drew up articles of consolidation, which had been approved by the public service commissions of the states in which such approval was required. The Commission found "that all things necessary to the completion and consummation of the consolidation have been effected" (p. 583). It appeared, furthermore, that this union of properties conformed to the Commission's tentative consolidation plan promulgated in *Consolidation of Railroads*, 63 I.C.C. 455 (1921).

as denying the right of State corporations to consolidate where State laws permit. We must conclude that if the Congress had intended to suspend State laws until we should at some later time elect to permit their use, such intent would have been manifested in plain terms. Where intent is not clearly shown we are not called upon by laborious construction to find Federal intent to dissipate State power. In view of the obvious intent of the Congress to facilitate and encourage worthy consolidations and of the comprehensive power given to us, it would be unfortunate to construe the law as preventing a consolidation which serves the public interest in an exceptional degree as here.¹⁸⁵ The defect of the Commission's holding does not lie in want of substantive merit in this particular consolidation; it springs, rather, from establishment of the principle that consolidations may proceed under state law without reference to the effect of such procedure upon the execution of the comprehensive consolidation plan, hemmed in by a series of significant guiding standards, which Congress intrusted exclusively to the authority of the Commission. Congress did indeed evince an intent "to facilitate and encourage worthy consolidations"; but it entered upon this policy only by setting up the Commission as sole arbiter as to their worthiness. Granting that there may be some question as to the constitutional power of Congress to control corporations as distinct from the interstate commerce in which they are engaged and as to its declared intent in this connection,¹⁸⁶ it would

¹⁸⁵ 79 I.C.C., at p. 586. See, also, note 59, *supra*.

¹⁸⁶ The Commission relied upon the Supreme Court's decision in *Texas v. Eastern Texas R. R. Co.*, 258 U.S. 204 (1922), for the narrow construction of its powers. The Commission declared that in this proceeding (see note 72, *supra*), involving the scope of its authority over abandonments, language "broad enough to include within its letter State corporations and intrastate operation" was so construed by the Supreme Court as not to nullify state laws and give the Commission power to disregard them, confining its right to permit abandonment to the sphere of interstate commerce. "This case," concluded the Commission, "brings out the distinction between control over interstate commerce and control over the form of the corporation which carries on such commerce. We have authority over one but not the other. The distinction applies to the case before us." 79 I.C.C., at p. 586. It is doubtful whether the inference drawn from the Court's decision is sound. When a carrier, located wholly within one state and unconnected with the system of any interstate carrier, is permitted to abandon the operation of its property in interstate commerce, it is no longer subject to the Interstate Commerce Act, and naturally reverts, with respect to its intrastate commerce, to the exclusive control of the state authorities. But it would seem that just so long as the carrier corporation is engaged in interstate commerce, the control of that corporation is properly vested in the Commission to the extent prescribed by Congressional

still seem, pending judicial determination of the issue, that the Commission's self-denying attitude runs counter to the overwhelming tenor of the consolidation provisions and involves the acceptance of limitations clearly inconsistent with the effective performance of its unquestioned duty.¹⁸⁷ The sounder view, as previously developed, would hold all consolidations not approved by the Commission under the conditions prescribed by the federal statute to be unlawful. There is ample basis for such a construction in the legislative provisions;¹⁸⁸

enactment in fulfilment of the purposes of federal regulation of the national transportation system.

¹⁸⁷ Only six of the eleven commissioners definitely subscribed to the report as adopted. Commissioner Aitchison did not participate in the disposition of the case. Commissioners McChord and Hall were not present when final action was taken, although Commissioner McChord had indicated that he was favorable to the adoption of the report, and Commissioner Hall had indicated that he was opposed to its adoption. Commissioner Eastman dissented, with the concurrence of Commissioner Esch, to which Commissioner Hall's concurrence was later added. By way of general dissent, Commissioner Eastman declared (pp. 587-588, 591): "This finding will gravely impair, if it does not destroy, our power to administer successfully what the authors of the transportation act, 1920, deemed to be one of its most constructive and important provisions. In my opinion it is an ill-considered and unsound finding. . . . I am wholly unable to accept a construction of the law which reduces the plan of consolidation to a state of helpless futility. Even if the question were open to grave doubt, I should feel that the doubt should be resolved in favor of the jurisdiction of the commission, at least until the courts have spoken. But if the section is read in its entirety, if the sequence of its provisions is observed, and if the detailed care of Congress is noted in fostering and safeguarding in every way the plan of consolidation, I am confident that all doubt as to its proper interpretation disappears."

¹⁸⁸ After an analysis of the guiding standards carefully prescribed for the Commission in formulating a plan for the consolidation of all the railroad properties of the country into a limited number of systems—involving the preservation of competition, the maintenance of existing channels of trade, the setting-up of systems so balanced that they will earn, under uniform rates, substantially the same rate of return on the value of their properties—Commissioner Eastman concluded that not only did Congress intend to give the Commission complete control over the situation but had actually done so. He encountered no difficulty in finding limitations upon state authority, or upon voluntary and independent action of the carriers, in the specific provisions of section 5: "Immediately following the elaborate provisions of paragraphs (4) and (5) for the preparation of a plan of consolidation comes paragraph (6) with its statement of the conditions under which consolidations 'shall be lawful.' It is provided that they 'must' be in harmony with the final plan, that they 'must' be approved by the commission, and that the securities issued 'shall not' exceed the value of the consolidated properties. Reading the three paragraphs in conjunction the conclusion is unavoidable that this detailed expression of the conditions under which consolidations 'shall be lawful' operates as an exclusion and prohibition of consolidations under any other conditions and that the affirmative, as one counsel has aptly put it, is 'pregnant with a negative.' It is a familiar principle of construction that a remedial statute is 'entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.' . . . Nor is this construction inconsistent

and the view that these provisions were merely designed to legalize consolidations inhibited by state or federal law jeopardizes the achievement of the affirmative purposes of the Transportation Act.¹⁸⁹

Despite the Commission's possession of sweeping power, an attitude of administrative restraint in the matter of superseding state authority is, on principle, praiseworthy. In view of the duality of our governmental institutions, state control should not be invalidated except in so far as is necessary to the achievement of effective federal regulation. Such an attitude of restraint, based upon a careful balancing of general and local interests, is decidedly commendable, as will appear in due course, in certain aspects of the field of service regulation, and particularly in that of rate control. The subjection of distinctively local situations to the controlling jurisdiction of federal authority involves a needless disregard of state sovereignty. In the sphere of finance and management, however, the carrier functions affected by the regulatory process are inherently national in scope. While Congress was rather tardy in entering upon the tasks of regulating security issues and controlling the character of intercorporate relations, the new policy, designed to rehabilitate railroad credit and to mold railroad organization in the public interest, was manifestly directed to the transportation system as a whole, in terms of estab-

with paragraph (8). That paragraph comes last, not first. It occupies no position of preëminence but brings up the rear. Paragraph (8) was plainly intended to serve the other paragraphs, not the other paragraphs to serve paragraph (8). It closes the circle and protects the consummation of the overshadowing plan of consolidation from interference in any way by other State or Federal laws" (pp. 590-591).

¹⁸⁹ The considerations urged by Commissioner Eastman against the majority's restrictive interpretation of the statute were equally convincing: "Throughout the preceding stress was laid upon the claim that the consolidation in question is in harmony with our tentative plan of consolidation and otherwise consistent with the public interest. Assuming that such a claim is well founded in this particular instance, what is its relevancy to the real issue? If the only purpose of paragraphs (6) and (8) is to afford relief from the antitrust laws or other restraining or prohibitory statutes, State or Federal, then a consolidation which does not run counter to such statutes can be accomplished without our approval, be it in harmony or out of harmony with our plan of consolidation and be it consistent or inconsistent with the public interest. How long will our delicately adjusted plan of consolidation, once it is finally adopted, survive in the face of such a construction of the law? Moreover, this interpretation leads to the anomalous conclusion that when a consolidation is barred by restraining statutes, State or Federal, so that our approval under paragraph (6) is necessary, *then* the securities issued must be carefully restricted to the value of the consolidated properties, but that no such restriction need be observed when no relief from restraining statutes is necessary" (p. 591).

lishing a single public control over all interstate carriers. While the proposed courses of action subject to approval concern the finances and management of state-created corporations, their effect is not limited and cannot be confined to the local circumstances and conditions of any one state. The assertion of federal authority in the premises, long deemed essential, necessarily merged all interests in the common good. The Commission's self-denying determinations, therefore, have but hampered its own labors, without safeguarding any valid local claims. When, in the field of consolidations, for example, where the Commission has most strikingly restricted its jurisdictional scope, we find the carriers, contrary to their usual policy, contending for the validity of state power, we witness a demand for facilitating the course of particular railroad combinations rather than for maintaining the integrity of state jurisdiction.¹⁴⁰ As a matter of administrative performance, pending adjudication of the relevant issues in the courts, the Commission would have proceeded with greater effectiveness on the basis of exclusive occupancy of this field of finance and management.

Service and Facilities

As previously noted, the Commission's regulation of service and facilities finds expression in a number of directions, the more important of which concern matters of safety, car service, extensions,

¹⁴⁰ Compare the following from Commissioner Eastman's dissenting opinion in *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I.C.C. 581 (1923), at p. 592: "It is asserted that to require all consolidations to be approved by this commission would be an undue and unconstitutional encroachment upon State authority. It is not our function to pass upon constitutionality, and I shall not undertake to discuss this question except to say that the Supreme Court has clearly shown a keen desire to uphold and sustain in a broad way all the constructive and remedial provisions of the transportation act, 1920. It is unusual, however, for carriers to rally to the defense of State authority and applicant's position merits analysis. No one questions that the law provides that if we approve a consolidation, thereupon such consolidation may be effected, 'the law of any State or the decision or order of any State authority to the contrary notwithstanding.' Which is the greater encroachment upon State authority, to give us veto power over consolidations which the States approve, a power which applicant denies we possess, or to give us power to authorize consolidations which the States prohibit, a power which it concedes has been conferred? The State authority which applicant is defending is, upon final analysis, only a power to agree with the carriers. Under the interpretation of the law which the majority have sustained, the carriers are given a double-barreled opportunity to effect consolidations. If the States approve, consolidation may be accomplished regardless of our disapproval. If we ap-

and abandonments. The Commission's dominance in the field of safety, both in law and practice, has been amply indicated.¹⁴¹ Nor need any elaborate consideration be given to the control of car service, either under normal conditions or in face of emergencies. Car service rules, as developed in coöperation with the carriers, are made to embrace all equipment, whether used in the carriage of intrastate or interstate commerce; and when, because of car shortage, occasion arises for the issuance of orders by the Commission, they are likewise made applicable to the entire traffic. Since the movement of all traffic is dependent upon the same car supply, equitable distribution can be achieved only through unified control. Under these circumstances conflicting orders emanating from state agencies are rendered invalid.¹⁴² And when the Commission exercises its summary emergency powers—suspending established regulations and issuing directions as to use of facilities and movement of traffic—there is no possible room for the assertion of state power. The immediate objective, under conditions of car shortage, congestion, embargo, or other emergency, is to facilitate the flow of interstate commerce, but its achievement necessarily involves complete control of the situation. The transportation system is dealt with as a unit, and all existing regulations, state and federal, are superseded by the Commission's exercise of its extraordinary powers.¹⁴³ The coöperation of state authorities

prove, it may be accomplished regardless of the State's disapproval. No consolidation can be prevented unless it meets both with our disapproval and with the disapproval of the States."

¹⁴¹ See Part I, chap. vi, The Development of Safety Legislation.

¹⁴² See, for example, *R. R. Com. of Ohio v. H. V. Ry. Co.*, 12 I.C.R. 398 (1907), in which the problem of counting private cars and railroad fuel cars against the distributive shares of mines was first considered. Since the carrier "can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic," their distribution by an interstate carrier must be subject to a single control. "Manifestly," said the Commission, "it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense" (p. 403). In subsequent proceedings involving the assigned-car rule, the Commission, without protest, has assumed complete jurisdiction. See, for example, *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923), 93 I.C.C. 701 (1924), and the Supreme Court's affirmation of the Commission's findings in *Assigned Car Cases*, 274 U.S. 564 (1927).

¹⁴³ For outstanding illustrations of the Commission's exercise of these broad powers—involving, among other expedients, the establishment of priorities, the disregard of shipping instructions as to routing, and the large-scale relocation of equipment—see *Annual Reports*: 1920, pp. 11-25; 1922, pp. 9-16; 1926, pp. 61-63; 1927, pp. 35-36.

has provided the primary safeguard for local interests.¹⁴⁴ It should be noted, however, that the Commission has confined its jurisdiction, in deference to the rights of the states, within the strict limits of its statutory authority. The "car service" subject to its control includes, for example, the "supply of trains"; but since the car service provisions deal with the transportation of property, they have been construed as conferring no jurisdiction over the supply of passenger trains.¹⁴⁵ In these circumstances due recognition is accorded to the exercise of state authority requiring just and reasonable service for intrastate commerce. Only when mixed trains, carrying property as well as persons, are involved, has the Commission's exclusive jurisdiction, embracing both intrastate and interstate traffic, been asserted.¹⁴⁶ Within the legitimate bounds of "car service," as defined by statute,¹⁴⁷ distinctions between intrastate and interstate commerce are not only impracticable, because of the identity of the instrumentalities employed in the movement of both types of traffic, but they are clearly subversive of effective exercise of the Commission's regulatory power. If the provision of adequate and non-discriminatory service is to be safeguarded and promoted, as contemplated by Congressional enactment, the entire complex of equipment, however used, must be subjected to unified control. In conformity with the Commission's practice, the assistance and advice of the state agencies, rather than their independent assertion of authority, must be chiefly relied upon to achieve satisfactory adjustments between general and local interests.

The Commission's performance in the field of new construction and abandonments requires somewhat fuller consideration. We are concerned as heretofore, not with the substantive character of its

¹⁴⁴ This has been true not only in emergency situations, but in the normal adjustment of service matters. While there is little question as to the scope and validity of federal authority in this sphere, the cooperation of the state bodies has been consistently enlisted in the actual performance of the regulatory task. The Commission has stated, for example, that "in matters affecting car service nearly all of the States have lent us their aid." *Annual Report, 1926*, p. 1.

¹⁴⁵ *Wisconsin R. R. Commission v. C. & N. W. Ry. Co.*, 87 I.C.C. 195 (1924).

¹⁴⁶ *Train Service on Northern Pacific*, 112 I.C.C. 191 (1926).

¹⁴⁷ "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act." Sec. 1, par. (10).

determinations, but with their bearing upon the maintenance of state sovereignty over the extent of local service and facilities. The provisions requiring the Commission's approval for proposed extensions and abandonments, through the issuance of certificates of public convenience and necessity, are designed, in the national interest, on the one hand, to prevent needless duplication of plant, and on the other, to permit the discontinuance of unnecessary service. These powers constitute an integral part of the affirmative responsibility toward the railroad system as a whole imposed by the Transportation Act. They are closely related to the maintenance of sound financial conditions and to the satisfactory execution of the tasks of rate regulation. Under these circumstances the Commission's jurisdiction, as a matter of law, necessarily extends to lines located or to be located wholly within one state, and to intrastate as well as interstate commerce, for the protection of federal interests. It is highly important, however, that local interests and state powers of control be not unduly ignored and invalidated. Construction of new lines and abandonment of existing services affect in a very high degree the permanent welfare of local communities; and the processes of self-determination, when not in conflict with national purposes, must be jealously safeguarded. In practice, there is room for a large measure of administrative discretion as to the scope which federal jurisdiction should assume. What has been the character of the Commission's performance in these circumstances?

In matters of new construction the Commission has made no effort to occupy the entire field. Only carriers by railroad which are subject to the Act are prohibited from undertaking extensions of their lines or the construction of new lines without first obtaining a certificate from the Commission. Unless, therefore, an applicant is already subject to the Act or would become so by the issuance of the certificate prayed for, federal control has not been held to be applicable. Thus, for example, an application for authority to construct an independent line, wholly within one state, which would be used entirely in intrastate commerce has been denied for want of jurisdiction.¹⁴⁸ Furthermore, even a corporation organized to engage in interstate commerce has been permitted to construct its proposed line, wholly within one

¹⁴⁸ *Construction of Line by G. P. & N. R. R.*, 76 I.C.C. 437 (1923).

state, and to operate it in intrastate commerce, under approval of state authority.¹⁴⁹ The Commission has thereby confined its jurisdiction within the strict limits of the statutory provisions. But the operation of such lines in interstate commerce, even when already constructed and used for intrastate purposes, has been consistently subjected to the Commission's control.¹⁵⁰ The mandate that interstate carriers must resort to the Commission for approval of their projects is laid down in absolute terms; and if the fact of actual construction, without federal authority, were to be automatically followed by operation in interstate commerce, or were to create a presumption in favor of the issuance of a certificate of convenience and necessity for such operation, the entire purpose of the enactment could be readily nullified. In the words of the Commission: "The circumstance that the line in question has been built and is in operation in intrastate commerce can not enter into the solution of the problem, since the Terminal entered upon construction of the branch with full knowledge that it could not operate it in interstate commerce until it had applied for and received the certificate required by law. Any other treatment of the case would render the administration of these paragraphs farcical in the extreme. Whether or not a corporation organized to engage in interstate commerce may lawfully construct a line of railroad wholly within the limits of one State and undertake its operation in intrastate commerce before obtaining our certificate, it can not properly urge the circumstance that its capital commitment has been made and that therefore our certificate should issue as a matter of course to permit it to engage in interstate commerce."¹⁵¹ The Commission's position appears to be entirely sound as a matter of

¹⁴⁹ *Public-Convenience Application of Utah Terminal Ry.*, 72 I.C.C. 89, 90 (1922).

¹⁵⁰ For a long list of cases in which the Commission has either granted or denied certificates for the construction or operation of new lines, lying wholly within the limits of one state, by corporations not theretofore carriers subject to the Act, see *Texas R. R. v. Northside Ry.*, 276 U.S. 475 (1928), at p. 480.

¹⁵¹ *Public-Convenience Application of Utah Terminal Ry.*, 72 I.C.C. 89 (1922), at p. 94. In this proceeding the application for authority to operate in interstate commerce was denied, on the ground that competing facilities were adequate. Upon rehearing, in 79 I.C.C. 187 (1923), the original finding was reversed, but only because the inability of the competing carrier to furnish a sufficient supply of cars was found to be due to causes "that may reasonably be expected to continue or recur" (p. 189). In other words, the decision was on the merits, and not in deference to any presumptive right of the applicant.

policy,¹⁵³ and it has received unqualified judicial support.¹⁵⁸ While the construction by wholly intrastate carriers of lines to be used wholly in intrastate commerce has properly been permitted to proceed without the Commission's authority, the assertion of power over interstate carriers has, with equal propriety, embraced their intrastate as well as interstate commerce. Only in this way can the plain intent of Congress be made effective. Under the terms of the statute the Commission cannot be forced, as of right, to accord recognition to the limitations of state law¹⁵⁴ or to mold its holdings in the interests of state commerce¹⁵⁵ without compelling a virtual abdication of the authority expressly conferred upon it. But the Commission has not been unmindful, in these circumstances, of the necessity of safeguarding local interests. This has largely been achieved through cooperation with the state commissions. While these bodies, from the standpoint of legal power, have merely served in an advisory capacity, their intimate contact with local conditions has constantly made itself felt in very substantial degree. At the request of the Commission,

¹⁵³ See, also, *Construction of Line by Jefferson Southwestern*, 86 I.C.C. 796, 799 (1924).

¹⁵⁴ Compare the following from the opinion of Justice Brandeis in *Texas R. R. v. Northside Ry.*, 276 U.S. 475 (1928), at p. 479: "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. . . . The mere fact that a railroad lies wholly within one State and is to be built by an independent corporation, does not, of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs."

¹⁵⁵ In *Construction by Los Angeles & Salt Lake R. R.*, 72 I.C.C. 147 (1922), the Public Utilities Commission of Utah urged that the applicant should comply with the state law governing railroad construction before action is taken by the federal body. The Commission disposed of this contention summarily: "We are unable to conclude that compliance with a State law on the part of the carrier is a prerequisite to our consideration of its application, however necessary such compliance may be prior to actual construction."

¹⁵⁶ In *Construction by G., C. & S. F. Ry.*, 131 I.C.C. 393 (1927), a certificate was issued for the construction of a branch line, upon condition that the new route be used only "where such use will clearly result in increased efficiency from the transportation standpoint." The State of Texas urged that the certificate be granted unconditionally, supporting the applicant's contention that the routing restriction would conflict with the authority of the state in the regulation of its intrastate traffic. The Commission held that the condition imposed did not exceed its jurisdiction, "particularly as it has in view the conservation of the financial resources of interstate carriers" (p. 406).

hearings have been held, for the most part, by the state agencies, and the recommendations of these agencies have in most instances been followed.¹⁵⁶

The Commission's power over abandonments, as conferred by statute, is in its general terms coextensive with that over new construction. The continued operation of existing lines may prove as burdensome to interstate carriers as the further extension of such lines, or undue competitive building by other carriers; hence discontinuance of service was made dependent upon the Commission's authorization, through the issuance of certificates of public convenience and necessity. Since this authority was conferred in the interest of fostering and protecting the transportation system as a whole, it was plainly essential, for effective control, that it be made to embrace lines located wholly within one state, and as to their intrastate as well as interstate traffic, in so far as such lines are engaged in interstate commerce or are part of the systems of interstate carriers, despite the derogation of state rights in the premises. In the early proceedings, however, the Commission exercised even this extensive power with undue sweep. Essentially it construed its jurisdiction as embracing all abandonments, once the applicant carrier was subject to the Act, regardless of their relationship to interstate commerce. Complete abandonment of independent lines located wholly within the borders of single states was authorized,¹⁵⁷ with summary disposition of the jurisdictional issue.¹⁵⁸ In other words, the Commission's certifi-

¹⁵⁶ The following, from *Annual Report, 1921*, p. 17, is typical: "Pursuant to the provisions of paragraph (3) of section 13 of the act, we have availed ourselves of the cooperation, services, records, and facilities of the state commissions in disposing of applications for certificates of public convenience and necessity. At our request these commissions have held hearings in 15 such cases, transmitting to us the records thereof together with their recommendation, which, in 13 of the cases, were followed by us." See, also, *Annual Reports*: 1922, p. 28; 1923, p. 19; 1924, p. 17; 1925, pp. 18-19; 1926, p. 17; 1927, p. 4; 1928, pp. 3-4; 1929, pp. 2-3; 1930, pp. 2-3.

¹⁵⁷ See, for example, *Certificate for Eastern Texas R. R.*, 65 I.C.C. 436 (1920); *Public-Convenience Certificate to S. & B. C. Ry.*, 67 I.C.C. 384 (1921); *Public-Convenience Certificate to P. & W. R. R.*, 67 I.C.C. 746 (1921); *Public-Convenience Certificate to Ocean Shore R. R.*, 67 I.C.C. 760 (1921); *Public-Convenience Certificate to Orangeburg Ry.*, 67 I.C.C. 789 (1921); *Abandonment of Sugar Pine Ry.*, 70 I.C.C. 478 (1921).

¹⁵⁸ In *Public-Convenience Certificate to D. & N. M. Ry.*, 70 I.C.C. 184 (1921), in which complete abandonment of a line of railroad located wholly within the State of Minnesota was authorized, objection was raised against the Commission's jurisdiction

cates permitted the abandonment of intrastate operation as well as interstate traffic, even though the discontinuance of service in interstate commerce would, under the circumstances, no longer render the carrier subject to the Act or its intrastate activity a matter of national concern. Not until the Supreme Court had held that the abandonment provisions do not confer power to authorize the discontinuance of intrastate service as such¹⁸⁹ did the Commission confine the operation of its orders affecting independent carriers lying wholly within one state to interstate and foreign commerce.¹⁹⁰ This restriction upon

on the grounds that a railroad lying wholly within one state, even though shipments originating upon it are destined to points outside the state, is not subject to the Act; and that the abandonment provisions, if construed as applicable to such an intrastate railroad, are unconstitutional. The Commission merely declared (p. 185): "We have considered the jurisdictional objections and are of opinion that we have jurisdiction to pass upon this application." It should be noted that the crucial issue—as to whether the Commission's jurisdiction extends to authorizing abandonment of the intrastate traffic of such a railroad—was not raised.

¹⁸⁹ *Texas v. Eastern Texas R. R. Co.*, 258 U.S. 204 (1922). The issue was as to the validity of the Commission's order in *Certificate for Eastern Texas R. R.*, 65 I.C.C. 436 (1920). The applicant carrier, a Texas corporation, owned and operated a line of railroad wholly within that state. The Commission authorized its complete abandonment because it was operating and promised to continue to operate at a loss. Approximately three-quarters of the carrier's traffic was in interstate and foreign commerce, and there was no question as to the propriety of the Commission's order with reference to that commerce. To uphold the Commission's certificate for complete abandonment, however, it was necessary to construe the provisions as conferring power over purely intrastate commerce. Such a construction, argued the Court, would raise serious questions as to the constitutional validity of the provisions, and would be out of harmony with other provisions of the Act. "As a whole these acts [the amendments of which the abandonment provisions are an integral part] show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce" (p. 217). In applying this interpretation to the instant proceeding, the Court said (pp. 216-217): "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

¹⁹⁰ In *Public-Convenience Certificate to D. & N. M. Ry.*, 71 I.C.C. 795 (1922), the substantive conclusions of the original report (70 I.C.C. 184) were affirmed, but it was recognized that the legal effect of the Commission's certificate was limited to the abandonment of the line in interstate and foreign commerce. See, also, *Abandonment*

jurisdictional scope, which reserves control of purely local service under such circumstances to the determinations of state authority, is in clear accord with the manifest purpose of the Act, which is directed to the regulation of interstate commerce and which occupies the field of intrastate commerce only to the extent incidentally necessary to the achievement of effective regulation of interstate commerce. Where the carrier is located entirely within a single state, and is independent of the railroad system of any interstate carrier, the authorization of abandonment in interstate and foreign commerce exhausts the national interest in the situation. Since the continuance of intrastate service neither affects nor burdens interstate commerce, the assertion of federal authority in the premises constitutes an arbitrary incursion into the domain of local sovereignty.

When, however, the intrastate commerce of an interstate carrier may burden or affect interstate commerce, local control must necessarily yield to the exclusive authority vested in the Commission. In so far as the authorization of complete abandonment constitutes a regulation of intrastate commerce, such regulation is but incidental to the proper performance of the primary federal task. Recognition of state power under these conditions would involve a subordination of general to local ends—a self-denial of jurisdiction more far-reaching in its effects than the lack of restraint previously noted. Under such circumstances the Commission has properly utilized the full measure of its authority. Accordingly, upon application of an interstate carrier operating a railroad system in several states, it has authorized the complete abandonment of a branch line lying wholly within one state and physically detached from the other lines of the carrier but operated as part of the system as a whole through connections with other roads.¹⁶¹ Similarly, it has authorized the complete abandonment of a branch line of an interstate carrier located entirely within one state and unconnected with the system of any other car-

of Branch Line by M. & L. S. R. R., 71 I.C.C. 329 (1922); *Public-Convenience Certificate to Bangor & Aroostook R. R.*, 71 I.C.C. 579 (1922); *Abandonment of Branch Lines of C. & G. R. R.*, 71 I.C.C. 725 (1922); *Abandonment by Fairchild & Northeastern Ry.*, 111 I.C.C. 275 (1926).

¹⁶¹ *Abandonment of Branch Line by Colorado & Southern Ry.*, 72 I.C.C. 315 (1922), 82 I.C.C. 310 (1923), 86 I.C.C. 393 (1924), 94 I.C.C. 657, 661 (1924). This holding was upheld by the Supreme Court in *Colorado v. U.S.*, 271 U.S. 153 (1926). See note 72, *supra*.

rier.¹⁰⁸ In both situations the petitioner was not only an interstate carrier at the time of application, but was to remain a carrier engaged in interstate commerce subsequent to the abandonment of the branch; jurisdiction properly extended to the intrastate traffic of these branches because of the burdens imposed upon interstate commerce by the losses incident to the performance of the intrastate service. The soundness of the guiding principle involved in these determinations cannot be questioned. There is ample room for difference of judgment in a given case as to whether abandonment should be authorized in the interest of public convenience and necessity; but this touches the substantive merit of the Commission's policy, to be subsequently considered, and raises the issue as to whether any abandonment is proper rather than the problem as to whether the Commission's certificate should include intrastate as well as interstate commerce.¹⁰⁸ As a practical matter, if the burden of loss in a given

¹⁰⁸ *Proposed Abandonment of Lincoln Branch by D. & M. Ry.*, 94 I.C.C. 624 (1925), 131 I.C.C. 156 (1927), 138 I.C.C. 576 (1928). In the first of these proceedings the application was denied; upon further hearing the findings were reversed, and a certificate issued authorizing abandonment in interstate and foreign commerce; finally, upon further consideration and argument, complete abandonment of the branch line was authorized. The issue, aside from substantive merits, was whether it was within the jurisdiction of the Commission so to modify its certificate authorizing abandonment of operation in interstate and foreign commerce as to include intrastate commerce. The applicant contended that the doctrine of the *Colorado* case was applicable; the protestants contended that the proceeding fell within the rule of the *Texas* case. See note 72, *supra*. After a comparison of the Supreme Court's holdings in the two cases, the Commission concluded (138 I.C.C., at pp. 579-580): "There is no contention on the part of the protestants that the applicant herein is not a common carrier by railroad subject to the interstate commerce act, nor, under the circumstances, could such a contention fairly be made. The fact that it is not necessary for the line of a railroad company to cross State lines in order to bring that company within our jurisdiction is too elementary to require discussion here. It is apparent, therefore, that the decision in the *Colorado* case is directly in point with the situation here presented. Had the applicant sought authority to abandon its entire line of railroad, instead of a branch, such abandonment as to interstate commerce and continued operation in intrastate commerce would have brought this case within the scope of the doctrine laid down in the *Texas* case. From a comparison of the *Texas* case and *Colorado* case . . . we are of the opinion that we have jurisdiction to permit complete abandonment of the Lincoln branch."

¹⁰⁹ In *Abandonment of Branch Line by Colorado & Southern Ry.*, 86 I.C.C. 393 (1924), Commissioner Eastman, dissenting in part (with whom Commissioners Campbell and Cox concurred), declared (p. 396): "I agree that the conditions surrounding the line in question are such that public convenience and necessity do not require its continued operation, but I believe that our certificate should in terms be restricted to abandonment in interstate and foreign commerce." This dissent appears to have been based, primarily, upon a misconception of law. He contended, in view of the decisions

instance is sufficiently great, in light of surrounding circumstances, to justify discontinuance of operation in interstate commerce, the reservation of power over intrastate operation to the states would but tend to prove a futile gesture. The discontinuance of interstate operation would generally increase rather than lighten the burden of loss, and the same considerations of public convenience and necessity initially applied to the interstate service would have to be applied to the entire traffic.¹⁰⁴ In view of the Commission's affirmative responsibilities toward the transportation system as a whole, its functioning authority over abandonments must comprehend the entire business of carriers engaged in interstate commerce which seek to discontinue operation of any part of their lines, and the limitations of state law

of the Supreme Court, that continued operation in intrastate commerce must "burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce," or operate "as a real discrimination against, and obstruction to, interstate commerce," in order to justify federal invasion of state authority. Essentially, this conception makes the issuance of certificates of convenience and necessity, in so far as they embrace intrastate commerce, dependent upon specific findings of discrimination against interstate commerce or of losses sufficiently great to involve a denial of just compensation. In effect, these contentions were urged upon the Supreme Court, on appeal, in *Colorado v. U.S.*, 271 U.S. 153 (1926). In finding these contentions without merit, Justice Brandeis said (pp. 167-168, 169): "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of the Transportation Act, 1920, to establish and maintain adequate service for both. . . . The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. . . . The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate. . . . In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect."

¹⁰⁴ In *Proposed Abandonment of Lincoln Branch by D. & M. Ry.*, 138 I.C.C. 576 (1928), for example, in which the certificate was modified to include intrastate commerce, the Commission declared (p. 581): "It is idle to contend or even assume that the Lincoln branch can be operated to better advantage in intrastate commerce than in a general way handling all classes of traffic. We found on the facts of record that

must be disregarded.¹⁶⁵ As in matters of new construction, the protection of local interests has been largely accomplished through the coöperative efforts of the states rather than through their independent assertion of state power. While the Commission has exerted its full legal authority with reference to abandonments, it has leaned heavily upon the assistance and advice of the state commissions,¹⁶⁶ and in relatively few proceedings have conflicts been dissolved adversely to the recommendations of the state bodies.¹⁶⁷

Rates and Charges

The most significant reflection of the Commission's assertion of power over intrastate commerce is to be found in the field of rates and charges. In this field the coexistence of both state and federal authority is explicitly recognized by statute; the Commission's jurisdiction is expressly confined to the removal of undue discriminations against persons and places in interstate commerce and against interstate commerce as a whole. Under these circumstances federal interference with rates on internal commerce prescribed by state authority is not justified as a matter of course, but must be grounded in specific findings of discrimination. In the field of finance and management, as well as in that of service and facilities, the functions sought to be

the branch was being operated at a substantial loss and that there was no prospect of improvement."

¹⁶⁵ In *Abandonment by C., R. I. & P. Ry.*, 138 I.C.C. 793 (1928), for example, an Arkansas statute required, under penalty, the regular operation of a specified number of freight and passenger trains over part of the line sought to be completely abandoned. "This statute," rightfully declared the Commission, "can not deprive us of the jurisdiction conferred by the transportation act, 1920, nor can it interpose any obstacle to the exercise of that jurisdiction" (p. 795).

¹⁶⁶ See note 156, *supra*.

¹⁶⁷ As persuasive evidence of the consideration given by the Commission to the representations of the state authorities, note the following from the opinion of Justice Brandeis in *Colorado v. U.S.*, 271 U.S. 153 (1926), at p. 167, n. 1: "From the enactment of Transportation Act, 1920, to February 18, 1926, the number of applications for abandonment acted on was 191. Of these, 9 were dismissed by the Commission for want of jurisdiction; 11 were denied; 170 were granted. Of these 170, only 6 were granted contrary to the recommendation of the state authorities. Of the 47 cases in which state authorities made specific recommendations, the Commission acted in 38 in accordance therewith. In a cases in which the State recommended postponement, the Commission denied the application. In one, in which the State recommended denial of the application, the Commission postponed decision pending the result of operation during a test period."

regulated are very largely national in scope; in any event, exclusive jurisdiction appears, for the most part, to have been conferred upon the Commission. No such exclusive jurisdiction prevails in matters of rates and charges, and both the protection of national interests and the safeguarding of local interests are dependent upon the character of the Commission's performance. There is room, on the one hand, for undue toleration of maladjustments springing from the relationship between intrastate and interstate rates, to the prejudice of effective national regulation in interstate commerce, and, on the other, the possibility of more or less ruthless invasion of the appropriate sphere of the states, to the prejudice of local self-government in intrastate commerce. A survey of the Commission's performance reveals expressions of both of these extreme methods of approach. The matured policies, meriting approval, which have come to prevail are the result of an evolutionary process. Initially undue restraint appears to have been exercised in removing obstructions to the free flow of interstate commerce; this was followed by the assertion of judicially recognized power over intrastate rates in a spirit of praiseworthy caution; with the enactment of the 1920 legislation, there was a disposition to occupy virtually the entire field, or at any rate to subordinate unnecessarily the primary functioning of the state tribunals; finally there has been a reversion, in effect, to the more commendable approach of the earlier period, with a growing reliance upon the coöperation of the state authorities.

The period of undue restraint was that which preceded the Commission's assertion of power in the *Shreveport* case.¹⁶⁸ It will be recalled that the basis of the Commission's exercise of authority over intrastate rates in that proceeding, as well as of the Supreme Court's affirmance of its order, was the comprehensiveness of the prohibitions of section 3 of the Act against unreasonable discrimination. The provisions of this section had been operative since 1887. Within the bounds of its jurisdiction over interstate rates, therefore, the Commission had always possessed the necessary power to remove maladjustments springing from the relationship between intrastate and interstate rates. The states frequently exercised their powers of rate

¹⁶⁸ *Railroad Commission of La. v. St. L. S. W. Ry. Co.*, 23 I.C.C. 31 (1912); upheld by the Supreme Court in *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1914).

control as a means of fostering local commerce and industry; and because economic areas do not necessarily coincide with state lines, the furtherance of sectional interests was often achieved at the expense of competitors in neighboring communities and inevitably resulted in numerous unjust discriminations. Such situations were brought to the attention of the Commission, but in view of the express proviso that transportation wholly within one state is not subject to the Act, it deemed itself helpless to remove conditions which it deemed "essentially iniquitous."¹⁰⁹ It was recognized that the discrimination could be removed by lowering the interstate rates to the level of the

¹⁰⁹ See, for example, *In the Matter of Freight Rates*, 11 I.C.R. 180 (1905), and *Saunders & Co. v. Southern Express Co.*, 18 I.C.C. 415 (1910). In the former, or *Memphis* case, the St. Louis Southwestern Railway maintained interstate rates from Memphis, Tennessee, to points in Arkansas which for the most part bore a fair and reasonable relation to the intrastate rates from the competing cities of Little Rock and Pine Bluff, Arkansas, to points within that state. Subsequent action on part of the Railroad Commission of Arkansas forced the carrier to reduce rates within Arkansas, which altered the relation theretofore existing and placed Memphis at a distinct and unjust disadvantage. For this maladjustment, in so far as it was caused by the intrastate rates, no lawful remedy was found to be available. In the *Saunders* case, the fish dealers of Pensacola, Florida, and those of Mobile, Alabama, had been for many years competitors in the Alabama markets. The Express Company maintained rates from these two centers to Alabama points practically on a parity, the conditions being substantially similar, and the rates appeared to be satisfactory to the dealers in both cities. In 1907, however, the Alabama Railroad Commission, against the defendant's protest, ordered an extensive reduction of the rates from Mobile, the interstate rates from Pensacola remaining unchanged. It appeared that subsequent to the effective date of the new rates the traffic from Pensacola diminished substantially and shipments from Mobile increased considerably. The complainants made no attack upon the reasonableness of the Pensacola rates *per se*, but contended that they were unjust as compared with the Mobile rates to the same Alabama points, and sought a removal of the alleged discrimination. The Commission found that the charges were substantiated, but could discover no lawful avenue of relief. It declined to order a reduction of the interstate rates, because they were deemed to be reasonable, and it held that its authority did not extend to ordering a change in intrastate rates prescribed by the state commission. "This view of the record," said the Commission, "will leave the Pensacola fish dealers without present redress before this Commission, so far as the discrimination complained of is concerned. But the situation is one that we find it difficult to remedy under existing legislation." The Commission then quoted the express stipulation of section 1 of the Act that transportation wholly within one state is not subject to its provisions. "This language," continued the Commission, "seems to have but one meaning, and that is that, although Congress constitutionally may give and in fact has given to the national commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely state traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is directly or indirectly to affect

state-made rates, but the Commission insisted, and rightly so, that such a course of action would be tantamount to a virtual abdication of its authority over interstate rates in favor of the state bodies. To this extent the integrity of its dominant position was maintained: as to the interstate rates as such complete control was assumed. But the source of difficulty, as in all such cases, lay in the rate relationships, rather than in the absolute level of the charges. If the Commission was to maintain non-discriminatory rates in interstate commerce, it was essential, assuming the interstate rates themselves to be reasonable, to assert authority over the intrastate rates which were the effective cause of the maladjustment. In this sphere the Commission deemed itself impotent. It emphasized the fact that the local rates were fixed by state authority, which relieved the carriers of all responsibility for them;¹⁷⁰ and while it acknowledged the gravity of the situation, it found existing law an inadequate basis for remedial action.¹⁷¹ The jurisdictional restraint manifested in these early pro-

the rates imposed upon the defendant by the order of the Alabama commission" (p. 422).

¹⁷⁰ In the *Memphis* case, in considering the character of the discrimination, the Commission said (pp. 209-210): "It was not the free and uncontrolled action of the carrier which brought about the alleged discrimination but the exercise of authority by the Arkansas Commission. The defendant in nowise acquiesced in the reduction ordered by that Commission but on the contrary manifested its opposition by repeated protests. Short of entering upon a course of litigation with the State of Arkansas the defendant appears to have done about all it could to show its objection to the rates imposed; and has even gone to the extent of printing a protest upon the face of its tariffs. . . . If its voluntary adjustment of rates as between these cities was fair and equitable and that adjustment has been changed and rendered unfair to one of them by action which the defendant could not prevent or control, it is difficult to see on what theory it can be held at fault for the resulting discrimination, provided its Memphis rates are *per se* just and reasonable. In a word, we are constrained to reject the complainant's contention so far as the charge of discrimination against Memphis rests wholly upon comparison with the lower rates imposed by the Arkansas Commission." Again, in the *Saunders* case (p. 421): "Nor, in view of the protest of the defendant against the action of the state commission and of its efforts before that body to secure a withdrawal or modification of the order, may the defendant fairly be held responsible for the resulting discrimination. The relation of rates thus produced was neither voluntary nor the consequence of any uncontrolled action on its part; the continuance of the relation thus created is not in any sense attributable to the defendant unless it may be said that the defendant is under an obligation to correct the discrimination by voluntarily reducing its Pensacola rates to the basis of the Mobile rates."

¹⁷¹ Note the following from the Commission's report in the *Saunders* case (pp. 422-424): "The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of ship-

ceedings is in sharp contrast with the prevailing scope of the Commission's interference with intrastate rates. Effective federal regulation was unduly subordinated to the maintenance of state sovereignty.

In due course, however, as we have already seen, the Commission's assertion of authority over intrastate rates under such circumstances did not await Congressional action. The pressure of discriminatory situations, increasingly mischievous in their effects, induced the Commission to reconsider the jurisdictional issue, and in the *Shreveport* case it found ample basis for interference with state-made rates in the existing provisions of the Act.¹⁷² Since it was completely upheld by the Supreme Court in this determination, the legal validity of its orders designed to remove discriminations resulting from the relation between intrastate and interstate rates was no longer open to question. But this newly recognized power was but incidental to the effective exercise of control over interstate rates. No authority

pers is not only in contravention of fundamental right and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same state and on traffic moving only within the state, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same state and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points, when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that state-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a point in another state a business that naturally belongs to that point or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity. . . . If it [the carrier] voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. . . . On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable."

¹⁷² See pp. 233-238, *supra*.

was vested in the Commission over intrastate commerce as such, and it was important that needless invasion of the legitimate domain of state power be avoided. Prior to 1920 the Commission appears to have been decidedly successful in this regard. It is noteworthy that both in the original *Shreveport* proceeding and its aftermath, and in the important cases following it, the Commission's approach was marked by great caution and restraint, in the interest of safeguarding the exercise of state authority against all unnecessary interference.

Even in the original *Shreveport* case,¹⁷³ the Commission did not look to the state-made rates alone in determining the cause of the disparity which resulted in the alleged unjust discrimination against Shreveport. The interstate class rates from Shreveport to points in eastern Texas were found to be unreasonable, and reasonable rates were prescribed for the future. To this extent the responsibility of the carriers for the unjust discrimination was accorded recognition, without reference to any conflict between state and federal authority. Only over the commodity rates fixed by the State of Texas, which were the ultimate cause of the discriminatory situation, did the Commission assert jurisdiction.¹⁷⁴ Moreover, despite judicial approval of this assertion of jurisdiction, the Commission proceeded with great deliberation in removing the maladjustments which were progressively disclosed. Not until numerous complaints had been filed, several hearings had been held, a number of years had elapsed, and

¹⁷³ *Railroad Commission of La. v. St. L. S. W. Ry. Co.*, 23 I.C.C. 31 (1912).

¹⁷⁴ The principal issue was as to the Commission's power in the premises. The reasoning of the majority was essentially the same as that presented by the Supreme Court in sustaining the order. See pp. 235-238, *supra*. Commissioners Clements, Harlan, and McChord dissented. They recognized the gravity of the situation and the need for correction, but they preferred to construe strictly the limiting provision of section 1. Commissioner Clements said (pp. 52-53): "The manifest theory of the statute is that there is a distinct field for separate and independent state regulation, and another for federal regulation of transportation rates. It is for this Commission to exercise only the authority conferred upon it, and when a condition arises presenting wrongs which can not be corrected without additional authority, to submit the situation to Congress, as provided in the act, for consideration of additional legislation which may commend itself to them. Section 3 of the act, condemning discrimination between places as well as persons and different descriptions of traffic, can not be read independently of this restrictive proviso of section 1." Similarly, Commissioner Harlan concluded his dissent as follows (p. 55): "In my judgment the language of the proviso of section 1 admits of no other reasonable construction than that the Congress intended expressly to withhold from this Commission the right, directly or indirectly, to exercise its powers with respect to state commerce or to enforce upon such traffic any of the provisions

many reports had been issued was the Texas rate structure so readjusted as to eliminate unreasonable discrimination against Shreveport. Since the original report and order, requiring the removal of such discrimination, was applicable to but three carriers, complainants soon filed petitions for additional relief. Thereupon, after further hearing, a supplemental report and order was issued which applied to many carriers not parties to the original proceeding.¹⁷⁶ Once more maximum interstate class rates were prescribed, and the order affecting intrastate charges was confined to commodity rates. The Commission declined to fix these commodity rates; it merely ordered the removal of the unjust discrimination against Shreveport. Furthermore, although the petitioners "sought a readjustment of rates not limited to any prescribed territory, and an order applying to all these defendants, governing all traffic to and from Shreveport and all points on their lines, and between all points on their lines on the local business"—that is, a readjustment embracing practically the entire State of Texas—the Commission declared that "from the inception of this proceeding its essence has been the discrimination between Shreveport and eastern Texas," and restricted its deliberations and its order to the territory defined as "eastern Texas."¹⁷⁶ The Commission thus exercised marked caution as to the scope of its authority, and was strictly guided by the record before it. Only upon still further complaint and hearing was the proceeding so broadened as to embrace practically the entire Texas rate structure in its relationship to Shreveport.¹⁷⁷ Essentially, under the new record, the Commission was called upon to determine: first, whether the

of the act." And Commissioner McChord concluded to substantially the same effect (p. 63): "My position is that this Commission should confine itself within the four corners of the law of its creation, usurping neither the legislative function of the Congress nor the judicial power of the courts."

¹⁷⁶ 34 I.C.C. 472 (1915). This supplemental proceeding arose on petition of the Railroad Commission of Louisiana, declaring that the same discriminatory conditions prevailed as those which had been disclosed at the first hearing, that the defendant carriers would not establish a uniform scale of rates without a supplemental order, and that shippers on the three lines affected by the original order would be accorded undue advantage over other shippers by its operation.

¹⁷⁶ *Ibid.*, pp. 475-476.

¹⁷⁷ *Railroad Commission of Louisiana v. A. H. T. Ry. Co.*, 41 I.C.C. 83 (1916). This was a consolidated proceeding embracing not only the original *Shreveport* case, No. 3918 (23 I.C.C. 31; 34 I.C.C. 472), but Investigation and Suspension Docket Nos.

carriers' class and commodity rates from Shreveport to Texas points were just and reasonable; and second, whether the existing relationships between intrastate and interstate rates and between the applicable classifications in intrastate and interstate commerce were unduly prejudicial to Shreveport. The evidence was convincing that the interstate rates were unreasonable and that the intrastate rates and classifications were discriminatory. The Commission prescribed maximum class and commodity rates from Shreveport to all points in Texas, and the carriers were ordered to remove the undue prejudice against Shreveport. There was a studied endeavor to give due consideration to the findings and opinions of the state authorities and to enlist their cooperation.¹⁷⁸ In fixing the maximum class rates between Shreveport and points in Texas, for example, the scale of mileage rates established by the Texas commission for intrastate transportation was followed very closely—which precluded a wholesale reconstruction of the intrastate class schedules. But the necessary cooperation was given very grudgingly by the Texas authorities. While they were duly notified and their representatives were present at the hearings, they took no part in the proceedings. Accordingly, even these determinations were not permitted to become final. Petitions were filed for a rehearing on the rates submitted in pursuance of the Commission's order and for a reopening of the proceeding; it was alleged, among other things, "that the order is null and void as to the state of Texas, its railroad commission, and its citizens, for the reason that none of them was a party to the proceeding, and as to them, full

710 and 729, and complaints docketed as Nos. 8290 and 8418. I. and S. No. 710 resulted from the suspension of the class rates published in compliance with the supplemental order (34 I.C.C. 472), upon protest of interested parties representing various cities, commercial organizations, and industries in the State of Texas. I. and S. No. 729 resulted from the suspension, upon protest of interested parties, of certain proposed increased class rates from Texas ports to Shreveport. No. 8290 was a complaint of the Louisiana Railroad Commission requesting that the terms of the supplemental order be extended to certain roads in eastern Texas not included as defendants in the previous proceedings. No. 8418 was a further complaint by the Louisiana commission, seeking to have the requirements of the supplemental order extended to all the railroads in Texas.

¹⁷⁸ Note the following, for example: "It is perhaps unnecessary to say that the findings and conclusions of state commissions respecting the reasonableness of intrastate rates should be given great weight, that rates established in accordance with such findings should not lightly be disturbed and that we consider it our duty to cooperate in every proper way with the state authorities." *Ibid.*, at p. 122.

hearing was not had.¹⁷⁹ Despite the fact that there had been ample opportunity for intervention on part of the Texas authorities, the petition for reopening was granted.¹⁸⁰ Only after rehearing, with the participation of the Railroad Commission of Texas, was the controversy finally settled, almost seven full years after the original proceeding was initiated.¹⁸¹ While the earlier order was modified in various details in this elaborate reconsideration of the issues and the evidence, the requirement for removal of undue discrimination against Shreveport resulting from the disparity between the intrastate and interstate rates was continued unchanged and its scope was permitted to remain state-wide.¹⁸² The Commission not only applied a

¹⁷⁹ *Annual Report*, 1916, pp. 86-87.

¹⁸⁰ *Railroad Commission of Louisiana v. A. H. T. Ry. Co.*, 43 I.C.C. 45 (1917). In granting these petitions, without protest from the Louisiana authorities, the Commission said (p. 48): "We are not advised as to the reasons prompting the Railroad Commission of Texas to refrain from participation in these proceedings until after the issuance of our report and order of July 7, 1916. Presumably they were sufficient for that body in the exercise of its discretion, and it is not our province to consider them. There is no provision in the act for compelling any party to intervene in a proceeding before us, and such participation would necessarily have been entirely voluntary." Note, also, the following from the Commission's *Annual Report*, 1916, at p. 87: "The present proceeding has been pending, in its various phases, since March 7, 1911. A number of hearings have been held. Three reports have been issued by this Commission. It has been the subject of two court decisions and has been commented upon at length in our annual reports to the Congress. In short, it may be said that few proceedings have received the publicity given to this."

¹⁸¹ 48 I.C.C. 312 (1918).

¹⁸² It was urged upon the Commission that its order for the removal of undue prejudice be restricted to "the territory that is substantially tributary to Shreveport." In light of the record, the request was denied. "In making our report and order of July 7, 1916," said the Commission, "we were not unmindful of their far-reaching effect. We were then and are now convinced that no attempt on our part to limit the scope of our order to a defined section in the eastern part of Texas would adequately meet the situation and extend to Shreveport the full relief to which that city was entitled. . . . Any attempt on our part to limit or restrict the area in Texas to and from which Shreveport could ship on equal terms with cities in Texas would have had the effect of continuing in part the prejudice against which the complaints were directed, and which we had found to be undue. We were dealing not with isolated instances of rate disparities, but with a complete system of intrastate rates lower, as a rule, than corresponding rates for like distances between Shreveport and Texas points. From the evidence of record we believed that the maintenance by these interstate carriers of the two divergent systems of rates inevitably tended to restrain and interfere with the free movement of interstate commerce between Shreveport and Texas points. The undue prejudice was state-wide and could only be removed by an order of equal scope. The evidence presented on rehearing confirms and strengthens these conclusions. . . . It is our opinion, and we find, that the area in Texas from and to which Shreveport may reasonably expect to ship freight embraces the entire state of Texas. The

sound and legally valid principle,¹⁸³ but manifested, throughout the long history of the proceeding, a patient and meticulous regard for the rights and interests of the state of Texas.

On the whole, the same restrained approach characterized the Commission's performance in the numerous other proceedings, prior to 1920, in which the exercise of its power over intrastate rate situations was invoked. It did not reach out, aggressively and on its own initiative, to invalidate state-made rates;¹⁸⁴ and it asserted its authority, on complaint of interested parties, in terms of the economic issues involved and with due regard to the maintenance of state sovereignty within its appropriate sphere.¹⁸⁵ Brief reference to a few of the more important proceedings will suffice.

shipments shown during the test period indicate a reasonable likelihood of shipments to and from any and every station in the state." *Ibid.*, at pp. 370-371.

¹⁸³ Chairman Hall concluded the Commission's report with the following trenchant declaration: "It seems elementary that under our laws and institutions Shreveport has the right to an equality of opportunity with Texas cities to ship freight on these interstate highways from and to every point within the state of Texas. As stated above, the maintenance of a full line of class and commodity rates from and to every station, village, and city in the state of Texas on a basis generally lower, distance considered, than the corresponding rates to and from Shreveport deprived that city of this fundamental right. There are no transportation conditions justifying higher rates, distance considered, between Shreveport and Texas points than between points in Texas. The only apparent reason for the exclusion of Shreveport from equal opportunities for trading in Texas, thus in effect building a tariff wall about the state, is that Shreveport lies east instead of west of the line between Texas and Louisiana" (p. 371).

¹⁸⁴ Compare the following: "We call to mind once more the fact previously noted, that this Commission has not reached out in a spirit of aggression to lay its hands on situations involving the principles of the *Shreveport Case*. While we have decided over 50 of such cases, and more are being presented to us from time to time, we have dealt with them in the regular line of official duty. In all instances the complaints were filed by sovereign states, municipalities, public administrative authorities, private associations of business men, corporations, and individuals, parties who had a legal right to do so. We handle and dispose of these cases in the same manner as all other cases, in accordance with law and in obedience to our official oath. Were we to look about for opportunities to apply the principles of the *Shreveport Case*, we could find them in every part of the United States, and we have been requested in several instances to institute investigations upon our own initiative with a view to removing unjust discriminations in such cases just as we have proceeded in scores of other instances on our own initiative to apply remedies which the law provides." *Annual Report, 1916*, p. 89.

¹⁸⁵ The spirit of the Commission's performance is likewise evidenced by the following declarations: "Generally speaking, such situations represent rate questions and economic problems rather than legal controversies and constitutional issues. While we are fully sensible of the vital principles of constitutional and statutory law which are inherent in certain aspects of such situations, we believe that every such case can, as a practical matter, be disposed of without challenge of these principles of government. In

The Commission found, for example, that intrastate rates on grain and grain products from interior Missouri points to St. Louis effected an unjust discrimination against interstate traffic and ordered the carriers serving St. Louis from the west to cease and desist from such discrimination; but it declined to consider the local rates as part of the through rates and thus to render them entirely inoperative.¹⁸⁶ Again, while the Commission found intrastate live stock rates in the same general territory to be discriminatory against interstate commerce, it ordered the removal of the prejudice only after prescribing just and reasonable interstate rates.¹⁸⁷ Moreover, in prescribing interstate rates, the Commission, except in clear cases, showed a reluctance to exercise its authority in such a way as to create discriminatory situations necessitating control of intrastate rates under the *Shreveport* principle.¹⁸⁸ Only where the existence of such discrimination

fact, controversies over constitutional limitations of powers and statutory grounds of authority tend to obscure the real elements of the rate problems presented and in which the public is primarily interested in these cases. The vital question is, What is the nature of the problem, and through what agencies and by what methods can that problem best be solved in the interest of the whole public?" *Ibid.*, pp. 89-90.

¹⁸⁶ *Merchants Exchange of St. Louis v. B. & O. R. R. Co.*, 34 I.C.C. 341 (1915). "So long as there are intrastate rates published to St. Louis shippers can not be denied the right to avail themselves of these rates for movements which are clearly intrastate, and so long as there are flat rates published out of St. Louis, shippers must be permitted, if they have in the meantime in good faith taken possession, to ship outbound under these rates irrespective of the rates paid inbound" (p. 351).

¹⁸⁷ *Dimmitt-Caudle-Smith Live Stock Commission Co. v. R. R. Co.*, 47 I.C.C. 287 (1917). "Considering all the evidence . . . we are of the opinion that the present interstate rates from Missouri points to East St. Louis do not furnish the proper standard of reasonable rates for the future, nor the proper measure by which to remove the undue prejudice and disadvantage against East St. Louis in favor of St. Louis which is inherent in the present adjustment" (p. 313).

¹⁸⁸ In *Interstate Class and Commodity Rates in Louisiana*, 33 I.C.C. 626 (1915), the carriers sought to cancel certain state basing rates applicable to interstate traffic and to substitute a higher scale of class rates. The Commission refused to sanction the increases. "If we allow them to become effective, while lower rates apply on state traffic from New Orleans, unjust discrimination must result" (p. 631). The Commission was urged to enter an order like that in the *Shreveport* case if undue prejudice to interstate commerce did in fact result from the lower intrastate rates, but in its view the evidence of record did not justify a disturbance of the *status quo*. Compare, however, *Danville, Va., Class and Commodity Rates*, 38 I.C.C. 742 (1916). The proposed increases in interstate class rates between Danville, Virginia, and points in North Carolina were found to be justified. Danville was primarily interested in the rate relationships, and urged that the discrimination that would result from the lower intrastate rates precluded the Commission's approval of the proposed interstate rates. The carrier, on the other hand, contended that the reasonableness of the interstate rates in question was the only issue. In disposing of these conflicting views, the Commission

was unquestionably supported by the record, did the Commission, as in previous instances, after establishing interstate rates on a reasonable basis, order the removal of undue preference and prejudice, as measured by the new standard, in conformity with its characteristic approach. Its findings were grounded in the realities of transportation conditions and rate relationships, after careful consideration of all the complexities contributing to the maladjustment, without undue interference with the intrastate rate structure as such;¹⁸⁹ but the

said (p. 745): "When investigating the propriety of proposed increased rates under a suspension order we are not limited to a consideration of their reasonableness, but may also consider their relation to other rates and what their consequence may be, and to what extent they may involve discriminations and preferences that are unlawful. . . . But to withhold our approval of rates found to be reasonable and in harmony with the general interstate adjustment in this territory, solely on the ground that when they become effective Danville will be at a disadvantage, compared with jobbing points in North Carolina, because of the lower state rates enjoyed by the latter points, would not only be in disregard of the principles of the *Shreveport Case*, *supra*, but would put both the carriers and this Commission under the control of the state authorities in many cases involving interstate rates." It was pointed out that the difference between the state and interstate rates was not great, but that in the event that undue discrimination resulted from the rate relationship it was the lawful right of the Danville shippers to bring the matter before the Commission for adjudication and correction.

