

# THE LAKE CARGO COAL RATE CONTROVERSY

A Study in Governmental Adjustment of a  
Sectional Dispute

BY

HARVEY C. MANSFIELD, M. A.

*Instructor in Government, Yale University*

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY  
IN THE  
FACULTY OF POLITICAL SCIENCE  
COLUMBIA UNIVERSITY

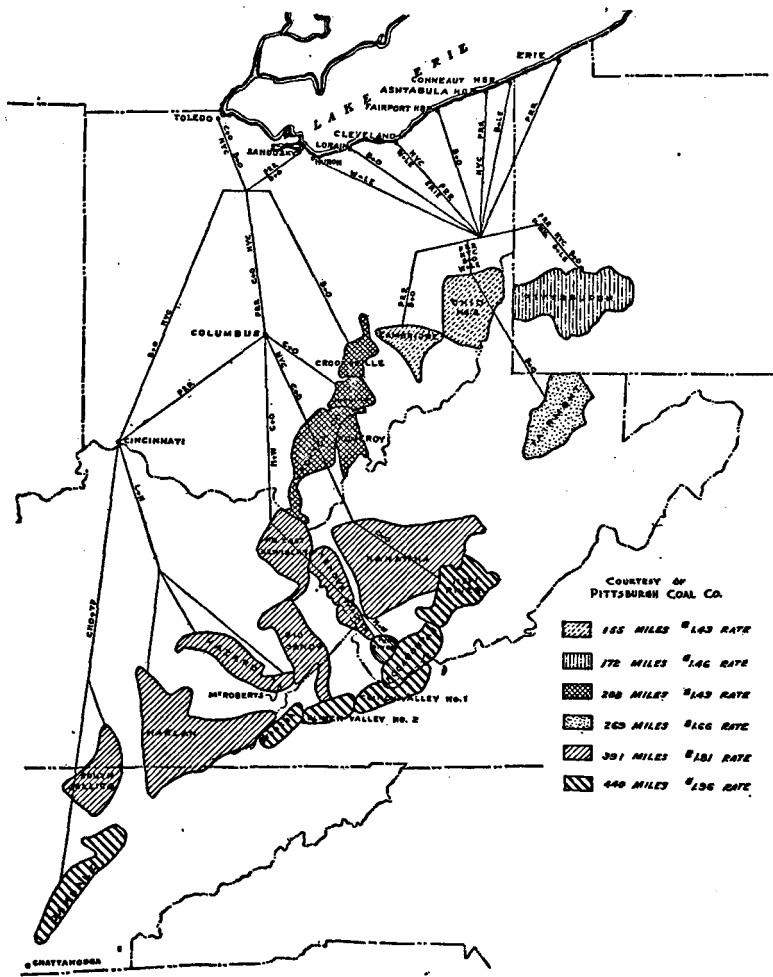
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My wife has been a constant companion through the labor of preparing this study, under particularly difficult circumstances.

By a familiar formula, the judgments here expressed are my own.

HARVEY C. MANSFIELD

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# CONTENTS

	PAGE
ACKNOWLEDGMENTS . . . . .	5
CHAPTER I	
Introduction . . . . .	11
CHAPTER II	
THE LAKE TRAFFIC IN THE COAL INDUSTRY	
Introductory . . . . .	14
Anthracite Distinguished . . . . .	15
The Characteristic Unsettlement . . . . .	16
Public Investigations . . . . .	18
Bituminous Problems . . . . .	21
Consumption Trends . . . . .	25
Profits . . . . .	28
Wastes . . . . .	29
Captive Mines . . . . .	30
Labor Troubles . . . . .	31
Sectionalism and the Lake Trade . . . . .	37
Operators and Carriers . . . . .	39
CHAPTER III	
THE EARLY CASES	
Before 1912 . . . . .	42
1912—The Boileau Case . . . . .	48
1912—West Virginia Case . . . . .	55
Results of the 1912 Decisions . . . . .	60
Ohio . . . . .	66
Conclusion . . . . .	67
CHAPTER IV	
THE 1917 CASE AND THE WAR	
The Aftermath of 1912 . . . . .	69
The Westbound Adjustment . . . . .	70
Back to the Commission . . . . .	72
The War Dislocations . . . . .	75
The Post-war Readjustment . . . . .	80



## CHAPTER V

## LAKE CARGO LITIGATION SINCE THE WAR

I. Docket 15007 . . . . .	88
Interveners . . . . .	90
The Hearings . . . . .	93
The First Decision. . . . .	97
II. Second Thoughts . . . . .	100
Changed Conditions . . . . .	100
Reconsideration . . . . .	104
III. I. & S. Docket 2967 . . . . .	114
Competitive Reductions from the South. . . . .	114
The Lake Coal Trade in 1927-1928 . . . . .	117
The 1928 Decision . . . . .	120
To the Courts . . . . .	124
Before the Supreme Court . . . . .	131
IV. Docket 23240. . . . .	134
Retrospect. . . . .	139

## CHAPTER VI

## THE PERSONNEL OF THE INTERSTATE COMMERCE COMMISSION

Bureaucracy . . . . .	141
Appointments Based upon Ability and Training . . . . .	143
Tenure. . . . .	150
Political Influences upon the Commission . . . . .	154
Recent Commission Appointments . . . . .	161
Harding Appointments . . . . .	163
Confirmation of Woodlock . . . . .	165
The Taylor "Deal" . . . . .	167
The Reed-Woodlock "Deal". . . . .	169
The Woods Appointment. . . . .	171
Woods' Successor. . . . .	176
"Getting" Esch . . . . .	178
Farrell and Porter. . . . .	183
Aitchison. . . . .	185
Jones and Tate . . . . .	186
Lee and Mahaffie . . . . .	189
What of it? . . . . .	191

## CHAPTER VII

## RESPONSIBILITY FOR DISCRIMINATION

Judicial Review. . . . .	195
What is Discrimination? . . . . .	198

CONTENTS

9

	PAGE
The <i>Ashland</i> Rule . . . . .	203
War Changes. . . . .	207
Modification of the Rule . . . . .	210
The <i>Ashland</i> Rule in Lake Cargo Litigation . . . . .	219
The <i>Gulf Port Differential</i> Case. . . . .	226
The Fate of the <i>Ashland</i> Rule . . . . .	230

CHAPTER VIII

THE CONSIDERATION OF COMMERCIAL CONDITIONS IN  
RATE-FIXING

Reasonableness. . . . .	234
"Relative Reasonableness". . . . .	238
The Consideration of Commercial Conditions. . . . .	242
The Hoch-Smith Resolution. . . . .	248
Rates to Give a "Fair Share" of the Business. . . . .	257
The Benefits of Geographical Location . . . . .	258
Conclusion . . . . .	259
APPENDIX . . . . .	262
BIBLIOGRAPHICAL NOTE. . . . .	265
TABLE OF CASES . . . . .	267
INDEX . . . . .	271

## CHAPTER I

### INTRODUCTION

THE Interstate Commerce Commission in January, 1932, dismissed a complaint by Pittsburgh and Ohio bituminous coal operators that the relationship between their lake cargo coal rates and those paid by their competitors in southern West Virginia and eastern Kentucky was unjustly discriminatory. The complaint sought to secure a further spread in the differential<sup>1</sup> that exists between the two rates whereby West Virginia operators must now pay thirty-five cents a ton more than the Pittsburgh operators. Lake cargo is the name in the trade for coal that is taken by rail to the ports on Lake Erie from Erie, Pa., west to Toledo, there to be transshipped as cargo by vessel to the several ports on the upper lakes for use in the Northwest. The map indicates the principal origin districts of the coal, the rail routes and the ports.

The announcement of the Commission's order brings a pause in a controversy that has extended now for over twenty years and which we may expect to see renewed in years to come. It is the purpose of this book to investigate the ramifications of the struggle thus far, as they have involved the federal government.

A generation ago the bituminous coal markets of the eastern United States, including those at the lake ports, were supplied chiefly from mines in the vicinity of Pittsburgh and eastern Ohio nearby. Some coal was being mined in the West Virginia panhandle around Fairmont, but the principal resource of the rest of the state was lumber. Great stands

<sup>1</sup> *I. e.*, the difference between the rates, which is the measure of the rate advantage that one competitor enjoys over another in reaching a common market.

of timber were cut and railroads were built to take the lumber to market. Conservation was unknown, the timber supply was rapidly exhausted, and the railroads were left with little other traffic. Coal was known to exist in the southern part of the state, but the distance from any large consuming market restricted its development. At about the beginning of this century the railroads, anxious for new business, offered rates so low that operators in southern West Virginia were enabled to ship coal to many of the markets that Pittsburgh filled, despite the considerably greater distance from West Virginia, at a cost that allowed them to compete.

The lake cargo market was one of these. The Pittsburgh rate to the lake was taken as a base, and a differential of a few cents added. The West Virginia operator had to absorb this differential before he could make any profit, but nearly everything else he had to pay for was cheaper there than in Pittsburgh. Coal lands cost less, and taxes, wages and standards of living were lower. With these advantages the West Virginia operators began to make inroads on the lake cargo market. Their carriers could not make a profit on the low rates they offered unless they got a large volume of traffic, so they did what they could to help.

With this development came the usual speculative boom. Northern railroads and other large corporate users of coal bought up reserve lands, and so acquired a stake in the success of the development. From that time and for the next twenty-five years West Virginia, and later eastern Kentucky as well, recorded an almost uninterrupted growth in coal production. Today West Virginia ranks the equal of Pennsylvania in total bituminous coal production, and has far outstripped it in the lake trade.

The Pittsburgh and eastern Ohio operators have not submitted without a struggle. Although many other factors are involved, the freight rate to Lake Erie is an immediate

and vital one. Since 1909 the northern operators have been engaged in an unremitting effort to increase the rate differential between the two fields. Freight rates are by law regulated by the Interstate Commerce Commission, so much of the controversy has taken place there. Neither party has hesitated, however, to resort to any other governmental aids that seemed likely to prove useful. There have been court appeals from the decisions of the Commission, and there have been political appeals to the body in whose hands is lodged the power to confirm appointments to the Commission, the Senate.

The lines of division in the industry are sectional, and these are reflected in the political aspects of the struggle. As in other sectional controversies in our history, they cut across party lines. Republican and Democrat stand together here, if they come from south of the Ohio River-Mason-Dixon line, to combat the efforts of senators from north of that line. Twenty-five years of this conflict thus offer a pretty fair test of the adequacy of our federal machinery to compose sectional differences. They show how deep-seated and permanent are the causes of sectional quarrels. They demonstrate once again that the roots of political strife are to be found in the soil of commerce and industry.

The method of procedure in this book, after outlining the industrial setting and the place that the lake cargo traffic occupies in it, will be to relate in detail the story of the controversy from its beginnings to its latest phase. Following that a chapter is devoted to the politics of appointments to the Interstate Commerce Commission, involving a review of the recent personnel of the Commission. Two final chapters deal with some legal problems of rate regulation that have arisen in the course of the controversy, and that bear directly upon many other rate disputes between sectional interests.

## CHAPTER II

### THE LAKE TRAFFIC IN THE COAL INDUSTRY

#### INTRODUCTORY

THE lake cargo coal trade is a competitive focus of the bituminous coal industry. Millions of tons of coal must be supplied every year to the industries, railroads and homes of the northwest, in the Twin Cities and beyond, and the bulk of it is carried in the freighters that ply the lakes during the season of open navigation. The coal may come from any of the Appalachian fields, from northern Pennsylvania to southwestern Virginia and Tennessee; it may go to any port from Chicago to Duluth and thence west; but the lake journey is common to all. Lake rates are published on a low basis, as though they were parts of through rates, but economically speaking they are independent and separable. As a matter of business, coal prices at the eastern end, in the Lake Erie ports where transshipment is made, must be equalized. Consequently, any differences in the transportation cost of getting coal to the lake must find compensation in reduced operating costs or profits for the mine operators.

The lake traffic moves in large volume, it comes at a slack season, and so is very attractive. The sharpness of competition, however, limits participation in the business to those whose survival powers are greatest. These low-cost producers are a minority of those who at one time or another in recent years have undertaken to mine coal. Marginal producers have made desperate efforts to keep their places.

Coal mining is distinctly a sectional industry, in which

local jealousies play a large part. Production costs vary markedly from one field to another and prices have fluctuated even more widely. Different fields have dominated the markets in turn. Coupled therefore with internecine struggles in each district, are broader competitive campaigns between one district and another. Ohio has been displaced, and Pittsburgh, that once held the lion's share, has yielded first place to West Virginia. Now Kentucky vies with Pittsburgh for second place.

All the producing fields have, in varying degree, been affected by some major factors of the industry as a whole—mining and processing methods, labor conditions, market demand, consumption trends and the business cycle. Success in individual fields has therefore been due not solely to competitive conditions in those fields. The coal industry and its ills have already received intensive study<sup>1</sup> and it is thus necessary here only briefly to review some features of the industrial setting in which the lake coal controversy has arisen.

#### ANTHRACITE DISTINGUISHED

It should be emphasized at the beginning that lake cargo coal quarrels concern only bituminous coal, not anthracite. The anthracite producers have their own troubles with competition from other forms of fuel, but they are not the troubles of the bituminous operator. The wartime upsets in both industries perhaps tended to confuse them in the public mind, but the situations in the two industries differ radically. For example, the "commodities clause", forbidding carriers to haul commodities which they themselves have produced, was inserted in the Hepburn Act of 1906 to strike at the roads in the anthracite field. It has never been seriously pressed against bituminous roads although the

<sup>1</sup> See Bibliographical Note, *infra*, p. 265.

language of the clause is broad enough to include them a well.

Anthracite coal is definitely limited in actual and potential supply. It is chiefly confined to a section of eastern Pennsylvania. Eight companies and eight railroads, associated in some manner presumably not violative of the "commodities clause", produce and haul 75% of the total and own 80% of the unmined acreage, approximately. For a few of these carriers, like the Pennsylvania and the New York Central, this business is only one item in the day's work. For most of them, the Reading, (including the Central of New Jersey which it controls) the Lackawanna, Erie, Lehigh and the Delaware and Hudson, the common name "anthracite roads" indicates their reliance on the commodity traffic. The anthracite companies' labor is completely organized, and their production since the post-war disturbances has been controlled. Together they enjoy a substantial monopoly, as is evidenced by the "premium" price commanded by the small tonnage of the independent producers above that circulated by the railroad companies. Possibly monopoly controls are needed here, but in any event the problem is very different from that of the bituminous fields where ruthless competition prevails, a situation like the "state of nature" as Thomas Hobbes described it, the "war of every man against every man".

#### THE CHARACTERISTIC UNSETTLEMENT

For more than two decades the bituminous coal industry has been chronically upset. The war and immediate post-war periods were especially difficult, but the trouble began much earlier and persisted throughout the so-called era of prosperity that followed. The extraordinary rise in coal prices during the war, coupled with the shortage and maldistribution of supply, led to attempts at federal control which



were renewed intermittently afterward. In a period of six years, 1916 to 1922, there were three major suspensions of mining. Operators blamed labor and transportation; labor blamed the operators and railroads. The public criticised all concerned, and investigations were held, but it proved impossible to assess ultimate responsibility.

Following the war, the United Mine Workers attempted to preserve their newly-gained standards of living, which were much higher than they had previously enjoyed. For several reasons the attempt failed. Unwise leadership and the halt in the wartime demand for men and for coal lessened the economic strength of the union. There were non-union fields in active competition. Most coal operators were hostile to organized labor and the government was unsympathetic. Moreover, our constitutional law does not yet recognize coal mining as interstate commerce, unless for the purpose of an occasional labor injunction, nor as a business "affected with a public interest". Such recognition is necessary before national legislation can deal effectively with the whole industry. The miners' union was unable to force the continuation of the wage scales it demanded, and even found itself presently engaged in a desperate struggle to maintain its very existence. It is not too much to say that except in the anthracite region and a few bituminous districts in Illinois, Indiana and elsewhere not directly involved in the lake cargo traffic, the union lost that struggle too, at least for the time being. The United Mine Workers' organization has ceased to be a real factor either in the coal industry or in the lake cargo controversy.

The union, however, did not submit without a struggle. The years from 1919 to 1928 in the coal industry were thus filled with tumultuous conflict among operators and between them and organized labor.

## PUBLIC INVESTIGATIONS

The struggle was accompanied by continuous appeals for public intervention and investigation. Probably no industry has received so much investigation, and to date has profited so little from it, as coal mining. The famous strike of 1902 produced one investigation. The war upsets called forth several more, but the time was too short and the pressure too great for an adequate inquiry then.

The principal investigation, and one of the most pretentious fact-finding tasks ever laid upon a governmental body was that of the United States Coal Commission, following the disastrous strike in 1922. This Commission, although limited by its opponents to a statutory life of eleven months, and to a reliance upon voluntary testimony, nevertheless undertook a comprehensive survey of all the information available on every phase of the industry. Its voluminous report has been a mine of material for popular writers, reformers, agitators and indeed all who have made serious study of the problems of the industry since. No later investigating commission, with the possible exception of the Wickersham Commission on Law Enforcement, has rivaled the scope of its efforts. The Coal Commission's report, however, it may be said without disparagement, proved no more a solution of the problems to which it was addressed than has the Wickersham Commission's report. The recommendations for dealing with the coal industry were immediately disregarded by Congress, on account of the opposition of operators affected, and the prevailing desire for a relaxation rather than an extension of government controls.

In succeeding years many essential facts have changed. The union is now moribund. Car shortage has disappeared and the number of operators has greatly decreased. Assumptions based on the Coal Commission's report are therefore not wholly safe. Moreover, it is generally admitted, when

coal operators speak frankly, that certain data were not fully available to the Commission. Without the power of compelling testimony its conclusions regarding operators' profits and losses lacked the authority that attaches to similar conclusions by the Interstate Commerce Commission regarding railroad finances.

Some phases, also, of the relations between operators and unions were shielded from the Coal Commission's scrutiny. For example, one of the principal items ostensibly in controversy between operators and unions in the northern bituminous fields, was the granting of the "check-off", which involved the recognition of the union and the provision of a steady revenue for the union treasury. It is now known that some operators agreed to the "check-off" on the secret understanding that the funds thus obtained would be used only in efforts to unionize their non-union competitors to the south. Likewise, some non-union operators did not hesitate to employ the striking union miners of their northern competitors, in order to encourage the strike. Thus strong hostility among operators led them locally to foster the very unions they fought in order to weaken their competitors.

On the other hand, after the West Virginia operators had successfully demonstrated the usefulness of a series of remarkably severe labor injunctions which practically prevented any activity in the name of the United Mine Workers in West Virginia, these same operators furnished evidence to northern operators for use in a campaign of injunctions against the unions in their northern strongholds. These injunctions contributed to the final crushing of the United Mine Workers in western Pennsylvania. Details of such transactions as these naturally were not elicited by voluntary testimony before the Coal Commission.

Another extensive public investigation occurred in 1928

as a result of the strike that followed the expiration of the Jacksonville wage agreement in 1927. During the winter of 1927-28 there was much hardship among the miners, and in February, 1928, public demand, skillfully stimulated by the union leaders, brought about an investigation by the Senate. The Committee on Interstate Commerce, in pursuance of a resolution offered by Senator Hiram Johnson, undertook the task.<sup>2</sup> Its chairman, Senator Watson, later the Republican floor leader, found such a duty little to his taste or talent. The brunt of the investigation accordingly fell upon a subcommittee headed by Senator Gooding of Idaho, who as State Governor had had some experience of labor troubles.<sup>3</sup> The group also included Senators Wheeler, Wagner and Couzens.

Although the volume of testimony was huge, filling some 3500 undigested pages of hearings, the investigation was neither as inclusive nor as conclusive as that of the Coal Commission in 1923 and was much less satisfactory. The operators were immediately antagonized by what they regarded as a predisposition among some committee members in favor of the union. The widely heralded calling of important figures, John D. Rockefeller, Jr., R. B. Mellon, and Charles M. Schwab, served chiefly to demonstrate the futility of pressing Mr. Schwab to discuss unwelcome subjects. Union officials largely guided the course of the hearings, and it is difficult to say from their testimony whether their concern was for genuine grievances or for showmanship. Certainly both elements were present. Their recital of labor injunctions affecting coal miners conveys a vivid impression

<sup>2</sup> *Hearings before the Senate Committee on Interstate Commerce, on Conditions in the Coal Fields of Ohio, Pennsylvania and West Virginia*, pursuant to S. Res. 105, 70th Cong., 1st Sess. (1928).

<sup>3</sup> He was Governor of Idaho in 1905 when the murder of ex-Gov. Steunenberg led to the sensational trial of "Big Bill" Haywood. See Louis Adamic, *Dynamite*, ch. xv (1931).

of what the supposedly equal protection of the laws may mean in actual practice. On the other hand at least one of the individual cases of destitute miners paraded before the committee was not *bona fide*, and that sort of evidence seems to have been intended chiefly as a bid for sensational publicity.

In the end the committee's labors bore little fruit. It was not united in its recommendations. In a presidential campaign year, the unnecessary stirring of such a controversial subject was farthest from the desire of Congress. The strike collapsed, the committee's report was definitely shelved, and public attention turned to the impending Hoover-Smith campaign. The actors in the drama of the coal fields slipped off the public stage.

Since then the coal industry has muddled along, unnoticed alike in the era of the bull market and in the depression that followed.<sup>4</sup> Before 1929 the unwelcome aspects of the total industrial picture were screened from public view, and as to the coal industry they still are, despite the Dreiser expedition. So long as the supply of coal is ample and the price cheap, public interest will hardly be diverted from the woes of the general depression to the woes of the coal producers until there are further outbursts of violence in the coal fields. A permanent solution of the problem of economical coal production seems to have been little advanced by public investigations thus far.

#### BITUMINOUS PROBLEMS

The heart of the difficulty in the bituminous industry lies in the severity of the competition that results from an enormous surplus of productive capacity divided among a large number of independent producers. The price the operator

<sup>4</sup>E. E. Hunt (ed.), *Recent Economic Changes* (1929), dismisses the coal industry briefly, p. 440.

receives is entirely inadequate to pay the physical and human costs of the industry. This was true of the decade before, and has been true of the decade since, the exceptional war-time period when a shortage of men and an extraordinary demand for coal coincided. If demand were unlimited, or if the distribution system were so unified and informed as to direct production intelligently, a price might be maintained that would afford ample reward for both operator and miner. Neither of these conditions obtains, and the result is that today even the operator, in his superior bargaining position, is not earning a "fair return". Out of the selling price of coal at the tippie (not necessarily to the consumer) must ultimately come miner's homes, public utilities and community welfare projects in mining towns, whether built by the company or by its employees, as well as wages and profits. The first necessity of the coal industry is either a higher relative price for coal at the mine or a delivered price sufficiently lower to attract a considerably larger volume of consumption. This would involve a drastic cut in the costs of distribution.

Many factors contribute to the basic difficulty. One is the scantiness of continuous and exact information about the industry. The chaotic distribution system and the jealous particularism of operators stand in the way of providing much of the full, continuous and current data, that are essential for stabilization and long-distance planning. Lack of information, however, is rather a symptom than the disease itself. The lack of any unified control or planning of production is more important.

The total coal reserves of the country seem adequate for perhaps two to five centuries, depending upon the limits of availability assumed. They underlie a tremendous area of land, much too large and valuable to be monopolized under present conditions. It is true there are large holdings. The

Norfolk & Western Ry. for example, through the Pocahontas Coal & Coke Co., whose bonds it guarantees, is said to control some 300,000 acres of coal lands in West Virginia. The United States Steel Corporation and other large-scale industrial consumers, as well as the larger coal companies, have enormous coal land reserves. Thus an incidental effect of a rise in coal prices to a level that would fairly sustain the industry would be to add an enormous increment of unearned value to those lands and to their owners. Although defended by their owners as a necessary precaution to ensure an adequate fuel supply in the distant future, these large reserves lay a heavy overhead charge of interest and taxes on current operations.

Taken as a whole, however, bituminous production is by no means confined to large-scale operators. As late as 1929, out of 6,057 active mines, although 83% of the total tonnage came from mines producing 100,000 tons or over, there were nearly 1500 mines in that class; and, on the other hand, there were 2541 mines producing less than 10,000 tons, and 1361 producing between 10,000 and 50,000.<sup>5</sup> Figures for earlier years were much more striking, since the trend is distinctly toward larger units. The small independent operator working a lease is still a characteristic though gradually diminishing feature of the industry.

Concurrently with the large number of small operators there exists an unused surplus capacity far beyond any conceivable need. Even in 1929 when most industries were operating at capacity, this surplus was estimated at 40% merely on the basis of the number of idle days at the mines then open, without considering the evident possibility of re-opening mines that had been shut down, or of hiring additional men. The 1929 condition was a large improvement over 1923, when the surplus was 70%.

<sup>5</sup> U. S. Bureau of Mines, *Bituminous Coal Tables, 1929 (1930)*.

Other industries have in recent years had to contend with surplus production, actual or threatened. The problem is always difficult, but it has not always proved insoluble. In a few cases, like steel, industrial combinations in trusts have provided an answer. Marketing associations in agriculture and dairying, pro-rating agreements in oil, pools in shipping, cartels in copper, are some of the other solutions attempted. Thus far, coal operators have not achieved any such close organization. On the contrary, in few industries has the rule of "every man for himself and the devil take the hindmost" been more literally applied. The union was a stabilizing force for a time, but is so no longer. In December, 1931, a regional sales agency plan was adopted under the auspices of the National Coal Association. It immediately encountered legal difficulties.

The operation of the anti-trust laws are still attended with a good deal of doubt, after forty years of interpretation, and until a test case on coal arises, few predict confidently the Supreme Court's attitude toward such an agreement. It is interesting to note that one of the earlier state cases in this country on restraint of trade under the common law held invalid, as against public policy, an agreement of coal producers and dealers who aimed to control and limit production.<sup>6</sup> There have been many recent proposals to amend the Sherman Act so as to relieve coal mining from its operation, but apparently the uncertainty that exists by reason of the presence of that Act is nothing compared with the uncertainty that would exist in its absence. A hardy perennial among bills on the calendar of the Senate Interstate Commerce Committee is one embodying the recommendation of the U. S. Coal Commission in 1923, and again urged as a result of the Senate Committee's investigation in 1928. A similar

<sup>6</sup> *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871). Cf. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1877).



bill is sponsored by Senator Davis of Pennsylvania. It would create a Bituminous Coal Commission and impose government control patterned on the interstate commerce act. It is unlikely that anything short of another major crisis threatening the country's coal supply will disturb the legislative repose of this bill, and in the meantime the coal lobby in Washington keeps a watchful eye upon it.

Despite legal and other obstacles, consolidation has made some headway in the past few years. This is shown by the fact that the membership of the National Coal Association, which in 1925 was 809, decreased during the succeeding five years to 479, while the tonnage produced by members increased measurably during the same period.<sup>7</sup> This trend will continue in the future, but the time when it will lead to limits upon production is still far off. The industry has not developed the self-restraint which would justify the absence of external restraint, and takes the resulting measure of anarchy as philosophically as may be.

#### CONSUMPTION TRENDS

It is coal consumption that has limited coal production effectively, and in this notable changes have taken place since the war. During the two decades from 1899 to 1919, the production of bituminous expanded at a yearly average rate of 16,800,000 tons. In the decade since, there was substantially no increase—fluctuation to be sure, but no discernible trend upward. If the rate calculated upon pre-war experience had been maintained, production in 1930 should have been in excess of 730,000,000 tons, or near the present estimated theoretical capacity of the mines. Actually it was less than 500,000,000, around which figure it has

<sup>7</sup> Report of the Executive Secretary, 13th Annual Meeting, National Coal Assn., Detroit, Oct. 15, 1930. See H. W. Laidler, *Concentration of Control in America Industry*, ch. iv (1931).

hovered for ten years until 1931. Consumption has nearly always lagged behind productive capacity, but before the war the continual expansion of operations was at least partially met by an annual increment of demand that could fairly be counted upon.

Since the war, consumption has been definitely arrested, for the time being at least. The causes are mainly two, the development of other sources of energy, oil, gas and water power, and the remarkable advances in the efficient use of fuel.<sup>8</sup> This may not be a permanent prospect for coal. There is a practical limit upon fuel economies. Known water power resources are definitely limited, and while the possible life of our petroleum resources has been consistently underestimated, in the light of subsequent discoveries of new producing fields and improved extracting and refining methods, it still seems improbable that the present scale of production there can be indefinitely maintained. If and when a decline comes, coal will feel the benefit. This will come sooner if the recently invented process of making gasoline from coal finds early acceptance. Moreover, the consumption of coal for heat energy for domestic purposes has shown a steady increase, greater than that of the population, reflecting higher standards in homes and offices. The long view for coal therefore is by no means hopeless, as total energy consumption may be expected to increase, efficiency limits to be approached, and competitive fuel resources to decline. Until present forces lose their vigor, however, the bituminous industry must budget its operations to not more than 500,000,000 tons a year, even in normal years.

A further aggravation of difficulties came from the temporarily high prices of fuel in 1917-18, 1920, and 1922-23, brought about first by the insatiable demands of the war, complicated by transportation troubles, and then by the

<sup>8</sup> For a detailed presentation of evidence, see *Coal in 1927*, pp. 411-429.

artificial curtailment during the strikes afterward. High prices led to rapid expansion between 1920 and 1923. Some 63,000 men, about 10%, were added to the number employed in mines, and the continued introduction of machine-mining methods increased the average output per man per day from 4 tons to 4.47, another 10% or more. Theoretical capacity increased from 796 million tons in 1920 to 970 millions in 1923, nearly double the annual consumption.<sup>9</sup>

In the language of the government report, "readjustment was inevitable". No such colorless expression, however, conveys the impressions of those who lived through the process. "Between 1923 and 1927, a total of 110,000 miners lost their jobs, 2320 commercial mines were forced to close, and mine capacity was reduced by 135,000,000 tons."<sup>10</sup> All this took place in an atmosphere of hostility that led to the use of every effort and resource that any party could muster, economic, political, legal or physical. "All the way through", said an official of the Pittsburgh Terminal Coal Corporation to the Senate Committee, "it has been a question of fight, fight, fight."<sup>11</sup>

The competition among operators derives added bitterness from the virtual helplessness of coal producers in stimulating added demand for their product. Demand is inelastic, and price reductions do not increase the volume produced, but simply decrease the revenue received. Every advantage gained by one operator is thus pretty directly at the expense of his neighbor.

The process and results of this "readjustment" form the

<sup>9</sup> *Coal in 1923*, pp. 516-17.

<sup>10</sup> *Coal in 1927*, p. 411. More recent experience is included in an article by F. G. Tryon, *et al.*, in *Coal Age*, p. 79, Feb., 1931, entitled "Drastic Liquidation of Excess Capacity". A trend toward large, but not too large, scale production is evident.

<sup>11</sup> *Conditions in the Coal Fields*, p. 226.

immediate background of the lake cargo controversy, for the fight for favorable freight rates on lake cargo coal, in order to retain or to secure a share in the lake market, was a major incident in the larger struggle for existence among operators and miners. The lake cargo controversy came to a head for the first time since the war with a decision of the Interstate Commerce Commission in 1925 adverse to Pittsburgh, and reached its political climax in 1928, the period when the economic readjustment was most drastic.

#### PROFITS

The profits of coal operators have long been a subject of acrimonious contention. The intensified competition brought on by the readjustment was doubtless a normal illustration of Darwinian selection, but it did little to make *laissez-faire* economics seem attractive. The number of the hindmost whom the devil had to take grew to extraordinary proportions. During the periods of high prices already mentioned, many fortunes were unquestionably made, both from sales of coal directly, and from the appreciation in value of coal lands. But there is also little question that most of the fortunes were transitory. When prices sank to the neighborhood of \$2.00 a ton at the mines, a level definitely reached by the second quarter of 1924, the possibility of any large profits vanished, and the ability of any particular operator to keep out of the red depended largely on his securing orders in volume and regularity enough to maintain operations. Concurrently the value of coal land reserves fell.

Even the largest companies were badly hit. The Pittsburgh Coal Co., with as large productive capacity as any coal company in the country, in each of the three years 1925-27, suffered net losses from operations exceeding a million dollars.<sup>12</sup> The Consolidation Coal Co., identified with the

<sup>12</sup> *Pittsburgh Gazette-Times*, March 12, 1925, March 27, 1925, March 9, 1926. *Pittsburgh Post-Gazette*, March 13, 1928.

Rockefeller interests, likewise underwent a thorough-going reorganization of management and operation in 1928. An attempt was made to maintain what was deemed a fair scale of wages and prices, which two years later had to be abandoned.<sup>13</sup> Competitive undercutting proved too formidable an obstacle to salvation by individual effort. The story of financial difficulties, followed by reorganization and wage-cuts, or more usually, wage-cuts, then reorganization and more wage-cuts, was repeated for most operators. Many with less ample financial backing went bankrupt, and standards of all sorts disintegrated.

Individual exceptions exist, and probably the most notable of them is the Island Creek Coal Co., at Huntington, W. Va. Until 1931 this company proved able to increase tonnage and earnings consistently at times when large-scale competitors were not meeting overhead and fixed charges. It is the exception that proves the rule. Coal operators generally are no longer growing rich.

#### WASTES

A distressing feature that has been greatly intensified by the impoverished condition of the coal industry is the amount of unrecoverable waste that is tolerated. To some extent the problem is one of engineering; to a larger extent it is economic. The amount of coal lost is staggering. The Coal Commission's study indicated that in 1921 for each two tons mined, slightly over one ton was left unmined and unrecoverable.<sup>14</sup> Part of this is unavoidable. Buildings, highways, railroads and streams must be supported to prevent settling; water in old workings must be dammed off to

<sup>13</sup> *Pittsburgh Post-Gazette*, May 23, 1928, quoting an advertisement in the *Fairmont (W. Va.) Times*; *ibid.*, May 25, 1928; *N. Y. Times*, May 24, 1930.

<sup>14</sup> *What the Coal Commission Found*, p. 264.

protect new ones. But a large share of the loss is avoidable and is due either to careless mining or to the fact that it would cost more to provide timber or steel supports than to leave coal pillars. The loss varies from nearly 50% under the agricultural lands of the Middle West to 10% or less where the coal deposits are most valuable, as in western Pennsylvania.

Regularity of operation is as important in cutting out coal wastes as the mining methods used. Cessation of work, whatever the cause, means loss of profits, of wages, of purchasing power, of living and working standards. The lake cargo controversy struck to the heart of the operator's problem of regular production, because the lake trade acts as a balance wheel for those operators who secure it. By providing a tonnage demand in midsummer when industrial and domestic consumption is seasonally lowest, it reduces the wastes of irregularity. Hence the eagerness to share it, and the earnestness with which the rate quarrel has been fought.

#### CAPTIVE MINES

The quest for security, in industrial as in international relations, is a dominant motive. In the bituminous industry it has led many important coal users such as the Steel Corporation and Henry Ford to buy their own mines. These are called "captive" as distinguished from ordinary commercial mines whose product has to be sold competitively. The consumers thus insure themselves against the uncertainties of price and supply, particularly from labor troubles and car shortage. The arrangement is equally advantageous for the mines concerned. With a known demand, planning is possible and the wastes of uncertainty can be eliminated. In 1929, only 226 of 4612 bituminous operations were captive, but of these, 58 were in the class producing over 500,000 tons a year, and the captive production amounted to

nearly a quarter of the total.<sup>15</sup> On the other hand a limit is reached when the consumer-owner finds that the possibility of a shortage is remote, and that by reason of lower standards the commercial mines are selling for less than his captive mine can meet.

The northwestern consumers of lake cargo coal have not yet found it advantageous to capture mines on a large scale, since the keen competition for the lake trade has given them the pick of the market at the lowest prices, and their principal uncertainty, transportation, is beyond their control by that method. The captive mine affects the lake trade in another way. The aim of the captive mine is to operate as nearly full time as possible on a permanent schedule just sufficient to meet the needs of its consumer-owner, flattening out seasonal variations. The most careful planning, however, may miss the mark, and either by the allowance of a margin of error or by an overcalculation of needs, a small surplus may result. From every point of view it is advantageous to keep operating, and whatever captive surplus there may be is regularly thrown upon the commercial market—and in the summer especially the lake market—for what it will bring. The result is a sharpening of competition in the lake trade directly, and indirectly as well, for substantially the whole burden of risk in the industry is placed upon the commercial mines that produce only three-fourths of the coal.

#### LABOR TROUBLES

It is a truism that the major item in the cost of producing and carrying coal is labor. Probably in no industry of comparable size does so large a proportion of the consumer's dollar go immediately for wages.<sup>16</sup> The mining of bitum-

<sup>15</sup> *Coal Age*, p. 79, Feb., 1931.

<sup>16</sup> I. Lubin, *Miners' Wages and the Cost of Coal*, p. 235 (1924), states

inous coal gives a living, such as it is, directly to over 500,000 men, and in 1923 the figure reached a peak above 700,000.

Coal has provided one of the principal battlegrounds for the familiar industrial struggle between capital and labor. Its history is filled with the memorable engagements that have commanded the front pages of newspapers from time to time for a generation. The story is long and controversial, and in its details not germane, but the main factors are at the heart of the West Virginia-Pittsburgh contest, and bear directly on the lake cargo controversy. Wage rates no less than freight rates determine an operator's ability to compete.

By nature and by training both the miner and the operator are "rugged individualists." The environment favors this attitude. Coal-mining towns are usually isolated communities, frequently in almost pioneer conditions, cut off from outside happenings. The isolation is increased rather than diminished because so many of the towns are "company towns". The streets and land, the dwellings and stores, belong to the coal company. Local government is company-controlled. A system more tempting to abuse could scarcely be conceived. The system is at its worst in the southern fields; in western Pennsylvania some of the coal underlies

that two-thirds of the cost of producing coal is labor cost. That was before or just at the beginning of the most drastic wage-cutting. In the present chaotic state of wages no accurate comprehensive conclusion is possible, but that the proportion may be somewhat less is perhaps indicated by the fact that in 1929 the average output per man per day was 4.85 tons, and the average sales realization \$1.78 per ton. Bureau of Mines, *Bituminous Coal Tables, 1929*, p. 1. Assuming a wage of \$4 a day, probably higher than the average, the product of the day's labor sold on the average for \$8.63, or a direct labor ratio of somewhat less than 50%. The sales realization of course includes any profit to the operator as well as overhead and direct costs, but the profit certainly could not have been large. Retail costs are quite another matter. In the domestic market at destination it is not unusual to find that the retailer's share amounts to as much as the f. o. b. mine price and the freight rate together.



lands that had been settled, where local government already existed, and where consequently the company has less arbitrary freedom.

On the other hand, it has long been evident that permanent progress in the coal industry can be made only by collective action of some sort, both for miners and for operators. The forces at work reach beyond the horizons of single men in either group.

The need for collective action on the part of the miners, to whom the advantages were most obvious, led to the rise of the United Mine Workers of America. It is an industrial union, not a craft union, that by virtue of a small Canadian membership elects "international" officers. It has never included all, or nearly all, the mine workers in this country, but at the height of its power after the war it did unite about two-thirds of them.

The stronghold of the United Mine Workers has been in the "central competitive field", Illinois, Indiana, Ohio and western Pennsylvania, and in some districts west of the Mississippi. It never mastered the Appalachian fields, except the Pittsburgh district for a time during and after the war, and that, though the heart of the industry, was in the nature of an outpost of the union. Fairmont, in the panhandle, was the only West Virginia district to remain in union control long after the war. New River was unionized then for a short time, and Kanawha for somewhat longer.

In the Pocahontas and newer southern West Virginia field, as well as in eastern Kentucky and Tennessee, the operators in undivided hostility, with the aid of the courts, have dislodged the union from every foothold it gained. The union power was destroyed in Maryland in the strike of 1922 and in southern West Virginia a year or two later. In northern West Virginia, Pittsburgh and Ohio trouble began in 1924-25, and the failure of the strike called in 1927

at the expiration of the Jacksonville agreement marked the union's downfall as a national force. Today (1932) its power, east of the Mississippi and outside the anthracite fields, is confined to Illinois and Indiana, in the former of which it is weakened by the factional quarrel between Alexander Howat, the Illinois leader, and John L. Lewis, international president.

The union strategy was to negotiate collective agreements covering the largest possible area, expiring all at the same time, and establishing if possible a single minimum standard for all. Before the war the central competitive field was usually covered by a single agreement, with separate contracts for adjacent union fields. After the war, for a time, the union was able to force a single negotiation for all union fields east of the Mississippi.

The weakness of the union, as George Bernard Shaw remarked of English experience, "was that the concessions wrung from the employers when trade was good were taken back again when trade was bad, because, as the employers commanded the main national store of spare money, they could always stop working without starving for longer than their employees. The Trade Unions soon had to face the fact that unless they could get the concessions fixed and enforced by law they were certain to lose by lock-outs all they had gained by the strikes."<sup>17</sup> In this country the miners were unable to secure the sanction of law to consolidate their victories.

In 1920 the Bituminous Coal Commission established by its award the highest wage scale ever received by the union, and after some adjustment in a joint conference of the central competitive field, \$7.50 became the basic day rate. To prevent a reduction of that rate as a result of the depression in 1921, a strike was called in 1922. By the coincidence

<sup>17</sup> *Intelligent Woman's Guide to Socialism*, p. 213 (1928).

of the railroad shopmen's strike which restricted shipments from non-union fields and a deceptively temporary look-up in business in 1923, the strike was favorably settled at a conference in Cleveland and the agreement extended to April 1, 1924. When that date arrived the course of business had convinced most operators that wages must come down. The union leaders were adamant. They not unnaturally preferred to keep the high rate even though the number of days' work at the rate must be small, rather than work more days at a less rate; let the mines that could not be operated profitably be shut down, they said. At the Jacksonville conference therefore, they held out against a cut. They ignored the threat that lower wages might be as effective a competitive device as efficient operation, and so close the high-wage as well as the inefficient mines. They stood pat. Since it was an election year, President Coolidge's cabinet exerted every effort to avoid a strike, and a majority of the operators were finally induced to agree to keep the same scale for three more years, until April 1, 1927. Secretary of Commerce Hoover pointed with pride to this achievement in his annual report for that year.

The effects were felt immediately. Long before the Secretary's report was published the evidence began to accumulate that the agreement was not one which "insures industrial peace in the industry," and that the industry was far from being "now on the road to stabilization", as Mr. Hoover optimistically predicted.<sup>18</sup> On the contrary, as seems sometimes to happen when the Administration predicts prosperity, the three or four years next following were marked by the most destructive competition the industry had ever known. In one district after another union mines were forced — not always unwillingly — to shut down, and to reopen, if at all, on a non-union basis.

<sup>18</sup> *Annual Report of the Secretary of Commerce, 1924*, pp. 13-14.

Naturally this provoked controversy. Union leaders accused the operators of bad faith in violating the agreement, and blamed the railroads particularly for abetting the violation, both to secure low coal prices, and to forestall wage demands of their own employees. This charge was frequently made before the Senate Committee in 1928 but was never probed to the bottom. The fact, abundantly proved, that railroad fuel prices had dropped from about four dollars a ton in 1923 to two dollars or less in 1927, was not of itself a substantiation. Coal prices declined everywhere, and except in Ohio the attitude of operators toward the union was generally such that coercion would have been unnecessary whenever an opportunity to destroy the union appeared. In the nature of the case, independent corroborative evidence was lacking, and judgment must rest upon inference. Doubtless no such formal agreement existed between operators and carriers as the word conspiracy implies, but every opportunity for informal pressure was present. Enough was shown to illuminate the interdependence of operators and carriers.

The United Mine Workers, for a variety of technical and practical reasons did not attempt to secure enforcement of the Jacksonville agreement by application to the courts,<sup>19</sup> so that its legal enforceability must remain a matter for speculation. It was not enforced. The charges of bad faith on the one side and of demagogy on the other that arose out of the breakdown contributed to the bitterness of the next events. The failure of the union to organize West Virginia—the hope of which was all that had reconciled the

<sup>19</sup> The status of the union as an unincorporated association, the cost and delay of litigation, the necessity of filing enormous bonds if an injunction were sought and the uncertain outcome of a suit for damages were given as reasons for the decision not to attempt a legal test of the Jacksonville agreement as a contract. *Conditions in the Coal Fields*, pp. 384-385.

Pennsylvania operators to the check-off before—together with the pressure of lower-wage competition, led the operators to turn on the union and attempt to destroy it, once for all.

The swan song of the union was sung to the Senate investigating committee already mentioned, in the Spring of 1928. When that failed to bring effective public support to the striking miners, the case was hopeless. The union's defeat was recognized in July when the international officers abandoned the demand for a single national agreement, and advised the district officers to make what terms they could in their districts. This enabled the salvaging of a fragment of the union in Illinois where it was strongest and its leadership most aggressive.

The elimination of the union under the leadership it then had may have been inevitable but it has certainly not paved the way, as was predicted, for a solution of bituminous troubles. It did somewhat redress the balance of competition between north and south, at fearful cost, but that is all. Until coal operators are philosophers, as in their mines they are kings, no permanent solution of the labor problem seems likely which does not include collective bargaining through self-designated organizations. The miners generally do not enjoy that right today.

#### SECTIONALISM AND THE LAKE TRADE

The bitterness of the labor struggle emphasized the sectional cleavage in the industry because the centers of union and non-union strength lay in the northern and southern fields, respectively. There are, however, other important differences between the two sections.

The geology of the coal fields is such that the workable seams in the northern districts run from two to four feet in thickness, while in the south they are often found as thick

as five or six feet. The same shaft or tunnel in the southern mines thus gives access to more coal and allows more convenient working of it. Again, the overhead costs of southern mines for interest and taxes are generally less than those of the northern competitors because the land is cheaper and less thickly settled. Living costs in the south are generally lower. Labor is cheap in both sections, but the fact that it is native-born in the south, while much of it is alien or of recent alien descent around Pittsburgh, does not promote solidarity between the two labor groups. Where the union was strong, wage scales were usually higher.

All these considerations give a competitive advantage to the southern mines. Against them can be set two factors. The northern operators had the established position in the trade, and they are much nearer the principal markets than their competitors. Over a period of thirty years the benefits of an established position have gradually but steadily disappeared. The other advantage has been neutralized to a large extent by the freight-rate adjustment. The willingness of the southern rail carriers to haul coal on a very low basis per mile has the economic effect of moving the southern mines closer to the markets than their geographical location indicates.

The fortunes of the sectional competition for coal markets are the resultant of these factors interacting during the past generation. Although the lake trade amounts to less than 10% of the total coal production in the country, its focal position concentrates all these forces upon it. And so at the time the coal industry's post-war readjustment was severest, northern operators were on the one hand attempting to destroy the union in order to equalize labor costs, while on the other hand they received assistance from the union in attempting to spread the freight-rate differential that measures their competitive distance from the south. Thus

freight rates and labor costs became inseparably mixed in political controversy just when the economic competition of the two sections was keenest. For a brief time in 1927 and 1928 the lake cargo rate controversy was front-page news.

#### OPERATORS AND CARRIERS

The chief parties to the dispute are operators and railroads. The contrast between north and south in the mutual relations of these parties is significant. The southern operators have generally been on excellent terms with their carriers.<sup>20</sup> Mutuality of interest makes this a good business policy. Low freight rates are necessary to the operators, and if coupled with large tonnage are possible for the railroads. Both parties can thrive on the combination and have united to maintain it against northern attacks.

The northern operators and their carriers on the other hand have been continuously at odds. It has frequently been said that if these railroads did as much for their shippers as the southern lines have been willing to do, there would be no lake cargo controversy, for the northern interests would have all the business. The matter is not so simple as that, yet the want of northern cooperation has undoubtedly contributed to the success of southern competition. The northern operators have had to fight through legal proceedings for every bit of rate advantage they have gained in the past twenty years. In the *Lake Cargo* cases the Pittsburgh Coal Company has been the moving spirit on the one side and the Pennsylvania Railroad its chief opponent.<sup>21</sup>

<sup>20</sup> There are individual exceptions which do not vitiate the generalization. See the *Wyoming Coal* cases, 272 U. S. 658 (1926), and 142 I. C. C. 681 (1928).

<sup>21</sup> Hostility between these two is of long standing. When the Pittsburgh Coal Co. in 1911 contemplated the extensive development of its coal lands southwest of Pittsburgh and south of the Ohio river, its executives are said to have approached those of the Pennsylvania Rail-

The reasons for the antagonism in the north are not easy to state, except in the general form that there is much less mutuality of interest than exists in the south. While coal is one of the principal items of traffic of the northern lines, carriers there are not so exclusively reliant upon it as are the southern roads, 80% or more of whose tonnage consists of coal. There seems to be a good deal more internecine competition in the north, both among operators and among railroads, and this causes bad feeling directly. The northern trunk lines serve more diverse origin districts, and so they must be wary lest a reduction in one rate invite demands for like reductions elsewhere. They are also among the largest consumers of bituminous coal and have used their power as indispensable customers not only to favor mines on their own lines but also to exact rock-bottom prices for coal and, it is charged, to influence labor policies among their shippers. All these influences tend to break down solidarity between the operators and carriers as groups.

