

TRANSPORTATION AND POLITICS

A STUDY OF LONG-AND-SHORT-HAUL POLICIES
OF CONGRESS AND THE INTERSTATE
COMMERCE COMMISSION



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FOREWORD

THIS study was first undertaken several years ago under the direction of Professor Henry Trumbower of the University of Wisconsin. The author has found the subject of such great interest that he has revised his original monograph on three different occasions, as changes in materials or interpretation promised profit from additional study. Since the later revisions, including this one, have not been seen by Professor Trumbower, the author is solely responsible for the general direction of the study and the specific conclusions therein.

The monograph disagrees with much expert opinion on the question of whether certain acts of the Interstate Commerce Commission, most noticeably in the transcontinental cases, were in fact legislative and not administrative. However, my purpose in discussing these cases is not to demonstrate that the decisions were wrong, but to point out the evidence that an entirely new note has been struck which, if applied generally enough, will revolutionize regulation.

The consensus of current opinion is probably against the contention. It is highly probable that the courts would refuse to set aside orders of the Commission on the basis of the arguments set forth in this study, if for no other reason, because the practical exigencies of regulation preclude their consideration. So the burden of proof is heavy upon the author to establish his contention that acts which the Commission insists are purely administrative, and which are usually taken for granted to be so, are in reality legislative in nature.

But, if there is any basis for such suggestions as the author makes, the recognition of that fact will do much to clear the ground for constructive legislation by Congress to cover the field which the Commission now feels it must cover by administrative orders. Failure to provide such constructive legislation might lead to the gradual elevation of the Commission to the position of economic dictator, apportioning and allocating economic opportunities among individuals, groups, and localities.

If, as has been held, the true policies of Congress are concealed in a hodgepodge of miscellaneous legislation, rather than in straightforward transportation legislation, it is high time for Congress to come out into the open and assume the responsibility for a broad, constructive transportation policy.

That the contentions of the author have never been argued before the Supreme Court, or charged against the Commission, or seriously

discussed by students of regulation, does not refute them. Examples cited in the text show that many groundless statements have been generally accepted without question and repeated over and over by members of the Commission and others; and yet no one has taken the trouble to check them against the facts to see if the statements are justified. A case in point is the assertion that the *Alabama Midland Case* nullified Sec. 4 of the Act of 1887. Another example is the statement that fourth-section discrimination was the cause of the disappearance of inland water competition. Others will appear in the discussion.

It may well be that the general tendency to take for granted the assumption that the functions of the Interstate Commerce Commission are administrative, rather than legislative, has led students to a less critical analysis of the acts of the Commission than is justified by facts. Accordingly, the author, with the foreknowledge that experts in the field, whose opinion he values highly, challenge his conclusions, presents them herewith for what they may contribute to a general understanding of the whole problem. It is his belief that a careful checking and rechecking of matters which have too long been taken for granted will support his contentions and conclusions.

Eugene, Oregon, Dec. 1939.

CALVIN CRUMBAKER.

On April 9, 1940, after the type for this monograph had been set, the Maritime Commission handed down a decision in Docket No. 514, in which minimum rates were fixed for common carriers in westbound intercoastal commerce, and certain reductions in westbound rates, proposed in Docket No. 534, were ordered canceled. Interesting data on the deplorable state of intercoastal carriers as a result of the competitive regime theretofore in force is contained in the report of the Commission in this case.

June 1940.

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CHAPTER I

RELATION OF POLITICS TO TRANSPORTATION

THIS study, when first undertaken, was designed to cover the changing practices and policies of the Interstate Commerce Commission in regulating long-and-short-haul discrimination as the law unfolded by amendment from time to time. It soon became evident that Sec. 4 of the Act to Regulate Commerce was more than a portion designed simply to control discrimination in which less is charged for a longer haul than for a shorter haul, over the same line, and in the same direction, the shorter being included within the longer. Regulation of long-and-short-haul discrimination under this section was an important part of the broader program of regulation in general, when regulation is understood to mean development and encouragement as well as inhibition, regimentation, and penalization.

The development of transportation in the United States has been largely the result of economic exploitation through direct or indirect political action. Direct political action includes the building of turnpikes, the construction of canals, the financing of railroads, and the establishment of water-carrier services through direct governmental participation. Examples of indirect political action are: permitting the development of for-hire transportation services over highways ostensibly built by the public for other purposes; and the failure and refusal of legislative agencies to provide regulation for certain types of carriers, no matter how pressing the public interest, because of a desire of constituents to exploit such carriers.

The clamor for public encouragement and development of transportation has come from a great variety of interests. It has come from producers seeking cheaper methods of getting their products to market. The settlers in the granger states promoted and encouraged railroad construction for this reason. It has come from those who desire transportation for nonpersonal reasons. "Good roads" associations illustrate this type. It has come from those who expect to set themselves up in the transportation business with capital supplied in part by public agencies. Recently it has come from those who see in the extension or improvement of transportation facilities an outlet for credit which, being released, would reflate the economic structure back to prosperity.

The net result of political development of transportation is difficult to evaluate. There have been serious wastes and losses, as well as

increases in productiveness. The period of development of transportation happens to have been the period of general economic and industrial development and expansion. Whether this economic progress was the result of political stimulation of transportation or the product of our varied and rich economic resources is a matter for dispute.

Whatever may have been the case in the past, it seems quite apparent that the public now faces serious transportation problems, largely because of the past activities of well-meaning political agencies. Business is very conscious of these problems, and is concerned about the part political agencies will play in this solution in the future. As indicated in the body of this study, political activities have resulted in a general plethora of transportation facilities. Few if any carriers can earn fair returns on competitive operations. Nevertheless the average shipper today does not seem to desire the curtailment of political promotion of new services or new extensions of existing services; he continues to look to political agencies for new services at public expense or for an artificial leveling of the rates of existing facilities.

While existing facilities are suffering from lack of business and revenue, new inland water routes, new railroad lines, new highways to parallel railroads, and new subsidies for transportation are proposed by political "godfathers" and "friends" to advance the interests of special transportation agencies or of groups and communities.

In this welter of conflicting transportation interests, the regulatory agencies are subject to the cross fires of groups struggling for such economic advantages as may be meted out in the name of regulation. A nod of the head of a regulating agency may effectively advance the economic interests of one group; a shake of the head may retard them. Small wonder that political control of such agencies should become the goal of groups large enough to possess voting power. It would be remarkable indeed if regulatory agencies were able to keep their objectivity and, pushing political considerations into the background, regulate on the basis of existing law.

The three agencies of the Federal government which share the responsibility for regulation are the Congress, the Supreme Court, and the Interstate Commerce Commission. The burden of responsibility for the success or failure of the regulatory program differs for the three agencies. This discussion will attempt to evaluate the peculiar function and responsibility of each under our existing scheme of government.

The authority and the responsibility of the Supreme Court are definitely limited at any given time by law, which directly or indirectly rests upon Congressional action. Attempts to hold the Court responsible for the shortcomings of regulation by charging that it has been guilty of "emasculatation" or "nullification" of the law have been made by those who speak for the Interstate Commerce Commission, by politicians in and out of Congress, and by responsible students of transportation. But the charge that the Court has prevented regulation of transportation by duly authorized agencies is not supported by the facts of history. True, it has not sanctioned every regulation that the Commission sought to enforce. Nor has its interpretation of the law always been that desired by the more zealous reformers. But this does not justify the statement so often made that the Court has failed to evaluate properly and interpret correctly the true policies of Congress. It may well be that the Supreme Court more nearly than any other agency has correctly interpreted the legislation of a fumbling, groping Congress, forced by public clamor to pass laws which it neither understood nor approved in its collective capacity as a legislative body. When later, after what seemed to be an interminable delay, Congress has come to a better understanding of the problems of regulation, the Supreme Court has given emphatic judicial support both to statutes and to Commission orders. The shortcomings of regulation were not the shortcomings of the Supreme Court, but those of a democracy which could not make up its mind.