¹⁸⁹ See *Missouri River-Nebraska Cases*, 40 I.C.C. 201 (1916). This proceeding embraced complaints by the commercial clubs of Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Missouri, and Atchison, Kansas, all of which attacked the class rates from the above-named cities to all points in Nebraska as unreasonable and unjustly discriminatory. The allegation of unjust discrimination was based upon a comparison of the interstate rates with the intrastate rates established by the Nebraska commission in 1914. As a result of the order of that commission, which reduced the intrastate rates by approximately 20 per cent, a long-standing relationship of rates between the principal distributing centers on the Missouri River and in interior Nebraska and all other points within the state of Nebraska was disturbed; in addition, the Nebraska classification for intrastate traffic contained ratings which were lower than the western classification applicable to interstate commerce, likewise resulting in discrimination against interstate localities. The defendant railroads, which included practically all the carriers operating lines in Nebraska, denied that the interstate rates under attack were unreasonable, and averred that the intrastate rates were made effective under protest and that any unjust discrimination found to exist was the result of the action of the state commission. There was ample evidence in support of the conclusion that the disparities between the two rate structures were unduly prejudicial to interstate commerce. The Commission conceded that the order which reduced intrastate rates in 1914 had been made after an exhaustive investigation, and that there had been an earnest endeavor to do justice to all concerned. None the less, in light both of traditional relationships and prevailing conditions, the intrastate rates were found to be too low for application to the interstate commerce of the complainant cities or as a measure for correcting the unjust discriminations which were disclosed. The Commission was not free to abdicate its powers of control over interstate commerce in favor of state authority. It was contended by the Nebraska commission that the doctrine of the *Shreveport case* could only be applied in instances where the intrastate rates were

maintenance of its exclusive control over rate relations of this character, and of its supreme and plenary power over interstate commerce, necessitated the assertion of its authority to remove undue discrimination where the maladjustment sprang from increases in interstate rates as well as from decreases in intrastate rates.¹⁰⁰

In one proceeding the Commission's order affecting intrastate rates was held inoperative for want of definiteness,¹⁰¹ but in general it pursued a consistent policy of restricting its findings and relief to such specific points and precise zones as clearly fell within the sphere of the discriminatory adjustments disclosed by the record.¹⁰² Nor

found to be confiscatory. This claim, obviously, was ill-founded—both in law and practice. The Commission has no authority to determine whether state-made rates are confiscatory; and there is no basis for making the assertion of a legitimate power contingent upon an *ultra vires* finding. "The position is wholly indefensible that this Commission must inquire into an issue as to which it has no jurisdiction for the purpose of determining a question as to which its jurisdiction is not only complete, but exclusive" (p. 254). Accordingly, the Commission prescribed maximum class rates from the five Missouri River cities to Nebraska destinations on a distance basis; and in characteristic language the carriers were ordered to cease and desist from the undue preferences and unreasonable prejudices to exist in the prevailing relation of class rates and of classification ratings.

¹⁰⁰ *Business Men's League of St. Louis v. A., T. & S. F. Ry. Co.*, 41 I.C.C. 13 (1916), 41 I.C.C. 503 (1916), 44 I.C.C. 308 (1917). The complainants alleged that the passenger fares and freight rates between St. Louis, Missouri, and points in Illinois were unreasonable and unjustly discriminatory. The disparity in charges, upon which the complainants' attack was primarily centered, was brought about by an increase in interstate rates and fares. Prior to the increase of interstate passenger fares by one-half cent per mile and of interstate freight rates by 5 per cent, pursuant to *Five Per Cent Case*, 31 I.C.C. 351 (1914), the charges between St. Louis and Illinois points and between East St. Louis and such Illinois points were substantially the same. The failure of the State of Illinois to permit corresponding increases in rates and fares resulted in the disparity which was alleged to constitute unjust discrimination. It was urged, in connection with the Commission's consideration of the freight rate adjustments (44 I.C.C. 308, 336-337), that this proceeding differed in principle from the *Shreveport* case, inasmuch as the discrimination had been effected by the carriers themselves, through an increase of interstate rates. The Commission found this difference to be of no controlling consequence. The carriers had been authorized to make the increases, and no evidence was presented to show the existing rates to be unreasonable. In case of both the passenger fares and freight rates, therefore, the Commission ordered the prejudice to be removed. Any other disposition of the issue would have involved a relinquishment of its unquestioned authority.

¹⁰¹ In *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U.S. 493 (1918), the Commission's order as to passenger rates in the above proceeding (41 I.C.C. 13) was held invalid because of uncertainty. The points in Illinois affected by the order were not specifically mentioned; the carriers assumed that there had been a finding of discrimination with regard to all intrastate passenger fares and proceeded to make state-wide adjustments. See note 104, *supra*.

¹⁰² See *Traffic Bureau v. American Express Co.*, 39 I.C.C. 703 (1916); and *Ameri-*

did the Commission assert its prerogatives in all instances in which the intrastate rates were shown to be lower than the corresponding interstate rates. Its authority was exercised only where the intrastate rates necessarily operated to prefer state localities or shippers unduly, and thus interfered with the application of interstate rates sanctioned or prescribed by the Commission. Where the traffic was essentially

can Express Co. v. Caldwell, 244 U.S. 617 (1917). In this proceeding, in which the Commission's order was upheld by the Supreme Court, Sioux City, Iowa, located near the South Dakota line and an important jobbing center in that region, complained to the Commission that the express rates from that city to points in South Dakota were unreasonable and unjustly prejudicial. The allegation of unjust discrimination was based on the fact that the intrastate express rates applicable to traffic moving from the important competing South Dakota jobbing cities of Sioux Falls, Mitchell, Aberdeen, Watertown, and Yankton to points in South Dakota were materially lower than the interstate express rates applicable to transportation between Sioux City and the same points. The carriers admitted that discrimination existed, but disclaimed responsibility for its creation, since the intrastate rates were operative under order of the South Dakota commission, and insisted that it be removed by making the existing interstate rates applicable to intrastate traffic. It appeared, from the record, that shipments by express from Sioux City to South Dakota points bore a substantially heavier burden than shipments of like character and for the same distances within South Dakota. The Commission found that the allegations of the complainants had been established; and since the interstate rates were found not to be unreasonable, the defendant carriers were ordered to remove the undue prejudice against Sioux City. In formulating its conclusions, the Commission indicated some of the more important items of policy by which it was guided. *First*, the matter of intention of the state authorities in fixing the intrastate rates at the prevailing level was held not to be controlling; the actual rate relations, whatever their effective cause, were deemed to be the important consideration. "The matter of intention may be of importance under some circumstances in an issue of this character, but it can not be controlling. We have before us the relation of express rates as they now exist and it is our duty to determine whether this relation effects such discrimination as the act condemns. If such discrimination is shown it is none the less our duty to require its removal, although the cause of the unlawful relation may have had its origin in motives which are above criticism. On the other hand, if such discrimination is not shown an order based upon a finding of wrongful intention would find no warrant in law" (p. 721). *Second*, the findings were applied to the intrastate rates complained of, and not to the entire intrastate rate structure. "Although a finding that the intrastate rates are too low for application from Sioux City may, in inference, imply a similar judgment with regard to the intrastate schedule as a whole, or may, in consequence, result in the readjustment of those schedules, the fact remains that the intrastate rates as a whole are not directly involved in this case. . . . We shall limit our findings to the allegations of unreasonableness and unjust discrimination found in the complaint" (p. 722). *Third*, the Commission would not be bound by a judicial finding that the intrastate rates are not confiscatory, nor was it compelled to await the determination of that issue. "If it should be held in that case [equity suit pending in the District Court] that the intrastate express rates are not confiscatory, it would still be the duty of this Commission, for which it has full power, to require the removal of an unjust discrimination against interstate commerce. . . . Circumstances may undoubtedly arise which would make it proper for this Commission to withhold its order, but it is clearly under no requirement to do so,

interstate in character and yet the carriers applied the lower intrastate rates to the portion of the movement taking place within the state of origin, instead of applying the through interstate rates to such through traffic, the Commission would make no order requiring changes in the intrastate rates.¹⁰⁸ Under such circumstances the unjust discrimination subject to attack resulted, not from a disparity

for through the delays of litigation such a requirement would make it possible to maintain and perhaps indefinitely prolong a discrimination which unjustly restricted the free movement of commerce between the states. . . . There is no suggestion that the record is incomplete or that further evidence would be of value in determining the issues before us. The complainant has shown that unjust discrimination exists for which it is entitled to relief. We think, therefore, that an order should be entered without further delay" (pp. 722-723). *Fourth*, where the interstate rates are found to be reasonable, the prejudice must necessarily be removed by raising the unduly low intrastate rates. "We are here under no doubt as to how the unjust discrimination found to exist should be corrected, for the record conclusively shows that the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points, while there is no proof that the rates which this Commission has approved are unreasonable, nor has a basis been laid for a modification of our order" (p. 723).

¹⁰⁸ In *Iowa-Dakota Grain Co. v. I. C. R. R. Co.*, 40 I.C.C. 73 (1916), the complainants alleged that the rates charged by the defendant carriers for the transportation of corn from interior Iowa points to Council Bluffs, Iowa, on interstate traffic, were unreasonable to the extent that they exceeded the rates contemporaneously applicable to like intrastate traffic, and that they unduly prejudiced the complainants to the advantage of dealers having elevators at Council Bluffs, who paid the lower intrastate inbound rates, unloaded at the elevators, and reshipped to the final interstate destinations at proportional rates. Whether this discrimination was unjust depended upon the propriety of applying intrastate rates for the movement from point of origin to Council Bluffs. It was shown that these grain movements were through interstate movements, that the interstate rates were not unreasonable, and that the alleged discrimination was due entirely to the failure of the carriers to collect the legal interstate rates on shipments of corn stored in transit at Council Bluffs. "It is clear," said the Commission, "that unjust discrimination would never have been alleged if the carriers had always observed the legal rates for the interstate movement. The same charges would have applied on all shipments whether stored temporarily in elevators at Council Bluffs or reconsigned in the original cars" (p. 76). The complaint was dismissed because the rates themselves were neither unreasonable nor unjustly discriminatory. A similar situation was presented to the Commission in *Memphis Merchants Exchange v. I. C. R. R. Co.*, 43 I.C.C. 378 (1917), where grain dealers at Memphis, Tenn., Henderson, Ky., and Evansville, Ind., alleged that the defendant carriers maintained rates to and through Cairo, Ill., which discriminated against them on shipments of grain from Illinois points to southern and southeastern territories. Grain was shipped from points of origin in Illinois to Cairo at the lower intrastate rates and then reshipped to points of consumption at the rates applicable from Cairo, to the disadvantage, on the through movement, of the complaining localities. The carriers urged that if unjust discrimination was found to exist it be removed by an order permitting them to increase their intrastate rates to Cairo to the level of the interstate rates to that point. There was no doubt as to the advantage accruing to Cairo, but its cause was held not to justify such a remedy. Practically all of the grain moving into Cairo was

between intrastate and interstate rates, but from the failure of the carriers to observe the legally published tariffs, permitting shippers to avoid the payment of lawful charges applicable to interstate traffic. Finally, there was always insistence that complainants alleging unjust discrimination assume the burden of proof, and orders were withheld where the rate differences were comparatively slight and the evidence of discrimination inconclusive.¹⁹⁴

reshipped to southern or southeastern destinations, raising the question as to whether any part of the movement could properly be treated as intrastate. "The question as to whether a shipment is inter or intra state 'must be determined by the essential character of the commerce,' which is governed by the intent of the parties controlling the movement of the traffic; and this must be ascertained from all of the pertinent facts, circumstances, and conditions, and 'not by mere billing or forms of contract'" (p. 388). Applying this test, the conclusion was reached that the movement of grain through Cairo must be considered wholly transportation in interstate commerce, and that the carriers were under legal obligation to apply interstate rates, both inbound and outbound. "In utter disregard of the plain provisions of their tariffs," said the Commission, "these defendants, so this record shows, have been applying to interstate shipments state rates applicable to a part of the through movement, which rates are not on file with this Commission. . . . In this situation no order is deemed necessary or appropriate at this time, in view of the penal provisions of the statute. These defendants are under legal obligation to apply interstate rates on shipments moving interstate via Cairo as well as via Memphis and the Ohio River crossings. When the lawful rates through Cairo are imposed the discrimination complained of will no longer exist" (pp. 390, 391).

¹⁹⁴ In *La Crosse Shippers' Assn. v. C. & N. W. Ry. Co.*, 38 I.C.C. 453 (1916), the complainants alleged that La Crosse, Wisconsin, located across the Mississippi River from Minnesota, was being unjustly discriminated against because of the existing rate adjustment in southern Minnesota. The allegation was predicated upon the fact that the Minnesota intrastate rates were lower per mile than the rates from La Crosse into Minnesota, although there was no uniformity in the relationship. The evidence purporting to show that La Crosse was unduly prejudiced was fragmentary, indefinite, and on the whole unsatisfactory and inconclusive. In holding the record insufficient for a finding of unjust discrimination, the Commission said (pp. 462-463): "The instances of discrimination to which our attention has been called have generally involved comparatively slight differences in rates or have been complained of chiefly in connection with points to which the movement of traffic can not be of great volume; but we are not to be understood from this as holding that unjust discrimination, because affecting unimportant shipping centers or a small volume of traffic, has been a determinative factor in reaching our conclusion. What we do mean is that apart from the fact that the degree of discrimination shown is not great, the evidence of record is of such a character as to make it impossible for us to determine in any particular instance that the situation with respect to which complaint was made was not due to circumstances quite outside the complaint. . . . The prohibition of the statute against discrimination which is unjust confers the right to exercise a reasonable judgment as to whether such discrimination is within the inhibitory clause; and we should not lightly, nor upon grounds which do not seem convincing, find that rate differences which may be capable of explanation or defense upon a complete record are tantamount to undue

Prior to 1920, then, the Commission's activity in this sphere was restricted in scope and restrained in performance. There was no affirmative effort, through assertion of authority over intrastate rates, either to effect any far-reaching unification of the rate structure or to increase the revenues of the carriers. The Commission remained in the background, providing relief only where discriminatory situations were shown, upon complaint of public or private interests, to hamper unduly the free movement of interstate commerce. The proceedings involved the relationships between specific intrastate and interstate rates, rather than the general level of charges applicable to through and local business. The alleged maladjustments always took the form of unjust discrimination against particular persons, places, or descriptions of traffic. The heart of the matter consisted in the existence of disparities between the intrastate and interstate rates applicable to the transportation of the same commodities by the same carriers under substantially similar circumstances and conditions, the intrastate charges being materially lower than the interstate rates. In such situations both classes of rates might well be within the zone of reasonableness when considered in and of themselves, though this was not always the case, yet the difference between them would create unwarranted preferences and prejudices as between intrastate and interstate commerce. This followed whether or not the motives actuating the state adjustments were narrow, selfish, deliberately restrictive. Even where the state authorities were genuinely bent upon the maintenance of a just and equitable intrastate rate structure, but without regard to the measure of charges established under federal jurisdiction, discriminatory situations were often created which the Commission, under its legislative mandate, was bound to remove. The record of performance in these circumstances warrants the conclusion that the Commission's findings of unjust discrimination were invariably based upon definite and convincing data. While the holding, in many instances, rested upon typical evidence, rate comparisons being made on a relatively small number of commodities or possible

discrimination, especially where such finding would result in what may be an unnecessary disruption of a rate fabric established for intrastate traffic." The record was kept open to afford opportunity for the complainants to file a supplementary petition for trial of the issue of unjust discrimination.

points of destination, the controlling situations were well chosen and provided ample support for the conclusions reached. Rate disparities were not accepted as evidence of unjust discrimination unless the actual movement of goods under these rates had operated to the disadvantage of the complaining parties; and even then relief was granted, in the form of interference with the intrastate rates, only where there was no question as to the propriety of applying these lower intrastate rates to the traffic under consideration. The orders issued by the Commission pursuant to its findings required the removal of the undue prejudice shown to exist, but they did not stipulate the exact manner in which this should be accomplished. If the reasonableness of the interstate rates was questioned, and the contention sustained that they were excessive, maximum interstate rates were prescribed, which also served as a new basis for measuring the disparities alleged to effect unjust discrimination. Since the Commission was without authority to prescribe specific or minimum interstate rates, its orders could have been complied with lawfully by reductions in interstate rates to the level of the intrastate charges. In that event the intrastate rates would have prevailed as to the entire adjustment. In actual practice, however, it was to the interest of the carriers to increase the intrastate rates at issue to the level of the interstate charges. Not only were revenues enhanced thereby, but disturbance of the interstate rate structure was avoided. With very rare exceptions,¹⁰⁵ the Commission's investigations and findings were carefully restricted to the scope of the complaints and to the areas in which discriminatory situations were actually disclosed. Where, as in the *Shreveport* proceeding, the Commission's order was finally made to embrace the entire state, it was only after the record had clearly established the existence of state-wide maladjustment. Once the Commission's power in this sphere was accorded judicial recognition, there was little challenge of its exercise of authority on jurisdictional grounds. Matters of law and government were subordinated to the vital realities of rate relationships and their economic effects. The controversies were adjusted in terms of the acknowledged de-

¹⁰⁵ See *Business Men's League of St. Louis v. A., T. & S. F. Ry. Co.*, 41 I.C.C. 13 (1916), 44 I.C.C. 308 (1917).

mands of sound public policy, but not without recognition of the rights and interests of the states. Despite the complete absence of any legal basis for coöperative activity, the Commission looked to the state authorities for assistance and sought to encourage their cooperation. The voluntary intervention of the state commissions, in most instances, served to enrich the record and to clarify the issues—and the service rendered by them was no less helpful because they were usually parties in interest. All of these characteristics of the Commission's performance evidence the spirit of restraint, not incompatible with fruitful accomplishment, which marked the earlier stages of federal incursion into the domain of intrastate rates and charges.¹⁹⁶

The character of the Commission's present practice, which involves a much more thoroughgoing and complete control of intrastate adjustments, is grounded, as we have seen, in the provisions of the Transportation Act. This legislation was not merely declaratory of the *Shreveport* principle. Not only was unjust discrimination against persons and places in interstate commerce expressly made unlawful, but the prohibition was extended to "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Furthermore, provision was made for a mode of relief involving the direct exercise of rate-making authority by the Commission. While it was clothed with no power to initiate intrastate rates as such, it was directed, upon a finding of unjust discrimination, to prescribe the rates, fares, or charges, either as maxima or minima or both, as well as the classifications, regulations, or practices, thereafter to be imposed or observed, in such manner as will remove the discrimination. These provisions, as judicially construed,¹⁹⁷ have served as a tremendous reservoir of power over intrastate rate situations. A legal basis was established for joint hearings with the state authorities and for eliciting their assistance and coöperation, but actual power was vested ex-

¹⁹⁶ For the exercise of the Commission's powers in this sphere during the period of Federal Control, see *Solway Process Co. v. D., L. & W. R. R. Co.*, 55 I.C.C. 280 (1919); *Swift & Co. v. Director General*, 55 I.C.C. 324 (1919); *Boldt Paper Mills v. Director General*, 55 I.C.C. 331 (1919); *National Fireproofing Co. v. Director General*, 55 I.C.C. 485 (1919); *New York Commission of Highways v. Director General*, 55 I.C.C. 619 (1919). See, also, Part I, chap. iv, notes 39 and 40.

¹⁹⁷ See pp. 239-246, *supra*.

clusively in the Commission; and this power was initially exercised in strikingly sweeping fashion.

The chief impetus to this far-reaching assertion of authority emerged from the Commission's administration of the new rule of rate-making, whereby it has sought so to regulate the general level of transportation charges as to produce a fair return to the carriers and provide an adequate basis for the maintenance and development of railroad service. This affirmative policy, as has appeared, necessitated the granting of large rate increases soon after the termination of Federal Control and the return of the roads to private management.¹⁹⁸ Because about one-half of the states failed to sanction increases in intrastate rates and charges corresponding to those authorized and applied in interstate commerce,¹⁹⁹ a long series of proceedings was instituted by the Commission, upon petition of the carriers for relief.²⁰⁰ Essentially, the curtailment of revenue resulting from the disparity between the intrastate and interstate rate levels constituted the burden of all the complaints and the controlling basis of the Commission's findings of unjust discrimination. A new principle of determination was introduced; the scope of control was broadened; the relief assumed the form of a precise remedy. A survey of a few of the more important of these proceedings, in which, predominantly on financial grounds, the Commission ordered the entire intrastate rate structure to be raised to the level established for interstate commerce, will disclose the crucial issues involved, the Commission's reaction thereto, and the significance of its determinations.

The facts disclosed in the *New York* case,²⁰¹ the first of these proceedings decided by the Commission, were typical, as to fundamentals, of those prevailing in all of the controversies; and the Commission's decision in that case reflected the basic reasoning and established the guiding principles for its findings and orders in all of the subsequent proceedings. Upon the Commission's authorization of

¹⁹⁸ *Increased Rates*, 1920, 58 I.C.C. 220. See note 105, *supra*.

¹⁹⁹ See note 106, *supra*.

²⁰⁰ See *Annual Reports*: 1920, pp. 41-42; 1921, pp. 32-34; 1922, pp. 43-44; 1923, pp. 34-35; 1924, p. 33; 1925, p. 37; 1926, p. 36; 1927, pp. 74-75; 1928, pp. 71-72; 1929, pp. 76-77; 1930, pp. 71-72.

²⁰¹ *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I.C.C. 290 (1920), 64 I.C.C. 55 (1921).

general rate increases, the New York steam railroads made formal application to the state public service commission for permission to file intrastate rates corresponding to those authorized on interstate traffic. The state commission granted the increases in general freight rates, but denied the application as to rates on milk and cream, passenger fares, baggage charges, and the Pullman surcharge. The New York Central and other carriers then petitioned the Commission for relief. After investigation and hearing, the Commission found that the rates and charges maintained under state authority were lower than the corresponding interstate rates and charges, that they were unduly prejudicial to interstate passengers and shippers and unduly preferential of intrastate shippers and passengers, and that they were unjustly discriminatory against interstate commerce; and this discrimination was ordered removed through increases in intrastate rates and charges corresponding to the level established by the Commission for interstate traffic.

The controlling issue was as to whether the Commission's authority, even under the new legislation, provided a legal basis for such findings of discrimination and for so sweeping an order. In supporting its assertion of jurisdiction in this manner, the Commission relied upon a course of reasoning which, in its essentials, was subsequently sustained by the Supreme Court.²⁰² The starting-point was the principle, impregnably established by judicial decision, that the Commission possesses power of control over intrastate rates in so far as the exercise of such power is incidental to the effective regulation of interstate commerce. This authority, recognized under the original Act, was transformed by the new legislation into an express mandate to regulate intrastate rates which are unjustly discriminatory against interstate commerce. Nor does prejudice against particular persons or places constitute the sole ground for findings of unjust discrimination and for the exercise of this authority. The basis of the Commission's jurisdiction in such situations lies in its regulatory authority over interstate commerce, and the explicit language of the enactment is broad enough to embrace discrimination against inter-

²⁰² *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922); *New York v. U.S.*, 257 U.S. 591 (1922). See, also, pp. 241-246, *supra*.

state commerce of any definition or description. The crux of the problem is whether the intrastate rates injuriously affect interstate commerce. There may, of course, be degrees of discrimination, "but in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a state should be involved."²⁰⁸ There was considerable evidence of discrimination against particular persons and places. For example: interstate passengers paid 3.6 cents per mile while intrastate passengers paid 3 cents per mile, although both types of passengers often rode on the same trains and in the same coaches; and shippers of milk and cream to New York City by intrastate routes paid 20 per cent less for the service rendered than shippers utilizing interstate routes under substantially similar circumstances. But the controlling factor in the Commission's findings was the burden imposed upon interstate commerce as a whole because of the disparity in rates. In order that an adequate transportation system may be maintained, it is necessary that rates be so fixed as to permit the carriers to earn a fair return upon the fair value of their property; to this end Congress enacted the rule of rate-making and imposed the responsibility for its execution upon the Commission. As a result of the disparity between the intrastate and interstate rate levels, the state necessarily failed to contribute its proper share towards the fair return of the carriers, shifting the burden of producing and maintaining adequate revenues to interstate commerce, and the Commission was thereby hampered in the effective exercise of the duty imposed upon it. It is true that jurisdiction over intrastate rates as such was not taken from the states and reposed in the Commission. "But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on

²⁰⁸ *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I.C.C. 290 (1920), at p. 292.

the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue.²⁰⁴ The record showed that the refusal to increase state rates to the level prescribed by the Commission was costing the carriers affected thereby between \$11,000,000 and \$12,000,000 per year. "To that extent," said the Commission, "the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York."²⁰⁵ The interstate rates were found not to be unreasonable, and the conditions surrounding the two types of transportation were found to be substantially similar. Accordingly, the Commission concluded that the lower level of intrastate rates and charges effected undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. No effort was made to consider or investigate individual rates and fares in any detail; the matter was regarded as an urgent and immediate practical problem, the needs of the carriers being such as to require prompt increases in revenue if adequate transportation service was to be provided.

The nature of the findings molded the form of the order. The carriers were directed to increase their intrastate rates and charges to the level applicable on corresponding interstate traffic. Since the financial effects of the disparity in rates was the basic ground for intervention, there being no specific findings of discrimination in terms of special territory or definite points, the order was made to apply to the entire intrastate rate structure, without restricting the readjustment, as in earlier proceedings, to particular localities or defined areas. Not only were all rates embraced by the order, but the interstate rate level was expressly prescribed as the precise measure of the intrastate rates. Only in one respect was the mandatory and sweeping character of the order relaxed—and that by way of reservation for future readjustment by the Commission itself. Because of the possibility that some rates were included which might not be within the "proper class or reason" of the order, a saving clause was attached thereto, which extended to the state authorities and to the shipping public the privilege of applying to the Commission for a modification of the order, on the ground that particular rates and

²⁰⁴ *Ibid.*, p. 294.

²⁰⁵ *Ibid.*

fares are not so related to the interstate charges as to constitute discrimination in contravention of the Act.²⁰⁶

All of the subsequent proceedings growing out of the 1920 rate increases were decided in general conformity with this approach. The effect of the disparity in rates upon the revenues of the carriers served as the controlling consideration. "If, without good reason," said the Commission, "the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such

²⁰⁶ Commissioner Eastman dissented (pp. 299-304), as he did in all the subsequent proceedings of the same character. His dissent was based upon the conclusion that, even under the new legislation, the Commission was lacking in power to go beyond the principle of the *Shreveport* case—that while discriminations against particular persons and places might lawfully be removed by the Commission, its jurisdiction did not extend to the issuance of an order embracing all intrastate rates, merely on a showing that the disparity in rate levels imposed a "burden" upon interstate commerce. On the question of statutory interpretation, and the scope of jurisdiction resulting therefrom, this position, as we have seen, was held invalid by the Supreme Court. But Commissioner Eastman also directed attention, in suggestive fashion, to the practical consequences of the Commission's policy and procedure, in terms of their unnecessary invasion of the sphere of state authority. "In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15a of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State commissions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view . . . by holding that applications to the state commissions are in substance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion, prescribe the intrastate rates desired even if no such applications had been made. If this be so, it follows that we could practically at will deprive any or all of the states of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they can not thereafter be changed without our consent" (pp. 299-300). In the instant proceeding the carriers filed application with the New York commission, but offered no evidence in support of the application. Although passenger fares were limited by New York law to a maximum of 3 cents per mile, the state commission was clothed with authority to "permit fares in excess of this limit upon a showing that existing fares were insufficient to afford reasonable compensation for the service rendered." The application was denied solely for want of evidence. "There is no basis for a belief," said Commissioner Eastman, "that the New York commission is disposed to deal other than justly with the carriers, or that it would have been unduly exacting if they had undertaken to show insufficiency of compensation. Upon the facts before us and in a spirit of comity the carriers might well be remitted to the state tribunal to exhaust their remedies before coming to us for action which will deprive

commerce. Such a situation will also result . . . in depleting the revenues from interstate commerce by diverting to intrastate channels what otherwise would form part of interstate passenger traffic. Thus, the existence, side by side with interstate fares, of intrastate fares fixed at a lower level constitutes an obstruction to interstate commerce, thereby unduly, unreasonably, and unjustly discriminating against such commerce, in contravention of the act.²⁰⁷ Since the findings of discrimination were thus grounded in the inadequacy of the entire intrastate rate structure, the remedy prescribed, by way of mandatory order, embraced all intrastate rates and charges, and, in practical effect, virtually ousted the states of jurisdiction.²⁰⁸ The Commission's

the state of all authority over intrastate fares so long as our order remains in effect. In this view of the matter whatever losses in revenue the carriers may have suffered are chargeable to their own default" (p. 301).

²⁰⁷ *Intrastate Rates within Illinois*, 59 I.C.C. 350 (1920), at p. 365. See, also, *Wisconsin Passenger Fares*, 59 I.C.C. 391 (1920); *Minnesota Fares and Charges*, 59 I.C.C. 502 (1920). For a discussion of the facts and issues in the *Wisconsin* case, see pp. 241-242, *supra*.

²⁰⁸ In *Arkansas Rates and Fares*, 59 I.C.C. 471 (1920), the state commission challenged the propriety of certain procedural steps taken by the carriers. Increases in intrastate passenger fares and excess-baggage charges had been denied by the state tribunal because of statutory provisions which it was not authorized to waive. Without first seeking to enjoin the operation of the statutes, so that the state commission might decide the issue on the merits, the carriers proceeded directly to petition the Commission for relief. It also appeared that intrastate rates on road-building materials were embraced in the carriers' petition, although no application had been filed with the state commission for increases in such rates, and it had been afforded no opportunity to pass upon the matter subsequent to the Commission's authorization of increases in interstate rates. Despite a reference to "the commendable spirit of cooperation" manifested by the Arkansas commission, immediate jurisdiction was assumed, at least in the matter of passenger fares and excess-baggage charges. "The desirability of concerted action of the state and federal regulatory bodies in all matters of transportation in which the power of both is involved has been given recognition in the interstate commerce act. The action of respondents in bringing the matter before us in advance of the filing of an application with the corporation commission and a determination by it renders difficult the coordinated action contemplated by Congress and deprives us of the benefit of such investigation and findings as the state authorities might have made. However, we are here confronted with practical questions for the solution of which Congress has provided a practical course of procedure by means of which substantial justice is assured. Respondents have elected to pursue that course and we are not vested with appellate power under which they might be remanded to tribunals of the state" (pp. 473-474). That the Commission was not entirely helpless in such a situation is evidenced by its disposition of the issue with regard to intrastate rates on road-building materials. "But," the Commission continued, "we are authorized to avail ourselves of the cooperation, services, records, and facilities of the state in the enforcement of any provision of the act, and we shall reserve for later determination the questions relating to rates on road-building materials" (p. 474).

authority was asserted even over minor items—such as the minimum charge per passenger, the conductor's penalty charge, and the excess-baggage charge—despite their acknowledged insignificance as sources of revenue;²⁰⁹ and rate-making jurisdiction was assumed even over traffic which did not move in interstate commerce.²¹⁰ Any adjustment calculated to burden interstate commerce was conceived by the Com-

²⁰⁹ *South Carolina Fares and Charges*, 60 I.C.C. 290, 296-300 (1921). The Commission's reasoning with regard to the minimum charge is also applicable to the other items: "The law requires us to fix rates, fares, and charges so that the carriers shall, under specified conditions, earn, as nearly as may be, a certain return upon the aggregate value of the railway property held for and used in the service of transportation, and it follows that to the extent that intrastate rates, fares, and charges do not contribute their proportionate share to such return they unjustly discriminate against interstate commerce. While in this instance the intrastate minimum charge apparently has no very substantial effect upon the revenues of any one carrier, yet if the same charge were established throughout the southern group, and if similar discriminations were permitted in other minor rates, fares, and charges, the effect upon revenues might become considerable. It is clear that the question whether the intrastate charge is unjustly discriminatory against interstate commerce does not depend upon the amount of revenue involved" (pp. 297-298). It appears that the Commission was forced to extend itself beyond the position taken in the leading *New York* case, where it had been declared that "in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent." 59 I.C.C., at p. 292.

²¹⁰ *Louisiana Rates, Fares, and Charges*, 60 I.C.C. 467 (1921). Relatively low rates on sugar cane had been established by the Louisiana commission in 1900, and these had been increased only by the 25 per cent ordered by the Director-General of Railroads in 1918. Unit transportation costs on this traffic were unusually high; there was some evidence that the cost of rendering the service was actually in excess of the compensation received. It appeared, however, that there was no interstate movement of sugar cane. The state authorities urged that under these circumstances there could be "no unjust discrimination against this particular traffic as between the rates applicable within the state and any other rates"; the carriers contended that the low basis of rates applicable to this traffic, involving loss of revenue, constituted unjust discrimination. In resolving this clash of opinion, the majority of the Commission upheld the carriers: "It is admitted that there is no discrimination as between intrastate shippers of sugar cane and interstate shippers of the same commodity. There is here no interstate commerce in sugar cane, but it seems manifestly unjust that interstate commerce and interstate shippers should be required to forego the use of needed equipment in order that this particular traffic may be accorded a preference, and that interstate commerce and interstate shippers should be penalized through the medium of necessarily higher interstate rates in order to meet the deficiency in revenue, amply portrayed upon this record, growing out of the preferred treatment of this particular kind of intrastate traffic and this special class of intrastate shippers" (p. 476). This was a holding based entirely upon revenue considerations. The circumstances and issues of the *Shreveport* and analogous cases, and, in part, of the proceedings decided under section 13, could exert no influence; the disparity in rates caused no change in the movement and volume of traffic and effected no discrimination against persons or localities in interstate commerce.

mission as involving a discrimination which it was obligated to remove.²¹¹ Nor did the existence of a considerable body of intrastate rates which were substantially higher than the corresponding interstate rates deter the Commission from finding unjust discrimination against interstate commerce and ordering the carriers to increase the general level of their state rates and charges by the percentages authorized on interstate traffic.²¹² The fact that the carriers were not

²¹¹ The decision in the above proceeding led Commissioner Eastman to elaborate the dissent which he had expressed in the *New York* case. See note 206, *supra*. The acceptance of the carriers' view that "discrimination against," is equivalent to "burden upon," in the sense that any deficiency of revenues caused by lower intrastate rates must necessarily fall upon interstate commerce generally, without reference to any particular class, inevitably means "that we are the final arbiters of the reasonableness of all intrastate rates, thus acquiring through section 13 a jurisdiction from which we are specifically excluded in the opening section of the act." Under such an interpretation it is wholly immaterial that there is no interstate traffic in sugar cane. But he argued for the adoption of a less revolutionary doctrine—that "intrastate rates unjustly discriminate against interstate commerce, within the meaning of section 13, only when an element of competition exists between the intrastate traffic in question and interstate traffic of the same kind and when, by reason of such relationship, the intrastate rates make it more difficult or burdensome to engage in interstate commerce. In other words, there must be some injurious effect upon interstate commerce more direct and tangible than the general and indefinite effect which may conceivably be caused by a deficiency in the revenues of the carriers, and which can ordinarily be transferred to the ultimate consumer" (p. 484). The rates on sugar cane were reserved by the Commission for subsequent consideration; but the same reasoning was deemed applicable to the Commission's finding that the intrastate passenger fares were unjustly discriminatory against interstate commerce in so far as they were lower than the corresponding interstate fares. "It is not convincingly shown that in all or in any great number of instances a relationship exists between the interstate and the intrastate traffic so that the difference in fares injures interstate commerce in a way which is dissociated from the possible effect of a deficiency in the revenues of the carriers. There is no evidence that interstate passengers and localities will be benefited in a direct and immediate way by an increase in many of these intrastate fares" (p. 485).

²¹² *Kansas Rates, Fares, and Charges*, 62 I.C.C. 440 (1921). After an examination of numerous specific instances of higher intrastate rates, the Commission added (p. 448): "Many other instances were shown by the Court of Industrial Relations where the rates are relatively higher intrastate than interstate. . . . As we understand it, these inconsistencies are referred to by the Court of Industrial Relations, not with the idea that we should here correct them, but as reasons why we should not supplant the general increase of 30 per cent in Kansas with one of 35 per cent" (p. 448). A general increase was ordered, however, despite these inconsistencies and their possible effect upon carrier revenues. In connection with rates on cement, the Commission said (p. 450): "If the intrastate rates are increased to the extent sought by the carriers, many intrastate rates will exceed the interstate rates, even between the same points in Kansas. . . . However, in this connection we may call attention to the amended orders in several intrastate cases that have been before us, which provide that no carrier is required to maintain a higher intrastate rate than its corresponding

required to maintain higher intrastate rates than the corresponding rates on interstate commerce was deemed a sufficient safeguard against the disparities prejudicing intrastate commerce, the process of modification, in the interest of intrastate traffic, being in effect reserved to the Commission rather than to the state authorities.²¹⁸

intrastate rate." The disparities shown to exist were merely reserved for future consideration, under the usual saving clause, and in cooperation with the state authorities. For the application of the Commission's findings and order to certain situations disclosed upon further hearing, see 64 I.C.C. 679 (1921).

²¹⁸In this proceeding Commissioner Campbell and Commissioner Lewis added their dissent to that of Commissioner Eastman. It is interesting to note that they became members of the Commission on May 5, 1921, after most of the intrastate rate proceedings growing out of *Increased Rates, 1920*, had been decided. Commissioner Campbell, in conformity with the views of Commissioner Eastman, dissented primarily as a matter of law. He did call attention, however, to the fact that the Kansas authorities had given consideration to revenue needs when they denied the full increases authorized on interstate traffic, and to the fact that the intrastate rates between many points were relatively higher than the interstate rates. "Notwithstanding this showing of the existence of apparent discrimination between state and interstate rates, the majority in effect perpetuates this discrimination instead of ordering its removal and thereby takes away from the state authorities the right to remove discrimination which may have existed and which will hereafter continue to exist" (p. 460). Commissioner Lewis, dissenting in part, approved of the doctrine that the Commission can exercise authority to set aside state-made rates which do not contribute a fair share of the revenue necessary to maintain an adequate transportation system, but he expressed the view that the doctrine of federal authority had been carried "to unjustified extremes" in the instant proceeding. With regard to the Commission's action in increasing the intrastate passenger fares to the interstate level he took no exception—because there was in fact discrimination against persons and places and undue depletion of carrier revenues. His attack was upon the order for a general increase in freight rates, in light of the existence of a great body of intrastate rates which were higher than the interstate rates. The two types of service being performed under substantially similar circumstances and conditions, there was no basis for the general conclusion that interstate shippers were being prejudiced, or that the free movement of interstate commerce was being impeded or burdened. "It is my opinion that the Commission goes too far when, encountering such a situation, it sweepingly condemns practically the entire state rate structure and issues an order, the effect of which is to set aside or cripple state authority that, except in the case of certain rates which can be isolated and dealt with separately, does not appear to have been exercised in a manner unfair to the railroads, or—except in such instances—has not failed to cover its part of the maintenance, operation, and success of the national or group transportation system" (p. 462). Rate readjustments in the case of a few specific commodities, coupled with the increases in other charges that had been properly authorized, could have made up the estimated depletion of carrier revenues, without any general order affecting freight rates. The emphasis was rightly placed upon the effect of the Commission's policy on the status of state authority. "The most unfortunate effect of such sweeping condemnation of all state rates is the prostration of state authority. The effect is to create a situation in which local facilities for readjusting state rates to the level of interstate rates are seriously disturbed, if not destroyed. On the other hand, the federal commission does not set itself to the work of making corrections. It contents itself by de-

Valuations of carrier property within the state were not permitted to govern,²¹⁴ nor did a claim of carrier inefficiency preclude the Commission from raising the intrastate rates.²¹⁵

In many instances, particularly in the states of Illinois,²¹⁶ Indiana,²¹⁷ Nebraska,²¹⁸ and Texas,²¹⁹ the Commission's original pro-

claiming that its order is not to be construed as requiring the carriers to maintain intrastate rates in excess of corresponding interstate rates, leaving to whoever may be interested the task of determining the comparative levels and instituting such action as may be necessary to remove discrimination against state traffic" (pp. 462-463).

²¹⁴ In *Nebraska Rates, Fares, and Charges*, 60 I.C.C. 305 (1921), for example, the computations of the Nebraska commission showed that the increases which it allowed would yield a return of approximately 6 per cent on \$331,846,206, which it estimated to be the value of the carriers' property in that state used for both intrastate and interstate commerce. This procedure, which amounted to the creation of a rate group embracing the State of Nebraska, was properly rejected by the Commission. The issue had been disposed of in *Intrastate Rates within Illinois*, 59 I.C.C. 350 (1920), where the Commission had said (p. 364): "We were directed to prescribe rates so that in the aggregate they would yield a certain return, as nearly as may be, upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." We understand the interstate commerce act to require us to determine upon a valuation for the total property of the carriers and not for the property that might by some necessarily arbitrary method or formula be assigned to interstate traffic. . . ." In the instant proceeding, after pointing out that value determinations and rate reasonableness are matters of informed judgment and not subject to mathematical precision, the Commission added (p. 313): "Differences in judgment as among the several state commissions, if each could and would create a rate group of its own, would obviously nullify the fundamental purposes of the transportation act." See, also, *Intrastate Rates within the State of Texas*, 60 I.C.C. 421 (1921); *Florida Rates, Fares, and Charges*, 60 I.C.C. 551 (1921); *Nevada Rates, Fares, and Charges*, 60 I.C.C. 623 (1921).

²¹⁵ In *Arizona Rates, Fares, and Charges*, 61 I.C.C. 572, 582-583 (1921), the provision of section 15a concerning "honest, efficient and economical management" was invoked in order to preclude the Commission from raising intrastate rates above the level prescribed by the state authorities. Because the claim of inefficiency, in the view of the Commission, was not founded upon sufficient evidence, it was given no weight in the final determination of the issue.

²¹⁶ *Intrastate Rates within Illinois*, 59 I.C.C. 350 (1920), 60 I.C.C. 92 (1921), 66 I.C.C. 350 (1922), 77 I.C.C. 173 (1923), 102 I.C.C. 232 (1925), 102 I.C.C. 479 (1925), 146 I.C.C. 127 (1928). See, also, *Intrastate Fares of the C., N. S. & M. R. R.*, 62 I.C.C. 188 (1921); *Rates on Grain, Grain Products, and Hay*, 69 I.C.C. 562 (1922).

²¹⁷ *Indiana Rates, Fares, and Charges*, 60 I.C.C. 337 (1921), 62 I.C.C. 648 (1921), 64 I.C.C. 645 (1921), 92 I.C.C. 487 (1924), 96 I.C.C. 644 (1925), 100 I.C.C. 169 (1925), 113 I.C.C. 531 (1926). See, also, *Indiana Passenger Fares of C., L. S. & S. B. Ry.*, 69 I.C.C. 180 (1922).

²¹⁸ *Nebraska Rates, Fares, and Charges*, 60 I.C.C. 305 (1921), 81 I.C.C. 290 (1923). See, also, *Western Cement Rates*, 69 I.C.C. 644 (1922); *Nebraska Cement Co. v. C. & N. W. Ry. Co.*, 92 I.C.C. 457 (1924).

²¹⁹ *Intrastate Rates within the State of Texas*, 60 I.C.C. 421 (1921), 62 I.C.C. 591 (1921), 68 I.C.C. 25 (1922). See, also, *Railroad Commission of Louisiana v. A. H. T. Ry. Co.*, 64 I.C.C. 197 (1921); *Wichita Falls & Southern Passenger Fares and Charges*, 83 I.C.C. 603 (1923).

ceedings affecting intrastate rate structures were prolonged for a period of years. The proceedings were reopened, either to consider carriers and charges not dealt with in the original reports, or in response to applications for modification of the original orders, so that particular charges which were alleged not to effect unjust discrimination against interstate commerce might be excluded from their operation. As a result, electric lines as well as steam roads were embraced by the Commission's orders,²²⁰ and even local commutation rates, on both types of carriers, were brought under federal control.²²¹ In these supplementary proceedings covering additional carriers and services, as in the original determinations, the Commission almost invariably accorded relief, usually on financial grounds.²²² In the few instances in which relief was denied, the Commission appears to have departed from its established doctrine and to have involved itself in inconsistency.²²³ Only in the modifications authorized under the "sav-

²²⁰ See, for example, *Intrastate Rates within Illinois*, 77 I.C.C. 173 (1923), dealing with the passenger fares of certain electric carriers that had been excepted from the previous findings. See, also, *Intrastate Fares of the C., N. S. & M. R. R.*, 62 I.C.C. 188 (1921); *Indiana Passenger Fares of C., L. S. & S. B. Ry. Co.*, 69 I.C.C. 180 (1922). Since the electric railways had increased their interstate rates and fares under the authority of the Commission, they sought like increases in intrastate charges, on the ground that discrimination would otherwise result. For the most part the disparities in rates were found discriminatory, and the intrastate charges ordered increased.

²²¹ The Commission's findings with respect to commutation fares did not receive unanimous support. See dissenting opinion of Commissioner Eastman, concurred in by Commissioner Cox, in *Intrastate Rates within Illinois*, 77 I.C.C. 173 (1923), at p. 179.

²²² In *Indiana Passenger Fares of C., L. S. & S. B. Ry. Co.*, 69 I.C.C. 180 (1922), for example, the Commission said (p. 183): "It is clear that there is no good reason for the difference between respondent's interstate fares and intrastate fares in Indiana . . . , and that, in view of respondent's financial returns, such difference must be removed by increasing its intrastate fares rather than by reducing its interstate fares."

²²³ *Montana Rates and Fares*, 60 I.C.C. 61 (1921), was reopened on petition of the Butte, Anaconda and Pacific Railway Co., a short line located wholly within the State of Montana and operated electrically for the most part, which had been a respondent in the original proceeding but had not been included within the Commission's order. In 61 I.C.C. 500 (1921), the relief sought, which was the same as that accorded to the steam carriers with respect to intrastate passenger fares and excess-baggage charges, was fully granted. On further hearing, however, in 77 I.C.C. 141 (1923), the findings in the earlier report were reversed, the order vacated, and the proceeding discontinued. It developed that the petitioner had increased its interstate passenger fares from points outside Montana to destinations on its line, but had not increased its local interstate charges. There being no basis for directing it to increase its intrastate charges, the order did not become effective. In due course, however, the increases in local interstate passenger fares were made, and upon a denial by the Montana com-

ing clause" were financial considerations relegated to subordinate influence. The question before the Commission in these circumstances was whether particular intrastate rates which were in effect at time of the original order should be excluded from its provisions on the ground that they were not so related to interstate rates as to cause undue prejudice against persons or localities or unjust discrimination

mission for like increases in intrastate fares, the case was again brought to the Commission. No additional evidence was introduced at the further hearing, but it was shown that the carrier suffered an operating deficit of \$350,733.95 for the year ending December 31, 1921, and that had intrastate fares been fixed at 3.6 cents per mile the resulting revenue would have been greater by \$20,113.44. "But this," said the Commission, "does not prove discrimination, as the interstate rates were on the same basis as the intrastate until November 15, 1921" (p. 143). The Commission found that its original order, being based upon evidence relating to a situation which did not in fact exist, was inoperative, despite the subsequent increase in local interstate rates; and it found insufficient ground for the conclusion that the then-existing relationship of rates was discriminatory against interstate commerce. "As far as may be judged from the meager record, the passenger business of petitioner is largely short-haul local traffic. Compared with the volume of intrastate traffic, the interstate passenger business must be insignificant. At any rate, it is sufficient for present purposes to say that there is no showing on this record of such 'substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce' as would warrant us in entering the order sought" (p. 143). The defect of this finding, in view of the Commission's established policy, was well brought out by the dissenting commissioners. Commissioner Eastman, who had dissented from all of the original findings relating to intrastate rates on legal grounds, found that the decision of the Supreme Court in the *Wisconsin Passenger Fares* case (see pp. 241-246, *supra*) provided adequate support for sustaining the position of the carrier. The fact that the petitioner had suffered a deficit, and that the revenues would have been considerably greater had the intrastate fares been increased, was urged as sufficient ground for granting relief. Commissioner Eastman concluded (pp. 144-145): "The order . . . sustained by the Supreme Court in the *Wisconsin* case increased the intrastate passenger fares of many little roads which have no closer relation to interstate commerce than has the Butte, Anaconda and Pacific. The same is true of many of our other orders which increased the level of intrastate rates in a similar way, and which have gone into effect. But for a mere accident the fares of the Butte, Anaconda and Pacific would have been covered by our order in 60 I.C.C., 61. I fail to see the logic in excepting them now from the general treatment of intrastate passenger fares in Montana." Commissioner Potter pointed out the inconsistency of the holding by showing that although the petitioner, by increasing its local interstate rates, had actually created the situation thought to have existed at the time of the first hearing, the Commission arrived at the opposite conclusion on the same set of facts, and that other carriers situated as was the petitioner had been accorded relief. "It is my view that the law and the facts, as well as all principles of right, justice, and consistency require the adoption of the same conclusions now as were adopted in the first report on further hearing" (p. 145). Apparently the Commission was "leaning backward" in its endeavor to give full effect to the pronouncement of the Supreme Court in the *Wisconsin* case that there must be "substantial disparity which operates as a real discrimination." If the Commission had been starting afresh in its deliberations concerning disparities between intrastate and interstate rates, there might have been ample reason for denying relief to interstate carriers

against interstate commerce.²²⁴ The issue concerned the rate structure rather than the rate level. Upon a showing that there was no interstate movement of the commodity,²²⁵ or that the intrastate movement was independent of any previous movement and not in competition with interstate traffic,²²⁶ or that the intrastate rate was actually higher than the interstate rate,²²⁷ or that the disparity was not sufficient to effect substantial prejudice,²²⁸ the Commission was disposed to find absence of unjust discrimination and to modify the order.²²⁹ If, on the other hand, it appeared that the intrastate movement of the commodity was in competition with interstate traffic, and that the level of the interstate rates contemporaneously applicable was higher than that of the corresponding intrastate rates, modifica-

located within a single state and performing but a small amount of interstate service. Since, however, such carriers were included within its general orders in the original proceedings, it appears both illogical and inequitable to dismiss their petitions when through force of circumstance their cases are reviewed singly. The same strictures may be made upon the Commission's findings in *Wichita Falls & Southern Passenger Fares and Charges*, 83 I.C.C. 603 (1923).

²²⁴ The Commission limited itself strictly to this jurisdiction. In *Nebraska Rates, Fares, and Charges*, 81 I.C.C. 290 (1923), for example, the Commission declined to require reparation to be made to a shipper who had paid a higher intrastate rate under its order, since its authority did not extend to the reasonableness of intrastate rates *per se*, but only to the removal of discrimination against interstate commerce. "But the exaction of an unreasonable rate on intrastate traffic is not, as such, prohibited or declared unlawful by the interstate commerce act. Our jurisdiction is confined to a determination of whether or not the rate on this traffic in effect on the date of our original order in this proceeding should be excepted from the general finding that the intrastate charges for freight services in the State of Nebraska resulted in undue prejudice to persons and localities outside of the State and in unreasonable preference of persons and localities within the State or in unjust discrimination against interstate commerce" (p. 292). On the other hand, state authorities were without power to pass upon the reasonableness of intrastate rates affected by the Commission's orders, during the period of their operation, unless such rates had first been excluded by the Commission from the provisions of these orders. See *Indiana Rates, Fares, and Charges*, 92 I.C.C. 487 (1924); *Intrastate Rates within Illinois*, 102 I.C.C. 232 (1925), 146 I.C.C. 127 (1928).

²²⁵ *Nebraska Rates, Fares, and Charges*, 81 I.C.C. 290 (1923).

²²⁶ *Indiana Rates, Fares, and Charges*, 64 I.C.C. 645 (1921).

²²⁷ *Intrastate Rates within Illinois*, 102 I.C.C. 232 (1925).

²²⁸ *Indiana Rates, Fares, and Charges*, 92 I.C.C. 487 (1924), 96 I.C.C. 644 (1925).

²²⁹ Furthermore, where the unjust discrimination had been removed by the carriers by voluntarily lowering the interstate rates, the corresponding intrastate rates were excluded from the provisions of the order. *Intrastate Rates within the State of Texas*, 68 I.C.C. 25 (1922). And reductions in intrastate rates, made necessary by motor-carrier competition, were authorized, where like reductions in interstate rates would not cause discrimination against localities in interstate commerce. *Railroad Commission of Louisiana v. A. H. T. Ry. Co.*, 64 I.C.C. 197 (1921).

tion of the order was denied.²⁸⁰ Petitions for modification have come from relatively few states, although it is probable that great numbers of intrastate rates, in all parts of the country, were not actually discriminatory against interstate commerce. The relative paucity of applications may be explained, partly by the inertia of shippers and of the state authorities, and partly by the fact that many of the Commission's general orders were in due course vacated, with a reversion of the control of specific rates to the local bodies.

But with the disposition of the long series of proceedings growing out of the general rate increases of 1920, the Commission has tended to revert once more to the less sweeping methods of the earlier period. It has been called upon to consider the propriety of intrastate rate adjustments on complaint of shippers, local interests, and state commissions,²⁸¹ through the institution of inquiries on its own motion,²⁸² and in connection with general rate investigations.²⁸³ In most instances the issues were substantially the same as those which had arisen in the so-called *Shreveport* cases: they involved discrimination against particular persons and places, rather than general revenue considerations. In these circumstances, as in the earlier proceedings, the reasonableness of the interstate rates was first considered, and only where there was such disparity between the intrastate rates and reasonable interstate rates as to produce undue prejudice against persons or places in interstate commerce, were findings to that effect made.²⁸⁴ But even where revenue considerations were involved, the

²⁸⁰ *Intrastate Rates within Illinois*, 146 I.C.C. 127 (1928). Similarly, the Commission denied an application to modify the original order where a state commission sought a reduction in an intrastate rate as a means of reestablishing a long-standing relationship, but where it was shown that the reduction in the intrastate rate would require a like reduction in the interstate rate, if discrimination were to be avoided, and that such reduction in the interstate rate was not warranted. *Intrastate Rates within the State of Texas*, 62 I.C.C. 591 (1921).

²⁸¹ See, for example, *Atlas Portland Cement Co. v. C., B. & O. R. R. Co.*, 81 I.C.C. 1 (1923); *Sioux City Live Stock Exchange v. C., St. P., M. & O. Ry. Co.*, 83 I.C.C. 243 (1923); *Indiana Public Service Commission v. B. & O. R. R. Co.*, 89 I.C.C. 651 (1924); *Arkansas City Sand Co. v. St. L.-S. F. Ry. Co.*, 102 I.C.C. 559 (1925).

²⁸² See *Annual Reports*: 1928, pp. 71-72; 1929, pp. 76-77; 1930, pp. 71-72.

²⁸³ See, for example, *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925); *Fertilizers between Southern Points*, 113 I.C.C. 389 (1926); *Consolidated Southwestern Cases*, 123 I.C.C. 203 (1927), 139 I.C.C. 535 (1928).

²⁸⁴ Note the following, for example, from *Virginia Corporation Commission v. A. & R. R. Co.*, 136 I.C.C. 173 (1927), at p. 180: "Where the issue is under section 3 and only interstate rates are involved, we can make an order requiring the removal of

Commission appears to have modified its policy, in the direction of exercising greater restraint with reference to control of intrastate rate adjustments, in at least two significant ways: first, by confining its condemnation of intrastate rates to instances in which the disparity between the intrastate and interstate charges is "substantial" and operates as a "real" discrimination against interstate commerce, it has come to be less liberal in upholding the complaints of the carriers; and second, by refraining from issuing orders in the first instance even where undue prejudice is found to exist, it has come to rely in increasing measure upon the state commissions for the removal of maladjustments.

Despite considerable disparities between intrastate and interstate rates, complaints of the carriers have frequently been dismissed. Because of "lack of uniformity" in interstate rates, the evidence of discrimination against persons and places in interstate commerce has been held to be "conflicting and inconclusive," and the burden imposed upon interstate commerce by the lower intrastate rates has been held to be negligible. "The law does not require," the Commission has said, "that intrastate rates shall be maintained on the exact level of interstate rates, but only that there shall not exist between the two a disparity so substantial as to operate as a real discrimination against and obstruction of interstate commerce."²⁸⁵ The absence of testimony from interstate shippers or receivers of goods that they were being injured by the lower intrastate rates appears to have weighed heavily in arriving at decisions adverse to the petitions of the carriers.²⁸⁶ In one proceeding the carriers sought an increase in intrastate rates

undue prejudice without regard to the level of the rates. If in complying with such an order the carrier transgresses section 1, the rates so filed can be suspended and dealt with accordingly. Where the issue is between intrastate and interstate rates, however, and undue preference of intrastate shippers or commerce and undue prejudice to interstate shippers or commerce are shown, it is necessary in the first instance to determine whether or not the offence is caused by the intrastate or the interstate rates. Plainly we can not require intrastate rates to be raised above a maximum reasonable level in order to cure a disparity with interstate rates, and where the intrastate rates have been fixed, as they have been here, by the order of a State commission, they can not be increased by the carriers without an order from us. . . . Obviously such an order can not be made without consideration of the reasonableness of the rates in issue."

²⁸⁵ *Ohio State Rates on Sand, Gravel, Stone, and Paving Blocks*, 85 I.C.C. 66 (1923), at p. 75.

²⁸⁶ See *Rates and Minimum Weights on Salt*, 128 I.C.C. 499, 504 (1927); *Rates on*

which were on a basis of 75 per cent of the interstate rates applicable to the same traffic. In dismissing the complaint the Commission said, by way of summarizing its conclusions: "The Florida intrastate rates on fertilizer materials, except for the shorter distances, are well below what we have found to be a maximum reasonable level for such rates within southern territory. But we have no power to require a change in intrastate rates, unless it is shown that they are working injury to shippers or localities in interstate commerce or discriminate unjustly against such commerce. There is here no convincing evidence that shippers or localities in interstate commerce are unduly prejudiced by the rates in question. With the exception of the general and vague testimony in behalf of the Savannah Traffic Bureau, the record contains no complaints or evidence from interstate shippers or localities."²⁸⁷ And it was held, furthermore, that the loss of revenue resulting from the lower intrastate rates had not been shown to be "of sufficient amount to create a substantial burden" upon interstate commerce as a whole.²⁸⁸ No less restrained determinations have been made in other proceedings.²⁸⁹

Pig Iron in Ohio, 136 I.C.C. 131, 138 (1927); *Rate on Sulphuric Acid from Natrona*, 148 I.C.C. 403 (1928).