In dealings between railroads, the southern lines have the enormous bargaining advantage of some 100,000,000 tons of traffic which they deliver annually to the northern

road with a view to arranging rail facilities for the new mines. They were confronted in the carrier offices, the story goes, with a map showing the territory in question parceled out, with boundaries drawn limiting its future development to the three principal trunk lines, in accordance with an agreement the latter had already reached. The coal company in defiance expanded its subsidiary, the Montour Railroad, to serve the new area, but it remained dependent on the Pennsylvania and the New York Central for access to markets outside Pittsburgh. In 1918, in the rush of the war, the Pennsylvania found time to locate a right-of-way, still unused, along the south bank of the Ohio in order to prevent the Montour from reaching the river at a point which would allow transshipment and connection on the opposite shore with a more direct route, free from trunk-line control, to the Youngstown steel district. Subsequent efforts of the Montour to accomplish a similar result by a river-rail route may be traced in *Construction of Branches by the Pittsburgh, Lisbon & Western*, 150 I. C. C. 43 and 619 (1928-29).



roads, a good deal of which could be diverted from one to another of these, and for which there is relatively little balancing traffic in return. This prevents effective objection by the northern lines to the maintenance of coal rates by the southern carriers on a competitively lower unit basis. It has also often been charged that the Pennsylvania's stock interest in the Norfolk & Western leads it to view with equanimity the shift in coal production southward.

Let us turn now to the beginnings of the lake cargo controversy.

## CHAPTER III

### THE EARLY CASES

#### BEFORE 1912

WEST VIRGINIA first began to be felt as a competitive force in the lake cargo market in about 1903, though its influence elsewhere was noticeable a decade earlier.<sup>1</sup> All three of the principal coal fields, Pennsylvania, Ohio and West Virginia, were expanding their production and their lake shipments, and though the Pittsburgh district still provided slightly over half the total, the rate of increase in West Virginia naturally was much faster than in the others. 1907 was a banner year for all; Pittsburgh secured 55%, Ohio 25% and West Virginia, 20%, out of a total of 16,801,098 tons, a new high record for the lake trade. In 1908 there was a drop in the total tonnage, and in that from Pittsburgh and Ohio, but a gain from West Virginia. The record in 1908 was substantially repeated in 1909.

In the early years of this century, it was the practice of the traffic managers of roads interested in the lake coal trade to meet in the spring, before the opening of navigation on the lakes, "for the purpose of announcing to one another the rates for the season then ensuing of their respective roads."<sup>2</sup> A meeting was held in New York City early in March, 1909, at which the lake trade was discussed, and for the first time the controversy over lake rates came to a head. The Pitts-

<sup>1</sup> A. E. Suffern, *Conciliation and Arbitration in the Coal Industry*, pp. 44, 65 (1915).

<sup>2</sup> *I. & S. Docket 26 to 26c*, 22 I. C. C. 604, 608 (1912).

burg operators were thoroughly alarmed over the inroads made on what they regarded as "their" markets, by the rapid development in the south, fostered by a combination of low capital and labor costs and a freight-rate structure designed to get southern coal into every market.

They demanded of the carriers that the differential in their favor be increased so as to check the West Virginian expansion. The rate at that time on a ton of lake cargo coal from Pittsburgh to Ashtabula, the key to the northern structure, was 88 cents for a haul of approximately 160 miles. From the Ohio districts it was 85 cents. From the Kanawha district in West Virginia, the center of southern production, to Sandusky or Toledo, the rate was 97 cents for approximately double the distance. Fairmont, lying between Pittsburgh and Kanawha, had a rate of  $96\frac{3}{4}$  cents, which classed it with the southern fields. The New River and Pocahontas districts, in the extreme south of West Virginia, at an average distance from the lake ports of nearly 400 miles, had a somewhat higher rate, \$1.12. The key differential was that of Kanawha over Pittsburgh, 9 cents.

The question at issue in the beginning was clearly not so much the reasonableness of any rate taken separately as the adjustments among the different fields. The Pittsburgh operators did not insist on a reduction in their own rate, provided their competitors' rates were raised. They wanted relief from a rate relationship, rather than from a rate. Nevertheless when three years later this controversy reached the stage of argument before the Interstate Commerce Commission, the justification of changes asked had to be pointed to the legal issue of "reasonableness" under sec. 1 of the act to regulate commerce, rather than to an economic settlement of the group relationship.

At the 1909 meeting the railroads out of West Virginia seriously contended against any change in the existing differ-

entials, but pressure from the northern carriers finally brought them to agree, first to a five-cent increase, and then, after further discussion, to an increase of approximately ten cents in the West Virginia rate. One persuasive argument was the threat of reductions by the northern carriers. Another reason later alleged by the southern operators was that the Pennsylvania Railroad held a controlling interest in the stock of the Norfolk & Western, which took the lead among the southern carriers in agreeing to the increase, and in justifying it later before the Commission. It was established that the Pennsylvania was in a position to dictate if it cared or needed to do so.<sup>3</sup>

The announcement of the West Virginia increases, to take effect at the beginning of the 1909 lake season, loosed the flood of litigation that has followed the lake cargo controversy during the twenty years of its history since. Leading southern operators applied to the federal court at Huntington, W. Va., for injunctions to restrain their carriers from filing the new schedules until the Interstate Commerce Commission should have time to investigate their reasonableness. The injunctions were denied after a hearing on the ground that the interstate commerce act gave the Commission jurisdiction in the first instance.<sup>4</sup> Appeals were taken, and the increased rates were meanwhile held in abeyance. When the Circuit Court of Appeals affirmed the judgments below, in February, 1910,<sup>5</sup> a further appeal was taken to the Supreme

<sup>3</sup> *Ibid.*

<sup>4</sup> *Imperial Colliery Co. v. C. & O. Ry. Co.*, 171 Fed. 589; *Columbus Iron & Steel Co. v. Kanawha & Michigan Ry. Co.*, 171 Fed. 713; *Houston C. & C. Co. v. N. & W. Ry. Co.*, 171 Fed. 723 (1909). Lower federal courts had been in conflict on the point.

<sup>5</sup> *Columbus, etc. Co. v. K. & M. Ry.*, 178 Fed. 261; *Houston C. & C. Co. v. N. & W. Ry. Co.*, 178 Fed. 266 (1910). The opinion relied on *B. & O. R. R. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910), in which the Supreme Court held the lower court to be without power to

Court, and again the effective date of the increases was postponed. The Mann-Elkins Act, which Congress passed that same year, empowered the Commission to suspend and investigate proposed rates, and when this power became effective the West Virginia operators abandoned the court proceedings and began anew before the Commission.

As it became evident that between aggressive southern operators and reluctant southern carriers, the prospects of northern relief by southern increases were receding indefinitely into the future, new lines of attack were formed. The eastern Ohio operators began proceedings before the Railroad Commission of Ohio against the Wheeling & Lake Erie Railroad, just then bankrupt, to force a reduction in their lake cargo rate, which was 3 cents per ton under the Pittsburgh rate.<sup>6</sup> The contentions urged and the decision rendered contain the germs of many subsequent volumes of testimony and argument presented in later lake cargo cases.

The operators asked for a reduction from 85 cents a ton to about 40 cents. In support of this they presented studies of the cost of hauling lake coal, which they declared should be the controlling factor in the rate, and they urged that their higher production costs as compared with those of competing southern fields should be considered. If their production costs were relatively higher than those in West Virginia, then their rates should be relatively lower, to allow them to compete. The carrier pointed to the financial effect of so great a reduction on a road in receivership and pooh-

give equitable relief against discriminations and similar violations of the interstate commerce act in advance of action by the Interstate Commerce Commission. The Supreme Court dwelt on the confusion and discriminations that would result from divergent rulings by the Commission and courts on similar points.

<sup>6</sup> *Pittsburgh Vein Operators Assn. of Ohio v. W. & L. E. R. R. and B. A. Worthington, receiver*, filed May 19, 1909, in *1909 Ann. Rep., Ohio R. R. Comm.*, p. 38; *1910 Ann. Rep.*, p. 13.

poohed the notion of cost of service as a controlling element in rate fixing. Its counsel denied the possibility of ascertaining such costs, and denied their importance if ascertained. These basic issues, the cost of the service, and the consideration to be given to economic conditions run through most of the subsequent lake cargo litigation.

The decision of the Ohio Commission on February 28, 1910, ordered a reduction of 20 cents per ton. Without discussing its own jurisdiction to act, it brushed aside the argument over production costs and financial effect as immaterial. In substance its utterance was echoed many times later:<sup>7</sup>

If one producer is at a disadvantage as compared with a competing producer, so far as cost of production is concerned, that is his misfortune; and while such a producer is entitled to sympathy, he is not thereby entitled to an advantage in rate. If it were admitted that a carrier had a right to equalize differing natural conditions by preferential rates, a wide field for discrimination would be without regulation. One of the necessities for rate regulation is the existence of the evil arising from the assumption by carriers of authority to neutralize natural advantages on the one hand, and to create artificial advantages on the other, by manipulation of rates.

In discussing what it thought the sole issue, the reasonableness of the rates, the Ohio Commission again anticipated future judgments by clinging to costs. Admitting that mathematical accuracy was unattainable, they thought a rough guess could be made, sufficiently good for practical purposes, and they proceeded to make one. They compared the complainants' cost studies with the figure of 39.7 cents, the division received by the Pennsylvania Railroad from the Norfolk & Western as its share for the northern part of the lake cargo haul from West Virginia, and concluded that a 20-cent reduction was amply justified. The railroad's re-

<sup>7</sup> *Ibid.*, p. 14.

ceiver went immediately into the federal court in Cleveland and secured an injunction restraining the enforcement of the decision, on the ground that the coal movement was interstate, by rail and water, and therefore the Commission had no power to regulate it. An appeal on this issue, was taken to the Supreme Court, which in its first (and so far its last) decision on the merits of a lake cargo controversy held that a carrier hauling lake cargo coal from eastern Ohio to Cleveland is engaged in interstate commerce.<sup>8</sup> The opinion rests on the fact that all coal moving at the lake cargo rate must be transshipped and taken out of the state of Ohio by vessel, otherwise a higher rate applied.

Thus it was established that the Interstate Commerce Commission must deal with the lake rate adjustments before the federal courts could touch them, and that no state commission could deal with them. The decks were cleared for proceedings before the federal body, and they promptly began.

The Interstate Commerce Commission of that day was in point of size but a miniature of the vast organization that today employs a staff in the neighborhood of 3,000 and runs on an annual budget of about \$10,000,000. The Commission itself consisted of seven members. It was an upstanding group, just emerging successfully from a long fight with carriers and with courts to a position of effective control over the carriers.<sup>9</sup> The proposed West Virginia increases were

<sup>8</sup> 225 U. S. 101 (1912), affirming 187 Fed. 965 (1911). The original injunction is unreported. The fact that the coal was billed only to the lake, and might change ownership there, was held not to be determinative, since the shipment must continue out of the state after a pause at the port. *Gulf, etc. Ry. v. Texas*, 204 U. S. 403 (1907), was distinguished.

<sup>9</sup> A sketch of the legislative expansion of the Commission's power over the carriers is prefaced to *Interstate Commerce Acts Annotated*, pp. 75-87 (Washington, 1930). See I. L. Sharfman, *The Interstate Commerce Commission* (New York, 1931-32).

filed with the Commission in November and December, 1910, and following each new schedule came a complaint against it from the shippers affected. The Commission promptly suspended each increase pending investigation, and ordered the carriers to file briefs in justification. The decision was delayed, however, for over a year by the appearance of related cases.

#### 1912—THE BOILEAU CASE

On February 15, 1911, a complaint was filed with the Commission against the northern carriers by John W. Boileau, a Pittsburgh mining engineer active in the agitation of the rate question, on behalf of Pittsburgh shippers. The complaint attacked the reasonableness of the Pittsburgh lake cargo coal rate, 88 cents per ton in carloads. Mr. Wade H. Ellis, counsel for the complainant and former Assistant Attorney-General in charge of the anti-trust division of the Department of Justice, requested the Commission to take no action on the West Virginia rates until the Pittsburgh case was heard. In May, 1911, the eastern Ohio operators, who had failed to get relief from the Ohio Railroad Commission, came to the Interstate Commerce Commission with a complaint similar to that of the Pittsburgh operators, and in July the southern Ohio operators followed suit. The result was that by the end of the year every considerable producing field in the lake traffic was involved in litigation before the Commission in regard to its lake rate; the southern shippers were trying to prevent increases, while the northern shippers attempted to secure decreases. For the first time the whole lake rate structure was under examination at once; each part could be studied in relation to the whole, and a comprehensive settlement attempted.

Up to that time the Commission had not often been so clearly placed in the position of arbitrating the economic



destinies of different sections of the country. It might well determine to a considerable extent the future course of development in the coal industry of the three states. To many operators the ability to participate in the lake movement meant the difference between staying in business or closing down. On the one side were the established coal operators who supplied most of the markets, but who faced increasing production costs. Their mining methods often entailed a reckless waste of natural resources in their desperate effort to keep unit production costs within the market price of coal. On the other side were newer mines of high quality coal, easily able to undersell the older competitors on the basis of cost. Between the two was a rate structure built up on the principle that promised greatest revenues to the carriers as a whole, that of allowing the greatest possible number of shippers to enter each market, i. e., of diluting the tonnage over the widest possible area. Would the Commission adopt the same principle, in the hope of placating all parties? If so, the differential should be spread somewhat, but not too much; just enough to redress the balance among the producing fields. Would it accept the Pittsburgh view that the opening of the West Virginia fields at all, until the northern fields were exhausted, was an "economic blunder"?<sup>2a</sup> If so, the differential should be spread considerably. Or would the Commission fall in with the West Virginia contention that the cheaper producer should have the market? If so, no change in the differential need be allowed.

Evidently these three alternatives embrace the practical possibilities, so that whatever action the Commission took, and for whatever reason, the economic result would be the same as though it had frankly adopted one or another of

<sup>2a</sup> The author has been unable to trace definitely the origin of this frequently used phrase. It is commonly attributed to Mr. Matthew Taylor, then Chairman of the Board of the Pittsburgh Coal Co.

these three policies toward the future expansion of the coal industry in the sections involved. But the Commission could not avow any such purposes. Under its constitutional and statutory powers, and according to the prevailing theories of the proper functions of government, its role was not that of an economic arbiter, nor of a nurse to ailing industries. Instead it was simply a body appointed to see that rates are "reasonable" and not "unduly preferential or prejudicial," according to recognized standards for lawful rates. Evidently also the complaining shippers cared little whether the Pittsburgh rate was adjudged "unreasonable", except insofar as such a decision would result in a change that would give them a larger share of the lake tonnage. We have, therefore, the not uncommon but still curious spectacle of the major interest of those who in the first instance move the Commission to action, treated as an irrelevant by-product of a process of legal inquiry for something quite different, in this case a "reasonable" rate. Obviously, the criteria of a reasonable rate by no means necessarily coincide with those upon which plans for an economic development of a vast natural resource would be based.<sup>9b</sup> What would the Commission do?

Before the *Boileau* case had gone very far, the Pittsburgh Coal Company, the largest in the Pittsburgh district and one of the largest coal companies anywhere, intervened and made of the struggle "probably the most celebrated coal case that ever came before the Interstate Commerce Commission up to that time."<sup>10</sup> The general counsel for the Pittsburgh Coal Company at that time was Cyrus E. Woods, later ambassador to Japan, and destined still later to become a

<sup>9b</sup> The question how far considerations of economic policy may be permitted to influence the legal criteria of "reasonableness" is dealt with *infra*, ch. viii.

<sup>10</sup> From an account of the argument in the case before the Commission, 9 *Traffic World* 453 (1912).

victim of Senatorial wrath over the lake cargo controversy when President Coolidge nominated him to fill a vacancy on the Commission.<sup>11</sup> To conduct the *Boileau* case he retained Louis D. Brandeis, now Mr. Justice Brandeis, then a Boston lawyer and an expert in rate law. Mr. Woods resigned in January, 1912, before the case was decided, to become Minister to Portugal.

It required some months to submit all the testimony offered, which centered mainly around two issues, the cost of mining in Pittsburgh, and the cost of the lake cargo haul from Pittsburgh as compared with that from West Virginia. The Pittsburgh Coal Company opened its books to the Commission and produced exhaustive data in order to show that despite its large tonnage its business was conducted at a loss on account of the competition with low-cost mines in the southern fields. The item principally responsible for its increasing costs was the payment of a union wage scale, a condition which Mr. Brandeis welcomed and defended.

The other main contention had to do with the carriers' costs in hauling coal to the lakes. The complainants introduced probably the most comprehensive and exhaustive statistical analyses of railroad costs that had up to that time been presented to the Commission by any shippers. Having opened their own books to show the costs of mining, they asked the Commission to compel the defendants to produce an equivalent mass of material, but this was denied on the ground that it would put the roads to an unjustifiable expense. The failure of the carriers to defend their costs suggests either that the production of figures would merely confirm the conclusions reached by the shippers, which is the inference drawn in the Commission's decision; or that the carriers preferred to accept whatever injustice the shippers' figures did them rather than run the risk of ex-

<sup>11</sup> *Infra*, ch. vi.

posing more damaging material that might be used in a general attack on the whole coal rate structure.

The shippers' attack centered around the revenue to the carriers per ton per mile of lake cargo coal, which was 5.5 mills for the haul from Pittsburgh, but only 3.9 mills from Fairmont, and 2.6 and 2.4 mills from Pocahontas and Kanawha respectively. They also stressed the back-haul ore movement from the lakes to furnaces in the northern fields, which did not exist for the southern fields. Their argument ran somewhat like this. Over a period of ten years their rate had been advanced from 73 cents to 88 cents per ton, although their lake cargo tonnage had likewise increased from 2,704,059 in 1901 to 10,197,127 in 1911, and although carrier efficiency had increased. The existing rate was not justified by the cost of doing the particular business, which they calculated was less than 50 cents per ton. Though not justified, it was caused by a desire to open up the West Virginia fields and to enable the West Virginia operators to enter the lake markets, a desire that was intensified by the large speculative holdings of coal lands by northern railroads. For this purpose the rate level was fixed by the cost of hauling from the most distant fields, and an arbitrary differential for the nearer fields was set, that gave no fair recognition to their shorter distance. This differential could not be defended on the ground of differences in production costs, for they were much lower in West Virginia than in Pittsburgh. Wherefore, a rate of 50 cents was demanded from Pittsburgh to Ashtabula, the key to the structure.

As against all this, the railroads replied that compliance with the shippers' demand would cut revenues \$4,000,000 annually, and would probably provoke southern reductions also, leaving the carriers as the net losers. It was denied that there could be such a thing as discrimination against northern mines when they were paying rates absolutely lower

than the West Virginia rates. The reasonableness of the rate was proved, the carriers thought, by the increase in the tonnage that had moved under it. Counsel for the roads urged that all the argument about the so-called "economic blunder" of opening the West Virginia fields was irrelevant and that what the complainants really wanted was the exclusion of West Virginia operators from the market—a result that would be achieved if the rate asked were granted. As to the elaborate figures of carrier costs, the defendants insisted that neither distance nor cost of service were the only, or even the controlling elements in rate-making, especially for heavy, low-grade commodities. In the opinion of the carriers, the real basis of the Pittsburgh operators' difficulties was their excessive competition with each other, something that no amount of rate reduction would cure, since it would apply to all in the field.

The Commission's decision was reached on March 11, 1912. The opinion, by Commissioner Meyer, is a competent review of the evidence, and gives detailed consideration to the studies made of the costs of the lake cargo traffic. As to mining costs the conclusions were generally favorable to the Pittsburgh contentions:<sup>12</sup>

After giving due consideration to the doubts cast upon their (Pittsburgh operators') actual condition, we are inclined to think that when witnesses and counsel for complainant said that generally speaking the operators in the Pittsburgh district were now "standing with their backs against the wall" and "struggling for existence", the situation was possibly not greatly exaggerated so far as this record discloses.

As to the cost of the service the carriers rendered, it was concluded that:<sup>13</sup>

<sup>12</sup> *Boileau v. P. & L. E. R. R.*, 22 I. C. C. 640, 648 (1912).

<sup>13</sup> *Ibid.*, 651-2.

these different statistical results point in the same direction and tend to show that the operating expense of transporting Pittsburgh coal to Ashtabula is probably less than one-half of the present rate of 88 cents . . . every combination and analysis of figures which has been, and we believe can be, legitimately made, or with any degree of propriety applied, points unmistakably to a cost of transportation much too low to serve in the slightest degree to defend the 88-cent rate.

After this emphatic language, however, Commissioner Meyer complained that in the absence of any figures whatever on the value of the physical properties of the carriers, overhead costs were entirely conjectural, and therefore "estimates of cost such as those which stand upon the record in this case, are mere approximations."<sup>14</sup>

The Commission did not agree that the issue was solely one of differentials, nor was it persuaded that the Pittsburgh operators' predicament was entirely due to their internecine competition:<sup>15</sup>

The testimony of the defendants makes the Pittsburgh-Ashtabula rate the keystone of the entire system of lake-coal rates. This keystone is involved in this proceeding. It determines the relative level of all the rates in the structure and should, therefore, be considered carefully and deliberately as a rate in and of itself without reference to any other rate. . . . The Pittsburgh field is entitled to a reasonable rate whether it brings the expected relief or not and irrespective of the specific channels into which the amount of the reduction in the rate will flow.

And yet, after all these comforting words, the final result reached was an order that the Pittsburgh-Ashtabula rate be reduced from 88 cents to 78 cents, not to 50 cents as the complainants asked. The reasons for this compromise action

<sup>14</sup> *Ibid.*, 653.

<sup>15</sup> *Ibid.*, 654.

are indicated at the end of the opinion. "From the point of view of the specific cost of doing this particular business this rate is still too high; but, as we have said before, cost is only one of the elements entering into a rate."<sup>16</sup> The Commission was evidently impressed by the consideration that it was dealing with a commodity that constituted much the largest item in the traffic of the roads concerned.<sup>17</sup> A reduction in the return from lake cargo coal would be serious, both in itself and because it might open the way for an attack on the whole coal rate structure, and thus impair the carriers' financial position. How great this threat really was, can only be conjectured, but it undoubtedly existed and was an important factor in the decision. Moreover, an enormous dislocation in established industries and channels of trade might be precipitated by a large reduction in the rate, a consequence that the Pittsburgh operators might be expected to view with more equanimity than the Commission. The Commission concluded that a 10-cent reduction would be enough for a trial, and it was so ordered.

#### 1912—WEST VIRGINIA CASE

The decision on the rate advances in West Virginia was rendered on the same day as that in the *Boileau* case although the former was initiated earlier, when the federal court injunctions were dissolved in 1910. The case was on the newly established Investigation and Suspension Docket and the legal burden was upon the carriers to justify the proposed increases.

The then existing lake cargo rates were 96¾ cents per net ton from Fairmont, 97 cents from Kanawha and Thacker,

<sup>16</sup> *Ibid.*, 655.

<sup>17</sup> Products of mines made up 77% of all freight tonnage carried in the fiscal year ending June 30, 1911 on the Pittsburgh & Lake Erie, and 58% on the Lake Shore (both units of the New York Central); 73% on the Pennsylvania Co. (lines west of Pittsburgh). *Ibid.*, 651.

and \$1.12 from New River and Pocahontas, as compared with 88 cents from Pittsburgh. The advances proposed were  $3\frac{1}{4}$  cents for Fairmont, making its rate \$1.00, and  $9\frac{1}{4}$  cents for the others, bringing Kanawha and Thacker to  $\$1.06\frac{1}{4}$  and New River and Pocahontas to  $\$1.21\frac{1}{4}$ . Coupled with the Pittsburgh reduction they would have spread the important differentials nearly 20 cents.

It has already been remarked that these advances were reluctantly proposed, and finally agreed to only under pressure from the northern carriers, before which the Norfolk & Western was the first to give way. The same reluctance persisted through the hearings. The Chesapeake & Ohio filed no brief, made no oral argument, and presented but one witness, its general freight agent, who merely announced his opinion that the proposed rates were just and reasonable. The Baltimore & Ohio made its justification of the reasonableness of the advances in two paragraphs of its brief which compared the lake rates with the commercial rates to the same ports. The brief was devoted mainly to the adjustment between Fairmont and Pittsburgh. The Kanawha & Michigan did little more. "We are conservatively stating the fact," wrote Commissioner Lane in his opinion, "when we say that the Baltimore & Ohio, the Chesapeake & Ohio and the Kanawha & Michigan have made no serious effort to convince the Commission that these increased rates were reasonable."<sup>18</sup>

On the other hand, the Norfolk & Western undertook an elaborate defense of the advanced rates, on the basis of costs and earnings per ton-mile. Since it served the most southerly fields, especially Pocahontas, it was in a position to make the best showing on ton-mile comparisons. The Baltimore & Ohio, which had the shortest haul, received four mills per ton-mile under the existing rates, and the Chesapeake & Ohio

<sup>18</sup> *I. & S. Docket 26 to 26c, 22 I. C. C. 604, 611 (1912).*



about three. As contrasted with these, the average revenue of the Norfolk & Western during 1910 from its lake traffic was 2.76 mills per ton-mile. The other carriers sat back and rested on the Norfolk & Western's showing apparently not only because it was the best showing, but also because they felt less urgently the pressure of the northern carriers' demands, and would not be unwilling to see the advances fail.

Even for the Norfolk & Western a defense on the basis of ton-mile costs was not easy. Counsel for the Pennsylvania, intervening in support of the Norfolk & Western, argued generally that the West Virginia rates were set unreasonably low in order to develop the territory; and since the mines were no longer new, the rates should be raised to a reasonably compensatory figure. This argument, being in general terms, of course blinked the fact that the Norfolk & Western was already a prosperous carrier; and likewise ignored the admitted cost figures produced, which went to show that the existing rate was well above the merely compensatory level.

The decision of the Commission, March 12, 1912, was announced in an opinion by Commissioner Lane, whose journalistic training enabled him to present cogently and readably a discussion of costs even longer and more detailed than that set forth in the *Boileau* decision. It rejected the carriers' contentions on four independent grounds, and then proceeded to grant part of what was asked.

In the first place, accepting for purposes of argument the ton-mile cost basis, the Commission declined to accept the carrier's calculations of them, and concluded that the existing southern rates were fully compensatory. Secondly, the Commission declined to agree that the ton-mile basis was the most proper method of figuring costs anyway. This was its answer in the *Boileau* case to the Pittsburgh operators' insistence upon ton-mile costs in fixing rates. In any com-

parison, it gives the maximum weight to distance, an element which the carriers themselves were the first to disregard, as shown in the blanketing of rates.<sup>19</sup> Another answer lay in the fact that although the value of coal per cubic foot is low, its weight is great; in other words a carload of coal contains so many tons that the car earnings are high though the rate is low. Commissioner Lane generalized to the extent of saying that "most of the freight which pays the carriers the best is that which yields the lowest rate per ton-mile."<sup>20</sup>

Possibly no neater illustration could be given of the fictitious nature of conclusions based solely on ton-mile figures, than an embarrassing incident that occurred during the hearings. Through a miscalculation of the mileage involved, the original figures submitted by the Norfolk & Western showed that the carrier's earnings per ton-mile on lake cargo coal under the existing rate were 2.54 mills, while under the proposed rate they would be 2.75 mills. The president of the road gave all his testimony on this supposition, and argued that the difference of .26 mill between the cost, 2.28 mills, and the revenue, 2.54 mills, was too small a contribution to overhead and profit; and that .47 mill, the difference between 2.28 and 2.75, was necessary for a reasonable return. Later

<sup>19</sup> Compare this comment on ton-mile rate-making in an editorial on the *Boileau* case in *1 Coal Age* 950 (1912): "Dissatisfaction with the decision of the Commission has been expressed in some quarters. There are those who point to the Pittsburgh rate of 5.5 mills per ton-mile as compared with the Kanawha rate of 2.4 mills and believe that the revision should be made on this basis. Railroad traffic is a question which has occupied the attention of some of the keenest intellects in the country, and a solution of the problem along these lines has been generally conceded impossible. When it is remembered that the rate on a carload of steel plates from Pittsburgh to Chicago is nearly double that on a carload of pianos from New York to Chicago, the utter absurdity of such a contention is at once evident."

<sup>20</sup> 22 I. C. C. 604, 620 (1912).

in the hearings the error in mileage was corrected, and the carrier's earnings from the existing rate proved to be 2.76 mills. The margin between cost and earnings then was actually .48 mill, a trifle more than what the road's president asked for, instead of half that. Nevertheless, counsel for the Norfolk & Western, summoning what nonchalance he could, simply boosted the ton-mile earnings figure they wanted to the 2.99 mills that the increased rate required when the proper mileage was used. Assuredly if the prosperity of the railroad had depended solely on the difference between ton-mile costs and ton-mile earnings, no carrier executive could have afforded a margin of error in his information on that vital subject of nearly one hundred per cent!

In the third place—and this the Commission regarded as the crux of the case—the doctrine that it must necessarily be reasonable to raise a rate which does not pay its full share of taxes, fixed charges and dividends, was rejected. On that theory a rate contributing more than its share, would be equally unreasonable, and railroad tariff classifications would have to be altered radically. No classification would be permissible except such as could be justified by differences in transportation cost and insurance risk.

Finally, the Commission refused to allow the Norfolk & Western to take upon itself the burden of justifying the proposed increases for all the roads involved. If that were permissible, all carriers involved in a case would as a matter of course take advantage of the best showing that any one of them could make.

The Commission's conclusion, however, after thus demolishing the successive steps in the carrier's case, was to allow the Norfolk & Western to make the increase it proposed, while denying any increase to the other roads. From the point of view of this case alone, that is not a surprising

result. The other carriers offered no defense, while the Norfolk & Western made the best showing it could. Why not make the distinction? The Commission indicated its compassion: "we are not inclined in this case to hold the carrier down to the minimum which would be permitted by the record, and certainly the increased rates do not exceed the maximum figure which might properly be fixed for this traffic."<sup>21</sup> This was largely a coal and coke road, and might reasonably expect the principal commodity it hauled to pay its full share of revenue. The new rates would give the Norfolk & Western no higher ton-mile earnings than some other of the defendant roads were already receiving. Furthermore the low costs on the Norfolk & Western, which made it one of the most prosperous roads in the country, were largely due to enterprising management and plant betterments that allowed the use of the most economical methods. The Commission did not desire to deprive carriers generally of the incentive to improve that might result from taking away the profits of improvement. All of this, however, the Commission pitched in quite another tone than that it used in discussing the carriers' arguments as arguments.

#### RESULTS OF THE 1912 DECISIONS

Viewing the West Virginia and Pittsburgh decisions together as a comprehensive settlement, it seems apparent that the Commission desired to take a step, though not a large step, in the direction of breaking up the system of equalizing the lake rates from all producing districts. Since Pittsburgh was the old-established field with the largest tonnage, the decision lowering its rate ten cents naturally attracted most attention. As often happens in the arbitration of bitter controversies, when the decision is given to one party the literature goes to the other. So to console the Pittsburgh

<sup>21</sup> *Ibid.*, 625.

operators for the slight measure of reduction given, in the light of what carrier costs might have warranted, the tone of voice and eloquent passages of the decision are distinctly favorable to them. But the West Virginia decision, if carried out as the Commission seems to have expected it would be, called for a greater upset and was potentially at least as significant. The increase was allowed only to the Norfolk & Western, serving the Thacker and Pocahontas fields. It did not disturb the rate from Fairmont, the West Virginia field nearest Pittsburgh and nearest the lake ports. It did not change the Kanawha and New River rates. Now the Kanawha and Thacker fields lay not far apart, had paid the same rate, and were in direct competition. Similarly the New River and Pocahontas fields, the two furthest from the lakes, both producing low-volatile coal, had paid the same rate and competed with each other. These were the changes contemplated by the decisions :

<i>District</i>	<i>1911 Rate</i>	<i>Diff. over Pittsburgh</i>	<i>1912 Rate</i>	<i>Diff. over Pittsburgh</i>
Ohio .....	\$0.85	.03	.85	.07
Pittsburgh .....	.88	—	.78	—
Fairmont .....	.96¾	.08¾	.96¾	.18¾
Kanawha .....	.97	.09	.97	.19
Thacker .....	.97	.09	1.06¾	.28¾
New River .....	1.12	.24	1.12	.34
Pocahontas .....	1.12	.24	1.21¾	.43¾

It will be seen that this raised the number of rate groups from five to seven, increased the total spread of the rates by practically twenty cents, and altered the relative positions of several fields. The Ohio rate, for example, instead of being slightly under, was left well above the Pittsburgh rate, though this was not intended as a permanent arrangement. Fairmont, nearest Pittsburgh, perhaps felt the force of the Pittsburgh reduction most keenly. In southern West Virginia competitive relationships were thoroughly dislocated.

The reception accorded the decisions in informed, disinterested quarters in the coal trade is shown by an editorial appearing in the *Coal Age*:

This decision, in its effects on the coal industry, is by far the most important ruling yet made by this court. It is broad in scope, conclusive in its results, conservative to a fault, and most important of all, will become effective immediately without further litigation.

We are firm advocates of an equable geographical distribution of the coal markets, and believe that any principle by which the railroads attempt to increase their tonnage or excite unprofitable competition by the imposition of unfair tariffs is directly contrary to the basic intent of our constitution. In the opinion of the Commission it was the intention of the railroads to promote such conditions by gradually advancing the Pittsburgh rate "not to bring it up to the level which the carriers might have regarded and defended as reasonable, but to let certain competing coal fields into the lake trade." This disposition on the part of the railroads to be the ruling factor in the destiny of any coal field is a distinct imposition on the industry, and one long resented by it. . . .

What the real material benefits accruing to the Pittsburgh operators will amount to, is problematical. As is well known, the Fairmont and Kanawha fields are the most important competitors in the lake trade, and no revision in rates from these districts has been made. On the other hand, it is estimated on the basis of past shipments from the Pittsburgh district that the reduction will effect a direct saving of the operators of over a million dollars annually. Aside from this, many mines heretofore unable to ship profitably to the lake market will now be in a position to compete actively in this trade. *That the ultimate effect will be a marked change and a radical readjustment in long established channels of commerce, is hardly to be questioned.*

A careful analysis of the findings of the Commission shows a marked (and commendable) leaning toward conservatism.<sup>22</sup> . . .

<sup>22</sup> "The Pittsburgh Rate Case", 1 *Coal Age* 950 (April 27, 1912).

How wide of the mark the italicized prediction proved to be, will be shown presently.

Today it is difficult to believe that the Commission could have expected this arrangement to take effect unchanged, especially that part which allowed an increase to the Norfolk & Western while denying it to the other West Virginia roads, but there is certainly no hint in Commissioner Lane's opinion that the changes authorized would not take place, nor in the trade comment quoted. Nevertheless circumstances altering the proposed settlement appeared almost at once. The Norfolk & Western declined to make the increase that was forbidden to its competitors and withdrew its proposed tariffs. This immediately cut in half the differential advantage given Pittsburgh by the decisions. Then the Baltimore & Ohio reduced the Fairmont rate from 96¾ cents to 90 cents. Even the fruit of the 10-cent reduction from Pittsburgh soon turned to ashes in the operator's mouths.

Pittsburgh lake coal on account of its quality had for years sold in the markets at the head of the lakes at a premium of ten cents over Ohio coal. A three-cent rate advantage and slightly lower production costs enabled the Ohio operators to compete in the same markets. But the advent in increasing quantities of West Virginia coal of a quality at least as good as Pittsburgh's, and produced at less cost than Ohio's, tended to drive out the Ohio operators, and to bring down the relative Pittsburgh price. In the 1912 navigation season the premium on Pittsburgh coal vanished.

Moreover, labor troubles pushed to the foreground. Agreements concerning all the unionized section of the bituminous fields, Pennsylvania, Ohio, Indiana and Illinois, ex-

The italics are mine. A journal covering the whole coal industry needed to preserve neutrality among the competing fields. Notice "conservative to a fault" in the first paragraph quoted, and "commendable leaning toward conservatism" in the last.

pired April first, and there was general apprehension of a strike on a large scale. A compelling argument, however, favored a renewal of the agreement in some form. That was that no matter who "won" the immediate fight, operators or union, both would be the overwhelming losers, not only in the long run, but at once. The one sure result of a strike would be the further entrenchment of West Virginia producers in all the competitive markets, with consequent loss to miner and operator alike in Pittsburgh. Consumers who wanted to be certain of an uninterrupted supply were already placing their orders in West Virginia.

The upshot of the matter was, that since the Pittsburgh operators had just received ten cents per ton relief in rates, they granted a five-cent-per-ton raise in wages, and the strike was averted. Within a month or two of the *Boileau* decision any benefits from it for the northern operators had thus vanished in the wage adjustment and in the loss of their price premium. On May 16 therefore, the Pittsburgh producers petitioned the Commission for a rehearing of the case, and for further reduction in the rate "in such amount as shall be just and reasonable." Mr. Brandeis argued that the time had come for the Commission to settle the controversy finally by setting a rate from Pittsburgh solely on the basis of what was reasonable for the carriers serving that field, *i.e.*, a rate determined primarily by the cost of service. Let the West Virginia roads then consider, he said, whether to meet that rate. Obviously such a solution would have arrested the development of West Virginia fields then and there. Whether it would have prevented the overdevelopment that has been the curse of the coal industry since the war, or whether under the stimulus of the war an excess of productive capacity would have been opened up anyway, is pure conjecture. At that time, at least, such action seemed too bold an exercise of regulatory power.



Counsel for the Pennsylvania Railroad, in opposition, argued that the petition showed, as the railroads had previously maintained, that what the operators really cared about was not the level of rates but the differentials; that there was no reason to believe another reduction would help them more than the first had; and that so long as the operators "continue this philanthropy and loose management" (cutting prices and raising wages), they would get no benefit from any Commission order.<sup>23</sup> The Commission was somewhat less severe in its views, but nevertheless seemed to agree in substance, for it denied the petition for modification of the previous order. In his brief opinion Commissioner Meyer commented unkindly that the petitioners seemed "not averse to action by this Commission which will assign to the Pittsburgh field a virtual monopoly of the lake-coal traffic."<sup>24</sup> He lamented that Congress had not yet seen fit to grant the Commission the power to fix minimum rates, "without which a fixed relation among these different fields hardly can be enforced." He reiterated that "it is not for this Commission to say which mines shall be worked and which shut down, who shall ship lake-cargo coal and who shall not," and concluded with a quotation from the Commission's recent decision in an eastbound coal adjustment case, *Asso. of Bituminous Coal Operators of Central Pa. v. P. R. R. Co.*:<sup>25</sup> "if rates should be made so as to sustain an industry, which, because of intense competition within itself, or because of local disadvantages, yields but a slight profit, the present rate should be reduced. But we do not understand the law as permitting us to fix a rate solely upon this ground."

<sup>23</sup> 9 *Traffic World* 1043 (1912).

<sup>24</sup> 24 I. C. C. 129, 132 (1912).

<sup>25</sup> 23 I. C. C. 385 (1912).

## OHIO

The eastern Ohio operators, who failed in their earlier attempt before the Ohio Commission, filed a complaint with the Interstate Commerce Commission in May, 1911, similar in all respects to the *Boileau* complaint, and the cases ran along concurrently. It is interesting to note that William Green, then a state senator in Ohio and statistician for the United Mine Workers, was a witness on labor costs.

Not long after the eastern Ohio complaint, proceedings were also begun both before the Ohio Railroad Commission and the Interstate Commerce Commission, by the operators in the Hocking field in southern Ohio, who asked for similar reductions. They were served by the Hocking Valley Railway, control of which was secured by the Chesapeake & Ohio in 1910. Alone of all the northern groups of operators, they found themselves obliged to depend upon a carrier that hauled coal also, and in much larger volume, from West Virginia. Those of them who were situated along the main line of the railroad were therefore obliged to be continual witnesses of the ironic spectacle of trainloads of West Virginia coal passing their dooryards and mine tipples on the way to markets once theirs, but now beyond their reach. Why they did not make their complaint under section 3 of the interstate commerce act, which forbids undue preference or prejudice, as was done in some later cases, is not clear, but the fact is that they were content to go along with the other northern operators and complain only of the unreasonable level.

The Ohio cases were not consolidated with the *Boileau* and West Virginia proceedings, and the arguments were not held until a month or two after the decisions in those cases. Following the conclusion of argument of the Ohio cases, but not until then, the carriers voluntarily reduced the Ohio rate by 10 cents to 75 cents and thus preserved the former re-

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lationship with Pittsburgh. The Commission's decision a few weeks later, therefore, merely confirmed what was already the fact in applying the *Boileau* reduction to the Ohio fields.<sup>26</sup> Commissioner Meyer quoted liberally from his *Boileau* decision, and found no substantial differences warranting different treatment or more drastic reduction in Ohio than was there ordered for Pittsburgh. Some months later the Hocking operators made one last effort in a petition for rehearing and reparation, but this too was denied.<sup>27</sup>

#### CONCLUSION

Thus ended the first stage of the lake cargo controversy.<sup>28</sup> The main lines of cleavage were drawn primarily between sectional groups, but also between operators and carriers and among the operators themselves. The general shifting of coal production southward was clear, and the rate structure became the focus of the clash.

The Commission's review of the whole structure led it to attempt a compromise solution, that neither granted the Pittsburgh operators much of the relief they asked, nor kept the existing structure intact to suit West Virginia. It denied the formal requests of every railroad involved except the Norfolk & Western, and that road changed its mind and declined what was granted it. Before the litigation was finished, it was evident that most of the changes anticipated

<sup>26</sup> *Pittsburgh Vein Operators' Assn. of Ohio v. Pa. Co.*, and *New Pittsburgh Coal Co. v. Hocking Valley Ry. Co.*, 24 I. C. C. 244 and 280 (1912).

<sup>27</sup> 26 I. C. C. 121 (1913).

<sup>28</sup> In some minor cases dealing with lake cargo rates during the next two or three years the Commission declined to find the Hocking rate unreasonable or unduly prejudicial because it was not lower than that from the Middle and No. 8 districts in Ohio, *San Toy Coal Co. v. A. C. & Y. Ry.*, 34 I. C. C. 93 (1915); and it readjusted slightly the boundary between the Pittsburgh and Fairmont districts as regards lake rates, *Clyde Coal Co. v. P. R. R. Co.*, 23 I. C. C. 135 (1912) and *Pittsburgh Gas Coal Co. v. P. R. R. Co.*, 37 I. C. C. 240 (1915).

from the Commission's solution would not occur, yet the Commission declined to go further at that time. It held to the doctrine that it was not concerned with the economic consequences of the rates it ordered, but only with their legal "reasonableness", though these consequences were the primary concern determining the action of all parties to the proceeding. If the Commission's orders fell far short of a permanent solution in which all would acquiesce, they probably indicated the safest course for a governmental regulatory body under the conditions then existing.

It was scarcely to be expected that the northern operators would long be content with the rate adjustment that emerged from this stage of the struggle, when they could point to the results of the litigation and say (1) that their rate by the Commission's admission was still too high on the basis of the cost of the service, (2) that as the Commission found, it had been set high in order to let their competitors into the business, and (3) that the West Virginia rate was left ten cents below a level that had been justified as reasonable by the most prosperous carrier enjoying that rate. On the other hand, the Commission was not in a position to wipe the slate clean. The West Virginia people were there, depending on coal for a livelihood, and ready to oppose any move that would injure them. How long the 1912 solution would last depended, in the last analysis, not upon its legal reasonableness, but upon the extent to which it would allow each producing district to retain approximately its relative position in the lake cargo market.

## CHAPTER IV

### THE 1917 CASE AND THE WAR

#### THE AFTERMATH OF 1912

1913 was a normal year, as years go in our national economic life. In the coal industry it was better than average. A glance at the figures shows that in each of the three years 1911-13 Pittsburgh shipped almost exactly 46% of the lake coal, so that instead of producing "a marked change and radical readjustment in long-established channels of commerce" the immediate effect of the 1912 rate readjustment was to keep Pittsburgh's relative position stationary while Ohio gained a slight advantage at the expense of Kanawha.

Ohio's advantage did not last long. In 1914, the year of the coal war in the Rockefeller mines in Colorado, there were disastrous strikes in Ohio. Lake shipments from the Ohio districts nearly ceased altogether and were still far below normal in 1915. The tonnage that Ohio lost was not gained by Pittsburgh, the nearest geographically, but by West Virginia and Kentucky. Pittsburgh's share in the lake shipments in 1914 and 1915 was 48% and 44% respectively, while Kanawha increased from 11% in 1913 to 16% in 1914 and held that gain in 1915. Other southern districts went up proportionately.

In 1916 the eastern Ohio operators enjoyed the benefit of the machine mining methods they had installed during the strike years. They more than regained their former position, but at the expense of Pittsburgh, not of the south. Kanawha moved up a notch while Pittsburgh slipped to 35%.

So the five years between the 1912 cases and the entrance of America into the war spelled only a continuation of the story of the previous decade in the lake cargo trade. West Virginia and Kentucky claimed a continuously increasing share of the market that Pittsburgh had dominated. Instead of something over a half, Pittsburgh now had to be content with nearer a third of the lake tonnage. Nor were there any signs of a reversal in the trend. In 1916-17 new southern coal areas were tapped in eastern Tennessee and Kentucky, on the Louisville & Nashville Railroad.

#### THE WESTBOUND ADJUSTMENT

Dissatisfaction with the settlement of 1912 therefore led the Pittsburgh operators to seek further relief from the Interstate Commerce Commission. In so doing they joined a general controversy over coal rates north and westbound, among various groups of operators and carriers, regarding the adjustment of rates as between Ohio and the so-called "Inner Crescent" — Pittsburgh, Fairmont, Kanawha, Kenova, Thacker, etc.—to the whole of Central Freight Association territory, the area lying east of the Mississippi and north of the Ohio rivers. The gradual shifting of production trends southward had emphasized certain rate discriminations that affected Ohio and Michigan particularly. The nearer the destinations were to the Ohio fields, the greater the discrimination appeared in favor of the southern fields.

The northern carriers were apprehensive. Back in 1911 the Ohio Railroad Commission had ordered the Hocking Valley Railway to reduce the long-standing key rate of \$1 per ton from Hocking to Toledo, intrastate, to 85 cents, and in July, 1915, the order was sustained on appeal in the Supreme Court of Ohio.<sup>1</sup> That enhanced the discrimination

<sup>1</sup> *Hocking Valley Ry. Co. v. Pub. Util. Comm.*, 92 O. S. 362 (1915).

against Michigan, to remedy which Michigan shippers had already filed a complaint. Moreover, the Ohio district of the United Mine Workers was pushing a complaint before the Ohio Commission in an effort to reduce the entire Ohio rate level. Success in this would jeopardize all coal rates, and would endanger the revenues the railroads had recently defended in the famous *Five Per Cent Case*.<sup>2</sup> Back of all was the fact that by the pragmatic test of tonnage shipped, Ohio was slipping badly. Into this general situation the Pittsburgh operators injected the lake cargo issues.

In view of the utter inability of the parties to agree on a settlement of these conflicting interests, the Interstate Commerce Commission in August 1915, and in January, 1916, ordered two general investigations into the reasonableness and propriety of all rates and differentials on westbound and on lake cargo coal. The two cases, *Bituminous Coal to C. F. A. Territory*, and *Lake Cargo Coal Rates*, involving practically the same origin territory, the same shippers and the same carriers, were decided concurrently.<sup>3</sup>

No clearer case could be wished for the beneficent intervention of a disinterested arbiter. The conflicting interests of shippers were intensely sectional, each of the sections had markedly different conditions, yet all were forced to compete in common markets. None saw beyond the end of his sectional nose. The carriers too were divided. If our crowded world admits of order, here was an invitation to administer some. Once again there seemed an opportunity for the Commission to make a comprehensive settlement, and once again the best-laid plans went awry.

<sup>2</sup> 31 I. C. C. 351; 32 I. C. C. 325 (1914).

<sup>3</sup> 46 I. C. C. 66 and 159 (1917).

## BACK TO THE COMMISSION

The theory of the Pittsburgh operators in the 1917 case was simple. They relied upon the passage in the *Boileau* case in 1912, *supra*, wherein the Commission had said, at page 655:

From the point of view of the specific cost of doing this particular business this rate (78 cents) is still too high; but, as we have said before, cost is only one of the elements entering into a rate. When we consider the coal rates from all the fields which will be affected by this change in the Pittsburgh rate (10-cent reduction), the disturbance of established differentials, the possible deflection of the currents of coal trade and its effect upon operators elsewhere, the effect upon the carriers directly involved and the indirect effect upon other carriers, and all of the other valid considerations, we are forced to the conclusion that a rate lower than this would not be just and reasonable under the conditions disclosed by this record.

If they could show that the cost of carrying lake coal had not increased, and that not only had there been no deflection of trade currents nor disturbance of established rates, but on the contrary that the trend from Pittsburgh to West Virginia had continued, then they thought their case was complete. The Commission had moved once in their direction, but hesitantly, lest others be upset. If it could be shown that no upsets occurred, then the Commission might move again, more boldly.

To this end the complainants' evidence was pointed. The details need not be exhumed here. The Commission concluded that costs in 1916 were much the same as in 1911, and that Pittsburgh's relative position, had declined, though until 1916 her absolute tonnage had not. But the Commission was equally capable of quoting its own decisions, and cited its opinion in the 1912 West Virginia lake case in support of this conclusion:<sup>4</sup>

<sup>4</sup> *Ibid.*, p. 165.



assuming that the contentions of the complainants were established, it is not the duty of a carrier to place all of its shippers in a position to meet the markets which they may desire to supply . . . and it is clearly not within the power of this Commission, nor is it the duty of the carriers, so to adjust freight rates as to maintain a fixed relation of tonnage as between given points or districts of origin.

It therefore observed that it would be inclined, on the complainants' theory, to dismiss the complaint. However, in the general investigation much other evidence was produced, and what had been withheld in the right hand was now partly given in the left. The Pittsburgh operators had complained of the *unreasonableness* of the Ashtabula rate. Because of new conditions to be noticed presently, the Commission declined to pass on that issue, but as a result of its investigation, it did reach the conclusion that the rates were *unduly prejudicial* to Pittsburgh, and *preferential* of West Virginia, and so ordered the differential spread from 19 cents to 25 cents. No notice was taken of the usual legal prerequisite to a finding of undue prejudice, that the same carriers be responsible for both the prejudicial and the preferential rates. In later lake cargo litigation this point was warmly contested. Six cents naturally was much less of a change than the Pittsburgh operators had hoped for, but it was half a loaf.