The Interstate Commerce Commission, like the Court, is dependent upon existing law. From the very beginning it has shown a desire to carry out both the letter and the spirit of regulatory law as these were interpreted by the more positive advocates of regulation. If the Commission has made mistakes, it has made them through willingness to accept at face value legislation which was really designed to quiet the clamoring partisans of specific proposals. The long record of the Commission shows a consistent desire to protect the shipping public against objectionable practices of carriers.

Upon the more technical question, whether the Commission has always depended for its authority upon existing legislation or has supplied itself with authority by usurping legislative power, the record is not entirely clear. It is safe to say that in the vast majority of cases the Commission has acted in a purely administrative capacity. During the greater part of its history the charge of usurpation of legislative power could scarcely be made against it. However, since the World War, if regulatory statutes alone are considered, there is

some evidence that determination of public policy, rather than administration of existing law, has characterized Commission acts.

This question is particularly pertinent in consideration of the transcontinental cases. What is important here is not the conclusion reached but the methods and principles used in deciding the cases.

In its treatment of these matters the Commission has had little help from Congress. On the contrary, its problem has been complicated in many ways by petty partisan laws and by the methods used by Congressional committees or members of Congress in securing or protecting advantages for constituents. How far shall the Commission go in enforcing the Act to Regulate Commerce, when its orders, otherwise legal, run counter to the provisions of a law purporting to encourage water transportation or to regulate highway carriers? This study attempts to set forth the problems of regulation faced by the Commission, not only from the standpoint of the Transportation Act and its amendments, but from the standpoint of miscellaneous legislation which has been dictated by special interests.

In regulation of carrier competition, the truly pathetic figure is Congress. In the face of a crying need for a broad national transportation policy, Congress has shown nothing more than desultory flashes of understanding, such as that which resulted in the Transportation Act of 1920. In 1920 some of those who are now members of powerful Congressional committees attempted to arouse farmers and others by incendiary statements which incorrectly or falsely presented the purposes or effects of this legislation. Proposed changes in policy, before they can become the law of the land, must run the gantlet of men who have deficient or partisan vision. Small wonder that legislation which has been subjected to the tug of war of blocs and groups should prove to be a hodgepodge of conflicting provisions.

This can be most clearly illustrated by the Congressional reception of the recommendations of the Federal Co-ordinator of Railroads, an officer charged with the duty of preparing and proposing a comprehensive plan for the coordination of transportation. The work of the Co-ordinator largely came to naught because legislators were unable to see the significance of the proposals or because they were unwilling to subject constituents to the loss of special transportation advantages through regulatory control. So a sound national transportation policy was relegated to second place in favor of temporary policies acceptable to local sections and interests. The role of "godfather" and "friend" of special interest was more acceptable to members of Congressional bodies than the role of public representatives seeking to advance public interest "in the large," to borrow a phrase from the Co-ordinator.

Politics, so far, shows only helplessness in the face of these problems. No central coordinated policy has been adopted. Governmental agencies are still being exploited to permit, encourage, develop, or protect superfluous or uneconomic transportation. Intercoastal and inland water carriers are permitted to engage in cutthroat competition which scuttles these carriers and demoralizes the transcontinental railroads and the communities served by them. Pressure groups are still busy seeking further political aid for the development of uneconomic transportation in the name of national defense. Highway carriers for hire are still able to destroy each other and contribute to the crisis in railroad service.

What is needed is regulation in the broad sense, in which the economic values of the several types of transportation to the country as a whole will be the important consideration. The conflicting claims of the several types of carriers can then be adjudicated in the public interest. It may be that the Commission has been trying to throw itself into the breach, while Congress floundered in its crosscurrents of conflicting interests. But ultimately, if economical transportation is ever to be developed, Congress must grasp the significance of the whole problem and work out a broad public policy to be administered by the Interstate Commerce Commission or some similar administrative body. As this is being written, there seems little hope that this will soon be accomplished. Long-time interests will have to suffer from whatever vacillations political expediency seems to dictate. The Commission will have to follow existing law, no matter what its shortcomings, influenced from time to time by sporadic legislation in the interest of pressure groups.

CHAPTER II

NATIONAL REGULATION OF CARRIER COMPETITION: 1887-1906

BEFORE 1870 political attention was centered on the construction and expansion of railroads. Abuses were impressive, but those adversely affected thereby were a minority too hopelessly small to achieve regulation by political action. Particularly irritating was the railroads' discrimination against noncompeting points, their discrimination in favor of certain shippers, and their discrimination between commodities and classes of traffic. Granger laws passed in the early 70's by the several states sought to remedy these abuses. But state legislation was ineffective, partly because of the type of law passed, partly because of the interstate nature of commerce and of transportation, and partly because the period was one of "hard times."

National attention was with great difficulty focused upon railroad problems. The Windom Committee report of 1874 noted several shortcomings of railroads, among them inadequate facilities, extortionate rates, and unfair discrimination. This report recommended government construction of competing railroads, and the development of inland waterways as a cure for the abuses noted.¹ But political regulation of carrier competition was not yet opportune.

In 1886, twelve years after the report of the Windom Committee, the Cullom Committee reported to the Senate that discrimination rather than extortionate rates was the truly serious railroad evil.² Several types of discrimination grew out of carrier competition. One, which has persisted in the face of attempts at public regulation, was discrimination between localities or places. Where the rate was higher for a shorter haul to a nearer point than for a longer haul to a more distant point on the same line, in the same direction, the shorter being included within the longer haul, the discrimination was known as long-and-short-haul discrimination. Typical was the rate by rail from the eastern part of the United States to Spokane, Wash., which was 80 per cent higher than the rate from the same points of origin to Seattle, Wash., several hundred miles farther west on the same lines.

This type of discrimination arose from several causes. For example, the lower rates to Seattle were made to meet low water rates; the rates to Spokane were not affected by water competition. The lower

¹ Sen. Rep. No. 307, pt. 1, 43 Cong., 1st Sess. (1874).

² Sen. Rep. No. 46, 49th Cong., 1st Sess. (1886).

rates to Atlanta, Ga. were based upon the competition of railroads which entered the city from many directions, while the higher rates to intermediate points on individual railroads were based upon the fact that such points had no such competition. In other cases, circuitous lines, attempting to compete with more direct lines, made competitive rates to a terminal to meet the rates made by the more direct lines, while keeping higher the rates to intermediate points where there was no competition. In still other cases, the discrimination rested upon the arbitrary authority of railroad officials, who chose for reasons other than carrier competition to favor one locality at the expense of another.

The Act of 1887, which followed the Cullom Committee report of 1886, was directed mainly at discrimination. Sec. 2 was designed to prevent discrimination in favor of certain persons by declaring it to be unlawful to charge one person more than another for like and contemporaneous services in transportation of a like kind of traffic under substantially similar circumstances and conditions.

Sec. 3, which is still a vital part of the act, made any undue preference to persons, localities, or particular descriptions of traffic unlawful. This section attempted to prevent discrimination which rested solely upon competitive policies of railroad managers.³

Sec. 4, the so-called long-and-short-haul section, dealt with discrimination between places rather than between persons. The section purported to make it unlawful to charge more in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance.⁴

This type of discrimination has always been obnoxious to residents of intermediate territory. After half a century it still exists, though progress has been made in removing the most flagrant abuses. The

³ 24 Stat. 379 (1887). Sec. 3 of the Act to Regulate Commerce provided as follows: "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference 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."