²⁸⁷ *Rates on Fertilizer Materials within State of Florida*, 151 I.C.C. 602 (1929), at p. 608.

²⁸⁸ The carriers were particularly concerned over the losses of revenue which would follow the extension of the Florida level of rates to the intrastate movement of fertilizer materials throughout southern territory. By way of reply, the Commission said (p. 609): "The situation in Florida, however, seems to be peculiar to that State, and it is likely that if the same rates were prescribed in other States undue prejudice to interstate shippers and localities could more easily be shown."

²⁸⁹ In *Rates on Powder and High Explosives*, 151 I.C.C. 155 (1929), for example, the propriety of the intrastate rates prescribed by the state commission for the transportation of powder and high explosives from Curtiss, Arizona, to various destinations within the state was in issue. It was shown that these rates to ten representative destinations ranged from 51 per cent to 72 per cent of the interstate rates previously prescribed by the Commission, and that they averaged 63.3 per cent of these interstate rates. The Commission decreased the interstate rates, but the intrastate rates were still from 12 to 28.5 cents (averaging 22.3 cents) below the new rates prescribed as reasonable maxima. Yet the Commission found that the lower intrastate rates were not discriminatory. It pointed out that "no California producer or manufacturer of explosives is here contending that the Arizona intrastate rates are unduly prejudicial," and it concluded that the record did not afford "a sufficient basis for finding that the Arizona intrastate rates will, from a revenue standpoint, result in casting a burden on interstate commerce" (p. 168). Where, however, the volume of traffic in a particular commodity is preponderantly intrastate in character, the Commission has viewed substantial disparities in rates as presumptively discriminatory, even in the absence of specific evidence of prejudice to persons and places or of serious curtailment of

It thus appears that the Commission is disposed to find unjust discrimination and to grant relief only where the disparities between the intrastate and the interstate rates are so substantial as to injure persons and places or obstruct the free flow of interstate commerce. A mere showing of differences in rates, even when the margin is a considerable one, is not deemed sufficient to induce an affirmative holding of prejudice or discrimination: it must be established that shippers or receivers are actually injured by the subsisting rate relationships, or that a disproportionate share of the total cost of rendering the service, amounting to a "burden," is actually imposed upon interstate traffic. It is especially noteworthy that the financial effects of state-fixed rates are not unquestioningly permitted to justify federal interference. While the allegations of the carriers with regard to the financial significance of depressed intrastate rates cannot always bear close scrutiny, it is also clear that revenue considerations are no longer given the controlling weight and sweeping incidence which were initially accorded to them under pressure of the general rate increases of 1920.

But even where unlawful discrimination is found to result from the relationship between intrastate and interstate rates, the Commission does not always issue direct orders compelling the carriers to change their rates on intrastate traffic. The correction of maladjustments, in the first instance, is being increasingly left to the state authorities.²⁴⁰ While the interstate rates which the Commission pre-

revenue. Compare the following from *Fertilizers between Southern Points*, 113 I.C.C. 389 (1926), at p. 432: "While exact harmony between intrastate and interstate rates may not in all cases be required by the law, nevertheless when there is such a preponderance of intrastate traffic as here obtains, the conclusion is inevitable that the application of rates thereon substantially lower than the interstate rates contemporaneously applied under similar conditions must bring about, in some degree at least, the unjust discrimination against interstate commerce as well as the undue prejudice to persons or localities in interstate commerce which are declared by the act to be unlawful."

²⁴⁰ In *Oklahoma Corporation Commission v. A. & S. Ry. Co.*, 101 I.C.C. 116 (1925), for example, after finding the Texas intrastate rates on grain and related products to be prejudicial to persons and places in Oklahoma, the Commission concluded (p. 131): "We have made no findings as to what rates should be established between points in Texas . . . to remove the undue prejudice against Oklahoma . . . that exists and will continue to exist if the Texas intrastate rates . . . are continued on their present basis. However, these cases have been handled jointly with the Railroad Commission of Texas, before which body there is now pending an application for an adjustment of the intrastate rates within Texas. Joint hearings were held and

scribes provide the basis for the modification of the state rates, the actual removal of the disparities found to be prejudicial to interstate commerce is generally left to the state bodies, in order that the intrastate rate structure may remain under the continual and flexible control of state authority. The following pronouncement is typical of the Commission's prevailing attitude: "The undue prejudice and unjust discrimination against interstate commerce found to exist should be removed by the establishment of the above scale throughout the territory in issue, both interstate and intrastate. The level of the scale has been fixed with that in mind. It is highly desirable, however, to avoid if possible the rigidity in the rate structure which would result were we to fix the intrastate rates by an order under section 13 of the interstate commerce act. With this in view we shall not, at this time, enter such an order, but shall leave to the several State commissions the action necessary to secure the establishment in the States of Texas, Arkansas, Oklahoma, Kansas, and in B territory in Missouri of intrastate rates based on the scale herein found reasonable on interstate traffic."²⁶¹ While this practice of withholding affirmative orders—involving voluntarily assumed administrative restraint—is the out-

the issues have been the subject of conferences with the Texas commission subsequent to the hearings and argument. We shall therefore leave to the Railroad Commission of Texas such action as may be necessary to remove the prejudice and preference herein found to exist by reason of the present intrastate rates in Texas."

²⁶¹ *Southwestern Brick Cases*, 107 I.C.C. 681 (1926), at p. 699. Similarly, in *Fertilizers between Southern Points*, 113 I.C.C. 389, 435 (1926), no orders were immediately entered in the state cases. "It is believed," said Commissioner Eastman, "that the respective State commissions will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment." But see *Fertilizer Rates in South Carolina*, 147 I.C.C. 178 (1928), where an order was entered establishing the same carload minimum weights for intrastate traffic which had been found reasonable for interstate traffic in the above proceeding. Again, in *Consolidated Southwestern Cases*, 123 I.C.C. 203 (1927), despite numerous findings of undue prejudice and unjust discrimination and the establishment of an interstate scale of rates equally applicable to intrastate traffic, no orders were issued with regard to intrastate rates. The matter of adjustment was left to the appropriate state commissions, a reasonable period of time being allowed for this purpose, at the expiration of which the situation could again be brought to the Commission's attention. Upon reconsideration of the proceeding, in 139 I.C.C. 535 (1928), the carriers, in an effort to secure greater revenue, requested that orders be issued requiring that the intrastate rates in Kansas, southern Missouri, Oklahoma, Arkansas, western Louisiana, and Texas be revised to correspond to the new interstate rates. In denying the request, the Commission said (p. 587): "But it is the present practice, observed in the prior report, to accord the State commissions and the carriers a reasonable time after the revised interstate rates are prescribed within which to adjust the intrastate rates to

growth of the scheme of coöperation between the state and federal authorities which has been progressively developed since the enactment of the 1920 legislation, it is not confined to proceedings conducted under the coöperative plan.²⁴²

This approach reflects a real tempering of the Commission's initial policy under section 13 of effecting the removal of maladjustments through direct action. There is no relinquishment of power: the Commission not only prescribes the controlling interstate rates, but retains all necessary authority to regulate the intrastate rates upon failure of the states to remove the undue prejudice or unjust discrimination. There is merely a modification of the manner in which remedial action is effectuated. The issuance of direct orders by the Commission tends to "freeze" the intrastate rates—the jurisdiction of

conform to the findings. We have no reason now to assume that an order by us will be necessary, and upon this feature the petition is denied." In some instances, furthermore, the Commission has even refrained from making formal findings of unjust discrimination, despite apparent maladjustments, relying upon the state commissions to authorize such revisions as would bring the intrastate and interstate rates into harmony. Compare the following from *Rates on Chert, Clay, Sand, and Gravel*, 122 I.C.C. 133 (1927), at pp. 169-170: "The changes in rates both intrastate within Georgia and interstate to Georgia brought about by the Georgia commission's order of February 25, 1925, have been fully discussed. We have been impressed with what appears to us to have been the broad-minded attitude taken by the Georgia commission when it undertook the revision of these rates which resulted in its order of February 25, 1925. This order as we have seen resulted in raising many depressed intrastate rates applying between important producing and consuming points, and subsequently had the effect of bringing about substantial increases in important depressed interstate rates. Considering the results brought about by this order it could not be found from this record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce. We are, however, in these proceedings approving a distance scale of rates for application alike to the interstate transportation of all of the commodities here considered. There is of course no transportation reason for the maintenance of a different basis of intrastate rates on these commodities within Georgia than herein found reasonable for interstate transportation. However, in view of the attitude taken by the Georgia commission in the past which we have above adverted to we do not now deem it necessary to make any finding or enter any order . . . for the future in so far as unjust discrimination against interstate commerce is there involved, because it is felt that the Georgia commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved." See, also, *Iron and Steel Articles*, 155 I.C.C. 517, 580 (1929). Where, however, it appears that the state commissions are not disposed to remove the maladjustments, the Commission not only makes findings of undue prejudice but proceeds directly to order its removal. See, for example, *Sand, Gravel, Crushed Stone, and Shells*, 155 I.C.C. 247 (1929); *Brick and Clay Products in the South*, 155 I.C.C. 730 (1929).

²⁴² In the following proceedings, for example, the state authorities did not coöperate in a judicial capacity, but the removal of the undue prejudice against persons and

the federal tribunal being confined to questions of discrimination against interstate commerce, and the state bodies being ousted of all control over the rates embraced by the federal orders. Reliance upon state action under these circumstances, with the assertion of mandatory power by the Commission in the event of recalcitrance on part of the states, tends to avert such rigidity of regulatory status, permits of adjustments more responsive to local needs, and prevents the development of strained relations between the state and federal authorities.

14. THE COÖPERATION OF THE STATES

Throughout the preceding analysis of the character of the Commission's performance, frequent reference has been made to coöperative activity as between the federal tribunal and the state regulatory bodies. This system of coöperation, first accorded legal recognition in the Transportation Act of 1920, constitutes an integral part of the process whereby the Commission is enabled to assert its broad powers over interstate commerce without undue subordination of local to national interests. While actual authority, in the various spheres previously defined, was vested exclusively in the Commission, the mere centralization of power was not deemed an adequate solution of the problem of conflicting interests, even by those who championed such a step most ardently. There was a further realization that the expanded federal jurisdiction, particularly in rate matters, necessitated special provision for the protection of the interests of the states. The remedy was believed to lie in a system of coöperation between the state and federal authorities, through which the Commission's power of decision might be tempered by the distinctive knowledge and experience of the local bodies.²⁴³ The statutory provisions, as

places in interstate commerce found to result from the applicable intrastate rates was none the less left, in the first instance, to state action: *Elberta Crute Co. v. A. C. L. R. R. Co.*, 107 I.C.C. 499 (1926); *Salt between Western and Southwestern Points*, 120 I.C.C. 91 (1926); *Oklahoma Portland Cement Co. v. D. & R. G. W. R. R. Co.*, 128 I.C.C. 63 (1927); *Clay County Crushed Rock Co. v. A., T. & S. F. Ry. Co.*, 144 I.C.C. 355 (1928).

²⁴³ The desirability of some measure of coöperation was recognized both by the Commission and by the states long before the extension of federal power into the domain of intrastate commerce. Note the following, for example, from the presidential address of C. C. McChord, later a member of the Interstate Commerce Commission, before the annual convention of 1908 of the National Association of Railroad and

finally enacted, established a basis for coöperation in three directions: the Commission is required to notify interested states of all proceedings bringing into issue any rate, regulation, or practice made or imposed by state authority; it is empowered to confer with the regulatory authorities of the states "with respect to the relationship between

Utilities Commissioners: "The necessity for co-operative and concerted action between the Interstate Commerce Commission and the state railroad commissions in every phase of the regulation of railroads has been advocated and approved by every convention of this Association since it was organized . . . on the 5th day of March, 1889. Judge Thomas M. Cooley, first chairman of the Interstate Commerce Commission and the first president of this Association, at that initial meeting said: 'We are all engaged in a kindred work, and not a kindred work merely, but in a large degree in the same work. . . . It is of the highest importance that there should be harmony in the legislation of control, so that this system can be controlled as nearly as possible, as nearly as the local conditions of the country will enable it to be controlled, harmoniously as a unit.' This same sentiment was most forcibly expressed . . . at our last annual convention in an address by the distinguished chairman of the Interstate Commerce Commission, Judge Martin A. Knapp, who said: 'I believe that as respects most questions of public interest the general welfare will be advanced by the greatest possible uniformity as between state and national laws. But independent of legislation we have an opportunity for very useful service, I think, by harmonizing as far as we possibly can our policies and our work of administration.'" *Proceedings*, 1908, p. 10. Reference to the coöperative idea continued to be made at subsequent meetings. See, for example, *Proceedings*: 1909, p. 9; 1910, pp. 10-11; 1912, pp. 5, 16; 1913, pp. 8, 12; 1914, p. 2. But it was not until the Supreme Court, in the *Shreveport* case, had upheld the Commission's authority to regulate intrastate rates prejudicing persons and places in interstate commerce that concrete proposals for coöperation were forthcoming. The Commission was first to recommend that it be clothed with authority to develop coöperative activity with the state commissions on an official basis: "Viewing the entire situation as it has been depicted in proceedings before us, affecting widely scattered localities and territories throughout the United States, we believe that without abdicating any of the federal authority to finally control questions affecting interstate and foreign commerce we should be authorized to cooperate with state commissions in efforts to reconcile upon a single record the conflict between the state and the interstate rates. We believe that procedure like this . . . will go far to meet the requirements of the rate situation as it is presented in this country today." *Annual Reports*, 1916, p. 90. In an address before the National Association of Railroad and Utilities Commissioners, Chairman B. H. Meyer of the Interstate Commerce Commission elaborated this procedure for coöperation as follows: "Every state commission directly involved would be given an opportunity, in accordance with law, to participate in the deliberations and to assist in formulating the final conclusions upon a record jointly made. The one rate within the zone of reasonableness, established through the joint efforts of the respective commissions, would then apply to all business, state and interstate, and thereafter there could be no *Shreveport* case in that territory and with respect to that commodity." *Proceedings*, 1916, pp. 7-8. The Commission continued to urge such legislation (*Annual Reports*: 1917, pp. 58-59; 1918, p. 3), and the National Association directed its committee on state and federal legislation "to confer and cooperate with members of the Interstate Commerce Commission in bringing said matter before the Federal Congress with the view of securing the necessary statutory authority for effecting co-operation between the Interstate Commerce Commission and

rate structures and practices subject to the jurisdiction of such State bodies and of the Commission," and, under rules to be prescribed by it, "to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission"; and, finally, it is authorized "to avail itself of the cooperation, services, records, and facilities of such State authorities" in the enforcement of any of the provisions of the Act.²⁴⁴ The general intent of Congress appears to be clear. Through notice to the state authorities, an opportunity is afforded them to intervene on behalf of local interests or to request coöperative action; through joint conferences and joint hearings, though optional with the Commission, a method is provided for harmonizing conflicting views and securing mutually acceptable results; through utilization of the services and facilities of the state authorities, likewise optional with the Commission, machinery is made available for enhancing administrative effectiveness and for furthering the plan of coöperation as a whole.

But it was essential that these statutory provisions be translated into a workable arrangement. The state commissions, through the National Association of Railroad and Utilities Commissioners, took the initiative toward this end, but their early efforts proved futile.²⁴⁵ No agreement was reached because the Commission held the view that

the regulatory commissions of the several states" (*Proceedings*, 1917, p. 41). The intervention of the war, with the subjection of the entire railroad system to the control of the United States Railroad Administration, delayed the achievement of the necessary legislation, but in 1920 Congress acted favorably upon the recommendation submitted by the federal tribunal and endorsed by the state authorities.

²⁴⁴ Sec. 13, par. (3).

²⁴⁵ In 1920 a committee was appointed by the Association for conference with the Commission, in order that the types of cases in which coöperation was deemed feasible might be ascertained and an understanding secured as to the methods by which coöperative proceedings might be initiated and carried forward. Although a conference was held with a committee of the Commission and an exchange of letters followed, nothing came of the effort. At the conference the Commission expressed its disposition to further the idea of coöperation and pointed to the instances in which it had already been invoked, but it was reluctant to commit itself to any definite program. On January 22, 1921, upon request of the Commission's representatives, the Association's committee submitted in writing a series of suggestions relating to coöperation. Five months later, on June 24, 1921, the Commission stated, by way of reply, that it was "in accord with the general principles" underlying the suggestions concerning joint hearings and conferences and that they would be followed "in so far as can consistently

two fundamental classes of cases were not suited to joint hearings and conferences—those in which the difference in rates was due to statutory requirements which the state commissions deemed themselves unable to modify, and those in which the disparity was due to the action of the state commissions themselves and in which they appeared as litigants. Since intrastate rates fixed by state statute or prescribed by state commissions serve as the chief source of conflict between the federal tribunal and the local bodies, the representatives of the state commissions rightfully contended that the elimination of these types of cases as inappropriate for cooperative action rendered impossible the joint consideration of rate controversies which the statute aimed to establish.²⁴⁶ This lukewarm attitude of the Commission toward the formulation of a plan for cooperative action can be traced in large measure to the extreme position which it had taken with regard to the control of intrastate rates in the numerous proceedings immediately following the general rate increases of 1920, and to the determined opposition from many of the state commissions which it had encountered in these proceedings.²⁴⁷ Compromise was thought to be inexpedient and impracticable. Moreover, the Supreme Court had not yet spoken as to the constitutionality of this unprecedented assertion of federal power over the level of intrastate rates.²⁴⁸

be done," but without unequivocal acceptance of the proposals. On the contrary it was made clear that in the Commission's opinion proceedings involving discrimination against interstate commerce caused by intrastate rates fixed by statute or prescribed and kept in force by orders of state commissions were without the scope of appropriate cooperative action. Under these circumstances, on August 20, 1921, the Association's committee merely expressed regret concerning the Commission's views, declaring that there could be no effective cooperation if such cases were to be excluded. *Proceedings, 1921*, pp. 298-313.

²⁴⁶ The Association's representatives urged that cooperative action was a means of dissipating conflicts and rendering it unnecessary for the state commissions to assume the status of litigants in proceedings involving rates prescribed by them. They were doubtless too sanguine in their hopes of attaining this ideal, but there can be no question that the cooperative scheme was intended to be used as an instrument for securing better understanding and closer agreement in cases of alleged discriminatory rates. There is little ground for dissent from the following declaration: "All of the discussion of cooperation which antedated the enactment of the provisions of section 13(3) . . . went upon the theory that frank and full discussion and comparison of information and views would in a given case be likely to lead to common conclusions, either as to the non-existence of discrimination, or as to the method by which it should be removed." *Proceedings, 1921*, p. 309.

²⁴⁷ See pp. 287-301, *supra*.

²⁴⁸ In view of subsequent developments, it is interesting to note that the repre-

Under these circumstances the Commission was reluctant to formulate a definite plan of coöperation for rate controversies. When, however, its exercise of authority was judicially sustained,²⁴⁹ and the Supreme Court itself suggested, by way of dictum, that "in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion,"²⁵⁰ the Commission promptly took steps to reach an understanding with the state commissions as to cooperative principles and procedure.²⁵¹ The formal agreement adopted in 1922, as revised and readopted in 1925, constitutes the controlling basis of prevailing practice.²⁵²

The heart of the agreement concerns the classes of cases deemed

representatives of the state commissions believed that the judicial affirmance of the Commission's sweeping orders would render undesirable the plan of joint hearings for which they were contending: "On the other hand, however, if the power of the federal commission is dominant as to all state rates, the desirability of joint hearings is open to serious question. In that case state commissioners sitting with the federal commission would be under the restraints imposed by considerations of courtesy which would unavoidably arise from the fact of their participation upon invitation in proceedings with respect to which they could exercise no power, and hence could have no final responsibility. In the opinion of this committee cooperative hearings are not desirable under such circumstances." *Proceedings*, 1921, p. 312.

²⁴⁹ *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922).

²⁵⁰ *Ibid.*, p. 591.

²⁵¹ The decision of the Supreme Court was rendered February 27, 1922. On March 7, 1922, the chairman of the Commission addressed a letter to the president of the Association inviting a committee of the Association to confer with a committee representing the Commission with regard to formulating a plan of coöperation. This letter quoted the final paragraphs of the Court's opinion, which set forth the respective spheres of the state and federal authorities and made the reference to coöperation as given above. See *Proceedings*, 1922, pp. 426-427.

²⁵² On May 3, 1922, a joint committee composed of five members of the Commission and of eight representatives of the Association formulated and reported a plan of coöperation based fundamentally upon joint conferences and hearings. The plan was adopted as a tentative guide, subject to modification as a result of experience. In October, 1925, a second joint committee report was made, retaining the basic elements of the original plan, but extending the principle of coöperation and modifying the procedural details. The revised plan was adopted by the Association October 14, 1925, and by the Commission October 17, 1925. See *Annual Reports*: 1922, pp. 8, 233-234; 1925, pp. 1, 273-277. Unless otherwise stated, the analysis that follows is based upon the provisions of the 1925 agreement.

appropriate for coöperation and the procedure to be followed in their disposition, but the details of the arrangement are prefaced by an "agreed statement of principles," which is designed to disclose the general aim and spirit of the coöperative plan. Despite past conflicts of jurisdiction and the litigation resulting therefrom, it is a controlling fact that "the Federal and State commissions were alike created in the public interest and have a common purpose, namely, the maintenance of a transportation system which will in all respects best meet the public needs." In light of this consideration, "they should, and . . . they can, work together" for the attainment of this common purpose "without conflict or resort to litigation." Such coöperative effort is highly desirable in the public interest, and it is contemplated by the statute as judicially interpreted. But in order that this effort may be made effective, it is essential that there be a realization "of the nature and difficulties of the common problem" both by the state bodies and by the federal tribunal. Accordingly, the state commissions, on the one hand, "realize that the railroads form a national transportation system and that the public interest demands a rate structure, State and interstate, as simple and harmonious as practicable"; and the federal commission, on the other, "realizes that there is danger in overcentralization of authority, that the field of regulation is vast, and that the State commissions are often better informed than itself in regard to local conditions and local needs." On this basis it is the common purpose of the state and federal authorities to give "the utmost force and effect" to the provisions of the statute for the utilization of state services and facilities and for the conduct of joint conferences and hearings, and to "look forward to and have in view" the avoidance of federal orders affecting intrastate rates, "so far as the public interest will permit." With these conciliatory professions by way of background, and after express recognition that coöperation "must in the nature of things be of the spirit and not a matter of rules and regulations," the details of the coöperative plan are set forth, subject to such modifications as time and experience shall prove advisable or as may be found necessary or desirable in special cases.

The agreement makes no attempt to enumerate all of the classes of cases to be handled on a coöperative basis. The more important types are specifically indicated; others are embraced in general terms.

Primary attention is directed to rate controversies. The proceedings of this character in which coöperation is deemed appropriate expressly include: first, cases in which it is alleged, in petitions filed with the Commission, that the intrastate rates unjustly discriminate against interstate commerce or against persons or places engaged therein, and the removal of such discrimination is requested; and second, cases involving attacks upon interstate rates, in which either the decision of the federal tribunal or that of a state body "appears likely to affect, in substantial and important respects, the relationship between State and interstate rate structures." In addition, specific mention is made of applications for certificates of convenience and necessity, involving construction of new lines or abandonment of old lines, and of proceedings involving matters of car service. Finally, by way of catch-all, the agreement embraces any proceeding in which it is believed by either regulatory agency "that matters of mutual concern are involved and where cooperation may be had to advantage," and all matters "which may occur to either the Federal or a State commission where it is the opinion that cooperation may be beneficial or advisable." It is apparent from these stipulations that no type of proceeding is expressly withheld from the incidence of the coöperative plan: either specifically or in general terms, provision is made for practically every situation in which conflict of interest or authority is likely to arise.

The coöperative action contemplated by the agreement is to be effected primarily through conferences and hearings jointly held. The procedure involved may be traced chronologically, particularly as specified for rate controversies. Assuming notification of the interested commissions concerning the pendency of appropriate proceedings, there must first be an exchange of views as to whether coöperation should be invoked and as to how it should be pursued. Either the federal commission or a state commission may suggest coöperative action in any proceeding pending before the other agency. If the commissions concur as to the desirability of coöperation, arrangements must promptly be made for a joint conference. The usual purpose of this preliminary conference is to consider the manner in which the proceeding shall be carried forward and to determine whether a joint hearing shall be held. If the case goes to trial, there is

provision for a joint hearing, but only on condition that there be pending before each of the coöperating commissions a proceeding "in which action can be taken on the common record."²⁶³ In other words, joint hearings are deemed appropriate only "where similar issues are pending before the Interstate Commerce Commission and a State commission." In recognition of the doctrine that the judicial function must be divorced from that of the litigant, and as a means of maintaining open minds in the determination of controversial issues, it is provided, in effect, that state commissioners or their representatives shall not sit with members of the Commission or its examiners in joint hearings "in any case in which they appear as advocates";²⁶⁴ but the declaration immediately follows that "this is not to

²⁶³ Note the following from John E. Benton, General Solicitor of National Association of Railroad and Utilities Commissioners, Bulletin No. 92-1930, p. 2: "The cooperative agreement . . . states the case where proceedings are pending before each commission as that in which a joint hearing should be had. It does not, however, say that there shall be no joint hearing in any other case, and it has not been so interpreted and applied. . . . The condition, recognized as desirable in the case of cooperation, as to the pendency of proceedings before each commission, is ordinarily met by state commissions without difficulty. Sometimes it is met, when rate advances, both interstate and intrastate, are sought by carriers, by the institution of proceedings by carriers before state authorities. Sometimes it is met by an order of the state commission instituting a rate investigation on its own motion. The appropriate method depends upon the law of the particular state involved. When the federal case is a 13th Section complaint against rates prescribed by a state commission order, the condition may be met by an order of the state commission setting down the proceedings, in which the rates complained of were prescribed, for hearing upon the question whether such order shall be revoked or modified. This leaves the challenged rates in effect but under inquiry in a proceeding in which the evidence taken in the joint hearing may be considered. In some cases in which the cooperation of state commissions with the federal commission is considered desirable by both, it is not practicable, or perhaps even possible, to meet the condition as to the pendency of proceedings before both. The agreement itself recognizes that there may be 'special cases where it may be found necessary or desirable to depart therefrom.' . . . In such cases cooperation may be arranged without regard to the pendency of proceedings. Examples are *Mutual Creamery Co. v. American Express Co.*, 132 I.C.C. 207, *Ex Parte 87*, and the several No. 17,000 proceedings. In these the fact that before various commissions no proceedings were pending was not considered an impediment to cooperation by those commissions, and to their representation upon cooperating committees."

²⁶⁴ This policy is not stated in the form of a direct prohibition: in view of the delicacy of the situation involved, the agreement reads: "It is our judgment that State commissioners or their representatives would not expect or desire to sit. . . ." It is interesting to note, also, that the provision in the original agreement of 1923 prescribed participation in joint hearings under such circumstances "in a judicial capacity." This phrase was struck out because of the insistence of some of the state commissioners that, being clothed with no actual power of adjudication in these coöperative proceedings, they could serve only in an "advisory" capacity.

be understood as precluding a State commission from causing pertinent evidence to be presented in any such case with respect to the matters in issue.²⁸⁶ Despite the fact that it is often difficult to distinguish between advocacy by the coöperating commissioners and the mere illumination of the record by members of their staffs, these provisions tend to safeguard coöperative proceedings against an undue infusion of partisan bias, without depriving the states of the

²⁸⁶ The rationale of the rule, as thus construed, and the difficulties encountered in its observance, have been explained as follows: "The fundamental conception which underlies cooperation is that federal and state commissioners have a common duty, which in rate cases is to discover what rates are reasonable and just, and to use their powers in an appropriate way to secure their establishment. It is assumed that the interest of commissioners in every rate proceeding, involving rates subject to their jurisdiction, will be official and not personal; and that in a cooperative proceeding federal and state commissioners, considering a common record, will reach common conclusions as to what schedules of rates should justly be prescribed upon a given railroad or railroads, and that such common conclusions, when carried into effect, will avoid or remove discriminations. Agreement as to conclusions, however, can be expected only when the cooperating commissioners approach consideration of a case with unprejudiced minds. Hence the cooperative agreement provides,—rather delicately, but with intended clearness,—that cooperating representatives of state commissions sitting with the Interstate Commerce Commission shall not appear as advocates in the proceeding in which they sit. . . . The propriety of this rule is clear. The various unhappy results which may be expected to result from a failure to observe it are equally clear. The rule, however, does not prevent a state commission from permitting its attorneys and experts to aid in developing the record by the preparation and presentation of evidence, and by briefing and arguing the same. By statutes of various states it is made the duty of commissions of those states to represent the interests of their shippers in Interstate Commerce Commission proceedings. The cooperative agreement does not interfere with compliance with such laws. . . . The design of such participation, however, should be the same as is the design of the Interstate Commerce Commission or of a state commission when it causes its own experts to introduce evidence in a proceeding before itself alone. They do not appear in the capacity of litigants or partisans, but to illuminate the record, and thus to enable the commissioners more certainly to reach right conclusions. One of the serious handicaps under which cooperation labors is found in the conflicting interests of various states. When commission experts and attorneys from these diversely interested states participate in presenting evidence and in argument, it is sometimes difficult for sitting commissioners from the same states to avoid something of partisanship when the case comes to be considered. Nevertheless, the problem is the same as before commissioners of a single state when commission witnesses and other witnesses have testified. It is to consider all evidence in a non-partisan way, and to reach just conclusions. In cooperative cases, often,—perhaps usually,—this requires a disposition to compose differences by giving the fullest recognition practicable under all the circumstances to conflicting state interests, remembering that if differences can not be composed in a joint conference, the problem remains with the federal commission, and must be determined by it unaided. One of the prime purposes of cooperation is to bring to the conference table the knowledge of local conditions which local commissioners can give, and to assure full consideration of the point of view of those who know the importance of local interests. In

opportunity to present evidence and argument in support of local interests.²⁵⁶ Upon conclusion of the joint hearing, an informal conference between the participating state representatives and the federal examiner is contemplated.²⁵⁷ It is at this stage of the proceeding that an opportunity is first afforded for a common consideration of the issues and the evidence, with the view of arriving at a decision which is just to all concerned.²⁵⁸ But the state authorities can make themselves felt most effectively in connection with the subsequent course of the proceeding, in advance of its final disposition. When the case comes to argument before the Commission, "it is to be understood that the cooperating State commissioners will be expected to sit . . . at the argument, if they so desire, and afterwards to take part in a joint conference to consider the disposition of the case."²⁵⁹ Because this policy is deemed one of invariable applicability, no provision is made for special invitations in this connection: mere notice of the assignment for oral argument, to be sent to the interested commissions in each instance, is presumed to carry with it the necessary invitation. "The aim is to establish the understanding that cooperative action involves always opportunity to sit at the argument and in subsequent conferences."²⁶⁰ Before final disposition of the proceed-

a sense, therefore, cooperating state commissioners must speak for their respective localities, but always they will remember that they are acting in an official capacity, and that the object of all who cooperate is to reach conclusions which are justified by facts." John E. Benton, *op. cit.*, pp. 3-4.

²⁵⁶ For a consideration of these provisions by the National Association of Railroad and Utilities Commissioners, reflecting considerable diversity of view, see *Proceedings*, 1925, pp. 54-67.

²⁵⁷ The agreement also provides for "informal conferences pending the decision of cases where there has been no participation in the prior hearings."

²⁵⁸ It is recognized that in many instances "the difficulties and complexities of the cases will make a satisfactory exchange of views impracticable at such times." In such circumstances the state representatives "may give the . . . examiner the benefit of their views in writing or otherwise, as may be convenient, before the proposed report of the . . . examiner is served." While, under the Commission's practice, the report of the examiner is intended to embody his independent conclusions, "it is believed that an exchange of views with the State commissioners may aid the examiner in formulating his proposed report."

²⁵⁹ The practice of providing for informal conferences with examiners immediately upon the conclusion of joint hearings, and of inviting state commissioners to sit at oral arguments and to participate in joint conferences afterward, was initiated by the Commission about a year prior to the adoption of the 1925 agreement. See *Minute Adopted by the Commission November 3, 1924, Annual Report, 1925*, p. 273.

²⁶⁰ In case there has been no oral argument, or in the event that the state com-

ing, therefore, there is ample occasion, through personal contact and discussion between members of the federal and state regulatory agencies, for harmonizing conflicting views, adjusting local and national interests, and attaining mutually satisfactory results.

The coöperative plan, as outlined above, evinces a whole-hearted effort to establish an effective basis for composing differences and averting maladjustments. It is notable for the sweep of its incidence and for the simplicity and flexibility of its procedure. Because it affords a genuine opportunity to the state authorities to exert their influence upon those of the Commission's determinations which involve or affect intrastate matters, practically all of the states have taken advantage of its possibilities. From the promulgation of the original plan in 1922 to the end of 1925, there was coöperation by 3 state commissions in car-service cases, by 36 in construction and abandonment cases, and by 41 in rate cases, some of the states coöperating in more than one proceeding.²⁶¹ In subsequent years, under the strengthened agreement, the coöperative procedure has been utilized "in an increasing number of instances": in 1926, by 27 state commissions in 51 rate cases, by 22 in 44 construction and abandonment cases, and by 6 in car-service cases;²⁶² in 1927, in 28 rate cases, in 18 construction and abandonment cases, and in 6 car-service cases;²⁶³ in 1928, in 28 rate cases and 38 construction and abandonment cases;²⁶⁴ in 1929, in 26 rate cases and 36 construction and abandonment cases;²⁶⁵ in 1930, in 22 rate cases and 41 construction and abandonment cases.²⁶⁶ In addition, there has been active coöperation by the state authorities in the various inquiries conducted in connection with the general rate investigation instituted under the Hoch-Smith Reso-

missioners have been unable to be present, provision is made for an exchange of views in writing or by joint conference.

²⁶¹ *Annual Report*, 1925, pp. 1-2.

²⁶² *Annual Report*, 1926, p. 1. "Moreover," the Commission added, "in matters affecting car service nearly all of the States have lent us their aid."

²⁶³ *Annual Report*, 1927, p. 65. "While the number of these proceedings is less than that reported in our last report, they have resulted in cooperative handling with most of the State commissions, all but nine of which have, at one time or another and as occasion arose, taken part in cooperative proceedings since statutory provision was made therefor in 1920."

²⁶⁴ *Annual Report*, 1928, p. 61.

²⁶⁵ *Annual Report*, 1929, p. 67.

²⁶⁶ *Annual Report*, 1930, pp. 74-75.

lution.²⁶⁶ The system of coöperation has thus become an integral part of prevailing practice in the consideration and disposition of controversies involving relationships between intrastate and interstate commerce. It is now necessary to note how this system has actually functioned, particularly in the field of rates and charges.²⁶⁷ For this purpose it will suffice to refer to a few of the more important coöperative proceedings.

The fruitfulness of the coöperative method is reflected most strikingly in comprehensive proceedings, affecting the whole or large sections of the country. In the unification of rate structures which has resulted from such proceedings, the state commissions have played a significant rôle.²⁶⁸ One of the best illustrations is to be found in the Commission's most recent general revision of express rates.²⁶⁹ In 1920,

²⁶⁶ No. 17000, *Rate Structure Investigation*.

²⁶⁷ In matters of service, the coöperation of the state authorities, like the activity of the Commission itself, is largely informal; in construction and abandonment cases, the state commissions generally conduct the hearings for the federal tribunal, and in most instances their recommendations prove to coincide with the conclusions of the Commission. See, for example, *Annual Report*, 1930, pp. 3, 44-47.

²⁶⁸ See, for example, *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925). While intrastate rates as such were not within the scope of the investigation, the Commission was particularly desirous that "a greater degree of harmony between interstate and intrastate rates within southern territory" should be established, the new interstate rates to serve as a guide to the state commissions in the adjustment of intrastate rates, and to this end it sought the coöperation of the state authorities. A committee representative of the southern commissions sat with the federal representatives throughout the hearings and argument and participated in the conferences relating to the disposition of the proceeding. Evidence with regard to intrastate rates was freely taken, and the coöperation of the state commissions was declared "of notable aid in the conduct of the inquiry" (p. 519). Rates were readjusted very largely on the basis of distance, necessitating a far-reaching reorganization of the class rate structure. Because of petitions for modification filed by both shippers and carriers, various changes in the original findings were made through supplemental reports, in 109 I.C.C. 300 (1926), 113 I.C.C. 200 (1926), 128 I.C.C. 567 (1927), and the readjusted rates on interstate traffic did not become effective till January 15, 1928. As of October 31, 1928, the Commission was able to report: "Pursuant to applications filed . . . by the carriers with the State authorities in the Southern States, a similar readjustment has been made effective on intrastate traffic in most of such States, resulting in a rate structure of far greater uniformity and simplicity than that theretofore existing." *Annual Report*, 1928, p. 58. Only in the case of North Carolina was further litigation necessary. See *Virginia Corporation Commission v. A. & R. R. Co.*, 136 I.C.C. 173 (1927), 161 I.C.C. 273 (1930), 165 I.C.C. 31 (1930), 169 I.C.C. 728 (1930).

²⁶⁹ *Express Rates*, 1922, 83 I.C.C. 606 (1923), 89 I.C.C. 297 (1924). See, also, National Association of Railroad and Utilities Commissioners, *Proceedings*: 1923, pp. 437-443; 1924, pp. 453-458.

the Commission had authorized two increases, aggregating 26 per cent, in interstate express rates.²⁷⁰ Many of the states declined to authorize similar increases for intrastate traffic, and the American Railway Express Company filed complaints alleging unjust discrimination against interstate commerce. The Commission's authority over intrastate rates was invoked in thirteen proceedings.²⁷¹ Hearings were held and argument was had upon these petitions, but no decision was rendered by the Commission; rather, in light of the record, the Commission was prompted to institute a nation-wide investigation of interstate express rates. In the conduct of this inquiry, with which was consolidated a petition of the rail carriers and the express company for further increases in rates, the Commission sought the coöperation of the state authorities. Upon the Commission's invitation, a committee composed of five chairmen of state commissions (one in each of the then prevailing express zones) was selected by the National Association of Railroad and Utilities Commissioners to coöperate with the federal tribunal, "with the view to the ultimate harmonizing of the interstate and intrastate express rates and charges upon a proper basis";²⁷² and this committee, in turn, assigned an examiner of one of the state commissions who was experienced in the express business to sit with the Commission's examiners at the hearings. There was close coöperation at every stage of the proceeding. In the course of the investigation many conferences were held between the federal authorities and the committee representing the states; and the state committee sat with the Commission at the oral argument upon the proposed report and participated in the deliberations preceding final disposition of the case. The inquiry resulted not only in a denial of the rate increases sought by the railroads and the express company, but in such a revision of existing charges as eliminated the inequalities which had given rise to the original conflicts between intrastate and interstate rates.²⁷³ The outcome was

²⁷⁰ *Express Rates, 1920*, 58 I.C.C. 281, 707.

²⁷¹ These proceedings involved the propriety of the local rates between points in the states of Texas, Georgia, Illinois, Montana, Utah, Idaho, Nevada, Arizona, South Dakota, Arkansas, Oklahoma, North Dakota, and California. *Annual Report, 1921*, p. 34.

²⁷² *Express Rates, 1922*, 83 I.C.C. 606, 612 (1923).

²⁷³ See chap. viii, notes 154 and 155, *supra*.

entirely acceptable to the state representatives as well as to the Commission,²⁷⁴ and there was no occasion for the exercise of federal power over intrastate rates. In decided contrast to the recalcitrance of the states in connection with the railroad rate increases of 1920, the interstate express rates prescribed by the Commission in this proceeding were promptly applied to intrastate traffic by the state authorities.²⁷⁵ The uniformity achieved thereby provides a striking manifestation of the possibilities of the coöperative method, both in removing past conflicts and in averting future maladjustments.

But the proceeding which overshadows all others from the standpoint of comprehensiveness is the *Rate Structure Investigation*, instituted by the Commission on March 12, 1925. At the end of 1930 this proceeding comprised sixteen separate inquiries (involving class rates, or commodities, or commodity groups), most of which were still in progress.²⁷⁶ The original order of investigation, in conformity with

²⁷⁴ Note the following, for example, from the report of the Committee on Express and Other Contract Carriers by Rail of the National Association of Railroad and Utilities Commissioners, *Proceedings*, 1924, p. 458: "This case . . . was the best and most apt example for the application of the co-operative clause of the Transportation Act, and your Committee sincerely hopes that each of the various States, members of this Association, will accept the basis of rates ordered by the Interstate Commerce Commission for application to State business without argument, and will do so cheerfully. State rates are being figured simultaneously with the Interstate rates and in identically the same manner. We believe that this case has been settled upon competent evidence in a fair and square manner, and we ask the various States represented here to do all in their power to bring about an amicable establishment of the rates proposed by the Interstate Commerce Commission in its order."

²⁷⁵ The effective date of the Commission's order was March 1, 1925. As of October 31, 1925, the Commission was able to report: "Express class rates computed on the bases prescribed for interstate traffic have been adopted and made effective upon intrastate traffic in all of the States except one, so that there is now substantial uniformity in interstate and intrastate express class rates throughout the country." *Annual Report*, 1925, p. 47. Only the State of Wisconsin, alleging that the prescribed bases would produce maladjustments in its intrastate rate structure, declined to comply. The intrastate rates which it finally established, after independent hearing and investigation, did not become effective till August 15, 1930, but they constituted no serious departure from the interstate adjustment. See Record, Docket No. 13930.

²⁷⁶ The following investigations had been undertaken under No. 17000: Part 1, revenues in western district; Part 2, western trunk-line class rates; Part 3, cotton; Part 4, petroleum and petroleum products; Part 4-A, petroleum and its products from, to, and between points in the Southwest; Part 5, furniture; Part 6, iron and steel investigation; Part 7, grain and grain products; Part 7-A, grain and grain products, southern territory rates; Part 8, cottonseed, its products, and related articles; Part 9, live stock; Part 10, hay; Part 11 and Part 11-A, sand and gravel; Part 12, non-ferrous metals; Part 13, salt. For the status of each of these investigations, see *Annual Report*, 1930, pp. 63-68.

the mandate of the Hoch-Smith Resolution that all discriminatory situations in the rate structure be removed, included intrastate as well as interstate rates,²⁷⁷ but the Commission also declared that it "will avail itself, as far as it can, of the assistance and cooperation of State authorities possessing rate-making powers."²⁷⁸ Through conference between representatives of the Association and of the Commission, a rather elaborate group of coöperating committees of state commissioners and rate experts was established,²⁷⁹ and active coöperation has been maintained in all of the proceedings. Reference need be made to only those of the investigations which have been brought to completion. In the western advanced rate case,²⁸⁰ the general increases sought by the carriers were denied, and the record was held open for further consideration in connection with the rate structure inquiry. Not only was much valuable evidence presented by the state commissions, but a committee representative of the western regulatory bodies, which sat at the hearings and argument and participated in the conferences preceding adoption of the final report, approved of the Commission's conclusions.²⁸¹ There was similar coöperation in

²⁷⁷ The inclusion of intrastate rates in the order of investigation caused some concern to the representatives of the states. Note the following from a bulletin of the General Solicitor of the National Association, quoted in *Proceedings*, 1927, at p. 182: "It would seem apparent that the purpose of the order of investigation has been to lay the groundwork for any order prescribing intrastate rates which the Interstate Commerce Commission may, as the result of its investigation, determine to make. . . . The proceedings involving intrastate rates under paragraphs (3) and (4) of section 13, which followed the enactment of the Transportation Act, at least gave the States an opportunity to know what rates were alleged to be discriminatory, and gave them an opportunity for hearing. This order aims to put all of the millions of intrastate rates under question in a single proceeding, without any allegation that they are in fact discriminatory for any reason. Obviously no State can prepare to defend such a proceeding. . . . But the Interstate Commerce Commission doubtless considers the mandate of the Hoch-Smith resolution broad enough to justify proceeding as to intrastate rates in wholesale fashion, as it must deal with interstate rates. . . . It may be hoped that matters will so shape themselves that all necessary rate adjustments may be made without an exercise of Federal power over intrastate rates within any of the several States; but all that is implied in the evidently careful inclusion of intrastate rates as among those which the Federal Commission will investigate and may act upon in this proceeding, can not be safely overlooked."

²⁷⁸ Notice to the Public of March 12, 1925. The order of investigation and the notice to the public are reprinted in Warren H. Wagner, *The Hoch-Smith Resolution* (1929), at pp. 209-216.

²⁷⁹ See *Proceedings*, 1925, pp. 247-251.

²⁸⁰ *Revenues in Western District*, 113 I.C.C. 3 (1926).

²⁸¹ *Ibid.*, p. 9.

the western class-rate case,²⁸² and without hindrance to the presentation of evidence on behalf of the shipping public by representatives of the state commissions. But the thoroughgoing reorganization of the rate structure in western trunk-line territory prescribed by the Commission was confined to interstate traffic. While all intrastate class rates were in issue, and rates in some of the states were specifically assailed, the adjustment of intrastate situations was left to the state authorities. The Commission conceded that, despite identity of transportation and operating conditions for both types of traffic, in most western trunk-line states "class rates are maintained on intrastate traffic lower, and sometimes materially lower, than on interstate traffic";²⁸³ but in view of the coöperative activity of the states and the fact that proceedings for intrastate rate revision were pending before the state bodies,²⁸⁴ it declined to make definite findings to this effect. The Commission's conclusion upon this aspect of the inquiry reflects the harmonious approach and attitude of restraint engendered by the coöperative procedure: "The commissions of the w.t.l. states are coöperating with us, . . . and some have already conducted hearings in their intrastate cases. Under the cooperative plan the State commissions will pursue their own course under the laws in their respective States in matters presented by the carrier's petitions and State cases covering intrastate rates and exceptions. There is no indication that they will not continue their fullest cooperation and render decisions as early as feasible on the matters under their jurisdiction and affected by these proceedings. Under these circumstances . . . there is no compelling reason for findings with respect to the intrastate situations until the State commissions have had a reasonable opportunity to exercise their judgment."²⁸⁵ In like manner, the investigation of

²⁸² *Western Trunk Line Class Rates*, 164 I.C.C. 1 (1930).

²⁸³ *Ibid.*, p. 206.

²⁸⁴ "As explained in chapter A, the State commissions of w.t.l. territory cooperated with us throughout these proceedings. The State commissions of South Dakota, Nebraska, and Michigan jointly heard with this commission their cases covering the intrastate class rates under their respective jurisdictions. All have for consideration the petitions filed by the carriers with the State commissions asking authority to revise intrastate class rates corresponding with the revision of interstate class rates proposed in the present proceedings; and some also have cases involving intrastate exceptions to the classification." *Ibid.*, pp. 205-206.

²⁸⁵ *Ibid.*, p. 206. But see *Cham. of Comm., Kansas City, v. Atchison, T. & S. F. Ry. Co.*,

cotton rates²⁸⁶ was conducted in coöperation with a committee representing the commissions of the cotton-growing states. While there were specific findings of undue prejudice resulting from the relationship between intrastate and interstate rates, the removal of these maladjustments was left to the state authorities.²⁸⁷ The other inquiries which have been completed were also conducted under the coöperative plan and were equally satisfactory in their results. In the iron and steel investigation,²⁸⁸ the basic distance scale prescribed was made directly applicable only to interstate traffic; there were no specific findings as to intrastate rates and no orders were entered.²⁸⁹ In the

164 I.C.C. 302 (1930), in which the intrastate rates of the State of Kansas were found to be unduly prejudicial to shippers and localities in interstate commerce and were ordered increased to the interstate levels prescribed in the principal proceeding. The complaints as to Kansas rates were filed with the Commission after the hearings in that proceeding had been completed; they were jointly heard with the Kansas commission upon a separate record, but they were argued in connection with the principal proceeding. In distinguishing this case from the general investigation, the Commission said (p. 310): "The Kansas commission argues that to order increased intrastate rates in Kansas prior to the establishment intrastate in other States of the rates prescribed in the *Western Trunk-Line case* would 'create a discriminatory situation along the Missouri and Nebraska borders of which Kansas shippers might reasonably complain.' Those situations will be disposed of in cooperation with the respective State Commissions [as indicated in the text above]. . . . But Kansas intrastate rates stand upon a different footing. They were found unduly preferential three years ago in *Southwestern cases* [123 I.C.C. 203 (1927)]; and on a separate record are here found unduly prejudicial to these complainants and unjustly discriminatory against interstate commerce. In all the circumstances we perceive no valid reason for deferring the entry of an order effective coincidentally with the establishment of the interstate rates in compliance with the *Western Trunk-Line case*."

²⁸⁶ *Rate Structure Investigation, Part 3, Cotton*, 165 I.C.C. 595 (1930).

²⁸⁷ Note the following, for example: "It is further found that the maintenance of intrastate rates in Texas to the Texas ports which are lower than the rates thereto from Oklahoma in greater proportion than would be the case if the rates from both Texas and Oklahoma were maintained upon the maximum reasonable bases here proposed will result in undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, in violation of section 13 of the act." But the Commission immediately added: "Pursuant to our usual practice we will make no section 13 order at this time but will leave to the Texas commission, in the first instance, the removal of the violation of section 13 which is here found to exist" (p. 667). For a like disposition of a similar finding, see p. 675.

²⁸⁸ *Iron and Steel Articles*, 155 I.C.C. 517 (1929).

²⁸⁹ "It is obvious, however," said the Commission, "that a general revision of the rate structure along the broad lines herein prescribed can successfully accomplish its purpose only if the rates within the several States are at the same time subjected to such revision as may be necessary to bring them into full harmony with the interstate rates prescribed. In fact . . . representatives of the State commissions were invited to

general rate readjustment required in the grain case,²⁹⁰ there was recognition of wide disparities between the intrastate and interstate levels, but the process of correction was once more reserved to the state authorities.²⁹¹ Only in a single instance, in the sand and gravel investigation,²⁹² was there occasion to issue an order against a recalcitrant state.²⁹³ All in all there can be little question as to the fruitful functioning of the cooperative method in the highly significant *Rate Structure Investigation*.

Nor has the orderly adjustment of interests under the cooperative plan, without conflict of authority or undue abdication of state power, been confined to comprehensive proceedings. Like results have been attained in more restricted situations. A few examples will

cooperate in these proceedings, and the conclusions herein have been reached after conferences with representatives from a number of the interested State commissions" (p. 580).

²⁹⁰ *Grain and Grain Products*, 164 I.C.C. 619 (1930).

²⁹¹ "An important issue is the relation between interstate and intrastate rates. The complaints of discrimination against interstate shippers have been numerous. The desirability of uniformity in rate levels in the same general territory, for both interstate and intrastate shipments, is apparent. Instead of any reasonable approach to this uniformity there is a wide disparity between not only interstate and intrastate levels, but between intrastate levels themselves. . . . It will be assumed that not only generally in the interest of substantial equality among all shippers, but in accordance with the cooperative agreement every effort will be made by the State commissions to achieve the maximum of uniformity in interstate and intrastate levels" (pp. 696-697).

²⁹² *Sand, Gravel, Crushed Stone, and Shells*, 155 I.C.C. 247 (1929).

²⁹³ The general investigation of rates on sand, gravel, crushed stone, shells, and related commodities in the southwest, under No. 17000, together with proceedings involving the intrastate rates on the same commodities within Texas, Oklahoma, Arkansas, and Louisiana, which were pending before the respective commissions of these states, were jointly heard under the cooperative plan. The Texas, Oklahoma, and Arkansas commissions approved the prescribed interstate basis of rates for intrastate application, but the Louisiana commission declined to do so. The Louisiana rates were on the average 35 per cent lower than those prescribed for interstate traffic and approved for intrastate application by the other states involved. Under these circumstances the Commission found that "to prescribe here the approved basis of rates for interstate application throughout the considered territory and at the same time permit the continued maintenance of this relatively low basis of intrastate rates within that portion of Louisiana here involved would be tantamount to sanctioning a substantial disparity between interstate rates and intrastate rates which is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. Moreover, there would exist in this particular group of States a discrimination between the States themselves which could not be justified" (pp. 281-282). The Commission was virtually compelled to issue an order for the removal of this discrimination.

suffice. In the so-called hog minimum case,²⁹⁴ which grew out of a proceeding as to the propriety of the minimum carload weights on hogs required by the State of Iowa, the interstate standard prescribed by the Commission for a group of midwestern states was approved by the coöperating state commissioners and resulted in uniform practice for intrastate and interstate shipments. In a proceeding involving the relationship of rates on livestock, intrastate and interstate, from points in Nebraska to Missouri River markets,²⁹⁵ a result was reached, after an extended course of coöperation,²⁹⁶ which "more nearly represents the action which should have been taken to protect the interests of all concerned, including especially those of the shippers of the State of Nebraska, than could have been accomplished by separate proceedings before the respective commissions and without any co-operate effort."²⁹⁷ In the Oklahoma cement case,²⁹⁸ the co-operative procedure resulted in concurrence by the state body in the findings of the Commission with respect to the level of intrastate rates and in the prescription, by the respective tribunals, of identical charges for intrastate and interstate traffic. Even in a proceeding, instituted on complaint of a state commission, in which the representative of another state commission, though virtually the defendant, sat in a judicial capacity under the coöperative plan—a situation in which

²⁹⁴ *Minimum Carload Weights on Hogs*, 81 I.C.C. 373 (1923).

²⁹⁵ *Nebraska Livestock Case*, 89 I.C.C. 444 (1924).

²⁹⁶ In this proceeding, which was instituted on the Commission's own motion, a member of the Nebraska commission sat with the federal examiner at the hearing. Just before the examiner's proposed report was to be served, the state commission suggested that definite findings be deferred for a reasonable period, "in the hope that the matter might be settled by the joint action of the two commissions." This suggestion was followed, and the Nebraska commission instituted a proceeding and held a hearing of its own, the record in the federal investigation being incorporated into the record of the state proceeding. The state commissioners submitted both majority and minority memoranda, and the federal examiner prepared a second proposed report, "which was substantially in accordance with the views of the minority member of the Nebraska commission." After oral argument before both commissions, followed by joint conferences, agreement was reached as to the revision of rates, and the conclusions of both commissions were announced simultaneously. *Ibid.*, pp. 445-446, 458-459.

²⁹⁷ Paul A. Walker, Counsel for the Oklahoma Corporation Commission, in National Association of Railroad and Utilities Commissioners, *Proceedings*, 1924, at pp. 44-45.

²⁹⁸ *Iola Cement Mills Traffic Assn. v. A. W. Ry. Co.*, 87 I.C.C. 451 (1924).

the legitimacy of coöperation is perhaps questionable—the joint efforts of the state and federal authorities issued in a satisfactory adjustment of the conflicting interests.²⁹⁹ While resort to coöperation, in these as in the more comprehensive proceedings, was entirely voluntary and a matter of agreement between the federal and state regulatory agencies, the record of performance discloses marked progress in the achievement of harmonious and effective adjustment of intrastate-interstate controversies and relationships.

Coöperation constitutes a process of mutual aid. The special knowledge of the state authorities is made available to the Commission, and the general outlook of the federal tribunal is impressed upon the state bodies. The regulation of both interstate and intrastate rates is improved thereby: the federal commission does not order interstate charges with inadequate understanding of their repercussion upon local adjustments, and the state commissions do not prescribe intrastate charges without opportunity to grasp their relationship to the rate structure as a whole. The method of joint hearings and joint

²⁹⁹ *Oklahoma Corporation Commission v. A. & S. Ry. Co.*, 69 I.C.C. 207 (1922), 101 I.C.C. 116 (1925). The Oklahoma commission filed a complaint alleging that the interstate rates on grain, grain products, and related commodities from Oklahoma to Texas were unreasonable in themselves and unduly prejudicial to Oklahoma as compared with the Texas intrastate rates. A petition was also filed with the Texas commission by the railroads of that state requesting that the intrastate rates be raised to the level of the interstate scale. In the latter proceeding a federal examiner sat with the Texas tribunal, and the record of that proceeding was made part of the interstate investigation pending before the Commission. When the interstate case came up for oral argument and final decision, the chairman of the Texas commission sat with the members of the Interstate Commerce Commission. In other words, the Oklahoma commission, as complainant, argued its case before a body which included a member of the allegedly offending Texas commission sitting in a judicial capacity. While the fact that the Texas intrastate rates were found to be unjustly discriminatory removed any direct ground of dissatisfaction on part of the Oklahoma commission, the propriety of the coöperative procedure under such circumstances is open to question. The arrangement followed seems less than fair as between the state commissions finding themselves in such antagonistic situations, and it may cast doubt upon the impartiality of the adjudicating process. Compare the following comment of Commissioner Aitchison concerning this practice: "Sometimes a State commission finds itself as a party complainant, and the State commission which is the real defendant then sits co-operatively while the other does not. This is a real source of embarrassment at times, because it is almost impossible to lay the ghost of a doubt in such cases as to whether the conferees may not have some shadow of personal interest in supporting their own decision because it has been attacked. Of course this phase of it is of real concern to the State commission—more so than to the members of the Interstate Commerce Commission." National Association of Railroad and Utilities Commissioners, *Proceedings*, 1927, p. 71.

conferences focuses attention upon the common ends sought to be accomplished—and thereby tends to facilitate agreement upon controversial issues, despite diversities of interest, and to remove the necessity of mandatory federal action upon matters primarily of local concern, despite the sufficiency of authority therefor. Not only do the administrative authorities generally regard such coöperative activity as desirable in purpose and happy in outcome, but its merits and possibilities, as an integral part of the regulatory process, have received express judicial recognition.⁸⁰⁰ In so far as the proceedings in which coöperation is invoked look entirely to the future, the method of joint action is clearly a desirable one: it serves to avert conflicts and maladjustments, and without fundamental departure from traditional legal processes. Should equal sanction be given to the employment of coöperation for the removal of conflicts and maladjustments which have resulted from past action by the state authorities? More concretely, does the fact that state commissioners may sit in proceedings involving intrastate rates which they have themselves prescribed necessarily destroy the propriety of the coöperative procedure?