The Commission based its action on a variety of factors. Elaborate comparisons of mileage were made, and of rates and differentials, and of revenue derived from them. The return haul of iron ore to the northern fields was considered. The prevailing single-line hauls from the northern fields were contrasted with the two- or three-line hauls from the south, and it was pointed out that the southern coal must cross the Ohio river over expensive bridges. The costs of the hauls from Pittsburgh and from West Virginia were compared by the use of "locomotive tractive power miles"—a yard-

stick which the Commission approved as affording "perhaps the best basis available of record for comparing the relative costs for the road haul of transporting lake cargo coal from the several fields."<sup>5</sup>

The southern operators who intervened made numerous efforts in this case and in *Bituminous Coal to C. F. A. Territory, supra*, to introduce evidence of the competitive conditions in the coal industry, but made little headway. Their argument was that the competitive situation was of primary importance. Not only freight rates, but also labor costs, mining methods, taxes and other overhead charges conditioned the ability of each operator to compete and therefore were proper subjects of inquiry. The Commission excluded this evidence with the comment:<sup>6</sup>

This argument is predicated upon a mistaken view of the duty of the Commission. Its fallacy lies in the assumption that in dealing with a competitive situation between producing fields, the Commission may, in disregard of transportation conditions, fix rates to equalize commercial and economic disadvantages or approve existing rates that effect such a result.

That sounds simple, and the Commission has often repeated the same thing in substance, but the issue will not down.

Now, it has already been indicated that this readjustment of coal rates, comprehensive and well-intentioned though it was, failed to prove any more lasting or satisfactory a settlement than that in 1912. Whether it would have done so in normal circumstances cannot be told, for it never had a chance. The war upset all calculations in this as in other fields. The war, indeed, exerted a controlling influence on the decision of these cases. The decision was rendered July 13, 1917, three months after the declaration of war, but the

<sup>5</sup> *Ibid.*, p. 182.

<sup>6</sup> *Ibid.*, p. 142.

effects had begun to be felt considerably earlier. At the last hearings in the case in April the carriers introduced a variety of exhibits indicating that while 1916 as a whole was the most prosperous year in their history, toward the end of that year operating expenses suddenly jumped, without any revenue increase. The cost of supplies went up about 50% in a few months, and contracts on a yearly basis that had carried the railroads through 1916 at pre-war prices had to be renewed at heavy advances. Labor costs rose too, though not as quickly.

The result was an emergency and led to the first of the war rate increases in the spring of 1917, while the coal cases were still pending. On the lake rates a flat increase of fifteen cents was added, leaving the differential structure untouched. The Pittsburgh rate then became 93 cents instead of 78 cents, and Kanawha \$1.12 instead of 97 cents. Under these circumstances, when the Commission announced its decision in July, no attempt was made to pass on the reasonableness of the rate level, and the carriers were simply ordered to revise their schedules so as to make effective the changes prescribed in the differentials. This was accomplished by adding six cents more to the Kanawha and other Southern rates, to make the key differential 25 cents. The Fairmont rate was raised three cents only. As the matter stood, the changes effected were of small moment, lost in the larger interests of the war.

#### THE WAR DISLOCATIONS

The war entirely submerged for the time being all the previous issues in the lake controversy and brought forth a whole new set of problems. Interesting in themselves as a part of our war history and as transportation studies, they have less bearing on the sectional conflict that runs through the rest of the story.

During the war the lake market lost its usual attractiveness. There were a variety of reasons, including transportation difficulties for which the operators were themselves often largely to blame, but the principal one was that there was more profit in supplying the war industries of the steel districts than in the lake trade. Coal at the lakes was handled in a pooling arrangement, and though there was some juggling of brokerages and commissions, price control was more effective there. In direct sales to industrial consumers there was much more opportunity for evading the price-fixing of government agencies. Much of the lake cargo coal shipped had therefore to be extracted almost under duress from unwilling operators. For months at a time northwestern consumers clamored in fear of a fuel famine and hastily improvised governmental authorities threatened and cajoled, ordered and countermanded orders, in an effort to get an adequate supply of coal to the lake ports.

During the five years preceding American entry into the war, average spot prices in Pittsburgh for mine-run coal at the mines ranged roughly between \$1 and \$1.50 a ton.<sup>7</sup> In the last nine months of that period, however, the stimulus given to eastern industry by European contracts led to the tripling of coal prices. By June, 1917, the complaints of consumers, whose bidding against each other was as much responsible for the high prices as profiteering by operators, could no longer be ignored. Drastic price-fixing methods were resorted to, but evasion was common, often with the connivance of the customer.<sup>8</sup> The familiar justification was

<sup>7</sup> C. E. Leshner, *Prices of Coal and Coke, 1913-18*, in U. S. Geol. Survey, *Mineral Resources of the United States, 1918*, pt. ii, p. 54. The account of war prices and movements of coal is taken largely from this source, and from *Coal, Part B—Distribution, ibid.*, pp. 695-813, 1315-1392, and from contemporary newspaper clippings. See U. S. Fuel Administration, *Report of the Distribution Division, 1918-19*, pts. i and ii (1920).

<sup>8</sup> The *Pittsburgh Post*, August 18, 1917, spoke of the \$3 price agreed

ready to hand that "everyone is doing it". On August 10, 1917, the Lever food and fuel control act became law. On August 21 the President announced a scale of temporary coal prices based on recommendations of the Federal Trade Commission to be effective pending an investigation of mining costs. Two days later he appointed H. A. Garfield as Fuel Administrator. For West Virginia and Pennsylvania mine-run coal, the price fixed was \$2 a ton. This was protested by the operators, and also by the miners who threatened a strike unless wages were increased so as to give them a share of the fabulous profits the operators were making. To take care of this demand, an increase to \$2.45 was allowed. As the subsequent investigation by engineers of the Fuel Administration showed, this was ample for the large-scale, low-cost mines from which most of the tonnage came, but it was not a sufficient stimulus to get out the extra volume from smaller, higher-cost mines, demanded by the wartime scale of activity. The policy of the Fuel Administration was to make every mine produce to capacity, and some later price increases had to be made.

Lake shipments in 1917 began at an indifferent pace, but speeded up gradually during the summer and by a spurt at the close came near the previous high record in 1913. This was accomplished in the face of acute car shortage by two expedients, pooling at the lake ports, and priority orders to the carriers. Pooling prevented the shipper from retaining "brands" and from getting the premium on

upon as "everywhere evaded". The *Pittsburgh Dispatch* of the same date mentioned a "rumor" that much lake coal was being "lost"—i. e., diverted to Canada, where the lake trade brokers could get more than the \$3 plus brokerage allowed by the agreement in this country. An Illinois operator, W. S. Scott, at an inquiry in Missouri, testified with the frankness of a Richard Croker regarding his idea of a fair profit during war: "There is no limit. We get what we can. Everybody is doing that, including the farmer ... I am doing all I can to get what I can." Quoted in *Pittsburgh Post*, Aug. 21, 1917.

special quality coals. It also kept him in ignorance for a week or two of the identity of the purchaser to whom he must ultimately look for payment. It did, however, cut down enormously the delays at the ports. The Director of Transportation Priority, under authority of the Priority Shipment Act, ordered all bituminous coal carriers to give priority to shipments of lake cargo coal. Later the Fuel Administrator on October 1 ordered all coal producers shipping to the lakes to continue through November sending at least as great a volume as they had sent in September. A representative of the Fuel Administration was placed in Cleveland in charge of apportioning lake coal. So the 1917 tonnage was carried.

In the light of these circumstances it is not surprising that the 1917 decision on lake cargo differentials was accepted without controversy. With fancy prices to be had and demand unlimited the important question confronting the operator each day was whether his railroad would give him any empty cars to fill, not whether he would have to pay six cents more a ton to have them shipped off. A differential of 25 cents did not mean what it had meant when the freight rate was nearly as much as the cost of the coal at the mine.

When the 1918 navigation season opened, the picture had changed again. Federal control of the railroads superseded the efforts of individual carriers to untangle a mass of conflicting priority orders and relieved the congestion at the terminals that had nearly brought war industry to a standstill. An exceptionally cold winter in 1917-18 heightened the difficulties. The famous five-day shutdown of all non-essential industries, followed by "heatless Mondays" gave the carriers a breathing space, after which transportation conditions gradually improved. The Fuel Administration was reorganized, and a zone system put in effect on the first of April. The essence of this system was to budget the needs

of each state and to require their filling from the nearest coal-producing district, thus eliminating cross-hauls. Pooling was retained, but no priority orders were issued.

The effect on the lake shipments was marked. Anthracite was largely confined to New England and the east, and the low-volatile "smokeless" coal prized by the Navy was forbidden for domestic consumption in the Northwest. All-rail coal from Illinois was likewise denied the Northwest, which was obliged to rely upon lake shipments exclusively to fill its needs. Coal production in 1918 was the largest on record, and the lake shipments amounted to 28,156,501 tons, also the largest then known.

Some of the broad results of the war control on the lake traffic may be seen by examining the changes in tonnage and percentage from important districts during the war years, as shown in the table in the appendix. From these it appears that while the Pittsburgh and northern Ohio operators diverted their tonnage to more profitable markets close at hand in 1917, in 1918 they were forced by government control to ship more to the lakes. Southern Ohio and West Virginia, having few industrial customers at home, to some extent filled the gap at the lakes in 1917, but they too sought more lucrative markets. The low-volatile coal from New River and Pocahontas was turned toward tidewater in 1918. Much new tonnage was opened up in southeastern Kentucky.

Thus instead of the normal scramble of operators trying to ship coal to the lakes in order to keep in continuous operation, we have the spectacle of consumers asking the government to make the operators ship them coal and of operators finding so great a demand among war industries at the pegged price or at bootleg prices, that the lake market offered little attraction. Prices were so high, on the pre-war scale, that pre-war differentials were of little account.

## THE POST-WAR READJUSTMENT

The signing of the Armistice stopped temporarily the urgent demand for coal. Federal control of prices and the zone system ceased on February 1, 1919, and production was low for a few months until the excess was consumed and until it was realized that a strike was likely on November 1 of that year. Demand became active in the fall as the strike approached and car shortage reappeared to limit production.

The strike that began on the first of November lasted for six weeks, and was the most effective tie-up on a national scale the industry had ever seen. A few hours before it went into effect, control of all soft coal then on wheels, as well as all later mined, was vested in the Railroad Administration—the Fuel Administration had disbanded—and its Central Coal Committee was clothed with the powers of the Lever Act over prices and movement.<sup>9</sup> The strike was most effective in the Mississippi Valley, least so in the West Virginia and Kentucky fields. It was finally called off, on December 11, after injunction proceedings had proved ineffective in returning the miners to work,<sup>10</sup> on the understanding that the President would appoint a commission to arbitrate between the parties.

By reason of slight demand in the spring, coupled with car shortage in the fall, lake cargo shipments in 1919 totaled only 21,755,869 tons, the smallest amount since 1914. Naturally the eastern operators made a vigorous effort to recapture the ground in western markets that they lost dur-

<sup>9</sup> A brief account of this will be found in W. D. Hines, *The War History of American Railroads*, pp. 83-84 (1928).

<sup>10</sup> The injunction granted by Judge Anderson in Indianapolis under the Lever Act, at the behest of Atty. Gen. Palmer on November 8, 1919. It commanded the revocation of the strike order within 72 hours. *United States v. Frank J. Hayes*, unreported. Sayre, *Cases on Labor Law*, p. 757 (1922).



ing the war. Some reflection of this may be seen in the fact that though the lake tonnage as a whole dropped about a quarter, Pittsburgh shipments dropped only about a tenth, and amounted to 30% of the total. This was still, however, far below the 44% Pittsburgh had enjoyed as late as 1915. The war had permanently lowered her relative position. Ohio, closer to the ports, maintained her place in the lake trade. Kanawha, hard hit by the car shortage, dropped badly. Pocahontas, on the other hand, and New River, with their prized low-volatile coal, returned to their pre-war lake tonnages.

In 1920 the coal operator's ship came in. No sooner had the winter control of the Railroad Administration over coal shipments been relaxed, than the short-lived boom of 1920 began. The testimony is unanimous that in no other year of this generation were the profits of coal-mining so great.

All was not plain sailing for the operators, however. The United States Bituminous Coal Commission, appointed to settle the wage dispute, recommended in March, 1920, increases averaging about 27 per cent, and a subsequent series of strikes raised the day rate from the \$6 fixed by the Commission to \$7.50. The wage had previously been \$5.

In July, too, a general increase of 40% in all freight rates in eastern territory was allowed, bringing them to the highest levels in history.<sup>11</sup> Differentials were preserved by figuring the percentage increase on the highest-rated district, and then adding that net amount to the rates from districts in the differential structure. Following this increase, the Pittsburgh lake rate stood at \$1.86; the Kanawha rate 25 cents higher, and Pocahontas 15 cents higher still.

Another difficulty was with the car supply. A switchmen's strike in April tangled transportation badly, and complaints of car shortage continued from then until the

<sup>11</sup> *Increased Rates, 1920*, 58 I. C. C. 220 (1920).

depression overtook the coal industry toward the end of the year. Since no more coal can be mined each day than will fill the empty cars switched daily to each mine, this acted as a direct check on production, and a particularly unwelcome one. Dissatisfaction with the manner of distribution of those cars that were available led to the litigation of the *Assigned Car Cases*,<sup>12</sup> and to much abuse and recrimination.

With the kaleidoscopic changes in conditions there was a hectic scramble for the profits that were going. In this case again, as during the war, the consumers of lake coal and those in New England suffered. With industrial demand at a peak, the lake market was again unattractive to the producing districts nearest the industrial centers. This was especially true of Pittsburgh, which with the eastern Ohio districts declined in both tonnage and percentage in the lake shipments in 1920. On the other hand, car shortage affected most seriously the districts furthest from the lake ports, and the consequence was a marked rise in lake tonnage originating from small or marginal districts whose local consumption is slight, such as Hocking and Fairmont.

As the summer advanced it became evident that not enough coal was reaching the lake ports and that heroic remedial measures would be required. Since neither the

<sup>12</sup> 80 I. C. C. 520 (1923) and 93 I. C. C. 701 (1924), in which the practice of assigning private cars and cars for railway fuel in excess of the allotment based on mine ratings, when cars were short, was held to be unreasonable and unduly preferential. The practice gave a great advantage to mines with railroad contracts, and a club to the carrier over the operator. An appeal to the courts was taken, *Berwind-White Coal Mining Co. v. United States*, 9 F. (2d) 429 (1925), but in *Assigned Car Cases*, 274 U. S. 564 (1927), the Commission was upheld. The system of mine rating, based on potential capacity per hour rather than total coal shipped and sold in a given period, of itself leads to inflated ratings, surplus capacity and irregular operation, and was condemned in the *Report of the U. S. Coal Commission*, pt. i, pp. 233-235. The Interstate Commerce Commission, however, after an investigation, refused to order a change, *Rules Governing Rating of Coal Mines*, 95 I. C. C. 309 (1925).

Fuel nor the Railroad Administration now functioned, it devolved upon the Interstate Commerce Commission to undertake this, the fourth governmental exercise of control in the industry in consecutive years. Under the enlarged powers granted it in emergencies by the Transportation Act of 1920, Order No. 10 was issued on July 20, 1920, directing all lake carriers to give priority to lake coal in furnishing and moving cars.<sup>13</sup> Lake coal began to move presently, but momentum came slowly. These special service orders of the Commission "came no closer to receiving universal approbation than had the efforts of the United States Fuel Administration and the Central Coal Committee."<sup>14</sup> Other sections complained of the preference to the Northwest and to New England; coal operators protested against being forced to ship to the lakes. If they refused, however, their carriers could refuse to move any cars for them.

The unusual forces that kept the depression from striking the coal industry as early as others in 1920 had spent their strength by the end of the year. It was a dramatic transition, in a period of six or eight months. Coal that in September, 1920, had brought as high as \$14 a ton was available in March, 1921, at about \$2.50 a ton. The situation was unrelieved except by the strike in the British collieries from April to July. This revived American export trade, at the expense of British miners, and permitted the actual shipment of "coals to Newcastle". Lake shipments remained at 22,363,899 tons, substantially the same as in 1920, but there were no transportation breakdowns to blame this time.

The 1921 depression furnished the first real test of staying power in the lake trade since before the war. Every ton that could be disposed of helped keep up operations, and the

<sup>13</sup> 1920 *Ann. Rep., I. C. C.*, p. 11. See *Pittsburgh Post*, July 21, 1920.

<sup>14</sup> *Coal in 1920*, p. 457.

lake market immediately regained its pre-war attractiveness. The share of the business that each district was able to get reflected directly its ability to adjust itself to a low-cost basis of operations. Eastern Kentucky, with non-union labor, nearly doubled its shipments of the previous year, and Pocahontas did almost as well. Kanawha likewise made a good gain. Pittsburgh, eastern Ohio, and Fairmont each slipped a bit. On the whole the trend toward the southern fields that had been characteristic of the decade before the war seemed to reassert itself, with Pittsburgh in particular several rungs further down the ladder.

In the coal year 1922, the great strikes in both the anthracite and the bituminous fields were the outstanding events. Great Britain was thereby enabled to return the coal exports of the year before. The expiration of the general union agreement on April 1, just when the lake season opened, was the signal for the strike's beginning. In 1919 the miners had struck to secure wage increases. This time they struck to prevent the reductions in wage rates demanded by the operators. Many operators, and much lay opinion, inclined to the view that the union would be unable to hold out for long, so there was little stocking beforehand. When, however, not only all the organized but many non-union fields also responded, the contest became one of attrition. On July 1 the striking miners were benefited by the railway shopmen's strike which added to the difficulties of distribution from the non-union mines still open.<sup>15</sup>

As the deadlock continued, government intervention and control was invoked, for the fifth time in six years—almost by habit. In July a Presidential fuel committee was formed, consisting of three cabinet members, a member of the Inter-

<sup>15</sup> This strike occasioned the "Daugherty" injunction granted by Judge Wilkerson in Chicago, *United States v. Railway Employees' Dept. A. F. L.*, 283 Fed. 479, 286 Fed. 228, and 290 Fed. 978 (N. D. Ill., 1922 and 1923).

state Commerce Commission, and a Federal Fuel Distributor. It undertook to coordinate Federal Government purchases, lake shipments and railway fuel orders, but it had, of course, only the moral authority of emergency. In September the Cummins-Winslow embargo law gave a statutory basis to the office of Federal Fuel Distributor with emergency powers, and enlarged the authority of the Interstate Commerce Commission.

The strike was settled on August 17 at a conference in Cleveland, when the union gave up its demand for a revival of the central competitive field agreement. Operations were to be resumed at the 1920 wage scale, which was to be continued until March 31, 1923. A proposal for a special committee of inquiry into the coal industry was abandoned when Congress provided for the United States Coal Commission. Producers' associations and many operators refused to attend or withdrew from the Cleveland meeting, but after the settlement union operators generally swung into line. Last of the important companies in the Pittsburgh district was the Pittsburgh Coal Co., the largest.

Once production at a normal pace was resumed, the problem became one of getting the more distant markets supplied before winter. This was the task of the Federal Fuel Distributor. By the end of the season 18,578,000 tons had been shipped, but not since 1909 had the total been so small. Eastern Kentucky, which had not closed down, increased again substantially its percentage share of the total, and Kenova-Thacker, also non-union, returned as a producer. Eastern Ohio shipments were cut in half from the previous year and Pittsburgh dropped in relative standing for the fourth consecutive year.

In May, 1922, freight rates were materially scaled down. The 40% increase over the 1918 level in eastern territory that had been granted in the boom year of 1920 was cut to

26%.<sup>16</sup> This was the last of the general changes in rate levels attributable to the war dislocations. Including the first rise early in 1917, they left a net increase of 88 cents in all lake cargo rates, just equal to the Pittsburgh lake rate as it stood when the 1912 controversy began. The differentials were not changed from the 1917 adjustment at the outbreak of the war, but they of course represented a much smaller fraction, either of the cost of production or of the selling cost in 1923, than before the war.

The shortage of coal in 1922 left a hangover of demand in 1923, and since 1923 developed a very good demand in its own right, it proved an excellent year—the first “normal” year since the war, coal operators reckon it. It was not so good a year for the employees, for there were too many of them. 1923 marked the peak of the overdevelopment in the mines, when productive capacity shot far beyond the horizon of consumption. 1920 was the last year in which the pre-war line of normal consumption trend was touched. War prices, strikes and railroad disability obscured the inevitable deflating forces for some time, and in 1923 they were still disregarded. It was a year of labor truce. The wage agreement of the previous year was renewed for another year without much difficulty. Toward the end of the year, however, the great competitive advantage of flexible wage costs in the non-union fields became increasingly apparent under the pressure of the enormous overcapacity of the industry. Early in 1923 most commercial mines were working part time. By the end of the year, a third of them were entirely idle, while the bulk of their business had gone to a small but growing percentage of the lowest cost mines that were working full time.

The total production for 1923 was about the same as in 1920, a little less than in 1918, but the lake shipments reached a new high mark, almost thirty million tons. This

<sup>16</sup> *Reduced Rates, 1922*, 68 I. C. C. 676 (1922).

was nearly two million tons above the war record in 1918. Every considerable originating district increased its shipments materially over the year before. The coal industry still looks back wistfully to this year.

Even then, however, perspective made the picture look less rosy to the northern operators. While the Pittsburgh lake shipments in 1923 showed a handsome improvement over the previous two or three years they were not quite as large as in 1916, and less than in any other pre-war year back to 1909. In those fifteen years the total annual volume of lake cargo coal shipped had practically doubled. Pittsburgh's share of the total had stood still or declined each year and all of the increase had gone to her southern competitors.

CHAPTER V  
LAKE CARGO LITIGATION SINCE THE WAR

I

DOCKET 15007

To remedy one factor in their unsatisfactory experience in the lake trade in the post-war years, the northern operators set out once more to secure a rate readjustment. As in 1909, they first approached the traffic managers of the carriers serving them, but after a series of conferences the latter refused to budge. Under pressure from the southern operators, the southern carriers declined to agree to any spreading of the differential and the northern carriers were unwilling to take the initiative by reducing their own rates and possibly precipitating a rate war. Consequently, the northern operators were informed that if they wanted relief, they would have to go to the Interstate Commerce Commission for it. They did, and thus began litigation which took all the parties three times before the Commission, then to the courts, and once more before the Commission, in a space of eight years.

Complaints were filed in July, 1923, in which the eastern Ohio and Pittsburgh operators alleged that their rates were unreasonable and unduly prejudicial as compared with those of all their competitors. In counter attack the Fairmont operators complained similarly of the rates of their northern but not of their southern competitors. The three cases were consolidated in Docket 15007, *Lake Cargo Coal Rates, 1925*.

The renewal of the attack on the lake rate structure was



not an isolated event. In the *Ohio-Michigan Coal Cases*,<sup>1</sup> just previously decided, the Commission reviewed substantially the same issues that were involved in 1917 in *Bituminous Coal to C.F.A. Territory, supra*, and spread the differential in favor of southern Ohio under the Inner and Outer Crescents on north and westbound coal from 40 cents and 60 cents to 50 cents and 75 cents respectively. The lake differentials in favor of Ohio were 28 cents and 43 cents, respectively, under Kanawha in the Inner Crescent, and Pocohontas in the Outer Crescent. Moreover, four Commissioners who concurred separately in the *Ohio-Michigan* decision thought that the differentials should be still further widened, and another thought the rates should be realigned on a mileage scale, which would have an even more drastic effect. The more emphatic of these concurring opinions, by Commissioner Potter, was based on a consideration of the general bituminous situation and urged the elimination of long hauls as a means of promoting transportation efficiency and concentrating production in the more efficient mines.<sup>2</sup>

This view was in line with the recommendations of the United States Coal Commission, whose reports on various phases of the coal industry appeared in the summer and fall of 1923.<sup>3</sup> Following the first of these, the Interstate Commerce Commission began an investigation on its own motion into anthracite freight rates, which presently became an inquiry into the rates on anthracite substitutes to New England and the middle Atlantic states,<sup>4</sup> and then a general re-

<sup>1</sup> 80 I. C. C. 663 (1923).

<sup>2</sup> *Ibid.*, 692.

<sup>3</sup> *Report of the U. S. Coal Commission* (Washington, 1925). See esp. pp. 193-254, "Report on Relief from Irregular Operation and Overdevelopment and on Transportation of Bituminous Coal".

<sup>4</sup> Docket 15006, *Anthracite Coal Investigation*, 101 I. C. C. 363 (1925), and 104 I. C. C. 341 (1925); *Eastern Bituminous Coal Investigation*, 140 I. C. C. 3 (1928).

view of eastbound bituminous rates. The several phases of this controversy stretched over a period of nearly five years, concurrently with the lake cargo cases and involved many of the same parties. The northern operators found their tide-water shipments to New York, Philadelphia and Baltimore, and their all-rail coal to New England subjected to the same strenuous competitive pressure from southern coal at Hampton Roads and Norfolk that their lake coal met in the northwest.

#### *Interveners*

A number of sharply conflicting interests were represented in the litigation. The Pittsburgh and eastern Ohio operators had brought their cases under both sections 1 and 3 of the interstate commerce act, alleging undue prejudice and preference as well as unreasonableness. Under section 3, they complained of the differentials from *all* the other coal districts as preferred, thus aligning themselves against southern Ohio and Fairmont with the others. They had no serious grievance against southern Ohio, whose competition they did not fear, and in the hearings eastern Ohio withdrew its complaint against Hocking, which took the same rate. The Hocking operators declined to join as complainants in this case, but in the hearings they indorsed all the complainants' contentions, except that they insisted that their rates should remain the same as those from eastern Ohio.

The Fairmont situation was somewhat different. Fairmont coal is mined from the same seam that underlies both Pittsburgh and Ohio No. 8, and the difference in average distances from Fairmont and from the Ohio districts to the lake ports is a good deal less than the difference between the nearest and the furthest Ohio districts. In spite of this the Fairmont differential was 15 cents over Pittsburgh, and 18 cents over Ohio. A much better case of prejudice to Fairmont, however, could be made out against southern West

Virginia and eastern Kentucky, yet no complaint against them was included in the Fairmont case. The largest Fairmont operator, the Consolidation Coal Company, was a still larger operator in the fields further south and in its efforts to improve the Fairmont situation was careful not to jeopardize its more important interests elsewhere.

The question occurs whether a similar motive might not deter other northern operators. The answer is not clear, for there are no comprehensive data of public record on the ownership of coal mines. But apparently commercial operators in the northern fields have no large holdings in the southern fields, and *vice versa*. This is not true of consumer-owned, or "captive" mines. Some of the largest coal mines in the Pittsburgh district are owned by consumers who have large coal properties in West Virginia. It is only the commercial coal companies that feel the competitive effect of differentials.

The other interveners in the 1925 case included associations of operators in the southern districts and in Illinois, the regulatory commissions of the southern coal producing and of the northwest consuming states, several of the largest industrial consumers of lake coal, and a variety of civic organizations and chambers of commerce. Naturally, the southern operators denied any unreasonableness or undue preference in their rates and they shared with their carriers the burden of the defense. The Illinois operators send coal all-rail to the Northwest in competition with lake cargo coal, and so opposed any lowering of the Pittsburgh rate, but they did favor spreading the differential by increasing the rates from the southern fields. This would benefit Illinois directly in competition with southern lake cargo coal, and also indirectly by bolstering an argument for a greater differential in favor of Illinois on all-rail coal westbound from the West Virginia and Kentucky fields of the Inner Crescent.

The regulatory commissions of the several states with supine unanimity indorsed the demands of the dominant industrial groups in their respective states. They displayed no independent judgment. The same may be said of the intervening chambers of commerce and boards of trade. These were the claquers—in the colloquial nomenclature of the commission, the “scenery.”

The northwestern consumers were vehement interveners. As the Commission remarked later,<sup>5</sup>

in no proceeding before us have consumers and their representatives insisted more earnestly and forcibly than they have here that their interests be not submerged in the struggle between competing coal districts.

They might have been expected to be neutral in the contest, interested only in access to the widest possible markets, with the lowest possible rates. They did want that, but they were not neutral. They supported the complainants' prayer for lower rates in order to bring down the entire rate level. They vigorously urged a narrower spread, not a wider one, and insisted that any rate reductions should be made a benefit to the consumers. Just how the reductions would relieve the shippers too in that case, they did not explain, and it is difficult to ground the consumers' position on anything else than the sheerest self-interest. Those represented were users of southern coal primarily, and insofar as they supported the complainants here, it was with the intention of getting southern coal on more favorable terms later.

Among the carrier defendants a superficial harmony prevailed, with one exception, the Wheeling & Lake Erie, which serves eastern Ohio chiefly. The Wheeling road, then an independent, agreed that undue prejudice existed against Ohio, and therefore proposed higher rates from West

<sup>5</sup> *Lake Cargo Coal Rates, 1925*, 101 I. C. C. 513, 546 (1925).

Virginia. The interests of the other carriers were not ultimately at one, as was shown by later developments, but they all agreed on the first step, which was to maintain the *status quo* if possible.

### *The Hearings*

The hearings began in the middle of February, 1924, and about five weeks in all were consumed in taking testimony. Briefs were filed in September, and the examiner's proposed report, which recommended a 21-cent reduction in the Pittsburgh rate and a general readjustment, appeared at the end of the following February, 1925. Congress was then in session, but adjourned the short session on March 4. In a "Leave-to-print" speech dated March 4, Congressman Robsion from eastern Kentucky made a violent attack on the Commission and its examiner because of the proposed report that had just appeared. This was the first mention of the *Lake Cargo* cases in the political arena of Congress. Oral argument was heard by the Commission in April, and in July the Commission's decision was announced.

From one important aspect, the complainants chose an unfortunate time to bring their case, for with the hearings completed before the lake season of 1924 was more than a month or two old, the bulk of the testimony had to be based upon the figures for 1923, and 1923 was the best lake season the northern operators were to see in a decade. It is true that by the time the case was decided, the Commission was not unaware of the results of the 1924 operations and of the beginning of the 1925 season, which was much worse for the complainants. But the record was built on the experience up through 1923 only and the decision was confined to that.

The bulk of the shippers' evidence in any important coal-rate case, which involves both issues of unreasonableness and

of undue prejudice, consists largely of elaborate analyses of the average distances; of the cost of the hauls (segregated as to terminal and road-haul costs); the revenue derived by the carriers per ton, per car and per train, by miles and by days; the conditions of transportation; comparisons of the rates with those on the same or similar commodities for similar hauls; and the same analyses and comparisons of the differentials as measures of the differences in these various respects. Out of this mass of material, the complainants here sought to emphasize two or three points.

One of these was the effect of the percentage increases in the rates, coupled with the maintenance of the differentials through the war changes.<sup>6</sup> Because the percentage was applied to the highest rated districts, the flat increases to the nearer ones obviously amounted to a higher percentage of those rates. Had the Pittsburgh rate been advanced and reduced by the standard percentages, it would in 1923 have stood at \$1.385, instead of \$1.66. Of course, the purpose in making the advances as they were made, was to preserve the differentials, and such treatment was not exceptional. However, with both the price of coal and the freight rate nearly doubled since the differentials were fixed, the competitive effect of the latter was much less.

Another point emphasized was the changed relation of the lake cargo rates to those on ex-lake iron ore moving from the same lake ports, often in the same cars, to furnaces located in the same general districts as the northern coal mines. When the Pittsburgh lake rate was reduced in the *Boileau* case, from 88 cents to 78 cents per net ton, with the remark that on a cost basis it was "still too high", the ex-lake ore rate was

<sup>6</sup> There were three advances, April 16, 1917, June 25, 1918, August 26, 1920, and one reduction, July 1, 1922. The Pittsburgh rate, beginning before the war was successively, 78c, 93c, \$1.30, \$1.86 and \$1.66.

94 cents per gross ton. In 1923, the ore rate was \$1.15, compared with the \$1.66 lake cargo rate.<sup>7</sup>

Perhaps the main reliance of the complainants was upon cost studies that indicated \$1.23 as a reasonable maximum cost, including a fair profit, of hauling lake coal from eastern Ohio; this was in line with the results of the cost studies in the *Boileau* case. Finally, as an indication that their differentials were too small, the complainants compared them with the differentials of 50 cents and 75 cents which the Commission had just fixed in the *Ohio-Michigan Cases*, *supra*. In conclusion, the complainants asked that their lake rates be reduced from the existing levels to \$1.23 for Ohio and \$1.26 for Pittsburgh—reductions of 40 cents which would increase the differentials under the southern high-volatile fields to 68 cents and 65 cents, respectively. Since a reduction of their rates would help them little if the rates from their southern competitors were likewise reduced, they asked the Commission to use its minimum rate power to keep those rates where they were.

The railroads' answer may be summarized in a few sentences. They cast what doubt they could on the cost studies that had been submitted and they emphasized the loss in revenues that reductions would bring. On the affirmative side, they offered comparisons of commercial coal rates for like distances in the same general territory, which were on a generally higher level. They urged in support of the adjustment as it had previously been fixed by the Commission, that under it the complaining districts, taken together, had in 1919 and 1921 still supplied more than half

<sup>7</sup> See *Iron Ore Rate Cases*, 41 I. C. C. 181 (1916), and *Trunk Line and Ex-Lake Ore Rates*, 69 I. C. C. 589 (1922), in the latter of which reductions by the carriers in ex-lake ore rates were disallowed by the Commission. The change reflects the greater bargaining power of the few giant shippers in the steel industry as compared with the multitude of coal shippers.

the lake shipments. This was not true in 1923 nor in 1924; still less so in 1925.

The intervening southern operators supported their carriers' contentions and in addition introduced much evidence of the competitive situation between themselves and the northern operators. They urged that a substantial share of the lake traffic was essential to the economical operation of their mines, without which the business and social life of the southern districts would be endangered. They complained also that they were handicapped by the fact that many of the dock and distributing companies of the Northwest were controlled by the northern operators and their associates. It was a fact, however, that the dock companies were constrained to carry and supply southern coal through the force of consumer demand for it.

Just before the appearance of the examiner's proposed report, Congress had passed, under pressure of the agricultural lobby, the so-called Hoch-Smith Resolution, which on its face seemed to direct the Commission to grant lower rates to shippers in depressed industries.<sup>8</sup> When the examiner's proposed report appeared and favored the Pittsburgh contentions, the southern operators invoked the new resolution and petitioned for further hearing in order that the conditions prevailing in the coal industry might be considered by the Commission. Later, when the shoe was on the other foot, the southern operators took a contrary view of the meaning of the Hoch-Smith Resolution, but here it seemed to offer support for their contentions. Although the Commission was still groping for the meaning it should give the Resolution, it decided not to reopen the *Lake Cargo* case or merge it with the general investigation ordered by the Resolution. The petition was denied.

<sup>8</sup> See below, chap. viii, p. 248.



*The First Decision*

The Commission, by a vote of seven to four, reversed its examiner's recommendations<sup>9</sup> and dismissed the complaints. The decision was made public on July 16, 1925 but by an unexplained leak the results were known to interested parties two weeks before the official announcement.

Commissioner Hall wrote the decision. The issue of unreasonableness was dismissed on the basis of comparisons which were taken as settling that the *level* of the rates was reasonable, despite the evidence of peculiarly favorable conditions in handling lake coal. What was said in the *Boileau* case to the effect that "cost is only one of the elements entering into a rate", was repeated.

The issue of undue prejudice seems to have been dismissed chiefly because of the good showing of the eastern Ohio districts, Ohio No. 8 and Cambridge, in lake shipments in the post-war years. In the interval of a dozen years since 1911 these districts had kept their standings, relative and absolute. The southern Ohio districts had decreased during the same period and similarly the Pittsburgh tonnage had declined, while that from Pennsylvania outside Pittsburgh had increased. These facts were regarded as demonstrating that no undue prejudice had existed; if Ohio No. 8 could do so well, the other districts on the same or nearly the same rate could not complain. In 1923 the complainants together still shipped 60% of the total.

The Commission also found that the legal basis for a finding of undue prejudice was lacking, even though the

<sup>9</sup> *Lake Cargo Coal Rates, 1925, Pittsburgh Coal Prod. Assn. v. Ashland C. & I. Ry.*, 101 I. C. C. 513 (1925). Commr. Campbell concurred, at p. 549, in the finding that the rates from Pittsburgh and Ohio were not unreasonable, but thought the differentials should be spread. To do that would require an exercise of the minimum rate power, and he thought the record presented an insufficient basis for that. The division on the issue of differentials was therefore 6 to 5.

facts otherwise would support it, as they said they did not. This was because "the carriers controlling the rate adjustment from the southern West Virginia and Kentucky districts are not the same as those which control the adjustment from the complaining districts," a condition the Commission had long held to be a prerequisite to a finding of undue prejudice.<sup>10</sup> The statement is literally true only if corporate entities are kept distinct, and the application of the condition to the lake cargo carriers is involved in considerable legal doubt. It is subject to change as the consolidation program advances.

All in all, the tenor of the Commission's decision was to recognize as facts most of the assertions of the Pittsburgh operators with respect to their rates, but to deny that they made out a case of unlawful carrier action which entitled them to relief. If the complainants have suffered, it is from acts that are within the lawful discretion of the carriers, or it is from causes outside the rate structure.

Four dissenting Commissioners, and one more who concurred in the finding that the rates were not unreasonable *per se*, thought the facts did make out a case and that the Commission should do something about it. Commissioner Eastman, who wrote at greater length than the others, had<sup>11</sup>

no doubt whatever that nothing has been shown which warrants the imposition of relatively high rates upon the northern districts in order that the southern districts may have the benefit of relatively low rates; and that is what has plainly occurred.

With the majority he agreed that the legal basis for a finding of undue prejudice was lacking and that there was no sufficient basis for the use of the minimum rate power. His

<sup>10</sup> *Ibid.*, p. 545. See *Ashland Fire Brick Co. v. Sou. Ry.*, 22 I. C. C. 115 (1911); *infra*, ch. vii.

<sup>11</sup> 101 I. C. C. 513, 553 (1925).

solution was to lower the Pittsburgh and Ohio rates to levels corresponding to the cost of the service, i.e., \$1.40 and \$1.35, respectively. That would do justice to the complainants. It would also place the burden of maintaining the favorable situation of the southern operators, if it were to be maintained, upon the southern carriers, who were, he said, a prosperous lot anyway. He continued:<sup>12</sup>

If after such reasonable rates were established the southern carriers should seek by corresponding reductions to maintain the present differentials, they would be at liberty to do so, provided they did not in the process impose an unreasonable burden upon other traffic. Whether they could avoid such a burden which would lay the foundation for the exercise of our minimum rate power, I do not undertake to say. It is at least very doubtful.

In conclusion he took occasion to denounce as "fantastic" the assertion that it was "necessary to give the southern fields access to the northwestern markets in order to ensure a reasonable price for coal there." With no shadow of monopoly among the Pittsburgh and Ohio producers, and with a supply greatly in excess of any possible demand, he thought the clear need of the situation was not more competition but steadier production and less waste of transportation by the curtailment of the longer hauls. In this will be recognized an agreement with the view expressed in 1912 that the opening of the southern fields was economically a misfortune and an agreement with the major conclusions of the United States Coal Commission in 1923. It was the view, however, of a minority of the Interstate Commerce Commission. The majority were more impressed with the immediate claims to existence of the others than with the harsher claims to justice of the complainants. "One must live", said the southern operators. The majority of the

<sup>12</sup> *Ibid.*

Commission were not the men to give the stern reply, "I do not see the necessity."

## II

### SECOND THOUGHTS

After an adverse decision by a 6-to-5 vote, the temptation to seek a reconsideration was natural and strong, particularly since the defeated parties themselves now felt the pressure of overwhelming necessity. This time it was the northern operators who said, "One must live." The seasons of 1924 and 1925 nearly wiped them out. About Christmas time in 1925, therefore, within six months of the original decision, petitions for a re-argument and reconsideration on the basis of the more recent experience were filed by the original complainants. The Commission issued an unusual order, to show cause why further hearings should not be had, and then in April, 1926, agreed to a further investigation.

#### *Changed Conditions*

The year 1924 is remembered as the year of the Jacksonville wage agreement, which continued for three more years the scale set in 1920. Probably no other word in the English language, to a northern coal operator, has quite so nearly the effect of a red flag on a bull as "Jacksonville." It has been the scapegoat upon which the sins and sufferings of the industry for the succeeding four years were heaped. It was a contributing factor and the immediate occasion of trouble, but separately considered, was probably not much more to blame than scapegoats usually are.

The agreement was made in January, 1924, in anticipation of the expiration of the previous year's truce, at a conference of representatives of the United Mine Workers, operators' associations, and government officials, Secretaries Hoover and Davis, and John Hays Hammond, chairman of

the Coal Commission in 1923. It is generally admitted that no agreement would have been reached but for the pressure of the government sponsors, who were anxious to avoid labor troubles like those of 1922 in a presidential year. The continuance of the 1920 wage scale was accepted with the greatest reluctance by the operators who signed. Many did not. The agreement covered perhaps 60% of the productive capacity east of the Mississippi, but the other 40% included all the southern West Virginia and eastern Kentucky and Tennessee mines.

In industry generally the year 1924 was characterized by a "mild reaction." The consumption of bituminous coal was reduced, and for the first time since the war no strike, no car shortage, no unusual export demand intervened to obscure the effects of the enormous overdevelopment of the mines and oversupply of labor. A period of drastic liquidation set in that has not yet ceased. For the first time since statistical records have been kept there was an absolute reduction in mine capacity.

Since the southern operators were free to reduce wages, the substantial parity in wage scales that had existed between the union and non-union fields after the strike in 1922 quickly disappeared. Consequently the shift in tonnage produced from north to south, which had become a familiar phenomenon to coal men, was greatly accelerated. The lake traffic reflected the general trends. The total volume of cargo coal shipped in 1924 shrank nearly to the 1919 level. Of this, Pittsburgh's share was cut almost in half from the previous year, 14% compared with 27%. Ohio maintained her relative position at 17%, thus for the first time forging ahead of Pittsburgh. Kanawha for the first time became the largest-shipping district in the lake trade. Eastern Kentucky moved far enough up to push Pittsburgh into fourth place. Every other southern district gained relatively over the year before. It was a runaway.

Lest 1924 be thought unusual, the next year repeated a similar story. This time Ohio, too, dropped way down. Early in 1925 most commercial mines in the Pittsburgh district shut down. Temporary relief appeared finally in the great anthracite strike on September 1, but the forces of overexpansion, increased economy in the use of fuel, competition of other sources of power, and increased output per man, on the one hand, and arrested demand and adequate transportation on the other, were not so easily exhausted. A few of the northern mines reopened non-union with lower wage scales, leaving their lawyers to take care of the Jacksonville agreement. In the case of the Pittsburgh Coal Company, the shutdown was accompanied by an executive reorganization<sup>13</sup> and by extensive improvements in the methods of handling and preparing coal.

These wage reductions were met by further reductions in the southern fields and as irreducible minima were reached, depression overtook them as well. The anthracite strike in September, however, was a boon to the low-volatile West Virginia districts. New Englanders were weary of hard coal shortages and turned to the smokeless bituminous they had heard of during the 1922 anthracite strike. The Interstate Commerce Commission at Thanksgiving time ordered the carriers to put in temporary all-rail rates from West Virginia to New England.<sup>14</sup> This was an entering wedge. The rates were later made permanent and another Pennsyl-

<sup>13</sup> Mr. W. G. Warden became chairman of the board. Testifying before the Senate Interstate Commerce Committee, he stated, "the policy of the Pittsburgh Coal Co. is to continue to operate its mines efficiently on the open-shop basis in the firm belief that under the present laws and economic conditions there is no other course that will give men in its employ the opportunity for steady work at the best wage rate possible or that offers opportunity for profit to its stockholders." *Hearings on Conditions in the Coal Fields*, p. 1286 (1928).

<sup>14</sup> *Anthracite Coal Investigation*, 104 I. C. C. 341 (1925).

vania market was opened to southern competition. Lake shipments in 1925 took a turn for the better, but, far from sharing the improvement, Pittsburgh's lake business was barely over 2,000,000 tons, the smallest of any year in this century.

In 1926 there was a let-up in the competitive pressure, not from any fundamental changes, but because of the concomitance of four short-term influences that for the moment outweighed the general trend. The first of these was the anthracite strike that continued through the latter part of February, 1926, and created a demand for bituminous in replacement. The second was the large general consumption that accompanied record industrial activity. 1926 was a boom year. Third was an export demand almost as large as that of 1920, created by the seven months' suspension in Great Britain. Finally, in the closing months of the year, a good deal of coal was stored in anticipation of a strike at the termination of the Jacksonville agreement in April, 1927.

All these forces were short-lived, and by the end of the year were exhausted, yet under their influence occurred one of those psychological flurries that fly in the face of logic. Prices rose abruptly, and by their very rise created additional demand among consumers who feared they might be caught by further rises later. Industrial purchasers found themselves bidding against lake shippers, exporters and domestic demand. Many northern mines that had closed down because their operators were unable to pay the Jacksonville scale and compete, were reopened. The bubble, however, did not last long. Late in November the British strike collapsed and prices dropped back.

Despite the boom, the diversion of business from north to south continued. Between 1923, when the pending *Lake Cargo* case commenced, and 1926, Ohio production had decreased 31% and Pennsylvania 11%, while in West Virginia

total production had gone up 33%, in Kentucky 41%, and in Virginia 20%. In lake shipments in 1926, Kanawha was again the leader, and for the third year in succession Pittsburgh stood in fourth place. All Ohio shipped less than the Thacker-Kenova districts in West Virginia.

### *Reconsideration*

The hearings on reconsideration began in July, 1926, before Commissioner Hall, who wrote the original decision. Every effort was made to bring the record down to as late a date as possible. The case had by this time attracted wide public attention, and a much larger audience was on hand than is usual at a rate case. An editor of *The Coal Age* covered each of the hearings in detail for that trade journal.<sup>15</sup> Political personages of varying importance hovered around, and threats and counter threats of political action were rumored. Lest there be any doubt where important Republican interests lay, James Francis Burke, late general counsel for the Republican National Committee, argued the case on behalf of the intervening Pittsburgh Chamber of Commerce. The issue, however, cut across party lines.

Three points were emphasized in the complainants' reargument. The sudden and much more rapid shift of business to the south in 1924 and 1925, they thought, dispelled any need of restraint by the Commission in reducing the northern rates for fear of undue disturbance of established channels of traffic. Southern coal would not be driven out of the lake market by any differentials that the Commission conceivably would fix. The northern districts now would be lucky to regain their 1923 share. Second, the remark of the Commission in its original report that "the issue of unreasonableness . . . is on the whole subordinated to that of undue prejudice," was denied, and a determined effort was

<sup>15</sup> 30 *Coal Age*, pp. 120, 154, 608, 643, 748, 785 (1926).



made to show that the northern rates were unreasonable, both on the basis of cost, and by comparison with rates on commercial coal. Finally, the Commission's previous conclusion that the legal basis for a finding of undue prejudice was lacking, was sharply challenged. The question of the Commission's power is evidently important in any sectional rate controversy involving a number of carriers. Here and in later phases of this case it was a crucial factor limiting the scope of the remedies the Commission could administer.

As for Ohio, the enormous reduction in its lake shipments in 1925 and 1926 destroyed the basis for Commissioner Hall's argument in the original case, that since Ohio No. 8 had done so well under similar circumstances, Pittsburgh and the other Ohio districts could not lay their troubles to the rate structure.

There were some changes in the defense on rehearing, but the principal one was in the volume of evidence and argument submitted. With each successive stage of the controversy two more words grew where but one had been before. The ardor of the northern carrier defendants slackened noticeably in this second case, perhaps because the drop in northern tonnage in the last year or two became alarming and threatened greater losses than a lower rate. In the first case they had been actively hostile; now they made no reply to the petition for reconsideration. Their representatives went through the motions of defense merely. The Wheeling & Lake Erie, which had played a lone hand in the original case, reaffirmed its willingness to accept the examiner's proposed report in the prior case, but asked for a proportionately greater increase in the rates from the southern districts. Before the hearings were concluded, however, it came under joint trunk-line control and thereafter its independence ceased.<sup>16</sup>

<sup>16</sup> Details of the acquisition of control of the Wheeling from John D.

The burden of the carrier defense was again assumed, and even more vigorously, by the southern carriers, especially the C. & O. The same ground was gone over as before and as the controversy grew in intensity, more extreme claims were made on both sides. One of these was the effort of the C. & O. to show that it had been developed into such an efficient "coal-carrying machine" that it could transport southern coal twice as far as the northern carriers for about the same cost. Counsel for the C. & O. plainly implied the intention of the southern roads to meet any reductions the Commission might order in the northern rates. The story failed to convince the Commission. The cost figures given included only out-of-pocket expenses. The claim of low cost in carrying from the south, on account of large volume, was made in one breath, while in the next it was argued that the higher cost of the northern haul was due to the congestion of a large volume of traffic on the northern roads, and this in spite of the preponderance of traffic southbound from the lakes on the northern roads and a preponderance northbound on the southern roads. On the whole the conclusion seems warranted that any significant difference in transportation costs in favor of the southern haul can only

Rockefeller, Jr., by the B. & O. on behalf of the trunk lines are given in an Associated Press dispatch from New York dated February 7, 1927. This incident in the long battle over consolidation programs is of interest because trunk-line control of the Wheeling eliminates one of the principal "free lines" in the lake cargo traffic from the northern fields. See *Interlocking Directors of the W. & L. E. and Trunk Lines*, 138 I. C. C. 643 (1928). In compliance with a later order to divest themselves of their Wheeling stock, the trunk lines turned it over to the Alleghany Corporation, Van Sweringen holding company, under a trust agreement. The 4-party consolidation plan currently proposed assigns the Wheeling to the C. & O. Since the Wheeling is the principal lake carrier from the Ohio No. 8 district, such a consolidation would provide a clear legal basis for a charge of undue preference and prejudice against the C. & O. with respect to its lake rates from West Virginia and Ohio. *Infra*, chap. vii.

be reached by leaving out of account some significant factor favorable to the north, such as comparing the C. & O., lowest-cost southern road, with the average of all northern roads, or by leaving out of account the P. & L. E., lowest-cost of the three principal northern lines, or the L. & N., highest-cost of the southern lines.