⁴ 24 Stat. 379, 380 (1887). Sec. 4 originally read as follows: "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance . . ." The italicized portion was removed by the Mann-Elkins amendment in 1910.

pages which follow examine the history of regulation since 1887 to see if there has been a clear-cut, consistent policy with regard to carrier competition and long-and-short-haul discrimination. Opinions differ as to what the attitude of the Commission toward long-and-short-haul discrimination under Sec. 4 has really been. Some have charged that the Commission has been unduly liberal in granting relief. Others have held that the Commission has, throughout its history, been overzealous in its attempt to prevent discrimination. The record shows that, until 1906, variations from Sec. 4 were very common in most sections of the United States. During this period the Commission was practically powerless to lay down a definite policy to which it could require carriers to adhere. It nevertheless denounced discrimination, set forth a theory of regulation, and announced a policy to which it would probably have compelled adherence, had it been given the authority to do so.

In the *Spokane Case* of 1892, one of the first cases to come before it, the Commission made two important rulings: (1) that competition of water carriers and of Canadian railroads justified lower rates to the more distant coast points than to the nearer intermediate points; and (2) that railroads could legally make no rate lower than that required to meet such competition. The Commission refused to order the discrimination discontinued, though it did find that Spokane rates were unfair, *per se*. The Commission said:

The commodity rates accepted by the defendants on shipments to their western terminals afford them a margin of profit over the cost of moving the traffic. Their net revenues are increased by engaging in their competitive business. Measured by the income which these roads are entitled to receive upon the large outlay required for their construction, their through rates are not remunerative. Their entire business could not be done on the same basis without financial disaster If the existing intermediate or class rates should be enforced on all shipments to the Pacific, a large portion of the through traffic would go to ocean carriers and the railroads be mainly confined to the business of their local and intermediate points. It is quite suitable, therefore, for the defendants to make through rates which enable them to participate in this competitive traffic, provided the receipts therefrom clearly exceed the added risk and expense involved in handling the business. This we find to be the general fact in respect of the through rates in question.⁵

The significance of the second principle announced in this case should not be overlooked. Rates made by railroads to coast terminals which were lower than necessary to meet water competition and special low rates to coast terminals on articles not actually carried by water were illegal because they created an undue discrimination against intermediate points contrary to Secs. 3 and 4. "Nothing but

⁵ The Spokane Case, 4 I. C. R. 183, 192, 5 I. C. C. 478 (1892).

the stress of unavoidable competition," said the Commission, "can legalize the inequality resulting from higher rates for shorter than for longer hauls."⁶ Parenthetically it should be stated that this principle has never, from 1892 to the present date, been set aside or modified by legislation or by court decision. It was not in any way affected by the *Alabama Midland Case*.

In its second annual report, in 1888, the Commission held that equality and justice should be the rule, even in competition between rail and water carriers:

Undoubtedly the public good is best subserved when all the carriers which the needs of the country require are suffered to do business at reasonable compensation, and when their rates as between all their patrons are relatively as nearly equal and just as under the circumstances they can be made. These are facts which are sometimes overlooked in the making up of railroad rate sheets when water competition is to be taken into account and its legitimate influence allowed for.⁷

In the same report the Commission held that in variations under Sec. 4, the lesser rate made under the stress of competition to the more distant point should stand the same tests of conformity to the public good as the higher rate to the noncompetitive intermediate points. That such terminal rates did not always conform to public good was indicated by the language of the report.

But it can hardly be for the public good that carriers by water should be subjected to unreasonable and excessive competition; they ought, as much as carriers by rail, to be allowed to charge remunerative rates; and the carrier by rail does not therefore make out a complete case, when called upon to justify extraordinary differences between his rates at a point of water competition and at other points, when he shows that at the former he made the very low rates because otherwise he would not have been able to have obtained the business. It may be that when the case is examined in the light of public interest it will be manifest that he ought not to have had it; that in taking it he had pressed the competition to an extreme which, while it harmed the carrier by boat, was harmful also to points on the railroad by reason of the great disparity in rates which it created, and also because of its producing so little revenue that the burden upon other traffic was increased in consequence.⁸

It is interesting that it was held that "excessive competition" created a "disparity," and unjust discrimination which was harmful to other points along the railroad lines. Such rates, because they were lower than they needed to be to meet water competition, placed a burden on other traffic, since manifestly, if the railroads had charged the higher rate possible under the competitive conditions, the increased revenues would have made possible a lighter burden on other traffic. A low rate to meet a low competitive rate already in force

⁶ 4 I. C. C. 183, 192.

⁷ I. C. C. Annual Report (1888), pp. 15-16.

⁸ *Ibid.*, p. 15.

would not necessarily place a burden upon noncompetitive traffic; but a rate cut below such a low competitive rate would be not only unnecessary but burdensome to other traffic.

In 1890, the Commission held that railways were not free to make such rates as they might choose, even if water competition were real; that they had no right to cause undue loss to other towns on the same railway; and that they had no right to drive water carriers out of business. "It was no part of the purpose of the act to drive water carriers out of business by means of rates for transportation by rail relatively unjust as between the patrons of the latter method of carriage. . . ."⁹

In 1897, the Commission reiterated its belief that the act was intended to preserve water competition. Accordingly it would recognize only actual water competition. On the latter point the Commission said:

. . . The mere existence of a water-way which might afford an avenue for such transportation is not enough. There must be actual competition by water and this competition must dictate the rate. A railroad rate so low as to drive water transportation out of existence cannot be justified by showing the possibility of water competition. The law as interpreted by this Commission permits railroads to *meet*, not to *extinguish*, such competition.¹⁰

The Commission, during the first year of its existence, rejected potential water competition as a basis for fourth-section discrimination when it refused the request of Opelika, Ala., the intermediate point, that it be given the rates extended to Montgomery, Ala. and Columbus, Ga., the more distant points. Instead of granting the request, the Commission ordered discrimination at all the points to cease, since extending the lower rates to Opelika would eliminate the discrimination as far as Opelika was concerned, but would leave a discrimination against other intermediate points. Only exceptional circumstances could justify a departure from the requirements of Sec. 4. Actual water competition, not potential competition, must be the controlling factor.¹¹

Among its first acts, the Commission clearly distinguished between rates made by the railroads and rates made by competitors of the railroads. At noncompeting points, the Commission held, the railroad made its own rates. At these points there was no good reason why it should be allowed to charge less for a long haul than for a shorter one. When a rate discriminated in favor of one noncompetitive point and

⁹ I. C. C. Annual Report (1890), p. 46.

¹⁰ Brewer and Hanleiter v. L. & N. R. Co., 7 I. C. C. 224, 236 (1897); see also B. H. Meyer, *Railway Legislation* (1903), p. 197.

¹¹ I. C. C. Annual Report (1888), p. 105.

against another noncompetitive point, the effect of the rate was to build up one place at the expense of another.¹² This type of competition has been termed "market competition." The Commission's attitude towards this competition developed early. In its first report in 1887, it pointed out the fact that long-and-short-haul discrimination, used arbitrarily to build up large merchandising centers, was undue and unjust and contrary to both Sec. 3 and Sec. 4 of the Act to Regulate Commerce.¹³

Moreover, the Commission decided that, if, in the past, such discrimination had been designed to benefit trade centers and if large centers had been set up because of it, there was no authority to perpetuate the injustice. "The statute aims at equality of rights and privileges, not less between towns than individuals, and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them." In its annual report of 1888, the Commission held that the purpose of the Act was to remove such discrimination even if of long standing.¹⁴

While the Commission believed that railroads were to be restricted in varying their rates from the requirements of Sec. 4, it also believed that the section was intended to be used by the railroads in order that they might provide effective competition for water carriers. If they were not allowed to make low charges for the purpose of competing with vessel owners, they must leave vessel owners in possession of the business without any check upon charges, such as competition would afford.¹⁵

The Commission held from the start that it did not have discretionary power to grant special privileges or to suspend Sec. 4 for the benefit of particular interests. Both the Commission and the carriers were bound by the law; under ordinary circumstances a lower rate to more-distant than to intermediate points, made by the railroad, even with the consent of the Commission, would be unlawful.¹⁶

Even if there would be financial advantages to a railroad from a discriminatory rate, the Commission held that Sec. 4 forbade it:

. . . Railroad companies have the right to earn a proper return upon some investment, just what has not been very definitely determined, but in earning it they must operate their property in accordance with the law. The requirement of

¹² Ex parte Koehler, 1 I. C. R. 319, 320 (1887).