Resort to advocacy is admittedly inconsistent with the simultaneous performance of the judicial function, and there is always the danger, recognized alike by the state and federal authorities, that the co-operating commissioners, in view of the centralization of ultimate responsibility in the federal tribunal, may become "expedient parti-

⁸⁰⁰ In *Board v. Great Northern Ry.*, 281 U.S. 412 (1930), the carriers had procured an interlocutory injunction restraining the enforcement of intrastate rates prescribed by the North Dakota commission pending a decision by the Interstate Commerce Commission as to their validity. In dissolving the injunction and ordering the carriers' petition to be dismissed, the Supreme Court, through Chief Justice Hughes, said *inter alia* (at pp. 426-428, 430): "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission. On the contrary, Congress sought to provide a more satisfactory administrative procedure which would elicit the cooperation of the State regulatory bodies, and insure a full examination of all the questions of fact which such bodies might raise, before any finding was made in such a case as to unjust discrimination against interstate commerce or any order was entered superseding the rate authorized by the State. . . . Congress has so provided [for judicial restraint upon the power of a state to prescribe intrastate rates] only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created." See, also, *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922), at p. 591.

sans rather than disinterested judges.³⁰¹ Under these circumstances it is essential, in the first place, that situations especially fraught with possibilities of partisan bias be withheld from coöperative disposition. Where, for example, two state commissions stand opposed to each other in a given controversy virtually as plaintiff and defendant, it is scarcely appropriate that the one prosecuting the complaint find itself urging its cause before a tribunal on which the other is represented.³⁰² Such a situation is rather anomalous, even though it be granted that the coöperating state commission acts in an "advisory" and not in a strictly "judicial" capacity. The exercise of forbearance in requesting coöperation or accepting invitations to coöperate under questionable circumstances would add to the prestige of the coöperative method and to the unqualified acceptance of its results. It is essential, too, that in such proceedings as are deemed appropriate for coöperation the spirit of partisanship be scrupulously avoided. The desirability of the coöperative plan is grounded in the assumption that the state commissioners, no less than the federal body, will seek to attain just and reasonable results, in terms of the totality of considerations disclosed at the joint hearings and joint conferences, rather than to effect authoritative confirmation of preconceived conclusions. Such an approach is indispensable, and any departure therefrom constitutes a serious reflection upon the administrative personnel charged with any measure of power or responsibility in the premises.

But the mere fact that rates prescribed by state commissions are in issue does not invalidate the participation of their representatives in a coöperative capacity. As far as past maladjustments are concerned, these are the very situations which the coöperative plan was designed to reach. Through joint hearings and joint conferences, the independent findings of the state and federal authorities, which are the source of conflict, can be reconsidered in light of a unified record and common counsel upon its meaning and remedial requirements. Neither in theory nor in practice is the assumption justified that the state bodies, any more than the federal tribunal, will merely utilize the opportunities of the conference chamber for pressing original claims

³⁰¹ See National Association of Railroad and Utilities Commissioners, *Proceedings*: 1926, p. 48; 1929, pp. 45-47.

³⁰² See note 299, *supra*.

or exerting partisan influence.⁸⁰⁸ The history of both the basic statutory enactment and the procedural agreement which followed it indicates that neither type of regulatory agency acceded to the coöperative plan simply as a means of silencing political protests against the federal assertion of jurisdiction over matters believed to fall within the reserved powers of the states. Definitely clothed with ultimate authority in these conflicting situations, the Interstate Commerce Commission, on its part, urged the desirability of coöperation and enlisted the services of the states for the purpose of attaining more enlightened and more effective performance of those of its tasks which, though of national concern, bear an intimate relationship to local needs and local interests. Similarly, the state commissions, shorn of actual power in significant directions, recognized in the coöperative procedure an opportunity to avoid conflicts of authority and to assure adequate consideration of these local needs and local interests. The coöperative plan vests no power in the state bodies to control the final action of the Commission, nor does it deprive them of the right to press their claims through the ordinary processes of litigation. Coöperation is resorted to in a given proceeding only when the federal and state commissions involved believe it to be helpful. The Commission, by way of voluntary restraint, may refrain from mandatory ac-

⁸⁰⁸ Compare the following from Bulletin No. 81-1930 of the General Solicitor of the National Association of Railroad and Utilities Commissioners, at p. 3: "Notwithstanding the history of the legislation, and the provisions of the cooperative agreement . . . there have perhaps been some commissioners, both federal and state, who have appeared to entertain doubt about the propriety of state commissioners, who have prescribed rates which are under question in a 13th section proceeding, sitting with the Interstate Commerce Commission in a cooperative capacity when the lawfulness of their rates is under consideration. Any such scruples have arisen, I think, from a failure to give due weight to the fact that rate proceedings by Commissions are administrative or legislative rather than judicial, and to the further fact that the state commissioners have no more personal interest in such a proceeding than the Interstate Commerce Commissioners have. Speaking broadly, their interests and duties are at all times the same. It is always the duty of each to secure establishment of the rates subject to his jurisdiction upon a proper basis, and it is not to be presumed that a state commissioner will become partisan and abandon his proper official attitude the moment he has given sanction to a schedule of rates believed by him to be just and reasonable. There is no more reason why a state commissioner should enter a conference in a case in which a schedule once prescribed by him is under challenge with a partisan disposition to resist change therein than there is for an Interstate Commerce Commissioner to enter such conference with a pre-determination to find that the interstate rates (with which the intrastate rates are to be compared) must be declared upon a proper level, and all lower intrastate rates brought to that level."

tion in the first instance, but it does not thereby relinquish its ultimate control of the situation; and the state bodies, though acting in a co-operative capacity, are free to have evidence and argument presented on behalf of the interests intrusted to their care. Furthermore, since coöperation is entirely a matter of agreement in each proceeding, there is no curtailment of the right of the state commissions to act with such authority as is recognized by law independently of the federal tribunal. The coöperative plan is a practical expedient for dealing with practical issues. While the details of its application will doubtless be improved with the further passage of time, the experience of the past has disclosed no basic defects which impair its propriety or usefulness as a functioning device.⁸⁰⁴

⁸⁰⁴ As alternatives to the policy of coöperation which now prevails, two other arrangements have been proposed at various times for meeting the difficulties incident to the fair and orderly adjustment of national and local interests under our dual form of government: that regional commissions be established (see, for example, Walter M. W. Splawn, in *Railway Age*, November 27, 1926, pp. 1027-1028); and that federal authority be delegated to the state commissions (see, for example, George W. Anderson, in *Proceedings of National Association of Railroad and Utilities Commissioners*, 1920, pp. 32-42). It is decidedly questionable whether either of these policies would constitute an improvement upon the existing situation. Regional commissions, with jurisdiction defined by natural economic areas, would doubtless be in more intimate contact with the distinctive problems of their respective districts than a centralized tribunal located in Washington, but their knowledge of local needs and local interests would be no greater than that of the coöperating state commissions which now conduct proceedings jointly with the federal tribunal. Furthermore, considerable difficulty would be encountered in constituting "natural" regions, and diversities of interest as between adjacent regions and in the case of inter-regional traffic would still remain. The Commission would thus be compelled to assume original jurisdiction in many instances and to retain appellate control in most others. There would be a further increase of regulatory agencies, but it is doubtful whether the regional commission plan could restore much final power to the local communities without sacrificing essential national interests. The delegation of federal power to the state commissions appears to be equally impracticable. While such procedure may be appropriate in a few specific matters which are predominantly of intrastate concern (see, for example, *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 [1928]), its adoption in the field of railroad rates, where the interrelationship between interstate and intrastate adjustments is potentially a constant source of conflict, would necessitate the retention of powers of review in the commission coextensive with those which it now exercises. The state commissions still possess complete authority over intrastate rates, except in so far as such rates cause undue prejudice against persons or places in interstate commerce or unjust discrimination against interstate commerce; and even in the case of such prejudice or discrimination, the Commission now relies upon these bodies, in the first instance, for correcting the maladjustments. Under these circumstances little would be accomplished by the express delegation of authority except the substitution of a rigid procedure for the flexible one which now prevails. If the rate-making powers of the state commissions were actually increased, there would be grave danger of re-

§5. SUMMARY AND CONCLUSION

The Commission's assertion of power over intrastate commerce, as thus developed, constitutes a highly significant aspect of its effective jurisdictional scope. It not only reflects the need of centralization in various directions for the adequate protection of interstate commerce, as recognized by Congress and sanctioned by the courts, but it discloses the character of the Commission's performance in a sphere which involves basic issues of distribution of power, close questions of adjustment of interests, and practical problems of administrative procedure.

The need of concentration of authority in the federal tribunal is grounded in economic considerations and operating conditions which make themselves felt constantly and in controlling measure. The fact that the same plant and facilities are used in both intrastate and interstate commerce, coupled with the further fact that the normal course of industrial and commercial enterprise is not conditioned by the political lines which delimit governmental jurisdiction, has necessitated the development of regulatory policy in terms of the essentially national character of the functions performed by the carriers. Unrestricted exercise of state power, though directly confined to intrastate matters and actuated by no ulterior motives, may interpose artificial barriers to the free operation of competitive forces over the economic field as a whole. Because of the intimate relationships between intrastate and interstate commerce, such results may flow from mere differences in policy among the individual states or as between the federal tribunal and the state bodies, even when all design to prefer local interests or to burden interstate traffic is absent. When state authority is consciously utilized to serve sectional ends, at the expense of adjoining localities or general interests, the vice of the situation becomes increasingly clear.

version to the conflicts and maladjustments which preceded the *Shreveport* decision and its legislative, administrative, and judicial aftermath; if, on the other hand, the federal power of ultimate control were to remain intact, as seems necessary in the national interest, the final disposition of proceedings might simply be prolonged, and without more adequate opportunity for the consideration of local conditions than is afforded under the prevailing cooperative plan. For a thoughtful discussion of suggested plans for the restoration of power to the state commissions and for the creation of regional commissions, see a letter of Commissioner Joseph B. Eastman, under date of October 22, 1926, addressed to Representative Homer Hoch of Kansas.

The consequences are not unlike those which would follow the imposition of duties on imports or exports by the several states, and centralized control in this sphere, with a view to the maintenance of harmonious policy, draws its rationale from the same considerations which underlie the constitutional prohibition of the levying of such duties. The primary end is to remove obstructions to the free flow of interstate commerce—to protect economic intercourse among the states against restrictive regulations emanating from the assertion of local sovereignty. This need of centralization of ultimate authority, manifest in principle from the very nature of the transportation function as performed by modern railroads, is supported, furthermore, by the pragmatic test of experience. The prevailing assertion of federal power over intrastate commerce in this field received its immediate impetus, first, from rate maladjustments and conflicts of authority which issued in unquestioned discrimination, to the detriment of interstate commerce and persons and places involved therein; and second, from a rather tardy public recognition, because of impaired credit and inadequate facilities, that the regulatory process must be directed to the achievement of positive ends, through the assumption of affirmative responsibilities toward the carriers viewed as a national transportation system. It was the pressure of these conflicts and maladjustments, as they emerged in numerous instances, which induced the initial exercise of federal authority in the domain of intrastate rates and its subsequent expansion in furtherance of the rule of rate-making; and it was the pressure of the inadequacy of the transportation machine, particularly as disclosed during the war period, which not only rendered the general level of state rates a matter of national concern, but led to the extension of federal jurisdiction to the regulation of service and facilities, including new construction and abandonments, and to the control of finance and management, including security issues and intercorporate relations, on a national basis. The prevailing centralization of authority, as a matter of legislative policy, has constituted a practical response to pressing need.

And because of the appropriateness of the various federal expedients to the effective regulation of interstate commerce, Congressional policy in this direction has encountered no constitutional obstacles throughout the course of its development, despite the express statu-

tory exemption of intrastate commerce from the incidence of the regulatory powers conferred by the Interstate Commerce Act. The power of Congress to regulate interstate commerce and its instruments had been recognized as plenary and exclusive from the very beginning. While the states were held to possess concurrent powers even in the field of transportation—with reference to subjects deemed appropriate to diversified control or regulations calculated to affect interstate commerce indirectly and incidentally—the validity of their exercise was made dependent upon the absence of Congressional action. With the assumption of control by the Federal Government, therefore, state regulations were necessarily superseded, and, because of identity of facilities and interblending of operations, the national policies came to occupy virtually the entire field in many aspects of regulatory activity. On this basis the dominance of federal safety legislation was repeatedly upheld, and the more recent centralized regulation of matters of service, organization, and finance has proceeded without judicial interference on constitutional grounds. In the sphere of rates, constitutional doctrine first restricted the powers of the states with reference to interstate adjustments, even in the absence of Congressional action, and later, in light of federal enactments, recognized the propriety of national interference with intrastate adjustments to the extent necessary to remove undue prejudice or unjust discrimination against interstate commerce. Despite a preliminary period of vacillation, the control of interstate rates was early recognized as constituting a subject of national importance and requiring uniformity of regulatory action. Distribution of power was thereby delimited in terms of the realities of commercial intercourse, and mere inaction was not permitted to derogate from the exclusiveness of federal authority in the interstate field. But this withholding of interstate rates from the jurisdiction of the states, whether asserted directly or indirectly, merely emphasized the need of national control and facilitated the establishment of the original system of federal regulation. The reserved powers of the states, as applied to intrastate rates, remained intact: from the standpoint of constitutional doctrine as such, the jurisdiction of the states in this sphere was deemed as exclusive as that of the general government in the sphere of interstate rates. Federal incursion upon the domain of intrastate rates, in

derogation of state authority, was the direct outcome of Congressional policy, as expressed in the original Act to Regulate Commerce and in some of its subsequent amendments. The general prohibition of discrimination, operative from the beginning, was couched in such sweeping terms that it naturally embraced maladjustments springing from the relationship between particular intrastate and interstate rates; and the more explicit prohibition, subsequently enacted, declaring unlawful state-made rates which cause unjust discrimination not only against persons and places but against interstate commerce, when coupled with the new national policy as to the earnings of the carriers, naturally embraced disparities between the general levels of intrastate and interstate rates. Power to remove such discriminations was expressly conferred upon the federal tribunal, but solely as an instrument for rendering effective the regulation of interstate rates. In upholding the constitutional validity of this exercise of power, therefore, the Supreme Court was only according practical recognition to the acknowledged supremacy of the general government in all matters of interstate commerce, and without ousting the states of authority in the field of intrastate rates as such. While this evolution of federal power has imposed definite and far-reaching restrictions upon the freedom of the states in dealing with intrastate matters, it has done so only as a direct incident to the national control of the interstate operations of interstate carriers. Constitutional doctrine, in conformity with the best traditions of judicial performance, has been flexibly adjusted to the changing demands of policy and administration. As far as mere distribution of power is concerned, the prevailing status appears to be soundly grounded in law as well as in economics.

But recognition of the need of centralized authority and of the valid assumption of the requisite power does not foreclose once for all the difficulties involved in federal regulation of matters of intrastate concern. The problems encountered are continuing problems. Since the state bodies have not been deprived of all jurisdiction in the railroad field, and since the practical adjustment of local and general interests, both economic and governmental, must be molded by the peculiar circumstances of each proceeding, the Commission's posses-

sion of sweeping power does not necessarily justify its full exercise. In this, as in other spheres of regulatory activity, the Commission functions within a broad zone of discretionary authority, and the question remains as to how far administrative performance, in safeguarding essential national interests, has none the less avoided undue encroachment upon the legitimate domain of state control.

In the field of service and facilities and that of finance and management, relatively few situations have arisen in which the propriety of the Commission's performance can be seriously questioned from the standpoint of state and federal relationships. In the exercise of both normal authority and emergency power over "car service," the Commission has inevitably assumed jurisdiction over the entire supply of facilities. It is practically impossible to differentiate between intrastate and interstate traffic in matters of interchange of equipment and car distribution, and the tasks of safeguarding and promoting the national interest in adequate and non-discriminatory service necessarily involve the subordination of the states. But even under these circumstances local interests have not been ignored: the coöperation and assistance of the state agencies, which are in close contact with local shippers, have been regularly enlisted, both in the interest of realistic adjustment and as an aid to efficient administration. Like expedients have served as the chief source of protection for the interests of the states in connection with the Commission's exercise of control over extensions and abandonments. Although, in the case of extensions, the Commission has uniformly refrained from asserting jurisdiction over new construction undertaken by independent lines located wholly within one state and engaged solely in intrastate commerce, and although, in the case of abandonments, it was early compelled by judicial decision to refrain from asserting jurisdiction over the intrastate commerce of independent lines located wholly within one state, the sweep of its statutory authority has largely ousted the states of power in this sphere. Since the controlling purpose of requiring certificates of convenience and necessity is to protect interstate commerce against needless duplication of plant or service and hampering financial burdens, the Commission's jurisdiction has been properly asserted over lines located wholly within one state, and over the

intrastate as well as the interstate traffic of such lines, in so far as the roads concerned have been related, through ownership or control, to interstate carriers, and in so far as the traffic involved has been calculated to affect interstate commerce. The dominance of national interests in such circumstances has resulted in a disregard of state restrictions and in exclusive control by the federal tribunal. But the record of performance discloses, none the less, that local conditions have been accorded scrupulous consideration. Not only has the bulk of the evidence, in almost every proceeding, consisted of representations as to local needs and local interests, but in a large proportion of the extension and abandonment cases the hearings have been held for the Commission by state bodies; and it is further significant that in most such instances the recommendations of the state authorities have been followed by the Commission. Finally, in matters of finance and management, the Commission has erred, if at all, in the direction of undue recognition of the authority of the states. Although there appears to be a clear Congressional intent that the field of railroad security regulation be completely occupied by the federal tribunal, the Commission's action has occasionally been accommodated to the limitations of state law; and although there appears to be a similar intent that railroad combinations be not only relieved from existing prohibitions and restrictions but affirmatively molded by the federal tribunal, consolidations have been permitted to be effectuated under state law without the Commission's prior approval. This self-denying attitude, though constituting a questionable procedure as a legal matter of jurisdictional interpretation, has produced no untoward practical consequences from the national standpoint, since the substantive policies involved have invariably coincided with those deemed in the public interest by the Commission. In view of the general dominance of federal authority in matters of finance and management, the spirit of restraint manifested in these determinations is readily understandable, even though it cannot command complete approval. In any event, there has clearly been no federal encroachment upon the legitimate domain of state power, and full opportunity has been afforded for the submission of local representations and for the consideration of the viewpoint of the state authori-

tics. Outside the field of rates and charges, then, the Commission's performance, in furtherance of its generally exclusive jurisdiction, has raised few basic issues which cast doubt upon the propriety of its prevailing policies.

In the matter of rate regulation, on the other hand, as applied to intrastate traffic, the character of the Commission's performance has varied in significant respects in the course of its development, and questions have arisen from time to time as to whether the Commission has successfully avoided substantive determinations and procedural processes calculated to subvert sound state and federal relationships. The established system of rate control contemplates the exercise of both state and federal authority. While national interests are paramount and restrictions upon state power are unavoidable, there is ample opportunity for unnecessary encroachment upon local sovereignty. To what extent has the Commission exercised its authority in overreaching fashion? For the most part the foregoing analysis of outstanding proceedings tells its own story, in the way of adoption of sweeping tactics as well as of exercise of commendable restraint; it will suffice to focus attention upon the fundamental characteristics of the administrative record. Has the Commission thrust itself unduly into matters of intrastate concern? Have its substantive policies interfered needlessly with the regulatory functions of the states? Has its procedural approach relegated the state bodies to a position of impotence in unnecessary measure?

While federal activity in intrastate rate cases has expanded in notable degree, particularly since 1920, there appears to be no basis for the contention that the Commission is pursuing a needlessly aggressive attitude with reference to the assumption of jurisdiction over intrastate situations. There is a marked contrast, it is true, between the Commission's approach before and after the adoption of the Transportation Act. Before 1920, intrastate rate proceedings, invariably confined to the issue of undue prejudice against particular persons or places, were instituted only upon complaint of state or municipal authorities, civic organizations, business associations, or interested shippers. The Commission did not proceed on its own initiative, nor was its authority invoked on petition of the carriers. Under these cir-

cumstances the Commission noted that it was not reaching out "in a spirit of aggression" in the matter of intrastate rates, that in all instances the complaints were being filed by "parties who had a legal right to do so," and that it was dealing with these cases "in accordance with law and in obedience to official oath."⁸⁰⁵ Since 1920, there has been a sharp intensification of activity in this field. The general level of intrastate rates has also come to be a matter of federal concern, and numerous proceedings have been instituted on the Commission's own motion and in response to carrier petitions, as well as on the basis of complaints by shippers and other parties in interest. It would seem, on the surface, that the Commission is thrusting itself into intrastate situations more confidently and with less restraint. But this expansion of activity is largely a reflection of changes in legislative policy rather than of a reversal of administrative attitude. The affirmative responsibilities toward the carriers imposed by the Transportation Act have rendered disparities between intrastate and interstate rate levels a significant constituent of discriminatory situations; and the rate structure investigation ordered by the Hoch-Smith Resolution has rendered the relationship between specific intrastate and interstate rates more than ever a matter of positive national interest. Moreover, the 1920 legislation explicitly authorized the carriers to file petitions invoking the Commission's authority over intrastate rates, and it made it the express duty of the Commission to prescribe intrastate rates in lieu of those found to be discriminatory. It is these expressions of Congressional policy that are primarily responsible for the marked growth of intrastate rate proceedings. In light of the prevailing statutory mandates, there is no evidence of any "spirit of aggression" on part of the Commission: it is as true now as it was in 1916, that the complaints, which remain the chief source of intrastate rate proceedings, are filed by parties which have "a legal right to do so," and that the Commission is handling such proceedings "in the regular line of official duty" and "in accordance with law." Such strictures upon the Commission's performance as may be justified must find their source in the character of its substantive determinations and procedural processes.

The most vulnerable aspect of the Commission's administrative

⁸⁰⁵ *Annual Report, 1916*, p. 89.

record was disclosed in the numerous intrastate rate proceedings which grew out of the general rate increases of 1920, despite the fact that these proceedings accomplished results essential to the national interest and that the sweeping power asserted in their disposition was sustained by the Supreme Court. There was a real departure from the attitude of restraint manifested by the Commission prior to that time, and the ruthless invasion of the domain of the states exemplified thereby proved unable to withstand the more mature demands of subsequent experience. Not only were revenue considerations accorded effective weight, as doubtless contemplated by the new statutory enactments, but they were deemed so controlling as to render all disparities between intrastate and interstate rate levels conclusive evidence of discrimination. The income of the carriers demanding immediate attention, and financial results of considerable magnitude being necessary to the maintenance of an adequate transportation service, the Commission virtually assumed full control of intrastate rates and charges. In each and every case in which the carriers drew the Commission's attention to rate disparities, these disparities were held, upon investigation, to constitute unjust discrimination against interstate commerce; and, in consequence, all of the intrastate rates were ordered raised to the interstate level. Little reliance was placed upon specific findings of prejudice against persons and places, and the limited extent, often negligible, of the financial burden imposed upon interstate commerce was not accepted as adequate ground for the denial of relief. Even where a considerable group of established intrastate rates were found to be higher than the corresponding interstate rates, the Commission issued a general order condemning the intrastate rate structure as a whole, instead of singling out the particular state rates which were actually shown to be prejudicial to interstate commerce; and even minor intrastate charges, and rates on traffic which did not in fact move interstate, were held to fall within the Commission's control, despite their insubstantial effect upon carrier revenues and their remote influence upon interstate commerce. It is not surprising that the Commission shrank from the logical necessities of this extreme policy and thereby involved itself in inconsistencies when the revenue issue arose in the case of short-line carriers which had not been included in the original proceedings. There can

be no question that disparities between intrastate and interstate rates may impose undue financial burdens upon interstate commerce, and that the Commission possesses the necessary authority to remove these burdens. But if the primary objective of the Commission's assertion of power over intrastate rates is to render the regulation of interstate rates effective, the disparities requiring federal intervention should be "substantial," and they should operate as a "real" discrimination against interstate commerce. All intrastate rate adjustments possess some degree of financial significance. If every departure from the standards established for interstate traffic were to serve as a justification for federal interference, the regulatory functions of the states would be destroyed. Rate control would be completely unified, in defiance of express statutory stipulation, and the state commissions would be rendered altogether impotent to mold carrier charges in matters of internal commerce. Such an outcome was seriously threatened by the Commission's determinations in this series of intrastate rate proceedings, and the danger of such an outcome was accentuated by the procedural processes employed.

Even if we accept the Commission's findings as to the burdensome character of all rate disparities, and as to the necessity of an enhancement of revenue from intrastate traffic measured in the aggregate by the amount that would be produced by raising the state rates to the interstate level, the question still remains as to how this discrimination shall be removed and as to how the added revenue shall be made available. If, upon such findings by the Commission, the correction of maladjustments were left, in the first instance, to the action of the local authorities, a flexible zone would be provided for securing the necessary revenue from the intrastate traffic as a whole, and at the same time the states would not be ousted of jurisdiction over the relationship between particular intrastate rates. While the Commission is vested with adequate power to proceed directly under such circumstances, it is also authorized to utilize the services and facilities of the state agencies, and such use might have accomplished the national ends in view without undue encroachment upon the freedom of the local bodies. But in these proceedings the Commission chose the path of direct action. The carriers were not required to exhaust state remedies as a condition of securing federal relief, nor were the state au-

thorities afforded an opportunity to correct the maladjustments disclosed by the Commission's findings. Not only did the horizontal increase of all state rates, as ordered by the Commission, create numerous discriminations in the intrastate rate structure, but the rates so prescribed, despite their impropriety in many instances, came to be "frozen"—that is, they were virtually withdrawn, in important respects, from the continuing impact of the regulatory process. The issuance of direct federal orders establishing state rates rendered such rates binding until the orders were vacated or modified by the federal tribunal. The Commission, having no jurisdiction over intrastate rates as such, could not change them from the standpoint of their interrelationships, and the state commissions were likewise powerless to act in this direction because of the controlling effect of the federal determinations. Only through petitions for reopening or through resort to the saving clauses could necessary modifications in the rate structure, as crystallized in this fashion, be achieved by the local agencies, and the attainment of such relief was dependent, in final analysis, upon the exercise of federal rather than state authority. The accomplishment of national purposes, under this procedural approach, was made to involve a needless disregard of the rights and interests of the states.

But the Commission's policies, both substantive and procedural, appear to have undergone a marked change. The extreme attitude disclosed in this series of proceedings was partly a response to the urgency of the financial situation which faced the carriers upon the restoration of private management after the war period, and partly an expression of administrative immaturity in the exercise of new powers. Once the general rate increases deemed essential to the maintenance of an adequate transportation service were effectuated and intrastate rate proceedings came to constitute a more normal aspect of regulatory activity, the Commission reverted to the restrained approach characteristic of its earlier determinations. In this transition an important influence was exerted by the dicta of the Supreme Court—that the Commission's action "should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce," and that such action "must leave appropriate discretion to the state authorities to deal with intrastate

rates as between themselves on the general level . . . found to be fair to interstate commerce."⁸⁰⁶ Practical effect is now being given to these considerations. There is no insistence that intrastate rates be maintained on the exact level of interstate rates; there is an increasingly controlling requirement that the allegations of discrimination contained in carrier petitions be supported by complaints of injury on behalf of forwarders and receivers of goods; there is growing emphasis upon the necessity of supplementing general claims of revenue curtailment by specific evidence of undue prejudice to persons and places. Under prevailing practice, in other words, the Commission tends to restrict its exercise of authority over intrastate rates to situations in which the evidence of discrimination is clear and persuasive, in which the burden imposed upon interstate commerce is a direct and material one, in which the business interests of shippers as well as the financial interests of carriers are adversely affected by the intrastate-interstate rate relationships. In these circumstances, national ends are amply safeguarded, but without overreaching intrusion upon the legitimate sphere of the states. Moreover, even when the existence of unjust discrimination or undue prejudice is unmistakably supported by the record, the Commission does not necessarily resort to the method of direct action for removal of the maladjustments. In most instances the process of correction is left to the state authorities, to the end that due flexibility in the establishment of rate relationships may be preserved, and that the field of intrastate rates as such, which is expressly exempted from the incidence of federal power, may not also be removed from the impact of state control. Through this procedure there is greater likelihood that national and local interests will be adjusted on a realistic basis, and the emergence of the problem of "frozen rates" is effectively averted. Only upon failure of the state authorities to provide the required relief does the Commission generally act through direct order, and even then only to the limited extent explicitly justified by the record and rendered necessary by the recalcitrance of the local agencies. This approach, from the standpoint of both substantive findings and administrative procedure, accords all necessary consideration to the demands of local conditions

⁸⁰⁶ *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922), at pp. 590-591.

and to the requirements of state sovereignty, and at the same time it involves no abdication of federal authority or undue subordination of paramount national interests.

In large measure these commendable characteristics of the Commission's present performance are the outcome of the coöperative activity of the state and federal authorities, expressly sanctioned by statute, which has come to dominate the disposition of intrastate rate proceedings. The availability of common records, as a result of joint hearings, and the free interchange of views, as a result of joint conferences, have greatly facilitated the avoidance of conflicts and the attainment of harmonious conclusions. Because ultimate determinations are generally not arrived at independently by either the federal tribunal or the state bodies, the tendency to extreme action has been effectively checked on both sides; and because the differences in policy under the coöperative plan are less marked, the need of federal interference has been correspondingly minimized. In other words, the Commission's findings as to unjust discrimination or undue prejudice have been narrowed in scope and rendered more realistic in content because there is a reciprocal cognizance, in concrete terms, on part of the local and federal authorities, of the respective rights and interests of the nation and the states. And the method of coöperation is likewise responsible for the Commission's voluntary reliance upon the state bodies, in the first instance, for the removal of such maladjustments as are found to exist. While the Commission is empowered to prescribe intrastate rates under such circumstances, there is no necessity of direct orders just so long as the state commissions which participate in the disposition of proceedings recognize the demands of each situation and provide the necessary remedial action. Because of the common understanding engendered by the coöperative procedure there is little danger of abuse on part of the state agencies, and there is the distinct advantage that rigid rate relationships are avoided and continuity of the regulatory process is maintained. Final authority, adequate for all purposes, resides in the Commission, but the self-imposed restraint in its exercise, induced by a recognition of the potentialities of the coöperative method, operates to safeguard all essential national interests and to conserve the economic and governmental interests of the states.

Viewed as a whole, the Commission's assertion of power over intrastate commerce, as gradually evolved in face of changing circumstances and conditions, constitutes a strikingly enlightening expression of the fruitful possibilities of the administrative method of control. In this field in which constitutional questions of distribution of power and legal questions of statutory interpretation are of basic importance, there none the less remains a broad zone for the exercise of administrative discretion; and, despite unprecedented centralization of authority, this discretion has come to be utilized in ways calculated as a practical matter to achieve the major ends of the regulatory process, rather than in a spirit of artificial reason or of arbitrary policy.

CHAPTER X

THE EXERCISE OF ADMINISTRATIVE DISCRETION

- §1. The Administrative Method
- §2. The Discretionary Nature of the Commission's Legislative Mandates
- §3. The Pragmatic Character of the Commission's Regulative Processes
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CHAPTER X
THE EXERCISE OF ADMINISTRATIVE DISCRETION

THE kinds of utilities, embracing not only the major field of railroad transportation but various allied public service undertakings, and the kinds of commerce, embracing intrastate as well as interstate situations, over which the Commission is exercising control, disclose the more formal expressions of its jurisdictional scope. In analyzing the sweep of the Commission's authority as a functioning body, it is necessary, also, that consideration be given to the nature and significance of its administrative power as such, as evidenced by the processes which inhere in its exercise of discretion and by the external limitations imposed thereon. Such an inquiry involves a cross-section of its principal methods and practices, as applied throughout the field of its regulatory activity, rather than an analysis of any single aspect of its labors. The exercise of a large measure of discretion springs, in the first place, from the very nature of administrative tribunals, particularly as they have developed in connection with the regulation of railroads and public utilities. By way of background, therefore, brief consideration will be given to some outstanding characteristics of such tribunals. But the far-reaching administrative power which the Commission is asserting is grounded more immediately in its own peculiar status and tendencies, as reflected, primarily, in the generality of the authority conferred upon it and in the flexibility of the methods used in its exercise. Since our special interest lies in the Commission's distinctive position, attention will be directed to the discretionary nature of the legislative mandates under which it operates, and to the pragmatic character of the regulative processes which it employs. But even independent administrative tribunals are subject to external limitations, entirely apart from the express restrictions upon jurisdictional scope which are imposed by the legislatures creating them. The most important of these limitations are imposed by the courts, as a means of maintaining the supremacy of law and confining these bodies to their legitimate channels. It is necessary, therefore, to examine the prevailing status of the Commission's relationship to the courts. In the early history of the Commis-

sion, broad powers of review were exercised by the courts, and the prestige and effectiveness of that body were seriously jeopardized. For more than two decades, on the other hand, the occasions and grounds of judicial review have been progressively narrowed, so that the Commission has come to occupy, as a practical matter as well as in point of theory, a position of unquestioned supremacy in the regulation of railroads and allied utilities subject to its jurisdiction. This result has been largely accomplished by the courts themselves, in light of the general purposes of the legislative structure, rather than through any express statutory definition of the respective spheres of administrative and judicial authority. The recognition that exclusive primary jurisdiction as to most aspects of the regulatory process resides in the Commission, the refusal to exercise censorship over the Commission's so-called negative orders, and the confinement of the grounds for judicial reversal to constitutional issues, matters of statutory interpretation, and situations involving arbitrary action, are the principal directions through which the Commission's dominant influence has been clothed with judicial sanction. Subject to the limitations, of comparatively restricted scope, characteristic of such exercise of judicial review, the Commission's orders are endowed with controlling finality, except in so far as the Commission itself is free to reverse, modify, or set aside its determinations. Yet the Commission's administrative independence may be weakened or destroyed despite the disposition of the courts (except, notably, in matters of valuation) to curtail judicial interference with its processes and results. The executive branch of the government, through the exertion of informal pressure in actual controversies or through manipulation of the appointing power, and the legislative branch of the government, through the enactment of specific measures as distinct from the establishment of general standards, may infuse partisan political considerations into the determination of far-reaching commercial, industrial, and economic issues, to the impairment of the Commission's standing as an expert investigatory body clothed with dominant authority to determine controversies in the public interest. Since such subversive tendencies have not been entirely absent in recent years, the problem of maintaining administrative independence from this standpoint also demands consideration. All these matters bear upon

the exercise of administrative discretion, as a final phase of the Commission's jurisdictional scope.

§1. THE ADMINISTRATIVE METHOD

While administrative tribunals exercising broad discretionary powers over persons and property, particularly in the form of public service commissions, are of comparatively recent origin in countries in which the Anglo-Saxon tradition of "supremacy of law" prevails,¹ they have grown very rapidly, both in number and in jurisdictional scope.² Probably the primary impetus to the present prominence of these governmental agencies is to be found in the growing tendency to conceive the state as a positive instrument for shaping and directing social policy.³ This tendency is reflected not only in the increased quantity of legislation but in the changed character of this legislation. The mere expansion of legislative activity has given rise to the problem of devising effective machinery of enforcement: the difficulty of dealing, through the ordinary channel of the courts, with the large mass of proceedings inevitably involved under many of the new laws has itself stimulated the establishment of special tribunals charged with the administration of specific legislative enactments.⁴ But it is in the peculiar nature of much of this legislation that the chief cause of the growth of administrative tribunals is to be found. The extension of governmental power into the realm of regulatory activity, particularly in the field of commerce and industry, has assumed the form, predominantly, of setting up basic standards of conduct, stated in general terms, which necessarily require administrative determinations as a preliminary to their judicial enforcement. The

¹ See John Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 5-6.

² See H. C. Spurr, *Guiding Principles of Public Service Regulation*, Vol. I (1924), chaps. i and ii.

³ See H. J. Laski, "The Growth of Administrative Discretion," *Journal of Public Administration*, Vol. I (1923), pp. 92-100.

⁴ Note, for example, with reference to the English Public Health Act of 1875, the declaration that "a measure which aimed . . . at compelling the whole nation to change its existing system of domestic sanitation, would never have been put into ubiquitous operation in less than a century if its enforcement had depended upon the costly and cumbersome methods of the law courts." W. A. Robson, *Justice and Administrative Law* (1928), pp. 254-255.

provisions, for example, for the maintenance of reasonable and non-discriminatory rates by railroads and public utilities, and for the prevention of unfair methods of competition by industrial concerns, are clearly of this character. The generality of the legislative enactments provides a basis for flexible adjustment to the diversities and complexities of business relationships and to the constantly changing character of the functioning economic order; and the delegation of administrative authority to special tribunals makes possible the attainment of sound and equitable results, through the settlement of concrete controversies by an expert personnel and in terms of specific "records." The growth of administrative tribunals has constituted a response to pressing need; their intimate relationship to the course of recent legislation lends strong support to the pronouncement that "administrative discretion is of the essence of the modern state."⁸

Perhaps the most striking characteristic of administrative tribunals, and the one from which much of their discretionary authority springs, is to be found in the exercise by them of mixed governmental functions. Mandatory public service commissions of the modern type almost universally exercise all three of the basic types of governmental authority. Despite the traditional doctrine of the separation of powers, these commissions, though generally regarded as branches of the executive department, are expressly endowed with authority of a legislative and judicial, as well as of an administrative, character.⁹

⁸ H. J. Laski, *op. cit.*, at p. 92.

⁹ Compare the following from John Dickinson, *op. cit.*, at pp. 15-20: "The essence of the system is to expand the functioning area of executive officers backward over the fields which, under a system of regulation by law, are occupied by the law-making body and the courts. Thus the administrative official who is to give orders to avert harmful conduct may find it desirable, before dealing with specific cases, to fix upon rules to govern the exercise of his discretion, and then proceed to apply these rules to fit the facts of each special case. These two steps may be taken separately or they may be combined. Either an administrative regulation may be framed beforehand and applied in a separate proceeding to each case as it arises; or the executive may, in one and the same proceeding, make and apply a rule, or, what is substantially the same process, apply a 'standard,' to the case before it. In either instance, however, the second of the two steps is, for all practical purposes, adjudication. . . . Our constitutional distinction between 'legislative,' 'executive,' and 'judicial' powers draws the courts frequently into discussions in which the 'legislative' or 'executive' aspect of an administrative act is generally emphasized at the expense of the 'judicial.' Thus, for example, the act of a public-utilities commission in fixing a rate has been held to be 'legislative' for constitutional purposes. From one aspect of juristic analysis, legislative it no doubt is—that is, from the aspect of its future operation and its applicability to a whole class

They not only perform executive functions of investigation and prosecution, but, like legislatures, they lay down rules for the guidance of future conduct, and, like courts, they adjudicate particular controversies growing out of past transactions. In passing upon the reasonableness of existing rates and awarding reparation, for example, they exercise judicial functions; in prescribing rates for the future, they exercise legislative functions.⁷ While mere adjudication of controversies, as traditionally pursued by the courts, does not, in most instances, involve a deliberate process of law-making, the express authority vested in administrative commissions to promulgate, in concrete terms, the conditions which shall apply to subsequent transactions almost necessarily involves judgments as to the propriety of existing relationships. That these commissions, in various aspects of their work, embrace functions performed by all three branches of government has received ample judicial recognition, although no consistent theory as to their character has been developed.⁸ This merging

of cases. But the writ of mandamus is future in its operation, and yet is not for that reason regarded as legislative; and if we examine rate-fixing from the standpoint of the general applicability of the resulting rate to an indefinite number of future cases as a class, we observe the significant peculiarity that, while the rate applies indifferently, indeed, as against all future shippers, it applies only to the particular carrier or carriers who were parties to the hearing and other proceedings before the commission, and for whom, as the outcome of those proceedings, the rate is prescribed. From the standpoint of shippers, therefore, the rate may no doubt be regarded as legislation, but from the standpoint of the carriers it seems quite as truly adjudication. . . . There is no intention to deny that rate-fixing involves as one of its elements the exercise of a function which may as well as not be called 'legislative.' The whole discussion should go to demonstrate the futility of trying to classify a particular exercise of administrative power as either wholly legislative or wholly judicial. The tendency of the administrative procedure is to foreshorten both functions into a continuous governmental act." (The voluminous supporting footnotes have been omitted.) See, also, Warren K. Pillsbury, "Administrative Tribunals," *Harvard Law Review*, Vol. 36 (Feb. and Mar., 1923), pp. 405-425, 583-592, at pp. 405-406.

⁷ Compare the following from *Baer Bros. v. Denver & R. G. R. R.*, 233 U.S. 479 (1914), at p. 486: "That the subject of Reparation and Rates may be dealt with in one order is undoubtedly true. . . . But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order."

⁸ The Interstate Commerce Commission, for example, has been described as "purely an administrative body," but has none the less been recognized to possess "quasi-judicial" and "quasi-legislative" powers; and some of its functions have been charac-

of functions in a single tribunal issues in the exercise of a large measure of discretionary authority. Administrative orders having the effect of law are subjected to a minimum of compulsion or restriction from the legislatures and the courts. While the very existence and general jurisdictional scope of these commissions is dependent upon the will of the legislatures, and while the courts provide adequate safeguards against illegal practices or arbitrary action, the zone of discretion is sufficiently broad to permit, as a matter of course and without interference, the continuous performance of the practical task of promulgating a great variety of rules of conduct, condemning their violation, and taking the necessary steps for their enforcement.⁹

The element of discretion which inheres in these processes is greatly enhanced by the fact that these administrative tribunals are

terized as "wholly legislative," in the performance of which "the Commission, like other legislators, may reason from the particular to the general," and thus establish rules of general application. See *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U.S. 474, 484 (1912); *Baer Bros. v. Denver & R. G. R. R.*, 233 U.S. 479, 486 (1914); *Assigned Car Cases*, 274 U.S. 564, 583 (1927).

⁹ For a consideration of these matters in terms of the duties of the Interstate Commerce Commission, note the following from a paper by Commissioner Joseph B. Eastman on "The Place of the Independent Commission" (read before a meeting of the American Political Science Association, at Washington, D. C., December 29, 1927; published in *The Constitutional Review*, Vol. 12, April, 1928, pp. 95-102, at pp. 96-97): "Returning to the essential character of the duties of the Interstate Commerce Commission, it is important to bear in mind that prior to the creation of the Commission the public regulation of interstate common carriers lay partly with the courts and partly with the Congress. The powers of the courts, which were far from clear and definite, were apparently limited to the redressing of past wrongs. With the Congress lay the power of protecting the public interest through the control of future conditions. In exercising jurisdiction over what has been done in the past, the Commission is, therefore, doing what the courts used to do and what they may yet do to some extent; but in prescribing rates and rules for the future the Commission is exercising a power which has always been regarded as of a distinctly legislative nature. Strictly speaking its duties of this latter class are administrative, for the general rule or standard is established by the Congress and the Commission's function is merely to apply that general rule to particular cases. As a practical matter, however, the general rules which the Congress lays down are often so exceedingly broad and general as to afford wide latitude of action, and thus the Commission's function, while administrative in theory, borders closely in reality upon the legislative. This is, I presume, what the Supreme Court meant when it recently classed the Commission with 'legislators.' When I say that the rules laid down by the Congress are broad and general, I have in mind the fact that the standard prescribed is often defined only by such expressions as 'just and reasonable,' 'consistent with the public interest,' and the like. In addition to these quasi-judicial and quasi-legislative functions, it is also true that the Commission has various duties which may without qualification be described as administrative. Such, for example, are its duties in enforcing various penal provisions of the statutes."

chiefly concerned with promoting the public interest. This concern with the public aspect of the matters intrusted to their charge has grown out of the very conditions which led to their establishment. The situation with regard to common-carrier rates is sufficiently illustrative. At common law shippers could sue for damages resulting from the imposition of unreasonable charges, but the remedy afforded by the courts was in the nature of redress for a private wrong. The public at large, which might ultimately bear the burden of the excessive rates, had no standing in the courts, and no means was available for the establishment, as a matter of policy, of a proper level of charges or an equitable system of rate relationships. Such positive protection of the public interest necessitated legislative action; and in order that the resulting adjustments might be placed on a realistic and flexible basis, the necessary legislative authority, under general standards, was conferred upon administrative commissions. The dominant objective was to further the public interest; and this objective, as will appear in due course, has molded the legislative provisions and regulatory processes affecting, not only the field of rates and charges, but the entire system of administrative control. In carrying the general legislative standards into effect under such circumstances the free exercise of informed judgment becomes indispensable. The public interest is dependent upon a great complexity of considerations, and it cannot be furthered intelligently and effectively without a flexible exercise of discretionary authority. In most instances the range of expedients that might conceivably satisfy the specific legislative mandate involved is a very broad one; and in adjusting the means to the end, the balancing of interests and the visualizing of practical consequences are of the very essence of administrative determination. In furtherance of the public interest, not only are subsisting policies and practices subjected to constant review, but a continuous influence is exerted upon future relationships. The innumerable circumstances which complicate particular situations, and the constantly changing character of these circumstances, require expert inquiry and frequent action.²⁰ In effect, within the sphere of its allotted jurisdiction and under general guidance, the administra-

²⁰ "The need for a commission arises . . . when the legislative body finds that particular conditions call for continual and very frequent acts of legislation, based on a uniform and consistent policy, which in themselves require intimate and expert

tive tribunal is set up as a legislative body, and in the performance of its tasks it exercises the broad discretionary power which acts of legislation necessarily involve. This discretionary power is all the more extensive because many of the matters subject to its jurisdiction are of such technical character as to preclude competent disposition by general legislative bodies, except in terms of ultimate objectives, and because authority to deal with emergency situations, for example, is in its very nature discretionary.¹¹ Not infrequently administrative tribunals themselves create the issues upon which to render judgment, and then proceed to prescribe, as general rules, the terms and conditions applicable to future conduct. Although particular proceedings, with definite respondents, are usually the starting-point, administrative action also issues in such rules of general applicability, which serve at least as a temporary code for the adjustment of future relationships. Attention is focused, in these circumstances, upon the demands of public welfare rather than upon the adjudication of private rights. In due course legislatures may transform specific administrative rulings into legislative enactments, with such modifications as are deemed wise; but under the dynamic conditions which prevail in the public service industries, a continuous stream of policy-making determinations, however tentative, is widely characteristic of the administrative method of control. The requirements of public interest are thus translated into concrete arrangements, not only with respect to particular situations, but for the field as a whole.¹²

knowledge of numerous and complex facts, a knowledge which can only be obtained by processes of patient, impartial and continued investigation. This may be illustrated by the subject of railroad rates. As we have seen, the fixing of common carrier charges for the future is a legislative function. State legislatures have in the past undertaken to fix such charges directly, without the agency of a commission. But trial and experience demonstrated that the task could not wisely be performed in this way, even within a single State, and the fixing of interstate railroad rates is a far larger and more involved undertaking. It is particularly complicated by the fact that the railroad industry is not wholly monopolistic but is subject to the influence of competition to a very considerable extent. There are a myriad of diverse circumstances and conditions to be taken into consideration, and these circumstances and conditions continually fluctuate. The task of regulating rates is not, therefore, one which can be performed in a single, mighty effort, but rather it is a continuous performance which must be accompanied by continual inquiry and investigation." *Ibid.*, at p. 97.

¹¹ It has been said that "the very notion of emergency implies action; and that, in its turn, involves the exercise of administrative discretion." H. J. Laski, *op. cit.*, p. 94.

¹² For a critical analysis of the nature of administrative discretion, see Ernst Freund, *Administrative Powers over Persons and Property* (1928), at pp. 71-103.

In order that the furtherance of the public interest, involving so large a measure of discretionary authority, may be pursued in effective manner, it is essential that administrative commissions be enabled to accord consideration to all the facts and circumstances essential to sound judgment. For this purpose they must be free, as far as practicable, from hampering procedural restrictions. Not only must complaints be entertained from whatever source they may arise, but the commissions must be endowed with investigatory power—to act upon their own initiative as well as upon complaint—and they must not be confined to records artificially controlled by technical rules of evidence. The administrative method, as generally employed by public service commissions, is characterized by such liberality in all these directions.¹³ In view of the fact that the establishment of proper relationships, rather than the provision of redress for existing maladjustments, is the basic objective of the regulatory process, complaints may be brought by private associations and public bodies, as well as by persons and corporations, and the absence of direct damage to the complainant does not constitute ground for dismissal. The power to initiate proceedings which is generally vested in these agencies is but a further manifestation of the legislative character of much of their activity. The formulation of policy, as in case of the legislatures, requires authority to act whenever action is deemed necessary or desirable; and the process of investigation, as in case of legislative committees, is but preliminary to the act of law-making. The protection of the public interest is not made to depend exclusively upon the initiative of private parties; the discretionary authority which characterizes the substance of administrative orders encompasses, also, wide latitude as to choice of occasion for the exercise of administrative power.¹⁴ And relaxation of the technical rules of evidence is grounded in a like purpose of affording these tribunals an opportunity to probe the realities which underlie the situations with which

¹³ See Max Thelen, "Practice and Procedure Before Administrative Tribunals," *California Law Review*, Vol. 6 (March, 1928), pp. 208-218.

¹⁴ Compare the following: "The power of initiative is necessary to the efficient performance of the administrative function, as such function is mainly regulatory in character. Administrative officers charged with the duty of protecting the public and state against harm must have the right to meet emergencies and give protection where necessary without waiting to have their machinery set in motion by private citizens." Warren K. Pillsbury, *op. cit.*, at pp. 584-585.

they deal.¹⁵ Not only are the principal reasons for strict rules of evidence, developed under the exigencies of the jury system, inapplicable to tribunals composed of expert personnel, but it would be virtually impossible to effect prompt and realistic administrative determinations under the narrow rules which govern court proceedings.¹⁶ While the commissions themselves, as an aid to orderly procedure and by way of safeguarding the legitimate interests of all parties concerned, formulate rules of practice which guide, in a general way, the character of the testimony submitted in evidence, their policies are usually so liberal as to necessitate a broad exercise of discretion, in determining both the admissibility of evidence and its probative force. The experience of the tribunal affords the protection which is generally deemed to inhere in specific rules. Through these various aspects of procedural freedom the employment of the regulatory process as a positive instrument of control is greatly facilitated.

¹⁵ In *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904), for example, the Supreme Court said (p. 44): "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." See, also, *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117 (1920). For a tabulation of the states which exempt their public utility commissions from the common-law rules of evidence, see John H. Wigmore, "Administrative Board Evidence Rules," *Illinois Law Review*, Vol. 17 (Dec., 1922), at pp. 272-273. As to the situation in the federal sphere, he concludes (p. 271): "In sum, therefore, the jury trial rules of evidence do not play a compulsory part, either in theory or in practice, in that extensive area of justice committed to Federal administrative officers."

¹⁶ The Interstate Commerce Commission, for example, has declared: "The ordinary court determines only the rights of the parties before it, but every decision of the Commission involves the rights of parties who are not present. Any important readjustment of rates applies not only to the complainant but also to all shippers under those rates, and frequently, as a commercial necessity, to carriers who are not before the Commission in a particular case; and in addition to the evidence actually presented to the Commission, it must consider the effect of a ruling in any given case upon carriers, shippers, or localities who are not represented. It is obvious, therefore, that the determination of almost every case requires consideration of conditions, tariffs, and statistics which are not presented to the Commission, but which it must take notice of in order to faithfully perform its duty, and the proper expedition of the Commission's work requires that these aids to the final determination of cases arising before it should be as easy of access as possible. It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts." *Annual Report*, 1908, pp. 9-10.

Essentially, despite the substantive limitations of the statutory structure and the procedural requirements of notice and hearing, the outstanding characteristic of the administrative method, as pursued by public service commissions, is to be found in the exercise of discretionary authority. Whether the administrative determinations issue in the promulgation of rules of general applicability, or in the prescription of terms and conditions of future conduct for particular respondents, or in the approval or denial of proposed courses of action—and whether or not they may be characterized as policy-making activities in the strict legislative sense—they involve a broadly untrammelled resort to judgment and discretion, in furtherance of the public interest. This essential of administrative power, as reflected in the activities of the Interstate Commerce Commission, is grounded in the discretionary nature of its legislative mandates, finds expression in the pragmatic character of its regulative processes, and has received judicial sanction in the determinations of the courts. In the sections following, each of these aspects of the exercise of administrative discretion will be accorded consideration.

§2. THE DISCRETIONARY NATURE OF THE COMMISSION'S LEGISLATIVE MANDATES

The development of the legislative charter under which the Commission is operating has been treated at length in earlier pages, with ample emphasis upon the general character and scope of the administrative authority established thereby.¹⁷ The purpose here is not to restate the statutory provisions, but to direct attention to the wide range of discretion which inheres in their enforcement. Even from this standpoint, moreover, no attempt will be made to survey the entire sweep of the Commission's duties and powers. It will suffice, merely by way of illustration, to isolate the discretionary element in some of the more important of the Commission's legislative mandates, both as found in the language of the statute and as evidenced by the record of administrative performance.

The language of the Act fairly teems with expressions which explicitly evince the intent of Congress that the Commission should be

¹⁷ See Part I, *The Legislative Basis of the Commission's Authority*.

guided by its own informed judgment in the exercise of the authority conferred upon it. Not only does the requirement, in numerous connections, that the arrangements sanctioned or prescribed shall be "just and reasonable" set up standards which are inherently discretionary in character, but grants of power are frequently vested in the Commission with more precise recognition of its freedom of action. The Commission has been authorized to act in various situations "at its discretion," "whenever deemed by it to be necessary or desirable in the public interest," "in such manner and by such means as it shall deem proper," when "not inconsistent with the public interest," if it "finds the public interest will be promoted," in such a way "as in its judgment the public convenience and necessity may require" or "as in its judgment the public interest demands," "if it sees fit," and the like. While the usual requirements as to notice and hearing, coupled with express restrictions, varying in definiteness, provide necessary safeguards against arbitrary action, the authority they leave open remains predominantly discretionary.¹⁸ This approach is typical of the Commission's powers of control in all of the major segments of the field—in matters of finance and management, service and facilities, rates and charges.

While the Commission's authorization of security issues is expressly conditioned by statute upon specific findings, the conditions specified are themselves of such character as to render ultimate judgment the controlling factor. The issue of securities or assumption of obligations must not only be for some lawful object within the carrier's corporate purposes—involving, presumably, a mere application of legal rules—but it must be "compatible with the public interest," must be "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public" and "not impair its ability to perform that service," and it must be "reasonably necessary and appropriate for such purpose." The Commission may grant

¹⁸ Compare the following: "Every definite provision has the effect of limiting the scope of discretion. It is a difficult and more delicate matter to attempt to temper the indefiniteness of discretion by limitations or directions likewise indefinite in character; but the attempt is made in connection with many, if not most, grants of discretionary power, usually in the direction of restriction, occasionally in the direction of enlargement, of the discretion. A simple adjective like 'reasonable' might lend itself to either purpose." Ernst Freund, *op. cit.*, at p. 85.

or deny applications either in whole or in part, and it may grant them "with such modifications and upon such terms and conditions" as it "may deem necessary or appropriate" in each particular proceeding. The guiding standards, in these circumstances, but serve to emphasize the essentially discretionary character of the Commission's authority. A like situation prevails with respect to other aspects of control in this sphere of finance and management. By way of relief from the general statutory prohibition, the Commission may permit persons to hold the position of officer or director of more than one carrier upon a showing "that neither public nor private interests will be adversely affected thereby." The principle of determination appears to be left entirely to the administrative tribunal. Similarly, the Commission's authority to relax the prohibition against the pooling of freights or the division of earnings as between different and competing railroads is overlaid with numerous discretionary elements. It may proceed upon its own initiative as well as upon carrier applications; it may indicate the extent to which the division of traffic or earnings shall be authorized; it may prescribe "just and reasonable" rules and regulations, consideration, and terms and conditions under which the approved action shall be pursued. And even the express restrictions upon its authority to act in this way are of a patently flexible character. It may grant the necessary relief whenever it is of opinion that such relief "will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition." In the case of acquisitions of control through lease or stock purchase or any other method not involving the consolidation of carriers into a single system for ownership and operation, the Commission's discretion is even less restricted. Here, too, it may prescribe the extent of the acquisition, as well as the terms and conditions, including consideration, under which it may be executed; but its determinations are conditioned only by the undefined requirement that the authorized acquisition, in its opinion, "will be in the public interest." The provisions dealing with the formulation of a consolidation plan impose much more definite restrictions upon the Commission's performance: in the assignment of the railroad properties to a limited number of systems, competition must be preserved as fully as possible,

the existing channels of trade must be maintained wherever practicable, and the resulting systems must be so balanced as to equalize, as nearly as may be, under uniform charges, both the transportation costs and the rates of return of competitive properties. But even these conditioning factors render possible the adoption of a great variety of alternative arrangements. As a practical matter, as in so many other directions, the Commission's mandate involves an act of government rather than a problem of law. And while, throughout this sphere of finance and management, the Commission's orders are permissive rather than mandatory, they are all the more of a discretionary nature because they impinge directly upon the field of discretion traditionally reserved to the carriers themselves.¹⁹

In matters of service and facilities the discretionary elements in the Commission's authority are strikingly manifest on all sides. The service which it is the duty of rail carriers to furnish must be "safe and adequate"; and the rules, regulations, and practices which it is their duty to establish and observe must be "just and reasonable." These general obligations are subject to the Commission's enforcement. More specifically, in prescribing reasonable arrangements, it may fix the compensation to be paid for equipment not owned by the carrier using it, as well as the penalties or other sanctions for non-observance of the rules, regulations, or practices which it may prescribe. The Commission may establish through routes, "whenever deemed by it to be necessary or desirable in the public interest"; it may order the construction and operation of switch connections with lateral branch lines or private sidetracks upon a determination "as to the safety and practicability thereof and justification and reasonable compensation therefor"; it may order the establishment of physical connections between rail and water lines, with "full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated," and the sums to be paid to or by the respective carriers either in the construction or operation of the connecting

¹⁹ The following declaration appears to be fully justified: "The effect of these new regulations of railroad corporations is to substitute, in no inconsiderable measure, the administrative discretion of the Interstate Commerce Commission for the judgment of the directors and executives of the corporations." Kenneth F. Burgess, "Federal Regulation of Railway Management," *Harvard Law Review*, Vol. 37 (April, 1924), pp. 705-743, at p. 708.

tracks. In emergency situations the Commission is authorized to exercise practically unrestricted power in summary fashion. Whenever it is of opinion that an emergency exists, whatever its cause, which requires immediate action in any section of the country, it is empowered to effect such arrangements as in its judgment will promote the public interest. Specifically: it may suspend the operation of all existing service rules and practices "for such time" as it may determine; it may issue such "just and reasonable" directions, without regard to ownership of facilities as between carriers, "as in its opinion will best promote the service in the interest of the public and the commerce of the people"; it may require such joint or common use of terminals "as in its opinion will best meet the emergency and serve the public interest"; it may establish priorities, embargoes, or arrangements for the movement of traffic under permit, "at such time and for such periods as it may determine," with power to modify, change, suspend, or annul them. Furthermore, whenever the Commission is of opinion that any rail carrier "is for any reason unable to transport the traffic offered it so as properly to serve the public," it may so direct the routing of such traffic and its distribution among other carriers as, in its opinion, "will best promote the service in the interest of the public and the commerce of the people." And these extraordinary powers may be exercised with virtually complete procedural freedom: the Commission may assert its authority "either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report."