The chief reliance of the southern operators was again upon a mass of testimony regarding economic conditions in the mining districts, and evidence of the superior preparation of southern coal for the market. At the best of their mines, they said, labor was steadily employed at higher average earnings, though at lower rates, than in the northern fields. Those mines got the lake business which were equipped to serve an increasingly exacting consumer. The burden of the argument was to the effect that the rate adjustment was a minor factor as compared with various competitive handicaps that the northern operators suffered. Some of these, like the higher wage costs imposed by the union, they thought could be cured; others, like the higher price of coal in the ground, were the penalty of operating in a congested industrial region. Neither, they said, entitled the complainants to rate relief. The northern operators in rebuttal admitted the higher costs and wages, but denied that they should on that account pay relatively higher freight rates too.

The evidence of industrial conditions was admitted this time, whereas it had been rejected in the previous cases, on the theory that while complainants could not rely upon it as a ground for rate changes, defendants could use it to combat the claim that rates were the basis for the complainants' troubles. In admitting it, the Commission was doubtless influenced by the existence of the Hoch-Smith Resolution, which still awaited authoritative interpretation, but directed the Commission to give consideration to conditions pre-

vailing in the industry when making rate readjustments. The resolution was later made a ground of appeal from the Commission to the courts, but it does not seem to have been a controlling factor. It is mentioned but once in the Commission's decision, and it is plain that the outcome of the case would have been no different had the resolution not existed. Whether the specific evidence of economic conditions was admitted or rejected, the general facts were matters of common knowledge to most of the commissioners.

Early in April, 1927, observers predicted a "political decision", a term not to be found in the Commission's vocabulary, but signifying a decision that attempts to adjust the immediate controversy with a maximum of satisfaction and a minimum of complaint without undertaking any fundamental settlement of the larger issues between the parties. There was a flurry of excitement in May, shortly before the decision was announced, over what was supposed to be a leak, when stock of the Pittsburgh Coal Company shot upward on the Stock Exchange, rising 50% in about two weeks. Stock of the Pittsburgh Terminal Coal Corporation, the Pittsburgh & West Virginia Railway, and of the Wheeling & Lake Erie Railroad, also shared the sudden rise. The West Virginia legislature in a memorial asked for a Congressional investigation. Nothing but rumor appeared in explanation of the spurt, which continued for some days after the lake decision was announced on May 28 and then stopped as abruptly as it had begun. It seems clear that the connection was a pure coincidence.

The newspapers in the communities most affected gave prominence to rumors of political action. Following the hearings in October, 1926, the *Pittsburgh Gazette-Times* had reported that Pittsburghers, while hopeful of the outcome of the case, were overlooking no opportunity to prepare for eventualities. To that end Congressman Stephen G. Porter

of Pittsburgh attended the proceedings, and, said the newspaper reporter,<sup>17</sup>

It is understood that consideration is being given to supplemental action if it becomes necessary, whether in the nature of a congressional investigation of the lake cargo situation, or the powers of the Commission, or additional congressional legislation . . . or further legal action on the part of the complainants.

On the eve of the decision in May, 1927, the *Charleston (W. Va.) Gazette* published a long and vitriolic editorial attack upon Secretaries Mellon and Hoover, George Otis Smith, Director of the Geological Survey and member of the United States Coal Commission, and upon the counsel for the Pittsburgh operators in their rate cases.

Ever since the 1925 decision, Senator Reed had talked about a Pennsylvania representative on the Commission, and in December, 1926, he seemed to have secured one when President Coolidge nominated Cyrus Woods of Pennsylvania to succeed Commissioner Cox. The political fight that culminated in the rejection of the Woods nomination came in January, just before the oral argument on reconsideration. Although there was no direct reference to this in the argument, and certainly no hint of it from the Commissioners, they could not help being acutely aware of the political atmosphere in which they were working.

The decision on reconsideration was favorable to Pittsburgh. On the ground of unreasonableness, it reduced the Pittsburgh lake rate from \$1.66 per ton to \$1.46, and the rate from eastern Ohio to \$1.43, just half the reduction asked. No change was ordered in any other rate, but the carriers were told they would have to justify any other changes in the existing differentials among the other Ohio and Pennsylvania districts. The Fairmont complaint was

<sup>17</sup> *Pittsburgh Gazette-Times*, November 1, 1926.

dismissed, leaving changes there to the carriers' discretion. The majority adhered to its previous finding that the legal basis was lacking for a finding of undue prejudice, but at the same time it said,<sup>18</sup>

We do not regard the present relationships between the rates from the complaining Pittsburgh-Ohio districts and the southern districts as proper. . . . It is expected . . . that the carriers will increase the differentials between the above-mentioned districts and the southern districts by the amount of the reduction in the rates from the former. . . .

That would have been enough, but the Commission went on to add the fatal dicta that later brought so much grief to some of its members:<sup>19</sup>

Under the issues now presented, it is unnecessary for us to consider whether the rates from the southern districts are lower than reasonable minima, but we are of the opinion that the carriers would not be justified in reducing the present rates from those districts.

Thus the Commission sought to avoid the possibility of a reversal in the courts if it should find undue prejudice and the court should decide that the legal basis for it was wanting, while at the same time the results of a finding of undue prejudice, *i.e.*, the fixing of new differentials, would be achieved. The only other way to ensure that result would be by the fixing of both maximum and minimum rates; but unless a rate war was inevitable, the Commission was unwilling to do that. It apparently hoped that even in so bitter a controversy the moral authority of its dicta would be enough to dissuade the southern carriers from meeting the reductions.

<sup>18</sup> *Lake Cargo Coal Rates, 1925*, 126 I. C. C. 309, 365 (1927).

<sup>19</sup> *Ibid.*

It would be difficult to find a case where less unanimity was displayed.<sup>20</sup> One Commissioner concurred separately; three more concurred in part; two dissented; one was absent but would have voted no; one did not participate. That left only three to concur in the decision as reported "by the Commission". No group of more than three were like-minded.<sup>21</sup>

The report was originally written by Commissioner Hall, who wrote the decision in the previous case, but the majority refused to accept his conclusions. Commissioner Esch was one of two who changed their votes on reconsideration, and was therefore delegated, over his protest, to write the modified report.<sup>22</sup> The conclusion that the Pittsburgh rate was unreasonable was based, in summary, upon these considerations:<sup>23</sup>

<sup>20</sup> In *Rate Structure Investigation, Pt. VII, Grain and Grain Products*, 164 I. C. C. 619 (1930), ten of the eleven Commissioners wrote separate opinions, but nine agreed to the report as a whole. In *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I. C. C. 1 (1927), five Commissioners joined in the majority opinion; two more added a separate concurrence; four dissented jointly and severally. Eight separate opinions were recorded in the two so-called *Magnolia Tank Cases*, 151 I. C. C. 795 and 799 (1929); and eight also in the *Gulf Port Differential Case*, 128 I. C. C. 349 (1927), *infra*, p. 227.

<sup>21</sup> Commissioner Taylor concurred separately "for this reason, if for no other", that reasonableness in a situation like this is a matter of proper relationships, to be determined by the comparative method, 126 I. C. C. 309, 365. Commissioners Campbell and McManamy joined in Commissioner Eastman's opinion that undue prejudice and preference existed as well as unreasonableness, p. 367. Commissioner Woodlock joined in the dissenting opinion of Commissioner Hall, who stood by his original opinion, p. 374. Commissioner Meyer, author of the report in the *Boileau* case and one of the majority in the 1925 decision, would have voted "no" if present, p. 391. Commissioner Brainerd did not participate. Commissioners Esch, Aitchison and Lewis were thus left to sponsor the report "by the Commission". The vote was 7 to 2.

<sup>22</sup> *Hearings on Confirmation of John J. Esch*, p. 159, Sen. Coman. on Interstate Commerce, 70th Cong., 1st Sess. (1928).

<sup>23</sup> 126 I. C. C. 309, 364 (1927).

the unusually favorable circumstances and conditions surrounding the movement of lake-cargo coal, which make the rates thereon in a class by themselves; the relatively much lower rates from the southern districts, which the carriers serving those districts find profitable to maintain; the very decided change in the relative tonnage of lake-cargo coal shipped from the complaining Pittsburgh and Ohio districts and the southern districts, respectively; the present depressed condition of the coal-mining industry in the Pittsburgh and Ohio districts; and the fact that the cost of the service warrants a substantial reduction in the rates. We have taken into consideration particularly the changed conditions since our previous decisions regarding these rates, also to some extent the rates on ore from the ports in or near the complaining Pittsburgh and Ohio districts.

Commissioner Eastman's concurring opinion is as usual a thoughtful and illuminating one. Consistently with his previous view, he agreed that the Pittsburgh rate was unreasonable and should be reduced. He changed his mind, however, with regard to the issue of undue prejudice, and came to the conclusion not only that it existed as a matter of fact, but also that the carriers concerned could legally be held responsible for it. To the latter point his main argument is directed. Since its chief interest lies in its legal argument, however, it will be more conveniently discussed in a later chapter.

The Commission's dilemma is apparent. A majority felt that the rate structure was unfair to Pittsburgh, yet were unwilling to say with Commissioner Hall that the adjustment was within the lawful discretion of carrier management, and so beyond the Commission's power to remedy. Their impulse was to cure the unfairness. At the same time they were doubtful of their power to correct the adjustment in the normal way, by a finding of prejudice and preference. Commissioner Eastman, bolder, disposed of his doubts on this point by an ingenious argument, and took that way out.



The majority, however, attempted to get at the same result, an adjustment of differentials, without the legal risks of Commissioner Eastman's solution, by reducing the Pittsburgh rate. Then, by the exertion of moral authority they tried to prevent reductions from the south. It was a dubious expedient, and strategically weak. It gave Commissioner Hall cause to say in his dissent—and the southerners to echo him in Congress—that “whether this be monitory, or minatory, it goes outside the findings and prejudges issues which may hereafter come before us for determination in the manner contemplated by law.”

The dissenting opinion of Commissioner Hall, in which Commissioner Woodlock joined, reflects a divergence in viewpoint upon one of the basic issues of public policy raised by this long controversy. He has little quarrel with the majority over the facts, though he weighs them differently than they. That is not serious; merely a difference in judgment, such as frequently occurs. If that were all, he could afford to be philosophic. What disturbs him is his conviction that the majority had concluded that the rate was unreasonable not by any of the recognized legal criteria but simply because they felt that the adjustment was unfair and worked hardship, that something ought to be done about it, and that this seemed to be the only way to get at it. They were interfering, he thought, regardless of their legal powers, because they thought something was awry and needed fixing. Against that he protested with vehemence:<sup>24</sup>

What right have we to invade the domain which the law has allotted to carrier management and to seek by hint, suggestion, warning or threat to coerce carriers into a course of action other than that which they have chosen or may choose to take? The essence of the transportation act is regulation and not management. That act was not a general reform act, giving us powers

<sup>24</sup> *Ibid.*, p. 390.

to redistribute the business or the wealth of individuals, or of producing regions, in accordance with whatever social, economic, or sectional views might at a given time command a majority of votes in this commission. These admonitions, or foreshadowings, or requirements, whatever they may be called, would seem to be prompted by a desire to afford a relief which can not be afforded upon the record made, and to result from the impulse which prompted the majority 'in considering whether the rates (from the complaining districts) may be reduced to relate them more fairly to those from the southern districts.'

It is the old cry against governmental interference. Men have never ceased to dispute over the limits of allowable regulation by government. Parties have been built, schools of thought founded, on the issue. Here it emerges again, the same in substance. There is the same benevolent concern of embodied authority to set right whatever comes to its hands. There is the same temptation to stretch broad powers in order to control what are felt to be wrongs. And the same result follows, a diminished area for private initiative, an increased dependence upon regulatory commissions. In such a quarrel as this, Commissioner Hall thought, the government could do no better than to keep hands off. On every matter of judgment his view stands in direct antithesis to that of Commissioner Eastman. The conflict within the Commission over the policies of *laissez faire* and social control is clear.

### III

#### I. & S. DOCKET 2967

##### *Competitive Reductions from the South*

If the Commission expected the southern carriers to be docile, they were disappointed. The interests of the northern and southern carriers were diverging, now that the

Commission had broken down the *status quo*. There was time for deliberation, however. The Commission's order reducing the northern rates, although issued in May, was not to take effect until August 10, when the lake navigation season would be half over.

Meetings between the northern and southern roads took place and several efforts to agree were made, but all attempts at compromise finally fell through. The northern lines announced most of the reductions ordered and suggested by the Commission, except that Connellsville and some of the central and northern Pennsylvania districts were reduced only 10 cents, as was Fairmont, thus improving Pittsburgh's position somewhat at their expense. The southern carriers immediately countered with a like reduction of 20 cents, effective August 28, from all the southern districts. They were probably moved less by a desire to defy the Commission's thunders than by the pressure of their shippers. Since the southern carriers depended so largely upon coal for their traffic, they were obliged to follow more closely the demands of their operators than were the northern lines. Their shippers insisted that the northern reductions must be met if they were to stay in the lake business on anything like the scale they then enjoyed. It was reported that the southern operators were prepared to go into court to prevent the spread in their differentials whether or not their carriers would help them, but obviously their standing in an equity court would be much better if their carriers offered reductions and the Commission refused to allow them to go into effect than if their carriers declined to help them.

The sanction of the northern connecting lines was necessary to make the southern reductions effective, for the southern roads did not propose by themselves to absorb all the shrinkage in their divisions of the reduced rates. The northern operators urged their carriers to refuse concur-

rence in the reductions by revoking the general powers-of-attorney granted by each line to all others with which it shares joint rates and through routes. Refusal would have been the most formal manner of expressing the northern roads' disapproval, and was urged as a gesture to show that they would do as much for their shippers as their competitors would; but they wouldn't.

The southern reductions were naturally a challenge to the authority of the Commission, and upon receiving protests from the northern operators, the Pittsburgh Chamber of Commerce, the Public Service Commission of Pennsylvania and others, it suspended the proposed rates from the south for six months and ordered the carriers to justify them. Thus began *I. & S. Docket 2967, Lake Cargo Coal from Kentucky, etc.*, the third lake cargo case in five years, with the same parties; in effect a second retrial.

The Commission has had since 1910 general authority to suspend any new rates proposed by carriers, pending investigation, and may order them canceled if they are not justified as lawful to the Commission's satisfaction. That was what was done in the southern lake cargo case in 1912, *I. & S. Docket 26 to 26c, supra*. But in that case, as usually, the changes proposed were increases. It does not so often happen that reductions are protested. Indeed, when the act to regulate commerce was first passed, a reduction in freight rates was regarded as so nearly the embodiment of the greatest good for the greatest number, that Congress exempted reductions from the requirement that thirty days' notice of changes in rates be given. It is questionable whether the general public is yet educated to the point where it would be easy to explain why a regulatory body should have the power to deny a rate reduction.

The northwestern consumers at least thought that it should not be exercised here. The same consumers who protested

against the Pittsburgh complaint were even more vehement in urging that the southern roads should be allowed to cut their rates competitively. All of them used southern coal. Some had contracts with operators which gave them the benefit of any reductions that might occur. Others owned captive mines in the south. All expected to gain by the southern cut. On their behalf the Governor of Minnesota asked the Commission to allow the new rates to stand. Senator T. D. Schall of Minnesota sent a telegram to Chairman Esch of the Commission, not as an individual but at the government rate and signed as Senator, in which he also urged the Commission not to interfere with the reductions<sup>25</sup> — a flagrant impropriety on the part of any official with regard to a pending case. As the litigation proceeded from one stage to the next, tempers grew shorter, and the Commission which had heard political threats from Pennsylvania for two years now worked in an atmosphere charged with the political resentment of the South. Better no Commission at all, or at least one shorn of its power, if that power was to be used to divert commerce from one section to another according to what the Commission thought was proper. It was freely predicted that whatever conclusion the Commission might reach, it would be reviewed in the Supreme Court, and that the whole affair would be aired when Congress reconvened. And meanwhile, the remaining half of the lake season passed with the differential of 45 cents in effect between Pittsburgh and Kanawha. The usual hearings and argument dragged on through the fall and into the winter.

*The Lake Coal Trade in 1927-1928*

"In the bituminous coal fields," says the annual government review, "1927 marked a return of the depression which in 1924 and 1925 had left in its wake declining prices,

<sup>25</sup> 40 *Traffic World*, 415 (Aug. 20, 1927).

narrow profits or absolute losses, abandoned mines and unemployment."<sup>26</sup> The temporary stimulants of 1926 were exhausted, and the forces that made for liquidation of excess capacity were again released. Coal stocks in the hands of consumers were high in anticipation of a shutdown on April 1, when the Jacksonville agreement expired. The strike came as predicted in the central competitive field, but the union strength this time was not sufficient to control production elsewhere. Ohio was the furthest state east to be really under the union sway. Many miners struck in Pittsburgh and nearby districts, but important operators had been running non-union since 1925, and continued to do so. There was much labor disturbance, however, and the operators laid out large sums for mine guards. Between labor troubles, high costs and low market prices, their production was lowered, and for the first time in history West Virginia produced more bituminous coal in a year than all Pennsylvania. The supply from non-union districts was at all times adequate to care for the demand, and this time there was no car shortage. The union finally concluded separate agreements retaining the Jacksonville scale in Illinois and Indiana until April 1, 1928, but in Ohio and Pennsylvania no settlement was made; the operators stood pat, and won. The suspension accentuated the normal shift in business. Ohio produced 43% less than the year before, Pennsylvania 13% less; the difference is a measure of the relative strength of the union in the two states.

The lake coal season in 1927 was a good one for those that could share it. The total was a new high record, over thirty million tons for the first time. The sharp increase was due to the suspension in the central competitive field

<sup>26</sup> U. S. Bureau of Mines, *Coal in 1927*, p. 328 (1929). The succeeding figures for 1927 are from the same source and those for 1928 from *Coal in 1928*.

which began just as the lake season opened and restricted all-rail supplies to the northwest and middle west. But it was cold comfort for the northern operators. Eastern Ohio in 1923 had shipped 17% of the total; in 1927 it shipped less than 1%. Pittsburgh in 1923 shipped 27%; in 1927 it shipped less than 8%, the smallest percentage in its history. Union-mined coal was virtually eliminated from the lake trade. West Virginia, eastern Kentucky and Virginia received all the increase. The increase in the differential in favor of Pittsburgh and Ohio was too small and came too late in the season to have any appreciable effect in stemming the southern tide.

As 1925 repeated 1924, so 1928 repeated 1927 in the coal industry and in the lake trade. There was an abundant supply at all times during the year and demand was weak. There were strikes again in the union fields where agreements had been made the previous year and the international officers of the United Mine Workers tried to swing public sentiment behind their effort to regain a hold in Ohio and Pennsylvania by the Senate investigation of conditions in the coal fields there. The committee hearings were held just at the time of the 1928 *Lake Cargo* decision, so the controversy was ventilated there.<sup>27</sup>

Again in 1928 the lake cargo tonnage reached a new high record—33,400,000. Not only the labor suspension in the central competitive field, but also the freight rates to the lake ports, seem to be factors in this result. The reduction from Pittsburgh in 1927, and the succeeding reductions elsewhere in 1928, opened permanent new markets to lake coal that had formerly been supplied by all-rail shipments from fields further west. But although the northern districts showed a slight return from the nadir of 1927, the results

<sup>27</sup> Hearings before Senate Interstate Commerce Committee on *Conditions in the Coal Fields*, pp. 28, 2274-2289, 2695-2713 (1928).

of the season were still disappointing. Pittsburgh regained fourth place, behind Kanawha, eastern Kentucky, and Pocahontas. The southern districts, except Pocahontas, all registered small losses, with Kanawha losing most, but together they still shipped three-quarters of the total. Eastern Ohio shipped only 3%. 1928 was a year of notable industrial activity, and if this was the best that the northern fields could do in a good year, the outlook for other years was not bright.

#### *The 1928 Decision*

The southern carriers were required to assume the burden of justifying the new rates. They argued, shortly, that the new rates were not below the level of minimum reasonable rates; that being within the "zone of reasonableness" the carriers were using their legitimate managerial discretion in fixing them; and that being reductions, they were in the public interest. The same sort of cost estimates which the same carriers had previously condemned as unreliable and worthless as applied to the northern roads were introduced to show that the new rates would be compensatory. Supporting the carriers, the northwestern consumers saw a public interest in the reduction, while the southern operators asserted that the return to the old differential was essential if they were to stay in business. The record was again filled with testimony of mining and industrial conditions.

The most notable change in this third case is in the position of the northern carriers. Hitherto they had been nominal, if increasingly passive, allies of the southern roads. Now, if the southern reductions were permitted to stand, they saw all hope disappear of greater tonnage from their own reductions and the net result a loss in revenues upon an important item of traffic for all concerned. They would be obliged to accept smaller divisions of the new southern rates



for their share of the haul, and thus further diminish their revenues. Although listed as respondents, since they would have to participate in the southern rates, they protested the reductions.

Why did they not simply decline to participate any longer in carrying the southern traffic? Aside from their legal duty as common carriers to join in through routes and joint rates, they probably could not afford not to participate. Their divisions, though smaller, would still be compensatory. But beyond this particular traffic, the southern carriers each year originated and brought something like a hundred million tons of freight, mostly coal, to the Ohio river, which they there handed over to the connecting northern lines for the delivering haul. The northern lines had no such bulk of traffic destined to the south to hand over in exchange, and moreover they competed with each other. They were not in a position to force favors from the southern roads.

The oral argument and decision of the case came just at the height of the political tumult over lake cargo rates, in February, 1928. The reappointment of Commissioner Esch, who sided with the majority in both the previous cases, was being made the test of political strength between the two sectional interests in the lake controversy. Perhaps never in the Commission's history was judicial calm more necessary, or more difficult to achieve. Over the clamor of the litigants could be heard the war-whoops of certain Senators after the scalps of the entire Commission.

The decision, as was anticipated, found that the proposed rates had "not been justified", and ordered them canceled.<sup>28</sup> The majority opinion rests mainly upon the ground that the reduced rates would be so low as to be "relatively unreasonable", although not non-compensatory. The Commission denied that the carriers were free to set rates anywhere

<sup>28</sup> 139 I. C. C. 367, decided Feb. 21, 1928.

within the "zone of reasonableness", in disregard of other rates on the same traffic in the same rate territory. Two other supporting grounds of decision were mentioned, the Commission's duty under section 15a of the Transportation Act to see that a level of rates was maintained in each rate territory which would permit the carriers as a whole to earn a "fair return," and second, its duty under the Hoch-Smith Resolution. The first of these, the Commission thought, disposed of the contention that the carriers were rich and could well afford a reduction. All the lake carriers were in the same territory, and as a whole they were not yet earning the "fair return" contemplated by the law. If these particular carriers were earning too much, the recapture provision would take care of them; the Commission must protect the revenues of all. These arguments, however, were merely makeweights thrown in at the end. Having found the rates unreasonable, the majority declined to consider whether they were also unduly preferential or prejudicial.

As before, Commissioner Eastman arrived at the same conclusion by a different path.<sup>29</sup> He criticized sharply the majority's use of the term "relatively unreasonable", as restricting carrier competition too narrowly, and also because section 1 was thus made to overlap section 3 of the interstate commerce act. Rates that were unduly prejudicial would also be relatively unreasonable, and hence section 3 would be superfluous. He relied again on the conclusion that there was a legal basis for a finding of undue prejudice and preference and that the facts amply sustained such a holding. The facts as to the northern carriers were, that in delivering southern coal from Cincinnati to Sandusky and Toledo, they accepted divisions of about 87 cents out of the \$1.91 rate, and were offered about 78 cents out of the proposed \$1.71 rate, for hauls ranging from 202 to 230 miles;

<sup>29</sup> *Ibid.*, p. 395.

while for the average haul of 166 miles from Pittsburgh to the ports they had till recently received \$1.66, and were still getting \$1.46. The cars must return empty to Cincinnati, while there was usually an ore haul back to Pittsburgh. The northern roads had no assembling costs on the southern coal, but even so the discrepancy in treatment of the two sets of traffic is startling.

Commissioner Esch was absent to attend the hearings on his own confirmation, but would have concurred with the majority. Three commissioners dissented, but their former spokesman, Commissioner Hall, had resigned, so there was no dissenting opinion. By this time, written statements of reasons hardly were necessary—indeed, politically they might be highly dangerous. The vote was 6 to 3.

As an afterthought, the Commission on March 8 "amended and corrected" the decision by a finding "that the proposed rates would be unjust and unreasonable, and have not been justified",<sup>80</sup> apparently in expectation of an appeal to the courts, to show that it was relying on its power under section 1, its safest ground.

On March 12 the Commission decided the eastbound bituminous case, previously mentioned, favorably to the southern operators.<sup>81</sup> The decision made permanent their recent entry into the all-rail traffic to New England and the northern seaboard. The lake decision, however, attracted more notice, and inflamed still further the southern delegation in the Senate. A few days later the Senate refused to confirm the reappointment of Commissioner Esch.

<sup>80</sup> Unreported; see *U. S. Daily*, March 12, 1928; 41 *Traffic World*, 655 (1928).

<sup>81</sup> *Eastern Bituminous Coal Investigation*, 140 I. C. C. 3 (1928). See above, pp. 89, 102.

*To the Courts*

The action on Commissioner Esch may have relieved the feelings of southern senators, but it gave no practical relief to the southern operators, who saw the lake season about to commence with the 45-cent differential in effect. A more material aid was to be found in the courts, and there the next round took place. The operators, not the carriers, sought an injunction to set aside the Commission's order. A three-judge court was convened, as the statute provides, including Judge McClintic, who had in the past given evidence of his complaisance toward the coal operators in West Virginia,<sup>82</sup> and Judge John J. Parker, whose appointment to the Supreme Court was rejected by the Senate in 1930. The parties to the case before the Commission intervened, and after four days' argument a final order issued, enjoining the enforcement of the Commission's decision.<sup>83</sup> The order was dated April 14, when the lake season was just getting under way, and again put in effect the 25-cent differential.

Judge Parker, for the court, repeated the customary and contradictory formulas to the effect that the court could not interfere, nor substitute its judgment, if the Commission had acted upon evidence, but that on the other hand, "to understand the power which the Commission has assumed

<sup>82</sup> Judge McClintic, sitting in the District Court for the Southern District of West Virginia, issued a series of sweeping labor injunctions in 1922 and 1924 in connection with strikes and organizing activities of the United Mine Workers, the so-called *Borderland* and *Red Jacket* cases. They were modified on interlocutory appeal and affirmed, Judge Parker writing the opinion for the Circuit Court of Appeals, *Keeney v. Borderland Coal Corp.*, 282 Fed. 269; *Dwyer v. Alpha Pocahontas Coal Co.*, 282 Fed. 270; *Int. Organ., U. M. W. A. v. Leevale Coal Co.*, 285 Fed. 32; cert. denied, 275 U. S. 536 (1927). The original temporary restraining orders, which effected the purpose, are unreported.

<sup>83</sup> *Anchor Coal Co. v. United States*, 25 F. (2d) 462; see comment in 34 *W. Va. Law Q.* 404 (1928).

to exercise, it is necessary that we go behind its merely formal conclusion . . . and ascertain exactly what it is that has been done." <sup>84</sup>

The Commission's order was set aside on three grounds: first, that the Commission had exceeded its powers in basing its action on industrial conditions and an effort to equalize them; second, that the Commission had proceeded upon an erroneous theory of law in placing the burden upon the southern carriers of justifying their rates by comparison with the northern rates; and third, that the Commission had erred in requiring the carriers to justify their rates under section 15a and the Hoch-Smith Resolution. The carriers need justify only increases, not reductions, the court thought, and by the general declaration of the Hoch-Smith Resolution, "Congress certainly did not intend . . . to create in the Commission an economic dictatorship over the various sections of the country." <sup>85</sup> It seemed clear to the court that the Commission was not concerned with fixing rates, but with differentials, and that in adjusting differentials it based its action primarily on the shift in tonnage: <sup>86</sup>

It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates. . . . We do not think that Congress could give such power to the Commission. (citing *Hammer v. Dagenhart*, 247 U. S. 251) We are perfectly certain that it has not attempted to do so.

Convinced that the Commission had exceeded its powers, the court turned finally to the question of jurisdiction—an inquiry ordinarily disposed of first—and decided that it was competent for the southern operators to bring the suit, though the order was directed to the southern carriers only.

<sup>84</sup> *Ibid.*, p. 464.

<sup>85</sup> *Ibid.*, 474.

<sup>86</sup> *Ibid.*, 470.

An objection to the operators' independent right to sue was stated but not pressed, since the Commission was more interested in getting a decision on the merits.

It was an extraordinary decision, a flagrant example of the substitution of judicial for administrative judgment. It was the first injunction against the Commission in an important rate case in years. The grounds for setting aside the Commission's order are equally remarkable. The northern operators — though not the northern interveners — had from the first argued their case as a rate case, upon transportation evidence, pointing to the shift in tonnage only as a measure of their damage. It was the southern operators who each time introduced the evidence of industrial conditions, to prove that those conditions, not rates, were the basis of the northern difficulties, and to show that it was imperative to keep the 25-cent differential if the southern operators were to stay in business. When, however, the Commission interpreted the evidence otherwise, and seemed, despite its disclaimers, to have rested its decision in favor of the northern operators in part upon industrial conditions, then the same southern operators were able to enjoin the enforcement of the decision on that very ground.

The northern operators and their carriers were unsuccessful, without the Commission's help, in securing from the Supreme Court a stay pending appeal. Obviously the shifting of tonnage in the 1928 season was the chief issue in considering a stay. The Commission adopted a hands-off policy following the issuance of the injunction, lest it lend color to the southern assertion that it was primarily interested in restoring northern tonnage; it was content with an appeal in due course.

Neither the northern operators nor their carriers, however, relished the opening of another lake season under the rates and differentials then existing, with the prospect of

repeating the previous year's disastrous experience. Compromise proposals were offered by the presidents of the B. & O. and the L. & N. at a meeting of most of the parties involved, but the intransigence of the operators on both sides prevented their consideration. Pittsburgh operators refused even to attend a conference at which compromise was to be discussed and called upon their carriers to meet cut with cut. The southern operators thought they might as well be killed for sheep as for lambs; with non-union labor and new machinery being introduced in the north, they said they could not stand a differential larger than 25 cents, and they preferred to take their chances on keeping the advantage they had won in the courts.

The breakdown of conciliatory measures finally drove the northern roads to retaliatory cuts. Led by the Pennsylvania and New York Central they reduced their rate another 20c. to \$1.26, just about what the northern operators had demanded in 1923. But the reduction was carefully restricted. The tariffs filed still stated a rate of \$1.46, and a supplementary note announced that a refund of 20 cents per ton would be allowed on all shipments going to points beyond Detroit. By limitation, the refund provision would expire on December 31, 1928, leaving the former rate in effect.<sup>87</sup>

Naturally the southern operators and carriers protested, and asked the Commission to suspend the reductions. The

<sup>87</sup> Without such a restriction in the tariff a consumer at a Lake Erie port who had a dock, or access to one, could save perhaps 20c a ton by taking coal at the lake cargo rate to another port and transshipping to his dock, instead of paying the regular local rail rate to his port.

The P. & W. Va., contemplating a 20c competitive cut without restriction as to destination—to take traffic from the larger northern roads—attempted an informal inquiry whether such a course would “further embarrass” the Commission. It was reported to have been answered that “nothing a carrier does within its legal rights can embarrass the Interstate Commerce Commission”. 41 *Traffic World*, 1423 (1928).

ghost of the rate war that had hovered about began to take on the flesh of reality, though no carrier would call it by name. The northern carriers claimed merely to be adjusting the differentials to what the Commission had itself indicated as proper. The Commission on June 12 refused to interfere, and a week later the reductions took effect. The northern operators had their 45-cent spread.

It was too good to be true. A couple of months' experience of the results was enough to convince the railroads on both sides that they had interests in common as against all shippers, and that so far they had only succeeded in pulling chestnuts out of the fire for the shippers and their customers. The changes of the past two years might restore some of the tonnage the northern lines had lost, but the loss of 40 cents revenue on every ton hauled would much more than offset this. The southern lines had lost 20 cents in revenue per ton, and faced loss of tonnage too. Clearly an ounce of railroad cooperation was worth a pound of rate wars.

The railroad compromise that had been foreshadowed ever since the spring was achieved in August as a result of conferences to which operators were not invited. Rail officials expressed satisfaction that the fixing of rates and differentials was taken from the more unrestrained hands of shippers. The compromise was upon a 35-cent differential, Kanawha over Pittsburgh. The southern roads announced tariffs effective August 15 in which their rates were raised 10 cents to \$1.81 and \$1.96, but with a provision similar to that in the northern tariffs for a refund of 10 cents until December 31. On that date the northern refund would cease, and the rates would become \$1.46 and \$1.43 from Pittsburgh and Ohio, respectively. The expiration of the southern refund at the same time would change the differential to the 35 cents agreed upon, and the northern and southern rates would be 20 cents and 10 cents lower, respec-



tively, than they were when the litigation began in 1923. For the rest of the 1928 season, however, the 45-cent differential remained.

It is a safe assertion that the dove of peace was a welcome visitor to the Commission, but it arrived in a shower of brickbats from all the operators, northern and southern. Was this their reward for a long and expensive effort? Perhaps the heartiness with which both sides protested is the best evidence of the fairness of the compromise. What would the compromise do to the appeal pending in the Supreme Court? The Commission wanted to prosecute the appeal, but it was in no mood to stand in the way of any promising settlement of the case, nor was it so confident in its own conclusions that it would insist upon a 45-cent rather than a 35-cent differential. It therefore voted not to suspend the new southern tariffs "in view of the situation created by the injunction entered by the District Court of the United States for the Southern District of West Virginia", but announced that the Commission would continue to contest that injunction. When the fall term of the Supreme Court opened, the Government's appeal was docketed; the case was advanced, and assigned for argument in February, 1929.<sup>88</sup>

Public attention in the fall was preoccupied with the Hoover-Smith campaign, and little was heard of the lake cargo controversy, except in the southern coal states, where campaign orators applied their bellows to the flames. In those states that were normally Democratic, the sectional resentment against Pennsylvania was for the time translated into

<sup>88</sup> Four appeals were filed and heard together: *United States and Interstate Commerce Commission v. Anchor Coal Co. et al.*; *Barton Coal Co. v. same* (the Eastern Ohio operators' appeal); *Pittsburgh Operators' Lake Rate Committee v. same*; *B. & O. R. R. Co. v. same* (the northern carriers' appeal).

partisan feeling, although the Republican Senators and Congressmen from West Virginia and Kentucky were as violent as their Democratic colleagues in denouncing Pennsylvanian greed. Senator Glass of Virginia, about ten days before the election, in a speech in Richmond, accused the Republicans of having packed the Interstate Commerce Commission in order to get a favorable decision, which decision he termed "the most dangerous and disgraceful usurpation of power ever attempted to be exercised by a quasi-judicial body in this country", and he threatened that the southern Senators who "got" Commissioner Esch would "get" Commissioner Aitchison too, if President Coolidge should have the temerity to reappoint him in December.<sup>88a</sup>

The results of the election were determined by issues far from the coal controversy, and the most narrow partisan would have a difficult time reading any mandate of the people regarding coal into the election returns. Nevertheless, the members of the Commission must have been something more than human if they did not breathe a little easier as the returns came in. Senator "Matt" Neely of West Virginia, the most intemperate defender of southern coal interests, went down in the landslide that gave Republican majorities in every one of the southern coal states, and the anticipated fight over Coolidge's reappointments to the Commission vanished.

In December a flare-up over the lake case threatened when the Pittsburgh and Ohio operators asked that the Commission suspend the expiration date, December 31, of their reduced rates. The Commission, however, after an hour's debate adhered to the hands-off policy it had followed ever since the District Court's injunction took effect.

<sup>88a</sup> 42 *Traffic World*, 926 (1928).

*Before the Supreme Court*

The argument before the Supreme Court commenced February 19, and marked the fifth time in five years that the issues in the lake controversy had been argued at length before a judicial or quasi-judicial body. Counsel for the Commission asserted the District Court had exceeded its powers in substituting its own judgment for the Commission's. Counsel denied that the Commission had granted relief based upon economic conditions, but urged that if it had, the Hoch-Smith Resolution was a sufficient warrant for it. In addition to these grounds, the Government's brief went beyond what a majority of the Commission had ever said, and adopted Commissioner Eastman's concurring argument that the basis was present in the record for a finding of undue prejudice under section 3, and that that was sufficient to support the Commission's order. The ultimate question was the power of the Commission to make the order.

The northern railroads stressed an argument they doubtless would not like to see the court always rely upon, the necessity of allowing the Commission to curb acts of individual railroads contrary to the interests of the transportation system as a whole, and to that end quoted from such decisions as *Dayton-Goose Creek Ry. v. United States*.<sup>89</sup> They also denied the right of the southern operators to sue in the first place. The northern operators, as might be expected, not only supported the Commission's order, but also asked the Court affirmatively to order the restoration of the 45-cent differential. They pointed out that a mere dissolution of the injunction would not be enough to restore the *status quo*, to which they claimed themselves entitled, because of the compromise rates now in effect which fixed a 35-cent spread.

<sup>89</sup> 263 U. S. 456 (1924), upholding the so-called "recapture" clause of the Transportation Act of 1920.

This argument let the cat out of the bag. Mr. Justice McReynolds asked from the bench whether there was any issue before the Court since the Commission had allowed the compromise rates to take effect. The Court was not satisfied with the affirmative reply, and a few days later announced that,<sup>40</sup>

these cases have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the appeals would leave the injunction in force, at least apparently so, notwithstanding that the basis therefor has disappeared. Our action must, therefore, dispose of the cases, not merely of the appellate proceedings which brought them here. The practice now established by this court under similar conditions and circumstances is to reverse the decree below and remand the cause with directions to dismiss the bill. . . .

The Commission, by declining to interfere with the rates while the injunction was in force and pending the appeal, found itself estopped from prosecuting the appeal. One may speculate whether the Commission was chiefly motivated in keeping hands off, by a desire to observe the strictest proprieties toward the District Court, or by a hardly-to-be-concealed sense of relief that the struggle was to be ended without further bloodshed. In any event, the Supreme Court's decision in effect told the Commission that it could not have its cake and eat it too; it must either fight for the power it claimed in its appeal, or if it preferred peace, it must give up the appeal.

It is harder to see why the northern operators were estopped from appealing by a compromise to which they were not parties and against which they protested vigorously.

<sup>40</sup> 279 U. S. 812 (1929). Mr. Justice Sanford did not participate.

There is no denying, however, that the compromise rates were fixed by those to whom that task in the first instance belongs; nor that these rates would remain in effect whichever way the Supreme Court decided, unless indeed the Court should accede to the northern operators' prayer for a specific decree restoring the 45-cent differential. But that asked the Supreme Court to do just what those operators complained the District Court had done, that is, substitute its judgment for that of the Commission.

Members of the Commission were no doubt disappointed by the outcome, and particularly by the failure of the Court to give them any hint of its interpretation of the Hoch-Smith Resolution.<sup>41</sup> Decision of that question was reserved for another case. The other questions involved in the appeal still await an authoritative answer.

So ended, in a grand anticlimax, five years of litigation, pursued at a cost, to all concerned, of millions of dollars. The northern operators had secured a spread of 10 cents in their differential, which was, to be sure, an advantage, but competition among themselves, to say nothing of that from the south and from Illinois, was too keen to allow them to retain much of the increase in the differential. And even if they could have kept all of it, it would take many thousand extra tons of coal sold at an advance of 10 cents a ton to repay a thousand dollars spent in litigation. For the southern operators, of course, the proceedings were a net loss—except for the prevention of a further spread in the differential—and the same may be said for the carriers. The principal gainers were the consumers in the northwest, who stood to benefit by 10 cents or 20 cents a ton on all their coal.

About a month after the Court's decision, the B. & O. reduced by 5 cents the lake rate from Fairmont, which had not been changed when the second northern reductions were

<sup>41</sup> See *infra*, chap. viii, pp. 248-256.

made, and at the same time adjustments were announced from some of the outlying Pennsylvania districts.

The northern operators pursued another forlorn hope. They asked the Commission to reopen the suspension case, *I. & S. 2967*, in which the southern reductions had been forbidden, and which led to the court appeals. The Supreme Court had dissolved the injunction, they said, and there was nothing now to prevent the Commission from carrying out the intention it had expressed in its 1927 and 1928 decisions, by ordering the 45-cent differential. But the Commission, somewhat battered and scarred, was out of the woods now and had no desire to go back. Nor was it so filled with pride in its own correctness that it was unwilling to try someone else's plan of settlement. The petition was denied. The 35-cent differential was to have a trial.

#### IV

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One chance remained. When the 1925 decision of the Commission was reversed in 1927, the majority report did not disturb the original finding that "the basis for a finding of undue prejudice is thus lacking, even if the facts adduced to support such a finding would in other respects support it." The 1928 decision was to the same effect, and in both cases the action taken was based on the reasonableness of the rates; but in both cases too there were strong criticisms from concurring members who urged action based upon the discrimination alleged. The proceedings in the courts and the railroad compromise foreclosed further action based upon reasonableness. However, it was still possible to contend that the previous remarks about discrimination were *obiter dicta*, and that that issue was left open. The Pittsburgh and Ohio operators were not content to let the question rest against them, especially at a time when it rather looked as

though a majority of the Commission were willing to take the view that the facts entitled them to some relief. After an interval of a year, consequently, they began anew before the Commission with a complaint that raised only the issue of undue prejudice.

Several circumstances differentiated this latest effort of the northern operators from the previous cases. Conditions in the coal industry and in railroading had changed. The parties on both sides had fortified their technical positions. The legal status was somewhat altered by a decision of the Commission in the *Gulf Port Differential* case<sup>42</sup> that seemed to broaden the responsibility of carriers for discrimination and so to warrant the reversal of the conclusion about undue prejudice in the 1925 decision, quoted above. Finally, there was a large turnover in the personnel of the Commission. Out of these facts, especially the first and the last, the latest decision was shaped.

In 1928, when the compromise differential took effect, the northern operators began a comeback from the depths they had sounded in the period 1925-1927. The differential helped some. The reorganization of managements and the installation of more modern machinery contributed. The successive reductions in wages that followed the crushing of the union helped still more. Taken together, they went far toward equalizing production costs between north and south. This was reflected in the rise in lake shipments from the Pittsburgh district from 8% in 1927, the low point, to an average of 14% over the next three years. This was still well below the 1923 percentage, but it was something. Ohio had been nearly wiped out in 1927, and it too regained about half its 1923 share. The other side of the picture is seen in the drop of the southern West Virginia fields from about 52% in 1927 to 44% in 1930. Competitive reductions

<sup>42</sup> *Infra*, chap. vii, p. 226.

followed in the already lower southern wage scales that forced the standard of living almost to the last degree of human endurance. It is not a coincidence that agitation and violence sufficient to attract nation-wide attention appeared in the eastern Kentucky coal fields in 1930 and 1931. In 1931 the total production of all coal dropped disastrously, so that regardless of percentages every field was hit. *Lake Cargo Coal Cases, 1930* was argued in July, 1931. The Commission was then aware of the plight of the coal industry, but it was even more concerned over the financial condition of the carriers, for which it felt a more direct responsibility.<sup>48</sup>

The technical changes centered around southern Ohio. The Hocking Valley Railway had become an integral part of the Chesapeake & Ohio. The complainants this time included some southern Ohio operators from the Hocking, Shawnee and Crooksville districts served by the Hocking Valley. Since 1920 these districts have shipped scarcely any lake cargo coal, but they have always enjoyed the same lake cargo rate as eastern Ohio, in spite of a somewhat greater distance. They could thus argue that the C. & O., which had never previously served any of the complaining districts, was prejudicing them directly, and preferring West Virginia, by maintaining the existing rate adjustment. Conceivably the C. & O. might satisfy that complaint by making a reduction where there is now little tonnage, but there was a risk of competitive reductions from Ohio carriers, which might in turn upset the whole appletart.

In this case, as contrasted with the previous, the carriers northern and southern put up a united front in support of the compromise differentials.

The C. & O. took the burden of the defense and it too had strengthened its technical position. It was doubtful, however, that enough had been done to make good its coun-

<sup>48</sup> Hearings were about to begin on the *15% Rate Advance case, Ex parte 103, 179 I. C. C. 215 (1931)*.



sel's boast that the C. & O. could by itself deliver all the southern lake cargo coal if the participation of northern carriers were cut off. By establishing the independence of its route, it hoped to avoid any legal grounds for complaint of discrimination by the northern operators that might exist if it were obliged to rely on the participation of the northern carriers in delivering the coal traffic it originated.

The hearings, testimony and argument of the 1930 case followed the familiar pattern. A mass of evidence dealt with rate and distance comparisons and estimates of transportation costs. If there was a feature, it was the thoroughgoing analysis offered by the complainants of the cost of hauling coal for the purpose of showing that the similarity of transportation costs north and south warranted no such differences as existed in treatment of the two regions.

The Commission's decision was announced in January, 1932. By a nine-to-two vote it dismissed the complaint.<sup>44</sup> With a minimum of discussion of the evidence the majority reverted to their conclusion in 1925 that the facts did not make out a case of undue discrimination. Consequently the legal issues which presuppose the fact of discrimination were not dealt with at all. Since no court appeal lies from a simple refusal of the Commission to take action, this seems to close the door definitely and finally, for a few years at least, to further rate litigation by the Pittsburgh operators.

As in some previous cases, news of the decision leaked out a week before its formal announcement, and there was at least circumstantial evidence in support of the newspaper rumor that the actual decision had been reached much earlier but the announcement of it held up until after the reappointment and confirmation of those commissioners whose terms expired in December.<sup>45</sup> The report of the decision was rela-

<sup>44</sup> 181 I. C. C. 37 (1932).

<sup>45</sup> The decision was made public on Jan. 21, 1932. *The Wall Street*

tively brief, and was criticized in Commissioner Eastman's dissent for its "inadequate presentation of the facts developed of record in this proceeding and an equally inadequate discussion of the law bearing on those facts." He saw no reason for changing the conclusions he had expressed in 1927 and 1928. Commissioner McManamy also dissented with the remark that, "an agreement between the carriers with respect to relationship can not make unlawful rates lawful." (p. 55)

The decision this time attracted virtually no political attention. It was hailed in West Virginia, though, as the best news there since the Jacksonville wage agreement. Coming at the end of the disastrous coal year of 1931 it served as notice to both sides that the future share of the lake market each is to enjoy will be determined by competition under the existing rates. The government will resume the role of spectator on the sidelines. New measures of cooperation among operators, and possibly some steps toward Federal regulation of the industry as a whole are in the air and may or may not materialize. The controversy over the rate adjustment is at least for the time being at rest.

*Journal* of January 15, and the *Pittsburgh Post-Gazette* the following day, carried announcements of what it would be. The decision was dated January 5, the first conference day following the holidays, and the first after the confirmation of Commissioner Lee, on whose docket the case was, and of Commissioner Meyer, for new terms. The months since July, 1931, when the oral argument was held, could scarcely have been needed for writing or considering the decision, for it was an almost verbatim copy of the examiner's proposed report issued in May, 1931. One obvious typographical mistake, "southern Virginia" for "southern West Virginia", was copied from the examiner's report into the mimeographed print of the Commission's decision as it was first made public. A few new sentences were added at the end.

*Retrospect*

In reviewing the costs and achievements of this long litigation, the several groups of operators and carriers may be expected to have their own opinions. None of them are fully satisfied, but some are more disappointed than others. Of all the parties other than the consumers, the southern carriers have perhaps least cause for complaint with the results thus far, and the Ohio and Fairmont operators perhaps most. Certainly no party has "won the war", and it is a serious question whether any of the groups has gained sufficient advantage to recompense it for the cost of the struggle. The process of social adjustment has been an expensive one.

An appraisal of the part played by the Commission and the other governmental bodies involved must depend upon what is expected of them. Considered as pacifiers merely, they have succeeded in keeping the struggle generally within the bounds of legal procedure except for one hectic period in 1927-28, and after that outbreak the Commission regained its control of the situation. During that period, however, the forces at play strained the governmental machinery near the breaking point. In a controversy that overreaches the boundaries of states, that arrays thousands of men and millions of dollars, keeping the peace is an achievement in itself.

If social justice is demanded of the government in addition, a wilderness of questions opens up. More obstacles lie in the way of the goal than simple human frailty. It would take a wiser man than Solomon to decide on that basis the relative claims to existence of miners and operators in Pittsburgh and West Virginia. Then one must inquire, what power has Congress to seek social justice if it could be defined? And admitting the power in Congress, does the Commission have it too? Is the Commission an institution fitted for the task? Are the Commissioners men equipped for the

search? Faced with such questions as these, one may well conclude, as apparently a majority of the Commission have, that keeping the peace is enough, that governmental agencies have nothing to contribute to the solution of the lake cargo dispute, and had best keep hands off.