¹³ I. C. C. Annual Report (1887), p. 22.

¹⁴ I. C. C. Annual Report (1887), p. 82; I. C. C. Annual Report (1888), p. 105.

¹⁵ Petition of L. & N. R. Co. et al., 1 I. C. R. 278, 285, 1 I. C. C. 31 (1887).

¹⁶ I. C. C. Annual Report (1889), p. 212; Re Iowa Barbed Steel Wire Co., 1 I. C. R. 605, 1 I. C. C. 17 (1887); Re St. Louis Miller's Ass'n, 1 I. C. R. 22, 1 I. C. C. 15 (1887); Re Petition Minn. & N. W. Ry. Co., 1 I. C. R. 73 (1887).

the statute is that they shall not discriminate between localities, and that they shall not charge more for the short than for the long haul. The fact that a railroad cannot earn a return to which it is otherwise entitled, without violating one or both of these statutory provisions, is no excuse for their violation.¹⁷

In general, the Commission interpreted the dissimilar conditions contemplated in the act to be as follows:

(1) Competition with carriers by water which are not subject to the Act to Regulate Commerce.

(2) Competition with a foreign or other railroad not subject to the provisions of the Act.

(3) In rare and peculiar cases, competition between railroads subject to the statute when a strict application of the general rule would be destructive of legitimate competition; for example, a case of competition between a circuitous and a direct route.

The purpose of relief in these cases was to preserve competition, not to abolish it.¹⁸

Among the reasons which were inadequate to justify a variation from Sec. 4, the Commission listed the following:

(1) The fact that the short haul was more expensive than the longer haul.

(2) The fact that the lesser charge for the longer haul had for its motive the encouragement of manufacturers or some other branch of industry.¹⁹

(3) The fact that the rate was designed to build up business in trade centers, or that the lesser charge for the longer haul was merely a continuation of favorable rates under which trade centers or industrial establishments had been built up. A community cannot claim a vested right in a rate which is against the law.

(4) The fact that the long-haul traffic could bear only certain rates. If its inability to bear higher rates rested on competition of

¹⁷ *Brewer and Hanleiter v. L. & N. R. Co.*, 7 I. C. C. 224, 238 (1897).

¹⁸ *Re Sou. Ry. & S. S. Ass'n*, 1 I. C. R. 288, 1 I. C. C. 31 (1887).

¹⁹ It is important to bear in mind that the Commission had no authority until 1920 to prevent the railroad from making abnormally low rates for the purpose of encouraging manufactures, building up trade centers, or destroying rail or water competition, provided it did not discriminate between localities in making the rate. It could well have been through these abnormally low rates, and not through abuse of Sec. 4, that boats were driven from the inland waterways. There is a difference between abnormally low rates made to all alike, or blanketed over wide areas, for the avowed purpose of developing some particular industry or eliminating some particular form of competition, and low rates designed for the same purpose but applied to favor one locality and to discriminate against another. Power to fix a minimum for any competitive rate, given in 1920, provided an adequate control of this problem.

other carriers, the Commission held that there would be justification for variation, but not for any other reason.²⁰

In general it may be concluded that in its early years the Commission did not favor the maintenance of a rate for a longer haul lower than for a shorter haul included within it. It held that the circumstances and conditions obtaining at the more distant point which are relied upon to justify such discrimination must not only be substantially unlike those prevailing at the nearer point, but that the differences must exercise a potent, controlling influence in making the lower rate. This statement was definitely formulated in 1908, two years before Congress made its first attempt to reform Sec. 4 as it stood in the original Act.²¹

The opinions of the Interstate Commerce Commission are not final. The Supreme Court of the United States interpreted Sec. 4 as it stood in the Act of 1887 differently than the Commission. Many restrictions placed upon undue preference and unjust discrimination by the Commission were set aside by the Supreme Court. The Commission appeared to be looking at the economic factors involved in each case, while the Supreme Court was looking at the delegation of authority to the Commission.

In the *Alabama Midland Case*, decided in 1897, the Court held that competition of railways and trade centers, as well as competition of water carriers, must be taken into account in determining whether conditions were dissimilar or not. Where, for any reason, dissimilar conditions existed, the prohibitions of Secs. 3 and 4 against undue discrimination applied with full force. The crux of the case lay in the ruling that in such cases, under Sec. 4, it was not necessary to secure the consent of the Commission before the rates were put in force. The Commission promptly asserted that this decision virtually nullified Sec. 4, since railways could usually show dissimilar conditions. It should be remembered that, as suggested above, discrimination was still unlawful when conditions were similar and presumably when discrimination was out of line with competition. The law was positive in its prohibition, and the Commission could have assumed jurisdiction in cases of unlawful discrimination.²² This important point will be discussed further in Chapter III, since it involves the whole question of regulation through the Commission.

Until 1910, when there was dissimilarity of circumstances and

²⁰ *Re Sou. Ry. & S. S. Ass'n*, 1 I. C. R. 279, 291, 1 I. C. C. 31 (1887).

²¹ *Bovaird Sup. Co. v. A. T. & S. Fe Ry. Co.*, 13 I. C. C. 56 (1908); I. C. C. Annual Report (1908), p. 166.

²² *I. C. C. v. Ala. Midland Ry. Co.*, 6 I. C. C. 3, 168 U. S. 144 (1897).

conditions, railroads had the legal right to make variations without application to the Commission. Whether the Commission was really without power to eliminate unlawful discrimination after the *Alabama Midland Case* is questionable. But regulation was in fact ineffective, and the Commission urged Congress in its annual reports to make the Act conform to what most advocates of railroad regulation agree the Act should have been.

As far as the attitude of the Commission throughout this period is concerned, its own pronouncements support the theory that it was unalterably opposed in principle to unfair and unjust long-and-short-haul discrimination, and that it was positively in favor of preserving all forms of competition among carriers. The Commission's attitude appears to have been consistent throughout the period, notwithstanding the fact that interpretations of the Act of 1887 by the Supreme Court made it impossible for the Commission to put into effect rulings which it was prepared to make in enforcing the law as it understood it.

A great deal of effort has been spent, probably uselessly, in the attempt to fix the responsibility for the ineffectiveness of regulation in this period. Some construe the liberality of the orders of the Commission into a partisan interest in the railroads as competitors of water carriers. Others choose to refer to the "emasculatation" of the Act to Regulate Commerce by the Supreme Court, seemingly forgetful of the fact that no court can remove power that has never been conferred. It requires a strong imagination indeed to permit one to believe that the Congress of 1887, composed of persons who held widely divergent opinions as to the propriety of regulation, had ever passed or attempted to pass a law that gave real power to the Commission. It is easier to believe that the Act to Regulate Commerce was never anything more than a gesture of Congress of the type that is now so common. The decisions of the Court were probably much closer to the real purposes of majorities in both houses of Congress in the Act of 1887 than were the interpretations of the Commission. The fact that there was no interference by the Court when Congress later made a sincere attempt to provide a regulatory law with real powers supports this conclusion.