In the field of extensions and abandonments, which bears upon the problem of service as well as upon that of management, the usual procedural safeguards are provided, coupled, as in the matter of security issues, with a requirement of express notice to the state authorities concerned; but the substantive power vested in the Commission confers, by its very terms, an almost unrestricted charter for the exercise of administrative discretion. The construction and operation of new lines, by way of extension or otherwise, and the abandonment of the whole or any portion of existing lines, or of their operation, are made dependent upon the issuance by the Commission of

a certificate "that the present or future public convenience and necessity require or will require" the new construction, extension, or operation, or of a like certificate "that the present or future public convenience and necessity" permit of the abandonment. No further guide to the required administrative action is provided. On the contrary, the discretionary character of the Commission's authority is accorded added recognition; for it is not only empowered to grant or deny the certificate as prayed for, but may issue it "for a portion or portions" of the line of railroad embraced in the application, or "for the partial exercise only of such right or privilege," and it may attach to the issuance of the certificate "such terms and conditions as in its judgment the public convenience and necessity may require." And the Commission's authority to *order* the extension of lines and the acquisition of facilities, by way of exercise of positive power toward the provision of adequate service, likewise involves a large measure of administrative discretion. It is true that the Commission's action, which may result from a proceeding instituted on its own initiative, is conditioned upon findings, "as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public"; but these limitations, in essence, but set up the usual standard of "public interest," and thus leave the determination of concrete policy to the judgment of the administrative tribunal. While in no direction is reliance placed upon the Commission's arbitrary will, and while in some connections the factors expressly conditioning administrative action are reasonably definite in character, the legislative mandates bearing upon the regulation of service and facilities necessarily afford wide latitude for the exercise of judgment.

Finally, a similar range of discretion prevails in the important field of rates and charges. The basic sections of the Act, which establish the duties imposed upon the carriers and provide the standards for the exercise of the Commission's powers, are couched in such general terms as to necessitate the independent formulation of guiding principles and to render the determination of ultimate facts essentially a matter of judgment. All rates and classifications, and all regulations and practices relating thereto, must be "just and reasonable," and the

Commission is authorized to prescribe rates and classifications in lieu of those found to be unjust and unreasonable. But there is no legislative guidance as to the constituent elements of a just and reasonable rate, and both the finding as to existing rates and the measure to be applied to future rates are necessarily left to the discretion of the Commission. In similarly uncharted terms the Commission is charged with the enforcement of the prohibition against undue or unreasonable preference or prejudice to persons, localities, and particular descriptions of traffic. The problem of discrimination, as well as that of reasonableness *per se*, thus becomes one which it is the peculiar province of the Commission to solve, through an application of informed judgment to the complicated and continually changing facts and circumstances of transportation and traffic conditions. Even the prohibition against long-and-short-haul violations, which are defined in unusually precise terms, does not foreclose the exercise of administrative discretion. The Commission may grant relief "in special cases," and it may prescribe "the extent" of such relief; and although a series of specific limitations condition this exercise of authority, some of these limitations—such as the requirement that no charge shall be permitted to or from the more distant point that is not "reasonably compensatory" for the service performed—are themselves largely discretionary in character. In exercising its powers of rate control the Commission may proceed on its own motion, and not merely await complaints—thereby determining whether existing adjustments, though not formally questioned by the parties immediately concerned, shall be subjected to investigation and possible modification; it may suspend the operation of schedules containing new rates, charges, classifications, or practices, pending investigation as to their lawfulness—thereby determining whether proposed changes shall be subjected to the regulatory process even prior to their effective date; it may afford positive relief, upon a finding that existing or proposed adjustments are unreasonable or discriminatory, by prescribing not only the "just, fair, and reasonable" classification or practice thereafter to be followed, but, in the case of rates and charges, whether the prescribed adjustment shall be observed as a maximum, as a minimum, or as both a maximum and a minimum—thereby determining whether the future rates and charges, as fixed by govern-

mental authority, shall be a precise measure of the rights and duties of the carriers, or merely a flexible safeguard against specific abuses. There appears to be an unrestricted freedom of choice with regard to the various policies which are left to the option of the Commission; in all these directions, it is apparent, the exercise of administrative discretion, guided only by the demands of public interest, constitutes the controlling factor in the practical performance of the regulatory task.

With reference to the aggregate of charges, which bears upon the revenue needs of the carriers and the maintenance of railroad credit, Congress has enacted a rule of rate-making. But even the most cursory analysis of this "rule" discloses a vast field of discretion necessarily reserved to the Commission. The Commission is directed to initiate or establish railroad rates so that the carriers as a whole or in rate-making groups will earn an aggregate net railway operating income equal, as nearly as may be, to a "fair return" upon the aggregate "value" of their properties. In the first place, however, the carriers are declared to be entitled to such earnings only under "honest, efficient and economical management" and "reasonable expenditures" for maintenance, which renders essential the exercise of a large measure of practical judgment as to how far carrier performance, as reflected in the operating figures, is a proper guide to rate policy; secondly, the execution of the mandate necessarily involves estimates as to the course of future revenues and expenses, requiring virtually controlling judgments with regard to the probable flow of traffic and the probable cost of labor and materials; finally, and most important, for the determination of both the rate of return and the value of the properties, only the most undefined standards, bristling with opportunity for the exercise of discretion, have been provided by way of guidance. In determining what percentage of property value constitutes a fair return, the Commission is merely directed to give "due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." What these transportation needs are, and what rate of return will attract the necessary capital, appear to be

left, without restriction, to the judgment of the Commission. Similarly, in the determination of the aggregate value of the properties, not only for purposes of rate making but in aid of the recapture of excess earnings which are bound to arise under the contemplated group system, the basis of computation of the fair return is made subject to the discretion of the Commission. It is authorized to utilize the results of its investigation under the Valuation Act, in so far as it deems them available; and it is directed to give "due consideration to all the elements of value recognized by the law of the land for rate-making purposes." Since, however, the Commission's valuation project was still in an early stage at the time of the adoption of the rule of rate-making, and since, too, even when complete data as to all recognized elements are present, "fair value" has been consistently held by the courts to be a matter of "judgment," there is little in the legislative mandate by way of express definition of the rate base. Essentially, under these terms, rate policy was conceived as a highly practical matter, to be determined by the expert tribunal in conformity with its own informed discretion.

The rule of rate-making was but one item in the affirmative scheme of regulation set up by the Transportation Act of 1920 whereby the railroads were committed to the "fostering guardianship and control" of the Commission. The task of maintaining an adequate transportation system necessitated also, among other things, the assertion of power over the level of intrastate rates, the recapture of excess earnings, and the apportionment of joint rates in the public interest; and all these grants of authority, under the "new departure," extended rather than restricted the sphere of administrative discretion.²⁰ And the Hoch-Smith Resolution, on its face, but added further discretionary elements to the exercise of the Commission's authority. They are manifest in the declaration that it is "the true policy in rate making," to be pursued by the Commission, "that conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so"; they are manifest in the direction that due regard be given "to the general

²⁰ See *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922); *New England Divisions Case*, 261 U.S. 184 (1923); *Dayton-Goose Creek Ry. Co. v. U.S.*, 263 U.S. 456 (1924).

and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation"; they are manifest in the mandate that, "in view of the existing depression in agriculture," the Commission "effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." Themselves undefined, these new provisions have but complicated the tasks of rate regulation.²¹ More than ever, both the absolute level of charges and the relativity of rates are subject to the discretionary authority of the Commission.

The actual exercise of administrative discretion in connection with these various grants of power is apparent in all of the Commission's determinations. We have noted numerous manifestations of such flexible performance, based upon guiding principles independently arrived at and applied in elastic manner, in those aspects of the field which have already been surveyed; more complete evidence of the controlling rôle played by administrative judgment will emerge in our subsequent analysis of the substantive character of the Commission's activities, particularly with reference to the valuation project, the control of organization and finance, and the regulation of both the rate level and the rate structure. At this point attention will be directed to some outstanding characteristics of the Commission's regulative processes which, entirely apart from the substantive nature of the findings, disclose the Commission's relative freedom to act in the public interest by such means as it deems to be required in each situation, largely unrestricted by its own prior determinations and generally unhampered by the usual limitations which condition legal settlements of a private character. The impetus to the use of such processes is to be found in the goal of maintaining a workable system of regu-

²¹ See Kenneth F. Burgess, "Conflict in Legislation Respecting Railroad Rates," *Harvard Business Review*, Vol. 7 (July, 1929), pp. 423-431; Vol. 8 (October, 1929), pp. 24-36. For the judicial interpretation of these provisions, restricting the Commission's exercise of discretionary authority, see *Ann Arbor R. Co. v. U.S.*, 281 U.S. 658 (1930).

lation continuously adjusted to changing conditions and to the complexities of the facts as they actually develop. Such methods of adjusting controversies and disposing of applications may properly be characterized as pragmatic; and this pragmatic approach further evidences the broad scope of the Commission's exercise of administrative discretion.

§3. THE PRAGMATIC CHARACTER OF THE COMMISSION'S REGULATIVE PROCESSES

Perhaps the most comprehensive evidence of the pragmatic character of the Commission's regulative processes is to be found in the relatively minor rôle played by precedent in the flow of administrative determinations. The special facts of each controversy constitute the dominant factor in its disposition, as a result of which very few new complaints are foreclosed by prior determinations and even proceedings which have already been adjudicated are reopened with striking frequency. The adjustments enforced by the Commission come to manifest themselves in a continual process of change and modification, induced by the dynamic forces constantly at work and reflected in the adoption of trial-and-error methods tested by their practical consequences. Not only do concrete findings change repeatedly, but the applicable rules, in terms of the guiding statutory standards, are also modified from time to time as occasion seems to require. The doctrines of *res adjudicata* and *stare decisis*, which exert an important influence upon the course of proceedings in the courts and upon the substantive character of judicial determinations, are not permitted to impose limitations upon the exercise of administrative discretion. Neither specific determinations nor principles of decision are clothed with any controlling degree of finality. While the advantage of establishing certainty in rules of conduct is not without recognition, and while the goal of maintaining stability and consistency in regulatory policy is constantly in the foreground, these considerations have not precluded primary stress upon the need of flexibility of performance. Such need arises from the very nature of the administrative method. Even quasi-judicial determinations are made in the enforcement of standards which have not crystallized into specific rules of law, and hence must depend, in predominant measure, upon the spe-

cial facts and circumstances disclosed in each particular proceeding; and the affirmative adjustments prescribed, which are essentially legislative in character, must necessarily be unrestricted by prior determinations. Under these circumstances the certainty and stability that might flow from rigid rules and unvarying principles are appropriately subordinated to the demands of just and reasonable performance, as molded by enlightened experience and informed judgment.

From the very beginning the Commission has held the view that the questions coming before it are not of such nature as to make its decisions in one case necessarily binding in subsequent proceedings of similar character.²² Because conditions continually vary at different times and in different localities, it has declared that "its decisions can hardly be said to have the effect of an estoppel, nor is there the same reason for applying the maxim *stare decisis* which exists in courts of law,"²³ and that, since each traffic situation is distinctive, "each complaint must be considered and decided upon its own peculiar facts."²⁴ The same position was taken by the Commission after it had been clothed with mandatory rate-making power. The fact, for example, that a bill to enforce one of its rate orders had been dismissed by

²² In *Re Relative Tank and Barrel Rates on Oil*, 2 I.C.R. 245 (1888), the Commission said (p. 247): "In thus reviewing the subject the Commission desires to say plainly, and with explicitness, that when making a decision upon a question purely of fact in respect to traffic in one section of the country whereby it endeavors to do justice, it does not understand that it is necessarily laying down a principle which must be applied in other sections of the country where the peculiarities of the traffic may be so different as to require an altogether different ruling in order to accomplish the like just result. Every railroad manager understands perfectly that the peculiarities of traffic in different sections have always made different treatment to some extent essential to public as well as corporate interests; that classifications differing very radically have come into existence as a consequence, and that to force conformity at once would in many cases be extremely mischievous. The Commission has in all its action had this fact in mind, and if it has in any case refrained from expressly stating it when making a decision, it has been because it had not occurred to its members that a fact so well known needed to be declared for any purpose of information to the carriers, or even to the general public." Again, in *Toledo Produce Exchange v. Lake Shore & M. S. R. Co.*, 3 I.C.R. 830, 835 (1892), the Commission declared that "the whole scope and spirit of the 'Act to Regulate Commerce' seems to stamp the report and order of the Commission as in no sense final in the sense that the judgment of a court is final, except where the parties impressed by the wisdom and justice of the order acquiesce therein in cases like those here under consideration." See, also, *Rice v. Cincinnati, W. & B. R. Co.*, 3 I.C.R. 841 (1892).

²³ *Board of R. R. Comrs. v. Atchison, T. & S. F. R. Co.*, 8 I.C.R. 304, 308 (1899).

²⁴ *Danville v. Southern R. Co.*, 8 I.C.R. 409, 429 (1900).

judicial decree was not deemed a bar to subsequent action with regard to the same rate. "It would seem plain that proceedings before this Commission can not be made the subject of judicial estoppel. The decision of a court once made is final, because, for one reason, the facts upon which that decision rests are always the same; but the facts upon which controversies before this body are determined vary from day to day. A rate, regulation, or practice may be unreasonable now, although a year ago it was entirely reasonable."²⁵ Similarly, a ruling as to minimum carload weights for a particular commodity in one proceeding was held not to foreclose independent determination of the same question in another proceeding. "While uniformity in such matters is highly desirable, and while the conclusion reached by the Commission in one case touching the reasonableness of a rule or regulation affecting rates ought ordinarily to afford a guide for our action in another case in which the same rule or regulation is involved, it must nevertheless not be forgotten that reasonableness is ordinarily a question of fact which must be decided in any proceeding upon the record made in that proceeding."²⁶ While, in the case of specific rates, it is the policy of the Commission to adhere to its original conclusions except upon a showing of new facts, altered conditions, or manifest error,²⁷ the occasions for broadening the record are so numerous that frequent readjustments are inevitable;²⁸ and when the findings are changed, they are not only made operative for the future, but produce retroactive effects—the carriers are made liable to reparation even on shipments moved under the rates originally prescribed by the Commission.²⁹ The unrestricted nature of the Com-

²⁵ *Cattle Raisers' Assn. v. C. B. & Q. R. R. Co.*, 12 I.C.R. 507, 514 (1907). See, also, *National Hay Assn. v. M. C. R. R. Co.*, 19 I.C.C. 34, 37 (1910).

²⁶ *Kansas City Hay Dealers' Assn. v. M. P. Ry. Co.*, 14 I.C.C. 597, 600 (1908), distinguishing *Wiener & Rich. v. Chi. & N. W. Ry. Co.*, 12 I.C.R. 462 (1907).

²⁷ "When the Commission, upon a given state of facts, reaches a conclusion regarding a certain rate, it will adhere to that conclusion in subsequent proceedings regarding the same rate, unless (a) some new facts are brought to its attention, (b) conditions are shown to have undergone a material change, or (c) it proceeded on a misconception or misapprehension." *Traffic Bureau of Nashville v. L. & N. R. R. Co.*, 43 I.C.C. 366 (1917), at p. 369. See, also, *Bell & Zoller Mining Co. v. I. C. R. R. Co.*, 109 I.C.C. 484, 485 (1926).

²⁸ See, for example, *Des Moines Board of Trade v. D. M. & C. I. R. R.*, 102 I.C.C. 186 (1925); *Eastern Bituminous Coal Investigation*, 140 I.C.C. 3 (1928).

²⁹ *Phoenix Chamber of Commerce v. A., T. & S. F. Ry. Co.*, 140 I.C.C. 171 (1928).

mission's approach in these matters is evidenced by the following recent pronouncement: "We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer."⁸⁰ This freedom of action has been retained and exercised by the Commission with regard to general matters of policy as well as with reference to specific adjustments. In considering, for example, the question of mine ratings for car distribution purposes, the Commission disclosed the pragmatic character of its approach in these words: "While an order of the Commission in a particular case must necessarily fix the rights of the parties to the proceeding, so far as past shipments are concerned, and must necessarily restrain, until our further order, the continuance of the rate or practice that we condemn, and compel the carrier to observe the rate or practice that we prescribe for the future, these great questions of transportation are not foreclosed of further discussion and consideration upon further complaint. Additional experience with the actual operation of rules that combine commercial and physical capacity in the rating of coal mines for car distribution, may throw new light upon a matter that has vexed the Commission as well as many carriers that have endeavored to do equity as between different mines on their lines; and if so, we shall not hesitate to modify what has been said here and in other cases before us on that question. The principle of *stare decisis* has little application in proceedings before us involving questions of this nature."⁸¹ While this attitude has tended to induce a continual flow of complaints, with the result that very few matters can be said to have been brought to

⁸⁰ *Ibid.*, p. 180. With regard to the instant proceeding, the Commission continued: "Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges."

⁸¹ *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I.C.C. 356 (1910), at p. 361. For the development of the Commission's policy in the matter of mine ratings, see chap. viii, note 260, *supra*.

definitive settlement even after more than four decades of regulation, it has provided an indispensable basis for realistic performance, in conformity with the primary aims of the administrative method. Concerned with a vast number of practical adjustments arising under constantly varying circumstances and conditions, the Commission has molded its determinations in light of the distinctive findings of each proceeding, in the execution of policies flexibly developed under the impact of its accumulated experience.⁸²

The Commission regularly finds itself under the necessity of reopening its proceedings, and of supplementing, modifying, or reversing its initial conclusions, not only because of the interdependence of many of its findings and the constantly changing circumstances and conditions with which it is faced, but also because its original determinations are frequently of such general character as to render a process of subsequent adjustment of specific situations unavoidable. The most striking manifestation of this influence is to be found in the fact that the Commission is often forced to act in sweeping fashion, even though its own determinations will inevitably continue or produce maladjustments, and that it must often proceed on typical evidence, without precise support for the comprehensive findings which the practical necessities of the situation may demand. The resort in such connections to "saving clauses," whereby particular parties or interests affected by the findings may except themselves from the orders upon a proper showing, is but an express recognition of the consequences that inevitably flow from the broad scope of the Commission's determinations. None the less, only comprehensive action may give promise of relief under the exigencies of the immediate situation; the legislative mandate sought to be executed may be entirely unworkable without the use of general orders properly safeguarded. The Commission's approach under such circumstances is highly pragmatic, however tentative its findings may be in their full sweep. Brief reference to a few of the more important proceedings involving general rate increases and the apportionment of joint rates

⁸² See, for example, *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923), in which the rule evolved in the earlier cases was characterized as "not the fruition of ripe experience" (p. 554). For the development of the Commission's policy in the matter of assigned cars, see chap. viii, pp. 131-141, *supra*.

among participating carriers will lend concreteness to this aspect of the Commission's processes.

When the roads were returned to their private owners in 1920, there was general agreement that rate increases were necessary. Accordingly, in execution of the rule of rate-making enacted by the new legislation, the Commission requested the carriers to file applications for increased rates, and after full hearing granted percentage advances for the various rate groups which it established.⁸³ The statutory requirement that rates be initiated which would yield a fair return on the aggregate value of the railroad property in each group was formally followed, but on the basis of data which were strikingly fragmentary in various directions. The valuation figure, for example, which was used "for the purposes of this particular case" was only a very rough approximation, without analysis of the principles or methods employed in its determination.⁸⁴ Similarly, the figures obtained from the carriers as to their revenue needs and as to the probable results of future operation were expressly recognized as inadequate and in many respects unreliable.⁸⁵ Since, moreover, the ur-

⁸³ *Increased Rates, 1920*, 58 I.C.C. 220.

⁸⁴ The Commission pointed out that it had before it the investment accounts of the carriers, together with evidence as to probable earning capacity under particular rates, the sums required to meet operating expenses, and the amount and market value of the stocks and bonds of the carriers; and it indicated that in appraising these elements of value it was mindful that the carriers are operating units and going concerns. Concerning the data accumulated in the valuation pursued under section 19a, the Commission said: "So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto" (p. 228). But there was no indication whatever as to how, in light of this evidence, the figure which was to serve as the rate base was derived. The Commission merely concluded: "From a consideration of all the facts and matters of record, and those which, under section 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam railway property of the carriers . . . is, for the purposes of this particular case, to be taken as approximating" \$18,900,000,000 (p. 229). But compare the following from the separate concurring opinion of Commissioner Eastman, in which he found the ascertainment of a valuation figure impracticable: "For some time the Commission has been diligently engaged in the enormously difficult task of ascertaining and assembling the valuation data required by section 19a of the interstate commerce act; but it has not yet fixed final 'value' for any road, and preliminary reports are available on but little more than 15 per cent of the mileage of the country. Nor have we as yet determined the principles by which 'value' for rate-making purposes is to be estimated from the data accumulated" (p. 256).

⁸⁵ Note, for example, the following: "A number of small carriers failed to answer the questionnaire, and we are asked to assume that the directions . . . were accurately

gency of the general financial requirements of the carriers was the dominant factor in the situation—promptness of action being deemed more important than precision of detail—there was little opportunity to consider the reasonableness of individual rates, and horizontal increases were established despite their inevitable disturbance of existing rate relationships.⁸⁰ Under these circumstances, the need of subsequent readjustment was expressly recognized by the Commission: "Most of the factors with which we are dealing are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be. The general price level is changing from month to month and from day to day. It is impracticable at this time to adjust all of the rates on individual commodities. The rates to be established on the basis hereinbefore approved must necessarily be subject to such readjustments as the facts may warrant. It is con-

and faithfully followed by the other carriers. The evidence indicates that such an assumption is unwarranted. . . . To the extent that different methods were employed the results are subject to criticism. A specific request by us that the carriers furnish 'all underlying details and formulas upon which the constructive increases estimated for 1920 were based . . . ' met with a response so general in character that it does not serve the purpose intended. . . . The inadequacy of the data furnished by the carriers increases substantially the difficulty of forecasting the results of operation for the two year period" (pp. 230-231). And the supplementary information was even less adequate and reliable: "Some of the important adjustments of revenues and expenses made subsequent to the filing of the questionnaire were based on data hastily obtained, in part by telegraph, from a few carriers regarded as typical. There is no assurance that this information was compiled on a uniform basis and no proof that it is accurate. The agents of the individual carriers by whom the information was originally compiled were not present at the hearing. Although an honest effort has apparently been made to provide the best information that could be obtained in the limited time available, it is necessary to call attention to the fact that the details of a number of the adjustments, both in the original questionnaire and subsequent thereto, cannot be accepted as accurate" (p. 231).

⁸⁰ "It would be desirable, if it were possible," said the Commission, "to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the burden of increases, and the relationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented" (p. 243). Again: "Without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it is evident that no general program of maintaining differentials can be made effective coincident with the increases here approved without materially delaying their effective date as definite testimony covering individual situations is before us in only a very few cases. . . . After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable. This conclusion is without prejudice to any subsequent finding in individual situations" (p. 245).

ceded by the carriers that readjustments will be necessary.⁸⁷ In point of fact, the rate readjustments effected during the course of the ensuing year were very numerous.⁸⁸

But the need of modification and supplementary action did not arise merely from discrepancies and maladjustments in classifications and rate relationships. In the first place, the failure of about half the states to authorize commensurate increases on intrastate traffic, which threatened serious curtailment of the carrier revenues deemed essential to the maintenance of railroad credit, resulted in the institution of a large number of proceedings designed to remove discrimination against interstate commerce; and the Commission's sweeping orders in these proceedings, whereby, without reference to particular situations, the general level of intrastate rates and charges was required to be raised to the level established for interstate commerce once more issued in a series of complaints and applications for the modification of specific adjustments.⁸⁹ The direct repercussions of the initial rate order were thus widespread and long-continued. But the unstable character of the industrial situation was a further source of pressing difficulty. Not long after the promulgation of the original order, a downward trend in commodity prices and labor costs developed; and the depressed condition of industry resulted in a sharp curtailment of railroad traffic. The rate increases which had been authorized were proving an undue burden upon commerce and were not accomplishing for the carriers the purpose for which they had been designed.⁴⁰ Said the Commission: "We have been confronted

⁸⁷ *Ibid.*, pp. 255-256.

⁸⁸ Note the following from the Commission's *Annual Report for 1921*, at p. 7: "Many rate readjustments have been made since the increases authorized in *Increased Rates, 1920*, *supra*, became effective on August 26, 1920. Some were made by the carriers voluntarily, others at our suggestion, and still others under our requirement after formal hearing. . . . It is safe to say that at least a million changes in individual rates have been filed with us."

⁸⁹ See pp. 287-301, *supra*.

⁴⁰ Compare the following from *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921), at p. 99: "The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net

with the demands of shippers, on the one hand, for reductions in rates which they allege are excessive and out of all proportion to the fallen values of commodities and which interfere with, or prevent, commodity movement; and, on the other hand, with the fact that the carriers have not been receiving the fair return contemplated by Congress.⁴¹ This pressure for change in existing adjustments, "because of the continuing state of flux both in cost and in value of transportation service,"⁴² became very insistent. Since even the carriers, despite their failure to earn the specified rate of return, recognized that the industrial situation would not permit further rate increases—that such action was necessary, rather, as might stimulate growth in tonnage—numerous downward readjustments were established, both voluntarily and through formal order.⁴³ But these specific rate decreases did not prove adequate. In due course, as a result of a general investigation instituted by the Commission on its own motion to determine what further reductions in the rate level might lawfully be required, all freight rates and charges were ordered reduced by ten per cent from the level established in 1920, in so far as they had not already been decreased by at least that measure.⁴⁴ This reduction was designed to assist the carriers as well as to afford relief to the shippers.⁴⁵ Like the earlier increases, however, this reduction was made applicable to the entire traffic, on a percentage basis, without attempt to determine the reasonableness of particular rates.⁴⁶ Further-

earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15a, to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers."

⁴¹ *Annual Report, 1921*, p. 6.

⁴² *Annual Report, 1922*, p. 17.

⁴³ See *National Live Stock Shippers' League v. A., T. & S. F. Ry. Co.*, 63 I.C.C. 107 (1921); *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921); *Southern Hardware Traffic Assn. v. I. C. R. R. Co.*, 66 I.C.C. 68 (1922); *Rate Reductions*, 67th Cong., 1st Sess., House Doc. No. 115 (1921).

⁴⁴ *Reduced Rates, 1922*, 68 I.C.C. 676.

⁴⁵ "We are of opinion," said the Commission, "that general reduction of the rate level, as substantial as the condition of the carriers will permit, will tend not only to lessen the transportation burden but also to equalize and stabilize the conditions under which commerce and industry are carried on, with consequent fuller assurance to the carriers of realizing the fair return contemplated by the law" (p. 734).

⁴⁶ "The raising of the rate level by the Director General of Railroads in June, 1918, and again under our authority in August, 1920, were necessitated by increases in

more, even as to the general rate level, these processes necessarily involved forecasts of future revenues and expenses, depending upon the uncertain course of operating costs and traffic demands. "The carriers take the position," the Commission declared, "that we must be guided solely by those things which are definite and certain in the past. With this we can not agree. Our function under the law is not that of mere computers and can not thus be atrophied. The duty to prescribe rates for the future carries with it the obligation to exercise an informed judgment upon all pertinent facts, present and past, in order to forecast the future as best we may."⁴⁷ Since, in the very nature of the case, such general determinations, whether by way of rate increases or rate decreases, are sweeping in scope and experimental in character, a continual process of change and readjustment becomes inevitable.

It is manifest from the foregoing survey that the Commission's action in such general rate proceedings is based upon typical evidence, provided it is deemed ample in quantity, and that its findings are in a large sense provisional. In the judgment of the regulatory tribunal the showing as to revenue needs and transportation charges was sufficiently representative of prevailing conditions to justify the percentage increases and reductions in rates which were ordered, without reference to the particular demands of each specific situation.

operating expenses. The latter have now partially receded. The rate increases were general and justified by the increase in general cost of service, and with decrease in that cost a rate decrease, also general, is justified. The justification for decrease is to be found in the rate structure as a whole rather than in individual rates, or in rates on individual commodities. It is true that the prices of some commodities have receded more rapidly and to a greater extent than others, even as some went up more rapidly and to a greater extent than others. Readjustment, however, is not complete and the process of equalizing prices is still in progress, some coming up and others going down, which will probably result in a more equal price level in the near future. The needs of commerce can not be met if rates are to fluctuate with market prices of commodities. In bringing down the rate level to meet lowered expenses a similar process should be followed and the reduction made generally upon all commodities in substantially equal ratio." *Ibid.*

⁴⁷ *Ibid.*, p. 730. Compare, also, the following from *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921), at p. 99: "The duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return."

The objective was to establish a rate level reasonably calculated to provide adequate earnings for the carriers without imposing undue burdens upon the shipping public. The need of providing prompt relief rendered altogether impracticable either the accumulation of the necessary evidence as to each carrier, or each locality, or each commodity involved, or the establishment of definitive adjustments grounded in the instant record. The practical exigencies of the railroad situation and of the administrative system of control often require such general findings—pointing the dominant direction of regulatory policy—which but serve as a starting-point for subsequent modification and readjustment. There is thus a large exercise of discretion in the first place, coupled with express recognition of the continuity of the controlling processes. This mode of approach has long characterized the Commission's regulative methods;⁴⁸ it sprang from "the actual necessities of procedure and administration."⁴⁹ In

⁴⁸ See, for example, *Advances in Rates—Eastern Case*, 20 I.C.C. 243 (1911); *Advances in Rates—Western Case*, 20 I.C.C. 307 (1911); *Five Per Cent Case*, 31 I.C.C. 351 (1914); *Western Rate Advance Case*, 35 I.C.C. 497 (1915); *Western Passenger Fares*, 37 I.C.C. 1 (1915); *Fifteen Per Cent Case*, 45 I.C.C. 303 (1917). For reliance upon typical evidence in connection with the regulation of intrastate rates, see pp. 269-307, *supra*.

⁴⁹ Compare the following from the opinion of Justice Brandeis in *New England Divisions Case*, 261 U.S. 184 (1923), at pp. 197-199: "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared . . . to be upon the carrier. Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new §15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it." Note, also, the following from the opinion of Chief Justice Taft in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922), at p. 579: "The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities . . . in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing any one to except himself from the order by proper showing. This practice is fully sustained by precedent. . . . Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute."

the words of the Commission: "In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."⁵⁰

For like reasons a similar procedure has been followed in the Commission's exercise of authority over rate divisions—that is, the divisions of joint rates prescribed for particular carriers have not always been based upon a consideration of each individual joint rate.⁵¹ The most enlightening instance of a comprehensive determination in this sphere, based upon typical evidence and issuing in an order which was provisional in character, is to be found in the leading *New England Divisions Case*.⁵² Immediately after the general rate advances of 1920, the New England railroads instituted proceedings to secure larger divisions of the increased joint rates, some six hundred carriers in the remainder of the United States being made respondents. At first, although an extensive record was made, the Commission did not grant the relief sought, merely suggesting, without order, that the parties individually modify their rate divisions and then submit the readjustments for further consideration; but this procedure was not followed by the carriers, and on reargument, upon the same record, the Commission ordered in effect that the shares of the New England railroads in the joint freight rates be increased by 15 per cent, and at the same time it directed the carriers involved to revise their divisions, which had been determined by agreement in terms of fixed percentages, on a more logical and systematic basis. The prescribed adjustment was to remain in force until further order of the Commis-

⁵⁰ *New England Divisions*, 66 I.C.C. 196 (1922), at p. 203. The Commission pointed out that in proceedings involving general increases or reductions in rates it has been its practice "to disregard the immediate effect upon particular rates and to afford relief without delay, leaving a door open for any necessary subsequent readjustments." Referring specifically to the percentage reductions which were ordered in *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921), the Commission declared that it was "not deterred by the fact that such reductions might, and probably would, leave certain individual rates unreasonably low and others unreasonably high."

⁵¹ See, for example, *Pittsburgh & W. Va. Ry. Co. v. P. & L. E. R. R. Co.*, 61 I.C.C. 272 (1921); *East Jersey R. R. & T. Co. v. C. R. R. Co. of N.J.*, 63 I.C.C. 80 (1921); *Division of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I.C.C. 47 (1922).

⁵² *New England Divisions*, 62 I.C.C. 513 (1921), 66 I.C.C. 196 (1922); *New England Divisions Case*, 261 U.S. 184 (1923).

sion, with the right reserved to any carrier to apply for a modification with respect to particular rates.⁵³ We are not here concerned with the substantive scope of the Commission's authority over rate divisions. The percentage increase in the share of the New England carriers was primarily induced as a means of relieving their financial needs, and this purpose was held to be within the legitimate sphere of the "new railroad policy" introduced by the Transportation Act and constitutionally valid.⁵⁴ It is the methods employed, rather than the substance of the findings, that reflect the pragmatic character of the Commission's processes. The order embraced the division of all the joint rates of all the carriers, but without specific evidence as to the propriety of the adjustment in each instance; and a percentage increase in divisions was immediately prescribed for the New England lines, despite the added direction that the entire basis of apportionment be readjusted by the carriers. The findings were thus based upon typical evidence, and the relief granted was expressly recognized as provisional in character. The Commission utilized these methods, as it had frequently done in other general rate investigations, because

⁵³ In its second report (66 I.C.C., at p. 204) the Commission declared: "Upon further consideration we are of opinion that in a case involving divisions we may, when the public interest so requires, grant immediate relief subject to later readjustments, as we have done in cases involving general increases or reductions in rates. Otherwise, we shall fail to do substantial justice. The act requires a practical administration, and prompt action where that is necessary in the public interest. In our former report we recognized the need for a revision of the divisions. The course of action suggested in that report having failed to produce prompt relief, we must adopt another, justified by the record, which will accomplish what Congress intended should be accomplished."

⁵⁴ 261 U.S., at pp. 189-196. "What the Commission did," concluded the Court, "was to raise the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent. and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in *Ex Parte 74*. If, by a single order, the Commission had raised joint rates throughout the Eastern Group 40 per cent., and, in the same order, had declared that 90 per cent. of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in *Ex Parte 74* was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in *Ex Parte 74*" (p. 196).

they afforded the only means of accomplishing, with reasonable promptness, the general purpose for which the proceeding had been instituted. It did not disregard the situation of particular carriers; it but generalized from representative evidence. It did not order a transfer of revenues from one set of carriers to another, without full hearing, pending decision as to what would constitute just and equitable divisions; it but recognized that subsequent readjustments would be necessary, despite the propriety of immediate relief. Both the typical nature of the evidence upon which the Commission relied and the provisional character of the order which it issued were a reflection of realistic performance rather than of arbitrary exercise of power.⁵⁵

As already stated, the large exercise of administrative discretion,

⁵⁵ In upholding the legal validity of these processes, Justice Brandeis also threw much light upon their rationale. With regard to the use of typical evidence he said (pp. 196-197): "The order directs a 15 per cent increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier. . . . Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief." The pronouncements of the learned Justice with regard to the provisional character of the order were equally illuminating (pp. 200-201): "Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing. . . . That the evidence left in the minds of the Commission many doubts, is true. But it had brought conviction that the New England lines were entitled to relief; that the divisional arrangements of the carriers required a thorough revision to put them upon a more logical and systematic basis; that a horizontal increase of the New England lines' divisions, made before such revision, would leave some divisions too high and others too low; that the comprehensive revision proposed would necessarily take a long time; and that, meanwhile, the New England lines should be accorded 'a portion of the relief to which . . . they are entitled and which the public interest clearly requires.' . . . A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes therein will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers."

both in the substance of the conclusions reached and in the methods employed in their determination, is exemplified throughout the range of the Commission's activities and finds expression in all aspects of the study in which we are engaged. The characteristics of the Commission's regulative processes to which attention has been expressly directed at this point are merely illustrative. Machinery is provided for the exertion of continuous control. Since prompt action is frequently more important than exact justice, neither substantial deficiencies in reliable data, nor the absence of precise evidence with respect to particular situations, can be permitted to defeat the remedial purposes of the legislative mandates which are being administered. Mere inability "to dispose of the issues completely or permanently" does not result in inaction; and even the incidental creation of maladjustments does not inhibit action which is designed to effectuate major public purposes. The processes of continual readjustment, both through the operation of formal saving clauses and through the medium of new complaints and applications, are relied upon to safeguard private rights and to achieve modifications in the public interest. It is true, of course, that the great flexibility of performance which characterized the highly significant and comprehensive proceedings to which reference has been made by way of illustration is not necessarily extended to matters of narrower scope and less import—that in such restricted proceedings more exacting standards are maintained as to adequacy of record, more precise evidence is required in support of findings, more limited rein is given to the sweep of orders. In a broad sense, however, virtually all of the Commission's proceedings are open to reconsideration, upon a showing of new evidence, changed conditions, or mistaken policy, by way of flexible response to practical demands. Moreover, the Commission's trial-and-error methods are often deliberate and not merely unavoidable. The use of temporary orders for purposes of experimentation is of this character;⁵⁶ and the withholding of corrective action pending volun-

⁵⁶ In *Pacific Coast Fourth Section Applications*, 129 I.C.C. 3 (1927), for example, a temporary order granting relief for one year was issued with respect to one of the situations involved, but with the following condition attached thereto: "Before November 1, 1928, applicant will be expected to revise and present anew such applications for relief as the situation may then seem to demand, at which time they should be prepared to show, for a representative period, the results from a traffic standpoint of

tary adjustments by the carriers themselves, along general lines suggested by the Commission, is similarly designed, at least as a preliminary, to render the scope of remedial action more elastic, and the arrangements actually adopted more realistic, than might be possible through the immediate promulgation of formal orders.⁸⁷ There is little limit upon the range of expedients to which resort may be had toward these ends.

In light of the broad discretionary powers conferred upon the Commission by the legislative structure, this pragmatic approach, which is further accentuated by the frequent necessity of securing guidance from the regulatory system as a whole⁸⁸ and of according

the measure of relief herein granted" (p. 23). In abandonment cases, interim orders temporarily denying relief or granting it only in part are very frequent. In *Abandonment of Branch by P. & A. R. R.*, 105 I.C.C. 762 (1926), for example, an application was denied, but "without prejudice to resubmission by the applicant at such time as it can show an arrangement has been made to provide some other suitable service or facility for the community dependent on the branch-line service now afforded" (p. 766). In *Abandonment of Eastern Kentucky Ry.*, 111 I.C.C. 476 (1926), the application was denied as to a portion of the line embraced by its terms, "but without prejudice to renewal after one year of operation succeeding the abandonment of line north of Grayson, herein authorized" (p. 481). In *Abandonment of Line by S. Ry.*, 105 I.C.C. 228 (1925), the record was held open for a period of one year, so that evidence might be adduced showing the results of operation for this additional period; and upon further hearing, in 131 I.C.C. 264 (1927), the application was denied, "but without prejudice to renewal after two years" (p. 269). In all these proceedings, as in numerous others, the Commission's avowed purpose was to render available further relevant data, based upon additional periods of actual experience, either under the original conditions or as modified by its own temporary or restricted determinations.

⁸⁷ See, for example, *Texas Common Point Case*, 26 I.C.C. 528 (1913); *New England Divisions*, 62 I.C.C. 513 (1921), 66 I.C.C. 196 (1922); *National Live Stock Shippers' League v. A., T. & S. F. Ry. Co.*, 63 I.C.C. 107 (1921). Compare, also, the following from *Consolidated Southwestern Cases*, 123 I.C.C. 203 (1927), at p. 409: "In so far as interstate and intrastate rate relationships are herein found to be unduly prejudicial to interstate, and unduly preferential to intrastate shippers, receivers, localities, or traffic, we will at this time enter no corrective order. We will for the present leave to the appropriate State Commissions and carriers the matter of adjusting the intrastate rates on bases which will harmonize with the rates prescribed or approved herein, and will remove the undue prejudice and preference. If such readjustments are not accomplished within a reasonable time interested parties may bring the matter to our further attention."

⁸⁸ In *Railroad Commission of Nevada v. S. P. Co.*, 21 I.C.C. 329 (1911), in which the long-and-short-haul clause as amended in 1910 was first given significant application, the Commission's interpretation of its powers of granting relief, in "the exercise of a wise and judicial discretion" (p. 336), was largely molded by the spirit of the Act as a whole, particularly as evinced by the first three sections, in condemning discrimination. Again, in *Transcontinental Cases of 1922*, 74 I.C.C. 48, in interpreting its powers under the fourth section as amended in 1920, with special reference to the

due consideration to the claims of established relationships and vested interests,⁶⁰ has rendered the Commission's rulings predominantly a

meaning of the requirement that the depressed rate must be "reasonably compensatory," the Commission clearly, and quite properly, went beyond the specific provision involved. In holding that a reasonably compensatory rate "must not be so low as to threaten the extinction of legitimate competition by water carriers," an attempt was made to accord recognition to the pronouncement of section 500 of the Transportation Act that it is the policy of Congress "to foster and preserve in full vigor both rail and water transportation"; in holding that such a rate must not "jeopardize the appropriate return on the value of the carrier property generally," an attempt was made not only to give effect to the express stipulation of section 15a, but to carry out the Commission's general responsibility for the maintenance of an adequate transportation system. This responsibility for the transportation system as a whole has also exerted a dominant influence upon the Commission's policies in prescribing divisions of joint rates. Note the following, for example, from *Pittsburgh & W. V. Ry. Co. v. P. & L. E. R. R. Co.*, 61 I.C.C. 272 (1921), at p. 283: "In our opinion it was to avoid the unduly prejudicial effect of such strategic advantages upon the weaker carriers and the resulting impairment of transportation facilities upon which a substantial portion of the country depends that our powers over divisions were clarified and strengthened. We are not prevented . . . from taking into consideration any circumstances and conditions which we may deem to have weight in measuring the justice and reasonableness of divisions; but it is an intent clearly disclosed that we shall keep continually in view the public interest, the public need for a transportation system strong in all its parts, and the consequent necessity that carriers shall receive compensations fairly proportional to the amount and character of the service which they perform and adequate to enable them to perform it efficiently." The same position was taken in *New England Divisions*, 66 I.C.C. 196 (1922): "Paragraph (6), section 15, of the interstate commerce act [dealing with divisions] was a part of the Transportation Act, 1920. Both the legislative history and the provisions of the act make it clear that the purpose of Congress in this legislation was broader than mere regulation of individual railroads. Congress was endeavoring to assure an effective transportation system for the nation" (p. 198); and in upholding the Commission's position, in *New England Divisions Case*, 261 U.S. 184 (1923), the Supreme Court expressly recognized the interrelationship between various parts of the statute: "The provision concerning divisions was . . . an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable" (p. 191). For the influence of the general purposes of the regulatory system upon the Commission's assertion of power over intrastate rates, see pp. 287-301, *supra*.

⁶⁰ Note, for example, the following from *Mississippi River Case*, 28 I.C.C. 47 (1913), at pp. 58-59: "Taking all things into consideration, much can be said, and much has been said on the record by these complainants, in support of the contention that there should be a parity of rates from the seaboard as between St. Louis and the Iowa towns on the west bank of the river; and we should be disposed to require such a parity of rates at all the crossings if the rate situation could be considered abstractly on the record and without regard to the effects elsewhere and on other rates. That, however, would not be so broad a view of the matter as the circumstances require. We cannot put out of sight the discriminations and inequalities that would result from such an order; on the contrary we must look at the whole situation and in that manner arrive at substantial justice. Moreover, the effect of such an order and so radical a change in a rate structure of this importance would be far-reaching; it would not only disturb the communities immediately involved, but would disturb other communities and at

matter of informed judgment, flexibly adjusted to changing circumstances and conditions, with the pressure of legal necessity emerging only on relatively rare occasions. As will appear from an analysis of the Commission's relationship to the courts, its administrative determinations, effected under such statutory guidance and by such regulatory processes, are clothed with a high degree of finality.

§4. THE COMMISSION AND THE COURTS

On what basis and to what extent are the Commission's determinations, as thus molded, deemed to be conclusive, and on what grounds and in what measure are they subject to review by the courts?⁶⁰ Judicial review of the legitimate exercise of discretion would relegate the method of administrative control to a subordinate status and would defeat the very purposes for which the Commission's vast grants of flexible authority were conferred; on the other hand, absolute recognition of the finality of administrative determinations would destroy in this field the supremacy which has been traditionally accorded to a *régime* of law and would run afoul of the express constitutional limitations to which all exercise of governmental authority is subject. While the Commission's jurisdiction operates, for the most part, in direct furtherance of the public welfare, its adjudications, whether with reference to the propriety of past transactions or by way of formulating policy for the future, affect private interests and determine private rights. Such rights and interests cannot, under all circumstances, be conclusively foreclosed by administrative determinations. Since the Commission's authority is entirely statutory, it must be restrained within the lawful scope of the legislative provisions; and since the Commission is but the creature of Congress, it must be subject to the same constitutional restrictions which condi-

the same time result in a drastic reduction in the revenues of the carriers. As a regulatory body, we cannot overlook such consequences." For more recent examples of the Commission's reluctance to disturb long-established adjustments "lightly and unnecessarily," even in proceedings of restricted scope, see *Anderson-Taylor Co. v. A., T. & S. F. Ry. Co.*, 115 I.C.C. 313 (1926); *Hanna Furnace Co. v. N. Y. C. R. R. Co.*, 123 I.C.C. 627 (1927); *American Wringer Co. v. N. Y., N. H. & H. R. R. Co.*, 146 I.C.C. 325 (1928).

⁶⁰ For a stimulating analysis of the more general problem of the growth of administrative adjudication and its relationship to the courts, see John Dickinson, *Administrative Justice and the Supremacy of Law* (1927).

tion the acts of Congress. There is ample room, therefore, for judicial interference. The crucial problem is as to the proper scope of such interference. In essence this is but a concrete manifestation of the larger problem, characteristic of the system of law as a whole, of achieving harmony between change and stability, in so far as such achievement is dependent upon delimiting the appropriate spheres of rule and discretion; as aptly put, "the problem of compromise between the need of stability and the need of change becomes in one aspect a problem of adjustment between rule and discretion, between administering justice according to settled rule, or at most by rigid deduction from narrowly fixed premises, and administration of justice according to the more or less trained intuition of experienced magistrates."⁶¹

The General Scope of Judicial Review

In this particular field, large discretionary powers are expressly conferred upon the Commission, but few corresponding restrictions are explicitly imposed upon the reviewing powers of the courts. The effective scope of judicial review, therefore, has been largely determined by the courts themselves. But in deference to the general expression of the legislative will, as manifested by the progressively expanding system of administrative control which has been established, the courts have adopted a dominantly self-denying attitude in matters of review. As will appear in due course, there is a broad and significant zone in which the Commission's determinations are clothed with finality; while ample judicial safeguards are provided against unconstitutional assertion of power, against usurpation of statutory authority, and against arbitrary performance of administrative duty, the large exercise of discretion which dominates practically all phases of the Commission's regulatory processes is, on the whole, free from judicial interference.

The prevailing relationship between the Commission and the courts, permitting this large measure of untrammelled exercise of administrative power, was not characteristic of the Commission's status during the first two decades of its existence. Under the original Act to Regulate Commerce the activity of the courts with reference to

⁶¹ Roscoe Pound, *Interpretations of Legal History* (1923), p. 1.

the Commission's determinations appears to have been regarded as an integral part of the regulatory process. The Commission's orders, as such, did not become binding upon the parties affected thereby; the carriers were free to ignore them without penalty. Upon neglect or refusal of the carriers "to obey any lawful order or requirement," the burden was placed upon the Commission to secure its enforcement in the courts. Not only did such enforcement necessarily involve a review of the Commission's determination, but since the Commission's report, on such judicial hearing, was merely to be "prima facie evidence of the matters therein stated," there was no obstacle to the admission of new evidence and thus to a hearing *de novo*.⁶² Under such circumstances the findings of the Commission were definitely subordinated to those of the courts. The cases were judicially tried on the facts as well as on questions of law, and the withholding of significant evidence from the administrative proceedings rendered

⁶² Note, for example, the following: "We do not mean . . . that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission. . . ." *Cin., N. O. & Tex. Pac. Ry. v. I.C.C.*, 162 U.S. 184, 196 (1896). "Nor can it be denied that, even when a petition is filed by the Commission for the purpose of enforcing an order of its own, the Court is authorized to 'hear and determine the matter as a court of equity,' which necessarily implies that the court is not concluded by the findings or conclusions of the Commission. . . ." *Texas & Pac. Ry. v. I.C.C.*, 162 U.S. 197, 239 (1896). "The first contention we encounter . . . is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its powers; that there was no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable. We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court should proceed, as a court of equity, to hear and determine the matter in such a manner as to do justice in the premises. . . . Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answer thereto, and for the Circuit Court of Appeals on appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the Commission as *prima facie* evidence of matters therein stated." *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, 174, 175 (1897). See, also, *Louisville R. R. Co. v. Behlmer*, 175 U.S. 648 (1900); *East Tenn. Ry. Co. v. I.C.C.*, 181 U.S. 1 (1901); *Interstate Commerce Commission v. Chicago R. R. Co.*, 186 U.S. 320 (1902). But compare the following from *Cincinnati Ry. Co. v. I.C.C.*, 206 U.S. 142 (1907), at p. 154: "The statute gives *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed."

reversal of the Commission's orders a natural and frequent outcome. Controversies were settled only after long delay, upon final disposition by the Supreme Court. In effect, judicial control, rather than administrative regulation, prevailed. It was the Commission's relationship to the courts, as well as its lack of basic substantive powers, which rendered it largely impotent prior to the passage of the Hepburn Act of 1906.⁶³

The Hepburn Act not only extended the Commission's substantive powers in various directions—notably, by the express grant of mandatory rate-making authority—but it modified sharply the procedural processes of the original statute. With the sanction of heavy penalties, the Commission's regulatory orders were made binding by their own terms. Responsibility was thus placed upon the carriers to restrain enforcement, rather than upon the Commission to secure enforcement; the administrative process was recognized as an end in itself, and not merely as a preliminary stage in the course of ultimate judicial control. In the event of violation of an order, the Commission might still apply to a circuit court as a means of effecting compliance therewith; but the "prima facie evidence rule" of the original act was no longer applicable.⁶⁴ To this extent the revised statute

⁶³ See Part I, pp. 23-35.

⁶⁴ In reparation cases, however, the Commission's awards are enforceable only through court action, and its findings and orders are only "prima facie evidence of the facts therein stated." Sec. 16, par. (2). This special treatment of orders for the payment of money arises from the fact that they are concerned exclusively with past transactions, and that they are designed to afford private redress to particular parties, rather than to further general public ends through the process of regulation. Compare the following differentiation between regulatory orders and reparation orders: "The type of directing power with which Anglo-American jurisprudence is most familiar is the injunction issued by a court of equity. From this the administrative directing power differs in substance (apart from questions of enforcement and conclusiveness) mainly by having for its object the furtherance of public rather than of private interest. If orders reducing railroad rates were matter of purely private concern, we should not have such orders issued by public utility commissions; the public interest appears in the fact that the administrative commission is given primary jurisdiction to the exclusion of the courts. . . . Such an order may enure in the first instance to the benefit of some particular shipper, but it is intended to operate also on behalf of all others similarly situated. In any event such an order operates prospectively. Such public benefit attaches, however, only in the remotest sense (in the same sense in which all administration of civil justice is for the public benefit) to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy. This is no longer public administration, but remedial justice." Ernst Freund, *Administrative Powers over Persons and Property* (1928), pp. 12-13. In these circumstances, the Com-

obviously contemplated a definite narrowing of the scope of judicial review. But the new provisions were altogether lacking in explicitness as to the grounds upon which the Commission's determinations might properly be declared invalid. Upon petition for enforcement, the courts, after such hearings as they might deem necessary, were directed to enforce obedience to any order which appeared to be "regularly made and duly served." It was open to the courts, under the obscure language of this direction, to assert either very broad or very narrow powers of review. In practice, moreover, this enforcement procedure does not serve as the usual vehicle for judicial review of the Commission's orders. The penalties for disobedience of an order, which become operative from its effective date, are so severe, that the carriers do not await enforcement proceedings by the Commission, but themselves seek equitable relief, by initiating proceedings to enjoin, suspend, or invalidate the Commission's order. This has become the established method of subjecting the Commission's determinations to judicial review. In the 1906 legislation the right to

mission has recommended that the power to award reparation be placed exclusively in the courts. See *Annual Reports*: 1916, pp. 75-78; 1919, pp. 17-21; 1921, p. 58. For judicial interpretations of the "prima facie evidence rule" in reparation cases—construing the presumption to be applicable to ultimate facts, and permitting wide discretion to the Commission in matters of supporting evidence—see *Meeker v. Lehigh Valley R. R.*, 236 U.S. 434 (1915); *Mills v. Lehigh Valley R. R.*, 238 U.S. 473 (1915); *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117 (1920); *Pennsylvania R. R. Co. v. Weber*, 257 U.S. 85 (1921). But the courts have differentiated between awards of damages based upon unjust discrimination and those based upon the unreasonableness of rates in and of themselves. In discrimination cases, the existence of damage must be proved and its measure determined by the circumstances of each proceeding, as in ordinary suits before courts of law—that is, the complainant "must establish the fact of his damage as well as the amount of damages he claims." *New Orleans Board of Trade v. I. C. R. R. Co.*, 29 I.C.C. 32, 34 (1914), applying the rule of the Supreme Court in *Penna. R. R. Co. v. International Coal Co.*, 230 U.S. 184 (1913). In cases, on the other hand, in which the award of reparation is based upon the unreasonableness of the published rates, the mere payment of an unreasonable charge is presumed to issue in damages to the extent of its unreasonableness, regardless of the fact that the complainant may have passed the unreasonable charge on to the consumer in the price of his goods. *Southern Pac. Co. v. Darnell-Taenner Co.*, 245 U.S. 531 (1918). In light of the realities of the situation, this differentiation has not approved itself to the Commission. Note the following, for example: "The distinction between the rule of damage of the *International Coal Case* in respect to discriminatory rates and the rule of damage in the *Darnell-Taenner Case* in respect to unreasonable rates is apparently based upon what is said to be the common-law principle that an unreasonable charge is equivalent to an 'extortion' or 'overcharge.' But there appears to be no real analogy between an action to recover an extortion or overcharge at common law and an action to recover an unreasonable charge under the act to regulate commerce. The common-

such relief was recognized only incidentally;⁶⁵ in the so-called Commerce Court Act of 1910, whereby jurisdiction over the Commission's orders was transferred from the circuit courts to the newly created Commerce Court, there was direct recognition of authority over cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Commission;⁶⁶ in the so-called District Court Jurisdiction Act of 1913, whereby the Commerce Court was abolished and its jurisdiction "transferred to and vested in the several district courts of the United States," this recognition of the right to equitable relief against the Commission's orders was made the statutory basis of prevailing practice in matters of review.⁶⁷ It is apparent, however, that the scope of judicial review was left entirely undefined. In enforcement proceedings brought by the Commission, which are largely in disuse, the highly flexible test of whether the order was "regularly made and duly served" is the only guide provided for the courts; in proceedings to restrain the enforcement of the Commission's orders, which serve as the ordinary channel of review, no guide whatever is provided for the courts. Under these circumstances, the prevailing

law action is more nearly analogous to an action to recover a charge over and above the published rate. At common law the overcharge was often in fact an extortion. But the exaction of a published charge which is legal under the statute, and which is afterwards found to be unreasonable, is in no proper sense an extortion, inasmuch as the law itself requires the payment of the published rate or charge. In publishing rates in the first instance carriers have no way of knowing that a regulating commission will subsequently find a particular rate to be unreasonable. . . . The fact suggested by the court in the *Darnell-Taenzer Case*, that in the end the public probably pays the damages in most cases of compensated torts and that the ultimate consumer who may have been actually damaged by the unreasonable charge can not recover, appears to be an insufficient reason upon principle why the shipper, who eventually has not been damaged, should be allowed to recover. The exaction of an unreasonable charge by a carrier is a public wrong; but there is a clear distinction between a public wrong and private damages. . . . The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9, and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage. The close analogy between a relatively unreasonable or unjust rate and an unjustly discriminatory or unduly prejudicial rate, and the difficulty of determining just when a rate becomes unreasonable or that it is unreasonable per se, suggest that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the *International Coal Case* should control." *Annual Report*, 1919, pp. 19-21. See, also, the Commission's formal recommendations to Congress in *Annual Report*, 1921, p. 58.

⁶⁵ Act of June 29, 1906 (34 Stat. 584).

⁶⁶ Act of June 18, 1910 (36 Stat. 539).

⁶⁷ Act of October 22, 1913 (38 Stat. 219).

relationship between the Commission and the courts—the nature and scope of judicial review—has been altogether molded by the courts themselves. The recognized dominance of the Commission in its appropriate sphere is the result of self-denying determinations by the courts, grounded in the general legislative purpose of establishing administrative control, rather than in special statutory restrictions imposed upon the powers of judicial review.⁶⁸

This self-denying attitude is evidenced, in the first place, by general pronouncements of the Supreme Court, oft-repeated, which emphasize the Commission's freedom from interference in all matters involving administrative discretion and confine the sphere of review to matters involving administrative power. While these pronouncements merely set up broad classifications as to the scope of judicial review—classifications which often overlap and which cannot in any event be self-enforcing—they none the less reflect the principle, controlling in all specific determinations, that the Commission is the tribunal to which the tasks of regulation have been expressly committed, and that the courts will restrict their power of censorship to the condemnation of abuse of authority. This position was first significantly developed by Chief Justice White in these words: "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority

⁶⁸ Compare the following from Gerard C. Henderson, *The Federal Trade Commission* (1924), at pp. 97-98: "In the case of the Interstate Commerce Commission, the Supreme Court itself, with but slight aid from the text of the law, has created in a notable series of cases a category of 'administrative questions,' upon which it will refuse to substitute its judgment for the judgment of the Commission, and into which, indeed, courts may not inquire until the Commission has made its ruling. These cases do not rest upon any supposed distinction between questions of fact or law; generally they are neither, but merely judgments of a practical character. They do not rest upon any statutory limits on the right of review. They rest on a statesmanlike comprehension of the purpose and function of administrative enforcement, and of the importance of expert decision upon questions of great economic importance."

which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."⁶⁹ "Power to make the order," he added by way of summary emphasis, "and not the mere expediency or wisdom of having made it, is the question."⁷⁰ After confirmation of these views in a number of decisions,⁷¹ they were further elaborated by the following declaration: ". . . it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."⁷² The concluding emphasis, once more, was placed upon the declaration that "the court confines itself to the ultimate question as to whether the Commission acted within its power," and that "it will not consider the

⁶⁹ *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U.S. 452 (1910), at p. 470.