The questions, however, are of interest beyond the lake cargo controversy, and so at the risk of some quixotic tilting at windmills, the rest of this essay will be devoted to examining some of the less recondite of them as they have developed in the lake cargo situation. One subject of paramount interest is the personnel of the Commission, the methods of its appointment and the character and training of its members. Others are some legal difficulties that limit the scope of the Commission's action in settling a large sectional dispute according to the demands of social justice.

## CHAPTER VI

### THE PERSONNEL OF THE INTERSTATE COMMERCE COMMISSION

#### BUREAUCRACY

THE traditions of the spoils system and the indifference born of their preoccupation with more profitable activities in other fields have joined to make Americans characteristically distrustful of the ability and disinterestedness of the governmental bodies they set up. Much of the public unwillingness to embark upon new social programs or to extend governmental regulation further over the field of so-called private business, is directly traceable to this want of confidence in administrative machinery. The Interstate Commerce Commission gained a place near the Supreme Court in public estimation, only after two decades and more of conscientious effort. For some years the Commission was the most conspicuous exception to the rule that the people distrust bureaus. Naturally, the larger the responsibilities placed upon it, the more important it becomes that politics be divorced from its work.

Impartiality is the Commission's first virtue. Why otherwise should the duty be delegated to it of adjusting rates as between different sections and industries? The commerce clause of the Constitution clearly puts it within the power of Congress, so long as it avoids confiscation, to pass a rate bill, if it should so desire, which would enact in so many words that the differential between Pittsburgh and Kanawha shall be 25 cents, 45 cents or 75 cents, as Congress pleases, or as the necessary votes could be summoned. The basic

reason for turning over the making of rates to an administrative body, aside from the physical labor of so gigantic a task, is to have the determination of rate controversies carried on, if possible, in an atmosphere and upon a plane of argument impossible of achievement in Congress. The cognate task of tariff-making illustrates the difficulties that rate-making by a commission is designed to avoid. No other legislature in the world insists upon framing detailed tariff schedules itself, and the good sense of delegation is obvious, despite the failure thus far of attempts at tariff-making by commission in this country. If Congress were to undertake to fix railroad rates directly, its very technique would inevitably inflame the controversies that the commerce clause was drawn to abate. In writing the interstate commerce act, one hope was that rate-making would be removed as far as possible from the realm of political influences.

Yet the public confidence won by the Commission over a generation has since the war been seriously threatened by political influences on some appointments and appointees. Between 1925 and 1929 there arose over the lake cargo cases the most formidable political challenge to the Commission's integrity that has yet been seen. The course of that controversy illustrates many of the difficulties involved in the attempt to get and keep a capable and trustworthy administrative service.

Students of public administration are in agreement on some of the conditions favorable to a strong administrative personnel. Appointments should be based upon qualification for the task and divorced from political considerations. Tenure should be secure for a long enough period to attract able men to the work as a career. Finally, the performance of the administrative body, while subject to review before proper judicial tribunals, should be guaranteed freedom from review elsewhere, that is, from political influence on its acts.

Generally speaking, the Commission's record before the war was an enviable one from these aspects. Since the war, and particularly as a result of the large cargo fight, all three of these principles have been flagrantly disregarded, and though the lapses may have been temporary, the Commission is still not free from the menace of a breakdown.

APPOINTMENTS BASED UPON ABILITY AND TRAINING

Of possible grounds for appointment, merit is only one. It must elbow its way among unfriendly competitors. Two difficulties are encountered at the outset, legal restrictions that narrow the field of choice. One is the fact that the Senate shares the appointing power with the President. Even if the President had always the best of intentions he must placate groups in the Senate to whom the word "merit" sounds as a foreign tongue. Senators accustomed to view all appointments as patronage can exert pressure that has frequently proved irresistible. Sometimes this has a wholesome effect in restraining the President, but it has also been a potent source of trouble.

Then there is bipartisanship. The act to regulate commerce in 1887 provided that of the five members of the new Commission not more than three should be of the same party. As the number has expanded to eleven, a corresponding restriction to six of the same party has been retained. The party in power thus is entitled to a bare majority of the places, and by inference the remainder belong to the opposite party. There is nothing in the words to prohibit non-partisanship, but in a world where that is inconceivable, bipartisanship has been looked upon as the summit of virtue.

Until 1896 appointments were uniformly given to regular party members. Following the election in that year, McKinley adopted the policy of using the available places that law or custom allotted to the minority party; to reward the

gold Democrats. In 1898 he went further and clearly violated the law by appointing a regular Republican, W. J. Calhoun, to the Interstate Commerce Commission, to succeed a Democrat when the allowable Republican quota was already filled. The next year he repeated the illegal action by replacing Mr. Calhoun, who resigned, with another Republican; so that for seven years the Commission consisted of four Republicans and one Democrat.<sup>1</sup>

Since McKinley's time splits in each party have been the rule, and it has not been unusual for a President to nominate, when the statute required a man not of his own party, one who was not in the dominant faction of the opposition. In such cases, there have always been Senators who denounced the nomination as an abuse, for the spoils tradition that none but good party men should hold any office is still strong. Some of these appointments to the Commission of men not closely identified with either party have added members exceptionally able and well qualified. Indeed, the best thing that can be said for the bipartisan provision in the statute now, is that it enables the President, if he so chooses, to disregard partisan considerations in appointing nearly half the Commission. From any other point of view than that of patronage, the bipartisan provision is obsolete and unnecessary. There is no longer need to fear that a dominant

<sup>1</sup> When the second term of Mr. W. R. Morrison, an original appointee in 1887 and a Democrat, expired in 1898, there were three Republicans on the Commission: M. A. Knapp of New York, who was chairman from 1898 until his elevation to the Commerce Court in 1910, J. D. Yeomans of Iowa, and C. A. Prouty of Vermont. Mr. Calhoun of Illinois was appointed to succeed Commissioner Morrison. He had been active in local Republican politics and was a friend and supporter of McKinley. Judson C. Clements of Georgia was the lone Democrat on the Commission from then until Roosevelt put the lame-duck Senator Cockrell of Missouri, long a Democratic leader, in Mr. Yeomans' place in 1905. The illegality of the Calhoun appointment has not hitherto been noticed in print so far as I am aware.



party might use the Commission to oppress its rival. The Commission often divides on rate and other decisions, but it has never divided along party lines in any decision.

Sectional interests in the regulation of commerce are a good deal more vital than party interests, and this fact has given rise to another difficulty in basing Commission appointments solely upon fitness for the task. The argument is frequently heard that each section of the country should have representation upon the Commission, in order to avoid unwise or discriminatory action based upon ignorance of the local conditions. It is never more earnestly urged than by those who feel aggrieved by the result of a particular decision, or by those who have been unsuccessful in securing nominations for their candidates.

To the extent that there is any validity in the sectional argument, it would seem that the President might safely be trusted to consider it among other factors in the use of his discretion in making appointments. Evidence that he does consider it may be seen in the fact that at least six of the last ten appointments to the Commission seem to have been dictated primarily by sectional considerations. But that does not satisfy the advocates of sectional representation, because it is a representative of their own section that they miss. In consequence, bills providing that appointments be based upon geographical divisions of the country have frequently been introduced. At the height of the lake cargo tumult in Congress in 1928, one such, sponsored by Senator Smith of South Carolina, got so far as a favorable committee report to the Senate.

There are two answers to such proposals, both of them cogent. On the plane of expediency, there are not enough commissionerships to go around unless the sections are made so large that the argument of familiarity with the conditions is destroyed, or unless the Commission is made larger. In

the opinion of at least some of its members, it is already unwieldy.<sup>2</sup> Moreover, the logical conclusion of the proposal is that every state, or at least every important commercial state, should have a representative. Only by logrolling could agreements be reached on such a basis.

This is abundantly demonstrated by what happened to the Smith bill for regional representation, which was considered at the time of the struggle over the confirmation of Commissioner Woodlock in 1925-26. Growing out of an earlier proposal of his for a commission of twelve, three to be appointed from each of four sections, this bill provided for two members each from six regions.<sup>3</sup> In the first bill, Senator Smith's carelessness was such that four important states were omitted, and Wisconsin included with the Southwest. President Coolidge indicated that he favored the increase to twelve since it offered an opportunity for mollifying the southern opposition to Woodlock's confirmation. Only two members of the Senate Committee on Interstate Commerce were so oblivious to politics as to oppose the "principle" of the bill, but there was disagreement on the sharing of the spoils, and a subcommittee, which had presently to be enlarged, was appointed to consider it. A letter from former Commissioner Clark in opposition to the bill, pointing out the gross inequalities in the size, population, and railway mileage of the regions proposed, increased the

<sup>2</sup> Commissioner Meyer, senior on the Commission in point of service, has expressed the opinion that a commission of seven best combines efficiency in action with soundness in conclusions. A larger number slows up decisions in which the entire commission must participate, and increases dissent. 41 *Traffic World*, 1243 (1928). His view is generally shared. Larger appropriations and greater powers of delegation to subordinates are uniformly the answers offered to suggestions that more commissioners are needed to handle an increasing volume of work.

<sup>3</sup> S. 1547, 69th Cong., 1st Sess., was the original one. The later version was S. 2808, in the same session (1925-26).

dissension. A favorable report was finally ordered on a scheme for thirteen commissioners from seven sections, some getting but one, most of them two, and one getting three members. Even that was unsatisfactory to several of the committee. The longer the measure was considered the greater became the pressure to divide and subdivide the sections entitled to representation, and the clearer it was that any allocation must be arbitrary. Indefinite enlargement of the Commission was the line of least resistance, so the committee found. Fortunately, as it turned out, the President found room for a southerner on the Commission without making that body any larger, Commissioner Woodlock was subsequently confirmed, and so the Smith bill did not come to a vote.

Aside from the practical difficulties, geographical representation rests upon a pernicious principle. Men chosen to represent sections are unlikely, as Congressional experience demonstrates, to transcend their sectional interests, and nowhere is a national viewpoint more necessary than in the regulation of commerce. Sectional representation means essentially a clumsy return to the Congressional pattern and procedure.<sup>4</sup> The chief precedent cited is the Shipping Board, an example which, although not entirely for that reason, does not encourage emulation. A variant of the argument for sectional representation is the suggestion that occupational groups be represented. Railway labor has several times obtained recognition in Commission appointments; railway finance once or twice. Shippers' and carriers' representatives have sometimes been advocated. The objections to geographical representation have equal cogency here.

<sup>4</sup> Silas Bent, in "Bureaucracy Triumphant" in his *Strange Bedfellows* (1928) suggests in journalistic style the rude reintroduction of the representative principle in the independent commissions that combine executive, legislative and judicial functions.

There is no objection to men from these fields being appointed, but they ought not to be regarded as delegates of the special groups.

Finally, there are personal influences in many appointments. These sometimes shade into, but are often distinct from, partisan political influences. The President, or a close adviser of his, may want to appoint a particular acquaintance to a particular office, irrespective of party considerations. Some poor men, but also some of the very best men, have been appointed to the Commission in that way, depending on the calibre of the President.

A review of the thirty-two appointments that have been made to the commission in the past twenty-five years confirms the foregoing analysis. The claims of merit to appointment have had to compete with political and personal influences, with the demands of sectional and occupational groups. An attempt at rigid classification of the men chosen on the basis of the dominant motive in their appointment would result in a false exactitude. In many cases more than one force is operative. The categories are not mutually exclusive. The influences at work are not always clear. The effort involves, ultimately, an inquiry into the mental processes of the President in reaching a particular decision, a hazardous essay. Nevertheless, some cases are clear, and it is possible at least to list instances where one motive or another is clearly discernible. The results of such a study are presented herewith, with due acknowledgment of the uncertainties upon which they rest, in order to make as concrete as possible the generalizations that are ventured.

It will be apparent that the principle of appointments based upon training and qualification has been too often submerged. Of the last ten nominations sent to the Senate, it seems to have had controlling weight in only three cases, and in only three or four of the previous ten. It is, of

INFLUENCES DISCERNIBLE IN THE APPOINTMENT OF MEMBERS OF THE  
INTERSTATE COMMERCE COMMISSION, 1905-1931, WITH THE  
PRESIDENTS BY WHOM THEY WERE APPOINTED

*Personal Influences*

F. K. Lane (Roosevelt)  
J. S. Harlan (Roosevelt)  
W. M. Daniels (Wilson)  
H. C. Hall (Wilson)  
G. W. Anderson (Wilson)  
J. B. Eastman (Wilson)  
H. J. Ford (Wilson)  
M. W. Potter (Wilson)  
F. I. Cox (Harding)

*Occupational Influences*

E. E. Clark (Roosevelt)  
\* J. Duncan (Wilson)  
M. W. Potter (Wilson)  
F. McManamy (Harding)  
T. F. Woodlock (Coolidge)

*Qualification and Training*

C. C. McChord (Taft)  
B. H. Meyer (Taft)  
J. H. Marble (Wilson)  
W. M. Daniels (Wilson)  
C. B. Aitchison (Wilson)  
J. B. Eastman (Wilson)  
M. W. Potter (Wilson and  
Harding)  
J. J. Esch (Harding)  
F. McManamy (Harding)  
T. F. Woodlock (Coolidge)  
P. J. Farrell (Coolidge)  
C. D. Mahaffie (Hoover)

\* Never actually held office.

These are, of course, only expressions of the author's fallible judgment. They are based upon contemporary newspaper and trade journal comment, Congressional utterances, and conversations with some former members of the Commission and others in close touch.

course, possible that a man appointed for other reasons than his ability becomes in time an able commissioner. E. E.

*Geographical Influences*

H. C. Hall (Wilson)  
\* H. C. Stuart (Wilson)  
J. B. Campbell (Harding)  
R. V. Taylor (Coolidge)  
\* C. E. Woods (Coolidge)  
E. Brainerd (Coolidge)  
C. R. Porter (Coolidge)  
W. E. Lee (Hoover)  
\* R. M. Jones (Hoover)  
H. M. Tate (Hoover)

*Political Influences*

F. M. Cockrell (Roosevelt)  
J. S. Harlan (Roosevelt)  
H. C. Hall (Wilson)  
R. W. Woolley (Wilson)  
\* H. C. Stuart (Wilson)  
M. W. Potter (Wilson)  
J. J. Esch (Harding)  
E. I. Lewis (Harding)  
F. I. Cox (Harding)  
R. V. Taylor (Coolidge)  
\* C. E. Woods (Coolidge)  
C. R. Porter (Coolidge)  
\* R. M. Jones (Hoover)  
H. M. Tate (Hoover)

Clark, whom Roosevelt nominated in deference to railway labor, was a notable instance, and there have been others, but such cases are exceptional. At best, the government pays, and the Commission is handicapped, while the new man learns. More usually the result is simply another mediocre commissioner. In arriving at the judgments expressed in the accompanying lists the motive at the time of appointment, not the subsequent career of the appointee, is taken as the basis.

The brightest aspect of the picture at present is the recent promotion to places on the Commission of the heads of its legal and finance bureaus. The effect of such moves on the morale of the rest of the Commission's staff is hard to overestimate.

#### TENURE

The tenure of commissioners, once appointed, is as important in ensuring an able Commission as getting men of high calibre in the first place. The term of six years provided in the original act to regulate commerce was lengthened to seven in 1906, but by that time the custom was already fairly established of reappointing commissioners who had served satisfactorily and who were willing to continue. Every dictate of sound administration supports this policy. Only a blind partisan or a frank disbeliever in all civil service could find a good word for such a proposal as Senator Neely made during the Senate's contest over Commissioner Esch's renomination, that the term of Commissioners be increased to eight years, but that no member be eligible for reappointment, and that not more than one member be appointed from any one state.<sup>5</sup> Reappointment provides the clearest and the severest test of the Commission's freedom from political supervision. Since Cleveland first

<sup>5</sup> S. 3529, 69 *Cong. Rec.* 4154 (1928); 41 *Traffic World*, 597.

appointed a Democratic majority on the original Commission, every President except Roosevelt and Taft has on some occasion failed for political reasons to reappoint a commissioner whose term was expiring. The custom gains strength with age, however, and deviations cause protest.

Failure to reappoint commissioners for political reasons was confined to isolated instances until 1920,<sup>6</sup> and was usually due to a change in administration which entitled the party in power to a majority of the places. In that year three Wilson appointees, two to fill additional commissioner-ships created by the Transportation Act, were held up by a Republican Senate in order that the places might be filled by Wilson's successor—a procedure that was defended on the ground that Democratic senators had held up Taft appointments similarly in 1912 after the election of that year. No

<sup>6</sup> President Harrison converted the original Democratic majority to a Republican one in 1891 by nominating Martin A. Knapp to succeed Augustus Schoonmaker, a Democrat. McKinley replaced W. R. Morrison, another Democrat, with W. J. Calhoun in 1898, leaving Judson Clements of Georgia the only full-fledged Democrat among the five members. (See above, note 1.) Roosevelt reappointed J. D. Yeomans in January, 1905, but with the understanding that he would resign two months later in order to permit Roosevelt to carry out a previous agreement to appoint Senator F. M. Cockrell, of Missouri, in his place. The latter, a prominent Democratic leader, retired in March, 1905, after five successive terms in the Senate. His appointment to the Commission was purely political; and partly on account of his age, he was the least useful member of the Commission during his term there. Taft declined to renominate him in 1911, but took care of him elsewhere. Wilson's failure, in 1918, to reappoint J. S. Harlan, a son of the justice of the Supreme Court, after two terms in office, is probably traceable to his personal feeling toward the Harlan family and to the ill-health of the Commissioner whose office and docket were for some months referred to familiarly at the Commission offices as "the morgue". Harding doubtless felt little compunction in not returning to office R. W. Woolley, Democratic publicity director and former Director of the Mint, nor H. J. Ford, Princeton professor whom Wilson had appointed out of personal regard, and who served on a recess appointment when the Senate declined to confirm him.

places on the Commission were involved in 1912, however. Of the three that Wilson named, one was finally confirmed when he was again nominated by Harding; the other two were displaced. This was clearly an incident in the larger controversy between President and Senate at the close of the war. During the Coolidge administration political interference with the Interstate Commerce Commission, as with other supposedly independent commissions, was at a high mark.

It is difficult to make comparisons of tenure on the Commission, since the number of members was smaller and the term of office was shorter in its earlier years; while of the later appointees, many are still in office. Study of the list of members and their terms of service, as shown in the accompanying tables, however, yields some observations of interest. Tenure on the Commission was most secure in the period between the passage of the Hepburn Act, in 1906, and American entrance into the war, when the average length of service was over twelve years. It has been most precarious in the last few years. The mortality was heaviest under President Coolidge, at the time the lake cargo fight was hottest. Since then a majority of the Commission have changed, and it was a new group that had to deal with the latest lake cargo case.

LIST OF MEMBERS OF THE INTERSTATE COMMERCE COMMISSION, 1887-1932,  
WITH THE DATES WHEN THEY TOOK OFFICE, AND THE  
LENGTH OF THEIR SERVICE

<i>Commissioner</i>	<i>Party</i>	<i>Office</i>	<i>Tenure</i>	
T. M. Cooley .....	R	1887	5	years
W. R. Morrison ....	D	"	11	" (not reapp. after 2d term)
A. Schoonmaker ....	D	"	4	" (not reapp.)
A. F. Walker .....	R	"	2	"
W. L. Bragg .....	D	"	4	" (died in office)
W. G. Veazey .....	R	1889	7	"
M. A. Knapp .....	R	1891	20	"



J. W. McDill .....	R	1892	2	"	(died in office)
(Wm. Lindsay) .....	D	"	0	"	(declined)
J. C. Clements .....	D	"	25	"	(died in office)
J. D. Yeomans .....	R	1894	11	"	
C. A. Prouty .....	R	1896	17	"	
W. J. Calhoun .....	R	1898	2	"	
J. W. Fifer .....	R	1899	6	"	
F. M. Cockrell .....	D	1905	6	"	(not reapp.)
F. K. Lane .....	D	1905	7	"	
E. E. Clark .....	R	1906	15	"	
J. S. Harlan .....	R	"	12	"	(not reapp. after 2d term)
C. C. McChord .....	D	1910	15	"	
* B. H. Meyer .....	R	1910	21	"	
J. H. Marble .....	D	1913	1	"	(died in office)
H. C. Hall .....	D	1914	14	"	
W. M. Daniels .....	D	"	9	"	
* C. B. Aitchison .....	R	1917	15	"	
G. W. Anderson .....	D	"	1	"	
R. W. Woolley .....	D	"	3	"	(not reapp.)
* J. B. Eastman .....	Ind	1919	13	"	
(H. C. Stuart) .....	D	1920	0	"	(declined)
H. J. Ford .....	D	"	1	"	(not confirmed)
(J. Duncan) .....	R	"	0	"	(not confirmed)
M. W. Potter .....	D	"	5	"	(not conf. till reapp. 1921)
J. J. Esch .....	R	1921	7	"	(reapp. not confirmed)
J. B. Campbell .....	R	"	9	"	
* E. I. Lewis .....	R	"	11	"	
F. I. Cox .....	R	"	5	"	(not reapp.)
* F. McManamy .....	D	1923	9	"	
T. F. Woodlock .....	D	1925	5	"	
R. V. Taylor .....	D	1926	4	"	(not reapp.)
(C. E. Woods) .....	R	"	0	"	(not confirmed)
* E. Brainerd .....	R	1927	5	"	
* C. R. Porter .....	D	1928	4	"	
* P. J. Farrell .....	D	"	4	"	
(R. M. Jones) .....	R	1929	0	"	(withdrew)
* W. E. Lee .....	R	1930	2	"	
* H. M. Tate .....	R	1930	2	"	
* C. D. Mahaffie .....	D	"	2	"	

Where appointees did not serve, date is of appointment. Fractions of years in tenure rounded to the nearest whole year. Those marked (\*) are now in office (August, 1932).

TENURE AND TURNOVER OF MEMBERS OF THE INTERSTATE  
COMMERCE COMMISSION, 1887-1932

<i>Period</i>	<i>Years</i>	<i>Size of I. C. C.</i>	<i>No. Appts.</i>	<i>Average Tenure</i>	<i>Turnover</i>
1887-1906 ....	20	5 members	16	8.6 yrs. <sup>1</sup>	300%
1906-1917 ....	11	7 "	7	12.4 " <sup>2</sup>	100%
1917-1920 ....	3	9 "	8	6.2 " <sup>3</sup>	67%
1921-1931 ....	10	11 "	15	4.8 " <sup>4</sup>	136%
1925-1932 ....	7	11 "	10	—	91%

<sup>1</sup> Excluding one appointee who did not serve.

<sup>2</sup> One still in office will raise this figure somewhat.

<sup>3</sup> Excluding two appointees who did not serve. Two others are still in office.

<sup>4</sup> Excluding two appointees who did not serve. Since eight are still in office, this figure is not comparable with the others.

## POLITICAL INFLUENCES UPON THE COMMISSION

The question why there should be political interference with the workings of the Commission is on its surface too obvious, and carried deeper, is too involved in the springs of human nature to answer. A readier question is why those who have political influence should not exercise it. The Commission may be a quasi-judicial body, but in theory at least it is the agent of Congress, the shrine of political influence; how can it rise above its master? Part of the answer lies in the fact that the Supreme Court is also the Commission's master in some respects, and that a decision founded upon other motives than are supplied by the evidence in the record is subject to judicial review and reversal. Another part of the answer is bound up in the phrase "professional ethics", which commissioners, like doctors and lawyers, feel and observe in varying degrees.

The general attitude of the commissioners, as explained by one of them who was concerned in the lake cases, is to talk with anyone about a pending case until the oral argument has been heard; and then to decline to discuss it at all until the decision has been announced. There are excep-

tions in individual cases. Some commissioners have a political ear to the ground and are willing to talk with political friends; out of this, minor scandals occasionally arise.<sup>7</sup> One member is even reported to have served notice on his colleagues that he would talk to whom he pleased when he pleased. Some commissioners, on the other hand, decline to hear anything from any outsider that does not go into the record, so that their colleagues may see it and opposing counsel may answer it if they desire. A well-known story about Commissioner Clements, picturesque Georgian Democrat and gentleman of the old school who died in office in 1917 after twenty-five years' service, illustrates the Commission's traditional attitude. On the occasion of the first exercise of the power given the Commission in 1910 to suspend rates, a hearing was set with Commissioner Clements presiding. When he arrived, he found the room full of Congressmen and Senators. The old gentleman had been in Congress himself, and knew his audience. Looking through the group, he announced that this was a legal hearing, duly set, and not a political convention, and that he resented the presence of a large number of men who he knew could not be there for the purpose of offering testimony. Whereupon, the gathering departed.<sup>8</sup>

Political interference takes many forms. There is one sort that is inevitable. When James Francis Burke, general counsel of the Republican National Committee, appears to argue in behalf of the Pittsburgh operators; when James W. Good, sometime Representative and later to be Secretary of War, speaks for northwestern consumers; and when John W. Davis argues for the southern operators before the Su-

<sup>7</sup> For an instance, see 31 *Traffic World*, 165; 32 *Traffic World*, 1534 (1923).

<sup>8</sup> This version comes from ex-Commissioner Hall. A variant is related in 41 *Traffic World*, 581 (1928).

preme Court, the lake cargo case cannot help taking a political slant. A more serious danger lies in attempts to exert political influence by those outside the formal proceedings.

Most of it is bluff—public speeches and statements from persons of some prominence but with no direct means of influence. What they have to say is usually the expression of a pious wish, intended for their constituents' consumption and without much expectation that it will really affect any action taken. In this category fall a series of letters from the governors of the states involved in the lake cargo controversy. Governor Gore of West Virginia, during the 1926 campaign, wrote an identical letter to the governors of the northwestern states that consume lake cargo coal, urging them to be represented at the hearings on the reconsideration of the lake rates, and to assert their mutuality of interest with West Virginia. Governors Donahey of Ohio and Pinchot of Pennsylvania followed up with letters expressing the opposite viewpoint. Messrs. Fisher, Vare, and W. B. Wilson, Republican and Democratic candidates for Governor and Senator in the Pennsylvania election campaign then in progress, all agreed to join the fight for fair rates for Pennsylvania. "I realize," said Mr. Fisher, "that it is not within the power of the Governor of Pennsylvania to change this, but no possible effort to exert influence against this discrimination should be neglected."

Much Congressional debate is of the same character; for example, the first reference to the lake cargo controversy in the *Congressional Record*, a speech by Congressman Robsion of Kentucky, printed under "Leave granted" on the last day of the session, March 4, 1925, in which he attacked the examiner's proposed report that recommended relief for Pittsburgh. This was not delivered at all, but was distributed at home among his constituents.<sup>9</sup>

<sup>9</sup> 66 *Cong. Rec.*, 5605-5607. The index to the *Record* omits reference

More sinister are the letters and calls from individual members of Congress and other politicians upon members of the Commission with regard to pending cases. Some are simply innocent of the Commission's practice. A visit to the Commission by President Harding in 1921 to inquire whether something could be done to benefit shippers was apparently of this nature.<sup>10</sup> Secretary Hoover also, when new to the Department of Commerce, tried to give advice to the Commission, and has done so once or twice again since becoming President.<sup>10a</sup> Not all such attempts are as innocent. Many Congressmen phone or write Commissioners to present arguments or claims of constituents in pending cases. The arguments are usually only nominal. The weight back of them is the power and the possible disposition of the member

to it. The leave was granted for a speech about the Pullman surcharge, which was not mentioned in it. The examiner's proposed report had appeared meanwhile. Representative C. Ellis Moore, of Cambridge, Ohio, in the next session denounced this attempt to "discredit the examiner's report while the Commission had it under consideration", and then proceeded to set forth the northern operators' side while the Commission was reconsidering the case. *67 Cong. Rec.*, 12407 (1926).

<sup>10</sup> The President's innocence of the Commission's ways was such, according to one who was present at the meeting, that on his arrival at the Commission's offices he looked over the directory at the entrance, thought the "Chief Examiner" sounded right, and asked to be conducted there. Concluding before he arrived, however, that the summit was yet higher, he asked for the Chairman instead. Chairman Clark gathered the other Commissioners, and they talked affably and innocuously. The report that circulated as a result, that Harding had "influenced" the Commission, was unwarranted. The President knew nothing of rates, and was surprised to learn that some Ohio rates had been reduced since 1920. There was no attempt to apply pressure, and the visit apparently was made either out of curiosity to see what the place was like, or for political consumption in Ohio.

<sup>10a</sup> In urging the adoption, in December, 1930, of a railroad consolidation program, and in March, 1932, of a more liberal policy in approving loans to railroads to be made by the Reconstruction Finance Corporation, *N. Y. Times*, March 28, 1932.

of Congress to do something disagreeable to the Commissioner politically.

An example occurred at the very hour when the Senate Committee on Interstate Commerce was voting to reject the renomination of Commissioner Esch for having yielded, so some of its members thought, to political pressure. The entire Georgia delegation in Congress, Senators and Representatives, visited a hearing on the southern peach-rate case, in which their constituents were interested—not, of course, to influence the presiding Commissioner in any way, but simply to let him know that they knew there was such a case and that they hoped he would do the fair thing.<sup>11</sup>

Not all the politicians who attempt to exert influence are in Congress. During the Coolidge régime a figure nowhere mentioned in the record but frequently to be seen around the Commission's offices was C. Bascom Slemp, the President's secretary during his first year in office. His interest in the Commission continued after his connection with the President ceased. As the owner of a group of coal mines in the southern fields, he was intimately interested in the lake cargo fight, and put what weight he had on the southern side. There is not much headway to be made by political pressure upon most Commissioners, but doubtless no possibilities were being overlooked.

Another kind of political pressure consists in Congressional browbeating by means of passing offensive resolutions and introducing punitive bills. The long session that began in December, 1927, during which the renomination of Commissioner Esch was rejected, was filled with instances of this sort of thing. The most objectionable of these was a resolution introduced by Senator Robinson of Arkansas, Democratic leader, shortly before the Esch hearings. With-

<sup>11</sup> See 41 *Traffic World*, 581 (1928).

out specifying names, it recited that Congress had been memorialized by state legislatures,<sup>12</sup>

to the effect that the Interstate Commerce Commission has attempted so to regulate rates of transportation as to equalize prosperity among producers of commodities and to the end has employed rate regulation to place an embargo upon the products of certain States and in order to favor the products of other States as to certain markets. . . .

and directed the Commission to transmit to Congress,

(a) Copies of all decisions handed down by it in the five years preceding . . . in which its decisions as to the reasonableness of any rate or rates was in any sense influenced by the competitive advantage or disadvantage of the producers in one State, district, or section as compared with the advantage or disadvantage of the producers in another State, district, or section; (b) a full and complete citation of the section or sections of the interstate commerce act . . . and of the clauses, . . . of the Constitution under which it claims and believes that decisions of such a character and purport were authorized or were implied."

This resolution was passed by a vote of 68 to 1, after a short debate that centered around the lake cargo case. Senator Barkley of Kentucky denounced the Commission and its decision, and asserted that there was nothing in the interstate commerce act which warranted the exercise of such power. Bruce of Maryland, who cast the lone dissenting vote, suggested that the information requested would be used "for the purpose of making an assault on the confirmation of Mr. Esch", and said he thought "that enough respect is entertained by the people of the United States for the Inter-

<sup>12</sup> 69 *Cong. Rec.*, 2668, Feb. 8, 1928. It lay over under the rule, and was debated the following day, pp. 2774-2780. A resolution from Kentucky which definitely asked that John J. Esch be not confirmed because he "indorses the objectionable . . . acts of the Commission" was printed, pp. 2888-2890.

state Commerce Commission . . . to induce us to forbear, in a resolution asking for information, to attempt to fix nothing less than a stigma to the character and standing of the commission." No one else showed serious concern over the reflection upon the Commission, and there was little sign of the self-restraint that would suggest a correction of the situation by changing the statute instead of chopping off commissioners' heads. The southern lake cargo senators found allies among the intermountain Democrats who complained of the lax interpretation of the long-and-short-haul clause—an incongruous alliance, since a strict construction of the fourth section would logically demand, as applied to the lake cargo rate structure, a much higher differential in favor of Pittsburgh. But it was enough that both had a grievance against the Commission, though for opposite reasons. Similarly Senator Trammell, of Florida, who was interested in the regulation of economic conditions between sections because of a recent Commission decision on fruit rates favorable to California, was stirred to ask whether Senator Robinson's resolution would "reach a situation . . . where rates were fixed for a haul of 3,000 miles practically the same as for a haul of 1200 miles?"<sup>18</sup> All parties were looking for ammunition, and many diverse interests were attracted.

No one could object, except on grounds of duplication or futility, to the Robinson resolution if it had been simply a request for information, and it is possible that many of those who voted for it saw no more in it. But certainly the Commission could not help seeing more than that in language which came near insulting it as a body.

<sup>18</sup> *Ibid.*, 2774. See *infra*, p. 251. Trammell as a southern Democrat voted against Commissioner Esch's confirmation, yet logically what he wanted for Florida as compared with California was precisely what Pittsburgh wanted as compared with West Virginia.



There were other bills introduced in the 1928 session as repercussions from the lake cargo struggle. Senator Neely's bill to limit tenure on the Commission has already been mentioned. Another bill to require appointments along geographical lines appeared.<sup>14</sup> The Commission's refusal to allow the southern roads to reduce their lake cargo rates in February, 1928, called forth a series of bills designed to restrict the minimum rate power (though that has never yet been used with regard to any of the late rates) and to limit the Commission's purview in considering rates to purely transportation factors.<sup>15</sup>

The final means of political interference, and the ground upon which all lesser attempts ultimately rest, is the control over appointments and reappointments that senators have by reason of their power to confirm or reject nominations. A review of Commission appointments and the Senate action upon them in the last few years will show how intimately sectional conflicts, and the lake cargo controversy in particular, have affected them.

#### RECENT COMMISSION APPOINTMENTS

The lake cargo controversy may be said to date as a political affair from President Coolidge's first appointment to the Commission of Thomas F. Woodlock of New York, on January 26, 1925—by a coincidence, just four days before the approval of the Hoch-Smith resolution, a landmark in the course of legal controversy over lake rates. Mr. Woodlock was nominally a Democrat, and filled a vacancy left by a Democrat, Commissioner Potter, but like most minority appointments to the Commission, he was not an organization man.

<sup>14</sup> S. 789, 69 *Cong. Rec.*, 342, introduced Dec. 9, 1927.

<sup>15</sup> See 41 *Traffic World*, 602, 833, 918 (1928). No action was taken on any of these.

The appointment proved to be one of the most contentious that President Coolidge made. Senators Smith of South Carolina, ranking Democrat on the Interstate Commerce committee, and Underwood, Democratic leader, immediately opposed confirmation, claiming that the appointment should go to a Democrat from the "deep South". They pointed to the fact that there had been only two such Democrats on the Commission, Bragg from Alabama, and Clements from Georgia, in its forty years' history, as an evidence of discrimination against southerners in national appointments—a long-standing grievance that even the Wilson administration had not mollified. Other Democrats in the Senate fell into line. Intermountain senators were apprehensive lest Woodlock take the railroad attitude toward the long-and-short-haul clause. Insurgent Republicans joined the opposition. They had spent their lives denouncing Wall Street and the railroads, and here was an appointee who personified both. Regular Republicans generally backed the President, but even here there were important defections. The opposition seemed to control a majority. No action was taken in the session that expired on March 4, 1925. During the special session of the Senate called immediately thereafter to consider nominations of the new administration, Mr. Woodlock's name was withheld until near the end, and again no action was taken. A few days later he received a recess appointment and took office on April 1, but under the statute he received no pay until he was confirmed.

No one questioned the ability of the nominee or his acquaintance with the duties of his office. Irish by birth, he had come to this country in 1892 after financial experience in London, and as a member of the Dow-Jones staff had specialized in railroad finances. He was editor of the *Wall Street Journal* from 1902 to 1905, and at the time of his appointment was financial writer for the *New York Sun*.

He had written much on railroad regulation, particularly in its financial aspects, and his selection, said to have been suggested by Frank Munsey,<sup>16</sup> was based on the President's desire to name someone who could bring to the Commission an authoritative acquaintance with railroad finance. To Washington politicians, however, the President could not have introduced a more complete stranger. The opposition that immediately appeared was purely political in nature, except for that of the middle-west Republicans. Those who had condemned the Esch-Cummins Transportation Act of 1920 for its liberality to the carriers could hardly be expected to approve a candidate who had consistently urged the carrier and financial viewpoint toward regulation.

The ground was well laid for a political struggle. The Republican party was split and the opportunistic alliance of Democrats and insurgent Republicans that was to characterize the succeeding years was just beginning to feel its strength. The President was not one to assert leadership in tumult. Moreover, the appointments of the preceding administration had not been of such character as to discourage partisan tinkering with the Commission personnel.

#### HARDING APPOINTMENTS

President Harding had filled six vacancies in an undistinguished manner. He had returned to the Senate one Wilson nominee, Woodlock's predecessor, Commissioner Potter, also a New York Democrat, president of a small southern railroad, who likewise was appointed in order to bring a knowledge of railroad finance to the Commission. To fill the other three vacancies left by the Senate's refusal to confirm Wilson's choices, he appointed John J. Esch of Wisconsin, Johnston B. Campbell of Spokane, Washington, and Ernest I. Lewis of Indiana. Mr. Esch had been many years in the

<sup>16</sup> 36 *Traffic World*, 1129 (1925).

House, was co-author of the Transportation Act, and had a thorough acquaintance with railroad regulation. He was of the conservative Republican faction in Wisconsin, however, and because of his connection with the Transportation Act was a target for the LaFollette forces. He failed of reelection in 1920, and was appointed to the Commission a week after the close of the short session and the inauguration of President Harding. His experience qualified him in the eyes of conservatives and disqualified him in the eyes of the so-called liberals. His appointment was possibly influenced by party considerations, but he was a conscientious and fair-minded public official. Though a lame-duck appointee, he had no personal acquaintance with the new President.

Johnston Campbell had for years represented the Spokane shippers in the long struggle over intermountain rates, and he was appointed to represent intermountain interests. Though he knew the Commission's business well enough he could scarcely be expected to bring an impartial view to many recurring problems on the Commission's docket, and he did in fact retain the intermountain viewpoint while in office.

Mr. Lewis had been a journalist, and when appointed was chairman of the Indiana Public Service Commission. His appointment, however, was due less to his qualifications for the task than to the support he got from Indiana Republicans, and he did not forget the source of his strength.

Two other vacancies occurred while Harding was President, by the resignations of Commissioners Clark and Daniels. The former was replaced in purely political fashion by Frederick I. Cox, a silk merchant and past president of an organization of commercial traveling men. Traveling men were dissatisfied with the passenger rates that resulted from the war changes, and brought political pressure to se-

cure representation on the Commission. Cox had led a band of greeters to Marion, Ohio, during the 1920 campaign, and was said to have been promised the appointment, in offhand fashion, on that occasion. He was also a friend of Senator Frelinghuysen of New Jersey, who was one of Harding's foursome at golf. He was personable to meet and had some skill in sizing up situations on short acquaintance, but he had no training or familiarity with railroad regulation that would fit him for the position,<sup>17</sup> and was probably the weakest member of the Commission during his term.

After Commissioner Clark resigned in 1921 there was no member to speak for organized labor; so the last of Harding's Commission appointments went to meet that demand. Frank McManamy had been with the organization of locomotive engineers. He became chief of the Commission's Bureau of Locomotive Inspection, and then transferred to the United States Railroad Administration. Though appointed to represent a particular viewpoint, he had at least the advantage of knowing the ropes.

#### CONFIRMATION OF WOODLOCK

Little wonder then that competing groups should use the occasion of the Woodlock appointment for selfish purposes. The campaign for his confirmation lasted for more than a year, with varying fortunes, and the moves were shrewdly calculated. The President fought the Senate with familiar weapons.

First in opposition was Senator Underwood of Alabama, crying for recognition for the South. Nothing against Woodlock, he let it be understood, but every member of the Commission then came from north of a line drawn from

<sup>17</sup> Senator Reed of Pennsylvania painted a rather less flattering picture of him as "a silk ribbon salesman". *Hearings on Nomination of Cyrus E. Woods*, p. 160, before Sen. Comm. on Int. Comm., 69th Cong., 2d Sess. (1927).

Baltimore to San Francisco, and if southerners did not call a halt, well, southerners would never share the responsibilities of government. He kept at the campaign all summer. Even in April, when Mr. Woodlock took office, it was reported that the President had wavered, and before giving Woodlock the recess appointment, offered the place to an unnamed South Carolinian, "the only man in the Southeast familiar with railroad finances", who, however, declined.<sup>18</sup>

Meanwhile the new Commissioner began to function in office. By siding with the majority in denying the renewed application of the transcontinental lines for fourth section relief, he showed that he was no mere rubber stamp of railroad opinion, and as a result the apprehensions of at least the Republican intermountain senators were somewhat allayed. But in July, 1925, came the first lake cargo decision, and in this Commissioner Woodlock also sided with the majority in dismissing the complaint of the Pittsburgh operators. That brought another enemy actively into the picture, Senator Reed of Pennsylvania.

Upon Senator Reed, more than any other single individual, rests the blame for making the lake controversy a political one and for making the Senate a forum for non-judicial review of Commission decisions. Much of the fault was in the system, and certainly Senator Neely of West Virginia, his principal opponent, was equally aggressive. But when all allowances are made, the fact remains that Reed started the trouble and pushed it as far as he could. The speech of Representative Robsion of Kentucky in the *Congressional Record* of March 4, 1925, was the first blow in Congress; but it was never delivered, only written and mailed to constituents. It is not contended that Reed's activities were precipitated by that speech or in answer to it. They were part of an independent campaign of his to increase Pennsyl-

<sup>18</sup> 35 *Traffic World*, 797, 858 (1925).

vania's share of the Federal patronage, as he very frankly said.

He complained with unwearied reiteration that his state originated 20% of the freight traffic, and contained an eleventh of the population of the country, but had not in forty years had a representative on the Commission. In a speech that was unfortunately reported in the papers and dinned in his ears for months afterward, before a group of coal operators at Uniontown, Pa., in March, 1926, he referred to the lake decision and the application for its reconsideration, and then said:<sup>19</sup>

Now, what are we going to do about it? Of course, we are going to demand our rights, but we are not going to stop at that. We are not only going to demand them, but we are going to fight for them, and fighting for them means that we are going to keep at it until we have fair representation and until that fair representation has yielded a correction of these conditions of which we complain.

In furtherance of this campaign, he joined the opposition to Woodlock's confirmation.

#### THE TAYLOR "DEAL"

When Congress convened in December, 1925, the prospects for obtaining confirmation were decidedly not bright, and the President intimated with regard to the Smith bill for geographical representation, that he would favor an increase in the size of the Commission in order to satisfy the demand for southern recognition. But a few days later C. C. McChord of Kentucky, who came nearest being a southerner on the Commission, resigned and the way was cleared. The President immediately announced the appoint-

<sup>19</sup> Quoted by Senator Reed of Missouri two years later, in a Senate speech opposing Esch's confirmation, 69 *Cong. Rec.*, 3149, Feb. 17, 1928. It was quoted also during the fight on Woods by those opposed to that appointment. *Hearings on Cyrus E. Woods*, p. 68.

ment of R. V. Taylor of Alabama to succeed him, and at the same time returned Woodlock's name to the Senate. Taylor was Senator Underwood's choice. He had been mayor of Mobile, and for many years previously had served in various capacities with the Mobile and Ohio Railroad.

Charges of a "deal" by the administration to get support for Woodlock were to be expected in such circumstances, and they were pushed by the South Carolina senators and others who had unsuccessful candidates. The accusation received wide publicity, and the President put himself on the defensive by issuing a statement that conflicted with Underwood's explanation on the Senate floor; but the so-called deal was of the unwritten, unprovable sort that consists in an informal understanding by the parties of each other's desires.<sup>20</sup> Other members of their respective parties were not bound, however, and so, while Taylor was speedily confirmed, Woodlock was still held up, and committee hearings on his nomination were ordered. Reed, envious of Underwood's success, inquired during debate whether the way to get representation on the Commission was to block all nominations until given an appointment, and he suggested that Pennsylvania might try it. In fact, he had already begun to do so.

It is noteworthy that the two men who opposed Woodlock's confirmation for purely political reasons, Reed and Underwood, both represented states that, at least until 1928, held to party loyalties with unvarying regularity. The patronage plums were reserved for states where it was hoped they would do some good, politically speaking. Reed was quite aware of the handicap he suffered on this account, and offered it in justification for resorting to extremes in order to secure recognition for Pennsylvania.<sup>21</sup> Obviously if many

<sup>20</sup> 36 *Traffic World*, 1461, 1539 (1925).

<sup>21</sup> *Hearings on Cyrus E. Woods*, p. 162 (1927).



legislators acted as Reed and Underwood did here, business could be transacted only by logrolling.

There was other opposition to Woodlock from the insurgent Republicans and radical Democrats who objected on principle to the opinions he had expressed. Allied with Reed and the dissatisfied southerners, this opposition was enough to cause the Interstate Commerce Committee to vote, seven to six, for rejection of the nomination.<sup>22</sup> It was an unexpected setback for the President, and presaged a close fight on the floor.

#### THE REED-WOODLOCK "DEAL"

What the President had done before, he could do again, and he did. There was a delay of some weeks in bringing up the nomination on the floor, and meanwhile another "deal" was arranged, this time in favor of the Pennsylvania senator. On March 23, 1926, a few hours before the Senate took up the question, announcement was made at the White House that,

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.

In debate on the floor the next day, Senator Wheeler of Montana, who was still opposed to Woodlock on principle, compared the situation to a "New England horse trade".

<sup>22</sup> In favor of the nomination were Watson, Cummins, Fernald, Fess and Sackett, administration regulars; and Underwood, Democrat. Gooding, Couzens and Howell, Republicans, and Smith, Pittman, Mayfield and Wheeler, Democrats, were opposed. Absent and paired were Goff, Republican, and Bruce, Democrat, in favor, and Pine, Republican, and Dill, Democrat, opposed. 37 *Traffic World*, 576 (1926).

He thought it a reflection on the integrity of the Senate that such "a bait (should be) held out to the south, the southwest, and Pennsylvania to get the confirmation of Mr. Woodlock". Senator Glass doubted that the President had "so poor an opinion of the Senate", and predicted that not a vote would be changed by the statement. Reed saw nothing in his own course that stultified him, as was charged, and said:

I have not opposed Mr. Woodlock for any reason except the non-recognition of Pennsylvania and her industries, and having won that point, I am glad to stand with the administration in the vote on Mr. Woodlock.

This prompted Senator Neely to inquire whether, when his Pennsylvania colleague suggested someone to fill a Commission vacancy, he would first make sure that the man he chose would vote to increase Pennsylvania's advantage in lake cargo rates; a suggestion that was of course indignantly denied, but that gave the two senators opportunity to rehearse once more their constituents' views of the lake trade.<sup>23</sup>

On March 26, after five hours of debate in executive session, the Senate confirmed the Woodlock nomination by a vote of 52 to 25. Senator Glass may have been wrong in his estimate of the President's opinion of the Senate, or other causes may have been at work, but votes changed. The margin was much greater than previous informal polls had forecast, and the result caused general surprise. Apparently some senators had been ambiguous in their pledges. Reed's change of position would not account for the difference. He had voted two days before in favor of the Gooding long-and-short-haul bill, which was lost,<sup>24</sup> and some took

<sup>23</sup> 67 *Cong. Rec.* 6163 (1926). The debate is summarized and the White House statement quoted in 37 *Traffic World*, 851 (1926).

<sup>24</sup> S. 575, 69th Cong., 1st Sess., a bill to take away the Commission's

that as a bid for intermountain support in his fight over Commission personnel, but even that would not be enough to switch the dozen votes that did not follow expectations.

Another influence contributed. When the Woodlock appointment was first made, the Democratic senators from the southern lake cargo states stood with their colleagues in opposing him on party grounds. But when Reed joined the opposition, and Woodlock voted with the majority to dismiss the first Pittsburgh lake cargo complaint, the more astute among the southern coal operators saw that continued opposition to Woodlock for partisan reasons would simply play into Reed's hands, by helping him place on the Commission other members who might be much more directly antagonistic to West Virginia interests than Woodlock. Some such suggestion to the senators may have been influential. Out of the complex of forces Commissioner Woodlock was confirmed.

#### THE WOODS APPOINTMENT

There were no changes in the membership of the Commission during the rest of 1926, so speculation turned to what the President meant by "vacancy" in his announcement about future appointments. Does the expiration of the term of a Commissioner constitute one? The term of Commissioner Cox was to expire at the end of that year, but although his appointment was political in the first place, it was generally expected that the rule of reappointing those

present discretionary power to allow carriers, when it thinks circumstances warrant, to disregard the long-and-short-haul clause. Neither the *Intermountain Rate Cases*, 234 U. S. 476, nor the Transportation Act satisfied intermountain shippers, who wanted to make the prohibition absolute. The theory that distance should determine rates, upon which their argument rested, would logically have aligned them with the Pennsylvania interests in the lake cargo controversy, for they too would benefit by a strict application of distance scales. Most of the intermountain senators voted, however, with the southern lake cargo interests.

who had served satisfactorily and desired to continue, would be followed in his case.