CHAPTER III

CARRIER COMPETITION AND MARKET COMPETITION

IT will be noted that, in the list of approved bases for fourth-section relief set out by the Interstate Commerce Commission in 1887, as outlined in the preceding chapter, there was no mention of market competition, either directly or indirectly. At least two of the bases rejected by the Commission as inadequate justification for fourth-section relief involved what was to be known as market competition in the later literature of the Commission.

Frequent reference has been made to market competition in Commission opinions. It is reasonable to suppose that the continued use of a concept in arriving at decisions has some relationship to the conclusions reached. There appears to be a division in the Commission over the matter.

One group represented by Mr. Eastman seems to think market competition an important matter. This is evident from opinions in which he may be identified. For example, in his dissenting opinion in the *Wisconsin Paper Cases*, he said :

The relief here granted is based upon what is called market competition. There is no carrier competition between the northwestern mills and New Orleans which makes it necessary to depress the rate, but other producing sections can reach the New Orleans market at less cost, and therefore it is proposed to reduce the rates from the northwestern mills so that they, too, can sell in this market We have discretion to grant or deny this relief, and in my opinion it ought to be denied. Indeed, I think that we ought in all cases to deny relief where 'market competition' is offered as the justification.

The difficulty with market competition is its too pervasive character. It rarely is the case that a consuming market can be reached at equal cost from all points of production. Hence this excuse for fourth-section relief may be invoked almost at will¹

Commissioner Eastman in the House Hearings on the Pettengill Bill, in 1937, said, ". . . the policy of the Commission is much more liberal than the view I take. It has granted relief on account of market competition in many cases."²

In the transcontinental cases of 1922 and 1926, Mr. Eastman did not note dissent, and thereby presumably expressed his approval of the opinion of the majority. It is an interesting matter of speculation whether he dictated the statements which disposed of those cases. In the case of 1926 this statement appears :

¹ Paper and Paper Articles to New Orleans, 88 I. C. C. 345, 352 (1924).

² House hearings on H. R. 1668, 75th Cong., 1st Sess. (1937), p. 478.

The relief sought is based primarily on market competition. Because Pittsburgh enjoys certain rail-and-water rates on iron and steel to the Pacific coast, the western carriers are proposing all-rail rates, not from Pittsburgh, but from Chicago, approximately the same as rail-and-water rates from Pittsburgh, and are blanketing those rates as to origin territory as far as the Colorado common-point line³

This case was decided according to the reasoning found in the dissenting opinion of Mr. Eastman in the *Paper Cases* mentioned above, and it seems reasonable to conclude that, even if he did not write this portion of the opinion, the sentiments expressed here must have been controlling in his mind. Sentiments expressed with such finality by one of the outstanding members of the Commission must lend some color to a theory that market competition is a factor in deciding fourth-section cases.

But a layman, searching through a Commission opinion for the real basis of the decision, would be unable to see any such factor as market competition. Different types of market competition are to him nothing more nor less than legal or illegal carrier competition. It may be that an unfortunate misuse of words seriously confuses real issues in important cases.

At times the Commission has shown a realization that market competition is usually closely associated with competition of carriers, as is indicated in a decision handed down after the amendment of 1910:

Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads. The whole situation must be considered by us in passing upon these applications.⁴

Unfortunately the Commission does not adhere to this concept of the identity of carrier and market competition. A study of a large number of cases in which the Commission has used the term "market competition" shows that two distinct types of market competition are recognized. These two types, known as "competition of markets of supply" and "competition of markets of distribution," were set forth in the readjustment of the basing-point system in the Southeast in 1910. The Commission said:

The two forceful reasons that induced the reductions at Columbus were the competition of markets of distribution and the competition of carriers

³ *Commod. Rates to Pacific Coast Terminals*, 107 I. C. C. 421, 436 (1926).

⁴ *City of Spokane v. N. P. Ry. Co.*, 21 I. C. C. 400, 414 (1911).

servicing other markets of supply. We have held that the competition between markets of distribution does not constitute a justification for the maintenance of lower rates to a more distant than to an intermediate point. The competition of carriers serving other markets of supply does constitute in our opinion a justification in some instances for making lower rates to more distant than to intermediate points, when it is found—

First, that the route from one market is under material disadvantage as against that from another,

Second, that the line seeking relief is meeting consistently at all points the competition against which relief is sought⁵

The two meanings of market competition are well illustrated in the analysis by the Commission of the competitive conditions at Montgomery and at Birmingham, Ala., in the case above cited.

Montgomery, an example of competition of markets of supply, is located on the Alabama River, a waterway navigable the year round. It has developed into an important trade center with routes by water, rail, or rail-and-water from all the important centers of production and distribution. It had long been a basing point with lower rates than were given to cities lying between it and the several sources of supply.

In 1914, the Commission found regular boat service on the river between Mobile and Montgomery. Steamship rates to Mobile and river-boat rates to Montgomery made lower combination rates than normal all-rail rates from New York, Ohio River points, or New Orleans. A large portion of the business to Montgomery was handled by boat. If railroads were to compete, rail rates to Montgomery would have to meet water rates and be lower than normal rates to intermediate points where there was no water competition. Many of these lower rail rates had been approved by the Commission after taking all the circumstances of transportation into account.

Statements of the Commission indicate that the preferential rates permitted at Montgomery rested upon two bases. The first was the competition of rail and water carriers. The second was competition of markets of supply, with New Orleans, New York, Ohio River points, and related marketing points, seeking through fourth-section rates a share of the business at Montgomery. This type of competition, in which the several carriers serving different markets of supply seek to secure a portion of the total business at a common market, was held and has since been held to justify fourth-section relief under certain circumstances.

The competition described as unlawful competition of "markets of distribution" is well illustrated by rates to Birmingham, Ala.,

⁵ Fourth Section Violations in the Southeast, 30 I. C. C. 153, 279 (1914).

which in 1914 were lower than to intermediate points on goods shipped from New York, New Orleans, the Ohio River, and related points. Birmingham did not have water competition, though it had superior railroad facilities. The competition upon which it relied to justify variation from Sec. 4 was described as competition of carriers, competition of rival markets of production, and competition of rival markets of distribution.

Competition of rail carriers resulted in low rates to Birmingham from the several centers of production and distribution, largely, the Commission held, "to keep the rates to Birmingham so adjusted as to permit the distribution of merchandise from that point in competition with Montgomery." Carriers entering Birmingham from the east and north met the rates from the west to secure some of the traffic. The Commission could find no basic disadvantage under which any of the carriers serving the many sources of supply of goods competed with any other carriers, with the possible exception of one circuitous route. Accordingly, it held:

The competition at Birmingham with Montgomery as a distributing center is not a justification for reducing rates thereto lower than to intermediate points. Montgomery is entitled to whatever advantage its natural transportation facilities have induced, and the desire of Birmingham to compete with Montgomery in common territory is nothing more than can be said of many other points, some of them intermediate to Birmingham.⁶

It is important here to note that the Commission did not say that the competition of the six railways serving Birmingham *could not* under some conditions have justified relief. If the railroad from the west, for example, enjoyed natural advantages, which enabled its normal rates to be lower than those from other centers, there would have been a ground upon which all the other railroads might have asked fourth-section relief to meet the competition at Birmingham. But the Commission found that the railroads in general were competing upon a fairly equal basis, and that all of them were unduly depressing their rates at Birmingham and discriminating against intermediate points for the sole purpose of enabling the merchants of that city to compete in price with those of Montgomery. Upon this basis the Commission refused to allow the discrimination to neutralize the natural advantages of Montgomery.