⁷⁰ *Ibid.*

⁷¹ See, for example, *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U.S. 481, 494 (1910); *Interstate Commerce Commission v. Chi., R. I. & Pac. Ry.*, 218 U.S. 88, 110 (1910); *So. Pacific Co. v. I.C.C.*, 219 U.S. 433, 442 (1911).

⁷² *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U.S. 541 (1912), at p. 547.

expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling."⁷³ The essential element of these pronouncements, stripped of undue elaboration, is that judicial review is confined "to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made."⁷⁴ In the absence of unconstitutional or unauthorized action, and assuming that orderly processes have been followed and no abuse of discretion is disclosed, the Commission's determinations are final. While under these principles of decision, as will appear in due course, there is ample room for judicial interference, without precise definition as to its scope, it is significant that the basic question thus open to the determination of the courts is the possession of power by the Commission rather than the wisdom or expediency of its exercise. This mode of approach has been repeatedly stressed by the Supreme Court and constitutes the controlling doctrine in all matters of review.⁷⁵

The narrow conception of the province of judicial review which is reflected in the foregoing pronouncements is based upon a recognition of the general legislative intent to constitute the Commission the controlling regulative tribunal with reference to all matters intrusted to its special jurisdiction. This recognition of the Commission as the

⁷³ *Ibid.* See, also, *Procter & Gamble Co. v. U.S.*, 225 U.S. 282, 297-298 (1912); *United States v. Balt. & Ohio R. R. Co.*, 225 U.S. 306, 323 (1912); *United States v. Louis. & Nash. R. R.*, 235 U.S. 314, 320-321 (1914).

⁷⁴ *Interstate Commerce Commission v. Chi., R. I. & Pac. Ry.*, 218 U.S. 88 (1910), at p. 110.

⁷⁵ Among numerous pronouncements of this character, note the following: "So long as it [the Commission] acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review." *Kansas City So. Ry. v. U.S.*, 231 U.S. 423, 456-457 (1913). "If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co. v. U.S.*, 236 U.S. 351, 361 (1915). "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . . and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers Ry. Co. v. U.S.*, 246 U.S. 457, 481 (1918). See, also, *Seaboard Air Line Ry. Co. v. U.S.*, 254 U.S. 57, 62 (1920).

single expert agency deliberately created for effectuating large public ends in its specific sphere is not only responsible for the restriction of the powers of review to cases in which the legitimate bounds of administrative authority have been transcended or arbitrary action has been taken, but it has led, also, to the enunciation of doctrines which inhibit resort to the courts prior to rulings by the Commission, and which eliminate all power of review where the affirmative relief sought by complainants has been denied by the Commission. Most suits based upon the Interstate Commerce Act and allied statutes cannot be brought in the courts until the issues involved have first been passed upon by the Commission; and in the event of dismissal by the Commission no further remedy is available by way of court action. These circumstances—that primary resort must be had to the Commission, and that only its affirmative requirements can be questioned as to their validity—are further indicative of the dominance of the administrative method and of the extensive discretionary authority vested in the regulative tribunal. Hence, before analyzing the determinations of the courts involving actual review of the Commission's orders, it will be necessary to examine the doctrine of primary jurisdiction and that of affirmative and negative orders as evolved by the Supreme Court.

The Doctrine of Primary Jurisdiction

The exclusive primary jurisdiction of the Commission was first established by a notable decision in the so-called *Abilene* case.⁷⁶ Despite express language in the statute which was designed to safeguard the common-law remedies of shippers, it was held that resort to the courts for the recovery of damages because of an alleged excessive charge, in the absence of a prior finding by the Commission as to the reasonableness of such charge, was so inconsistent with the general purposes and provisions of the Act to Regulate Commerce as to render such remedy in the courts inoperative. The *Abilene* Company had sued in a state court to recover damages for the exaction of an alleged unreasonable rate for the transportation of interstate shipments of cottonseed oil. Although the rate was part of a schedule duly published and filed under the federal statute, the Commission had never

⁷⁶ *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

had occasion to pass upon its lawfulness. The trial court found the rate to be unreasonable, but rendered judgment for the carrier. The Court of Civil Appeals, to which the case was then taken, adopted the trial court's finding of fact, but reversed its decision, rendering judgment in the complainant's favor for the excessive charges. This result was based upon the conclusion that it was within the jurisdiction of the court to grant relief, and that the exercise of such jurisdiction was not repugnant to the Act to Regulate Commerce. Upon appeal to the Supreme Court, the underlying issue concerned the effect of the Act to Regulate Commerce upon the common-law rights of shippers. The common-law right to recover damages in the courts for the exaction of unreasonable rates was unquestioned; and there was no express abrogation of that right in the federal statute. On the contrary, both section 9 and section 22 of the Act lent support to the contention that this right was not materially altered by the statute: the former seemed to give the shipper a definite alternative of pressing his claim either before the Commission or before the courts; and the latter, as a general saving clause, seemed to preserve to the shipper all existing common-law and statutory remedies.⁷⁷ None the less, the Supreme Court denied the existence of a remedy in the courts in the absence of a prior determination by the Commission. The special provisions of sections 9 and 22 were disposed of rather summarily.⁷⁸

⁷⁷ Section 9 provided: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission . . . or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act . . . ; but such person or persons shall not have the right to pursue both of said remedies, but must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Section 22 provided that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

⁷⁸ With reference to section 9, the Court said: "Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant,

The Court fell back upon the character of the Act as a whole, as evidenced by the evils sought to be eliminated thereby and the means adopted for the accomplishment of its purposes,⁷⁹ and it thereupon concluded that the recognition of the right of a court to assume jurisdiction prior to a determination by the Commission would be "wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."⁸⁰ With original jurisdiction in the courts, diversity of status as between different shippers and divergence of decision as between different courts would create the very discriminations which the Act was designed to eliminate and destroy the uniformity of rate standards which the system of control aims to

redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power . . . is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." In similar fashion, the Court relegated section 22 to a distinctly subordinate place: "This clause . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act." *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 304 U.S. 426 (1907), at pp. 441-442, 446-447.

⁷⁹ After a survey "of the general scope of the act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view" (p. 437), the Court concluded as follows (p. 439): "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. . . . And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. . . ."

⁸⁰ *Ibid.*, p. 441.

achieve;⁸¹ and conflicting determinations as between the Commission and the courts "would render enforcement of the act impossible."⁸² Under these circumstances, the Court did not confine itself to the narrow technicalities of statutory construction; it sought, in statesmanlike fashion, to give effect to the manifest Congressional intent to set up the Commission as the dominant agency of control. For this purpose, a recognition of its exclusive primary jurisdiction was indispensable.

⁸¹ The argument of the Court "that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations" is unanswerable. "This follows," declared the Court, "because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." *Ibid.*, p. 440.

⁸² "Indeed," concluded the Court, "no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." *Ibid.*, p. 441.

This doctrine, as developed in connection with the problem of rate reasonableness, has also been applied to numerous other aspects of the regulatory process. Perhaps the most important of these applications have been concerned with the prevention of discrimination. In the absence of previous findings by the Commission on the issues involved, the courts have declined to compel the discontinuance of practices alleged to be discriminatory or to award damages alleged to result from these practices. Original resort to the courts has been denied, for example, in connection with the propriety of car-distribution rules established by the carriers,⁸³ the differentiation of charges as between shippers utilizing different types of loading facilities,⁸⁴ the granting of allowances for services performed by shippers,⁸⁵ the re-

⁸³ In *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U.S. 481 (1910), relief was sought in the courts under section 23 of the Act, by way of mandamus, to prevent alleged discrimination in the distribution of coal cars resulting from the car distribution rule followed by the carrier. In reversing the judgment of the Circuit Court of Appeals and ordering the petition to be dismissed, the Supreme Court could "see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions" (p. 493). Similarly, in *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U.S. 304 (1913), involving a suit for damages, it was held that "the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission," and that "the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable" (p. 313). See, also, *Midland Valley R. R. v. Barkley*, 276 U.S. 482 (1928).

⁸⁴ *Robinson v. Balt. & Ohio R. R.*, 222 U.S. 506 (1912). The carrier had charged fifty cents more per ton for the shipment of coal loaded from wagons than when the loading was from tipples. The shipper sought reparation in the state courts for excess payments resulting from the higher rate, on the ground that this rate was unjustly discriminatory. Since, however, the rate was part of a filed and published schedule and the Commission had not passed upon its reasonableness, the Court held that action did not lie, in conformity with the doctrine of the *Abilene* case. "It is true," said the Court, "as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper" (p. 511).

⁸⁵ *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U.S. 247 (1913). The principal issue was as to whether the payment of "lateral allowances" to shippers for hauling cars from

striction of through routes and joint rates to particular connecting carriers.⁸⁶ In order that uniformity of policy may be maintained in matters of discrimination, on the basis of expert consideration of the technical questions at issue and the exercise of administrative discretion contemplated by law, such controversies must be determined, in the first instance, by the Commission. Similarly, primary jurisdiction has been held to rest in the administrative body in proceedings involving routing practices,⁸⁷ freight classifications,⁸⁸ property valuations,⁸⁹ carrier tariffs.⁹⁰ Essentially, all these determinations have been

their mines to the station, which was alleged to cause injury to the complainant operating in the same coal field, might properly serve as a basis for the recovery of damages in the courts, in the absence of a prior finding by the Commission as to the reasonableness of these allowances. In holding the doctrine of primary jurisdiction to be applicable, Justice Lamar said (p. 255): "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute." More specifically, the Court said (pp. 263-264): "Inasmuch as this rate [from station to destination] included the haul [from mine to station], the Railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor. In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body. The courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful." See, also, *Loomis v. Lehigh Valley R. R.*, 240 U.S. 43 (1916).

⁸⁶ *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913).

⁸⁷ *Northern Pacific Ry. Co. v. Solum*, 247 U.S. 477 (1918).

⁸⁸ *Director General v. Viscose Co.*, 254 U.S. 498 (1921).

⁸⁹ *Dayton-Goose Creek Ry. v. U.S.*, 263 U.S. 456, 487 (1924).

⁹⁰ *Tex. & Pac. Ry. v. Am. Tie Co.*, 234 U.S. 138 (1914). Suit for damages was brought in the lower court because of the refusal of the carrier to furnish cars for the loading of railway ties. The basic question was as to whether ties were embraced in the tariff on lumber. In reversing the judgment of the lower court because it had declined to sustain a motion to dismiss for want of jurisdiction, Chief Justice White said (p. 146): "There is no room for controversy that the law required a tariff and therefore if there was no tariff on crossties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by

grounded, as in the leading *Abilene* case, in the necessity of giving effect to the general purposes of the Act, whereby the method of

the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the prevention of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with[in] the jurisdiction of the Commission." Similarly, in *Loomis v. Lehigh Valley R. R.*, 240 U.S. 43 (1916), it was held that shippers could not recover in the state courts, without a preliminary inquiry by the Commission, for instrumentalities they had provided in the course of transportation, under a tariff which made no reference to allowances for such instrumentalities. "In the last analysis," said Justice McReynolds, "the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. . . . And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. . . . If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result, is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted" (p. 50).

But the mere construction of carrier tariffs, when words are used in their ordinary meaning and no questions of fact or of administrative discretion are involved, does not require preliminary resort to the Commission. Such construction, as in the case of all written instruments, is deemed solely a matter of law. Thus, in *Gt. No. Ry. v. Merchants Elev. Co.*, 259 U.S. 285 (1922), where the controversy, on undisputed facts, concerned solely the ordinary meaning of the words of a published tariff, the doctrine of primary jurisdiction was held to be inapplicable. In the words of Justice Brandeis: "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary" (p. 294). Furthermore, in distinguishing the *American Tie* and *Loomis* cases above, he threw much light upon the circumstances which may render preliminary resort to the Commission necessary in matters of so-called tariff construction. "It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the situation in the *American Tie & Timber Co. Case*. . . . The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. The only matter really in issue was whether the word 'lumber' which was in the tariff, had been used in a peculiar sense. The trial judge charged the jury: 'If you believe from the evidence that oak railway cross ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment.' This question was obviously not one of construction; and there is not to be found in the opinion of this court, or in the proceedings in either of the lower courts, a suggestion that the case involved any disputed question of construction. The only real question in the case was one of fact; and upon this question of fact 'the views of men engaged in the lumber and railroad business as developed in the testimony' were in 'irreconcilable conflict.' . . . As that question, unlike one of construc-

administrative control was constituted, in the interest of just and effective regulation, the primary vehicle for the furtherance of public ends.⁹¹

tion, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to ensure uniformity. The situation in *Loomis v. Lehigh Valley R. R. Co.* . . . was similar. There the question to be decided did not require the consideration of voluminous conflicting evidence; but it involved the exercise of administrative judgment. The carrier had been requested by a shipper of grain, fruits and vegetables to supply cars for loading. In order to load ordinary box cars to the minimum capacity on which the freight rates are based and to the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or transverse bulkheads, so that they may safely contain the load and enable unloading to be done without waste and inconvenience. Those sent lacked the inside doors and bulkheads. The carrier having refused to furnish these, the shipper was obliged to do so and sought reimbursement. The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable. To determine this enquiry the court held that preliminary resort to the Commission must be had, because "an adequate consideration of the . . . controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered" (pp. 293-294).

⁹¹ In *Balt. & Ohio R. R. v. Pittsain Coal Co.*, 215 U.S. 481 (1910), the difficulties that would spring from "primary interference of the courts with the administrative functions of the commission" were illustrated as follows: "A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body" (pp. 494-495). Again, in *Robinson v. Balt. & Ohio R. R.*, 222 U.S. 506 (1912), the Court said: "When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure" (pp. 509-510).

This does not mean that the Commission is vested with exclusive primary jurisdiction in all matters growing out of alleged violations of the statute.⁹² While the provisions of the Act expressly authorizing resort to the courts for the recovery of damages and safeguarding common-law remedies have been construed as applicable only when not inconsistent with the doctrine of primary jurisdiction, it is recognized that there are situations which do not require prior adjudications by the Commission. Thus, for example, the principle of primary jurisdiction has been held to be inapplicable in cases involving construction of carrier tariffs,⁹³ departures from published rates,⁹⁴ un-

⁹² For a long list of cases in which the jurisdiction of the court was upheld without preliminary resort to the Commission, see *Gt. No. Ry. v. Merchants Elev. Co.*, 259 U.S. 285 (1922), at p. 295.

⁹³ See note 90, *supra*.

⁹⁴ *Penna. R. R. Co. v. International Coal Co.*, 230 U.S. 184 (1913). It was the practice of the carrier, in the case of shipments of "contract coal" (that is, coal sold for future delivery), to collect the published rate, but to rebate to the shipper the difference between that rate and the lower rate in effect at the time of the contracts of sale. The complainant company, which received no such rebates, alleged discrimination and sued for damages. The initial issue was whether the courts might properly assume jurisdiction in the absence of a preliminary determination by the Commission "as to whether a carrier could make a difference in rate between shipments of free and contract coal." In upholding the jurisdiction of the courts in such circumstances, Justice Lamar first set forth the basic considerations which support the doctrine of primary jurisdiction: "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals" (p. 196). In this proceeding, involving a prohibited departure from the published rates, rather than any issue of fact or discretion as to their reasonableness, the need for preliminary resort to the Commission is removed. "None of these considerations . . ." continued the Court, "operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. . . . The tariff, so long as it was in force, was . . . to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. . . . In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the

equal enforcement of car-distribution rules.⁹⁶ In these circumstances the only task was to apply the law to uncontroverted facts. In construing the words of carrier tariffs used in their ordinary meaning, independently of external conditions, and in awarding damages for departures from published rates and for discriminatory enforcement of established car-distribution rules, practices definitely prohibited by statute, the courts were but asserting a jurisdiction expressly reserved to them. The reasons for requiring preliminary resort to the Commission, in conformity with the nature and purposes of the regulatory structure as a whole, were not operative under these conditions, because no issues of fact, evidentiary or ultimate, were involved, and

administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden, and § 8 . . . expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation . . . ' (pp. 196-197). On similar reasoning, in *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U.S. 247 (1913), the Court distinguished that case (see note 85, *supra*) from *Wight v. U.S.*, 167 U.S. 512 (1897), in which it had been held, without preliminary action by the Commission, that an allowance paid to a consignee of goods for hauling them in wagons from the station to his warehouse constituted a rebate which justified the exaction of the statutory penalties. "But that case," said the Court, "did not involve any question of reasonableness of rate or allowance. Nor was the court there called on to indirectly exercise rate-regulating power, but only to pass upon the question of fact as to whether, as charged in the indictment, the defendant had paid a secret rebate to a favored consignee. It appeared that the carrier's published rate of 15 cents included the haul from Cincinnati to the yard in Pittsburgh. Neither by its terms, nor by general practice, did the rate include delivery at warehouses in the city and distant from the railroad tracks. Not having undertaken to furnish free cartage, it was unlawful for the carrier to perform that service for one patron and not for all others. Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. It was therefore not necessary to have a preliminary ruling by the Commission because the statute itself prohibited the payment of rebates and the courts could apply the law accordingly" (pp. 260-261).

⁹⁶ *Penna. R. R. v. Puritan Coal Co.*, 237 U.S. 121 (1915). Suit for damages was brought in the state courts because of the carrier's failure to furnish the coal company with the number of cars to which it was entitled under the carrier's rule of distribution, while other shippers were provided with more cars than they were entitled to under the same rule. The carrier contended, among other things, that the determination of a proper car-distribution rule was a matter calling for the exercise of the Commis-

there was neither need nor occasion for the exercise of administrative discretion.

Only in small measure, however, does the Act inflict punishment or grant redress for specifically defined violations. In most instances further definition is expressly contemplated, on the basis of the facts of each proceeding and in light of an informed judgment, as a means of translating Congressional policy into concrete rules. If the special skill required in determining complex and technical questions is to be utilized and uniformity of result is to be attained, preliminary investigations and findings must be made by the administrative tribunal. The general statutory standards of justness, reasonableness, and the like, in terms of which the basic duties of the carriers and the chief powers of the Commission are formulated, necessarily involve such

sion's power, and that no court could assume jurisdiction of a suit for discriminatory allotment of cars in the absence of a preliminary determination by the Commission that the established car-distribution rule was improper. In denying the validity of this contention, under the circumstances of the instant proceeding, the Court, after pointing out "that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule," continued: "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. . . . But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage" (pp. 131-132). On this basis the Court distinguished *Morristdale Coal Co. v. Penna. R. R. Co.*, 230 U.S. 304 (1913), which also involved the question of discrimination in the distribution of coal cars, but where it was held that jurisdiction, in the first instance, lay exclusively in the Commission (see note 83, *supra*): "There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission. . . . The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity, was unfair, unreasonable, discriminatory, or preferential. But . . . the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. . . . So that on the trial there was no administrative question as to the reasonableness of the rule but only a claim for damages occasioned by its violation in failing to furnish cars. . . . The state and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission" (p. 134). See, also, *Ill. Cent. R. R. v. Mulberry Coal Co.*, 238 U.S. 275 (1915).

inquiries and determinations, in the first instance, both for the adjudication of past controversies and for the molding of future action. In the words of Justice Brandeis: "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintanceship with many intricate facts of transportation is indispensable; and such acquaintanceship is commonly to be found only in a body of experts."⁹⁸

From the standpoint of our present analysis, the most significant aspect of the doctrine of primary jurisdiction lies in its recognition that the exercise of administrative discretion inheres in the enforcement of the principal provisions of the Interstate Commerce Act, and that the exclusion of the courts from the entertainment of suits as an original matter is essential to the preservation of this discretionary authority. Such emphasis upon administrative discretion as the controlling factor in the establishment and development of the doctrine can be gathered from all judicial determinations upon this issue. The need of uniformity of policy, for the avoidance of inequalities and discriminations, is most frequently stressed as the basic ground for requiring preliminary resort to the Commission; but the fact that the attainment of uniformity is deemed to necessitate administrative

⁹⁸ *Gr. No. Ry. v. Merchants Elev. Co.*, 259 U.S. 285 (1922), at p. 291. For an analysis by the Commission of the question of primary jurisdiction, see *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I.C.C. 52 (1915).

findings in the first instance but reflects, explicitly or implicitly, a recognition of the incompleteness, as a practical matter, of the general standards established by statute, and of the necessity of giving definiteness to these standards, when applied to specific situations, through the further assertion of policy-making authority, whether the particular controversy involves a question of reparation for past wrongs or a problem of regulatory action for the future. When the courts insist upon preliminary findings by the specialized tribunal created for the purpose of determining such controversies, they are merely recognizing that the exercise of skilled discretion constitutes a necessary condition for the performance of their own judicial functions. Similarly, the various criteria developed by the courts in delimiting the scope of the doctrine of primary jurisdiction are reducible, in the last analysis, to the presence or absence of an element of discretion in the determination of the questions at issue. When, for example, a differentiation is made between acts of the carriers which are lawful or unlawful "according as they are reasonable or unreasonable, just or unjust" (e.g., the exaction of published rates) and those which are absolutely illegal (e.g., the granting of rebates from the published rates), with a requirement of preliminary resort to the Commission in the one case and a sanction of original resort to the courts in the other, it is obvious that the applicability of the principle of primary jurisdiction is made to depend upon whether or not the inquiry necessitates an exercise of administrative discretion. The distinction between proceedings involving matters of fact (e.g., whether the words of a carrier tariff were used in a peculiar sense), which are held to be primarily for the Commission, and those confined to matters of law (e.g., as to the ordinary meaning of words used in a carrier tariff), of which the courts are permitted to take original jurisdiction, possesses, fundamentally, a like import. Both the weighing of evidentiary facts and the finding of ultimate facts, in view of the technical character of the problems at issue and the voluminous and conflicting character of the testimony generally offered as bearing upon their disposition, call for the exercise of discretion by the tribunal deemed to be expert in these matters. If original reliance were placed upon the findings of courts and juries under these circumstances, not only would the benefits of such expert judg-

ment be foregone, but diversities of result would be inevitable and the basic purposes of the Act would be largely thwarted. Judicial emphasis upon the factual nature of controversies bringing to issue the justness or reasonableness of rates, rules, or practices is but another way of according recognition to the inherently controlling element of discretion. Because this element of discretion, inextricably bound up with the ascertainment of the facts of each such proceeding, constitutes the predominantly distinguishing mark of the category of "administrative questions" to which the doctrine of primary jurisdiction has been held to be applicable, these "administrative questions" embrace the performance of quasi-judicial functions, as in awarding reparation for past maladjustments, as well as of quasi-legislative functions, as in prescribing rates and regulations for the future.

But the doctrine as thus evolved merely establishes priority of administrative jurisdiction; it does not, as such, bear upon the degree of finality which attaches to administrative determinations. It is true, of course, that the requirement of preliminary resort to the Commission, largely because of necessity for the exercise of informed judgment in the application of general standards to specific situations, would seem to create a presumption against the disturbance of its findings in so far as they fall within the legitimate bounds of administrative discretion; there would be little point in establishing priority of jurisdiction on this basis if administrative determinations were subject to judicial re-examination from the standpoint of their wisdom or expediency. It is true, also, that most controversies which are brought before the Commission do not as a practical matter get to the courts, so that in the vast majority of instances the administrative findings and orders, under the doctrine of primary jurisdiction, come in fact to be final and conclusive. As a matter of law, however, the degree of finality which attaches to the Commission's action must be gathered from determinations of the courts which involve directly the nature and scope of judicial review.

The Doctrine of Affirmative and Negative Orders

The most definite and perhaps the most questionable narrowing of the sphere of judicial interference after preliminary resort to the

Commission springs from the doctrine of so-called negative orders, whereby those of the Commission's holdings which deny the affirmative relief sought by complainants are held not to be reviewable in the courts.

The specific issue first received elaborate consideration in the leading *Procter & Gamble* case.⁹⁷ A rule of the carriers provided for the collection of demurrage on private cars, even when such cars were standing on the tracks of their owners. The Procter & Gamble Company, which owned about five hundred tank cars used in the transportation of oils for the manufacture of soap, alleged in a complaint before the Commission that this rule was unjust and unlawful. When the Commission sustained the rule and dismissed the complaint, a bill was filed in the Commerce Court petitioning that the Commission's order be annulled, the operation of the rule set aside, and pecuniary relief granted. The Commerce Court assumed jurisdiction, but upheld the Commission's order on the merits. The controlling question before the Supreme Court was whether the Commerce Court possessed authority to review such negative orders of the Commission. This jurisdictional issue was sharply drawn: "The question to be decided is this: Does the authority with which the Commerce Court is clothed . . . invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands? In other words, the important question is, Is the authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass upon its correctness?"⁹⁸

⁹⁷ *Procter & Gamble Co. v. U.S.*, 225 U.S. 282 (1912), denying the jurisdiction assumed by the Commerce Court in 188 Fed. 221 (1911). The proceeding before the Commission was *Procter & Gamble Co. v. C., H. & D. Ry. Co.*, 19 I.C.C. 556 (1910). See, also, *Hooker v. Knapp*, 225 U.S. 302 (1912), which was decided the same day, without independent discussion, on the authority of the *Procter & Gamble* case.

⁹⁸ *Procter & Gamble Co. v. U.S.*, *supra*, at p. 292.

In reversing the decree of the Commerce Court, and in holding that the powers of judicial review are confined to affirmative orders, Chief Justice White, speaking for a unanimous court, first placed reliance upon the language of the statute creating the Commerce Court. Jurisdiction was there conferred over "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."⁹⁹ This language, concluded the Court, plainly discloses the legislative intent: "Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give to the court the right to take cognizance when properly made of complaints concerning the legality of orders rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."¹⁰⁰ Confirmation of this conclusion was found, furthermore, in the provisions of the Commerce Court Act as a whole.¹⁰¹ But the Supreme Court did not confine itself to an interpretation of the special statute; the exercise of powers of review as to such negative orders was declared to be inconsistent with the entire system of administrative control set up by the Act to Regulate Commerce. The assertion of such jurisdiction by the courts "would

⁹⁹ Act of June 18, 1910 (36 Stat. 539), sec. 1, par. (2).

¹⁰⁰ 225 U.S., at p. 293.

¹⁰¹ "But if it be conceded for the sake of argument," continued the Court, "that the language of the provision is ambiguous a consideration of the context of the act will at once clarify the subject. Thus, the first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is given to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 . . . provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the Commission 'shall not stay or suspend the operation of such order' but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order sought to be enforced, essential to the granting of an order or injunction restraining or suspending its enforcement." *Ibid.*, pp. 293-294.

result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action was contemplated."¹⁰² This position as to negative orders was made to rest, fundamentally, upon the same course of reasoning which had been used in support of the doctrine of primary jurisdiction. The enforcement of many of the duties imposed upon the carriers and of many of the rights conferred upon shippers by the Act required, by their very nature, the exercise of administrative judgment; and in order that consistency of policy might be maintained in such enforcement, it was essential that original authority with regard to these "administrative questions" be vested in a single body. The Commission was established as the special agency for the performance of these tasks, and only findings by that tribunal that the Act has been violated provide the necessary basis for the exercise by the courts of their powers of review. In other words, not only is preliminary resort to the Commission necessary, but it is equally essential that a violation be found to have been committed, as evidenced by an affirmative order granting appropriate relief, before the courts may properly assume jurisdiction.¹⁰³ The

¹⁰² *Ibid.*, p. 294.

¹⁰³ It will be helpful to present the Court's analysis in its own words: "By [the] act as originally enacted many regulations and consequent duties were imposed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement the exercise of official functions of an administrative nature, and, second, for their harmonious development an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act . . . created an administrative body endowed with what may be in some respects qualified as *quasi*-judicial attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. And for the purpose stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining, limited as to the subject-matters to which we have referred, whether the provisions of the act had been violated and if so of primarily enforcing the act by awarding appropriate relief. The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt coming within the scope of the administrative unity which we have mentioned primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated the act did

recognition, on the other hand, of the right of a court "to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission . . . would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act," since, *inter alia*, such recognition "would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative."¹⁰⁴ Since the doctrine was thus grounded in the fundamental character of the Act, the United States District Courts, which have succeeded to the jurisdiction of the Commerce Court, are without authority to review such negative orders of the Commission.¹⁰⁵

But the distinction between affirmative and negative orders is not merely one of form. When it appears that the substance of the Commission's determination is affirmative in character, the right of the courts to assume jurisdiction is recognized, despite the fact that the order on its face may be a negative one. Two illustrations will indicate the nature of the problem.

In disposing of applications for relief from the long-and-short-haul clause as amended in 1910, the Commission, in a group of important proceedings, ordered that percentage relationships, graded according to defined zones, be maintained between the lower long-haul rates

not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints, when by previous submission to the Commission, they had been sanctioned by a command of that body." *Ibid.*, pp. 295-296.

¹⁰⁴ *Ibid.*, pp. 296-297, 298, 299.

¹⁰⁵ See, for example, *Lehigh Valley R. R. Co. v. U.S.*, 243 U.S. 412 (1917), in which, in reliance upon the doctrine of the *Procter & Gamble* case, a denial of the application of the carrier for a continuance of common control of rail and water lines, in *Lake Line Applications under Panama Canal Act*, 33 I.C.C. 699 (1915), 37 I.C.C. 77 (1915), was held not to be subject to review by the courts. But compare the following from *Chicago Junction Case*, 264 U.S. 258 (1924), at p. 264: "In *Procter & Gamble Co. v. United States* . . . *Hooker v. Knapp* . . . and *Lehigh Valley R. R. Co. v. United States* . . . judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought. This Court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied."

and the higher short-haul rates.¹⁰⁶ In part, relief was granted to the carriers; in part, it was denied. The enforcement of the Commission's order was enjoined by the Commerce Court,¹⁰⁷ and upon appeal to the Supreme Court it was argued, among other things, that the order was not subject to judicial inquiry because, in denying the relief sought by the carriers, it was "purely negative."¹⁰⁸ In holding this contention to be invalid, the Court relied essentially upon its interpretation of the meaning of the amendatory statute.¹⁰⁹ Prior to the amendment of 1910, the exercise of primary judgment as to the propriety of departure from the long-and-short-haul clause was lodged in the carriers, but was subject to administrative control and ultimate judicial review; in consequence of the amendment, the right of primary judgment was withdrawn from the carriers and vested in the Commission, but the substantive grounds for relief were not changed, and the Commission's determinations continued to be subject to judicial review. "The contention . . . presupposes that the power which from

¹⁰⁶ *Railroad Commission of Nevada v. S. P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane v. N. P. Ry. Co.*, 21 I.C.C. 400 (1911).

¹⁰⁷ 191 Fed. 856 (1911).

¹⁰⁸ *Intermountain Rate Cases*, 234 U.S. 476 (1914).

¹⁰⁹ "It is certain," said Chief Justice White, "that the fundamental change which it [the 1910 amendment] makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short-haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short-haul clause and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or so to speak the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law. . . . But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not in any event by necessary implication granted." *Ibid.*, pp. 484-485.

the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist."¹¹⁰

Similarly, an order of the Commission dealing with the apportionment of coal cars in time of shortage which in form dismissed a complaint of shippers but in effect required the observance of a particular car-distribution rule has been held not to be negative in character and to be subject to review by the District Court.¹¹¹ The nature of the difficulties involved will be disclosed by a brief *résumé* of the facts. In an early case the Commission had found the "150 per cent rule" to be reasonable for the apportionment of cars among "joint mines" (that is, those served by two or more carriers) as compared with "local mines" (that is, those served by a single carrier).¹¹² During the period of Federal Control, the United States Railroad Administration, through "Rule 4,"¹¹³ placed both types of mines on substantial equality, and this rule remained operative for more than a year after the return of the roads to their private owners. When, upon complaint of operators of joint mines, Rule 4 was found by Division 5 of the Commission to be "unduly prejudicial to joint mines and unduly preferential of local mines,"¹¹⁴ the carriers, in accordance with the recommendation of the division, adopted the 150 per cent rule; but, upon petition of intervening operators of local mines, the proceeding was reopened and the full Commission, expressly reversing the findings of Division 5, held Rule 4 not to be unreasonable or unduly prejudicial and dismissed the complaints.¹¹⁵ Upon notice of the carriers that Rule 4 would once more be put into effect, suit was brought in the District Court to set aside the Commission's order and the car-

¹¹⁰ *Ibid.*, p. 490.

¹¹¹ *United States v. New River Co.*, 265 U.S. 533 (1924).

¹¹² *In re Irregularities in Mine Ratings*, 25 I.C.C. 286 (1912).

¹¹³ Circular CS-31, Revised.

¹¹⁴ *Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co.*, 62 I.C.C. 269 (1921).

¹¹⁵ *Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co.*, 74 I.C.C. 433 (1922).

distribution rule upon which it was based, as a result of which suit a permanent injunction was entered.¹¹⁶ The Supreme Court, on appeal, was called upon to decide whether the order was subject to review by the District Court, and if so, whether it should be set aside.¹¹⁷ On the merits the decree of the lower court was reversed, but approval was given to the assumption of jurisdiction for purposes of judicial review. It is obvious that the real controversy concerned the propriety of alternative car-distribution rules, supported, respectively, by the operators of joint mines and of local mines, and that the dismissal of the complaints was but incidental to the adoption by the Commission of one of the alternatives. In effect, then, the Commission's order granted affirmative relief to one of the groups of contending litigants. Accordingly, while the Court paused to distinguish in a rather formal way the earlier decisions establishing the doctrine of so-called negative orders,¹¹⁸ the compelling considerations in support of the propriety of judicial review were found in the facts of the proceeding. Said Justice Butler: "The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4

¹¹⁶ *New River Co. v. Chesapeake & O. Ry. Co.*, 293 Fed. 460 (1923).

¹¹⁷ *United States v. New River Co.*, 265 U.S. 533, 539 (1924).

¹¹⁸ "The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co. v. United States* . . . *Hooker v. Knapp* . . . and *Lehigh Valley R. R. Co. v. United States*. . . . In the first of these cases, application was made by the Procter & Gamble Company, a shipper and owner of tank cars, to be relieved from paying demurrage charges, in accordance with demurrage rules applied by the carrier. The Commission dismissed the complaint. As shown by the report . . . the reason for dismissal was that the tank cars were made subject to the demurrage rules, by an arrangement between the shipper owning the cars and the carrier hauling them. The question before this Court . . . was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker v. Knapp* and *Lehigh Valley R. R. Co. v. United States* were decided on the authority of the *Procter & Gamble Case*. The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellants' contentions here. In all of these cases, affirmative relief sought was denied by the Commission. Judicial review was denied on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission, in the exercise of its powers, should be granted. . . . The authority conferred upon the Commerce Court . . . was vested in the District Courts . . . and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred." *Ibid.*, pp. 539-540.

does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent. rule. The Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers promptly to amend their car service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4 and applied the 150 per cent. rule in its place. When the case was reopened before the Commission, the contest was between the operators of local mines attacking the 150 per cent. rule and the operators of joint mines supporting that rule and objecting to rule 4. The Commission reversed its former findings and decided in favor of rule 4 and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. . . . Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent. rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction."¹¹⁹

While there can be no question that the courts properly assumed jurisdiction in the foregoing proceedings, it is by no means clear that the doctrine of the *Procter & Gamble* case is altogether sound in any event. In interpreting that case, and those following it, and in distinguishing it from proceedings involving formally negative orders in which resort to judicial review has been deemed proper, it has been emphasized that the controlling consideration in the Supreme Court's refusal to interfere with the Commission's determination was not the negative character of the order, but the denial of the affirmative relief sought.¹²⁰ The assumption of jurisdiction by the courts under such circumstances, it is argued, would be to trespass on the functions of

¹¹⁹ *Ibid.*, pp. 540-541.

¹²⁰ See notes 105 and 118, *supra*.

the Commission—to determine whether the relief which had been denied by the Commission, in the exercise of its authority, should be granted. It is clear that “a particular exercise of judgment or discretion” cannot be compelled through resort to the courts;¹²¹ and it is equally clear that in exercising their powers of review, on petition to set aside an order of the Commission, the courts are without authority to substitute their own judgment for that of the administrative tribunal.¹²² But the mere assumption of jurisdiction by the courts, after preliminary resort to the Commission, does not involve an original adjudication of the administrative question or a necessary interference with the exercise of legitimate discretion. The purpose, rather, is to render possible the prevention of abuse of authority or discretion: the judicial inquiry is concerned solely with whether the administrative determination is based upon a mistake of law or was arrived at in arbitrary fashion. “It is of course true,” said Chief Justice White in upholding the validity of judicial review of the Commission’s orders under the long-and-short-haul clause, “. . . that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine . . . does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right of abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be

¹²¹ *Interstate Commerce Commission v. Waste Merchants Assn.*, 260 U.S. 32 (1922). Justice Brandeis said (p. 34): “Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion . . . or be used as a writ of error.” *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U.S. 474 (1912), *Louisville Cement Co. v. I.C.C.*, 246 U.S. 638 (1918), and *Kansas City So. Ry. v. I.C.C.*, 252 U.S. 178 (1920), were distinguished. In the first two of these proceedings the Commission erroneously declined to assume jurisdiction; in the third it wrongly refused to perform a specific duty which Congress had made mandatory.

¹²² See pp. 390–392, *supra*.

not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."¹²³ There are possibilities of such abuse in connection with orders denying the affirmative relief sought, and judicial review of these orders would not necessarily infringe upon the functions of the Commission any more than the review of orders which grant affirmative relief. There is a large initial exercise of discretion in both instances, which is amply safeguarded by the doctrine of primary jurisdiction and by the lack of authority in the courts, upon review, to invalidate orders which, as contemplated by the Act, are but an expression of the informed judgment of the administrative tribunal created for its enforcement; but there are also matters of law involved which are as appropriate for judicial inquiry in the one case as in the other. Indeed, it may be said that every administrative determination of a quasi-judicial character, whether the relief sought be granted or denied, is based upon a "system of law by which judgment is to be controlled,"¹²⁴ both in substance and by way of procedure, and hence may transcend "the statutory powers conferred" or "the limits of a sound discretion." Moreover, the denial of relief to one of the parties is usually tantamount to the granting of relief to the other, so that distinctions as to the character of the order issued tend to assume a predominantly formal aspect. In practical effect, under the doctrine of the *Procter & Gamble* case, there comes to be an unwarranted differentiation between carriers and shippers. In most proceedings involving the reasonableness of rates, rules, and practices, for example, shippers appear as complainants against carriers. If the contentions of the shippers prevail and affirmative orders are issued, the carriers are safeguarded against abuse through the process of judicial review; if, on the other hand, the carriers prevail, the affirmative relief sought being denied, the shippers have no recourse to the courts, even though the administrative determinations may be based upon palpable error. It would seem that nothing in the general nature and purposes of the Act necessitates such an outcome, since the dominance of the administrative method can be effectively maintained through the requirement of preliminary resort to the Commission

¹²³ *Intermountain Rate Cases*, 234 U.S. 476 (1914), at pp. 490-491.

¹²⁴ *Ibid.*, p. 485.

and the restriction of the powers of review to questions of transcendence of authority or abuse of discretion.

In so far, however, as the express language of the statute creating the Commerce Court, as construed by the Supreme Court, confined its jurisdiction to cases issuing in affirmative administrative commands, the limitation is grounded in the will of Congress and continues to be binding upon the courts. The jurisdiction originally vested in the Commerce Court was transferred, upon its abolition, to the several district courts of the United States,¹²⁵ and there has since been no change of legislative policy in this sphere. The zone of judicial censorship has thus been definitely narrowed. Not only is preliminary resort to the Commission necessary in all matters involving the exercise of administrative discretion, but the findings of the Commission appear to be clothed with finality in so far as they deny the affirmative relief sought.

The Grounds of Judicial Censorship

When, after preliminary resort to the Commission and the issuance of an affirmative order by that tribunal, the courts do assume jurisdiction, the question of constitutionality provides the most indisputable ground for the exercise of judicial censorship. The constitutional issue, by its very nature, involves the matter of power. Even the most liberal recognition of the finality of administrative determinations cannot exempt them from the requirements of due process or from the necessity of adhering to the basic delimitation of state and federal jurisdiction. Both the power of Congress, in the enactment of the controlling statutory provisions, and the power of the Commission, in the exercise of the authority conferred upon it, may be questioned on these grounds. In point of fact, however, there has been an almost complete absence of censorship because of constitutional violation in the sphere of the Commission's activities. The writer is aware of no important legislative enactment or administrative order which has been declared invalid on constitutional grounds.¹²⁶

¹²⁵ District Court Jurisdiction Act (October 22, 1913), 38 Stat. 219.

¹²⁶ But see *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and *Brown v. Walker*, 161 U.S. 591 (1896), with reference to the Commission's early difficulties in the matter of compulsory testimony.

For the most part the issue has arisen in connection with attacks upon some of the statutory provisions as such, rather than upon the manner of their administrative enforcement; and these provisions, ranging over a broad field and effectuating unprecedented centralization of authority and the progressive subordination of private rights to public interests, have been uniformly sustained. The nature of the constitutional issues involved in most of the pertinent proceedings has been dealt with in some detail in other connections; it will suffice at this point merely to refer to a number of outstanding examples. The extension of the Commission's jurisdiction to carriers by pipe line, though ostensibly impressing private business with a public status, has been held to be a valid exercise of legislative power;¹²⁷ the sweeping assertion of federal authority over intrastate rates, as an incident to the exercise of plenary power over interstate commerce, has received judicial sanction;¹²⁸ the validity of requiring reports as to the hours of service of all railway employees, in the interests of safety of operation, has been upheld;¹²⁹ the attack upon the right to exercise regulatory power over the accounts of the carriers on a comprehensive basis has been held without merit;¹³⁰ rate-making authority vested in the Commission has been held not to constitute an unconstitutional delegation of Congressional power;¹³¹ the authorization to apportion joint rates on the basis, among other things, of the revenue needs of the participating carriers, has encountered no obstacle in the requirements of due process;¹³² the provisions for the recapture of "excess earnings," though involving a trusteeship of revenues derived from reasonable rates, have been held not to be repugnant to the Constitution.¹³³ These and similar judicial determinations have served to maintain the integrity of the legislative structure for the performance of the Commission's tasks, but they do not bear directly upon the character of review of the Commission's orders on constitutional grounds. While in all such instances the court proceed-

¹²⁷ *The Pipe Line Cases*, 234 U.S. 548 (1914).

¹²⁸ *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1914); *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922); *New York v. U.S.*, 257 U.S. 591 (1922).

¹²⁹ *Balt. & Ohio R. R. v. I.C.C.*, 221 U.S. 612 (1911).

¹³⁰ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912).

¹³¹ *Intermountain Rate Cases*, 234 U.S. 476 (1914).

¹³² *New England Divisions Case*, 261 U.S. 184 (1923).

¹³³ *Dayton-Goose Creek Ry. v. U.S.*, 263 U.S. 456 (1924).

ings resulted from the exercise of the contested power by the Commission, the issue of constitutionality was primarily concerned with the question of Congressional authority.

In very few cases, however, have the administrative orders as such been challenged for violation of the fundamental law, and in these few cases the Commission's findings have not only been upheld, but without such examination of the facts as might threaten the finality of the Commission's discretionary action. Two illustrations will indicate the character of the meager record on this aspect of judicial review.

In the *Abandoned Property Case*,¹⁸⁴ the Commission, in prescribing a uniform system of accounts and a classification of expenditures for additions and betterments, required the carriers to charge the replacement cost of abandoned property to operating expenses. Among the contentions of the carriers was the claim that this regulation would reduce the amount of current net earnings available for dividends to the non-cumulative preferred stockholders, and that it therefore constituted a deprivation of property without due process of law. The Court declared that even if the regulation should in fact require the preferred stockholders to forego current dividends it would not amount to an unlawful taking of property, since the improvements out of which the abandonments arose would increase the prosperity of the company and afford better assurance of dividends for the future. The classification prescribed was held to be a reasonable exercise of the Commission's statutory authority, and hence not subject to judicial review. The discretionary element in this authority was expressly recognized. "It is further insisted," concluded Justice Pitney, "that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. Except for the contention (already disposed of) that the value of the abandoned parcels should be permanently carried in the property account as part of the cost of progress, it is and must be conceded that sooner or later it must be charged

¹⁸⁴ *Kansas City So. Ry. v. U.S.*, 231 U.S. 423 (1913).

against the operating revenue, either past or future, if the integrity of the property accounts is to be maintained; and it becomes a question of policy whether it should be charged *in solido* to profit and loss (an account presumptively representative of past accumulations) or to the operating accounts of the present and future. . . . But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."¹⁸⁵

In the *New Castle Interchange Case*,¹⁸⁶ the constitutional issue was disposed of in like manner, without review or disturbance of the Commission's findings of fact. The Commission had ordered the Pennsylvania Railroad to cease and desist from discriminating against the Buffalo, Rochester & Pittsburgh Railway Company by refusal to interchange traffic with that carrier at New Castle, Pennsylvania, while interchanging such traffic with other carriers. It was contended by the Pennsylvania Company, *inter alia*, that the Commission's order amounted to a taking of property without due process of law, in that it subjected the Pennsylvania's terminals to the use of another company without compensation. In declaring this contention to be invalid, the Court pointed out that the Commission's order merely obligated the Pennsylvania Company to receive and transport cars over its terminals by its own motive power on a non-discriminatory basis, without any attempt to appropriate the terminals of the owning company to the use of other carriers, and that the Commission's authority, in view of the broad scope of the "transportation" covered by the Act, extended to such regulation of terminal facilities. "What is here accomplished," said Justice Day, "is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the trans-

¹⁸⁵ *Ibid.*, pp. 456-457.

¹⁸⁶ *Pennsylvania Co. v. U.S.*, 236 U.S. 351 (1915).

portation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation. . . ."¹⁸⁷

Judicial review of the Commission's orders has been concerned primarily with the meaning and scope of the statutory provisions under which administrative action was taken; but in this sphere also, as in connection with constitutional issues, censorship has been grounded in want of power rather than in the manner of its exercise. Statutory construction has been appropriately recognized as involving matters of law reserved for the final determination of the courts, and it has served as a basis both for denying essential powers and for validating far-reaching assertions of administrative authority. In so far as the mere language of the statute has sufficed to fix the bounds of the Commission's jurisdiction, there has been no disposition on the part of the courts to examine the record or to review the findings of fact; where, on the other hand, errors of interpretation have been found to spring from a disregard of generally applicable rules of law, or where questions of arbitrary performance have arisen, it has often been found necessary to consider the factual basis of the Commission's findings, as a means of determining the real nature of the authority sought to be exerted by the administrative order. In both situations, however, the Supreme Court has purported to confine itself to issues of power, rather than to substitute its judgment, in matters of policy, for that of the administrative tribunal. In other words, judicial review, as will appear, has almost invariably served as a safeguard against the abuse of administrative authority, and not as an independent source of authority in the courts for molding the character and direction of the regulatory process.

There are many instances in which administrative orders have been invalidated for want of the statutory authority sought to be exercised. Some of these denials of authority, when judicially decreed, seriously

¹⁸⁷ *Ibid.*, pp. 371-372. See, also, *Louis. & Nash. R. R. v. U.S.*, 238 U.S. 1 (1915). Prior to the decision of the Supreme Court in *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), the constitutionality of orders of state commissions under the due process clause was likewise determined without independent judicial consideration of the findings of fact. See John Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 176-202.

crippled the Commission. When, for example, it was held, under the original Act to Regulate Commerce, that Congress had conferred no power upon the Commission to prescribe rates for the future,¹³⁸ the most essential basis for the affirmative development of administrative control was removed, and the status of the Commission was largely transformed into that of a mere investigatory body.¹³⁹ And there have also been similar judicial determinations with regard to more restricted assertions of power. In a great variety of circumstances the Commission's orders have been held invalid because beyond the scope of its statutory authority: because its power to require switch connections with lateral branch lines could be exercised only upon application of shippers, as explicitly provided by the statute;¹⁴⁰ because its authority to establish through routes, under the 1906 legislation, was expressly conditioned by the proviso that "no reasonable or satisfactory through route exists";¹⁴¹ because the jurisdiction over railroads conferred by the Act does not extend to interstate street railways;¹⁴² because neither the 1887 statute nor the 1906 amendments vested power in the Commission to require carriers to provide and furnish tank cars;¹⁴³ because its authority over abandonments, as conferred by the 1920 legislation, did not clothe it with power "over the discontinuance of the purely intrastate business of a road whose situa-

¹³⁸ *Cin., N. O. & Tex. Pac. Ry. v. I.C.C.*, 162 U.S. 184 (1896); *Interstate Commerce Commission v. Railway Co.*, 167 U.S. 479 (1897).

¹³⁹ See, also, *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897). In a dissenting opinion, Justice Harlan said (p. 176): "The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character."

¹⁴⁰ *Interstate Commerce Commission v. D., L. & W. R. R.*, 216 U.S. 531 (1910).

¹⁴¹ *Interstate Commerce Commission v. Nor. Pac. Ry.*, 216 U.S. 538 (1910). The Court construed the proviso as jurisdictional in character. Said Justice Holmes (p. 544): "We are of opinion . . . that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass."

¹⁴² *Omaha Street Ry. v. I.C.C.*, 230 U.S. 324 (1913).

¹⁴³ *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208 (1916).

tion and ownership . . . are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business";¹⁴⁴ because the emergency service powers, under the Transportation Act, did not authorize the issuance of a summary order requiring a terminal carrier to perform a switching service for connecting carriers.¹⁴⁵ In all such instances, however, the judicial process does not direct itself to the wisdom or expediency of the administrative action under attack, and there is little occasion, upon review, to look beyond the language of the statute and such circumstances surrounding its enactment as may disclose or clarify the Congressional intent. The courts are concerned, in these situations, with the meaning and scope of the legislative provisions, rather than with the facts or reasoning which support the particular administrative findings and orders.

Statutory interpretation is undeniably a matter of law, and the determinations of the courts in this direction have but served, progressively, to carve out the precise metes and bounds of the Commission's power and to place the superstructure of administrative performance upon solid foundations. Where denials of power, as a result of judicial construction, have left serious gaps in the Commission's functioning jurisdiction, there has been almost invariable resort to the Congress for relief, with the ultimate reestablishment of the authority sought to be exerted. Thus, for example, the express delegation of mandatory rate-making power in 1906 and the rehabilitation of the long-and-short-haul clause in 1910 effectively removed the major early difficulties encountered by the Commission because of adverse judicial interpretation of the substantive provisions of the Act; and ample evidence has been presented in earlier pages of a like Congressional response in many less significant directions. The dominance and effectiveness of administrative control have been subjected to little hampering influence of a permanent character because of judicial determinations denying the existence of the statutory authority under which the Commission has purported to act. Indeed, when the legislative structure as it now exists is viewed as a whole, it is rather strikingly manifest that the Commission's own interpreta-

¹⁴⁴ *Texas v. Eastern Texas R. R. Co.*, 258 U.S. 204, 218 (1922).

¹⁴⁵ *Peoria Ry. Co. v. U.S.*, 263 U.S. 528 (1924).

tions of the nature and breadth of its statutory authority have been generally sustained. Once the intent of Congress to clothe the Commission with positive powers of control was clearly evinced by the amendments of 1906 and 1910, the validity of its far-reaching activities was repeatedly upheld as in full conformity with legislative contemplation,¹⁴⁶ and the scope of judicial interference progressively narrowed;¹⁴⁷ and, by way of extension of this liberal attitude, the "new departures" introduced by the Transportation Act of 1920 have been uniformly interpreted as fully justifying the Commission's unprecedented assertions of power.¹⁴⁸ In so far as judicial review has been confined to the problem of statutory construction in the narrow sense of interpreting the meaning and scope of the legislative provisions as such, the Commission has found itself relatively free to pursue its regulatory tasks without hindrance.

But the Commission's orders may be attacked for want of conformity to statute conceived in a much broader sense. While the general type of authority sought to be asserted is recognized to have been conferred upon the Commission, the mode of its exercise may be alleged to be illegal. In other words, the courts may be petitioned to invalidate administrative determinations which, though formally within the scope of the delegated authority under which they purport to have been made, constitute, in substance, a transgression of that authority. Such transgression, which may spring from mistakes of law or from the absence or disregard of evidence, is deemed to amount to abuse of discretion or arbitrary action. Appeal is here made, not merely to interpretation of the express language of the statute, but to the exercise of powers by the courts which are regarded as "of the essence of judicial authority, and which . . . may not be

¹⁴⁶ See, for example, *Interstate Commerce Commission v. Louis. & Nash. R. R.*, 227 U.S. 88 (1913); *Intermountain Rate Cases*, 234 U.S. 476 (1914); *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1914).

¹⁴⁷ See, for example, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Procter & Gamble Co. v. U.S.*, 225 U.S. 282 (1912); *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U.S. 452 (1910); *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U.S. 541 (1912); *United States v. Louis. & Nash. R. R.*, 235 U.S. 314 (1914).

¹⁴⁸ See, for example, *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922); *New England Divisions Case*, 261 U.S. 184 (1923); *Dayton-Goose Creek Ry. v. U.S.*, 263 U.S. 456 (1924).

curtailed, and whose discharge may not be . . . avoided."¹⁴⁹ The question of conformity to law, rather than of conformity to statute in the narrow sense, comes to be the controlling issue, for the solution of which it becomes necessary for the courts to examine the evidence and review the findings. Because the character of the administrative orders as such is thus subjected to censorship, it is in this aspect of the reviewing process, though nominally confined to "questions of law," that the principal opportunities arise for judicial interference with the exercise of administrative discretion; but it is noteworthy that even in this sphere, despite the indeterminateness of the category of "questions of law," the courts have generally refrained from substituting their judgment for that of the Commission.

The nature of the grounds upon which the Commission's orders have been invalidated will become clearer if we first note the extent to which its administrative findings are held to be final. Recognizing that the tasks of regulation have been vested in the Commission and that judicial review is restricted, essentially, to the issue of legal power, the courts have declined to assume jurisdiction over all determinations involving the exercise of administrative discretion. Such determinations have been treated as "questions of fact," to be freely and finally established by the Commission in its application of the general standards laid down by statute. The problem has arisen most frequently in connection with controversies as to whether rates and practices are unreasonable or unjustly discriminatory. The Commission's findings in such proceedings embrace not only the primary, objective, or evidentiary facts disclosed by the record, but the conclusions drawn therefrom as ultimate facts. In both processes administrative judgments are reached. Conflicting or inconclusive testimony may necessitate the resolution of doubts as to the evidentiary facts; and even if there were no dispute as to the evidentiary facts, the conclusions drawn therefrom as ultimate facts—that the rates or practices at issue are unreasonable or unjustly discriminatory—necessarily constitute an expression of judgment. The courts seldom distinguish between evidentiary facts and ultimate facts, except that the latter category is sometimes referred to as involving, not merely "questions

¹⁴⁹ *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U.S. 452, 470 (1910).

of fact," but "mixed questions of fact and law"; both groups of findings are held to be free from judicial interference. In these circumstances, and assuming the absence of errors of law, judicial review is confined to a determination as to whether there is evidence to support the administrative conclusions, regardless of whether the courts would themselves reach the same conclusions. In other words, the element of judgment or discretion which inheres in the administrative method is allowed free play, and determinations which reflect such judgment or discretion are clothed with finality. A few illustrations of this approach, from the large number that might be presented, will suffice.

When the Commission's orders condemning as discriminatory the practice of the carriers in not counting their own fuel cars in the distribution of equipment to mines in times of shortage were attacked in the courts, the reviewing jurisdiction assumed was confined to questions of power: as to whether authority to regulate the distribution of cars was vested in the Commission, and as to whether this authority extended to "company cars." The Commission's finding of discrimination, on the other hand, was held not to be open to judicial review. "Power to make the order and not the mere expediency or wisdom of having made it, is the question," said the Court, and it declined to "usurp merely administrative functions by setting aside a lawful administrative order upon our [its] conception as to whether the administrative power has been wisely exercised."¹⁵⁰ Similarly, it was held that the Commission's findings of unjust discrimination because of the refusal of carriers to apply carload rates to consolidated shipments tendered by forwarding agents were not subject to judicial review.¹⁵¹ The sole question over which the Court assumed jurisdiction was one of law: whether a carrier might make the ownership of goods tendered for transportation the criterion by which the transportation charge is to be measured. Having answered this question in the negative, all other differences of opinion, bearing upon the existence of discrimination, were held to be based upon "conclusions of fact as to which the judgment of the Commission is not sus-

¹⁵⁰ *Ibid.*

¹⁵¹ *Interstate Commerce Commission v. Del., L. & W. R. R.*, 220 U.S. 235 (1911).

ceptible of review by the courts."¹⁵² The Commission's affirmative finding that the enforcement of the carrier's rule "would give rise to preferences and engender discriminations prohibited by the act to regulate commerce" was expressly declared to embody a conclusion of fact beyond the competency of the courts to reexamine.¹⁵³ This doctrine has been repeatedly affirmed in connection with other practices. When, for example, the Commission ordered carriers to desist from extending certain reshipping privileges at a particular junction point as unjustly discriminatory against other localities, and, there being no conflicting evidence as to the primary facts, the Commerce Court, passing independently upon the matter of discrimination as a question of law, enjoined the enforcement of the Commission's order, the Supreme Court said: "In view of the doctrine announced [in previous decisions] . . . it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. . . . And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, . . . show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the

¹⁵² *Ibid.*, p. 251. The Court continued: "This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission."

¹⁵³ *Ibid.*, p. 255. See also *Balt. & Ohio R. R. v. Pittsburg Coal Co.*, 215 U.S. 481 (1910), upon which the Court specifically relied by way of precedent.

view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.¹⁶⁴

This doctrine as to the finality of the Commission's determinations on "mixed questions of fact and law" has not been confined to proceedings involving carrier practices. It has been applied with equal sweep in rate controversies, both on the issue of discrimination and on that of reasonableness *per se*. At this point a single illustration in each field will serve our purposes.