In the meantime, only a day or two after the announcement from the White House that swung Reed over, and in fact before the vote on Woodlock was taken, there appeared in Pittsburgh papers a political rumor that in this case hit the mark. It was a report from Philadelphia that Cyrus E. Woods, former ambassador to Japan, might be appointed to the Commission.<sup>25</sup> The intimation that President Coolidge was considering Woods, on the recommendation of Senators Reed and Pepper, was linked with a visit by Secretary Mellon to Philadelphia, where Woods was staying. It was an unconfirmed rumor not connected with any particular Commission vacancy, and until Congress opened in December it was generally assumed that Cox would continue in office.

After the session began, however, friends of the Commissioner became concerned over Reed's activities, and they were not reassured when the "White House spokesman" let it be known on the 14th that no decision regarding Cox had been reached. Reed, contrary to his previous habit, had nothing publicly to say. On the 20th, without any word of notification to Commissioner Cox, the President sent to the Senate the nomination of Cyrus E. Woods to succeed him.<sup>26</sup> Cox joined in the Washington law practice of C. Bascom Slemp.

With the exception of the nomination of Charles Beecher

<sup>25</sup> *Pittsburgh Gazette-Times*, March 25, 1926. In 39 *Traffic World*, 123, the rumor is referred to as "long-standing". The southern senators, the writer is informed, heard of it only a few days before the nomination was sent in.

<sup>26</sup> In the same way, though for different reasons, Commissioner Harlan's term expired in 1918 without any word from Wilson, and it was over a year—May, 1920—before Prof. H. J. Ford of Princeton was appointed to succeed him.

Warren as Attorney General, the only Cabinet appointee to fail of confirmation by the Senate in half a century, the Woods affair was probably the most conspicuous blunder of the Coolidge régime. The choice was thoroughly bad. The widespread publicity that attached to the White House statement during the Woodlock fight gave notice that Commissions might become pawns in the patronage game. The failure to reappoint Cox, though there need be little regret over the passing of a man who, if proper standards were observed, should not have been appointed in the first place, gave no promise that his successor would be chosen according to higher standards. Considering the fact that Cox had voted with the majority in dismissing the first Pittsburgh lake cargo complaint, and the further fact that the rehearing was then being held, the appointment of any Pennsylvanian, and especially Woods, could not appear in any other light than an attempt to give one more vote for lower lake cargo rates from Pittsburgh. The amount of bluster in which Senator Reed had indulged made such a construction by the public inevitable, and even the pledge, which the nominee later gave, that he would not participate in the decision of the lake cargo case, was not enough to dispel the bad impression. Critics recalled as a parallel the stir created when President Grant appointed Justices Strong and Bradley to the Supreme Court, and the subsequent reversal of the *Legal Tender* cases.

Cyrus Woods was a native of Pennsylvania, of inconspicuous origin, who had "arrived" by the familiar route of law and politics. Beginning as a clerk for the Pennsylvania Railroad while in college, he took up law, and aided by a fortunate marriage became one of the road's solicitors. This position he left to become general counsel for the Pittsburgh Coal Company in 1907. As such he was concerned with the beginning of the lake cargo controversy, but was no

rate lawyer himself, so when the stage of Commission proceedings was reached, the company employed Mr. Wade Ellis and Mr. Louis D. Brandeis to conduct the case. Before the case was decided, he resigned his connection and for a short period was Minister to Portugal. His political career continued with a term as Secretary of the Commonwealth of Pennsylvania, and then in 1921 Senator Knox secured his appointment by Harding to be Ambassador to Japan. The great Japanese earthquake and America's share in the relief work that followed, gave him unusual prominence in that position. Out of his law, business, and politics he had accumulated a modest fortune. Finally during the year preceding his nomination to the Commission, he had been mentioned for the Governorship of Pennsylvania, and had taken part in the bitter Vare-Pepper-Pinchot primary contest as a coordinator of the campaigns of Pepper for Senator and Fisher for Governor. The Senate campaign fund investigating committee headed by Senator Reed of Missouri submitted its report of primary expenditures in that campaign—which led to the refusal to seat Senator-elect Vare—just a day or two after Coolidge sent in Woods' nomination. Woods' part in the campaign was mentioned, but he was not connected with the raising of funds.

Woods was a close personal friend of Pepper, Mellon, and Reed, and his nomination was secured directly by them. Although he had been general counsel for the Pittsburgh Coal Company, he was rather *persona non grata* when he left and was certainly not one the Pittsburgh operators would have suggested for the place.<sup>27</sup> Nevertheless the fact of his prior connection added color to the impression that the Commission was being "packed". Wide public criticism strength-

<sup>27</sup> The *Pittsburgh Post*, Jan. 6, 1927, reporting the opening of committee hearings on Woods, mentions the sharp division on the Woods appointment in Pittsburgh business circles.

ened the hands of the senators who immediately set out to defeat his confirmation. A *New York World* editorial which called the appointment Coolidge's worst since Brosard and Warren, stung Reed to reply on the Senate floor "as a matter of personal privilege".

The fight to defeat Woods was not so long drawn out as that over Woodlock, but it lasted a full month. The Interstate Commerce Committee held hearings after the Christmas recess. Mr. Woods as a witness "handled himself well", as a lawyer might say. He refused to be drawn into any controversy with either Senator Goff, Republican, or Senator Neely, Democrat, both of West Virginia, who were his principal inquisitors. He professed the open mind of ignorance upon all rate questions. He was afflicted with loss of memory with regard to many details concerning the railroad and coal companies he had served and his connections with them, which might conceivably have been used as ammunition against him. He answered readily, but he gave nothing away. He did definitely promise that if confirmed he would not participate in the pending or any future lake cargo case. But the tide was running strongly against him and it is unlikely that the hearings changed many votes. The committee voted against him, eight to six, with several doubtful members absenting themselves.<sup>28</sup>

The fight was carried to the Senate floor, and meanwhile political forces were marshaled. The United Mine Workers

<sup>28</sup> Watson and Fess supported Woods, as they had Woodlock. Gooding, who had opposed Woodlock, and Metcalf (Rep.), and Mayfield and Hawes (Dem.), also voted for Woods. Opposed were Sackett and Goff, stalwarts who had voted for Woodlock, Couzens, Howell and Pine, who had not, and Smith, Wheeler and Bruce, Democrats. Mayfield had opposed Woodlock, but changed over on this vote; Bruce switched the opposite way. Dill and Pittman, absent, were doubtful. Underwood and DuPont, thought to be for Woods, were also absent. *Pittsburgh Post*, Jan. 13, 1927.

were strongly opposed to the retention of Commissioner Cox, whose utterances regarding organized labor had antagonized them, and so they backed Woods; presumably their opinion carried weight with the Indiana and Ohio senators. Senator Edge of New Jersey, no friend of former Senator Frelinghuysen, announced he would support the President's nomination. There were rumors of Presidential wire-pulling among susceptible Democrats. Every vote was canvassed. As the decision approached the conviction grew that the defeat of the nominee was probable. When the nomination was finally taken up, on January 22, Senator Neely moved an open executive session, in which Woods' defeat would have been certain, and obtained a majority of 48 to 31, but the motion required a two-thirds vote and was lost. The division closely indicated the lines of strength, for the vote, when it came two days later, was for rejection by 49 to 28. The combination of Democrats and insurgent Republicans which gave Coolidge so much trouble throughout his term had scored another victory, and the victory was more decisive this time because of the defection of regular Republicans from the southern lake cargo coal states, Goff of West Virginia, Sackett and Ernst of Kentucky, and Weller of Maryland.<sup>29</sup>

#### WOODS' SUCCESSOR

Senator Reed did not give up his fight to get a Pennsylvanian on the Commission with Woods' defeat. He cast around, and presently urged Representative Temple, of Washington, Pa., as a suitable candidate who would enjoy the

<sup>29</sup> Gould of Maine, Lenroot of Wisconsin, Norbeck and McMasters, Dakotans, were also reported among the opposition. An informal caucus of progressives at noon on the day of the vote turned thumbs down, which made defeat sure, but the size of the adverse majority was unexpected. The vote, in executive session, was secret under the rules, but the results quickly leaked to reporters.



advantage of the unwritten rule of the Senate that members of Congress are always eligible for appointive positions in the federal establishment. A former minister, and professor of economics, Representative Temple had come into Congress on the Bull Moose wave in 1912, and had never been identified actively either with Pennsylvania industries or with the Penrose machine. But Coolidge declined to burn his hands twice in the same fire. On the 16th of February he sent to the Senate the name of Ezra Brainerd, Jr., of Muskogee, Oklahoma, and the next day the Senate confirmed him without opposition and without investigation.

Mr. Brainerd was an attorney, son of a New England college president, with political connections in his adopted home, who was recommended by his senators—they had opposed Woods—and by Senator Watson. Thus Coolidge gave representation to another of the sections that he had admitted during the Woodlock fight were being neglected. The new Commissioner has turned out to be an able one, with sympathies in the conservative tradition of Hall and Woodlock, but he came to the Commission with nearly everything about his job still to learn. The *Traffic World*, speaking of him as an attorney, and presumably a good one, lamented that the President,<sup>80</sup>

did not choose him, however, because of any outstanding qualifications for the job he is to fill. . . . He has had no training or experience that would fit him for the place to which he is appointed, and, therefore, he is a bad appointment. . . . We have not reached the point where qualifications, instead of politics, count.

The second round in Senator Reed's fight to get relief for Pennsylvania politically, whether or not it was aimed directly at the lake cargo situation, thus ended in defeat

<sup>80</sup> 39 *Traffic World*, 457 (1927).

definitely because of that situation: it seemed too blatant an attempt to get by political pressure what the Interstate Commerce Commission had refused on its merits. The lake cargo case was in process of rehearing on its merits, however, and in May, 1927, the second decision was announced. The Commission, by the changed votes of Commissioners Aitchison and Esch, reversed its previous position, and granted a 20-cent reduction to Pittsburgh, coupled with the warning that a corresponding reduction from the southern fields would not be justified. This precipitated the next round of the political, as well as the legal, quarrel.

#### "GETTING" ESCH

The Senate was not in session when the 1927 lake cargo decision appeared, but the memory of it kept fresh in senatorial minds over the summer. A long, vitriolic editorial in a West Virginia paper put in words what many southern operators thought, and what was later charged on the Senate floor: that Commissioners Esch and Aitchison, who changed their votes within the two-year period, and whose terms on the Commission were the next to expire, had changed their votes out of fear that if they did not they would not be renominated.<sup>21</sup> The circumstantial evidence upon which the charge rested consists of the two facts just mentioned, and a third, the failure of President Coolidge, because of Reed's influence, to reappoint Commissioner Cox.

On the other side, it may be said on the plane of political expediency that the 1927 decision was not reached until after the rejection of the Woods nomination, which made it clear that Senator Reed of Pennsylvania was less to be feared politically than his opponents, when it came to a vote. But the innocence and integrity of Commissioner Esch do not rest upon arguments of expediency.

<sup>21</sup> *Charleston (W. Va.) Gazette*, July 3, 1927.

In the first place, there is nothing inherently improbable in a fair-minded man's changing his mind after an interval of a year and a half, and after reading some two thousand pages of additional testimony. As the *Traffic World* commented, "everyone makes mistakes, and some can be convinced that they have done so." The Commission has reversed itself, on important issues, oftener and much more frankly, than the Supreme Court.

Further, there is the unanimous testimony of all those who had personal acquaintance with Commissioner Esch. These include his fellow Commissioners of all shades of opinion on the lake cargo question: Aitchison and Campbell, who had agreed with him; Hall, who dissented vigorously from his conclusions, yet spoke of him as "the salt of the earth", and told the Senate committee there was ample ground for a change of opinion, even though his own had not changed; Eastman, whose general philosophy was poles apart, and who concurred separately in the lake cargo decisions; and former Commissioner Clark.<sup>82</sup> Men outside the arena, and beyond the reach of immediate interest, who opposed Mr. Esch's views and who would have opposed his original nomination, were quick to condemn the treatment of him as a public outrage and scandal, a bitter ingratitude toward a conscientious and hard-working public official. The testimony is ample and convincing of Mr. Esch's absolute integrity. Before the vote was taken Senator Neely of West Virginia, who led the fight against him, publicly withdrew any reflections on his personal honesty.<sup>83</sup> Nevertheless, at the supposed behest of his operator constituents, he set out to "get" Esch.

President Coolidge on December 19 sent to the Senate the

<sup>82</sup> See *Hearings on Confirmation of John J. Esch*, Sen. Comm. on Int. Comm., 70th Cong., 1st Session. (1928).

<sup>83</sup> *Hearings on Esch*, p. 119.

nomination of Commissioner Esch to succeed himself when his term should expire at the end of the year. There were undercurrents of opposition, and plans for a fight, but no action was taken before the Christmas recess. The senators from the southern coal states apparently hesitated at first to contest the nomination openly. They tried to interest the younger LaFollette in leading the opposition. His father had fought the Transportation Act of 1920, of which the then Congressman Esch was co-author, and had also opposed Harding's nomination of Esch to the Commission when the LaFollette forces had encompassed his defeat for reelection to Congress from Wisconsin.

When Esch's term expired the Commission asked him to continue as a Special Examiner, pending the Senate's action, to continue supervision of the matters under his jurisdiction as a commissioner, as had been done in the case of Henry Jones Ford when the Senate took no action on his nomination in 1921. But President Coolidge, who knew his Constitution, made that unnecessary. On January 3, the first business day of the new year, he gave Esch a recess appointment. The Senate reconvened from the holiday recess two days later and the question was raised whether this was one of the "vacancies that may happen during the recess of the Senate", which the President is empowered to fill up, under paragraph 3, section 2, of Article II of the Constitution. The objection was not pressed, however.<sup>84</sup>

Senate action was delayed about six weeks, and delay worked against the President. Several strands of interest were spun into a cord of opposition. Under the rule of senatorial courtesy, stronger than a statute, a man's case is

<sup>84</sup> Holiday recesses had not previously been thought of as among those contemplated in the constitutional provision for recess appointments. There seemed to be no doubt, however, that the language of the Constitution, literally taken, covered the case.

nearly hopeless without the endorsement of the senators from his own state, and Esch got no support from his. The farm bloc, which had fought and denounced the Transportation Act, and had brought about the defeat of Senator Cummins for his share in its writing, were hostile. This hostility, to be sure, tended to bring him the support of the railroads, but carrier officials could not be expected to be enthusiastic in behalf of one who had joined the majority in the *O'Fallon* valuation decision.<sup>85</sup> Democrats viewed the matter in a party light, and the southern coal senators, Republicans and Democrats alike, of course opposed him. Without these last there would have been no effective opposition, and indeed the whole incident is only understandable as a sequel to the Woods affair.

Publicly, the opening gun was fired on February 16, when Senator "Jim" Reed of Missouri announced that on the following day he would speak in opposition to Esch's confirmation. He did, with all the skill that made him the foremost orator in the Senate. After reviewing the history of the lake cargo dispute from 1912 and denouncing the 1927 decision as "not only revolutionary and unjust, but . . . probably the most arbitrary yet handed down by any Federal board or tribunal", he turned to the Commission appointments:<sup>86</sup>

<sup>85</sup> In 41 *Traffic World*, 719 (1928), it was reported that Norris and LaFollette voted for confirmation, under the strong persuasion of Howell of Nebraska, because Esch had concurred with the majority in *Excess Income of St. Louis & O'Fallon Ry.*, 124 I. C. C. 3 (1927), in adopting the prudent investment theory of railroad valuation, in which those senators were much interested. But Mr. Esch was personally under the impression that his senators opposed him, thus invoking the rule of senatorial courtesy. Since the vote was in executive session there is no official record of the votes of individual senators. The railroad view was expressed editorially in 84 *Railway Age*, 179 (1928).

<sup>86</sup> 69 *Cong. Rec.*, 3230-3232 (1928).

The term of Commissioner Esch was about to expire. His emoluments and honors were, of course, dependent upon re-appointment. He must have known of the threat of Senator Reed that Pennsylvania proposed to be represented. He had doubtless observed that the Senator from Pennsylvania had climbed to the very apex of political power and influence. I doubt not that the commissioner often viewed with disconsolate eyes Cox's scalp already suspended from the pole of the Reed tepee. He naturally desired to avoid a similar fate. . . .

Just a week before, the Senate Interstate Commerce Committee had begun its investigation, already mentioned, of conditions in the coal fields, to which Reed of Pennsylvania had unsuccessfully attempted to attach an inquiry into the coal freight-rate structure. On the day following this speech hearings on Esch's confirmation began, and before they were over the 1928 lake cargo case was decided, in which the reductions from the southern fields were ordered canceled.

Senator Neely was again the chief prosecutor, and this time had a less formidable witness than Woods had been. It is evident even from the cold print of the reported hearings that Mr. Esch did not help his case by his appearance before the Committee. A faithful and industrious man, no longer young but habitually at work in his office an hour before the Commission's employees, he was deeply humiliated by the character of the opposition to his confirmation. Many sleepless nights and the nervous tension of the long delay sapped his self-confidence. The differences in men that make some give way before personal attacks, even after long experience in politics, while others can meet them brazenly, may have little to do with their qualifications for office, but they have much to do with impressing an investigating committee. Despite testimony in Mr. Esch's behalf by other members of the Commission, by representatives of the National Industrial Traffic League and of the National

Association of Railroad and Utilities Commissioners, and much criticism of senatorial views in the press and trade journals, the committee voted against him, ten to seven. The insurgent Republicans, Couzens, Gooding, Howell, stood with the administration chiefs, Watson and Fess, but the southern coal state Republicans, Goff and Sackett, were joined in opposition by Pine and Metcalf and all but one Democrat on the committee, Bruce of Maryland.

From then on there was little doubt of the result. Debate on the floor was enlivened by frequent interchanges between the Reeds. Glass of Virginia, second to none in the Senate in his capacity for invective, made public a vitriolic letter which he had written in reply to a criticism of him, in which he denied that the opposition to Esch constituted political interference; it was rather designed to stop the political interference of Pennsylvania. Senator Fess presented a minority report which was a decent defense of Esch, but which would have been stronger had it rested simply on the ground that commissioners should be free to decide according to their best judgment without fear of senatorial review, instead of attempting a justification of the lake cargo decision on its merits, in which the Senator's constituents obviously had an interest. On March 17 the final vote came, and it stood 39 to 29 against confirmation. Mr. Esch was the third victim to be sacrificed to lake cargo politics in the Senate. The Senate had quite properly refused to confirm Woods, ostensibly because of the sectional backing he had. To be consistent it should then have confirmed Esch because of the sectional opposition to him. Instead, the Senate showed in the Esch vote how strong sectional interests could be.

FARRELL AND PORTER

Commissioner Esch was serving under a recess appointment that was good until the end of the Senate session, and

after the Senate rejected his confirmation President Coolidge broke a precedent by asking him to continue until the work on which he was engaged was finished. That gave the President time to look around without leaving the Commission short-handed, and in view of the aspect of President-versus-Senate that the contest had had, it gave the President the show of a last word.

To succeed Esch, the Commission's chief counsel, P. J. Farrell, a Democrat, was appointed in May. Politicians were surprised that so regular a party man as Coolidge should put a Democrat in a Republican's place, but with characteristic caution the President was evidently anxious this time to nominate one whose qualifications were unimpeachable. Republicans could scarcely complain, for some of their number were most active in creating the vacancy. Farrell had frequently been mentioned for previous vacancies but a succession of political appointments had kept him out.

While the fight over Esch was going on, another change in Commission personnel took place almost unnoticed. Commissioner Hall, Democrat of Colorado, author of the 1925 lake cargo decision, and of the dissenting opinion in 1927, was obliged by ill health to resign. In his place Claude R. Porter of Des Moines, a former Democratic Congressman, and chief counsel of the Federal Trade Commission in 1919-20, was nominated in January, 1928. He was, as the *Traffic World* said,<sup>87</sup>

well qualified in character and general attainments, but the usual objection lies that he has had no experience with the subjects with which he has to deal. He may turn out well, but in the meantime the Commission will be handicapped.

The appointment was reported to have been first offered to

<sup>87</sup> 41 *Traffic World*, 72 (1928).



R. C. Fulbright, chairman of the legislative committee of the National Industrial Traffic League, but he declined it. From the railroad point of view the Commission was already too full of men who represented distinctly the shippers' attitude. One or two other western and southwestern Democrats with experience on their state regulatory commissions were also mentioned for the post.

In earlier days a considerable proportion of the appointees to the federal Commission were or had been state commissioners. The four senior members on the present Commission have all had such experience, but the last of these, Lewis, was appointed rather because of Indiana political backing, and in the ten years since his nomination no other state commissioner has been named. This may reflect the decline in the importance of state commissions since the Transportation Act of 1920, or the increased strength of new influences on Commission appointments.

#### AITCHISON

No move was made to confirm Porter before the end of the long session of Congress in 1928, and although Farrell's name was unanimously approved by the Committee on Interstate Commerce and favorably reported, no action was taken on the floor. Farrell, as chief counsel, had represented the Commission in the lake cargo case before the lower court in April, 1928, so when he received a recess appointment after Congress adjourned, outside counsel was employed to conduct the case in the Supreme Court.

At the end of the year, while these appointments were still pending, Commissioner Aitchison's term expired, and he was renominated as Esch had been. A year earlier Aitchison might likely have been defeated also, for he too had changed his vote in the lake cargo rehearing; perhaps more easily, for the western senators were against him on account of his

stand on the long-and-short-haul, and in the Senate hearings on Esch he had been aggressive almost to the point of belligerence, thus alienating some senators. But he was an abler man, and knew better how to take care of himself than Esch, and in the year's lapse a change had occurred. Feelings had cooled off. Criticism of the treatment of Esch had perhaps some indirect effect. Senator Neely, the most unrestrained on the southern side of the controversy, was defeated for reelection in the Hoover landslide that fall, and though still a member in the short session that began in December, his influence as a lame duck was lessened. During the fight on Esch he had freely admitted that his coal operator constituents had told him it was Esch's head or his; as it turned out, it was both. In any event, Aitchison, Porter, and Farrell were confirmed together just before the Christmas holidays, without serious opposition, and with almost no debate.

#### JONES AND TATE

After the Esch fight, and after the Supreme Court dismissed the *Anchor Coal Co.* case, there was a lull in lake cargo politics while the "compromise differentials" were tried out. But before the end of Mr. Hoover's first year in office trouble flared up anew. The terms of Richard V. Taylor, for whose appointment Underwood had fought Woodlock's confirmation, and of Joseph B. Eastman, expired at the close of 1929. Hoover reappointed Eastman but not Taylor, and in place of the latter sent to the Senate the name of R. M. Jones of Knoxville, Tenn., a Republican.

Since Commissioner Eastman's views on valuation and on government operation of railroads are thought radical by railroad men and orthodox Republicans, some opposition to him had been expected.<sup>88</sup> The list of his endorsers which

<sup>88</sup> See 84 *Railway Age*, 179 (1928).

Mr. Hoover sent along with his name to the Senate, however, contained among others the names of many important railroad presidents, coal interests on both sides of the lake cargo controversy, twenty-two senators, several Congressional delegations, seven former Commissioners, and spokesmen for railroad labor. It was a striking testimonial to the respect which his intelligence and conscientious effort has gained for him even among those who oppose his views. His nomination was reported back favorably the same day it was received by the Interstate Commerce Committee, and was confirmed on the following day.

Jones did not fare so well. Since Farrell's appointment there were only five Republicans on the Commission, whereas the law allowed six. The new administration policy of a rejuvenated and respectable Republican party in the South required a bit of nourishing patronage now and then to make it more palatable to southern politicians. Taylor's appointment was a political one in the first place, and Underwood was now dead. Consequently Hoover chose not to reappoint Taylor, and Jones was given the place. He was an equity judge, chancellor of the eleventh judicial district of Tennessee, who had the endorsement of the Tennessee and Kentucky senators, of J. Matt Chilton, potent Republican national committeeman from Louisville, and of the chairman of the state Democratic committee of Tennessee.<sup>89</sup> It was obviously one political appointment in place of another, with different persons pulling the wires. There was objection in the Senate.

Senators Smith of South Carolina and Black, who succeeded Underwood from Alabama, raised the old cry that the South was entitled to representation by a real southern Democrat. On their objection, the Senate referred the nomination back to the committee for investigation, at the

<sup>89</sup> *U. S. Daily*, Dec. 18, 1929.

same time that it confirmed Eastman. Hearings were to have been held after the holidays, but on January 3 the President announced that Judge Jones on reconsideration had decided to decline the nomination, which was thereupon withdrawn. Rather than suffer such a grilling as Woods had, Jones chose to forego the Commissionership. There was no sign of opposition from northern lake cargo senators, but sectional as well as partisan interests were aroused.

To replace Jones the same persons who had named him suggested another of similar qualifications, Hugh M. Tate, also a Knoxville lawyer, and a predecessor of Jones as chancellor of the eleventh judicial district of Tennessee. Like Jones and most other political appointees, he had had no experience in interstate commerce law. The new nominee met the same opposition that had greeted the first. The Senate debate included repeated references to the Woodlock and Woods cases, and the lake cargo fight was not forgotten.<sup>40</sup> Nevertheless, Tate had a tougher skin than Jones, and in the showdown won out. There was no opposing vote in the Committee on Interstate Commerce, and he was confirmed on the floor by 48 to 18. Only four of the eighteen dissenting votes came from states east of the Mississippi, and they were from Democrats of the far South.

The really sound objection to Tate was not mentioned in the Senate debate. That was, that like so many other appointees he was fitted neither by training nor by experience for his duties, and that his appointment, regardless of who suggested it, was dictated by political forces rather than fitness. There is nothing new in this objection, and it applies with equal force to a majority of his predecessors, but it is still one of the principal handicaps to the Commission's effectiveness.

<sup>40</sup> *72 Cong. Rec.*, 3353-54, 3927-39, 3999-4005 (1930).

LEE AND MAHAFFIE

In the interval between the Jones and Tate appointments another vacancy on the Commission occurred by the resignation of Johnston B. Campbell, of Spokane, spokesman for the intermountain interests, who retired at the end of 1929 to return to private practice. His place was filled, with a minimum of public notice and attention, by William E. Lee, chief justice of the Idaho Supreme Court. Senators and Congressmen from Idaho and Oregon united in thus keeping on the Commission a member from the intermountain region. While it is as yet too early to express final judgment, it seems likely that the change was an improvement rather than otherwise. By way of rapid education of the new commissioner the latest lake cargo case was placed on his docket when it was commenced in 1930. Although cases are usually assigned by lot among the commissioners, it is hard to believe that there was not conscious design in thus turning over to a new man an old and vexing problem that reappeared at a time when a majority of the Commission was being changed.

One more change in Commission personnel has occurred thus far in the Hoover régime. After five years in office, Commissioner Woodlock resigned in August, 1930, to return to financial writing. Experience fortified the views he had expressed before taking office, and often repeated as Commissioner, that the Commission was unduly restrictive in its regulation of railroads, and gave too little heed to the purpose announced in the Transportation Act, that adequate transportation service be assured. This he interpreted to mean a more liberal policy toward carrier revenues and finances, and furnished the text of his criticisms of the Commission after leaving office. On the recommendation of the retiring commissioner and of several of his colleagues, the Director of the Commission's Bureau of Finance, Charles

D. Mahaffie, was given a recess appointment to succeed him, and later was confirmed for the remaining two years of Woodlock's term. Mr. Mahaffie was a native of Oklahoma and a Rhodes scholar. He was a protégé of Franklin K. Lane, and had been solicitor for the Interior Department and a member of the legal staff of the Railroad Administration before coming to the Bureau of Finance of the Commission. Many important consolidation and finance cases were before the Commission during his tenure, and came to him for handling in the first instance. His record was an exceptional one, and the promotion was well deserved.

The fact that within a little over two years two of the principal permanent officials of the Commission's staff, Farrell and Mahaffie, were promoted to Commissionerships is one of the most hopeful signs for the future of the Commission as an administrative body. It indicates that the Commission is training some men of high calibre, worthy of preferment; it must necessarily stimulate the morale of the service enormously to have the prospect of such advancement opened up; and it will tend to minimize political considerations in making appointments, by setting a high standard against which future candidates will have to be measured. At the same time, it is worth remembering that both of these men were appointed as Democrats by Republican Presidents. In the latter case particularly the President was freed of the necessity of consulting political interests in making his choice. There is a certain irony in the fact if it be true, that better men are appointed when the President is prevented from naming men of his own party. Nevertheless it is among political independents, irregulars and indifferents that those best qualified to be Interstate Commerce Commissioners are likely to be found. These the President can only appoint, as a practical matter, at the expense of the opposing party, for pressures in his own are usually too strong to permit it.

WHAT OF IT?

What conclusions may be drawn from this review? The conflict of commercial interests gives rise to thousands of disputes over freight rates. With the increasing industrial development of the country these frequently grow out of sectional competition for common markets, and may involve enormous sums of money and the welfare of large communities. The lake cargo controversy is such a one. To settle these disputes, Congress has established the Commission, not as a general arbiter of economic destinies, though there are signs that it is moving towards that thankless role, but with power to fix rates in accordance with certain limited, if not altogether definite, considerations. Where the answer in any specific case means so much in dollars and cents to the parties it is not surprising that tremendous pressures should be exerted to influence the answer. Influencing the personnel of the Commission is one way of influencing the answer, although if one party can do it, the usefulness of the Commission for the rest is destroyed.

This is what was attempted in the lake cargo fight. The integrity of the Commission and its place in public esteem suffered a real shock, and there were innocent victims who went down undeservedly. The Commission seems to have recovered from the blow, but as the public memory dims there is no guaranty that another one may not come; possibly even out of the same lake cargo dispute. The danger is inherent in the present system, which relies on the conscientiousness of the President in making his appointments and on the uncertain force of public opinion in restraining by its condemnation any attempts to influence the Commission in that way. Neither of these is infallible.

Two possible modes of relief have been suggested. One of these was urged by J. V. Norman, of counsel for the southern coal operators, in a provocative address entitled

“Why Rate-making has become a Political Question, and a Suggested Remedy”.<sup>41</sup> It was to restrict the Commission’s power by repealing sections 13, 15, and 15a of the Transportation Act, which confer the minimum rate power, and command the establishment of a rate level that affords the carriers an opportunity for a fair return.

Speaking as a shippers’ representative, he thought the so-called guaranty of a fair return was an emergency measure necessitated by the financial condition of the roads at the end of the war, and was no longer needed. (This was in 1927, not 1932.) The minimum rate power, he argued, was given incidentally, to make section 15a effective, rather than as a necessary power that the Commission ought permanently to have. Yet the existence of that power, conferred by the statute in general terms, encouraged such sectional controversies as the lake cargo cases. The fact that it could be exercised if the Commission saw fit, he said, offered a temptation to shippers to tinker with rate relationships in the hope of improving their competitive positions. The demand for regional representation on the Commission and the application of political pressure on appointments were thus immediate and natural consequences:

I know of no way (he said) under a republican form of government, that provision can be made for the establishment of an impartial tribunal to determine commercial controversies where the interests of great sections of the country are arrayed against each other.

Rejecting the expedient of sectional representation as unsound, he therefore concluded that the power itself was too hot to handle, and should be withdrawn.

Each step in this argument is open to challenge. Railroad men would scarcely admit that the guaranty section of

<sup>41</sup> Reprinted in 39 *Traffic World*, 337 (1927).



the Transportation Act was no longer needed. The debates at the time of the passage of the Act give no indication of such a limited purpose of the minimum rate power.

Moreover, sectional controversies did not begin after its enactment. They have been present in Congress ever since tariff legislation has been an issue, and even in the field of rate regulation probably the most bitterly fought case based on sectional conflict, exceeding the lake cargo fight, the *Intermountain Rate Cases*,<sup>42</sup> came to a climax in the Supreme Court long before the minimum rate power was given to the Commission in 1920. Undoubtedly also, the method of procedure before the Commission is an improvement over the tariff procedure of Congress. To remove the possibility of sectional conflict in litigation before the Commission it would be necessary to restrict the latter's power much further than by simply repealing the power to fix minimum rates, and to do so might well jeopardize rate regulation in cases where sectional interests were not at issue. It would therefore seem a backward step to reduce the Commission's power unless the political pressures aroused are so great and uncontrollable that the entire usefulness of the Commission is threatened. It should be a last resort.

A more hopeful remedy lies in the improvement and protection of the appointing process so that men will regularly be secured who may be trusted to exercise great powers. The Commission has, and has had, many such men among its members, and it is owing to them that it now stands so high. But the review that has been given of recent appointments to the Commission shows that while some admirable choices have been made, in a majority of cases political considerations have dominated. It reveals the inadequacy of party nominations as a method of filling such posts. It shows that the Senate has on occasion restrained the Presi-

<sup>42</sup> 234 U. S. 476 (1914).

dent when he showed undue deference to political forces. But the Senate may be equally supine before similar forces, and equally unconscious of any high sense of its responsibilities. Aside from the impracticability of getting Congressional approval, one would need to place greater confidence in the President than recent experience warrants in order to advocate freeing him from Senatorial check in making appointments.

The results might well be beneficial if the President felt obliged to rely more on the advice of railroad men, or of shippers' representatives and traffic organizations, as advocated by their trade journals, rather than upon political advisers, in selecting nominees. A higher level of competence and a correspondingly shorter period of apprenticeship for new commissioners might be assured in that way. The danger of special advocates would still be present, however.

There is no single or simple answer to the problem of better personnel in this as in other public offices. It waits in part upon improvement in the appointing authority, in part upon higher standards of official performance generally, which in turn rests upon increased public education and participation in public affairs. For the present its chief reliance must be upon the influence of the best of those now in office, and the traditions they succeed in building. Their influence is great and the very hardening of bureaucratic routine may perpetuate healthy traditions beyond the tenure of their founders.

## CHAPTER VII

### RESPONSIBILITY FOR DISCRIMINATION

#### JUDICIAL REVIEW

FOR those who are dissatisfied with their treatment at the hands of governmental agencies, the great American remedy is judicial review. Money and time are of the essence of the process, but those thus fortified may pursue their battle at length through the courts. The Interstate Commerce Commission, like other administrative bodies that exercise discretion, is a veteran of many such encounters, and must always be ready to justify its acts by the ordeal of law. The greater the stakes involved between the parties before the Commission, naturally the greater is the likelihood that one party at least will seek a review of the Commission's disposition of the stakes. In the quarter century since the lake cargo traffic assumed important dimensions, its value has grown while the coal industry as a whole has fallen on evil days, and the welfare of large communities is bound up in the struggle to control the traffic. No wonder then that the Commission's word should not be taken as final in the lake cargo litigation so long as the cost of legal proceedings could be financed. The philosopher may question the ultimate helpfulness of judicial intervention in such a dispute as this. If the Commission, a "body informed by experience", in the Supreme Court's phrase, is unable in a half dozen attempts to hit upon any solution mutually satisfactory to the parties, or even to agree itself consistently upon a single view of justice for them, how can a court hope to improve matters? The history of the litigation affords no

very satisfactory answer to the question. Judicial healing has one sovereign sedative, delay, which permits natural forces to determine the issue. Delay has thus far effected no cure.

We may leave the philosophical question unanswered, for judicial review is a legal right of the litigant. Business men are accustomed to look to the courts for protection from governmental agencies. The right to judicial review of the Interstate Commerce Commission's decision in a rate case, however, rests upon the condition that the appellant discover some ground of *legal* difference between himself and the administrative body. Questions of fact are to be determined finally by the Commission, questions of law by the courts, according to the familiar formula of review.<sup>1</sup> John Dickinson has shown how unsatisfactory this distinction is, either in logic or as a basis for prediction how particular cases will fall. "Mixed questions of law and fact" and conflicting opinions as to what is law and what is fact spoil the neatness of the categories. He offers instead as the "real distinction", that,<sup>2</sup>

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, . . . 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

<sup>1</sup> *United States v. L. & N. R. Co.*, 235 U. S. 314 (1915). Cf.: "... 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..." *I. C. C. v. U. P. R. Co.*, 222 U. S. 541, 547 (1911).

<sup>2</sup> *Administrative Justice and the Supremacy of Law*, pp. 168 and 49-55, 159-174 (1927).

cases, the court, if it holds the proposition one of sound law, must enforce it by overruling the administrative determination.

The several "grounds of difference", where law and fact were mixed, upon which the Supreme Court has thus far set aside orders of the Interstate Commerce Commission were listed by Mr. Justice Brandeis in his dissenting opinion in the *O'Fallon* valuation case:<sup>3</sup>

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.

These are the paths to judicial review. The steps of those who seek protection in the courts from acts of the Commission must be guided along these trails. What are the possible "grounds of difference" or "questions of law" in the lake cargo controversy,<sup>4</sup> and what bearing have they upon the ultimate issues at stake among the several parties to the lake cargo traffic?

After the Supreme Court's decision in the *Worthington* case<sup>5</sup> in 1912 had established the sole jurisdiction of the Interstate Commerce Commission to deal with lake cargo rates in the first instance, an interval of somewhat over

<sup>3</sup> *St. Louis & O'Fallon R. Co. v. United States*, 279 U. S. 461, 492 (1929).

<sup>4</sup> Cf. D. F. Cavers, "'Questions of Law' in Lake Cargo Coal Rate Regulation". 37 *W. Va. Law Quart.*, 391, 394 (1931).

<sup>5</sup> *Railroad Comm. of Ohio v. Worthington, receiver of W. & L. E. R. Co.*, 225 U. S. 101 (1912). See above, ch. iii, p. 47.

fifteen years elapsed before litigation over those rates led to appeals from the Commission to the courts. Toward the end of that period, however, "questions of law" took shape that carried the germs of court appeals. In 1928 these began bearing fruit.

Two principal issues have emerged, both of them matters of statutory construction under the interstate commerce act immediately, but involving aspects of the constitutional power of Congress to fix rates according to economic need. Both concern the basic legal problem of the lake cargo controversy, the extent of the Commission's power to arbitrate the economic destinies of two competing sections of the country.

The first issue we confront at the threshold. How far can carriers be held individually responsible for a rate adjustment that they do not individually control when the Commission thinks the adjustment works substantial injustice? Put in another way, the problem is that of locating one of the legal boundaries of social control. After that we may inquire how far the Commission can go in fixing a rate structure according to the economic conditions of an industry as well as according to transportation conditions. Clearly both of these bear directly upon the power of the Commission to intervene effectively in sectional disputes.

#### WHAT IS DISCRIMINATION?

The first question involves the third section of the interstate commerce act and illustrates the natural history of a legal doctrine, which arises partly out of procedural considerations, and presently becomes substantive law. Section 3 provides,

That it shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality,

or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, *or locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (41 Stat. 456, 479; U. S. C., Title 49, sec. 3 (1); italics added.)

Where only a single carrier, or several carriers in the same section of the country serving common terminal points, are concerned, this is fairly clear. Mathematical equality of treatment is not required, but if any preference or prejudice to any shipper or to any locality is substantial enough to seem "undue" to the Commission, it is forbidden. Actual injury to the prejudiced party is an essential element of the proof.

There is a preliminary difficulty in balancing opposing claims to fair treatment, to determine what *is* discrimination in fact.

A good example is the struggle over rates to intermountain points in the west under the fourth section of the interstate commerce act, which forbids, without special permission of the Commission, the charging of a less rate for a longer haul than for a shorter, over the same line and in the same direction. The long-and-short-haul problem is a special case of the same "undue preference" that is forbidden by the third section. Where is the line between justice and discrimination in that situation? The Commission must balance the claims of the intermediate shippers and consignees, whose traffic is probably light and who have no alternative means of transportation to which they can turn, against those of the terminal shippers, who probably have more traffic to offer and who can choose among several carriers by rail or by water. Against both of these must be set the desire of each carrier serving the terminal points to compete for the terminal traffic. After long and bitter liti-

gation these claims were compromised in the *Intermountain Rate Cases*,<sup>6</sup> upon a somewhat arbitrary basis that did not satisfy any of the parties. The transcontinental carriers did not give up hope of modifying the adjustment that the Supreme Court had approved until the decision was reaffirmed a dozen years later.<sup>7</sup>

If it is unfair to treat differently those in similar circumstances, is it not equally unfair to treat similarly those who are in different circumstances? Lower federal courts have on occasion said that it was a contradiction in terms to assert that discrimination existed where there was equality of rates, but the Commission undoubtedly has business sense on its side in taking the view that equality of rates is not equality of treatment, and that the latter is what section 3 requires. The desire of a carrier to secure a larger share of the traffic by equalizing rates to its shippers often leads it into such a considerable disregard of distances as constitutes a real hardship on shippers located near the market.

The lake cargo situation lies in debatable ground. The burden of the northern operators' complaint is that the differences in circumstance between them and their southern competitors warrant a difference in treatment that is very inadequately reflected in the differentials that exist; while their opponents see no differences that may not with propriety be equalized.

When the balance of claims is struck and the issue of discrimination in fact is settled, there is an end of the matter, provided only a single railroad is involved. But where several separate carriers and different sections of the country are involved, the legal difficulties begin. Commencing with a diagrammatic illustration, suppose three points in a triangle, A, B, and C, and that, transportation conditions being

<sup>6</sup> 234 U. S. 476 (1914).

<sup>7</sup> *Commodity Rates to Pacific Coast Terminals*, 107 I. C. C. 421 (1926).



similar, the rates between A and B are on a higher basis than the rates between A and C. Then buyers at B of products made or distributed at A must pay more to get them than buyers at C, and they will complain of undue prejudice in rates. Or reversing the flow of traffic, producers at B who must sell in competition with those at C in the same central market A, will likewise complain.

If but one railroad serves both points, the legal discrimination is clear. It can be remedied either by raising one rate or by lowering the other, or by doing both. Another theoretical solution, that of withdrawing from one traffic or the other altogether, is usually forbidden by commonsense economic considerations if not by the legal requirement that a common carrier serve all comers. On the other hand if B and C are each served by separate carriers, neither serving the other point also, then nothing can be done about it unless one of the rates is so unreasonably high or low as to fall under the ban of section 1 of the act. In the eye of the law there is no discrimination if the carrier to B simply declines to treat its customers as handsomely as does some other carrier, say the road to C. Each carrier is regarded individually. The accident of independent ownership of the carriers involved may seem an irrelevant distinction to shippers at B if they must compete with those at C, and so must absorb any rate differential against them, but in a competitive economy that is simply a fact of the environment at B, a hardship for shippers there, the burden of which the law declines to shift. These are the two extreme cases. Where but one carrier is involved, or several carriers each serving both points, the legal remedy is clear; where no carrier serves both points, there is no legal remedy.

Between the extremes lie several intermediate possibilities. Suppose one carrier to A serves both B and C; another serves C only. May the first road give lower rates to C in order to

meet the competition of the second road, without likewise reducing the rates to B, where there is no competition? Suppose that a carrier serves B, and without itself reaching C, shares with another road in a joint rate and through route from or to C. May it be held responsible for discrimination between the two points? Or suppose that many carriers are involved, some serving both points, some only the one, some only the other. Are those that serve both excused in discriminating by reason of the presence of the "free lines" that serve only one? If we suppose finally that the competitive market in which the several shippers must meet is not a single point A but a series of points, and add also a factual dispute whether any discrimination exists in the premises, we then have most of the elements of the legal question under section 3 as raised in the lake cargo controversy. Let us look at the map.

The Pennsylvania Railroad serves the Pittsburgh and Ohio districts, to the ports of Cleveland, Ashtabula and Erie, directly; and from Columbus it delivers to Sandusky coal originated in West Virginia by the Norfolk & Western and other southern carriers. Similarly the B. & O. and the New York Central serve northern coal fields and participate in delivering southern coal as well. The latter even originates a little southern coal, in the Kanawha field. But other northern lines are "free"; the Bessemer & Lake Erie, the Pittsburgh & West Virginia and the Wheeling & Lake Erie all serve northern fields exclusively.

The southern roads, the C. & O., the N. & W. and the L. & N., originate coal in West Virginia and Kentucky which they turn over to the northern roads in the neighborhood of the Ohio river for delivery to Sandusky and Toledo. The largest of the southern roads, the C. & O., by reason of its ownership of the Hocking Valley (which serves southern Ohio districts), is able to deliver part of its tonnage all the

way to Toledo. It is prevented from delivering the whole of it partly because of the limited physical facilities of the Hocking Valley—a matter of dispute—and partly because of routing instructions from shippers who have business ties with modern lines. There are one or two other lesser southern roads, but none that reaches the lake ports independently of northern connections. Assuming for purposes of argument—and this is very much a matter of dispute—that there is in fact discrimination in rates against the northern fields and in favor of the southern fields, how far can the several railroads be held individually responsible for removing the preference and prejudice? What limits restrain the prohibition of section 3 in this situation?

#### THE ASHLAND RULE

We may take as a starting point the leading case, *Ashland Fire Brick Co. v. Southern Ry.*,<sup>8</sup> found in the same volume of the Commission's reports as the *Boileau* case in 1912. In that case the apex of the triangle was the Birmingham (Ala.) market for fire brick, which was growing with the steel industry there. Most of the brick came from kilns in the neighborhood of Ashland, Ky., but the Frisco line undertook to open the market also to its shippers in St. Louis, somewhat further away, by putting in a rate lower than that from Ashland. Ashland was served by the C. & O. as far as Lexington, and from there to Birmingham by either the L. & N. or the Southern. From St. Louis there were routes over the L. & N. and over the Mobile & Ohio, as well as by the Frisco. Thus while the L. & N. straddled both sides of the triangle, reaching St. Louis on its own rails, and Ashland in conjunction with the C. & O., it was possible to reach Birmingham from either point over an independent line that had nothing to do with traffic from the other point. It was

<sup>8</sup> 22 I. C. C. 115 (1911).

held that there was no liability on any of the carriers under Section 3, although the facts constituted an undeniable preference to shippers at St. Louis, at the expense of those at Ashland. The case was but one step removed from the hypothetical case put a moment ago, of two independent carriers serving the two origin points, and the decision went the same way.

The Commission argued that the independent roads owed no duty to shippers not on their lines, and the L. & N., which served both groups, was excused on the ground that it could not put a stop to the discrimination by itself. Even if it withdrew from the St. Louis business, shippers there could still reach Birmingham at the preferential rate, so it was allowed to continue to enjoy the benefits of a situation for which it was held not to be responsible. If the L. & N., on the other hand, had been the only delivering road in Birmingham, connecting with the others, so that its concurrence was necessary to the maintenance of the discrimination, then it would have been liable. Commissioner Lane, who wrote the decision, generalized the result by saying, "The test of the discrimination is the ability of one of the carriers participating in the two through routes from the two points of origin to the same point of destination to put an end to the discrimination by its own act."<sup>9</sup>

This is the so-called *Ashland* rule. It contains three important elements. The carrier must participate in both the preferential and the prejudicial rate; it must be a responsible participant, in the sense of being itself able to put a stop to the discrimination;<sup>10</sup> and the liability of each carrier must be considered separately and individually.

<sup>9</sup> *Ibid.*, p. 120.

<sup>10</sup> "Discrimination" is here used, as it commonly is by the Commission and courts, as interchangeable with "preference and prejudice". Section 2 of the interstate commerce act defines "unjust discrimination" more

The last of these was until the war a matter of fundamental doctrine in the Commission's regulatory scheme; any other view smacked of socialism. We find the Commission in *Galloway Coal Co. v. A. G. S. R. Co.* in 1916 saying with respect to section 3,<sup>11</sup>

We have repeatedly held that the provisions of the Act against unjust discrimination speak to the carriers of the country individually and with respect to those things for which they are individually responsible, and not to the carriers as parts of a single great system.

In the same year the Supreme Court affirmed a lower court holding to the effect that an order of the Commission, directed against a number of carriers on a finding of discrimination, "must be supported by evidence which is sufficient to warrant a finding separately against each railroad named in the order."<sup>12</sup>

It is evident that the *Ashland* rule was an interpretation which narrowed the broad words of the statute. There was a dictum in the *Shreveport* case that the language of section 3 (1) "is certainly sweeping enough to embrace all the discrimination of the sort described which it was within the power of Congress to condemn. . . . It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at."<sup>13</sup> In excluding from the condemnation of section 3, as not "undue", that which was beyond the power of an individual carrier to correct, the narrowly as a special case of the "undue preference and prejudice" forbidden by section 3. It is rarely made a separate ground of complaint. See *Interstate Commerce Acts Annotated*, 1063, 1110-11, 1119 (1930).

<sup>11</sup> 40 I. C. C. 311, 315 (1916).

<sup>12</sup> *St. Louis, I. M. & S. Ry. Co. v. United States*, 217 Fed. 80, 82 (1914), appeal dismissed 241 U. S. 693 (1916).

<sup>13</sup> *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, 356 (1914).

Commission was allowing discriminations to stand which shippers found substantial. Its action was compelled by circumstances not mentioned in the statute, one of which was the necessity for treating the carriers individually.

Another reason was the character of the remedies available to the Commission. Until 1906 it could not fix any rate for the future; until 1920 it could fix only *maximum* reasonable rates. When undue preference and prejudice had been found, therefore, the remedy was simply an "alternative order" for its removal, leaving the manner of compliance with the order a matter for the carrier's discretion. The preferred rate might be raised, or the prejudiced one lowered, or a combination of both effected.<sup>14</sup> That the Commission recognized the effect of this limitation on its interpretation of section 3 is plain from a further passage in the *Galloway* case,<sup>15</sup> where in connection with the *Ashland* rule it was said,

The only way to establish differentials where entirely independent carriers serve a common market from competing producing points would be to fix maximum rates from some of the producing points and minimum rates from the others, and the latter is not within our authority.

Without the minimum rate power, the *Ashland* rule was an entirely natural one, and it became thoroughly embedded in interstate commerce law.