Whether one would choose to designate the competition at Montgomery as market competition or carrier competition will depend entirely upon what interests are to be emphasized. If the interests of

⁶ Fourth Section Violations in the Southeast, 30 I. C. C. 153, 316 (1914).

carriers are to be emphasized, the term could be "carrier competition" for carrier competition is present. If the interests of the producers in competing industrial centers are to be emphasized, the term might be "competition of markets of supply." A third possibility exists when carrier competition could be carried on on a fairly equal basis but distributors demanded abnormally low discriminatory rates to put their goods into a given competitive market; then the term would be "competition of markets of distribution."⁷

Two hypothetical cases might illustrate the Commission's usage with regard to market competition after the *Alabama Midland Case*. One hypothesis will picture the discrimination which would have been legal after the *Alabama Midland Case*, and the other the discrimination which would have been as unlawful immediately after that decision as it would be at the present time.

In this hypothetical case, which resembles the situation at Montgomery in 1898, let it be assumed that a railroad enters a marketing point *M* from some point in the west, *W*, another from the north from point *N*, and a water carrier from the south from point *S*.

In this case it is assumed that the water carrier from the south had some advantage as to location or operation which justified a rate of 80 cents per hundred, while railroads from the north have a normal rate of \$1.00 per hundred, and railroads from the west a normal rate of 90 cents per hundred.

The *Alabama Midland Case* said that under such circumstances railroads from *N* and *W* could meet the 80-cent rate by fourth-section variations without application to the Commission, and without lowering rates at intermediate points. In other words, railroads could use their own judgment and pleasure in discriminating against intermediate points.

It is much more difficult to illustrate competition which was still illegal in spite of the *Alabama Midland Case*. Yet, contrary to popular opinion, many competitive rates were illegal. Let it be assumed that as at Birmingham, a railroad operates from point *W* to marketing point *B*, on a rate of 80 cents per hundred, although its normal rate

⁷ For additional cases involving market competition see the following: Grand Rapids Paster Co. v. Lake Shore and Mich. Southern Ry. Co., 41 I. C. C. 1 (1916); Coal and Coke from Kentucky, Alabama, and Tennessee, 151 I. C. C. 543 (1929); Sugar Cases of 1933, 195 I. C. C. 127, 158 (1933); Iron and Steel to Texas Ports, 206 I. C. C. 249 (1935); Coal to St. Louis District, 198 I. C. C. 603 (1934); Limestone to North Carolina, 210 I. C. C. 635 (1935); Machinery and Machines from the South, 213 I. C. C. 189 (1935); Iron and Steel to Corpus Christi, Texas, 215 I. C. C. 143 (1936); Newsprint Paper to Central and Trunk Line Territory, 215 I. C. C. 191 (1936); Sirup and Molasses from South and Southwest, 215 I. C. C. 205 (1936); Salt from Grand Saline, Tex., 215 I. C. C. 511 (1936).

would be \$1.00 per hundred, and that it discriminates against intermediate points in making the rate; and that other railroads, from point *N* and from point *S*, with a normal rate of \$1.00 per hundred, made a rate of 80 cents per hundred to meet the rate from the west, at the same time discriminating against intermediate points.

The assumption is that the railroad between *W* and *B* did not have an advantage over the railroad between *N* and *B* or that between *S* and *B*, that the normal rate of each of the three roads would be the same, \$1.00 per hundred. If the rate at *B* were lowered from \$1.00 per hundred to 80 cents on railroad *W* to *B* without a corresponding reduction at all intermediate points on the railroad, an unlawful discrimination would result. The rates would be unlawful, regardless of whether the purpose was to build up the railroad's business and revenues, to enable merchants of *B* to meet prices made by merchants of competing wholesale market *M*, or to enable manufacturers at *W* to secure *B* as its market at the expense of producers at points *N* and *S*. For any of these reasons the competition, which should be dubbed competition of markets of distribution, would have been unlawful in 1887, in 1897, and today. If it were unlawful for the railroad from the west to lower the rate, it would be equally unlawful for railroads from the north or from the south to meet the illegal rate.

It has never been agreed just what the status of market competition was from the *Alabama Midland Case* until the amendment of 1910. It has been customary to dispose of the matter by a statement that, through the *Alabama Midland Case*, the Supreme Court dealt a "death blow" to the Commission's power to regulate long-and-short-haul discrimination.⁸

A recent writer—apparently unwilling to accept such generalizations concerning the *Alabama Midland Case* for the reason that in that case the Court noted limits to discrimination, even where competition was present—concluded that the true death blow came in 1901 in the *East Tennessee, Virginia, and Georgia Case*. The Court in this case seemed to say that competition, even railroad competition, which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute. Lifted out of context this statement might be understood to mean that competition of markets of distribution or competition of markets of supply would both be beyond the reach of regulation by the Commission because of dissimilarity of conditions.⁹

⁸ Jones, *Principles of Railway Transportation* (1924), p. 228.

⁹ Locklin, *Economics of Transportation* (1935), pp. 545-6; *East Tenn., Va., and Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1, 12 (1901).

Though these conclusions on these two cases are widely held, they are both in error, as far as the legality of discriminatory rates is concerned. This is shown by the fact that regulation of the long-and-short-haul has been revolutionized since these cases were decided, although no change whatever in the legal definition of unjust and undue prejudice and discrimination has been made. The law defining the terms is now precisely what it was in 1887, in 1897, and in 1901. The gist of the Court's decision in both cases was merely that all forms of competition must be considered in deciding (1) whether a carrier could establish rates without consulting the Commission and (2) whether discrimination and prejudice were unjust and undue.

The Court did not say that the mere presence of some kind or some degree of competition would legalize any kind or any degree of discrimination convenient to railway managers. This, unfortunately, is precisely the meaning which commentators have been inclined to read into the decisions of the Court. Instead, the Court made it plain in each case that the degree of discrimination in each competitive rate was governed by the type and degree of carrier competition present.

There can be no doubt that discrimination of the kind present in the second hypothetical case would have been illegal at all times from 1887 down to the present time. What is involved here is nothing more or less than the legal definition and interpretation of the terms "undue" and "unjust" when applied to prejudice and discrimination. Since conditions of transportation as between the points of origin, *W*, *N*, and *S*, are all essentially similar, a discriminatory rate made by railroad *W* to secure business would be illegal, and any rate made by railroads *N* and *S* to meet the illegal rate from *W* would likewise be illegal. The essential difference between the first and the second hypothetical case lies in the fact that in the first there was an actual advantage enjoyed by one carrier which the others had a right to meet. In the second case, there was no such advantage; competitive rates were made arbitrarily.

That the degree of competition controls the degree of discrimination in rates was brought out many times by both state and Federal courts, before and after the law was amended in 1910. A Missouri court said:

It needs neither a statute nor a constitutional provision to make unjust discrimination unlawful, for such discrimination was forbidden by the common law . . . Arbitrary discriminations alone are unjust; if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination . . .¹⁰

¹⁰ *State v. M. K. T. Ry. Co.*, 172 S. W. 35, 40 (1914).