In a highly complicated proceeding involving the question of allowances to terminal railroads and rate divisions, the Commission found, among other things, that it was not unjustly discriminatory for

¹⁶⁴ *United States v. Louis. & Nash. R. R.*, 235 U.S. 314 (1914), at pp. 320-321. Compare also the following: "It is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation. Such a question is manifestly one upon which it is the province of the Commission to pass. . . . We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review." *Los Angeles Switching Case*, 234 U.S. 294 (1914), at p. 311. "This section [3] forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. . . . If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co. v. U.S.*, 236 U.S. 351 (1915), at p. 361. "We are of opinion that the Commission was correct in regarding the service in question as a like and contemporaneous service rendered under substantially similar circumstances and conditions. . . . Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. . . . The practice condemned by the Commission . . . was that of absorbing switching charges only when the line-haul carrier competes with the switching line; and refusing to absorb such charges when the switching line does not compete with the line-haul carrier; this the Commission held was discrimination within the meaning of §2 of the Act to Regulate Commerce. We find no occasion to disturb this ruling as arbitrary in character or beyond the authority of the Commission." *Seaboard Air Line Ry. Co. v. U.S.*, 254 U.S. 57 (1920), at pp. 62, 63.

the trunk-line carriers to absorb the charges at St. Louis of the Terminal Railroad Association, which was under their control, while contemporaneously refusing to absorb the charges of the Manufacturers Railway Company, an independent terminal carrier controlled by the Anheuser-Busch brewing interests.¹⁵⁵ It was contended that such rate differentiation as between the territory served by the Terminal and that served by the Railway was in its very nature unlawful, but the Supreme Court found no merit in the contention and declined to review the Commission's finding. After directing attention to the fact that not every discrimination is condemned by the Act to Regulate Commerce, but only those which are found to be "undue" or "unreasonable" or "unjust," Justice Pitney said: "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . . and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. . . . In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. . . . The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done."¹⁵⁶

¹⁵⁵ *Manufacturers Ry. Co. v. St. L., I. M. & S. Ry. Co.*, 21 I.C.C. 304 (1911), 28 I.C.C. 93 (1913), 32 I.C.C. 100 (1914).

¹⁵⁶ *Manufacturers Ry. Co. v. U.S.*, 246 U.S. 457 (1918), at pp. 481-482. The Court also specifically negated the contention that there was any error of law involved: "The common use of the St. Louis Terminal by the fourteen trunk lines under a single arrangement as to absorption of the terminal charges does not, as matter of law, entitle the Railway, which has no trunk line and does terminal switching alone, to precisely the same treatment" (p. 482).

Essentially the same judicial attitude was disclosed in an important proceeding involving the validity of an order of the Commission which required a reduction of lumber rates in the northwest because they were deemed unreasonable.¹⁵⁷ In upholding the order, the Court confined itself to the single question "as to whether, in making the 45 cent rate, the Commission acted within or beyond its power."¹⁵⁸ Because one of the principal contentions urged by the carriers was that the order was void because made without evidence, a detailed examination of the record was necessary; but the Court indicated clearly that its function was merely to determine whether there was substantial evidence to support the order, rather than to weigh the evidence and reach an independent conclusion. "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. . . . Its [the Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."¹⁵⁹ And after such an examination of the facts, it was made manifest that the question of rate reasonableness, aside from errors of law and the issue of confiscation, must in the very nature of the case be left to the conclusive determination of the Commission. In the first place, the evidence adduced is necessarily of a varied and complex character. "The reasonableness of rates," said the Court, "cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that

¹⁵⁷ *Interstate Commerce Commission v. Union Pacific R. R.*, 222 U.S. 541 (1912).

¹⁵⁸ *Ibid.*, p. 546. This was the very first statement in the opinion of Justice Lamar. After considering in detail the contentions of the carriers—essentially that the Commission's order was vitiated by errors of law and by the absence of supporting testimony—he concluded his opinion as follows: "Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumptions arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power and, in view of the statute, its lawful orders cannot be enjoined" (p. 555).

¹⁵⁹ *Ibid.*, pp. 547-548.

the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts."¹⁰⁰ And, even more important, the conclusions drawn from such evidentiary facts necessarily require expert judgment of an authoritative character. "In this case," said the Court, "the Commission had before it many witnesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. . . . With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive."¹⁰¹

Aside from the effect of "mistakes of law," which will be considered in due course, the single limitation upon the finality of the Commission's determinations chiefly stressed in the foregoing proceeding and previously noted in many others is that the administrative findings must be supported by evidence. For the purpose of determining whether this requirement has been satisfied, the entire record is open to the examination of the courts. Moreover, the negative pronouncement that "a mere scintilla of proof" is not sufficient has been developed into an affirmative declaration that the order must be supported by "substantial" evidence. The problem as to the existence of such evidence to support an order is thus made to constitute one of those "questions of law" which are reserved for the final determination of the courts, as a means of preventing arbitrary action or abuse of discretion. Perhaps the most complete statement of the doctrine is to be found in a rate proceeding in which the Government contended that an order of the Commission based upon a finding that existing

¹⁰⁰ *Ibid.*, p. 549.

¹⁰¹ *Ibid.*, pp. 549-550.

charges are unreasonable is conclusive, "even if the finding was wholly without substantial evidence to support it."¹⁶² Although the Supreme Court, reversing the decree of the Commerce Court, sustained the Commission's order,¹⁶³ it found this contention entirely without merit. The very requirement of a hearing not only "conferred the privilege of introducing testimony," but "imposed the duty of deciding in accordance with the facts proved," and thereby rendered a finding without evidence "arbitrary and baseless";¹⁶⁴ and the determination of this issue, which presents "a justiciable question" under the statutory provision that the Commission's orders "may be suspended or set aside by a court of competent jurisdiction," is within the proper scope of judicial power.¹⁶⁵ "Under the statute," said the Court, "the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. . . . In a case like the present the courts will not review the Commission's conclusions of fact . . . by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law. . . ."¹⁶⁶ Accordingly, after disposing of the further contention of the Government that the Commission may act upon its general information, in the absence of formal proof, as nullifying the right to a hearing, the Court found it necessary "to examine the record with a view of determining whether there was substantial evidence to support the order."¹⁶⁷

¹⁶² *Interstate Commerce Commission v. Louis. & Nash. R. R.*, 227 U.S. 88, 91 (1913).

¹⁶³ The opinion of the Court was concluded as follows: "The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is reversed" (p. 100).

¹⁶⁴ *Ibid.*, p. 91.

¹⁶⁵ *Ibid.*, p. 92.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, p. 94. An examination of the evidence disclosed much conflict, but the

On its face, this doctrine, particularly in so far as it establishes a requirement of *substantial* evidence, would seem to afford an opportunity to the courts to pass upon the record independently and thus to render their judgment of the evidence controlling. In point of fact, however, while the courts do often find it necessary to make a detailed examination of the record, they do not construe their function of determining "the legal effect" of evidence as embracing authority to pass upon "the weight" which shall be attached to the evidence. In the very proceeding, analyzed above, in which the requirement of substantial evidence was definitely laid down, the Supreme Court not only sustained the Commission's order, despite much conflict of testimony, but indicated that the Commission's findings, when supported by evidence, must necessarily be controlling under the complex conditions which generally surround the task of rate making. "The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to circumstances, but the weight to be given to it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country."¹⁶⁸

A few years later, in a proceeding, involving the same carrier, in which the Commission, using the method of rate comparisons, had held rates on coal to Nashville to be unreasonable, the Supreme Court was called upon "to consider the sharp-cut issue as to whether, as matter of law, the Commission's findings of fact sustain its order."¹⁶⁹ It was conceded by the carrier that the evidence, though conflicting, tended to support the Commission's findings, but it was insisted "that the facts found were insufficient in law to sustain the orders which were made."¹⁷⁰ With the issue as thus defined, the Court, in examining the relevant part of the record submitted and the method of rate determination employed by the Commission, was apparently enter-

Court declined to substitute its judgment for that of the Commission. "The question is whether there was substantial evidence to support the order" (p. 98).

¹⁶⁸ *Ibid.*, p. 98.

¹⁶⁹ *Louis. & Nash. R. R. v. U.S.*, 238 U.S. 1 (1915), at p. 11.

¹⁷⁰ *Ibid.*, p. 10.

ing upon an independent inquiry as to the weight to be attributed to the evidence. In reality, however, the result of this independent inquiry was confined, essentially, to a holding that rate comparisons, though inconclusive as to the reasonableness or unreasonableness of either the charges under attack or of those by which they are tested, "may furnish evidence of probative value."¹⁷¹ Once this principle was established, there remained only the question as to whether there was such evidence before the Commission; and upon a finding of such evidence, the Court, as in the earlier proceeding, deemed itself foreclosed against passing upon the weight of the evidence or disturbing the expert judgment of the Commission:¹⁷² "Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate. . . . The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the \$1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. In the light of these findings we cannot say that the facts, set out in the Report, do not support the order."¹⁷³

¹⁷¹ *Ibid.*, p. 12.

¹⁷² Indeed, the Court concluded its discussion of this aspect of the case by express approval of its pronouncement in the earlier proceeding: "And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U.S. 88" (p. 16), quoting the declaration set forth in the text above to the effect that the weight to be given to the evidence is peculiarly for the tribunal experienced in the intricacies of rate making.

¹⁷³ *Ibid.*, pp. 15-16. That it is beyond the functions of the courts to pass independent judgment upon the weight of the evidence has been repeatedly affirmed. In *New England Divisions Case*, 261 U.S. 184 (1923), Justice Brandeis said (pp. 203-204): "It is contended that the order is void, because it is unsupported by evidence. An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. . . . The rule must, of course, be the same in respect to an order fixing divisions. . . . That the evidence was ample to support the order made, is shown in the opinion of the lower court . . . and in the reports of the Commission. To consider the

That the requirement of substantial evidence has not been carried to extremes appears even from those proceedings in which the Commission's orders have been invalidated by the courts for want of supporting evidence. In practically all of these proceedings there had been a complete absence of essential data. This situation is clearly disclosed, for example, in connection with the annulment of an order of the Commission establishing rates on citrus fruits and vegetables shipped from points of production in Florida to consumption points outside the state.¹⁷⁴ The Commission had originally found the rates

weight of the evidence, or the wisdom of the order entered, is beyond our province." In *United States v. Erie R. Co.*, 280 U.S. 98 (1929), it appeared that the Commission had fixed an all-rail rate on wood pulp from Hoboken, New Jersey, the port of importation, to Garfield, also in New Jersey. The order was attacked on the sole ground that the shipments were wholly intrastate and hence beyond the Commission's rate-making jurisdiction; and on this ground the District Court enjoined the enforcement of the order. In reversing this decree, the Supreme Court said (p. 102): "The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain them." Compare, also, the following pronouncements: "The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States v. New River Co.*, 265 U.S. 533 (1924), at p. 542. "In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence. . . . There was ample evidence to support the finding that the joint through rates regarded as entireties were reasonable and justified. . . . To consider the weight of evidence is beyond our province." *Western Chem. Co. v. U.S.*, 271 U.S. 268 (1926), at p. 271. "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' . . . This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry. v. U.S.*, 272 U.S. 658 (1926), at pp. 665-666. "If the order of the commission be unsupported by the evidence, it is, of course, void. . . . But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the commission's action." *Chicago, R. I. & P. Ry. v. U.S.*, 274 U.S. 29 (1927), at pp. 33-34. "There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission . . . or to enquire into the soundness of the reasoning by which its conclusions are reached . . . or to question the wisdom of the regulations which it prescribes. . . . These are matters left by Congress to the administrative tribunal appointed by law and informed by experience." *Assigned Car Cases*, 274 U.S. 564 (1927), at pp. 580-581. But see *St. L. & O'Fallon R. Co. v. U.S.*, 279 U.S. 461 (1929), particularly the dissenting opinions of Justice Brandeis (pp. 488-548) and Justice Stone (pp. 548-553). All these holdings as to the weight of the evidence are but a concrete expression of the basic doctrine that the Commission's legitimate exercise of judgment or discretion is clothed with finality.

¹⁷⁴ *Florida East Coast Line v. U.S.*, 234 U.S. 167 (1914).

to be reasonable, but upon supplemental complaint ordered them reduced. This order, which was made applicable to the Atlantic Coast Line and the Seaboard Air Line as well as to the Florida East Coast Line, the appellant in the suit, "was based upon what was deemed to be a change in conditions since the previous decisions."¹⁷⁵ It appeared, however, that the testimony by which the new order was supported was confined to changed conditions on the lines of the carriers other than the appellant. Upon an examination of the evidence the Court failed to find "the slightest proof tending to sustain the reduction in rates as to the East Coast Line, which was made."¹⁷⁶ In the reversal of the decree of the Commerce Court, therefore, which had upheld the Commission's order, there was mere reliance upon the fundamental doctrine that an administrative order, to be valid, must be supported by evidence. Said Chief Justice White: "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reëxamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide."¹⁷⁷ Such complete absence of neces-

¹⁷⁵ *Ibid.*, p. 183.

¹⁷⁶ *Ibid.*, p. 186. Under these circumstances, the real issue was as to the probative value, for purposes of determining the position of the appellant carrier, of the evidence adduced with respect to the other carriers. In the words of the Court: "Did the facts as to the increased loading which the Commission found to exist in the case of the Seaboard Air Line and the Atlantic Coast Line support or tend to support the order as to the East Coast Line in the absence of all testimony in the record concerning the existence of such fact as to the traffic on that road? In other words, the question is, Because there was testimony as to the traffic of those roads, can such testimony be said to tend to establish the same condition on the East Coast Line?" These questions the Court answered in the negative: "Conceding that from an abstract point of view an affirmative answer would have to be given to such question we think such is not the case here for the following reasons: (a) because of the difference in business carried on by the two roads named and the East Coast Line, they being not only gatherers of the local product but trunk line carriers; (b) because of the difference in the situation and traffic of the two trunk lines named and the East Coast Line, as deduced solely from the peculiar environment and movement of business on that road so aptly stated in the . . . reports of the Commission" (p. 187).

¹⁷⁷ *Ibid.*, p. 185. See, also, *Phila. & Reading Ry. v. U.S.*, 240 U.S. 334 (1916), where the enforcement of an order to cease and desist from a discriminatory rate adjustment was enjoined, because "the facts reported afford no foundation for the Commission's findings" (p. 341). There was no finding of unjust discrimination against

sary supporting evidence was likewise the controlling ground for the annulment of an order of the Commission authorizing the acquisition of certain terminal lines at Chicago by the New York Central Railroad.¹⁷⁸ In the bill seeking to have the order declared void, it was alleged that the essential finding that the acquisition "will be in the public interest" was wholly unsupported by evidence; and in the motions to dismiss, this allegation of fact was admitted. In reversing the decree of the lower court, which had sustained the motions to dismiss, Justice Brandeis said: "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."¹⁷⁹ Similar situations have arisen in connection with orders of the Commission prescribing divisions of joint rates. Such an order has been declared void, for example, because based upon evidence not legally before the Commission;¹⁸⁰ and other orders have been annulled because of the ab-

the complainant, and the community declared to be prejudiced was not a party to the proceeding. The Commission's order, therefore, was held to be wholly unsupported by the ascertained facts. But see John Dickinson, *op. cit.*, at pp. 173-174.

¹⁷⁸ *Chicago Junction Case*, 264 U.S. 258 (1924).

¹⁷⁹ *Ibid.*, pp. 264-266. Justice Sutherland, Justice McReynolds, and Justice Sanford dissented, but solely on the ground that the complainants, the chief competitors of the New York Central, were "without legal standing to sue" (pp. 271-274).

¹⁸⁰ In *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274 (1924), it appeared that the findings were partly based upon data contained in the carriers' annual reports on file with the Commission. Neither the annual reports as a whole, nor the parts containing the data relied upon, were formally put in evidence; and no reference was otherwise specifically made to these essential data. The order was held to be void, under these circumstances, because unsupported by evidence. In the words of the Court: "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. . . . But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. . . . Nothing can be treated as evidence which is not introduced as such. . . . The

sence of evidence to support essential findings.¹⁸¹ In all these instances of adverse judicial decrees, the Court was not concerned with the character of the administrative determinations as such, nor did it attempt to substitute its judgment for that of the Commission. The sole question was one of power—as to whether there was evidence upon which the order could have been made. The requirement, then,

objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties. . . . The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void" (pp. 288, 289, 290).

¹⁸¹ In *Brimstone R. R. Co. v. U.S.*, 276 U.S. 104 (1928), the challenged order was annulled because the Commission had failed to consider, and hence to secure necessary evidence for, certain items definitely specified by section 15, paragraph (6), as essential to the exercise of its powers over rate divisions. In effect, the Commission made the necessary investigations with regard to the short-line carrier, whose divisions of joint rates were reduced, but not with regard to the connecting carriers affected by the order. After an examination of the record, the Court felt justified in concluding: "The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers'" (p. 115). Similarly, in *B. & O. R. R. v. U.S.*, 277 U.S. 291 (1928), it appeared that the Commission had ordered eastern railroads to absorb certain terminal transfer charges on combination through rates that had been previously absorbed, as a result of competition, by western roads, without evidence to support the conclusion that the established "practice" was unjust or unreasonable. In declaring the order invalid, Justice Butler said: "Paragraph (6) of §15 empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action. . . . That rule may not be avoided by a broad construction of the word 'practice.' The record here contains all the evidence that was submitted to the Commission. Its report shows that 'the propriety of divisions was not the subject of inquiry or investigation.' . . . The same considerations apply in determining the reasonableness of the apportionment of revenues derived from combination rates as govern the divisions of joint rates. The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of §15 relating to the division of joint rates. The case was not presented by complainants or considered by the Commission on that basis. There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic. The order cannot be sustained" (pp. 300, 301-302).

that the Commission's findings must be supported by evidence has not restricted its legitimate exercise of discretion; it has been invariably enforced only in the interest of orderly procedure and as a safeguard against arbitrary action.

But there are other "questions of law" which are even more intimately related than the problem of substantial evidence to the "questions of fact" which are deemed to be reserved for the Commission's conclusive determination. When the courts examine the record to determine whether there has been any "mistake of law"—whether the Commission has failed to apply or has erred in applying some legal principle—they are in effect reviewing the Commission's ultimate findings of fact. Although it is definitely established that "questions of fact" are for final determination by the Commission, while "questions of law" are for final determination by the courts, the distinction between these two categories is not so clear-cut as to provide an automatic guide for delimiting the respective spheres of administrative and judicial jurisdiction. This is necessarily so, since a finding of ultimate fact by the administrative tribunal involves a decision as to whether the evidence adduced, under controlling legal considerations, sums up into what is contemplated by the statute as constituting a violation of the established standard, and, on the other hand, the enforcement of legal requirements involves a decision by the court as to the effect or significance of the evidence upon which primary action was based. The Commission, in dealing with "questions of fact," cannot avoid the consideration of "questions of law"; the courts, in dealing with "questions of law," cannot avoid the consideration of "questions of fact." Mere differentiation between these two categories, as a guide to the scope of judicial review, tends to subordinate the complex realities of the relationship between commissions and courts to a formalistic rationalization, the chief merit of which lies in its simplicity and its symmetry. The causal relationship in matters of review which is generally assumed to prevail on this basis may be readily reversed—that is, matters which are reviewed may be designated "questions of law" and those which are held to be free from censorship "questions of fact," instead of the line of causation operating from the undoubted character of the question at issue. "In truth," it has been declared, "the distinction between 'questions of

law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say that it is a question of 'law.' Thus, while the reasonableness of a rate is said to be a matter of fact and not reviewable, yet when the rate-fixing body has omitted to take into consideration some element or factor which the court thinks ought to have been included, error of law is promptly held to have been committed and the power of review is exercised.¹⁸²

It is not to be presumed, however, that the line of demarcation between "questions of fact" and "questions of law" is in practice obliterated, and that the courts, under guise of dealing with matters of law, are wont to invalidate administrative holdings which reflect, essentially, an exercise of the Commission's discretion. The foregoing strictures upon the distinction between the categories of "fact" and "law" were directed against its sufficiency, without further analysis, to explain the actual course of review, rather than to suggest that it is disregarded as a basis of decision and thus serves as an instrument for accomplishing illegitimate censorship through indirection. There has been ample indication in the foregoing pages that the Commission's findings within the scope of its delegated authority, when supported by evidence, are generally clothed with finality. In most comprehensive terms, the exercise of judicial review is restricted to the issue of legal power; and whether, in declining to disturb the Commission's findings, the courts designate them "questions of fact" (or "mixed questions of fact and law") or hold them to be free from judicial interference because they involve conclusions as to the wisdom or expediency of particular courses of action grounded in judgments on the weight of the evidence, there is a clear recognition that the exercise of

¹⁸² John Dickinson, *op. cit.*, at p. 55.

administrative discretion, in furtherance of the general standards established by statute, must be deemed to be conclusive. "Questions of fact," which, in both their primary and ultimate sense, necessarily reflect the judgment of the administrative tribunal, probably comprehend or describe such findings more aptly than any other category. But if *abuse of discretion* is alleged, problems of due process arise the settlement of which is deemed to be of the essence of judicial authority; they present legal issues the determination of which may necessitate the overriding by the courts of the discretion exercised by the administrative tribunal. Assuming the necessary constitutional and statutory authority, these "questions of law" embrace not only the rule of substantial evidence, but the requirement that there be no misapplication of, or failure to apply, any legal rule or principle which is essential to the adjudication of the controversy. In so far as the outcome of the particular proceeding depends upon circumstances and conditions which are distinctive of that proceeding, the courts decline to interfere, regardless of their own views—that is, such findings are deemed to involve "questions of fact," inherently discretionary in character, which are for the conclusive determination of the administrative tribunal; but in so far as the outcome of the particular proceeding depends upon principles of decision which have been or may be crystallized into legal rules of general applicability, the courts assert their power of censorship, even though the judgment of the administrative tribunal appears thereby to be reversed—that is, such issues are deemed to involve "questions of law" which are for the controlling consideration of the courts. While such judicial determinations necessitate a full examination of the facts submitted in evidence and of the principles applied to them, they are none the less concerned with "questions of law" rather than with fact-finding as such. Like the requirement that administrative orders must be supported by evidence, they are designed, by their very nature, merely to provide safeguards against the abuse of discretion.

The legitimacy of this exercise of judicial power, despite the usual doctrine that administrative findings are clothed with finality, is suggestively illuminated in the following brief analysis: "On the other hand, the courts will overrule administrative discretion whenever it reaches a result inconsistent with some general proposition of

law applicable to the entire class of similar cases. We here uncover the real distinction which lies behind the attempts to distinguish between so-called 'questions of law' and 'questions of fact' that have everywhere so confused the language of the opinions. Where the only ground which a court can give for its difference from the administrative body is limited to mere difference of opinion as to some matter or matters peculiar to the case, or some difference in inference from those matters, then the court should not disturb the opinion or inference of the fact-finding body unless the latter is plainly beyond the bounds of reason; for the difference is one of discretion, or 'fact.' On the other hand, where the ground of difference between court and fact-finding body can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination. The distinction can be illustrated by an example from the law of negligence. Although a court believes from the evidence that the way in which the plaintiff crossed a railroad track was negligent, still if the jury find that it was not, and if that finding is within the bounds of reasonable inference from the evidence, the court may not substitute its own inference for the jury's unless it can point out as the ground for its different conclusion some general proposition equally applicable to all similar cases of alleged negligence—as, for instance, that the plaintiff neglected to stop, look, and listen. If the court does this, it enunciates a rule of law—whether of good law or bad law is not here the question,—but in either case a general rule, which requires the setting aside of a verdict or administrative determination inconsistent with the rule so announced. This is the ordinary way in which rules of law originate and develop. As disputes of the same sort become frequent, general principles emerge from the particular facts of successive cases which are seen to be applicable to the whole class; and the courts pick these out as they are observed, and reverse such determinations as run counter to them. The freedom of the courts to carry on this process must not be interfered with if law is to generate new categories and distinctions. It is therefore essential that the whole record of the administrative proceedings should be open to the inspection of the courts, and that they should be free to reverse administrative determi-

nations on the basis of any general principles involved which they feel bound to regard and enunciate as a rule or principle of law.¹⁸³

Some of the Commission's orders have been held invalid on such grounds throughout the course of its history. In one of the earliest proceedings which raised such an issue of law the Commission had condemned as unjustly discriminatory the issuance of "party-rate tickets," whereby each member of a group of given size might travel at lower rates of fare than those applicable to individual passengers; the Supreme Court declared this order to be void because the carrier's practice was within the reason for the issuance of commutation, excursion, and mileage tickets, which was expressly authorized by statute, and because, unlike the differentiation of freight rates on the basis of size of shipments, it did not operate to the prejudice of those unable to avail themselves of the privilege.¹⁸⁴ Of more far-reaching consequence were the early judicial determinations as to the legal bearing of competition upon findings of undue discrimination: that in condemning the extension of lower rates on imported goods than on domestic goods from ports of entry to interior points, the Commission erred in not considering foreign competition as a factor creating such dissimilarity of circumstances and conditions as to justify the prevailing rate adjustments;¹⁸⁵ that in condemning rate relationships as in violation of the long-and-short-haul clause, the Commission erred in not considering competition between carriers subject to the Act as a factor creating such dissimilarity of circumstances and conditions as to justify the prevailing rate adjustments.¹⁸⁶ While such holdings exerted a controlling influence upon significant aspects of rate policy, they were grounded in general legal requirements rather than in the distinctive findings of the particular proceedings. Principles of law were established for the Commission's guidance, on the basis of elements common to large groups of controversies, but without infringement upon the legitimate administrative tasks of appli-

¹⁸³ *Ibid.*, at pp. 168-170. Supporting footnotes are omitted.

¹⁸⁴ *Interstate Commerce Commission v. B. & O. R. R.*, 145 U.S. 263 (1892).

¹⁸⁵ *Texas & Pac. Ry. v. I.C.C.*, 162 U.S. 197 (1896).

¹⁸⁶ *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897); *Louisville R. R. Co. v. Behlmer*, 175 U.S. 648 (1900); *East Tenn. Ry. Co. v. I.C.C.*, 181 U.S. 1 (1901); *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U.S. 29 (1901); *Interstate Commerce Commission v. Louisville R. R.*, 190 U.S. 273 (1903).

cation and enforcement. In conformity with this approach, a considerable variety of carrier practices which had been ordered discontinued by the Commission have been held, as matters of law, not to constitute violations of the basic standards prescribed by statute.¹⁸⁷ Generally, as in most of the foregoing instances, the mistakes of law which serve as grounds for invalidating the Commission's orders are intimately related to the processes of statutory interpretation.¹⁸⁸ Oc-

¹⁸⁷ See, for example, *Southern Pacific v. I.C.C.*, 200 U.S. 536 (1906); *Southern Ry. Co. v. St. Louis Hay Co.*, 214 U.S. 297 (1909); *United States v. Balt. & Ohio R. R. Co.*, 231 U.S. 274 (1913); *Central R. R. Co. v. U.S.*, 257 U.S. 247 (1921). In all these proceedings, involving, respectively, the propriety of carrier practices in routing through shipments, establishing reconsignment charges, granting lighterage allowances, and extending the "creosoting-in-transit" privilege, the Commission's orders were invalidated because of mistakes of law. The issue was squarely put by Justice Brandeis in the last of these proceedings (at p. 256): "The order entered by the Commission declares that the twenty-three carriers 'in so far as they respectively participate in tariffs carrying joint rates' on these forest products . . . subject the American Creosoting Company to undue prejudice and disadvantage; and it directs these twenty-three carriers to avoid this undue prejudice. . . . In effect the order directs that unless the Central and the Pennsylvania establish the privilege at Newark, the twenty-three carriers must withdraw from all tariffs establishing the joint rates. As to administrative orders operating *in futuro*, the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and a finding that the discrimination is unjust is ordinarily a finding of fact. . . . But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding made by the Commission can prevent the review of such questions."

¹⁸⁸ Compare the following from *Central R. R. Co. v. U.S.*, 257 U.S. 247 (1921), at p. 259: "It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under § 3 to remove discrimination so practiced. . . . But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than another similarly situated. . . . If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of § 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, . . . nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3." In effect the Court held that section 3 did not provide a remedy for the discrimination found to exist. See, also, *So. Pacific Co. v. I.C.C.*, 219 U.S. 433 (1911), in which a rate order of the Commission was held to be

asionally, however, they arise in connection with determinations which are subsidiary to the assertion of acknowledged statutory power. Thus, for example, the Commission's order, after extensive investigation, requiring trunk-line carriers to cease and desist from making allowances to lumber tap lines on their proprietary traffic was vitiated, essentially, by the preliminary error of law in holding these tap lines not to be common carriers with respect to such proprietary traffic.¹⁸⁹ The conclusions of fact as such were not questioned by the Court; the order was annulled because the tests of common-carrier status applied by the Commission, which provided a necessary basis for its findings of discrimination, ran counter to established legal doctrine.¹⁹⁰

These "mistakes of law," as a ground for judicial censorship, cannot be confined within any single distinct compartment: they embrace not only misapplications of general legal principles and failures to consider factors of legal significance, but the problems of statutory construction and the questions of sufficiency of evidence previously discussed.¹⁹¹ All these "questions of law," upon adverse determination, tend to merge into judicial findings of want of power. An error of law may keep necessary facts from the record; by the exclusion of relevant elements, it may amount to a disregard of essential evidence; it inevitably results, through misconstruction, in the assertion of authority beyond that conferred by statute. Such censorship for "mistakes of law," in so far as it rests upon an examination

void because, in condemning an advance in rates, it proceeded on the theory that railroad companies were estopped from increasing rates which they had maintained for a considerable period, and hence exceeded the authority conferred by the rate-making sections of the Act. "While it is true," said Chief Justice White, "that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future" (p. 449). A mistake of law was clearly the ground of the adverse judicial decree, but it manifested itself in the assumption of power not conferred by statute.

¹⁸⁹ *Tap Line Cases*, 234 U.S. 1 (1914).

¹⁹⁰ For a detailed analysis of the proceeding, see pp. 160-165, *supra*.

¹⁹¹ See pp. 421-424, 432-439, *supra*.

of the facts disclosed by the record and of the conclusions drawn from them, affords frequent opportunities for judicial interference with administrative findings, particularly since general legal rules and principles are in constant process of development, on the basis of the very findings being subjected to review, and affect future conduct as well as past transactions. But there is little evidence, on the whole, of any disposition on the part of the courts to transgress the bounds of legal issues, however faulty the basis of their adjudication may appear in particular instances. Indeed, despite the opportunities for judicial interference which spring from the fluid character of legal doctrines in this regulatory sphere, it is noteworthy, as indicative of the restraint exercised by both the administrative tribunal and the courts, that relatively few of the Commission's significant determinations have been invalidated for "mistakes of law," especially after the Commission was clothed with affirmative powers and established as the dominant instrument of control by the amendatory legislation of 1906 and the subsequent Congressional enactments.

But that there is no rigid line of demarcation between the administrative and the judicial sphere in these controversies, and that the opportunities open to the courts to overrule "fact-finding" conclusions are very real, is strikingly illustrated by the decision of the Supreme Court in the notable *O'Fallon* case.¹⁹² In this proceeding, involving, as the principal issue, the legality of the methods employed in the valuation of carrier property for purposes of recapture of excess earnings, the Commission's order was held to be invalid because beyond the authority granted to it by statute. While the main issue was thus one of statutory construction, there was merged with that issue the question of what constitutes the law of the land in matters of valuation as well as the problem as to how far administrative conclusions on the effect of evidence may be upset by judicial decree. Under the statute the Commission was required, in ascertaining value in connection with the enforcement of the recapture provisions, to "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes." The Commission declared that it had "endeavored to give heed to this direction," and that its

¹⁹² *St. L. & O'Fallon R. Co. v. U.S.*, 279 U.S. 461 (1929), annulling the Commission's order in *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I.C.C. 3 (1927).

findings of value were based, not upon any formula, but upon a consideration of all relevant facts. The problem before the Court was whether due consideration had been given to current reproduction costs, which admittedly constitute one of the elements of value recognized by the law of the land. It appeared not only that the Commission had had evidence of current reproduction costs before it, but that, in valuing the structural property acquired after June 30, 1914, at actual cost, and in taking carrier lands at their current market value, it had given some effect to such reproduction costs. It is true that the property acquired prior to June 30, 1914, was valued at cost of reproduction at 1914 unit prices; but this merely meant that the evidence of what it would cost to reproduce that part of the property at current prices, being merely synthetic estimates based on index numbers, was not deemed, in light of all the other available evidence, to possess any effective probative force. Despite these considerations, the Commission's order was held invalid. In effect the majority of the Supreme Court construed the statutory requirement, in view of its holdings in previous valuation decisions which were largely confined to local utilities, as making it mandatory upon the Commission to accord actual weight to current reproduction costs, under all circumstances, regardless of the probative value of the evidence adduced in support of the reproduction cost estimates. Under this construction, the Commission was held to have disregarded the requirements of the statute and hence to have acted beyond its powers. But since neither the express words of the Congressional mandate nor the circumstances leading up to its enactment disclose any intent to impose limitations upon the Commission's discretionary authority as a fact-finding body, this decision appears to involve a sharp departure from the well-established attitude of the Supreme Court in matters of judicial censorship of the Commission's determinations. The Commission unquestionably "considered" current reproduction costs, though it rejected them as to the older portions of the structural property, and there seemed to be ample evidence to support the conclusions reached as to final single-sum values. The annulment of its order, therefore, though nominally ascribed to a "mistake of law," was in effect a substitution of the judgment of the Court for that of the Commission.¹⁰⁸

¹⁰⁸ In view of these considerations, the position of the dissenting minority of the

But this treatment of the question of valuation is in no sense typical of the prevailing relationship between the Commission and the courts. Valuation controversies, even as applied to local public utili-

Court, consisting of Justice Holmes, Justice Brandeis, and Justice Stone, appears to be much more soundly grounded. The following from the dissenting opinion of Justice Brandeis indicates clearly the character of the conflict between the Court's decision and established doctrine in matters of review: "An arbitrary disregard by the Commission of the probative effect of evidence would, of course, be ground for setting aside an order, as this would be an abuse of discretion. Orders have been set aside because entered without evidence; or because matters of fact had been considered which were not in the record; or because the Commission excluded from consideration facts and circumstances which ought to have been considered; or because it took into consideration facts which could not legally influence its judgment. But no case has been found in which this Court has set aside an order on the ground that the Commission failed to give effect to evidence which seemed to the Court to be of probative force, or on the ground that the Commission had drawn from the evidence an inference or conclusion deemed by the Court to be erroneous. On the contrary, findings of the Commission involving the appreciation or effect of evidence have been treated with the deference due to those of a tribunal 'informed by experience' and 'appointed by law' to deal with an intricate subject. . . . Unless, therefore, Congress required the Commission, not only to consider evidence of reconstruction cost in ascertaining values for rate making purposes under §15a, but also to give, in all cases and in respect to all property, some weight to evidence of enhanced reconstruction cost, even if that evidence was not inherently persuasive, the Commission was clearly authorized to determine for itself to what extent, if any, weight should be given to the evidence; and its findings should not be disturbed by the Court, unless it appears that there was an abuse of discretion" (pp. 492-494). And the argument of Justice Stone, by way of concrete application of established doctrine to the instant proceeding, is equally persuasive: "That the Commission gave consideration to present reproduction costs appears not only from its own statement, but from the fact that it gave full effect to increased current market values in determining the value of land and to additions and betterments since June 30, 1914, taken at their cost less depreciation. In the light of those considerations which affect the present value of appellant's structural property . . . , I cannot say that the Commission did not have before it the requisite data for forming a trustworthy judgment of the value of appellant's road or that it failed to give to proof of reproduction cost all the weight to which it was entitled on its merits. . . . I cannot avoid the conclusion that in substance the objection, now upheld, to the order of the Commission is not that it failed to consider or give appropriate weight to evidence of present reproduction cost of appellant's road, but that it attached less weight to present construction costs than to other factors before it affecting adversely the present value of the structural property. . . . This Court has said that present reproduction costs must be considered in ascertaining value for rate making purposes. But it has not said that such evidence, when fairly considered, may not be outweighed by other considerations affecting value, or that any evidence of present reproduction costs, when compared with all the other factors affecting value, must be given a weight to which it is not entitled in the judgment of the tribunal 'informed by experience' and 'appointed by law' to deal with the very problem now presented. . . . But if 'weight in the legal sense' must be given to evidence of present construction costs, by the judgment now given we do not lay down any legal rule which will inform the Commission how much weight, short of its full effect, to the exclusion of all other considerations, is to be given to the evidence of synthetic costs of construction in valuing a railroad property. If full effect were to be

ties, have engendered sharp conflicts of opinion and have issued in little definitive development of guiding principles.¹⁹⁴ The *O'Fallon* case was the first proceeding in which the use of the Commission's valuations as part of its regulatory process, on a national basis, was challenged in the courts, and there is much ground for the belief that the Supreme Court's adverse ruling was induced in no small measure by the character of the Commission's report—by what the Commission said rather than by what it did—since the report contained a vigorous attack upon the reproduction cost theory, and hence lent color to the claim that "consideration" had not been accorded to current construction costs. Justice McReynolds, speaking for the majority, said: "The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrine approved by us; and the superiority of another view is stoutly asserted."¹⁹⁵ And Justice Stone, in his dissenting opinion, found the following declaration to be justified: "Had the Commission not turned aside to point out in its report the economic fallacies of the use of reproduction cost as a standard of value for rate making purposes, which it nevertheless considered and to some extent applied, I suppose it would not have occurred to anyone to question the validity of its order."¹⁹⁶ It is by no means certain, under these conditions, that the doctrine seemingly applied in the *O'Fallon* case represents the matured conclusion of the Supreme Court in the sphere of railroad regulation by the Interstate Commerce Commission. In any event, the majority of the Court did proceed on the assumption that the Commission's order was vitiated by a "mistake of law." The "consideration" of all the elements of value recognized by the law of the

given to it in all cases then, as the Commission points out in its report, the railroads of the country, valued by the Commission in 1920 at nineteen billion dollars, would have had in that year a reproduction value of forty billion dollars and we would arrive at the economic paradox that the value of the railroads may be far in excess of any amount on which they could earn a return. If less than full effect may be given, it is difficult for me to see, how, without departure from established principles, the Commission could be asked to do more than it has already done—to weigh the evidence guided by all the proper considerations—or how, if there is evidence upon which its findings may rest, we can substitute our judgment for that of the Commission" (pp. 550-552).

¹⁹⁴ See Part I, chap. ii, note 4.

¹⁹⁵ *St. L. & O'Fallon R. Co. v. U.S.*, 279 U.S. 461 (1929), at p. 485.

¹⁹⁶ *Ibid.*, p. 550.

land which is specified in the Congressional mandate appears to have been construed to require that some actual effect be given to current reproduction costs as applied to all property and under all circumstances. Within the limits of such construction, however, the discretionary authority of the Commission was not expressly denied or curtailed. That the meaning of "consideration," as influenced by the Supreme Court's previous valuation decisions, was the crucial factor in the annulment of the order is evidenced by the following from the majority opinion: "The question on which the Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction, costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed."¹⁹⁷ Even the majority view, therefore, does not in terms repudiate the well-established doctrine that the Commission's findings of fact, when within the lawful scope of its delegated authority and supported by evidence, are not subject to judicial censorship. However unsatisfactory the Supreme Court's construction of the statutory mandate may appear to be, the adverse decision, in the light of such construction, was clearly rendered on a "question of law." At most, in other words, the validity of this particular assertion of judicial authority may be questioned; there is no evidence of any disposition, by way of general policy, to extend the scope of judicial interference with the exercise of administrative discretion.

It is manifest from the foregoing extended analysis of the relationship between the Commission and the courts, viewed in its entirety, that the large measure of discretionary authority which inheres in the basic legislative provisions and which finds expression in the regulatory processes employed in their enforcement is on the whole free from judicial review, both in principle and in practice. The application of the doctrine of primary jurisdiction constitutes, at the very threshold, a clear recognition of the dominance of the administrative

¹⁹⁷ *Ibid.*, p. 487.

method; and the rationale of the doctrine necessarily confines the grounds of censorship to narrow limits. The differentiation between so-called affirmative and negative orders, with the complete withdrawal of the courts from the sphere of control where the relief sought has been denied by the Commission, constitutes a further significant step toward clothing administrative findings with finality: a definite zone of discretion is marked off which is deemed by its very nature to be free from the incidence of the reviewing authority of the courts. And the grounds of judicial censorship, after the requirements of primary jurisdiction and of affirmative relief by the administrative tribunal have been fulfilled, are essentially restricted to matters of legal power, whether these matters assume the form of constitutional violations, errors of statutory interpretation, absence or disregard of supporting evidence, or such other "mistakes of law" as may reasonably be deemed to issue in arbitrary action or abuse of discretion. While the exercise of reviewing powers by the courts necessitates an examination of the record and occasionally involves an independent appraisal of its significance, it does not extend, in terms of deliberate purpose at any rate, to the substitution of judicial for administrative judgment in matters which do not in essence raise "questions of law." Under the complex statutory structure, developed piecemeal over a long period of years, which now prevails, and with the numerous conflicting interests, involving large financial stakes and far-reaching adjustments of commercial and industrial relationships, which come to issue in the performance of the tasks of governmental control, it is only natural that administrative determinations should from time to time be challenged in the courts. It is noteworthy, however, that such attacks as are made upon the Commission's orders have come to be predominantly concerned with the nature and limits of its statutory authority, and that the adjudications which follow but serve, for the most part, to define and clarify the lawful scope of its functioning jurisdiction. Even adverse decrees, under these circumstances, tend to facilitate rather than hamper the course of administrative performance, since, through authoritative interpretation of the operative statutory provisions, they provide a basis for essential amendatory legislation, and, in any event, help remove doubt and difficulty from the execution of recognized powers.

But a sharp line is consistently drawn between the necessary and legitimate function of the courts in restraining the Commission within the bounds of its delegated authority, as supplemented by general legal requirements, and that of interfering with its findings of fact, by way of expression of judgment upon the weight of the evidence or upon the wisdom or expediency of particular adjustments. Unless the Commission's disregard of orderly processes is so flagrant as to constitute arbitrary action or amount to abuse of discretion, its determinations, within the scope of valid statutory authority, are entirely free from judicial censorship. In other words, under the prevailing matured relationship between the Commission and the courts, the judicial restrictions imposed upon the exercise of administrative discretion tend to be confined, in all their varied manifestations, to questions of legal power.¹⁹⁸

§5. THE MAINTENANCE OF THE COMMISSION'S INDEPENDENCE

In view of the tremendous scope of the sphere of administrative discretion, as contemplated by statute, as exercised in practice, and as sustained by the courts, it is a matter of crucial importance that the Commission be free from such control by external influences as may impair its functioning as an expert and impartial tribunal. Happily, throughout the Commission's long history, *private* interests have neither sought nor found opportunity for deflecting this tribunal or any of its members from the path of disinterested public service. We are concerned, rather, with the relationship of various organs of government to the performance of the Commission's tasks; but it is equally difficult, though the manifestations are much less flagrantly inimical to the general good, to discern any valid grounds for *public* interference with administrative independence. The Commission's

¹⁹⁸ It is significant, also, that relatively few of the Commission's determinations are challenged in the courts on any basis. During each of the years 1920 to 1930, for example, the formal complaints filed with the Commission (which do not include valuation and finance proceedings) numbered 1040, 1487, 1264, 1160, 1343, 1505, 1524, 1561, 1693, 1520, and 1412, respectively. During each of the same years all the proceedings involving the Commission's orders or requirements which were instituted in the courts numbered but 4, 24, 10, 10, 10, 15, 14, 11, 19, 16, and 22, respectively. *Annual Reports*: 1920, pp. 37, 50; 1921, pp. 29, 43; 1922, pp. 40, 51; 1923, pp. 30, 43; 1924, pp. 30, 41; 1925, pp. 34, 47; 1926, pp. 33, 47; 1927, pp. 65, 15; 1928, pp. 62, 17; 1929, pp. 68, 17; 1930, pp. 14, 19.

organization and procedure will be treated elsewhere, but it may confidently be declared, in anticipation, that they involve no elements which by their very nature are subversive of a high level of performance; and, as is evident in every aspect of the Commission's activities, high standards of performance have in fact generally characterized its labors, despite the constant multiplication of tasks and accumulation of burdens. Yet, in recent years, certain governmental tendencies have emerged which are fraught with danger to the maintenance of the Commission's independence. With the growing judicial recognition of the dominance of the administrative method of control and the resulting enhancement of the Commission's power in the conclusive adjustment of far-flung practical affairs, the other major branches of government—the executive and the legislative—appear, in various ways, to have sought to influence unduly the direction of the Commission's determinations. We are here dealing with an approach which is not always evidenced by outward acts of public record, and with borderline governmental relationships which do not lend themselves to appraisal by reference to precise or dogmatic standards. None the less, though great caution must be exercised in questioning the propriety or wisdom of legislative and executive action bearing upon the Commission's administrative freedom, it will prove helpful to examine briefly the character of some of these recent developments.

The exertion of pressure by the executive branch of the Government in matters confided to the Commission's jurisdiction may make itself felt in two principal ways: first, by seeking to influence the adjustment of controversies on the horizon or in actual process of determination; and second, by seeking to mold the general course or direction of regulatory policy through manipulation of the appointing power. Such pressure, however indirect or intangible the forms which it may assume, proceeds on the assumption, express or implied, that the Commission is part of the national administration and hence is a proper medium for the expression of political policy. This assumption, it is submitted, is an index of desire rather than a statement of fact. While the basic character of the Commission as a functioning body is dependent upon all three branches of government—upon the President, who is charged with making appointments; upon the Congress, by which it was created and through

which its powers and duties are conferred; and upon the courts, by which its determinations are reviewed and the nature and scope of its authority defined—in the actual performance of its tasks, within the sphere of its lawful jurisdiction, it is, as now constituted, an independent tribunal. The statutory requirement as to membership, specifying that not more than a majority shall belong to one political party, is obviously designed to assure, as it has in fact produced, a non-partisan body. The controlling legislative standards are of course a general expression of political policy, but the large exercise of discretion which they inherently entail and the orderly processes of administration which they expressly contemplate are unquestionably a recognition of the need of expert and unbiased judgment by the enforcing tribunal. The usual requirement of notice and hearing—which “implies both the privilege of introducing evidence and the duty of deciding in accordance with it”¹⁸⁹—is clearly inconsistent with the infusion of political influence. While the Commission, in the execution of its diversity of powers and duties, is charged with the exercise of functions which are closely related to those of all the major branches of government, its most significant tasks involve the adjudication of controversies and the prescription of courses of action for the future. The performance of such tasks necessitates, and has in practice been accorded, the same thoroughness of consideration and impartiality of decision which are deemed to characterize judicial proceedings. The Commission is no more a part of the national administration—in the sense of being an instrument for furthering the particular political ends of the party in power—than is the Supreme Court, and executive influence is as manifestly out of place in the one case as it would be in the other. Even a formal change of the Commission’s status, by way of subordination to the executive branch of the Government, would constitute a backward step. The issue has been succinctly stated by one of the members of the Commission: “What purpose . . . would be served by bringing an independent commission within the jurisdiction of some executive department or cabinet officer? I can conceive of no purpose except to influence in some way the judgment of the commission or to bring it within the sway of some administration policy. But plainly, it seems to me, the

¹⁸⁹ *Chicago Junction Case*, 264 U.S. 258, 265 (1924).

cold neutrality of the commission, to use the expression of the Supreme Court, ought rather to be safeguarded jealously against precisely such extraneous influences. They are as out of place in the case of a commission as they would be in the case of a court.²⁰⁰ In the existing situation, certainly, the exertion of executive influence, whether directly or through manipulation of the appointing power, would constitute an unwarranted intrusion upon the Commission's administrative independence.

The method of exerting direct influence in connection with the performance of the Commission's tasks is obviously crude and subversive. Political policy may properly express itself in the basic legislation; there is no warrant whatever for its assertion in the enforcement of that legislation. This has been formally recognized by the executive branch of the Government, and on the whole the Commission has been free from this type of pressure. Since 1920, however, there have been a number of incidents calculated to embarrass the Commission in the free exercise of its powers of control.

During the Harding Administration, when the Commission was struggling with the problem of rate readjustments necessitated by the business depression which followed the period of post-war inflation, there were unmistakable evidences of attempted executive influence. Relief to agriculture, as one aspect of special rate treatment to "basic" commodities, was accepted as an administration policy, and its adoption appears to have been urged upon the Commission and some of its individual members even by the President himself.²⁰¹

²⁰⁰ Commissioner Joseph B. Eastman, "The Place of the Independent Commission," *The Constitutional Review*, Vol. 12 (April, 1928), pp. 95-102, at p. 101.

²⁰¹ Compare the following: "Within a few months after the 1920 increased rate level was established, a severe business depression affected all industry throughout the country. . . . Among the industries, agriculture was the first to feel the full effects of the depression. The values of agricultural products, live stock and meats suffered a rapid decline. Amid the clamor for relief and remedy, the high level of freight rates was emphasized more generally than the economic forces which were really responsible for the crisis. It was the story of the middle '90's over again. Freight rates became the target of dissatisfaction, although the Interstate Commerce Commission assured the public that it was 'not persuaded that it (high level of freight rates) has been more than a minor factor in bringing about distress.' But the farmer was not convinced and as he represented a powerful political group, his complaint was given recognition. High freight rates were acclaimed as a primary cause of the depression by men high in the councils of the government. Rate reduction, even though dependent upon reducing the wages of railroad employees, was demanded. The President made a personal

Furthermore, the Commission's determinations in the premises,²⁰² on the basis of thorough investigation and in terms of the mandates of existing law, were subjected to sharp criticism by the then Secretary of Commerce. Though the Commission is not specifically mentioned, the tenor of the following can scarcely be misinterpreted: "In an era of wide disparity between farmers' income and that in and of industry, the transportation rates have proven to be a heavy burden on agriculture. On the other hand, under present conditions railway earnings are obviously not large enough to assure railway expansion. Some relief both to the railways and the farmer may be obtained by thorough reorganization of the rate structure. Some classes and areas of traffic are carried at actual loss; others are carried at lower rates than the relative value of the commodities warrant; and a series of scientific upward readjustments should be made in some cases in order to give the railways and the shippers of primary commodities and agricultural produce some relief. The recent reduction of 10 per cent in rates on luxuries as well as on primary goods contributed nothing to commerce and impoverished the railways just that much. The tangled skein of rates seems a mesh in which there is so persistent a resistance against every constructive proposal, that we are incapable of rescue except by some complete departure in courage."²⁰³

And during the Hoover Administration there were at least two statements issued by the President tending to prejudice matters reserved to the independent determination of the Commission. When the Supreme Court rendered its decision in the *O'Fallon* case,²⁰⁴ from which it appeared that the property valuations upon which the railroads are entitled to earn a fair return would be far in excess of those utilized by the Commission in the past, the President declared, for

call on the Interstate Commerce Commission." H. B. Vanderblue and K. F. Burgess, *Railroads: Rates—Service—Management* (1923), pp. 113-114. Although the writer is not at liberty to disclose the sources of his information, it appears that the President urged his views privately upon at least one of the commissioners, and that the desires of the Department of Commerce were clearly made known to the Commission.

²⁰² See *National Live Stock Shippers' League v. A., T. & S. F. Ry. Co.*, 63 I.C.C. 107 (1921); *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921); *Reduced Rates*, 1922, 68 I.C.C. 676 (1922).

²⁰³ *Tenth Annual Report of the Secretary of Commerce* (Herbert Hoover), 1922, p. 24.

²⁰⁴ See pp. 446-450, *supra*.

publication: "I am confident that there will be no increase in railway rates as the result of the O'Fallon decision."²⁰⁵ While this comment may have been designed, despite its purely prophetic tone, as counsel to the carriers, it likewise constituted a declaration of policy for the Commission which alone is charged with the duty of passing upon applications for increased rates. The weight which might naturally attach to the views of the President, particularly in the minds of officials subject to presidential appointment, renders such comment subtly subversive of the judicial atmosphere which should surround the Commission's regulatory processes. This type of influence is reflected in much more tangible form in the President's statement of December 30, 1930, with regard to the four-system merger plan of the eastern trunk-line railroads.²⁰⁶ The statement from the White House constituted the first announcement of the agreement, which grew out of negotiations undertaken at the suggestion of the President. The plan that had been formulated by the Commission for consolidating the roads concerned into five systems²⁰⁷ was declared to have met with "objections which apparently made it an unsolvable basis," and no note was taken of the statutory requirement that such mergers must be in harmony with the Commission's comprehensive consolidation scheme. Despite the President's concluding declaration that "the plan, of course, must be submitted to the Interstate Commerce Commission, who have the independent duty to determine if it meets with every requirement of public interest," there can be no question that the agreement of the railroad executives was accorded his complete support and approval. "It is my understanding," he announced, "that the plan provides for the protection of the interests of the employes and full consideration of the interest of the various communities and carries out the requirements of the law in protection of public interest generally." There was an obvious executive prejudgment of an issue of far-reaching importance, although formal action was necessarily left to the administrative tribunal charged with its determination. Under these circumstances, there might well be public concern with reference to the maintenance of the Commission's

²⁰⁵ 4 *United States Daily* 691 (May 22, 1929).

²⁰⁶ 5 *United States Daily* 3297 (December 31, 1930).

²⁰⁷ *Consolidation of Railroads*, 159 I.C.C. 522 (1929).

independence. The following, among other like comments, from a formal statement issued by Senator Couzens, Chairman of the Senate Committee on Interstate Commerce, is a reflection of this concern: "In view of the President's support of the plan it is questionable whether the 'independent duty' of the Commission can be ascertained. Everyone knows the power and influence of the presidential approval, and everyone knows that these Commissioners owe their positions to the President of the United States, and while it is the duty of the Senate to confirm these appointments, no name can get to the Senate without first having been selected by the President of the United States. There is rapidly growing a public opinion that the President determines the action of these independent commissions and such opinion will not be dissipated by the issuance of the present statement of the President."²⁰⁸

The Commission's record of performance discloses no grounds for belief that it has actually yielded to executive influence in any direction; but the various developments we have noted are none the less fraught with grave danger, since even independent action, under such circumstances, becomes subject to public misconstruction.²⁰⁹

A like danger to the Commission's prestige and independence may

²⁰⁸ 5 *United States Daily* 3313 (January 2, 1931).

²⁰⁹ Anxiety concerning the Commission's continued independence is accentuated by the experience in recent years of other administrative bodies in the Federal Government. The Tariff Commission, while not clothed with extensive administrative power, was specifically created to function in an expert capacity for the removal of tariff-making, as distinct from the formulation of general tariff policy, from politics. But objective performance by that Commission, particularly after the flexible-tariff provision was thrust upon it to administer, appears to have been neither encouraged nor permitted. The views of Professor F. W. Taussig, the Commission's first chairman, are typical and informed: "The appointments by successive presidents to the various commissions [other than the Tariff Commission] have not been made entirely with a view to ability, training, and open-mindedness. Some regard has been had to the known views of the appointees on disputed questions. It is with regret that I am compelled to state my belief that in recent appointments to the Tariff Commission this process has been carried to a dangerous and lamentable extreme. The endeavor seems to have been to make it not an organization for unbiased inquiry on the facts, but one for preparing such recommendations as are known in advance to be acceptable to the party and the administration in power." *American Economic Review*, Vol. 16 (March, 1926, Supplement), p. 177. See, also, *Senate Hearings on Investigation of the Tariff Commission*, 69th Cong., 1st Sess., pp. 26, 133. It has been alleged, furthermore, that the accomplishment of the purpose of making the Commission, in President Harding's words, the "agency of the President in dealing with the tariff problem," was facilitated in the case of some of the commissioners by offers of other federal posts, by requiring un-

spring from undue emphasis upon political considerations in the choice of personnel. Appointments to the Commission are made by the President by and with the advice and consent of the Senate. No positive qualifications for office being prescribed by statute, there is ample freedom, in the exercise of this executive function, to select and approve men clearly capable of performing the difficult and onerous tasks with which the Commission is charged; and, in point of fact, the personnel of the Commission, despite such unevenness as characterizes all governmental agencies, has on the whole measured up to very high standards of public service. The appointment of Judge Thomas M. Cooley as the Commission's first chairman has served as an enduring index of the importance of membership on this tribunal; and

dated resignations before appointment, by creating personal situations calculated to result in withdrawal from membership on the Commission. Commissioner Costigan, after discussing executive interference in the sugar investigation, declared upon resigning: "Both from within and without pressure was brought on members of the Commission, directed toward the destruction of the Commission's impartiality." Letter to Senator Robinson, 3 *United States Daily* 115 (March 16, 1928). The experience of the Federal Trade Commission has been similar in many respects. With the appointment in 1925 of Commissioner Humphrey, reducing the remaining Wilson appointees to a minority, there was effected a marked change of policy, most concretely manifest in an altered procedure which has been widely commended, but evident more significantly in a narrowed conception of the Commission's functions and a broad tolerance respecting business behavior. See *Nation's Business*, Vol. 15 (July, 1927), p. 30; H. R. Seager and C. A. Gulick, *Corporation and Trust Problems* (1929), pp. 527-528. It is suggestive, for example, that while the Humphrey confirmation was pending, President Coolidge, in supporting the appointment of Charles B. Warren as Attorney-General in the face of opposition based on the appointee's connection with sugar interests, committed what was characterized in the press as an "unprecedented action by the White House in issuing a defense of the Toledo Sugar Company and the Michigan Sugar Company in an action brought by the Federal Trade Commission." *New York Times*, February 18, 1925, p. 2. A construction which was commonly placed upon these developments was expressed as follows by Senator Carter Glass of Virginia: "When Mr. Humphrey was appointed a member of the Federal Trade Commission it was announced, if not by the White House spokesman, with quite as much apparent authority as that gentleman appeared to assume, that he was put on this Commission to halt its inquisitiveness, to change the order of its activities, to revolutionize by restraining its methods of procedure. The statement was even made that it was the conviction of the President that this and other commissions should subordinate their judgment to the opinions of the Executive; that they properly were mere agencies to register the policies of the administration." *Congressional Record*, Vol. 69, p. 3031. In these circumstances, the adverse Congressional criticism which was directed against the Commission's policies and personnel was ill calculated to sustain public confidence in its work. See *ibid.*, pp. 1802-1808, 2942-2961, 3005-3054. It would, perhaps, be too much to expect that the subversive tendencies disclosed in connection with the Tariff Commission and the Federal Trade Commission should be escaped altogether by the Interstate Commerce Commission.

the established tradition of reappointment of commissioners has contributed in marked degree to the Commission's standing as a skilled, experienced, and impartial body.²¹⁰ Because of this very fact that the Commission has generally been held in high regard in matters of appointment, recent evidences of political manipulation are greatly disconcerting.