One early modification of the rule extended somewhat the

<sup>14</sup> In the earlier days of regulation it was held that the carrier must be left free in the first instance to choose the method of redressing discrimination, and that an order which allowed no such discretion was unlawful. *Detroit, G. H. & M. Ry. Co. v. I. C. C.*, 74 Fed. 803, affirmed 167 U. S. 633 (1897). For a later view see *Amer. Express Co. v. South Dakota ex rel. Caldwell*, 244 U. S. 617 (1917). That no such necessity exists since the Transportation Act is made clear in *York Mfrs. Assn. v. P. R. R.*, 107 I. C. C. 219, 231 (1926).

<sup>15</sup> *Supra*, note 11.

area of regulation without altering its essential theory. It was held to be unnecessary that a carrier should actually reach both the prejudiced and the preferred points over its own rails in order to be liable for discrimination between them. It was enough if the railroad reached one point and participated in a through route and joint rate to the other, and so controlled both rates at the apex. The Supreme Court approved this extension in one of the first of a series of decisions in which Mr. Justice Brandeis, out of his experience as a commerce lawyer, has expounded section 3 for the Court. In *St. Louis Southwestern Ry. Co. v. United States* the appellant carriers did not reach Paducah, Ky., the prejudiced point, over their own rails, but they billed through traffic to it, and so the Court said,<sup>16</sup>

thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practising discrimination against a particular locality is not confined to those whose rails enter it.

The phrase "effective instruments of discrimination" took its place with Commissioner Lane's quotable test as a formula for the liability of carriers under section 3.

#### WAR CHANGES

The war, federal control and the Transportation Act of 1920 wrought fundamental changes in both the factors that controlled the *Ashland* decision, and the history of the rule in the past ten years has been one of adaptation to the new

<sup>16</sup>245 U. S. 136, 144 (1917). By an ironic twist the old *Maximum Rate Case*, 167 U. S. 479 (1897), which in its day had emasculated the Commission's regulatory power, was cited in support of this proposition.

conditions. Section 15(1) of the Transportation Act provided that,

Whenever, . . . the commission shall be of opinion that any individual or joint rate . . . is or will be unjust or unreasonable or unjustly discriminatory *or unduly preferential or prejudicial*, . . . the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . . or the maximum *or minimum*, or maximum *and minimum*, to be charged. . . . (41 Stat. 484; U.S.C., Title 49, c. 1, sec. 15 (1); italics added.)

When the minimum rate power was written into the Transportation Act, it was apparently without recognition of the possible effects of the change upon section 3. In the committee reports accompanying the bill, and in the brief debates upon section 15 in the House and Senate prior to its passage, the enforcement of the long-and-short-haul clause and the protection of water carriers were the purposes emphasized.<sup>17</sup> The carriers were to have the opportunity of a "fair return", and this was necessary to insure it. Even this much marked a revolutionary change in public policy.

The wording of section 15, however, grants the minimum rate power in as unrestricted form as the power to fix maximum rates. Any purpose that warrants fixing the latter would apparently serve equally well as a legal foundation for the former. Consequently, looking simply at the words of the statute, it should be as available to cure an unduly preferential rate as an unreasonably low one, and counsel have repeatedly urged this view upon the Commission.

Federal control likewise brought unified treatment of the carriers, and though they were later returned to their previ-

<sup>17</sup> Speeches by Senator Cummins, 59 *Cong. Rec.* 141, and by Representative Esch, 58 *Cong. Rec.* 8317 (1919). See H. Rep. No. 456, p. 19, 66th Cong., 1st Sess. (1919).



ous owners the new viewpoint could not be wholly forgotten.<sup>18</sup> The Transportation Act contained several innovations that were inconsistent with the pre-war theory of individual treatment. The recapture clause, the revolving loan fund, the provision for favoring weak roads in the division of joint rates, are among these. Since then the trend has been toward more collectivism rather than less. A conspicuous instance is the condition imposed by the Commission in its recent grant of somewhat higher rates in the *Fifteen Per Cent Rate Case, 1931*,<sup>19</sup> that the increment to railroad revenues as a result of the increases granted be kept separate, pooled, and made available to carriers that fail to earn interest charges. The Commission still repeats its time-honored disclaimer that within the limits fixed by the law it will not invade the sphere of carrier discretion. But as the area of that domain becomes increasingly restricted, the formula takes on a hollow sound.

Since 1920, then, the circumstances that compelled the *Ashland* rule have altered, and the abandonment of the rule itself has been advocated by counsel in arguing cases on alleged discrimination. In response to this pressure the Commission has moved some distance, but it is not yet clear that the doctrine has been overthrown. The final word in statutory construction rests with the Supreme Court.

<sup>18</sup> The effect of unification of the carriers on the interpretation of section 3 may be seen in *Equity Co-operative Packing Co. v. Dir. Gen.*, 64 I. C. C. 615, 616 (1921), where the requirement of participation was not applied during the period of federal control, but was applied to the period subsequent, in considering a carrier's liability for a discriminatory rate relationship.

<sup>19</sup> 178 I. C. C. 539 (1931). As modified and put into effect, the pool is voluntary, 179 I. C. C. 215 (1931); cf. *Securities and Acquisition of Control of Railway Express Agency*, 150 I. C. C. 423 (1928).

## MODIFICATION OF THE RULE

The first real step away from the *Ashland* rule resulted in a reversal in the Supreme Court and a dictum that deterred the Commission from extending the minimum rate power to enforce section 3. This was in the *American Creosoting* case.<sup>20</sup> The defendant carriers, the Central of New Jersey and the Pennsylvania, refused to grant the privilege of creosoting-in-transit to shippers of lumber at Newark, although they participated in joint rates on traffic through Newark to New England destinations in connection with southern and western roads which allowed creosoting-in-transit at points en route on the originating lines. The Commission found this an undue preference and prejudice, although not unreasonable under section 1. The Central of New Jersey had nothing directly to do with the creosoting at western points, but the established rule was followed that sharing in a joint rate meant joint responsibility for all of the incidents of the rate as specified in the tariff. The *Ashland* rule required participation as a condition of liability, and although this was a constructive sort of participation, the Commission took it as sufficient and ordered the carriers to end the discrimination.

On appeal a unanimous Supreme Court set aside the Commission's order, *Central R. Co. of New Jersey v. United States*.<sup>21</sup> Mr. Justice Brandeis for the Court remarked that the appellant roads had not participated in *establishing* the transit privileges, which were local, and concluded that the carriers,

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. . . . If this were not so, the legality or illegality of a carrier's practice would

<sup>20</sup> *American Creosoting Co. v. Dir. Gen.*, 61 I. C. C. 145 (1921).

<sup>21</sup> 257 U. S. 247 (1922).

depend, not on its own act, but on the acts of its connecting carriers. . . . What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, . . . but unjust discrimination between them by the same carrier or carriers (p. 259).

"That which causes the discrimination" echoes the phrase in the *St. Louis Southwestern* decision, and the last sentence joined issue directly with those who urged that Congress had condemned *all* undue discrimination. In response to the Commission's argument that the minimum rate section added in 1920 had broadened its powers, the Justice continued:

Neither the Transportation Act, 1920, . . . nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of sec. 3 (p. 260).

Thus the stamp of the Supreme Court's approval was given to the *Ashland* rule, just after the changes were accomplished which made the rule no longer an inescapable one.

In the *Sugar Cases of 1922*<sup>22</sup> the first serious effort was made to induce the Commission to use the minimum rate power to support section 3 in overhauling an important rate structure involving different sections of the country. Boston interests asked the Commission to equalize port differentials, which at the time favored Philadelphia and Baltimore, under New York and Boston, on sugar in carloads from the ocean ports to the highly competitive market of Chicago. The remedy proposed would have placed all ports from Boston to Savannah and New Orleans on a rate parity, and would have required the fixing of minimum rates to deprive New Orleans and other favored ports of their advantage. The Commission, with the *Central of New Jersey* decision still fresh in mind, declined to act. Following the

<sup>22</sup> 81 I. C. C. 448 (1923).

*Ashland* rule, it found that since the carriers from New Orleans to Chicago had no share in the eastern port traffic to Chicago, there was no basis for liability under section 3. As to minimum rates, the Commission had this to say:

The power to fix minimum rates can be employed to advantage and with propriety to avert rate wars and to prevent an unjust burden upon other traffic or other parts of the country, but it should be exercised sparingly and only to avoid substantial public injury. A purpose to give each producer a "fair share" of the business, considered alone, does not justify use of the power (p. 472).

The threat of a rate war was held to be not sufficiently clear, so this effort ended in defeat. No court appeal lay from the dismissal of the complaint.

The same conclusion was reiterated shortly afterward in *Maritime Assn., Boston C. of C. v. A. A. R. Co.*,<sup>23</sup> where Boston people sought to get the port differentials abolished which favored Baltimore and Philadelphia on all import and export traffic to and from the west. Since the rate-making lines to the middle Atlantic ports had no control over rates to Boston, and *vice versa*, the Commission refused to invoke section 3.

Other shippers took up the charge, and in the *Salt Cases of 1923*<sup>24</sup> the first breach in the wall was made. Again Chicago, with its packing industry, was the principal market. The rates on salt had been built upon the basis of differentials to Chicago from widely separated producing districts—Detroit, New York, Kansas and Louisiana. Other recent salt cases had dealt with parts of the situation, but this time a genuine rate war was imminent. The Illinois Central was also suspected of using an excessively low salt rate from

<sup>23</sup> 95 I. C. C. 539 (1925).

<sup>24</sup> 92 I. C. C. 388 (1924).

Louisiana as a form of concealed rebate to secure the freight business of other industries controlled by the shippers who got the rebate. The Commission concluded to attempt a general settlement. It fixed a minimum rate from Detroit to Chicago and then fixed minimum differentials for the other producing districts over the Detroit rate.

The results were acquiesced in by all but one Louisiana shipper who protested that the Commission had no power to fix differentials from Louisiana because the carriers there had no share in the traffic from the other producing districts. A three-judge federal court, waiving the objection to the right of a shipper to appeal from an order directed to a carrier, upheld the Commission in *Jefferson Is. Salt Mining Co. v. United States*.<sup>25</sup> The court's language was sweeping:

The Commission is empowered to raise rates, not merely because they are noncompensatory to the carrier receiving them, but because they are unjust or unreasonable from the point of view of *other carriers and localities*; and in fixing minimum rates on a specific commodity from different points of origin to a common destination it is proper to take into account a variety of factors, such as comparisons of going rates on the same commodity in the same or similar territories, the relation of the rates to distances, the revenues per car mile and ton mile, variations in traffic densities, and the peculiarities in transportation which affect transportation costs in general (*italics added*).

The appeal was not pushed beyond the lower federal court.

Thus, where there was the possibility of a rate war to lean on, the Commission showed itself willing to review a rate structure involving several separate origin territories, and to prescribe new rates which would be proper under section 3, despite the *Ashland* rule and the individual responsibility of the carriers involved. The Commission's decision,

<sup>25</sup> 6 F. (2d) 315, 318 (1925).

oddly enough, was agreed to by Commissioner Hall, who had dissented in the *Ashland* case from the first relaxation of the *Ashland* rule, and who a year later wrote the Commission's 1925 *Lake Cargo* decision, which refused to do for lake cargo coal what was here done for salt.

At about the same time a case reached the Supreme Court in which the element of a rate war was not present at all, but where, nevertheless, the Court sanctioned a considerable departure from the strict requirement of responsible participation as to each carrier defendant. In *Swift Lumber Co. v. Fernwood & Gulf R. Co.*,<sup>26</sup> complaint was made of the lumber rate from Knoxo, Miss., a point on a tap line, as compared with the rate from Fernwood, the junction point of the tap line with the Illinois Central. From all points on the Illinois Central and a few of its connections within a territory of some hundreds of square miles in the yellow pine district, blanket rates on lumber were maintained to northern markets. Fernwood was one of these points. Knoxo was likewise in the heart of this region, but because the independent short line that served it had to rely entirely on the Illinois Central for access to outside markets, the latter, preferring its own shippers, declined to allow the blanket rate to apply there. The joint rate from Knoxo was therefore 2c a hundredweight higher than from Fernwood, to northern markets. The Commission found the Knoxo rate unduly prejudicial, though not unreasonable *per se*, because it stood out like a peak above a surrounding plateau; and the discrimination was ordered removed.<sup>27</sup> The two carriers appealed, each invoking the *Ashland* rule and the *Central of New Jersey* case.

<sup>26</sup> 61 I. C. C. 485 (1921).

<sup>27</sup> A similar fact situation in *Chemical Lime Co. v. Bellefonte Central R. Co.*, 147 I. C. C. 285 (1928), was remedied in a somewhat different manner. See *infra*, p. 239.

The Supreme Court unanimously sustained the Commission, in an opinion again by Mr. Justice Brandeis, *United States v. Illinois Central R. Co.*<sup>28</sup> There was not much difficulty in holding the Illinois Central, for it served Fernwood directly and was a necessary participant in the traffic from Knoxo. But how to get at the Fernwood & Gulf, which had a share in the discriminatory rate only?

"By joining with the Illinois Central," said the Court,

in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practised as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. . . . If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it (p. 520).

The latter sentence undoubtedly expresses the real ground for the decision. The court's prior decision in the *Central of New Jersey* case proved but a slight obstacle. It was distinguished in a footnote: ". . . the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff, granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them."

Upon practical considerations the two cases are not inconsistent. In the creosoting case, to have upheld the Commission would have obliged the defendant roads, and all their competitors, to allow an added privilege which was denied in trunk line territory and granted only in the west and south, or to have ceased to concur in joint rates under which the transit privileges were granted on the originating lines. Without an additional transit charge the privilege brought

<sup>28</sup> 263 U. S. 515 (1924).

in no more revenue, but only increased the carriers' expenses, and was subject to abuses. The Court seemed willing to protect the roads from such raids on their resources. In the *Swift Lumber* case, on the other hand, the Court was protecting the shippers on a small tap line, who had no bargaining weapon, against the power and policies of a transportation giant that was acting in unneighborly fashion.

The changing attitude of the Court toward Section 3 in the light of the Transportation Act is the chief matter of interest in the *Illinois Central* decision. Whereas in the *Central of New Jersey* case the dictum had been expressed that the latter act had affected no change in the scope of section 3, here the Court spoke in another tone:

The innocent character of the discrimination practised by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practised is unjust. Such was the law even before the Transportation Act, 1920. . . . In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. *For now, the interests of the individual carrier must yield in many respects to the public need . . . and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable* (p. 525; italics added).

This decision treats with scant respect the individual responsibility of each participating carrier, upon which the *Ashland* doctrine had insisted. It is to be observed, however, that



the case was not one that arrayed sectional interests and trunk line carriers against each other, but involved only the elimination of a minor inconsistency in a blanket of rates from one district.

An opportunity for discrimination somewhat like that found in the *Illinois Central* case is also presented where trunk lines decline to cooperate with independent short lines in switching agreements, and the Court has dealt with this situation in similar fashion. In *Chicago, I. & L. R. Co. v. United States*,<sup>29</sup> in an opinion by Mr. Justice Brandeis, the Commission was sustained in requiring a subsidiary of the New York Central and two other trunk lines which connected at Michigan City, Indiana, to extend to an electric interurban line a reciprocal switching arrangement at Michigan City which the three steam roads enjoyed but refused to share with the electric. The refusal was held to be an undue discrimination, despite the fact that the electric line had a physical connection with only one of the three steam roads:

Direct physical connection with the carrier subjected to prejudice is not essential. . . . Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practised, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. . . . There is nothing to the contrary in *Central R. of N. J. v. United States*. . . . The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. Here each of the steam railroads

<sup>29</sup> 270 U. S. 287 (1926). In *United States v. P. R. R.*, 266 U. S. 191, cited in the quotation given, Mr. Justice Brandeis for the Court approved the Commission's finding of discrimination in *York Mfrs. Assn. v. P. R. R.*, 73 I. C. C. 40 (1922), another switching case.

was an effective instrument of the discrimination complained of (p. 293).

Thus the creosoting case was again distinguished and the same phrase "effective instrument of discrimination" reappeared as the test of liability.

Another case, similar to the *Swift Lumber* case in principle but nearer home in its facts was *Virginian Ry. Co. v. United States*.<sup>80</sup> The bituminous mines in the New River, Tug River and Pocahontas districts of southern West Virginia in the "Outer Crescent" were served by the C. & O. and the Norfolk & Western to markets both east and west over their through lines, and by the Virginian eastbound only—the Virginian was built for the exclusive purpose of carrying coal to tidewater. In order to increase its eastbound tonnage the Virginian acquired certain independent short lines tributary to the C. & O., and in order to reach these it arranged a reciprocal trackage and switching agreement with the C. & O., whereby the latter obtained access to westbound tonnage from some mines on the Virginian. To these mines the C. & O. accorded the same blanket rates on coal to western destinations then in effect from all mines in the Outer Crescent districts on the C. & O. and the N. & W. Other mines on the Virginian not included in this arrangement could not ship to western markets under the competitive conditions obtaining, because the combination of the Virginian local plus the C. & O. through rate was prohibitive.

Several of the mines thus excluded complained to the Commission that their rates westward were unreasonable and unduly prejudicial, under sections 1 and 3, as compared with the mines covered by the trackage agreement. The Commission found that discrimination existed and ordered it

<sup>80</sup> 272 U. S. 658 (1926), sustaining the Commission's order in the "first Wyoming case", *Wyoming Coal Co. v. Virginian Ry.*, 96 I. C. C. 359 (1925); order amended 98 I. C. C. 488 (1925).

removed by the extension of the blanket rates to all mines on the Virginian, over the strenuous objection of the carrier that its route was not economically adapted to westbound traffic. The switching agreement had not been made with any idea of preferring the mines it affected, but as the necessary price of more eastbound coal. The Supreme Court found the matter of the Virginian's intentions to be

not of legal significance. These forty-five mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the fifty-four mines, found to be similarly situated, to which the market is closed. And the Commission has found that the preference is unjust. In essence, the situation is the same as that considered in *United States v. Illinois Central*. . . . The contention that there can be no order to remove the discrimination, because the Virginian is in no legal sense responsible for the lower western rates granted to the favored mines, is likewise disposed of by the earlier case (p. 665).

The *Illinois Central* case was thus reaffirmed, and its doctrine stands as the Supreme Court's latest expression on the subject. It allows a considerable relaxation of the spirit and letter of the *Ashland* rule, while continuing to pay lip-service to it.

#### THE ASHLAND RULE IN LAKE CARGO LITIGATION

When the lake cargo litigation was begun anew in 1923, the northern operators' complaint alleged both unreasonableness and undue prejudice under sections 1 and 3. To prove undue prejudice it is ordinarily necessary to show not only an improper relationship of rates on paper, but also an actual injury to the prejudiced party which is a source of advantage to the party preferred, and a competitive relationship between the two. This the complainants did by showing the decline in northern lake cargo shipments and the rise in those from

the south, based on the figures through 1923. The bulk of the northern case consisted in cost studies and rate comparisons directed at the intrinsic and relative reasonableness of the Pittsburgh and Ohio rates, but the issue of undue prejudice was also vigorously pressed.

In the decision to dismiss this first complaint, in which a majority of six commissioners concurred, the *Ashland* rule was applied in excusing the carriers under section 3. "As bearing on the issue of undue prejudice," said the Commission, "it should be noted that the lines principally interested in the rates from the southern West Virginia and Kentucky districts are in nowise responsible for the rates maintained from the complaining districts."<sup>81</sup> The participation of important carriers in the rates and traffic from both sets of districts was conceded, but the Commission pointed to the Bessemer & Lake Erie, Montour, West Side Belt, Pittsburgh & West Virginia, Wheeling & Lake Erie, and Pittsburgh & Lake Erie, as carriers serving only the complaining fields, and to all the southern roads as serving the preferred districts only. The importance of the C. & O.-Hocking route was stressed, and thus the conclusion was reached:

It is apparent that the carriers controlling the rate adjustment from the southern West Virginia and Kentucky districts are not the same as those which control the adjustment from the complaining districts. The basis for a finding of undue prejudice is thus lacking, even if the facts adduced to support such a finding would in other respects support it, as they do not. (p. 545)

The Commission then declined to call its minimum rate power into play, in the absence of a threat of a rate war, and having already found the Pittsburgh rate not unreasonable, the complaint was dismissed. Commissioner Hall, who had

<sup>81</sup> *Lake Cargo Coal Rates, 1925*, 101 I. C. C. 513, 545 (1925).

found ample warrant for setting minimum rates in the *Salt Cases of 1923, supra*, wrote the opinion here.

In reviewing the decision, it may at the outset be remarked that the list of independent carriers from the northern districts given in the majority opinion seems much more formidable at first glance than analysis shows it to be. The Bessemer & Lake Erie is independent of all other lines, but it is a subsidiary of the Steel Corporation, specialized for the task of taking the Corporation's ore from Conneaut on the Lake to the Corporation's furnaces, and taking coal back. It is available only in a very restricted way for the general hauling of commercial lake cargo coal, and it follows rather than sets the rates to be charged.

The Montour is also industrially owned, by the Pittsburgh Coal Company, and so originates a great deal of commercial coal; but it is a short line entirely dependent upon other northern carriers, chiefly the Pennsylvania and the P. & L. E., for access to the Lake ports. The West Side Belt is another originating short line, controlled by the Pittsburgh & West Virginia, another of those named, which in turn does not reach Lake Erie, but connects with the Wheeling & Lake Erie, which does. In recent years, since the 1925 decision, it is reported to have come under the dominance of the Pennsylvania.

The Wheeling, by itself and in connection with the P. & W. Va., undoubtedly was a northern independent line in 1925. It was a Rockefeller investment which was later sold to three trunk lines jointly, and was thus neutralized. The recent four-party consolidation program assigns it to the C. & O. It never was a rate-making line in the controversy.

As for the P. & L. E., one of the principal northern roads, it is only blindness to the corporate fiction that refuses to see the identity of this carrier with the New York Central. It is thus apparent that the northern independents constitute

no obstacle from the practical viewpoint to the responsibility under section 3 of the chief northern carriers for any prejudice that may exist. Only by an insistence upon technicalities do they serve as a pretext for excusing the principal carriers under the *Ashland* rule.

Since the Commission in 1925 had the *Central of New Jersey* decision freshly before them, while the modifications expressed in the *Illinois Central* case were still over a year in the future, the attitude taken toward section 3 in the first lake cargo opinion is natural. Indeed, since the majority refused to find the factual basis of unjust discrimination, the whole discussion was probably *obiter*.

Even Commissioner Eastman, who sharply challenged the majority's conclusions of fact, agreed with them that the "basis for a finding of undue prejudice" was lacking. His thinking on this subject was in a process of transition. He felt convinced that the facts demanded a change favorable to the northern coal interests, but did not see how section 3 could be made to apply, and he agreed with the majority that there was no case for fixing minimum rates as yet. His solution therefore was to reduce the Pittsburgh and Ohio rates rather more than the 20c upon which the majority had decided, on the ground that they were unreasonable; and then if corresponding cuts were made from the south, to see whether they would justify the use of the minimum rate power.

Following the *Illinois Central* decision, which occurred between the first *Lake Cargo* hearing and the reargument, counsel for the Pittsburgh operators urged that the Supreme Court had opened the way for complete Commission control of the lake cargo rate structure by throwing over the *Ashland* rule. The Commission kept to its own path. In its 1927 decision, it repeated what had been said before about section 3 but reversed its prior finding that the northern rates were

not unreasonable; and then added the warning that the southern carriers would be expected not to reduce their rates correspondingly.<sup>32</sup> It laid an offering on the altar of the *Ashland* case by pointing to another instance since the Illinois *Central* decision in which the prior doctrine had been recognised and followed.<sup>33</sup>

The Commission had in *Lake Cargo Coal Rates*, in 1917,<sup>34</sup> done without evoking any protest what it here decided to be beyond its power, namely, it declared the lake cargo rate structure unduly preferential and prejudicial, and fixed a set of differentials which were still in effect. This anomalous fact was dismissed with the remark that "it does not appear that the question here raised was considered in that case."

Commissioner Eastman, this time concurring with the majority's result, had in the interval been won over by the complaining operators' argument:

The essence of the doctrine in the *Ashland Fire Brick* case is only that preference is not "undue" where it is brought about by the competition of an independent route, or routes, having no responsibility for the rates paid by the prejudiced point. But if that competition is within our control, so that its influence as a disturbing factor may be eliminated, then plainly the justification for the preference ceases. Whether or not and the extent to which the competition is within our control, under the power to fix minimum rates, thus become the determining factors in any given case. . . . (p. 371).

Note the subtle change in the argument that has thus come about in the years since the Transportation Act. When Commissioner Lane wrote his decision in 1911 a carrier was excused in granting preference on account of competition not under *its* control; now it is urged that the carrier should be

<sup>32</sup> *Lake Cargo Coal Rates*, 1925, 126 I. C. C. 309, 365 (1927).

<sup>33</sup> See *Lake Dock Coal Cases*, 89 I. C. C. 170, 185 (1924).

<sup>34</sup> 46 I. C. C. 159, 189. See above, p. 71.

excused only if the competition is not under the Commission's control.

In applying this theory to the lake cargo facts, Commissioner Eastman found no difficulty, following the *Illinois Central* and *Virginian* cases, in holding the principal northern lines responsible. As to the C. & O.-Hocking route he said, "Here we would be dealing with what is practically one route out of many, and the rates over all other routes would be governed by an order under section 3. Under such conditions resort to the minimum-rate power can readily be justified."<sup>85</sup> So he argued that the differentials over those routes that *were* under control should be spread, and if the C. & O. should attempt to divert all the southern traffic to its "free" line and reduce its rate over that line to meet the northern reduction, (the feasibility of which he doubted) then the reduction could be suspended, investigated and refused if permitting it would cause undue preference and prejudice.

When the southern roads in spite of the Commission's warning did make corresponding reductions, which were suspended and denied, there was no change in the attitude toward section 3. The majority, resting their conclusions on other grounds, found a discussion of undue prejudice unnecessary, while Commissioner Eastman repeated and somewhat amplified his previous argument. This third *Lake Cargo* decision was upset by the federal court of first instance, upon the ground that it was a regulation of commercial conditions under the guise of a rate decision.<sup>86</sup> The court was in turn reversed by the Supreme Court when it decided that the controversy had become moot.<sup>87</sup>

<sup>85</sup> 126 I. C. C. 309, at p. 373.

<sup>86</sup> *Anchor Coal Co. v. United States and Interstate Commerce Commission*, 25 F. (2d) 462 (1928). See below, p. 124.

<sup>87</sup> *United States v. Anchor Coal Co.*, 279 U. S. 812 (1929).



The latest *Lake Cargo* case sheds no further light on the problem. Although it was brought specifically to obtain a ruling on section 3, and much labor was spent in the briefs and upon argument in an effort to sharpen the legal issue, the Commission's decision in *Lake Cargo Coal Cases, 1930*,<sup>38</sup> went off on the facts alone. After concluding that they did not warrant a change in the differentials, and that the complaint would therefore be dismissed, the report quotes what was said in the 1925 case about section 3, and continues:

Upon the facts there stated we found that the basis for a finding of undue prejudice was lacking. This finding was adhered to in the second report. Since that decision was rendered the Hocking Valley has lost its identity as a separate carrier and has become an integral part of the Chesapeake & Ohio. The Hocking and Crooksville districts, which in the former case intervened in opposition to the complaint of the northern Ohio district, are here joined with the latter as complaining districts. The Chesapeake & Ohio is the originating carrier in the Hocking district and is a participating carrier from the Crooksville district. With these exceptions no material difference exists between the situation upon which our former finding was based and that here before us. Further discussion of this question is unnecessary in view of our finding above, that in other respects the facts do not support a finding of undue prejudice. (p. 54)

Unless and until a majority of the Commission in some future case is willing to take a different view of the facts, the question of the legal responsibility of the carriers for the lake rate structure will remain latent.

The legal argument that was put up and passed over without consideration in this latest *Lake Cargo* case followed the same lines that Commissioner Eastman urged in the 1928 case, but it had by 1931 a stronger foundation. In the in-

<sup>38</sup> 181 I. C. C. 37 (1932).

terval between the two decisions the uncertainty as to the controlling weight of the *Ashland* rule had increased rather than diminished. It had been followed in some quite recent cases and yet was expressly overruled in another. Litigation over the latter reached the Supreme Court while the *Lake Cargo* case was still pending before the Commission, and the northern operators pinned their hopes on its outcome, but no decision was forthcoming in time to be of assistance. In this, the so-called *Gulf Port Differential case*, *Texas & Pacific Ry. Co. v. United States*,<sup>39</sup> the Supreme Court has been asked to decide whether the T. & P., which reaches only New Orleans over its own rails, can be held responsible under section 3 for a discrimination against Galveston, which it reaches only through connections. The case may well prove of critical importance in determining the future scope of section 3 in dealing with sectional controversies. The doctrine of the Commission's decision if applied to the lake cargo situation would be favorable to the northern operators.

#### THE GULF PORT DIFFERENTIAL CASE

The carriers entering New Orleans from the north and west had for years given that port, with its larger traffic and superior facilities, rates on products for export and coast-wise shipment as low as the rates to Galveston and Houston from interior points west of the Mississippi, despite the greater distance to New Orleans. On a complaint by the Galveston Chamber of Commerce, Division 2 of the Commission in 1925 concluded that this amounted to unjust discrimination. They ordered it removed by placing rates to the Texas ports on a differential basis under New Orleans.<sup>40</sup> Regarding the existing port equalization, the Commission said that it

<sup>39</sup> No. 24, October Term, 1931.

<sup>40</sup> *Galveston Comm. Assn. v. G. H. & S. A. Ry. Co.*, 100 I. C. C. 110 (1925).

necessarily disregards distance, and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages, from the origin territory here considered, a line must be found beyond which distance may not be disregarded (pp. 121-2).

The result was held to amount to giving a substantially greater service to one set of shippers than to another under similar circumstances, and hence to be an undue preference.

After a rehearing before the full bench, a badly divided Commission affirmed this finding in general but exempted the Texas & Pacific Railway from liability under it, on the ground that it reached only New Orleans and not any of the Texas ports over its own rails and so was not responsible for rates to the latter—the *Ashland* doctrine.<sup>41</sup> Parenthetically it may be observed that this decision was reached only a month after the 1927 *Lake Cargo Case*, in which a majority of the Commission took a similar attitude toward the responsibility of the southern coal roads. One minority group of Commissioners disagreed to the exclusion of the T. & P. because of the intercorporate relations between that carrier and the Missouri Pacific. The latter road, in the course of a recent policy of expansion, had acquired stock control not only of the Texas & Pacific but also of the International-Great Northern, serving Texas ports, and the Gulf Coast Lines, which connect New Orleans with the Texas ports. Clearly, if all these were regarded as but parts of a single system, any doubt of the responsibility of the whole under section 3 would vanish. The majority, however, following ancient Supreme Court doctrine,<sup>42</sup> found the Texas &

<sup>41</sup> *Same case*, 128 I. C. C. 349 (1927). Of ten commissioners who participated, eight expressed separate views.

<sup>42</sup> *Pullman Car Co. v. M. P. Ry. Co.*, 115 U. S. 587 (1885); *C. M. & St. P. Ry. v. Minn. Civic Assn.*, 247 U. S. 490, 500 (1918).

Pacific to be an independently operated carrier and not to be regarded as a part of the Missouri Pacific system. Finally, another minority group of Commissioners dissented from the finding that the facts presented any case of undue preference, since the difference in treatment was forced by competition at New Orleans.

All the other carriers to New Orleans immediately protested against the exemption of the T. & P. It seemed evident that much of the Texas rate structure would remain unstable as long as one carrier was relieved of conditions imposed on the others. The Commission, therefore, after further hearing and again by a majority vote, reversed the preceding decision and ordered the T. & P. to conform with the others in maintaining the differential.<sup>48</sup> But whereas in the first of the three decisions the Texas road had been held liable as a part of the Missouri Pacific system, which finding was reversed in the second decision, in this third proceeding the majority refused to discuss that issue and rested their conclusion squarely on a reconsideration of the *Ashland* doctrine. The opinion reviews the Supreme Court decisions from the *St. Louis S. W. Ry.* case, *supra*, to the *Illinois Central* case, *supra*, and in view of the participation of the T. & P. in traffic to both ports the Commission concluded that

the foregoing expressions by the Supreme Court leave no room for doubt that the construction of our powers under section 3 (1) of the act as announced in *Ashland Fire Brick Co. v. S. Ry. Co.*, *supra*, is too narrow, and that in the situations before us in the instant cases we have the power to require the New Orleans carriers to remove the undue prejudice herein found to exist. (p. 358)

<sup>48</sup> *Galveston Comm. Assn. v. G. H. & S. A. Ry. Co.*, 160 I. C. C. 345 (1929).

Thus the rule that for years had been held to prevent the Commission from dealing with the lake cargo rate structure under section 3 was definitely rejected; and only three months later, on March 14, 1930, the complaint was filed in the latest lake cargo case, *Ohio Lake Cargo Coal Rate Committee v. B. & O. R. Co.*, Docket 23240, which raised the single issue of preference and prejudice under section 3.

The Texas & Pacific appealed from the last of the Commission's orders to the statutory district court, but made little headway with two of the three judges. They sustained the order in the typical formula:<sup>44</sup>

In short, the Interstate Commerce Commission . . . is the body to determine rate questions and rate relationships, and in the face of the voluminous record and its careful examination and consideration by the Commission, it will not do for persons complaining of it to urge, as these do, that the Commission gave too much weight to distance, and not enough to other considerations; because it is for the Commission and not for the court, to say what weight should be given to the admissible factors. . . .

The third judge took much the same attitude as the district court which set aside the Commission's order in the 1928 *Lake Cargo* case.<sup>45</sup> He thought the Commission's decision was based not so much upon distance as upon the superior advantages enjoyed by New Orleans, which was none of the Commission's business. An appeal from the judgment of the district court is pending before the Supreme Court. Plainly if the Commission's order is sustained the legal argument for the northern operators in the lake cargo situation will be greatly strengthened.

<sup>44</sup> *Texas & Pacific Ry. Co. v. United States*, 42 F. (2d) 281 (1930).

<sup>45</sup> *Ibid.*, p. 286.

## THE FATE OF THE ASHLAND RULE

The ultimate fate of the *Ashland* rule is still in doubt. Among cases which have not been taken to the courts, *Oswego v. B. & O. R. R. Co.*,<sup>46</sup> in 1928, seems to have been the first in which the Commission (by a bare majority) declined to excuse carriers from observance of the third section on account of competition at the preferred point which they could not control. This was followed by *Duluth C. of C. v. C. & N. W. Ry.*,<sup>47</sup> where the defendant road was held guilty of undue prejudice to Duluth in failing to grant to shippers there certain concentration privileges on dairy and poultry products which were granted to Chicago shippers by roads not serving Duluth. In neither of these was the *Ashland* case mentioned by the majority. *Inland Empire Mfrs. Assn. v. A. & S. Ry.*<sup>48</sup> is a third case. The refusal of the Milwaukee road to allow at Spokane transit privileges on lumber which the stress of independent competition forced it to grant at some midwestern points was held to be an undue prejudice, on the authority of the *Duluth* case.

On the other hand, in *Wisconsin Bridge & Iron Co. v. Ill. Term. Co.*,<sup>49</sup> Division 2 of the Commission cited the *Ashland* case and followed its doctrines strictly. And Commissioner Eastman, himself a leader in urging the liberalization of the *Ashland* rule, when writing the Commission's report in the *Eastern Class Rate Investigation*, spoke of the issue of undue

<sup>46</sup> 146 I. C. C. 293 (1928). The Lackawanna and the New York Central were ordered to cease a prejudice in ex-lake grain rates from Oswego as compared with Buffalo, both of which points they served, although there was another road from Oswego and several from Buffalo which were uncontrolled. The defendants were found to be in fact able to maintain a differential at Oswego under Buffalo. Dissenting Commissioners stood by the *Ashland* case.

<sup>47</sup> 156 I. C. C. 156 (1929).

<sup>48</sup> 165 I. C. C. 53 (1930).

<sup>49</sup> 161 I. C. C. 176, 179 (1930).

prejudice in New England rates as "apparently dependent upon whether there are lines serving New England which have equal responsibility for the rates to and from competing sections."<sup>50</sup> Again in his dissent in *Baltimore Chamber of Commerce v. Ann Arbor R. R.*, he suggests that,<sup>51</sup>

it is our duty to look to the substance rather than to the form and to consider the extent to which defendants participate in what are in reality the rate-making routes to and from the rival ports. In other words, the question is whether mere participation in rates to both is enough, if it is a participation which could be eliminated without particular sacrifice and without materially changing the situation.

Thus he too recognizes the need for carrier responsibility as a prerequisite to the Commission's action under section 3, using the word, however, in a broader sense than the *Ashland* definition of it; while on the other hand he is prepared to insist that it be a real responsibility, not the legal show of it.

It is evident from the cases that any definitive answer to the question of responsibility under section 3 must await further word from the Supreme Court. Until that comes there is much force in another contention of Mr. Eastman, that the statute ought to be liberally construed and doubts resolved in favor of shippers, since it is always open to the carriers to appeal to the courts from an affirmative decision holding them liable, while the shipper has no appeal from a negative finding that results in the dismissal of his complaint.<sup>52</sup>

<sup>50</sup> 164 I. C. C. 314, 416 (1930).

<sup>51</sup> 159 I. C. C. 691, 709 (1929).

<sup>52</sup> Two questions are involved, the judicial review of a negative decision, and the independent right of a shipper to appeal from a decision, negative or affirmative, when he was not a party to the original action before the Commission or when the carriers involved acquiesce. As to the first, the theory is that the Commission's simple refusal to act in a field where its

What has been said thus far will make clear how important the outcome of the appeal in the *Gulf Port Differential* case may be,<sup>58</sup> not only to the parties in future *Lake Cargo* cases, but also more generally to all those interested in rate disputes that involve widely separated points served by different railroads. If the *Ashland* rule is definitely scrapped, a basis is laid for many new adjustments of differentials. Until large advances have been made in the consolidation pro-

cession is discretionary, can infringe no right of an applicant, and there is therefore no proper subject matter for an exercise of equity jurisdiction. Chief Justice White's broad rule in *Procter & Gamble v. United States*, 225 U. S. 282, 293 (1912), that the court has "jurisdiction only to entertain complaints as to affirmative orders of the Commission", was elaborated into an argument that to do otherwise would be to render a declaratory judgment, in *Piedmont & Northern Ry. v. United States*, 280 U. S. 469 (1930).

The right of a shipper to sue to set aside an order of the Commission in a proceeding to which he was not a party was recognized in *I. C. C. v. Diffenbaugh*, 222 U. S. 42 (1911), and in *Skinner & Eddy Corp. v. United States*, 249 U. S. 557 (1919), where the Commission's order was alleged to be beyond its statutory power. In *Anchor Coal Co. v. United States*, 279 U. S. 812 (1929), where the shipper was an intervener before the Commission, objection to his right to sue was entered but the acquiescence of the Commission in a railroad compromise was held to make the case moot. In *Sprunt & Son v. United States*, 281 U. S. 249 (1930), a shipper who had benefited under an arrangement found by the Commission to be discriminatory was held to have no independent standing to object to an order for its removal when the carriers acquiesced in the order. See *Edward Hines Trustees v. United States*, 263 U. S. 143 (1923).

<sup>58</sup> The Supreme Court on May 31, 1932, restored this case to the docket "for reargument upon all questions involved", and invited the attention of counsel to the question "whether the respective relations of the Louisiana ports and the Texas ports to the... traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3 (1) and 15 (1) ... and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced..." *Texas & Pacific Ry. Co. v. United States*, 286 U. S. —, 52 S. Ct. 642. The phraseology hardly sharpens the issue for reargument. Mr. Justice Cardozo succeeded Mr. Justice Holmes in the interval since the original argument.



gram which would make carriers now separated amenable to section 3 as it stands, this case offers the likeliest possibility of bringing within the Commission's grasp many sectional controversies that have heretofore been considered to be beyond its jurisdiction. The rate structure on coal east-bound for transshipment coastwise to New England from Pennsylvania and from West Virginia, the Atlantic port differentials on export and import traffic, the salt rates to Chicago when no rate war is involved, the situation which in the *Sugar Cases of 1922, supra*, was found to be without the scope of section 3, may in that way be brought under control. Considering the volume of traffic now moving subject to section 3, it is hard to see any inherent harm in subjecting the remainder of it to similar control, even though the carriers involved may not be the same.

At present the only conclusion is that the Commission is of divided mind and that the Supreme Court has not yet spoken. One leaves a reading of recent Supreme Court decisions with an impression that the Court will not be greatly embarrassed in writing an opinion whichever way the case is decided. This is a case where "inarticulate major premises" count for more than statutory formulas.

Thus far the discussion has revolved around the Commission's power to adjust differentials in sectional controversies that heretofore were supposed to be beyond its reach. Once the power is established, inquiry turns naturally to the criteria for its exercise in such sectional disputes. How far may the Commission go in basing its adjustment of differentials upon a consideration of commercial conditions in the industry concerned? This is the second major question of law raised by the *Lake Cargo* cases. It too is of wider interest, especially in these times when every economic group looks to the government for aid. From one point of view we are here examining the constitutional limitations upon a centralized social control of transportation in this country.

## CHAPTER VIII

### THE CONSIDERATION OF COMMERCIAL CONDITIONS IN RATE-FIXING

#### REASONABLENESS

THE question of the power to take account of commercial conditions in fixing rates leads us beyond the confines of the third section of the interstate commerce act. It is usually thought of in that connection because an element of the proof in a discrimination case is a showing of injury. If the case is brought by a city or a chamber of commerce rather than by a shipper, this requirement is met by evidence of the competitive disadvantage under which those in the locality suffer as a consequence of the rate discrimination, which in turn may lead to evidence of commercial conditions existing in the locality. These are relevant only to the issue of injury in fact flowing from an unlawful discrimination. In that sense the Commission's power to consider commercial conditions is undisputed.

A broader question is presented when maximum, minimum, or specific rates are being fixed under the authority of section 1, which commands simply that they be "just and reasonable".<sup>1</sup> The constitutional power of Congress as well

<sup>1</sup> No separate meanings have been attached to the two words of this jingle. "Reasonable" is commonly used as a synonym for the phrase. *Int. Comm. Acts Ann.*, p. 321. Commissioner Hall once suggested unofficially that a rate at the lower limit of the "zone of reasonableness" might be "reasonable" in the sense of being not confiscatory, and yet fail to be "just" if set to shift some of the burden of depression upon the carrier, or if out of line with related rates to other shippers or other commodities. The distinction has never been employed.

as the statutory construction of the interstate commerce act are involved in determining how far the Commission may let its view of the conditions prevailing in an industry influence its judgment of what is a "reasonable" rate for shippers in the industry to pay. Congress may freely vote tariffs, embargoes or subsidies out of direct regard for industrial conditions, and with little fear of constitutional restrictions. It cannot treat railroad rates so cavalierly. The Fifth and Fourteenth Amendments have been interpreted as forbidding regulatory bodies to set rates so low as to be considered confiscatory by the courts. In *Northern Pacific Ry. v. North Dakota*,<sup>2</sup> the Supreme Court embodied this fundamental doctrine in a formula later paraphrased by the Commission: "Rates that we may lawfully require must in principle be high enough to cover all the cost that may fairly be allocated to the service, plus at least some margin of profit."<sup>3</sup> A lower limit is thus fixed, in words at least, below which the Commission may not for any reason grant a shipper concessions at the expense of his carrier.

Nevertheless, the statutory criterion is so vague, despite years of practical application and interpretation, that it is customary to speak of a "zone of reasonableness", reaching from the maximum that the Commission usually determines, down toward the limit of confiscation. This zone represents the common meeting ground of a variety of factors that have come to be recognized as entitled to consideration in deciding what is a reasonable rate. Among these is the cost of the service, which with an undefined allowance for profit marks the minimum. Progress in accounting technique permits far greater precision now in estimates of the cost of particular railroad services than was possible

<sup>2</sup> 236 U. S. 585 (1915).

<sup>3</sup> *Amer. Nat. Live Stock Assn. v. A. T. & S. F. Ry.*, 122 I. C. C. 609 (1927).

twenty years ago. Of this, a comparison of the record in the first lake cargo case in 1912 with that of the latest in the series, in 1931, gives ample proof. But when all is done, cost accounting as applied to the rates for individual services still rests necessarily upon a series of arbitrary assumptions. To say that the rates as a whole must be so adjusted as to allow a "fair return" upon the carrier's property affords no help in judging a single rate.

The value of the service to the shipper is an equally uncertain guide. A rate so high that the shipper cannot do business under it is a "paper rate" that does neither the shipper nor the carrier any good, and so marks the upward limit beyond which the carrier itself will not push. Short of that limit are many stages for argument, but no clearly defined basis for agreement.

"What the traffic will bear" is another guide. In former days an apology for extortion, it has since the time of Commission control been taken to mean that rates may vary in rough proportion to the market value of the freight transported. Thus basic commodities like grain, coal, and ore, are carried at a much lower cost per ton-mile than manufactured goods like textiles and furniture.<sup>4</sup> Because of the low value of the commodity, however, the portion of final cost represented by freight charges may be relatively higher. In the case of coal, freight charges average about 60% of the destination price. Obviously this rule too is a generality that is of little assistance in fixing any particular rate.

Since the search for a measure of intrinsic reasonableness proves disappointing, resort is had to comparisons as a means of showing whether a given rate is or is not too high. "Rates that we may lawfully require", said the Commission in the case quoted a moment ago, "must in principle be high enough to cover all the cost that may be fairly allo-

<sup>4</sup> See *I. & S. Docket 26 to 26c*, 22 I. C. C. 604, 623 (1912).

cated to the service, plus at least some margin of profit . . . we say 'in principle' because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates." Arguments resting upon comparisons have great force where the situations involved are strictly comparable, but they invite easy counter attack where differences in the situations compared can be shown. Another infirmity lies in the fact that "before the Commission can find that a rate on a given commodity is too high, by comparison with some other rate named, it must know that the rate selected as the standard is a reasonable and a fair one".<sup>5</sup> Finally, in a competitive and opportunist rate structure, it is usually possible to find comparisons that support either side of an argument.

It is evident that the factors of reasonableness are all sufficiently indefinite to warrant the characterization once given by the Supreme Court in approving a rate based on cost:<sup>6</sup>

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.

In addition, the weight to be attached to each factor when it has been estimated is also uncertain, varying from case to case. The Commission has sometimes regarded the cost

<sup>5</sup> *Darling v. B. & O. R. Co.*, 15 I. C. C. 79 (1909); *Int. Comm. Acts Ann.*, pp. 471-480.

<sup>6</sup> *Interstate Commerce Commission v. U. P. R. R.*, 222 U. S. 541, 550 (1911).

of the service as of greatest importance and so fixed even coal rates virtually on a mileage basis.<sup>7</sup> It has elsewhere approved rate structures in which costs and mileages were practically disregarded.<sup>8</sup> This but proves the obvious, that what is reasonable is a matter of judgment, about which reasonable men may differ. A "reasonable rate" may be as elusive as "fair value".

"RELATIVE REASONABLENESS"

So broad a term as reasonable is at once convenient and dangerous in the variety of uses it may have. An example of its elasticity was provided in the 1928 *Lake Cargo* decision, where the Commission relied upon the recently developed doctrine of "relative reasonableness." The doctrine is a sort of bastard in the eyes of those who frown on its use, but is a justifiable legal device to others.

In *Wyoming Coal Co. v. Virginian Ry. Co.*, *supra*, the Commission concluded that the refusal of the Virginian Railway to grant to some mines on its lines through rates westward which it had granted for a special and quite innocent purpose to certain other mines it served, and which were enjoyed generally by mines on other lines in the surrounding district, constituted undue prejudice. But in order to make sure that the correction it desired would be made, the Commission was not content to order the prejudice removed. It found also that the rates from the complaining mines were and would in the future be unreasonable to the extent that they exceeded the district rates in effect from neighboring—and competing—mines. This was done without inquiring into

<sup>7</sup> *Holmes & Hallowell Co. v. Gt. Nor. Ry.*, 60 I. C. C. 687, 713 (1921); 69 I. C. C. 11, 18 (1922), in which coal rates from the head of the lakes were revised to accord with the intrastate rates approved in the *Minnesota Rate Cases*, 230 U. S. 352 (1913).

<sup>8</sup> *Calif. Growers' and Shippers' Prot. League v. So. Pac. Co.*, 100 I. C. C. 79 (1925). *Infra*, p. 251.

the cost of transportation from those particular mines, and without pretense that the rates ordered were *maximum* reasonable rates. On the contrary, it was well understood that they had been depressed because of severe competition among both operators and carriers. In announcing its decision, the Commission said,<sup>9</sup>

the rates applicable under this adjustment have been so uniformly related, and that relation has endured so long, that they now afford a standard of reasonableness for rates from the same producing fields. Under the circumstances of this case relative reasonableness, rather than intrinsic reasonableness, becomes the important thing to be considered, and other criteria, such as ton-mile earnings, fall into the background.

The Supreme Court on appeal expressly affirmed this assertion of jurisdiction under the first as well as the third sections, although if the latter was applicable it would seem to have afforded ample authority by itself for what the Commission did.

The same doctrine was invoked in *Chemical Lime Co. v. Bellefonte Central R. Co.*<sup>10</sup> Shippers in small towns local to an independent short line were refused blanket rates that were accorded to the junction point and to trunk line points over a wide area around the complainants on incoming shipments from various origins. The situation was similar to that of Knoxo in the *Illinois Central* case, *supra*, and so far as appears it would have been appropriate to remove the discrimination here in the same way, by a section 3 order; a dissenting minority urged that that be done. A majority of the Commission, however, made a finding under section 1 of the character made in the *Wyoming Coal* case. The decision did not fix an absolute rate, but used the rate to Belle-

<sup>9</sup> 98 I. C. C. 488, 496 (1925).