The Supreme Court of the United States was equally clear in pointing out, not only that circumstances and conditions could justify discrimination, but that the competition must produce a "substantial and material effect upon traffic and rate making."¹¹

In the *Behlmer Case* the Court said significantly, ". . . we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3rd and 4th sections."¹²

Even the *Alabama Midland Case*, which is usually given credit for destroying the effectiveness of Sec. 4, said :

But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts when it is charged that such action has resulted in rates unjust and unreasonable, or in unjust discriminations and preferences.¹³

The *East Tennessee, Virginia, and Georgia Case* referred to above appears to confirm competition as a factor limiting discrimination, although the case itself did nothing more than challenge the administrative powers of the Commission. The issue involved was not the legality of the long-and-short-haul rates which discriminated against Chattanooga, Tenn., the short-haul point, and in favor of Nashville, Tenn., the long-haul point, but the procedure by which the rates were put into effect. The railroad insisted upon the right to act upon its own motion. The Commission insisted that, as a matter of procedure, application must be first made to it. It did not allege or imply that the rates were illegal, or that it might not, upon application, permit the identical rates under challenge.¹⁴

The Commission recognized the peculiar position of Nashville, which gave it the rates of the official classification district on shipments from the north which were lower on certain goods than rates in the southern classification district. It did not challenge the legality of these rates. It did not deny that railroads running from the south through Chattanooga to Nashville must meet the rates from the north or lose the traffic at that point. It did not assert that the higher rates at Chattanooga were unreasonable *per se*. There was nothing in the Commission's case that asserted that Chattanooga suffered unfair or unjust discrimination or prejudice. The Commission merely said that, since the discrimination arose out of rail transportation instead of water competition, it was under the jurisdiction of the Commission

¹¹ *Tex. & Pac. R. R. Co. v. I. C. C.*, 162 U. S. 197, 211 (1896).

¹² *L. & N. R. R. Co. v. Behlmer*, 175 U. S. 648, 674 (1900).

¹³ *Alabama Midland R. Co. v. U. S.*, 168 U. S. 144, 173 (1897).

¹⁴ *East. Tenn., Va., and Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1 (1901).

and that permission to file discriminatory rates must be secured before the rates were put into effect.

The Court said nothing more than that competition, the existence of which was admitted by all parties and the legality of which was challenged by no party, in and of itself made a dissimilarity of circumstances and condition which authorized the railroad to make discriminatory rates on its own motion, without application to the Commission. The *East Tennessee Case* did not in any way affect the legality of fourth-section discrimination; it dealt entirely with the administrative powers of the Commission. As a result of this case, the *Alabama Midland Case*, and other cases, discrimination under Sec. 4 was neither more nor less legal. The net result was to establish the powers of the Commission as powers of review in any case in which competition, whether of markets or of carriers, established dissimilarity of conditions. The Commission, however, had sought to exercise original jurisdiction in cases which involved what might be termed market competition.

CHAPTER IV

NEW "TEETH" FOR THE FOURTH SECTION: ACT OF 1906

THE administrative impotence of the Commission, which was exposed by these fourth-section cases, was in reality no more apparent in these cases than in those involving all other sections of the act. This was brought out clearly by Dr. Clyde B. Aitchison in a recent discussion of the evolution of the Interstate Commerce Act, in which he said:

The initial period, while marked from the first by vigorous and generally useful efforts to enforce the new Act, developed into an anticlimax as the courts in successive decisions brought to light major defects in both the substantive and procedural structure of the Act. This series of adverse holdings culminated in 1897 with decisions of the Supreme Court that the Commission had no power to prescribe a rate to control in the future although it might pass upon the past reasonableness of a rate, and that railway competition alone was sufficient to justify a higher rate to shorter than to longer distance points. The Commission frankly recognized its impotence. It reported to Congress that . . . it had ceased to be a regulating body.¹

Two features of this statement are significant. First, the Commission felt that it had ceased to be a regulatory body because of the "major defects in both the substantive and procedural structure of the Act" brought out but in no sense caused by the Supreme Court decisions cited. Dr. Aitchison seems to assert that the Court "unmasked" the Act, not, as is so often charged, that the Court "emasculated" it. The second significant point is found in the words, "that railway competition alone was sufficient to justify a higher rate to shorter than to longer distance points." These words must be read with care. It is not to be assumed that Dr. Aitchison is asserting that railroad competition of *some* degree would legalize discrimination of *any* degree. The words merely mean that, from a procedural standpoint, the railroad was relieved of the necessity of obtaining Commission approval before giving legal effect to discriminatory rates.

Whether weakness arose from Sec. 4 or from the general provisions of the Act is not a mere academic question, though it may not have appeared important in the early years of the Commission. It is a very important matter today, when highway and water carriers are vigorously urging the retention of certain features of Sec. 4 as essen-

¹ Clyde B. Aitchison, "The Evolution of the Interstate Commerce Act: 1887-1937," *George Washington Law Review*, vol. 5 (Mar. 1937), p. 289; cited by Dr. Aitchison: *I. C. C. v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479 (1897) (Maximum Rate Case); *I. C. C. v. Alabama Midland Ry. Co.*, 168 U. S. 144 (1897).

tial to their continued existence. The pressing question is whether Sec. 4 is vital to the control of long-and-short-haul discrimination or whether it is a useful device in the allocation and reallocation by the Commission of transportation opportunities among competitors.

If it could be demonstrated that the original weakness of the Act to Regulate Commerce was not in Sec. 4 at all, but in the administrative and enforcement sections, it would be reasonable to assume that renewed strength of the Act came not in 1910 with the amendment to Sec. 4, but in 1906 with the general amendment of the Act. This conclusion would require a complete reappraisal of what was accomplished by the changes made in Sec. 4 in 1910, and a new realization of what was conferred upon fourth-section regulation in the Act of 1906. The latter is as habitually underestimated by students of fourth-section regulation as the former is overestimated.

Prior to 1906 Congress passed three acts affecting railroads. No evidence of a realization of the necessity for rigorous regulation appears in these acts. The Act of 1887 was very general and the Acts of 1889 and 1891 made only perfunctory changes. The Act of 1906, popularly called the Hepburn Act, made such significant changes that it has been said that the Act of 1906 found the Interstate Commerce Commission an advisory commission, without power to issue or enforce orders, and left it a mandatory commission, with strong powers to investigate and to issue enforceable orders.² Thereafter, the courts from the lowest Federal court to the Supreme Court of the United States recognized the changed status of the Commission and of regulation. They now recognized the duty, imposed upon them by the Act of 1906, to enforce the orders of the Commission, subject only to judicial review as to matters of law and evidence.

The Hepburn Act extended the jurisdiction of the Commission as set forth in Sec. 1, but made no significant change in the requirement of just and reasonable rates. Secs. 2, 3, and 4, all dealing with discrimination and prejudice, were not directly touched by the new Act. Sec. 6 was affected, since thirty days' notice was now required for a change in rates, either an increase or a decrease, whereas the former law had provided a notice of ten days for an increase in rates and of three days for a decrease in rates. Presumably this would affect the publishing of rates to meet competition.

It is only when the text of Secs. 14, 15, and 16 of the Act of 1887 is compared with these sections in the Act of 1906 that real changes in regulatory authority can be discerned.

² M. G. Glaeser, *Outlines of Public Utility Economics* (1927), p. 271.

Sec. 14, in 1887, provided that the Commission should make investigations, under certain conditions, report in writing the findings of fact upon which its conclusions were based, and make recommendations as to what reparation, etc., if any, should be made. The Act did not provide binding force for any finding and order, or command common carriers to obey any recommendation. The findings of the Commission were only *prima facie* evidence of fact in judicial proceedings involving the Commission's activities.

The Act of 1906 made similar provisions for investigation and for reports in writing of the conclusions of the Commission, but it added a provision for the issuance of a decision. If damages were awarded, the Act provided that the report must include findings of fact upon which the award was made.

In Sec. 15 the Act of 1887 had provided that, if the Commission found upon investigation that anything had been done or omitted to be done, in violation of the provisions of the Act by any common carrier, "It shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violations, or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the Commission." Thereafter the Commission records were to indicate whether the carrier had desisted from the practices or made the required reparation. It would be hard to find a more futile provision in an act that pretended to provide regulation.