During the Coolidge Administration there were charges of political "deals" in connection with the filling of vacancies on the Com-

²¹⁰ Note the following from an address on "The Interstate Commerce Commission" by Walker D. Hines, before The Association of the Bar of the City of New York, on March 27, 1930, at pp. 21-22: "A highly favorable factor in the case of this Commission is that the practice has been quite general to reappoint commissioners after their terms expire, so that a considerably greater degree of stability attaches to membership on the Commission than is true in many instances of members of similar bodies appointed for short terms. There have been, of course, efforts to appoint commissioners for purely political reasons, but these efforts have not been very successful, and mere political considerations do not seem to have played any considerable part in the selection of the commissioners. The Act provides that not more than six commissioners shall be appointed from the same political party, and when a vacancy comes to be filled there is thus no large opportunity to change the politics of the Commission by selecting a new man, and the support for the existing member, unless he clearly falls short of the requirements for the work, is likely to outweigh the support for someone else for his place. All these considerations work toward reappointment, and have made the Commission . . . far more worthy of confidence than if appointments to it had been made, to any large extent, footballs of political activity. In addition to this, the Commission seems to have developed over many years a good scheme of organization and to have built up traditions of internal conference and procedure which have made for careful and disinterested work. In addition, the Commission has had increasingly great power, and this has brought an increasingly great sense of responsibility. When we add to these considerations the fact that there have been, and are, on the Commission numerous individuals who inspire a high degree of confidence in their honesty, impartiality and devotion to their tasks, there has developed an atmosphere which promotes sincere and disinterested work." The reappointment, at the end of 1929, of Commissioner Joseph B. Eastman, with the support of the very interests he had frequently opposed and despite his reputed "radicalism," is the latest manifestation of the surviving vigor of the tradition of reappointment. No one possessing an intimate acquaintance with the work of the Commission, regardless of his social, political, or economic views, can question the high competence and great service of Commissioner Eastman, extending, on this body, over a period of more than a dozen years. He has been justly characterized as one "who has watched government closely all his life and now is himself one of the ornaments of the public service," and as one who "furnishes striking proof of the extraordinary gifts which government does attract." The recognition of the principle involved in his reappointment augurs well for the future of the Commission. "That Mr. Eastman's reappointment as member of the Interstate Commerce Commission should have been strongly urged by railroads whose views on vital issues he has rejected, also proves that, so far as the public opinion which asserts itself is sufficiently informed regarding the quality of public work, disinterested capacity in government will find support." Felix Frankfurter, *The Public and Its Government* (1930), pp. 135-136.

mission, and emphasis upon sectional interests came to occupy a large place in the debates on confirmation.²¹¹ Whether or not these charges of actual "deals" were well grounded, they are indicative of the extent to which appointments to the Commission had become involved in party politics; questions of personal fitness, which should clearly

²¹¹ When, in 1925, Thomas F. Woodlock of New York was named as the successor of Commissioner Mark W. Potter, much of the opposition of the southern senators was based upon insistence that a representative of the south be placed upon the Commission; and when, upon appointment of Richard V. Taylor of Alabama as successor to Commissioner Charles C. McChord, this opposition to Mr. Woodlock was withdrawn, it was openly charged that the Taylor appointment was the result of a deal for securing southern support for the Woodlock confirmation. Again, when in 1926 Cyrus E. Woods of Pennsylvania was nominated to the Commission, it was widely declared that the President had given Senator Reed of that state the right to name the next commissioner as the price of his support for the earlier Woodlock appointment. The latter situation was complicated, furthermore, by the fact that the coal-mining interests of Pennsylvania were insisting that a representative from that state be placed upon the Commission because of their dissatisfaction with the Commission's findings in *Lake Cargo Coal Rates, 1925*, 101 I.C.C. 513, which was then pending before the Commission on further hearing; indeed, there was considerable opinion that the President was attempting to influence the Commission's decision through the Woods appointment. These developments are fully recorded in the reports of Senate debates and committee hearings. While the Woodlock confirmation was pending and just after the Taylor appointment, Senator Underwood of Alabama, though he formally denied the allegations of a deal, related how he had received a promise from President Harding, just before the latter's death, to appoint a southerner to the Commission, and how, respecting Mr. Woodlock, he had contended that he "would not vote for the confirmation of another man appointed to the commission until the South or the West had some representation thereon." Senator Watson of Indiana stated that a subcommittee of the Committee on Interstate Commerce waited on the President to express the sympathy of that body with the southern viewpoint, but he deplored the forcing of the President's hand: "I do not believe that that is the proper course to pursue, but so sympathetic were the members of the committee with the view that when it was presented we failed to recommend the confirmation of Mr. Woodlock's appointment." Senator Reed remarked that that was an excellent suggestion for Pennsylvania; he observed, with regard to the impartiality of commissioners, that "as a matter of practical humanity, we know that they speak for the regions from which they come, if only because they understand their needs better"; and he called attention to Pennsylvania's situation in the matter of coal rates. *Congressional Record*, Vol. 67, pp. 1252-1258. On March 23, 1926, before the Senate had voted on the adverse committee report on the Woodlock appointment, the following statement was issued from the White House: "In filling future vacancies on the Interstate Commerce Commission President Coolidge intends to give special consideration to the South, the Southwest, and Pennsylvania. The White House disclosed today that the President believed those sections are justified to an extent in contending they have not been adequately represented on the Commission. The President is making no public comment on pending bills to make regional representation on commission mandatory." Newspapers reported the swinging of several votes to the support of the Woodlock appointment, including that of Senator Reed. After reading the press report into the record, Senator Wheeler of Montana remarked: "A short time ago a headline appeared in the papers stating that

dominate in matters of appointment, were unduly subordinated to extraneous political considerations. The pursuit of such methods in the selection of the Commission's personnel is bound to prove detrimental to both the prestige and the independence of the administrative tribunal. And the sectional issue, as raised, is calculated to produce similar adverse effects. The Commission is a national body, concerned with impartial adjustment of intricate relationships on a national basis: the interests of all states and of all sections of the country are alike committed to its care. Any theory of state or regional representation, by focusing attention upon local needs and special interests, appears to be inconsistent with the very nature of the tribunal. But even if the desirability, as a matter of policy, of having so large and powerful a body as the Commission reasonably representative of all major sections of the country were conceded, the method of political wirepulling, induced in part by dissatisfaction with the Commission's informed and orderly determinations on specific issues, can scarcely command approval. The tactics employed tend to generate partisanship in the appointees and to extend the influence of the appointing power into the realm of administrative performance. In at least one instance during this period, moreover,

Mr. Woodlock would be confirmed . . . by reason of the fact that southern Democrats had entered into a deal with the White House, and now we find a statement stating that Republican senators have entered into a deal with the White House." When Senator Reed made formal denial, Senator Wheeler continued: "I want to make the observation that it must be apparent that the confirmation of Mr. Woodlock hinges entirely upon the coal situation in West Virginia and Pennsylvania." Subsequently, Senator Reed declared: "It is with a sense of great gratification that now, for the first time, I find that our point has gone home and that great regions of the United States will not be neglected in the make-up of these important commissions. To say that there is a deal gives a sinister aspect which the matter does not deserve." *Ibid.*, pp. 6162-6164. Late in the year the Woods nomination was made, and in January, 1927, extended hearings were conducted by the Committee on Interstate Commerce. Prominent participants were Senators Reed of Pennsylvania, Neely of West Virginia, and McKellar of Tennessee, who were not members of the Committee. Some years before, Mr. Woods had been counsel for the Pittsburgh Coal Company and the Pennsylvania Railroad and still held securities of both companies, and, although he consistently disavowed either commitments or predilections respecting matters at issue before the Commission, he was vigorously opposed. So largely was the hearing concerned with the *Lake Cargo Coal* case that Senator Gooding of Idaho was constrained to declare: "Well, Mr. Chairman, then it seems to me that the confirmation of Mr. Woods depends entirely upon the selfish interests of West Virginia and Pennsylvania and Ohio." See *Hearings before Senate Committee on Interstate Commerce on the Nomination of Cyrus E. Woods*, January 6 to 12, 1927, 69th Cong., 2d Sess.

the established tradition of reappointment, which has contributed so largely to the Commission's effectiveness, was not only violated, but on grounds which are clearly subversive of the Commission's independence. The renomination of a commissioner of proved competence was rejected by the Senate because of its apparent disagreement with a single decision in which the nominee had joined with the majority of the Commission;²¹² in effect the case at issue was retried by the Senate Committee on Interstate Commerce, the various parties being heard who had appeared in the proceedings before the Commission, and little ground for rejection was disclosed other than Senatorial dissatisfaction with the result reached.²¹³ While there can

²¹² The proceeding at issue in the hearings on the confirmation of Commissioner John J. Esch was *Lake Cargo Coal Rates, 1925*, 101 I.C.C. 513 (1925), 126 I.C.C. 309 (1927). In the original proceeding relief was denied to the complaining Pennsylvania, Ohio, and other northern coal mines; upon further hearing the original findings were in part reversed and reductions in rates on lake cargo coal were made for the northern districts. Commissioner Esch, in voting with the majority in both cases, had reversed his original position.

²¹³ See *Hearings of Senate Committee on Interstate Commerce on Confirmation of Commissioner Esch*, 70th Cong., 1st Sess., February 18, 20, 21, 23, and 24, 1928. The testimony, amounting to 277 printed pages, dealt chiefly with the *Lake Cargo Coal* decisions. Senators Neely of West Virginia, McKellar and Tyson of Tennessee, Barkley of Kentucky, and Glass of Virginia, representing states adversely affected by the Commission's second decision, were present at the hearings; and the examination was conducted in large measure by Senators Neely and Barkley, assisted by Senator Sackett of Kentucky, a member of the Committee. The facts of the original and supplementary record and their interpretation by the Commission were set before the Committee in great detail and with much repetition, since Commissioners Esch, Aitchison, Campbell, and former Commissioner Hall were confronted with almost identical questions. The purpose of the southern Senators was stated with candor by Senator Neely: "We are not fighting Mr. Esch's confirmation as a man. We are fighting it because the decisions of the commission in which he has concurred are creating monopolies for the industries of certain states at the expense of similar industries in other states. Mr. Esch has helped to crucify the greatest industry of West Virginia and Kentucky for the benefit of the coal operators of Pennsylvania" (p. 118). Senator Barkley placed a somewhat broader construction upon the issue: "Nobody has hinted, and nobody would hint—I would be the first to resent any such hint—that there was ever at any time the slightest taint upon the personal honor or character of John J. Esch. But just as the people of my state have a right to pass upon whether my policies as a Member of Congress carried out their will or carried out their intention in sending me here in passing on whether I ought to be reelected, I think the Senate has the right to inquire into the policies of this body and any member of this body which it has created, to determine whether the membership of the body shall be continued or any individual member shall be reconfirmed" (pp. 270-271). This view was firmly opposed by former Commissioner Hall: "If you find that he was fit he certainly should be confirmed, unless you see fit to go farther and punish him because his judgment did not accord with yours. Now, it seems to me . . . it would be profoundly upsetting to all the business

be no question as to the right of the Senate to scrutinize the record of nominees, whether for original appointment or for reappointment, the propriety of directing inquiry to specific decisions and distributing reward and punishment in terms of approval or disapproval is decidedly questionable. Such procedure is not only unjust to the individuals immediately concerned, but it might tend, through its possible repercussion upon existing commissioners and future appointees, to undermine the administrative independence of the Commission as a body. Under such circumstances extraneous political considerations might well come to the foreground in the settlement of controversies, with a substantial weakening of the judicial temper essential to withstand the pressure of powerful influence or popular clamor. If the fruits of thorough investigation, expert judgment, and impartial decision are to be achieved, as contemplated by the administrative method of control, there must be no division of responsibility in connection with specific determinations.²¹⁴

of this country if those who have to come before the Commission should be given to understand that they had a right to appeal either to the Senate or to the House or the Congress or the White House" (p. 188). The same type of criticism was ably presented by Luther M. Walter, general counsel of the National Industrial Traffic League. The issue, as he saw it, was this: "Shall honest officials fail of reappointment or lose their offices because litigants are dissatisfied with their decisions honestly rendered?" "That is the question," he continued, "that I think has been presented to you. They may sugar coat it in any way they like, but you all know that the opposition to Mr. Esch comes alone from the men who were parties litigant to the Lake Cargo Coal cases. If that decision had been in their favor never one word against Mr. Esch would you have, and the National Industrial Traffic League of the United States, with its 300,000 representatives, is here not to see Mr. Esch confirmed, but to see that you are not made the tools of dissatisfied litigants trying to vent their dissatisfaction by keeping an efficient man from taking the position that Congress has created. We want the Interstate Commerce Commission to stand above suspicion and when we go there with our case or somebody else's and present the facts and the law, we would like to feel that there is no partiality" (p. 247). Mr. Walter was followed by R. C. Fullbright of Texas, chairman of the legislative committee of the League, and he further emphasized the subversive character of the procedure being followed: "But, gentlemen, if this thing goes through, the next time we have a case for the people of Texas, the people of Texas are going to expect their Senators and their Representatives in Congress to espouse their cause and to review that decision here" (p. 261).

²¹⁴ Compare the following: "At times there has developed in Congress, and especially in the Senate in connection with confirmation of appointments to the Commission, criticism of specific decisions of the Commission. Not unnaturally these criticisms have been made principally by members of one House or the other from States in which there were important business interests which were dissatisfied with the decisions in question. I think it is fair to say that in any such controversy the chances are nine out of ten, if not ninety-nine out of a hundred, that the right of the matter

It is true, of course, that the play of political motives in the exercise of the appointing power, which manifests itself occasionally even with reference to so august a tribunal as the Supreme Court, is too complicated and too individualized to be subject to any precise standards of control; but the recent developments briefly noted with respect to the selection of the Commission's personnel are real danger-signals, which, if unheeded, may seriously impair the effectiveness of that body in the performance of its extraordinarily difficult and important tasks.

Legislative interference with the Commission's independence (as distinct from such interference, considered above, as may spring from the Senate's participation in the processes of appointment) manifests itself in the character of some recent Congressional enactments, and of bills, failing of enactment, to which serious consideration has been given. This legislative activity raises some basic issues as to the dominance of the administrative method.

It is clear that Congress possesses ample power, within constitutional limits, to define the policies which shall guide the Commission in the exercise of its authority. The very existence of the Commission depends upon Congressional enactment, and both the scope of its jurisdiction and the range of its functions and activities have been changed from time to time through legislative action. The major statutes which constitute the present Congressional charter under which the Commission must operate have been the outcome of a long evolutionary process. Further far-reaching changes may lie ahead; and they would not, as such, interfere with the Commission's independence or impair the administrative method. It is entirely within the discretion of Congress, for example, as to what the nation's future policy shall be with regard to railroad consolidations or with regard to regulation of motor-carrier transport. Legislation in both

will be with the Commission, with its continuing sense of responsibility, its traditions and methods of work and its equipment for obtaining and appraising the true meaning of the situation involved, and for testing it in the light of all its interrelations, rather than with Congress, with all its limitations for dealing with such matters; and, if in one case out of a hundred, or even one case out of ten it should turn out that Congress was right and the Commission was wrong, even then such interference with the discretion properly vested in the Commission would do the public more harm than good through the resulting impairment of the Commission's standing and its sense of responsibility." Walker D. Hines, *op. cit.*, pp. 23-24.

of these directions has been pending for some time, and its enactment, under such substantive terms as may finally approve themselves to the law-making body, is likely to strengthen rather than weaken the effectiveness of the Commission's labors. Even specific limitations upon the Commission's general authority are entirely within the legitimate sphere of Congressional power, and very many such limitations are included in the Interstate Commerce Act and allied statutes subject to the Commission's jurisdiction. But the legislative structure, as thus developed, has been designed primarily to provide a basis for administrative control. The system of state regulation through charter agreements and maximum rate laws was superseded by commission control, not only because of the greater flexibility of the administrative method, as applied in quasi-judicial proceedings by continuously functioning expert tribunals, but because of the tendency of direct legislative action to reflect unduly the pressure of temporary discontent and political influence. In the federal sphere the importance of these considerations was recognized from the very outset by the establishment of the Interstate Commerce Commission, and until the post-war period there was a marked absence of direct Congressional regulation. Latterly, however, there has emerged a disposition on the part of Congress to interfere with matters already intrusted to the control of the Commission, in terms of giving heed, through enactments of more or less limited applicability, to the demands of special interests that are politically powerful. Such Congressional action, or the threat of its consummation, tends not only to undermine the supremacy of the administrative method, but to impair the independence of the Commission as a functioning tribunal. It involves a partial reversion to regulatory processes which have long been discredited; it provides a clear indication to disgruntled litigants that relief may be had through resort to politics; it constitutes an indirect exertion of legislative influence upon the entire course of administrative performance. Brief reference to some of these developments will illustrate concretely the character of this Congressional tendency.

We will first consider an enactment which appears on its face to be a perfectly appropriate exercise of Congressional authority, by way of supplement to the basic statute. By an amendment to section

22 of the Interstate Commerce Act approved August 18, 1922,²¹⁵ the Commission was directed, after notice and hearing, to require interstate carriers to issue interchangeable mileage or scrip coupon tickets "at just and reasonable rates." In strict terms this was but a general enunciation of legislative policy. The level of the rates to be charged was left to the decision of the Commission, and that body was also vested with discretion in determining the denominations of such tickets, in formulating the rules and regulations which shall govern their issuance and use, and in exempting carriers from the operation of the requirement "where the particular circumstances shown to the Commission shall justify such exemption to be made." Because of its political origin and limited applicability, however, this amendment proved a source of difficulty. It was enacted very largely under pressure of commercial travelers' organizations, and it sought, through direct legislative action, to deal with a single isolated aspect of the problem of passenger fares. The form in which it was adopted was the outgrowth of many bills, all of which required the issuance of interchangeable tickets at very substantial reductions from the standard rates, without reference to the effect of such reductions upon the aggregate revenue derived from the passenger service or upon the creation of discriminations in that service, in possible violation of the basic sections of the Act. These preliminary bills clearly constituted a marked departure from the established system of control, since they involved legislative rate-fixing for the furtherance of special interests, without reference to the reasonableness of prevailing adjustments and without the support of special investigation, and since they ignored the organic interrelationships which bind together the various aspects of the regulatory process. Under these circumstances, although the amendment, as adopted, omitted all requirement of reduction from regular charges and substituted therefor the usual standard of "just and reasonable rates," the Commission found itself effectively influenced by the general atmosphere surrounding the enactment. The issuance of interchangeable scrip coupon tickets, in denominations of \$90, at a reduction of 20 per cent from the face value of these tickets, was ordered by the Commission,²¹⁶ despite the fact that there

²¹⁵ 42 Stat. 827.

²¹⁶ *Interchangeable Mileage Ticket Investigation*, 77 I.C.C. 200, 647 (1923).

was little in the record to support the conclusion that such reduced rates were "just and reasonable," and that a preferred class of travelers was thereby artificially created.²¹⁷ In essence the Commission departed from its usual orderly processes because it was seeking to give effect to what it deemed to be the desire of Congress. "The spirit and apparent theory of the law," declared the majority report, "is that carriers shall be required to sell such a ticket at something less than the standard fare. . . ."²¹⁸ This determination could not withstand attack in the courts. "It seems to us plain," said Justice Holmes, "that the commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was

²¹⁷ Four of the commissioners (Hall, Potter, Daniels, and Eastman) dissented. On the discriminatory character of the majority action, Commissioner Hall said: "The majority recognize that the demand for this ticket comes chiefly from organizations of commercial travelers, and that what they seek is a lower rate than that paid by other travelers who do not hold such tickets. In other words the holders of these tickets are to be in a preferred class, whatever may be the just and reasonable rate paid by the public generally. Special privilege dies hard, and the craving for it never dies. But I see no good reason why, reading the act as it is written, we should give to it the gloss for which these organizations contend. The 'class' set up by the majority embraces only those, and all those, who have \$72 in money available with which to buy \$90 in scrip, and want to spend the money in that way. There is no other criterion or determining feature" (p. 214). And Commissioner Daniels, differentiating other classes of travel, was even more specific on this issue: "Commutation service is unique in its large volume, its regularity, and in the delimited area within which it is demanded and supplied. The extra service involved in excursion and convention travel is capable of close calculation in advance, both as to the revenue it is likely to yield and as to the extent to which special physical provision must be made therefor. Tourist travel is seasonal, is generally for long distances and is also capable of fairly accurate prevision. The so-called additional class of travel which the report says the carriers must now recognize has seemingly no distinctive characteristics. Within the year's limit the travel may be taken at any time, on any train, and for any distance. It may be taken in one trip or distributed over as many journeys as the holder desires. Such a preferred class of travelers appears to be artificially and not naturally created. True, they may travel more miles than they would do but for the minimum one-fifth discount from the regular rate of fare. But so would practically all patrons of passenger service in the course of a year. In short, the requirements of the amendment do not seem to me to necessitate, and other sections of the act seem to me to preclude, the creation of a class of travelers entitled to the privileges herein proposed" (p. 218). Finally, Commissioner Eastman concluded his dissent with the following declaration: "I fear that the action taken in this case will postpone the day of a reduction for the benefit of *all* travelers, which is far more to be desired" (p. 221).

²¹⁸ *Ibid.*, p. 209.

passed, and therefore that the present order cannot stand."²¹⁹ That this was a sound construction of the Commission's approach is evidenced by the subsequent disposal of the proceeding. After further hearings, the Commission definitely reversed its original position: "Bearing in mind the admonition of the Supreme Court that in administering the amendment to section 22 we must exercise our own independent judgment, we conclude that sound policy dictates that the basic fare should be the same for all classes of travelers and that we should require no departures from this rule, unless it can be clearly shown, as it has been shown in connection with certain commutation fares, that we are dealing with a class of passenger business which can be so completely segregated that a rate of fare differing from the basic fare should be applied. We find that the basic or standard rate of fare for one-way tickets is, and for the future will be, a just and reasonable rate for the interchangeable scrip coupon ticket we shall direct carriers to issue."²²⁰ The origin of the amendment, the purposes it was designed to serve, and the course of proceedings under it all cast doubt upon the wisdom of this type of Congressional action.

Perhaps the most outstanding illustration of the new legislative approach is provided by the so-called Hoch-Smith Resolution of January 30, 1925.²²¹ While this resolution directed the Commission to undertake a comprehensive rate structure investigation, so that mal-adjustments in rate relationships might be removed, and purported to enunciate guiding principles for the settlement of rate controversies, its primary objective was to afford relief to agriculture in matters of freight rates. This is evidenced by the initial declaration that it is "the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move"; it is clearly disclosed in the culminating direction that the Commission effect such lawful changes in the rate structure as will promote freedom of movement of the prod-

²¹⁹ *United States v. N. Y. Central R. R.*, 263 U.S. 603 (1924), at p. 611.

²²⁰ *Interchangeable Mileage Ticket Investigation*, 98 I.C.C. 298 (1925), at p. 312.

²²¹ 43 Stat. 801. For a more detailed analysis of the nature and implications of this enactment, see Part I, pp. 227-235.

ucts of agriculture, including livestock, affected by depression, "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." Throughout the course of its history the Commission, in the enforcement of the basic standards of the Act, had been striving to remove the maladjustments toward which the rate structure investigation ordered by the enactment was directed. Even this mandate of the resolution, therefore, though seemingly involving a regulatory requirement of general applicability, but constituted an arbitrary expression of want of confidence in the Commission, induced solely by the clamor of the agricultural interests for relief. That the effective impetus for the legislation as a whole was provided by these special interests appears clearly, of course, from the provisions dealing specifically with rates on agricultural products. The Commission had investigated such rates in a number of proceedings, during the period of post-war readjustment, and though it recognized that the difficulties of the agricultural situation were the result of more fundamental causes than the level of transportation charges, it had effected considerable reduction of the rate burden.²²² But dissatisfaction continued, and appeal was made directly to Congress. The Hoch-Smith Resolution was an attempt to override the judgment of the Commission, exercised through orderly processes in the light of the established regulatory structure viewed in all its interrelationships, and to recognize the special demands of dissatisfied litigants and their supporters through the exertion of political power.²²³ Moreover, as so often happens in such cases of Congress-

²²² See, for example, *National Live Stock Shippers' League v. A. T. & S. F. Ry. Co.*, 63 I.C.C. 107 (1921); *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85 (1921); *Reduced Rates*, 1922, 68 I.C.C. 676. See, also, *Rate Reductions*, 67th Cong., 1st Sess., House Doc. No. 115.

²²³ Compare the following from an address on "The Modern Trend of Railroad Regulation" by Kenneth F. Burgess, before the St. Louis Railway Club, on April 12, 1929, at pp. 8-9: "From 1920 through the year 1924 the Interstate Commerce Commission and the state commissions heard and decided a number of cases involving the demands of farmers for reductions in the rates on the products of the farm, ranch and orchard. Grain rates were reduced in amounts varying from 15 to 20 per cent, and other rates on the products of agriculture were subjected to large reductions. All of these cases were decided upon voluminous records, after careful investigations by the regulatory commissions. Yet, in January, 1925, Congress passed a Joint Resolution, which is known as the Hoch-Smith Resolution, in which the Interstate Commerce Commission was directed to embark upon an entirely new undertaking. No one yet knows exactly what this Resolution means, but it did declare that the Commission

sional interference, this political move turned out to be a mere gesture. Although the resolution complicated the standards of rate making and imposed very onerous tasks upon the Commission, it fell far short of providing a clear-cut basis for according the contemplated relief even to agriculture. Its very terms inhibited effective action. The conditions prevailing in particular industries were to be considered only "in so far as it is legally possible to do so"; the "lowest possible" rates to be established on the products of agriculture were also to be "lawful" rates and "compatible with the maintenance of adequate transportation service." Accordingly, while the Commission deemed itself under Congressional order to prevent rate advances on agricultural products affected by depression and to require rate reductions wherever possible, it was compelled to recognize that the resolution "sets no new standards of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our [its] discretion, we [it] shall require the maintenance of the lowest rates falling within these flexible limits"—in other words, "that agricultural products affected by depression shall . . . be included in the class of most favored commodities, to such extent, at least, as may be compatible with the maintenance of adequate transportation service."²²⁴ But even this restricted construction has been held to be un-

should, with the least practicable delay, put into effect the lowest possible lawful rates on the products of agriculture and that in making rates for the future it should take into account the present and future conditions of particular industries which ship freight. This Resolution was recently described by one of the members of the Interstate Commerce Commission as undertaking to make the railroads a sort of economic shock-absorber for the country. If it be interpreted literally it is perfectly impossible of execution, because the railroad commissioner of the future would have to become a sort of clairvoyant. He not only would have to investigate as to the internal conditions of every sort of industry which shipped freight, but he would have to prognosticate as to the future of industries in order to determine what would be necessary and wise. Since this Resolution was enacted, the whole processes of the Interstate Commerce Commission have been devoted largely to investigating these economic conditions which do not concern railroad transportation, except in a remote degree. Whatever it may finally be held to mean, it is perfectly clear to any student of the situation, that the Hoch-Smith Resolution was in essence a criticism by Congress of the judgment of the Commission in the cases which it had been deciding on voluminous records after careful investigation and was passed upon the solicitation of unsuccessful litigants and their political supporters."

²²⁴ *Grain and Grain Products*, 122 I.C.C. 235 (1927), at p. 264. See, also, *Americus National Live Stock Assn. v. A. T. & S. F. Ry. Co.*, 122 I.C.C. 609 (1927); *Calif. Growers' & Shippers' Protective League v. S. P. Co.*, 129 I.C.C. 25 (1927), 132 I.C.C. 58a (1927).

duly sweeping.²²⁵ Considering the definite issue as to "whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it,"²²⁶ the Supreme Court reached a negative conclusion with respect to all of the stipulations of the enactment. Specifically, it found the mandate with regard to rates on agricultural products affected by depression to require only "lawful changes," as determined by the provisions of pre-existing law, and to afford no foundation for according "most favored" treatment to the products of agriculture, by way of departure from findings justified by pre-existing law.²²⁷ Essentially, however, the impropriety of this Congressional interference is grounded in more basic considerations than the judicial construction placed upon the particular terms of the resolution. It seems clear that such political enactments, for the furtherance of special interests through direct legislative action, tend to weaken the system of administrative control, and to hamper, if not seriously to impair, the independent performance of the Commission's tasks.

²²⁵ *Ann Arbor R. Co. v. U.S.*, 281 U.S. 658 (1930), holding invalid the Commission's order in *Calif. Growers' & Shippers' Protective League v. S. P. Co.*, 129 I.C.C. 25 (1927), 132 I.C.C. 582 (1927).

²²⁶ *Ibid.*, p. 666.

²²⁷ The Court found that "the true policy in rate making," as enunciated by the first paragraph of the resolution, "is not new" (p. 666); and that the substantive provisions of the second paragraph, under which the Commission was directed to make a thorough rate structure investigation, specified matters which "have all been regarded as factors requiring consideration under existing laws" (p. 667). A similar conclusion was reached with regard to the provisions dealing specifically with rates on agricultural products. In the words of Justice Van Devanter: "The third paragraph was construed by the commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' for which §15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. Indeed, it is apparent from the Commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections . . . of the existing law." No basis was found for such a construction. "The paragraph," said the Court, "does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law. The paragraph requires only that 'lawful changes' in the rate structure be made; and we find in it no sanction for any other change" (pp. 667-668).

One further illustration of this Congressional tendency will suffice. The vigorous efforts put forth in recent years to remove the Pullman surcharge through direct legislative action, though they have not been crowned with success, throw much light upon the subversive character of this disposition to substitute political power for administrative judgment. The surcharge as it now operates—whereby 50 per cent of the charge for space in sleeping and parlor cars is levied on the passenger for the benefit of the rail carrier—was authorized by the Commission in 1920 as a means of providing a necessary addition to the passenger revenues of the railroads.²²⁸ The need for enhancing carrier revenues upon the termination of Federal Control and the expiration of the transitional guaranty period was universally acknowledged; and the surcharge was established, by way of supplement to the large direct rate increases which were authorized, in execution of the affirmative Congressional mandate with regard to earnings imposed upon the Commission by the Transportation Act. The rates thus prescribed, including the Pullman surcharge, were made applicable to intrastate as well as interstate traffic, and the exercise of this authority was sweepingly upheld by the Supreme Court.²²⁹ From the beginning, in other words, the matter of the surcharge constituted an integral part of the process of rate regulation, with special reference to the passenger service. This was made indisputably clear in a subsequent elaborate investigation, in response to complaints by an association of commercial travelers, as to the propriety of continuing the surcharge.²³⁰ The reasonableness of the charge was upheld because of the railroads' need of the revenue provided thereby, because of the higher cost of the service rendered to the Pullman passenger, because of the greater value of that service as compared with ordinary coach service. In this determination the Commission was but exercising its informed discretion in regulating passenger fares. "The surcharge . . . ought not to be regarded as an independent third charge upon the passenger. It was devised as a simple and convenient

²²⁸ *Increased Rates, 1920*, 58 I.C.C. 220, 242. For a more detailed analysis of the problem of the Pullman surcharge, see pp. 88-96, *supra*.

²²⁹ *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U.S. 563 (1922).

²³⁰ *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925). The original proceeding, No. 11567, which dealt with the broader issue of the reasonableness of Pullman charges, was *Order of United Commercial Travelers of America v. Pullman Co.*

method for computing an addition to the basic passenger fare for those who ride in Pullman cars, and is thus equivalent to an increase in the rate per mile.²⁸¹ Furthermore, the Commission found that the railroads "earn less per car-mile, on the average, from their Pullman business than they earn from their coach business, even when the surcharge collections and the various financial benefits accruing from the existing Pullman contracts are taken into consideration," and that "at least there is less warrant for eliminating the surcharge than for reducing the basic passenger fare which applies even to travel in mixed trains of freight and passenger cars."²⁸² Considerable emphasis was also placed upon the relationship of the surcharge to the reasonableness of the Pullman rates as such, from the standpoint of the aggregate burden upon the passenger, and some of the commissioners even stressed the necessity of making freight rates the first beneficiary of such revenue reduction as was contemplated.²⁸³ Regardless of the particular outcome of this proceeding, then, the inextricable relationship between the basic passenger fare, the Pullman tariff, and the surcharge—indeed, the unity of the entire process of rate regulation—was clearly established. Under such circumstances, Congressional tampering with the surcharge would constitute a reversion to the method of direct legislative rate fixing, in contradiction of the underlying character of the prevailing system of control, with-

²⁸¹ *Ibid.*, p. 478.

²⁸² *Ibid.*

²⁸³ Note the following from the concurring opinion of Commissioner Lewis (pp. 479-480): "Beyond the considerations which are presented in the majority report, another impresses me. It is that, if the revenues of the carriers are to be reduced some \$35,000,000 to \$40,000,000 a year, the cut should not be made in behalf of those who patronize that part of the transportation service that borders on the de luxe unless it clearly appears that the present rate is unreasonable. There are fundamental readjustments for which the \$35,000,000 to \$40,000,000 should be conserved. In passenger transportation, reductions when made should be in the basic 3.6-cent fare, which would apply to Pullman and coach travelers alike. . . . But other adjustments demand more prompt attention than passenger-fare adjustment. Reductions aggregating \$35,000,000 to \$40,000,000 in rates on basic commodities would not be inconsiderable." In the western district the shrinkage of revenue resulting from the removal of the surcharge "would cover the removal of the remainder of the *Ex Parte* 74 increase from coarse grains and mill products other than those of wheat, and a 14 per cent reduction added to the 1921 reduction of one-half of the increases of 1920, on wheat, flour, and meal." In the eastern district such shrinkage of revenue "if applied to grain and grain products . . . would afford a 15 to 18 per cent reduction." As for the southern district: "From the standpoint of public policy, the South stands in greater need of lower freight rates on fertilizer and some basic commodities than of a reduction of charges paid very largely by nonresidents who travel in superservices across her States."

out reference to the organic nature of the regulatory process, and by way of political censorship of specific administrative determinations. None the less, the dissatisfied interests have repeatedly resorted to Congress for relief since the Commission's adverse findings were made; and though the proposal for repeal of the surcharge has not thus far reached the stage of enactment into law, the legislative body appears to have lent a willing ear to the petitioners. Hearings have been held by Congressional committees, amounting, in effect, to a review of the proceeding before the Commission, numerous bills providing for the removal of the surcharge have been presented, and favorable action has been taken by the Senate.²⁸⁴ This procedure may well be characterized as "a striking and glaring example" of the recent legislative tendency to interfere unduly with the functions of the Commission.

To construe the various developments to which attention has been directed as effecting a destruction of the Commission's status as an expert and independent tribunal would constitute a serious distortion of the facts. Neither executive nor legislative influence has been exerted in such measure or has proceeded to such extremes as in fact to undermine the dominance of the administrative method of control or impair the judicial temper with which the difficult tasks of regulation must be performed. The Commission remains the outstanding administrative body of the federal governmental establishment, in the high quality of its labors as well as in the great sweep of its

²⁸⁴ Bills to abolish the Pullman surcharge began to be introduced during the 67th Congress, early in 1921; and during the next Congress a very large number appeared. On March 20, 1924, it was said that "something like 117 bills have been introduced in Congress to accomplish this purpose." *Congressional Record*, Vol. 65, p. 1924. No action was taken, however, until after the Commission's decision in *Charges for Passengers in Sleeping and Parlor Cars*, 95 I.C.C. 469 (1925). S. 862, providing for the abolition of the surcharge, was then attached as a "rider" to the independent offices appropriation bill (H.R. 11505), and was passed by the Senate, 56 to 8, on February 13, 1925. Public hearings on the amendment were held by the House Committee on Interstate and Foreign Commerce, February 18 to 20, and the Committee decided adversely by a vote of 16 to 2, largely because of the undesirability of Congressional interference with rate making and because of the opposition of the agricultural interests. On February 27, 1925, the House defeated the "rider" by a vote of 255 to 124. The Senate Committee on Interstate Commerce also held hearings on S. 1143, April 20 to 24, 1926, and still further bills have been presented since that time. See *Congressional Record*: Vol. 66, pp. 3606-3614, 4887-4913; Vol. 67, pp. 6272, 6288, 6714, 11609; Vol. 68, p. 5927; Vol. 69, p. 9675.

authority. The Commission itself, in conformity with a long tradition of intelligent and disinterested public service, has maintained a meticulous aloofness from the embarrassments of politics; and these standards of competence and integrity and impartiality have been reflected in the public confidence with which constantly increasing responsibilities have been intrusted to its care. Administrative control, under broad legislative policies, through the continuous and flexible exercise of discretion, on the basis of thorough inquiry, by a specialized tribunal "appointed by law" and "informed by experience," constitutes the established method of regulation in the federal sphere; and it is generally recognized that under this method of regulation the complete independence of the adjudicating tribunal must be scrupulously maintained. The overwhelming bulk of the Commission's tasks has been, and is being, performed under such a legislative structure, through such administrative processes, and in such freedom from interference. The emerging disposition to exert executive influence upon the Commission's determinations, whether directly or through manipulation of the appointing power, and to define the rights of special interests by direct legislative action, virtually by way of retrial of some of the Commission's proceedings, is not only a quite recent phenomenon, but it has merely touched the fringes of the extensive and highly complex regulatory system. The dangers which inhere in such an approach are very real, but they chiefly concern the future of the Commission rather than its past or present performance. The foregoing analysis of various developments which might impair the Commission's independence of action was designed to emphasize such trends as are clearly inconsistent with the maintenance of the prevailing methods of regulation, despite the fact that these trends have not, as yet, crystallized into a definite course of governmental policy, and that their practical influence, thus far, has been largely negligible. Persistence in this new approach, however, or the further extension of these recent tendencies, might seriously jeopardize the system of control which has been deliberately and laboriously developed over a period of more than four decades, and which has constituted, by comparison with all earlier methods, the most appropriate and effective instrument yet devised for the equitable adjustment of private rights and public interests. It is

highly significant that one of the ablest and most experienced American students of the problems and agencies of public control has recently found it necessary, by way of conclusion to a careful survey of the Commission and its work, to focus attention upon "the paramount importance in the public interest of both the executive branch and the legislative branch of the Government doing everything practicable to strengthen the Commission and refraining from any impairment of its dignity or sense of responsibility through interfering directly or indirectly with its discretion and authority."²⁸⁸

§6. SUMMARY AND CONCLUSION

An effort has been made in the preceding pages to indicate the nature and limits of the Commission's exercise of discretion, as a final aspect of the scope of its jurisdiction. The legislative sources of this discretionary authority, the administrative processes through which it is asserted, and the judicial doctrines under which its practical manifestations are sustained have been analyzed in considerable detail; and attention has been directed to certain recent developments, reflecting the exertion of external influence, which are calculated to impair the independence of action essential to the equitable and effective exercise of this discretionary power. It is but necessary to re-emphasize, by way of summary, the more general significance of these characteristics of the Commission's formal status and functioning experience.

Both the initial adoption and the continued expansion of the administrative system of regulating public service undertakings, in the federal sphere as in the case of the states, has been grounded in the pressure of practical need. While the method of judicial enforcement of the common-law obligations of public callings may have served as an adequate instrument of control under the relatively simple economic conditions which preceded the dawn of modern industrialism, it would constitute a virtual abdication of control in the public interest under the complex and dynamic relationships resulting from the operations of the railroad and other utility enterprises

²⁸⁸ Walker D. Hines, *op. cit.*, p. 24. For a brief survey of the entire problem, with numerous concrete illustrations of alleged interference, see L. C. Sorrell, "Political Rate-Making," *Traffic World*, Vol. 44 (Oct. 26, 1929), pp. 1049-1052.

of the prevailing industrial era. Judicial regulation, in common-law terms, merely provides private redress for private wrong; because its processes are prolonged and costly, they frequently are not invoked even on this basis; when invoked, they afford an avenue of relief only to those who are direct participants in the litigated transactions, regardless of the ultimate incidence of the burdens produced by maladjustments; they are confined to determining the legal validity of past arrangements, without prescribing appropriate courses of future action. Since the fundamental objective of government control is to maintain proper relationships between these key industries and the public, rather than merely to provide private redress by way of indemnification for past wrongs, some measure of affirmative legislative action was found to be necessary from the very beginning of the modern public services. Regulation through special charters and franchises, supplemented by more general statutory enactments, was deemed to constitute an indispensable minimum of positive governmental interference. But the course of experience disclosed unmistakably the inadequacies of the method of direct legislative regulation. The law-making bodies, sensitive to the constant pressure of political influence and possessed of no special competence for the intricate tasks of public service control, were unable to establish authoritative relationships between private rights and public interests on a just and effective basis; and even where such relationships, necessarily of restricted scope, were soundly determined in the first instance, they tended to serve as rigid adjustments, unresponsive to the changing demands of changing conditions. There was pressing need, in these circumstances, for a more comprehensive, a more realistic, and a more flexible system of regulation—a system grounded in unbiased inquiry, molded by informed judgment, enforced by specialized agencies, of expert personnel, functioning continuously. With such ends in view resort was had to the administrative method of control. The early bodies, of the advisory type, were in due course transformed into mandatory commissions, with a progressive extension of their jurisdictional scope and sweep of authority. The functions of the courts came to be restricted to tasks of review, performed, predominantly, as a means of providing mere negative safeguards against abuse of power; the functions of the legislatures came to be

confined to the enunciation of guiding policies, without attempt, for the most part, to define in concrete terms the complex of rights and duties involved in the enforcement of the accompanying legislative standards; vast powers were conferred upon the administrative tribunals to evolve specific principles and practices in furtherance of these general policies, and, on the basis of orderly fact-finding activity, to mold continuously and flexibly all of the more significant practical relationships between the public and the public service industries.

The dominant characteristic of this system of control is to be found in the broad scope of the discretionary authority which it entails. Both procedurally and substantively there is contemplation, at every turn, of a large exercise of informed judgment by the administrative bodies. In order that their determinations, designed to achieve positive ends, may be based upon the fullest possible disclosures of fact, these tribunals are free from hampering procedural restrictions. Complaints may be brought by associated groups, both private and governmental, as well as by individuals and business units directly concerned in the questioned adjustments; proceedings may be entered upon in the absence of complaint, on the initiative of the regulatory bodies themselves; in the conduct of the proceedings, there is great latitude as to the admissibility of evidence and the significance to be attached thereto. In other words, these commissions are endowed with broad investigatory powers, instead of being restricted by the artificial issues and legalistic requirements which so frequently characterize purely judicial inquiries. In conformity with this approach, too, they have the assistance of permanent technical staffs and they are often represented by special counsel. And the administrative findings, so arrived at, involve the exercise of mixed governmental functions. Controversies are adjudicated, and reparations are awarded; courses of action for the future are prescribed, and conditions are imposed in connection with permissive findings; complex and significant bodies of fact are ascertained, rules and regulations of diverse character are established, statutory violations are investigated, criminal prosecutions are instituted. There is a marked blending of judicial, legislative, and executive functions in this regulatory process, and it is applied, in these various aspects, with reference to the same parties, and frequently in different proceedings pending at the same time. In these

circumstances the workability of the system depends upon the intelligence and fairness with which the administrative authorities perform their many interrelated tasks; but the pervasive exercise of large discretionary authority is of the very nature of these tasks, not only in connection with matters of procedure, but, more significantly, in the fashioning of substantive adjustments. For the most part the legislative policies with the execution of which the commissions are charged are formulated in very general terms, by way of basic duties imposed upon the carriers and controlling powers conferred upon the regulatory authorities. Standards of action, largely undefined, are thus prescribed for both the public service enterprises and the administrative tribunals, but the proper translation of these standards into concrete arrangements, in the light of the complexities of each proceeding, the organic character of the regulatory process as a whole, and the pressure of constantly changing circumstances and conditions, is left to the ultimate determination of these governmental bodies, on the basis of their informed judgment. Since the primary objective, in most instances, is the protection and furtherance of the public interest, which is subject neither to precise definition as a general goal nor to automatic realization in concrete terms, the exercise of discretion becomes the dominant factor both in the disposition of applications, under the enabling powers, and in the adjudication of controversies, under the directing powers. The administrative determinations come to constitute a series of governmental acts, only the general channels of which are charted by the legislatures, and the enforcement of which, in the absence of vitiating constitutional or legal difficulties, is free from judicial interference.

The Interstate Commerce Commission was conceived as such a discretion-exercising tribunal from the very outset. This is clearly evidenced by the generality of the basic standards, still operative, established by the original Act to Regulate Commerce. Initially, the authority of the Commission was almost entirely confined to the sphere of rate control; and for guidance in this sphere, the first three sections of the Act merely prohibited unreasonable charges, unjust discriminations, and undue preferences. Regardless of whether, under the 1887 legislation, the Commission was limited to the condemnation of existing adjustments or could prescribe others in lieu

thereof for the future, the enforcement of these prohibitions, necessitating the determination of ultimate facts as to reasonableness and discrimination, rendered the independent exercise of informed judgment indispensable. But this was a mere beginning. As the weaknesses of the original statute were gradually removed and the authority of the Commission progressively expanded by subsequent enactments, the element of discretion became, unquestionably, the dominant characteristic of the regulatory process. The express delegation of directing powers to the Commission provided a highly flexible instrument, essentially legislative in character, for molding future adjustments; the authority conferred upon the Commission to act on its own initiative, as well as on complaint, was a reflection of the public nature of the relationships sought to be regulated and of the affirmative character of the responsibilities reposed in the established agency of control; the procedural reforms whereby, with the sanction of penalties, the Commission's orders became binding by their own terms, constituted an explicit recognition of the primacy of the administrative method and served as a basis for withholding the powers of judicial review from all determinations of a fact-finding or discretionary character. The jurisdiction of the Commission, in such terms, was extended to an important group of public service undertakings other than carriers by railroad; and in the expansion of the range of its substantive powers, the Commission was increasingly endowed with vast grants of discretionary authority.

The development of the original field of rate regulation affords an excellent example, even if we but recall a few of its more important aspects. The rate-making power, as conferred in 1906, was restricted to the prescription of maximum rates; by the 1920 legislation the Commission was authorized to fix minimum as well as maximum rates, and thus, within its discretion, to prescribe the absolute rates to be charged. Initially the Commission's authority in rate controversies could be invoked only after charges had actually been put into effect; by the 1910 legislation, through the rate-suspension power, the Commission was enabled, within its discretion, to enter upon the processes of investigation upon the mere filing of proposed schedules. During the greater part of its history the Commission's authority over general rate levels was expressly conditioned only by the necessity of

observing traditional standards of reasonableness; the 1920 legislation enacted a rule of rate-making which, though nominally a more precise definition of legislative policy, opened up additional zones, of broad scope and far-reaching significance, for the exercise of administrative discretion. Under the mandates of this rule, the Commission is required, for the purpose of maintaining railroad credit and providing for the development of an adequate transportation system, to determine and announce, from time to time, what constitutes a fair rate of return to the carriers; in the establishment of a rate base for its computations of a fair return, it is required, in almost complete absence of Congressional guidance, to ascertain what value shall be placed upon carrier properties; and it is directed to make available the necessary revenue, as thus determined, only under the largely undefined conditions of reasonable expenditures for maintenance and of honest, efficient, and economical management. Moreover, as a means of further safeguarding the transportation system as a whole, the Commission is empowered, with like resort to judgment and discretion in controlling measure, to regulate the disposition and use as between the Government and the railroads of excess earnings accruing to individual carriers; to apportion joint rates as between participating carriers with primary reference to the public interest; to adjust rate relationships as between intrastate and interstate commerce and the flow of revenue resulting from local charges in terms of national requirements.

Nor has this growing reliance upon the exercise of administrative discretion been confined to matters of rate control. The affirmative approach, with its flexible methods of performance, which is reflected in these rate provisions has been extended to the field of service and facilities and to the sphere of organization and finance. Even under normal conditions the Commission's powers over car service necessitate the concrete application of such general standards as are implicit in the requirements of safety, adequacy, and reasonableness; under conditions of emergency they authorize summary action, in complete disregard of prevailing regulations and by way of unrestricted subordination of private rights to public interests, with reference to such highly significant matters as the common use of rolling stock and terminal facilities, the observance of preferences

and priorities in the movement of traffic, the routing and distribution of shipments as between different carriers. And the control exercised over the extent of the railroad plant and service to be made available by the carriers is also dominated by the element of discretion: voluntary extensions and abandonments of road, as well as compulsory construction of new lines, are made to depend upon uncharted administrative findings of public convenience and necessity. Similarly, the Commission's enabling powers in connection with intercorporate relations and the issuance of securities are overwhelmingly discretionary in character. Whether authority is sought for the pooling of traffic or of revenue, for acquisitions of control of one carrier by another through lease or stock ownership, or for actual consolidations of carrier properties, findings of public interest are essential to approval, and terms and conditions may be imposed under which the proposed courses of action may be consummated; and applications to issue securities or to assume obligations must likewise be shown to be compatible with the public interest, both as to their general purposes and in terms of the specific instruments under consideration, and the imposition of conditions is again expressly contemplated. In all these directions, as in numerous other aspects of the legislative structure, the Congressional enactments virtually provide a basis for a continuing process of administrative law making as applied to particular situations.

The sweeping exercise of discretion which thus inheres in the legislative mandates is reflected, in practice, throughout the range of the Commission's labors. This has been amply illustrated, in this volume, by the nature of the interrelationships which subsist between railroad regulation and the control of allied utilities, and by the character of the federal assertion of power over intrastate commerce; it will be even more strikingly revealed, in the volume following, by the substantive direction of the Commission's activities in the major fields of control—particularly in the valuation of carrier properties and in the regulation of extensions and abandonments, intercorporate relations, security issues, rate relationships, and the level of charges. But entirely apart from the substance of the Commission's findings, the regulative processes employed are characterized by such a high degree of flexibility that the element of discretion tends to control the

disposition of the vast bulk of proceedings. Since the ascertainment of facts with regard to both the past and the future, in terms of such general standards as justness, reasonableness, fair return, convenience and necessity, public interest, and the like, is the Commission's primary objective, precedents are but feebly operative, and rights and interests are seldom adjudicated with any degree of definitiveness. The outcome of each proceeding is determined by its own distinctive circumstances, and opportunities for change or modification, through rehearings and supplemental investigations, are generally made available as matters of course. This approach springs not only from the basic nature of the administrative method, which seeks to provide continuous and flexible control by a body of experts in the light of specific records developed for its consideration, but also from certain important peculiarities which often attach to the Commission's determinations. In comprehensive proceedings, like those dealing with general rate levels, the Commission frequently issues sweeping orders, designed to attain major ends, despite deficiencies in necessary data; and even more frequently, as in case not only of general rate levels but of intrastate-interstate rate relationships and the division of joint rates, it is compelled to act on typical evidence, without precise support for the all-inclusive findings which it may promulgate. In these circumstances the original determinations, which may themselves bring maladjustments into being, are necessarily provisional in character, at least as far as their full sweep is concerned, and subsequent modifications become inevitable. The addition of saving clauses to such orders is not merely a means of providing safeguards against attack in the courts, but rather a frank recognition of the inconclusiveness, on the merits, of the immediate administrative findings, and of the essential continuity of the regulative process. Not infrequently, furthermore, the Commission voluntarily refrains from formal action, despite acknowledged authority in the premises and adequacy of record by way of support, in order that the carriers themselves may have an opportunity, in the first instance, to adjust the difficulties disclosed, just as it has come to permit the state authorities to eliminate intrastate-interstate rate maladjustments, despite its own unquestioned power to issue direct orders; and often, too, temporary action is deliberately taken, in order that opportunities may be

afforded for necessary or desirable experimentation. Through pragmatic processes of this character, molded by the requirements of each situation as it arises, the Commission, on the basis of continuing inquiry, is enabled to carry out the policies of Congress in realistic and effective fashion, for the achievement of general constructive ends as well as the elimination of specific abuses. It operates, within broadly defined channels, as an independent governmental agency of economic control.

In recognition of the legislative intent as to the dominance of this administrative method, the Commission's findings and orders, in so far as they are grounded in such necessary exercise of judgment and discretion, are clothed with finality. Under the prevailing regulatory structure, the courts insist upon resort to the Commission in the first place, and they withhold interference with all determinations which constitute an expression of discretionary authority. Through the doctrine of primary jurisdiction they recognize that the judgment of the Commission is an essential preliminary to the assertion of judicial power; through the doctrine of so-called negative orders they so far accept this judgment as to decline, on any basis, to review proceedings in which the relief sought has been denied by the Commission; and the grounds of judicial censorship of the Commission's affirmative orders, whether mandatory or permissive, consistently exclude all matters involving the exercise of administrative discretion. The Commission's conclusions on issues of reasonableness, discrimination, and public interest, as well as on those raised by such other general standards as guide its concrete findings with respect to past adjustments and future relationships, are deemed to involve questions of fact the determination of which is inherently dependent upon the judgment of the tribunal "appointed by law" and "informed by experience." Since these conclusions are based upon the character of the conflicting interests, the nature of the alternative expedients, and the weight of the evidence adduced, they are held to be entirely free from the reviewing processes of the courts. Essentially, judicial censorship confines itself to the matter of power—that is, the courts are almost exclusively concerned with legal issues clustering around the problem of whether the Commission, in the contested proceedings, has acted within the scope of its authority. While these issues assume many

forms—involving not only basic constitutional questions and direct questions of statutory construction, but inquiries as to whether, because of the absence or palpable disregard of evidence, or because of the misapplication or failure to apply controlling rules of law, arbitrary action or abuse of discretion has resulted—they have not in their outcome, with perhaps the notable exception of the valuation controversy, infringed upon the sphere of the Commission's legitimate exercise of discretion. The courts provide negative safeguards against unlawful action; the tasks of positive control are reserved to the Commission, and the findings and orders to which they lead are free from disturbance. Indeed, under the broad scope of the present legislative structure and under the matured relationship between the Commission and the courts which now prevails, relatively few administrative determinations are judicially invalidated on any ground. On the whole, the respective spheres of judicial and administrative activity have come to be differentiated with adequate clearness and certainty, and commendable restraint is being exercised by both the Commission and the courts.

There is little questioning today of the desirability of the prevailing relationship between the Commission and the courts. Judicial review of matters of law is obviously essential. The safeguards provided against unconstitutional assertions of power, whether through the Congressional enactments as such or through the administrative orders based thereon, are but a concrete recognition in this province of requirements which have been deemed fundamental to our entire institutional development; and the condemnation of administrative holdings which transcend the valid powers conferred is but a means of confining delegated functions and their exercise within the bounds of statutory jurisdiction. Judicial determinations of this character have imposed no unnecessary restraints upon the essential freedom of the Commission. They have but defined its jurisdiction on an authoritative basis, in conformity with orderly legal processes. And like ends have been served by the judicial requirements that findings and orders be supported by evidence and that pertinent rules of law be not ignored or misapplied. Administrative determinations which do not comply with such requirements are vitiated, not because of differ-

ences in judgment as between the primary tribunal and the courts, but because they involve abuse of authority or issue in arbitrary action. Judicial censorship on these grounds, therefore, which is designed to maintain the fundamentals of a *régime* of law and to render possible its organic development, is likewise restricted to defining the limits of administrative power. But while it is clearly necessary that judicial review embrace all these matters of legal power, it is equally important that it be not extended beyond these limits—that the discretion of the Commission be not subordinated to the discretion of the courts. For the most part, in this field, regulatory activity does not lend itself to the development of concrete legal rules; in the enforcement of the general standards established by Congressional enactment, resort to judgment and discretion is unavoidable. The issue, in these circumstances, is as to whether the conclusions of the Commission or those independently arrived at by the courts shall be controlling; and weighty considerations, grounded in both principle and experience, have led to the resolution of this issue in favor of the Commission. Administrative determinations are recognized as conclusive, to the extent that they reflect a lawful exercise of discretion, because through such recognition the system of regulation tends to develop on a sounder basis and to be rendered a more effective instrument of control. Because of its specialized tasks, expert personnel, technical assistance, informal procedure, and continuous investigation, the Commission possesses a competence in its province which courts of general jurisdiction, restricted by the traditional outlook and machinery of judicial process, can scarcely hope to attain; and, as a practical matter, administrative finality avoids the costs and delays incident to judicial review, and thereby effectuates the remedial purposes of regulatory policy more promptly and with less social friction. The general futility of the Commission's efforts during the first two decades of its existence, when the enforcement provisions of the original Act virtually rendered the courts the agencies of ultimate control, disclosed sharply the need of narrowing the scope of judicial review to matters of legal power; and the fruitful experience of the ensuing years, under the prevailing relationship between the Commission and the courts, has amply justified the dominance of

administrative authority. The desirability of this delimitation of functions has been recognized both by the Congress and by the Supreme Court, and in no quarter is there counsel of retreat.

If the institution of any policy of increased judicial control over the Commission's exercise of discretion is without sound warrant, political interference with its processes and results merits absolute condemnation. The exertion of political influence upon the performance of its diverse functions and numerous tasks is entirely inconsistent with the prosecution of impartial inquiry and the exercise of independent judgment, as contemplated by the law-making body and as assumed by the courts. Because of the very fact that the sweep of the Commission's discretionary authority is so vast in its scope and so controlling in its incidence, aloofness from political entanglements and freedom from external pressure are indispensable. Such requirements are so basic in character that one cannot but view with concern the recent developments threatening the maintenance of the Commission's independence. Interference by the executive branch of the Government is an unmixing evil, however subtle and indirect its manifestations may be. No one would question the subversiveness of direct executive pressure upon an independent tribunal charged with tasks of adjudication which involve the adjustment of significant rights and interests both for the past and for the future; the pre-judgment of pending issues, the denial of reappointment because of dissatisfaction with specific determinations of commissioners, and the general control of personnel in terms of furthering political ends, are equally calculated to undermine informed and disinterested administrative performance. Political policy has no place in the application and enforcement of duly enacted Congressional mandates. And some of the activities of the legislative branch of the Government may likewise prove harmful, although there can be no question as to the right of Congress to mold the character of the regulatory structure. In so far as the legislative enactments establish general policies, by way of supplement or amendment of the existing system of control, they but modify or extend the basic charter under which the Commission is operating, without impairment of the administrative method or unwarranted restriction of administrative freedom; in so far, on the other hand, as they are designed

to serve special interests, by way of censorship of the Commission's specific determinations, they tend to substitute political power for the established system of orderly inquiry, in disregard of the organic character of the regulatory process, in derogation of the independence of the administrative tribunal, and in reversion to methods of control which are inherently unsuited to the complexities of the prevailing social and industrial order. While this undesirable intrusion by the executive and legislative branches of the Government has not, as yet, issued in serious consequences, such developments in this direction as have emerged in recent years are sufficiently ominous to arrest attention. Only through avoidance of the pitfalls which they involve can the full possibilities of independent administrative regulation be realized.

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