<sup>10</sup> 147 I. C. C. 285 (1928).

fonte, the junction point, as the measure for future maximum reasonable rates to the complaining points.

Commissioner Eastman in a special concurrence defended this use of "relative reasonableness" as something that the Supreme Court had in terms approved and as a remedy entirely appropriate in this kind of situation:

Where the complaining community had rates which stood up like a pinnacle in the midst of a prairie land of blanket rates surrounding it for many miles, we are warranted in finding it unjust and unreasonable not to maintain the blanket rates to the complaining community for the future, even if we are unable on the record to determine whether or not those blanket rates in all cases or in any case have the attributes of maximum reasonable rates. (p. 288)

He suggested also other possible situations where it would be desirable to require rates below what could be said to be the maximum of intrinsically reasonable rates, and where section 3 would be inapplicable. The opening of new through routes competitive with existing routes was one such.

"Relative reasonableness" has more extended potentialities than these. In the *Wyoming Coal* and *Chemical Lime* cases the same origin territories and the same carriers were involved in each of the comparisons upon which the findings of relative reasonableness were based, and there is no reason to doubt that section 3 as well as section 1 would have afforded a remedy. But in the 1928 *Lake Cargo* case, in which the Commission in the height of its political difficulties suspended and canceled the competitive reductions from the southern districts, a further step was taken. The same device was used although there were doubts as to whether section 3 applied. The weight of majority opinion then was that it did not. If it did not, then, as Commissioner Eastman in his concurring opinion pointed out, since



“the facts here adduced in support of the finding under section 1, . . . are precisely such facts as would be pertinent in an inquiry under section 3, . . . the net result of the doctrine of relative unreasonableness, as here applied, . . . is to extend the principles of section 3 to situations where the ‘same carrier or carriers’ are not involved”.<sup>11</sup> The doctrine, that is, was being used to circumvent the limitations which the *Ashland* rule placed upon section 3. If section 3 did apply, as he contended it did, then section 1 was made to cover the same ground, and one or the other was superfluous. He criticized this extension of section 1 not only because of the confusion it created between the two sections, but because it would fetter rate competition within very narrow limits.

The majority in the 1928 *Lake Cargo* decision, however, went ahead under section 1, which is not subject to the limitations of the *Ashland* rule. Action under section 3 would have required a reversal of previously expressed opinions, for which they were not then ready. They thought that

in competitive adjustments the carriers may disregard distance even in substantial degree, so long as the competitor whose geographical location is largely disregarded is not injured thereby, but where it is made to appear in an interrelated adjustment such as that with which we are here dealing that such a competitor is injured and is complaining, we believe that a proper interpretation of the law which we administer demands a remedy. (p. 390)

Having concluded that a remedy was demanded, they found it in section 1, which was interpreted to require “that rates shall not only be reasonable *per se*, but just and reasonable in their relation to other rates on like traffic in the same territory that afforded a proper standard of comparison, and

<sup>11</sup> *Lake Cargo Coal*, 129 I. C. C. 367, 396 (1928).

[it] applies to instances in which rates are below that standard" (p. 386). Because they failed to meet this comparative standard, the reductions proposed were ordered canceled.

The doctrine of relative reasonableness seems thus to have established itself as a flexible device, useful in some situations, possibly confusing in others, in which the seeds of an indefinite expansion are latent. It is not merely an intrinsically interesting example of the results of the logical method. It illustrates the difficulties that may be encountered at the boundary between sections 1 and 3, even though the main areas covered by the two sections are tolerably well demarcated. It illustrates also the difficulty of restricting the effect of rate comparisons, even in the minds of commissioners, to the limited purpose of determining a reasonable level for given rates. The comparisons suggest inevitably the commercial effects of the rates compared.

We return from this digression to the point of departure, namely, a zone of reasonableness, within which the fixing of any particular rate is an act of judgment solely. We return with the query to which the discussion just now indulged in should give point: If "reasonable" is so flexible, why should it not be capable of including a consideration of the commercial conditions to which the rate will be applied? Why not fix a rate that will be "reasonable in view of the situation in the industry which is to pay it"? Shall the Commission keep its eyes strictly upon transportation conditions, letting industry conform to the results; or shall it, with an eye to the results, have regard for what it considers the orderly development of commerce and industry in the country as a whole?

#### THE CONSIDERATION OF COMMERCIAL CONDITIONS

A number of practical objections have been urged against lodging any such power as has just been suggested in the

Interstate Commerce Commission: the difficulties of national economic planning (for that is what it would tend toward) for so gigantic and complicated an industry, the enormous pressures to which our political machinery would be subjected, and the disinclination of the carriers and of the Commission itself to enter such an arrangement. These are important though not unanswerable objections. We are here primarily concerned with the Commission's present power and practice in that regard, rather than with future legislative extensions of it.

One objection often raised, that the Commission would thereby invade the legitimate field of the carrier's managerial discretion, may be disposed of at the outset. Managerial discretion is a question-begging phrase, the name of the area on the other side of the line that bounds the Commission's power. When that power has been defined, managerial discretion is what is left. We are in search of the boundary, and it advances the argument not at all to name the territory before the line has been fixed. The Commission has answered this contention time and again. Not until the objection is backed with a claim that the Commission is overstepping the powers possible to it under the commerce clause of the constitution does it become substantial.

The orthodox doctrine of the Commission, often repeated, is that the commercial conditions within an industry and the effects on it of the rates to be set are not factors to which the Commission can give significant weight in fixing those rates, although they are of prime importance to the shippers who initiate rate cases. In the same *Ashland* case previously discussed is another of Commissioner Lane's quotable expressions: "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as part of one great whole,

and apportion to each a certain territory, or to require all to meet upon a common basis at all points.”<sup>12</sup> So again in the 1928 *Lake Cargo* case where the charge was hotly pressed that this was being disregarded, appears this disclaimer:

We are not a general manager of the railroads, or of any of them. We have neither the inclination, the wisdom, nor the power to make or regulate rates for the purpose of determining whether goods shall be bought or sold, produced, manufactured, or consumed in one section or locality, or by one set of persons or another. Such has been the settled policy of the commission from its creation in 1887 to the present day. We have other well recognized standards by which the lawfulness of rates have been and are tested, and these standards concern themselves with transportation characteristics. When the standards are applied, the necessary and immediate effect may be to interject into an existing commercial situation new factors, important to those who produce or distribute, buy, or sell, and to their competitors; but such result is neither the cause nor end which has motivated our action. These standards are of . . . universal acceptance, and our practice is . . . well understood by students of transportation. . . . (p. 391).

The railroads themselves, on the other hand, have as a matter of course given controlling weight to the conditions prevailing in an industry whenever it seemed advantageous from a traffic point to do so. They have developed new sections — coal fields in West Virginia, for example — by “missionary” rates and they have cut rates in order to get new business, or to save old business that otherwise would be lost. Doubtless, however, the instances are few of reductions made out of pure compassion for a depressed industry, except in the emergency relief of disaster.<sup>13</sup> Simi-

<sup>12</sup> *Ashland Fire Brick Co. v. Sou. Ry.*, 22 I. C. C. 115, 121 (1911). Compare the similar expression of the Ohio Railroad Commission in the *Worthington* case, *supra*, p. 46.

<sup>13</sup> In such cases the railroads are authorized to, and have on numerous

larly they extorted where extortion was possible, until checked by regulation which now holds that the prosperity of a shipper does not of itself justify a carrier in raising a previously remunerative rate, simply because the shipper can stand the increase.<sup>14</sup>

To the shipper the commercial effect of the rate is the prime concern. The control over his destiny formerly exercised by the railroad through its ability to open or close markets to him by the rate adjustment is now shared between the carrier and the Commission. He is not disqualified from securing a lower rate by reason of his business depression, if he is otherwise entitled to it; and to him the result is the same whether the reduction comes on account of his need or on transportation grounds. It answers his need in either event and he will probably insist the more keenly on the latter if he feels also the pressure of need. Whatever the reason for a change in rates, therefore, it is nearly certain to benefit one section at the expense of another. From the shipper's point of view, the Commission is already and inevitably an "economic arbiter of the country".

Since the Commission acts usually on the motion of either shippers or carriers it can scarcely help feeling the weight of the motives that impel the litigant before it. So, despite its disclaimer, it, too, has had a fairly realistic sense of the commercial effects of its acts. This was expressed in Commissioner Meyer's opinion in the *Boileau* case in 1912 in commenting on evidence of wages, living standards, production costs, etc., introduced by the Pittsburgh coal-operator complainants:<sup>15</sup>

occasions rendered effective assistance without charge, or at a reduced charge. A list covering the period 1906-1930 was compiled by the Library of the Bureau of Railway Economics, Washington, October, 1930.

<sup>14</sup> *Southern Ry. v. Tift*, 206 U. S. 428 (1907).

<sup>15</sup> *Boileau v. P. & L. E. R. R.*, 22 I. C. C. 640, 647 (1912)

Whatever weight it may be permissible under the statute to give to considerations of this kind in the determination of a question like that presented here, it would seem that wages of miners and their standard of living should be kept in view, and that great issues affecting them should not be decided without at least bringing their interests into the horizon of consciousness. . . . Whatever legal limitations may be imposed on this view by the act to regulate commerce as at present interpreted, from the point of view of public policy and humanity, considerations like those adverted to by counsel should most assuredly not be ignored.

So also in the 1931 rate-advance case, *Ex parte 103*, where the Commission denied the 15% increase requested, and suggested instead flat increases in varying amounts on different commodities, agricultural products were exempted entirely, coal and ore were raised only slightly, and other products more.<sup>16</sup> No grounds were given for this differentiation other than the existence of competing means of transportation and the conditions prevailing in the several industries.

In important rate cases it has become a habit of the Commission to include fairly elaborate introductory statements of the industrial background. For example, in the *Sugar Cases of 1922*, *supra*, the opinion contains an elaborate review of the entire sugar industry in this country, prefaced by this statement:<sup>17</sup>

These cases have to do with most of the important sugar rate adjustments of the country. At the outset it may be well to present a verbal picture of the sugar business, not because all the facts to be here stated necessarily bear on the issue but because they may lead to a better understanding of the cases.

While they make for long opinions and hardly seem neces-

<sup>16</sup> 179 I. C. C. 215 (1931).

<sup>17</sup> 81 I. C. C. 448, 449 (1923).

sary to the litigants, to whom these are the ordinary bread-and-butter facts of life, they display a commendable desire on the part of the Commission to keep close to the facts.

The basis of the legal difficulty over the criteria to determine the fixing of a rate within the zone where judgment controls, lies in this conflict of aims. The carriers are moved primarily by considerations of commercial advantage, which to the Commission are secondary; they are restrained by the requirements of "just and reasonable", which are the Commission's chief concern. The Commission, one may say, is the embodiment of justice, but it is not on that account blind. It cannot ignore what it cannot help seeing

When we turn to instances, two forms of the argument for rates based upon commercial conditions appear. One is for rates according to need. The shipper's industry is badly depressed; let the Commission fix a rate for him within the zone of reasonableness, but near its lower margin, to ease his burden a little. The other urges rates that will give a complaining shipper his "fair share" of a given market. This demand among shippers is responsible for many blanket equalizations of rates that allow producers far and near to enter the same market on the same terms; that in other words eliminate the geographical factor from the competition among them. The carriers may voluntarily acquiesce and initiate rates on either of these grounds, but the Commission cannot go far in ordering them to do so without abandoning the doctrine that it listens to transportation arguments only. How far it would and could go in basing rates on need was tested in its effort to comply with the so-called Hoch-Smith resolution, which Congress passed in 1925 as a measure of farm relief.

## THE HOCH-SMITH RESOLUTION

Among the principal complaints of the farmer during the depression that followed the war was the burden of the freight rates he was obliged to pay. Some drastic remedies were proposed in Congress and when it became politically expedient to pass some sort of bill, an agreement was reached at a White House breakfast between representatives of the farm bloc and more conservative leaders. On January 30, 1925, after brief and generally indiscriminating debate and with little opposition, the compromise was passed as a joint resolution. A few members seriously approved it; others thought it a gesture. "A mere sop . . . that Members . . . will fondly carry home to show to their farmer friends," was the characterization of one Congressman.<sup>18</sup> This is what the Resolution said:

It is hereby declared to be the true policy in ratemaking, . . . 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 then directed the Commission to undertake a thorough investigation and revision of the entire freight rate structure of the country, to correct unlawful rates, and in doing so to

give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years,

<sup>18</sup> 65 *Cong. Rec.* 11023-24 (1924). The debate is summarized in G. H. Robinson, "The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission," 42 *Harvard L. Rev.* 610, 618, n. 30 (1929). Prof. Robinson urged that the Resolution be repealed on the ground that, if taken seriously, it subjected the Commission to irresistible political pressure. On the limits of the change it could make in the interpretation of the interstate commerce act, see D. P. Locklin, *Railroad Regulation Since 1920*, pp. 59-70 (1928).



to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation.

Finally, it ordered the Commission

in view of the existing depression in agriculture . . . to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement . . . of the products of agriculture . . . at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. (43 Stat. 801)

While on its face this might seem to embody a direction that lower rates be granted to depressed industries, the words are hedged with qualifications and might mean only an inquiry under the existing law, which was already within the Commission's power. To take account of the relative value of commodities introduced no new factor except emphasis, for that was merely another way of stating the "value of the service", which the Commission had long held was entitled to some, though varying, weight. But the consideration of the "conditions that prevail . . . in our industries" and of the "natural and proper development of the country as a whole" places emphasis at least upon a view of the Commission's duty that it had often disclaimed or rejected, and that is irreconcilable with the regulation of rates upon transportation conditions solely. The further question how carriers were to recoup from prosperous shippers revenues lost in giving reductions to those who were depressed, was never faced by the Commission as a whole.<sup>19</sup> Candidates for a raise in rates do not present themselves.

The Commission was divided and uncertain as to the meaning it should attach to the Resolution, but under in-

<sup>19</sup> See the concurring opinion of Commr. Woodlock in the *Deciduous Fruit case*, 129 I. C. C. 25, 58 (1927), *infra*, n. 25.

sistent pressure from shippers a majority came finally to the conclusion that while members of Congress might vote as a gesture, they themselves were scarcely at liberty to treat so lightly what had in law the force of a statute.<sup>20</sup> The first real concession to the Resolution was made in *Ex parte 87, Revenues in Western District*,<sup>21</sup> in which a horizontal 5% increase in rates sought by the western roads was denied on the ground that no special consideration was shown the products of agriculture. The Resolution was cited but did not seem to exercise controlling weight in a score of cases over the next three or four years.<sup>22</sup>

The first court test was inconclusive. The West Virginia three-judge court that enjoined the 1928 *Lake Cargo* decision was confident in its view that Congress had not empowered the Commission to equalize economic conditions through rate adjustments. Speaking of the Resolution, it said:<sup>23</sup>

Congress certainly did not intend by this language to create in the Commission an economic dictatorship over the various

<sup>20</sup> Joint resolutions "are really bills and in procedure are treated like bills." R. Luce, *Legislative Procedure*, p. 556 (1922); 1 Watson, *The Constitution*, 379 (1910). The distinction between the two is now recognizable only in the form of the enacting clause. Watson's statement, *ibid.*, that "a statute can neither be repealed nor amended by a joint resolution", is contrary to the present settled procedure of Congress. Several members of the Senate, among them the present distinguished Republican floor leader, were apparently unaware of the legal effect of a joint resolution when they voted for this one. *Hearings on Confirmation of John J. Esch, supra*, p. 51. There seems to have been no direct adjudication of the point in a federal court, but in the *Ann Arbor* case, *infra*, p. 253, the Supreme Court, in denying that the Hoch-Smith resolution had changed the interstate commerce act, tacitly assumed that it *could* have done so.

<sup>21</sup> 113 I. C. C. 3 (1926).

<sup>22</sup> *Interstate Commerce Acts Annotated*, p. 2836 *et seq.* (1930).

<sup>23</sup> 25 F. (2d) 462, 474 (1928).

sections of the country. . . . If the Commission has the right in rate adjustment to consider the shift in traffic to a community already paying a higher rate, and act upon it as one of the factors in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift . . . in every branch of industry, will become a matter for consideration by the Commission: for all depend upon freight rates . . . and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. We feel perfectly certain that Congress did not intend to vest such power in the Commission.

By thus centering its discussion upon the *intentions* of Congress it avoided any consideration of the *power* of Congress to act, supposing its intentions to have been otherwise. The Supreme Court reversed this decision and dismissed the case without expressing itself upon the Resolution.

Another opportunity was presented in a case dealing with rates on deciduous fruits from California to the eastern markets. The Commission had in 1925 dismissed a complaint by the fruit growers.<sup>24</sup> In 1926 a rehearing was secured and the force of the Resolution was emphasized. The shippers made a showing of the depression in their industry, their distance from the principal consuming markets and the decline in fruit prices.

The Commission was impressed. Largely on account of the Resolution the rate was reduced from \$1.73 to \$1.60.<sup>25</sup> It was admitted that the former had recently been found to be not higher than a reasonable maximum rate. But \$1.60 was found to meet the minimum requirement marked out in *Northern Pacific Ry. v. North Dakota, supra*, that a rate

<sup>24</sup> *California Growers' etc. League v. Sou. Pac. Co.*, 100 I. C. C. 79 (1925).

<sup>25</sup> *Same case*, 129 I. C. C. 25; 132 I. C. C. 582 (1927).

fixed by the Commission must be high enough to cover all costs allocable to the service with at least some contribution to profit. It found that the California growers had brought themselves within the terms of the Resolution, and concluded that the Resolution had so changed the law as to require the Commission to set the rates on products of depressed industries at the bottom instead of at the top of the zone of reasonableness. The difference between \$1.73 and \$1.60 thus affords an empirical test of the Commission's judgment of the extent of the zone in this case.

The carriers appealed from the decision, but failed to secure from the District Court in California even so much as a stay pending appeal to the Supreme Court. In *Ann Arbor R. R. v. United States*<sup>26</sup> the Commission was sustained in a summary decision which held that the carriers were not being compelled to carry the freight at a loss or without substantial reward and which denied that the roads were entitled to a "fair return" on each class of business considered independently.

The Supreme Court took a different view of the matter and vacated the Commission's order. In an opinion by Mr. Justice Van Devanter the Resolution was nullified by a process of statutory interpretation. The Commission had been directed to make only such "lawful" changes as could be made in the rate structure, and to give the lowest possible "lawful" rates to agricultural products. Since the meaning of "lawful" is to be ascertained only by reference to the interstate commerce act as it stood before the Resolution, therefore, said the Court, the Resolution worked no substantive change in that basic act.<sup>27</sup> The criteria of a reason-

<sup>26</sup> 30 F. (2d) 940 (1928).

<sup>27</sup> This is the same device that the Court used in *Duplex Co. v. Deering*, 254 U. S. 443, 469-472 (1921), in sustaining a labor injunction after the Clayton Act.

able rate remained what they were before. But the Commission had decided that the Resolution *did* alter the previous rule, and so the decision was reversed; in the Court's view the Resolution was "more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate-making"<sup>28</sup>—in short, a gesture.

To one seeking the criteria of a reasonable rate, the Court's opinion tells disappointingly little. By resting upon the construction of the Resolution the Court avoided any discussion of the power of Congress other than the intimation that if the measure were intended to go further and reduce rates below the existing lawful standard, a serious question of its constitutional validity would be raised. Whether the question would arise under the due process or the commerce clause was not explained.

The subsequent history of the Resolution is likewise inconclusive. The general investigation it ordered has been organized under Docket No. 17000 and subdivided into about a dozen separate inquiries dealing with different commodities. It is an enormous task. For the first time the rate structure of the country is being systematically overhauled, and the results are undoubtedly in the direction of substituting order for chaos. It is too soon to pass any judgment upon this. It is evident, however, that by the very magnitude of the task the special interests of any group such as agriculture have become fairly well submerged.

In Part 2 under Docket 17000, *Western Trunk Line Class Rates*,<sup>29</sup> decided just before the *Ann Arbor* decision was an-

<sup>28</sup> *Ann Arbor R. R. v. United States*, 281 U. S. 658 (1930). See the author's article, "The Hoch-Smith Resolution and the Consideration of Commercial Conditions in Rate-Fixing," 16 *Cornell L. Q.* 339 (1931); cf. "The Consideration and Control of Commercial Conditions in Railroad Rate Regulation," 40 *Yale L. J.*, 600 (1931).

<sup>29</sup> 164 I. C. C. 1 (1930).

nounced, the Commission ordered a general upward revision of class rates from which certain agricultural products of some importance to the farmer were exempted, on the ground that "the agricultural industry has not fully recovered from the serious depression following the World War period," and the rates proposed by the carriers "would in many instances result in substantial increases thereon, for which sufficient justification does not appear" (p. 224). The effective date of this revision was postponed, however, until December 3, 1931, and a recent petition by the carriers for rehearing was denied without prejudice to the filing of another if the experience of 1932 shows that the traffic estimates of 1928, upon which the decision was based, are no longer warranted.

In Part 3, *Cotton*, Commissioner Woodlock took cognizance of the *Ann Arbor* decision thus:<sup>80</sup>

Economic evidence bearing upon the question of depression in the cotton-growing industry . . . was confined to Oklahoma and Mississippi. . . . From this evidence we conclude that no substantial depression was shown to exist at the time the hearings closed. But even if our conclusions were otherwise we could not, in view of the decision of the Supreme Court . . . accord cotton special treatment in the way of a lower level of rates than would have been possible prior to the adoption of the resolution.

Mr. Woodlock, on and off the Commission, is known to be less sympathetic than some others to arguments of shippers that would reduce carrier revenues.

The final ironic touch in the history of the Resolution came in Part 7, *Grain and Grain Products*.<sup>81</sup> Upon the grain-growing sections had fallen the chief burden of the

<sup>80</sup> 165 I. C. C. 595, 598 (1930).

<sup>81</sup> 164 I. C. C. 619 (1930).

post-war depression, and from them had come the loudest cries of political disaffection. In this case if anywhere the practical significance of the Resolution and the extent of the Commission's compliance with it should have been tested. The volume of testimony assembled, dealing with the economic plight of the grain farmer as well as the transportation situation, was larger than in any other case the Commission has ever heard. The case was argued and submitted in July, 1929, based on statistics for 1928. The decision appeared in July, 1930, just after the *Ann Arbor* decision. In view of that case, the Commission inserted in its decision the specific disclaimer that, "The findings herein are under the provisions of the interstate commerce act" (p. 661). The new structure as a whole, in addition to bringing some sort of order out of chaos, seems to have been expected to decrease the carriers' total annual revenues by about \$15,000,000.

The physical task of calculating the thousands of tariffs that had to be filed to comply with the Commission's order led to the postponement of its effective date until well into 1931. By that time our latest depression was making drastic inroads upon railroad traffic and revenues. The carriers petitioned in February, 1931, for a rehearing on the ground that the figures for 1928, upon which the report was based, no longer had anything to do with the case. Partly because a large number of issues of discrimination were involved which had nothing to do with the level of rates, partly because the question of revenues was being brought up in another case, the *Fifteen Percent Case, 1931, supra*; possibly in part out of sheer weariness of the case, the Commission denied the petition. Thereupon the carriers took to the courts, and in January, 1932, the Supreme Court vacated the Commission's order and ordered a rehearing, on the grounds

urged by the railroads.<sup>82</sup> So by the time the farmers, afflicted by one depression, had raised enough political stir to obtain legislative relief and had pursued their remedy through administrative red tape, a whole economic cycle had swung around and another depression was with us. This time the carriers found public sympathy and took advantage of it to get release in the courts from the small part of the burden that the farmers were about to shift upon their shoulders.

We emerge from this review of the Hoch-Smith Resolution, then, with our constitutional question still unsolved: To what extent may Congress include the need of the shipper as a factor for consideration in determining what is a reasonable rate? Assuming that the classification itself, *i. e.*, needy shippers, is a reasonable one, any rate which falls within the general limits of the zone of reasonableness may presumably be granted to those in the class without transgressing the Fifth Amendment.<sup>83</sup> The question then becomes, whether the classification is a reasonable one. Here apparently the limitations of the Fifth Amendment and of the commerce clause merge. If the classification is reasonable, one may hazard a guess that the law embodying it is a reasonable regulation of commerce, and vice versa. Conversely, if the Court thought the classification bad, it might condemn the law either on that ground or as an unwarranted extension of the commerce power. There is no reliable guide.

<sup>82</sup> *Atchison, etc. Ry. Co. v. United States*, 284 U. S. 248 (1932).

<sup>83</sup> The power of Congress under the Fifth Amendment "admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary." *Second Employers Liability Cases*, 223 U. S. 1, 53 (1912); *Northern Pacific Ry. v. North Dakota*, *supra*, at 598-9; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 416 (1909).



RATES TO GIVE A "FAIR SHARE" OF THE BUSINESS

A variant of the argument for rates based upon the needs of the shipper that has often been put independently of the Hoch-Smith Resolution is that which asks the Commission to fix rates which will allow the complaining shipper a "fair share" of the available market. That is after all his primary concern, regardless of the reasonableness of the rate. But why is it not also a good criterion of what is a reasonable rate, or at least of where in the zone of reasonableness a particular rate should be put? So it has been urged, not only in the *Lake Cargo* cases but in many others.

From the Commission's point of view a major objection is the inevitably subjective character of this criterion. The sum of the fair shares to which all of the parties consider themselves entitled is invariably greater than the whole available. If one tries to argue by the formula that a fair share is what each can get under a fair and reasonable rate adjustment, the result is only a logical circle, for the search is for the criteria of a reasonable rate.

When addressed to the carriers this argument has frequently found a sympathetic response. As counsel for the C. & O. in the 1925 *Lake Cargo* case remarked, "We had always thought until this case came up, that the test of the reasonableness and propriety of a coal rate structure would be the shipments that move under the structure." The railroads have found equalization schemes such as rate blankets the simplest way of meeting the demands; the shipper's "fair share" is then determined by other than transportation factors. Where the railroads want a fair share too, as in the *Lake Cargo* cases, the answer is less simple.

Pushed to the extreme, equalization means postage stamp rates, a single blanket for the entire country. Even short of

<sup>84</sup> Record in I. C. C. Docket 15007, p. 4714.

the extreme it is wasteful of transportation in its use of long hauls and is uneconomic in encouraging the development of surplus productive capacity which leads to excessive competition. This was the United States Coal Commission's diagnosis of the coal rate structure in 1923.

It was argued by lake cargo coal consumers that the public interest—their own, by a convenient identification—demands equalization of rates as nearly as may be, in order that consumers may have access to the widest possible markets. During the war there was a justification for this when shortages of coal and of transportation made certainty of supply a prime object. That justification no longer exists. It seems apparent that the real interest of consumers and of the public generally is not in the widest possible competition but in transportation at the lowest possible cost. Equalization cannot bring this, unless at the expense of an undue burden on some other traffic, because equalization means averaging in the low cost hauls with the high. The blanket rate must be higher than what the cheapest route would justify.<sup>85</sup>

A fair share thus proves to be too subjective a test to be of help unless it means equalizing rates, and in that case the fair share is determined only after eliminating railroad rates as a factor.

#### THE BENEFITS OF GEOGRAPHICAL LOCATION

The contrary doctrine frequently asserted by the Commission in connection with section 3 where the question usually arises, is that each community is entitled to the benefits of its geographical location. In the early case of *Eau Claire*

<sup>85</sup> The argument embodied in these paragraphs was worked out with regard to port differentials by Commissioner Eastman in his dissenting opinion in *Baltimore Chamber of Commerce v. Ann Arbor R. Co.*, 159 I. C. C. 691, 703-708 (1929), and was elaborated as to section 3 in his separate opinion in *Dutton Lumber Co. v. N. Y., N. H. & H. R. R. Co.*, 151 I. C. C. 391, 414-419 (1929).

*Board of Trade v. Chicago, etc. Ry.*,<sup>86</sup> this was expressed as follows:

That rates should be fixed in inverse proportion to the natural advantages of competing towns, with a view of equalizing "commercial conditions", as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and any exaction of charges unreasonable in themselves or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute.

This is an application of the principle of equality of treatment, and is as sound with regard to section 1 as to section 3. It does not necessarily mean a distance scale for all rates. Distance, as one southern operator remarked, has no divine right. As a convenient approximation distance is much used, but its importance may readily be offset by a difference in transportation costs. Equality of treatment with regard to these latter is important. It is plain, however, that the carriers, even with the Commission's sanction, in practice disregard costs as well as distance in many cases, whether because the costs are not exactly ascertainable, or in favor of the value of the service, or in deference to a general desire for equalization on the part of industries or communities affected. No single theory can be universally applied in rate-making.

#### CONCLUSION

Throughout this review of the legal problems raised by the lake cargo controversy one thread persists, whether the discussion is dealing with section 1 or with section 3. That is the basic conflict between two conceptions of the purpose of rate regulation, and so of the function of the Interstate

<sup>86</sup> 5 I. C. C. 264, 293 (1892).

Commerce Commission. On the one side it is said that the Commission's duty is to look to transportation conditions alone, to hew to that line, and to let industrial development adjust itself to the consequences. On the other, the Commission is urged to proceed with one eye on the commercial results of rate adjustment; to give its major attention to transportation conditions, it is true, but to mitigate the consequences of so harsh a rule by considering the "natural and orderly development of the country as a whole", or by making some room for the ancient principle of live and let live—by considering the needs of depressed shippers, if you please.

Out of this conflict comes no clearcut solution but a series of compromises. A rate that the Commission may require of a carrier is strictly limited by the cost of the service. A rate that the carrier may offer a shipper may disregard cost to a substantial degree. An adjustment that the Commission will approve, or that it will refuse to disturb, may lie anywhere in between, and there are no certain criteria of the Commission's action in any particular case. The main emphasis is put upon transportation conditions, but with carriers and shippers both concerned for the commercial effects the Commission cannot but be swayed by them too, sometimes more, sometimes less. In this uncertain territory the *Lake Cargo* cases prick out a small section of the boundary. According to its latest pronouncement, the Commission will not in the present circumstances condemn an adjustment under which the northern operators pay for transportation on a scale at the top of the zone of reasonableness, while their southern competitors pay on a scale considerably nearer the bottom of the zone.

How long the present adjustment will remain no one can predict. It rests upon factors that lie in the realm of judgment and both men and their judgments may be expected to

change with time. The future may well see a different view taken of what is a proper rate relationship. One thing that may be expected not to change is the conflict of interests out of which the rate cases arose. There are ample coal reserves both north and south, and it is a safe prediction that if coal is still carried by railroads, Pittsburgh and West Virginia operators will be fighting over lake cargo rate differentials for generations to come.

## APPENDIX

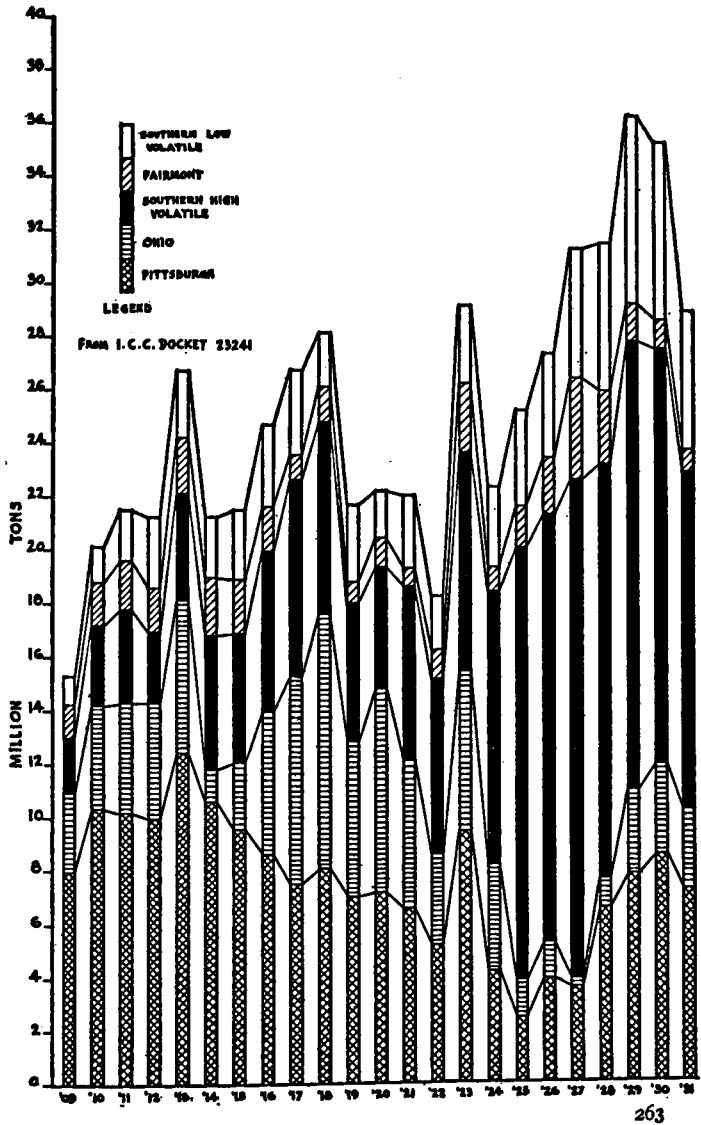
### LAKE CARGO COAL SHIPMENTS, 1909-1931 (IN MILLIONS OF TONS)

(Figures from U. S. Bureau of Mines)

Year	Pennsylvania	Ohio	Fairmont	Southern High Volatile	Southern Low Volatile	Total
1909	8.055	2.918	1.277	2.026	1.035	15.331
1910	10.442	3.768	1.611	2.946	1.397	20.267
1911	10.228	4.110	1.784	3.499	1.963	21.627
1912	10.053	4.318	1.687	2.607	2.611	21.310
1913	12.562	5.646	2.162	3.941	2.486	26.830
1914	10.640	1.247	2.214	4.952	2.294	21.384
1915	9.620	2.484	2.030	4.832	2.515	21.507
1916	8.768	5.302	1.618	6.008	2.986	24.693
1917	7.548	7.821	1.029	7.263	3.154	26.829
1918	8.149	9.537	1.317	7.142	2.011	28.157
1919	7.080	5.840	.828	5.133	2.851	21.756
1920	7.270	7.607	1.285	4.540	1.668	22.391
1921	6.661	5.538	1.015	6.502	2.640	22.364
1922	5.291	3.386	1.370	6.524	1.938	18.578
1923	9.560	5.953	3.170	8.262	2.895	29.840
1924	4.281	4.004	1.404	10.247	2.984	22.981
1925	2.481	1.452	2.384	16.205	3.692	26.333
1926	3.933	1.421	2.469	16.079	4.116	28.162
1927	3.613	.346	4.605	18.736	5.410	32.858
1928	6.631	1.053	3.600	15.642	6.209	33.324
1929	7.874	3.209	2.085	16.830	7.655	37.772
1930	8.573	3.362	1.482	15.659	7.180	36.399
1931	7.272	2.979	.990	12.697	5.728	29.805

NOTE: Fairmont figures include Moundsville; Southern Low Volatile includes Winding Gulf. These two are not included in the chart. Small shipments from Cumberland-Piedmont and Tennessee and Virginia are included only in totals.

### LAKE CARGO COAL SHIPMENTS, 1909-31



CHRONOLOGICAL STATEMENT OF LAKE CARGO COAL RATES FROM PRINCIPAL  
DISTRICTS TO LAKE ERIE PORTS

(per net ton)

	<i>Effective Date</i>	<i>Pittsburgh</i>	<i>Ohio</i>	<i>Fairmont</i>	<i>Kanawha</i>	<i>Pocahontas</i>
	Before 1912	\$0.88	\$0.85	\$0.96 $\frac{3}{4}$	\$0.97	\$1.12
Boileau Case	May 1, 1912	.78	.75	.90	.97	1.12
War Increase	Apr. 16, 1917	.93	.90	1.05	1.12	1.27
1917 Case	Aug. 13, 1917	.93	.90	1.08	1.18	1.33
War Increases	June 25, 1918	1.30	1.27	1.45	1.55	1.70
Ex Parte 74	Aug. 26, 1920	1.86	1.83	2.01	2.11	2.26
Reduced Rates	July 1, 1922	1.66	1.63	1.81	1.91	2.06
Docket 15007	Aug. 10, 1927	1.46	1.43	1.71	1.91	2.06
Southern						
Reductions	Apr. 20, 1928	1.46	1.43	1.71	1.71	1.86
Northern						
Reductions	June 18, 1928	1.26	1.23	1.51	1.71	1.86
Compromise						
Rates	Apr. 18, 1929	1.46	1.43	1.66	1.81	1.96

Condensed from exhibit in I. C. C. Docket No. 23240.



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*Procter & Gamble v. United States*, 225 U. S. 282 (1912), 232n.  
*Pullman Car Co. v. M. P. Ry Co.*, 115 U. S. 587 (1885), 227n.  
*Reduced Rates, 1922*, 68 I. C. C. 676 (1922), 86.  
*Revenues in Western District*, 113 I. C. C. 3 (1926), 250.  
*Rules Governing Rating of Coal Mines*, 95 I. C. C. 309 (1924), 82.  
*St. Louis, I. M. & S. Ry. Co. v. United States*, 217 Fed. 80 (1914), 205n.  
*St. Louis & O'Fallon R. Co. v. United States*, 279 U. S. 461 (1929);  
*Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I. C. C. 3  
(1927), 111n, 181, 197.  
*St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136 (1917),  
207, 211, 228.  
*Salt Cases of 1923*, 92 I. C. C. 388 (1924), 212, 221.  
*Second Employers' Liability Cases*, 223 U. S. 1 (1912), 256n.  
*Securities and Acquisition of Control of Railway Express Agency*, 150  
I. C. C. 423 (1929), 209n.  
*Shreveport case*, see *Houston, E. & W. Texas Ry. Co. v. United States*.  
*Skinner & Eddy Corp. v. United States*, 249 U. S. 557 (1919), 232n.  
*Southern Ry. Co. v. Tift*, 206 U. S. 428 (1907), 245n.  
*Sprunt & Son v. United States*, 281 U. S. 249 (1930), 232n.  
*Sugar Cases of 1922*, 81 I. C. C. 448 (1923), 211, 233, 246.  
*Swift Lumber Co. v. Fernwood & Gulf R. Co.*, 61 I. C. C. 485 (1921),  
214-6.  
*Texas & Pacific Ry. Co. v. United States*, 286 U. S. 52 S. Ct. 642 (1932),  
135, 226-9, 232-3; 42 F. (2d) 281 (1930), 229.  
*Trunk Line and Ex-Lake Iron Ore Rates*, 69 I. C. C. 589 (1922), 95n.  
*United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909), 256n.  
*United States v. Frank J. Hayes* (unreported), 80.  
*United States v. Illinois Central R. Co.*, 263 U. S. 515 (1924), 215-6,  
219, 222, 224, 228, 239.  
*United States v. L. & N. R. R.*, 235 U. S. 314 (1914), 196n.  
*United States v. P. R. R.*, 266 U. S. 191 (1924), 217n.  
*United States v. Railway Employees' Dept. A. F. L.*, 283 Fed. 479; 286  
Fed. 978; 290 Fed. 228 (1922-3), 84n.  
*Virginian Ry. v. United States*, 272 U. S. 658 (1926), 39n, 218, 224.  
*Western Trunk-Line Class Rates*, 164 I. C. C. 1 (1930), 253.  
*Wisconsin Bridge & Iron Co. v. Ill. Term. Co.*, 161 I. C. C. 176 (1930),  
230.  
*Wyoming Coal Co. v. Virginian Ry.*, 96 I. C. C. 359; 98 I. C. C. 488  
(1925), 218n, 238-240; 142 I. C. C. 681 (1928), 39n.  
*York Mfrs. Asso. v. P. R. R. Co.*, 73 I. C. C. 40 (1922), 217n; 107  
I. C. C. 219 (1926), 206n.

## INDEX

- Aitchison, Clyde B., Commissioner, 111*n*; denounced by Sen. Glass, 130; lake cargo vote, 178; on Esch, 179; reappointment, 185-6
- Anthracite, 15-6; during the war, 79
- Ashland* rule, 203-9; modification, 210-9, 226-233, 240-1; in lake cargo litigation, 219-226
- Baltimore & Ohio Railroad, in 1912 case, 56; compromise proposals, 127; lake cargo carrier, 202
- Bent, Silas, *Strange Bedfellows*, 147*n*
- Bessemer & Lake Erie R. R., 202, 220, 221
- Bipartisanship, in appointments, 143
- Boileau, John W., 48
- Brainerd, Ezra, Commissioner, 111*n*, 177
- Brandeis, Louis D., 51, 64, 174; Justice, 207, 210, 215, 217*n*.
- Bruce, W. C., Senator, 159, 169*n*, 175*n*, 183
- Burke, James Francis, 104, 155
- Calhoun, W. J., Commissioner, 144
- Campbell, J. B., Commissioner, 111*n*, 164; on Esch, 179; resigns, 189
- Captive mines, 30-1, 91
- Car supply, 81-2
- Chesapeake & Ohio Railway, in 1912 case, 56; control of Hocking Valley Ry., 66; "coal-carrying machine", 106; in 1930 case, 136; lake cargo carrier, 202
- Chilton, J. Matt, 187
- Clark, E. E., Commissioner, 146, 149, 164; on Esch, 179
- Clements, J. C., Commissioner, 144*n*, 151*n*, 155
- Coal Age*, quoted, 62, 104
- Coal reserves, 22
- Commodities clause, 15-6
- Consolidation Coal Co., losses, 28; Fairmont operations, 91
- Consumption of coal, trends in, 25, 86
- Coolidge, Calvin, President, appointments to I. C. C., 149, 161-2, 165, 169, 171-3, 176-8, 180, 184
- Cost of service, in rate-fixing, 46, 57, 235-6, 260
- Cox, F. I., Commissioner, 109, 164-5, 171-3, 176
- Cummins, A. B., Senator, 169*n*, 208*n*
- Daniels, W. M., Commissioner, 149, 164
- Davis, James J., Senator, bill sponsored by, 25; Secretary of Labor, and Jacksonville agreement, 100
- Davis, John W., 155
- Dickinson, John, *Administrative Justice and the Supremacy of Law*, 196
- Dock companies, 96
- Dreiser expedition, 21
- Eastman, J. B., Commissioner, dissenting in 1925 decision, 98-99, 222; on reconsideration, 112, 223-4; dissenting in 1930 case, 138, 225; on Esch, 179; reappointed, 186-8; on *Ashland* rule, 230-1; on relative reasonableness, 240; on competition, 258*n*
- Ellis, Wade H., 48, 174
- Esch, J. J., Commissioner, author of lake cargo decision, 111; denounced by Sen. Glass, 130; reappointment, 121, 178-183; appointment, 164; lake cargo vote, 178; Congressman, 208*n*
- Fairmont, in 1912 case, 61, 63; in 1917 case, 75; rise in 1920, 82; in 1923 litigation, 88, 90; reconsideration, 109; rate readjusted in 1929, 133

- Farrell, P. J., Commissioner, 183-5  
 Fess, Simeon D., Senator, 169, 175, 183  
 Ford, H. J., Commissioner, 149, 151*n*, 172, 180  
 Garfield, H. A., Fuel Administrator, 77  
 Glass, Carter, Senator, denounces I. C. C., 130; on Esch, 183  
 Goff, Guy, Senator, 169, 175-6, 183  
 Good, James W., 155  
 Green, William, 66  
 Hall, H. C., Commissioner, first decision, 97, 220; reconsideration, 104, 105, 111-4; on Esch, 179; resigns, 184; in *Salt Cases*, 214; on sec. 1, 234  
 Hammond, John Hays, Jacksonville agreement, 100  
 Harding, W. G., President, appointments to I. C. C., 149, 151*n*; visit to I. C. C., 157  
 Harlan, J. S., Commissioner, 149, 151*n*, 172  
 Hines, W. D., *War History of American Railroads*, 80  
 Hoch-Smith Resolution, passed, 96; justifies lake decision, 107, 122, 125, 131; interpretation, 247-256  
 Hocking operators, in 1912, 66; in 1923, 90; in 1930, 225  
 Hocking Valley Ry., controlled by C. & O., 66, 202; coal rate to Toledo, 70; in 1930 case, 136  
 Hoover, Herbert, Secretary of Commerce, and Jacksonville agreement, 35, 100; newspaper attack on, 109; President, advises I. C. C., 157; I. C. C. appointments, 186-190  
 Interstate Commerce Commission, jurisdiction over lake cargo rates, 47; special service orders, 83, 85; denounced by Senator Glass, 130; influence on appointments to (table), 149; list of appointees to, 152-3  
 Island Creek Coal Co., profits, 29  
 Jacksonville wage agreement, 35, 100, 118  
 Jones, R. M., appointed to I. C. C., 186  
 LaFollette, R. M., Jr., Senator, 180-1  
 Lake cargo rates, see Appendix  
 Lake cargo shipments, see Appendix  
 Lane, F. K., Commissioner, 57, 190, 204, 223  
 Lee, W. E., Commissioner, 138*n*, 189  
 Lever Act, 77, 80  
 Lewis, E. I., Commissioner, 149, 164, 185  
 Lewis, John L., 34  
 Louisville and Nashville Railroad, enters lake traffic, 70; proposes compromise, 127; lake cargo carrier, 202; in *Ashland* case, 203  
 Luce, R., *Legislative Procedure*, 250*n*  
 McClintic, G. W., Judge, 124 and *note*  
 McKinley, Wm., President, illegal appointment, 143-4  
 McManamy, Frank, Commissioner, 111*n*, 165  
 Mahaffie, C. D., Commissioner, 189, 190  
 Mann-Elkins Act, 45, 116  
 Mellon, Andrew W., Secretary of Treasury, 109, 172  
 Mellon, R. B., before Senate committee, 20  
 Meyer, B. H., Commissioner, 53, 65, 67, 111*n*, 138*n*, 245  
 National Coal Association, regional sales agency plan, 24; number of members, 25  
 National Industrial Traffic League, 182, 185  
 Neey, M. M., Senator, defeated for reelection, 130, 186; on terms of Commissioners, 150; on I. C. C. appointments, 166, 175; on Esch, 179, 182  
 New York Central Railroad, rate reductions, 127; lake cargo carrier, 202  
*New York World*, editorial, 175



- Norfolk and Western Ry., Coal reserves, 23; defends early southern increases, 44, 56-9; lake cargo carrier, 202
- Norman, J. V., 191
- Ohio, lake rates, 45-7, 48, 66
- Parker, John J., Judge, 124
- Pennsylvania Railroad, anthracite carrier, 16; relations to northern operators, 39; stock interest in Norfolk and Western Ry., 41, 44; rate reductions, 127; lake cargo carrier, 202, 221
- Pittsburgh Coal Co., losses, 28; hostility towards Pennsylvania R. R., 39; in *Boileau* case, 50; Cleveland agreement, 85; shut-down and reorganization, 102; stock flurry, 108; Woods counsel for, 173-4; control of Montour R. R., 221
- Porter, C. R., Commissioner, 183-5
- Porter, Stephen G., Congressman, 108
- Railroad Administration, 78, 80
- Reed, David, Senator, 109, 165*n*, 182; on I. C. C. appointments, 166-178
- Reed, James, Senator, speech by, 167*n*; campaign fund committee, 174; opposing Esch, 181-2
- Robinson, Joseph E., Senator, Resolution introduced, 158
- Robsion, John M., Congressman, 93, 156, 166
- Rockefeller, J. D., Jr., before Senate committee, 20; sells W. & L. E. R. R., 105*n*, 221
- Roosevelt, Theodore, President, appointments to I. C. C., 149, 151
- Schall, T. D., Senator, 117
- Schwab, Charles M., 20
- Sectionalism, 14, 37; in Commission appointments, 145
- Senate, investigation of conditions in coal fields, 20, 37, 182
- Slemp, C. Bascom, 158, 172
- Smith, George Otis, 109
- Strikes, coal, 17, 20, 34, 64, 69, 77, 80, 83, 84, 102, 103, 118, 119, 136
- Surplus producing capacity, 23
- Taft, W. H., President, appointments to I. C. C., 149, 151
- Tate, H. M., Commissioner, 188
- Taylor, Matthew, 49*n*
- Taylor, R. V., Commissioner, concurrence in decision, 111*n*; appointment, 168; not reappointed, 186-7
- Temple, H. W., Representative, 176-7
- Tenure, on I. C. C., 150-4
- Traffic World*, quoted, 177, 179, 184
- Underwood, Oscar E., Senator, 162, 165, 168-9, 186-7
- United Mine Workers, in post-war period, 17; relations with operators, 19; growth and decline, 33; Ohio district, 71; Woods appointment, 175
- United States Coal Commission, investigation by, 18, 85; recommendation of, 24, 89, 90, 258
- United States Steel Corporation, coal reserves, 23; captive mines, 30; control of B. & L. E., 221
- Wastes, in coal mining, 29
- Watson, D. K., *The Constitution*, 250*n*
- Watson, James E., Senator, 169, 175, 183, 250*n*
- Wheeling and Lake Erie Railroad, in early lake cargo litigation, 45-7; position in 1923, 92; on reconsideration, 105; stock flurry, 108; lake cargo carrier, 202, 220, 221
- Wilson, Woodrow, President, appointments to I. C. C., 149, 151*n*
- Woodlock, T. F., Commissioner, 111*n*, 113; appointment, 161-3, 165-6, 168; opinion by, 166, 249*n*, 254
- Woods, Cyrus E., counsel for Pittsburgh Coal Co., 50; nomination, 109, 172
- Zoning system, 78, 80

## V I T A

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