Under the Act of 1906 the Commission was authorized, empowered, and enjoined to hold hearings upon complaint as to rates, charges, discrimination, prejudice, or acts otherwise in violation of the provisions of the Act; to determine and prescribe what will be just and reasonable maximum rates or charges; to decide what regulations or practices shall be just and fair and reasonable; to make orders that carriers cease and desist from the violation of the provisions of the act. All orders, except for the payment of money, "shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended, modified, or set aside by a court of competent jurisdiction."

The Act of 1887 had provided that, when carriers ignored the recommendations of the Commission, the Commission or any person or any company interested in the recommendation might petition a circuit court of the United States, sitting as a court of equity, to

order stopped such violation of the law or disobedience to the recommendations of the Commission. The section provided that the court should have power to hear and determine the matter and to serve proper notice upon the carrier affected. The findings of the Commission were *prima facie* evidence only. The court was given authority, apparently discretionary, to issue a proper order to restrain disobedience, or to enjoin obedience on the part of the carrier.

In the Act of 1906, Sec. 16 gave to Commission orders the force and effect of law. It was no longer necessary for the Commission to secure an order of the court to make its orders binding upon carriers. The Act said, "It shall be the duty of every common carrier, its agents, and employees, to observe and comply with such orders so long as the same shall remain in effect." Violations were punishable by forfeiture to the United States of \$5,000 for each offense. Each distinct violation and each day of a continuing violation were considered separate offenses.

This language means that the orders of the Commission were made binding upon carriers as soon as they were lawfully issued. While disobedience was punishable by legal recourse to courts, as in the previous period, it was not necessary to have recourse to a court to put a Commission order into effect. Violation of a Commission order became the same in nature as the violation of an act of Congress, as far as punishment was concerned.

It would seem that all discretion of the court in commanding obedience and enjoining disobedience was also eliminated in 1906. Sec. 16 now said that the court *shall* prosecute inquiries and investigations and that the court *shall* enforce obedience by lawful orders and by proper process. In the Act of 1887 it had said "it shall be lawful" for the court to issue writs of injunction or other proper process to restrain disobedience and enjoin obedience.

The Supreme Court recognized the change made by the Act of 1906 and commented upon its significance in a number of cases. In the *Baltimore and Ohio Case* handed down in January 1910, five months before the Mann-Elkins Bill became the amendment of 1910, the Supreme Court through Mr. Justice White said:

Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result.

Sec. 14, in 1887, provided that the Commission should make investigations, under certain conditions, report in writing the findings of fact upon which its conclusions were based, and make recommendations as to what reparation, etc., if any, should be made. The Act did not provide binding force for any finding and order, or command common carriers to obey any recommendation. The findings of the Commission were only *prima facie* evidence of fact in judicial proceedings involving the Commission's activities.

The Act of 1906 made similar provisions for investigation and for reports in writing of the conclusions of the Commission, but it added a provision for the issuance of a decision. If damages were awarded, the Act provided that the report must include findings of fact upon which the award was made.

In Sec. 15 the Act of 1887 had provided that, if the Commission found upon investigation that anything had been done or omitted to be done, in violation of the provisions of the Act by any common carrier, "It shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violations, or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the Commission." Thereafter the Commission records were to indicate whether the carrier had desisted from the practices or made the required reparation. It would be hard to find a more futile provision in an act that pretended to provide regulation.

Under the Act of 1906 the Commission was authorized, empowered, and enjoined to hold hearings upon complaint as to rates, charges, discrimination, prejudice, or acts otherwise in violation of the provisions of the Act; to determine and prescribe what will be just and reasonable maximum rates or charges; to decide what regulations or practices shall be just and fair and reasonable; to make orders that carriers cease and desist from the violation of the provisions of the act. All orders, except for the payment of money, "shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended, modified, or set aside by a court of competent jurisdiction."

The Act of 1887 had provided that, when carriers ignored the recommendations of the Commission, the Commission or any person or any company interested in the recommendation might petition a circuit court of the United States, sitting as a court of equity, to

order stopped such violation of the law or disobedience to the recommendations of the Commission. The section provided that the court should have power to hear and determine the matter and to serve proper notice upon the carrier affected. The findings of the Commission were *prima facie* evidence only. The court was given authority, apparently discretionary, to issue a proper order to restrain disobedience, or to enjoin obedience on the part of the carrier.

In the Act of 1906, Sec. 16 gave to Commission orders the force and effect of law. It was no longer necessary for the Commission to secure an order of the court to make its orders binding upon carriers. The Act said, "It shall be the duty of every common carrier, its agents, and employees, to observe and comply with such orders so long as the same shall remain in effect." Violations were punishable by forfeiture to the United States of \$5,000 for each offense. Each distinct violation and each day of a continuing violation were considered separate offenses.

This language means that the orders of the Commission were made binding upon carriers as soon as they were lawfully issued. While disobedience was punishable by legal recourse to courts, as in the previous period, it was not necessary to have recourse to a court to put a Commission order into effect. Violation of a Commission order became the same in nature as the violation of an act of Congress, as far as punishment was concerned.

It would seem that all discretion of the court in commanding obedience and enjoining disobedience was also eliminated in 1906. Sec. 16 now said that the court *shall* prosecute inquiries and investigations and that the court *shall* enforce obedience by lawful orders and by proper process. In the Act of 1887 it had said "it shall be lawful" for the court to issue writs of injunction or other proper process to restrain disobedience and enjoin obedience.

The Supreme Court recognized the change made by the Act of 1906 and commented upon its significance in a number of cases. In the *Baltimore and Ohio Case* handed down in January 1910, five months before the Mann-Elkins Bill became the amendment of 1910, the Supreme Court through Mr. Justice White said:

Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result.

... Now, it cannot in reason be questioned that among the purposes contemplated in the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the Commission, made in the exertion of the authority conferred upon that body. To that end, one of the amendments, section 4 [of the act of 1906] gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be *unduly prejudicial and unjustly discriminatory, to correct the same by its order*, which order should have effect within the period fixed in the statute, and to enforce these provisions penalties and forfeitures are provided. . . .⁴

The words of the Court seem to indicate that, even if Sec. 4 had not been amended in 1910, the increased administrative powers given the Commission in 1906, and later in 1920, would, after the Commission had adjusted itself to its new powers, have effectively controlled all long-and-short-haul discrimination. Most of the cases settled by the Supreme Court came after the amendment of 1910; but it does not follow that the basic powers exercised in long-and-short-haul regulation were conferred on the Commission in the Act of that year. Correction of existing discrimination came largely under administrative powers granted in 1906. While the shift of initiative from the railroads to the Commission in 1910 simplified the procedure for new applications for relief, it had slight effect upon existing discrimination. It is doubtful whether the amendment of 1910 took on any great significance until after the World War. The transcontinental cases of 1922 were the first important cases in which the initiative of the Commission, rather than the increased administrative powers of 1906, was significant. In the cases of 1922, and in many cases which have followed, the Act of 1910 has been important for the reason that, under it, the Commission can assume legislative functions and treat Sec. 4 as its authorization to deny or permit relief upon its idea of what will best serve public policy. This point will be discussed at length in another chapter.

The Act of 1920 made further changes, both in Sec. 4 and in the general powers of the Commission. In discussions of discrimination, emphasis is usually put upon changes in Sec. 4, without a proper realization that the new power to fix minimum rates for specific services was probably the most effective check ever put upon Sec. 4, especially with regard to market competition in all its forms.

After 1920 the Commission could have set aside the abnormally low discriminatory rates at an interior basing point such as Birmingham, thereby eliminating, not only the long-and-short-haul discrim-

⁴ *B. & O. R. Co. v. U. S.*, 215 U. S. 481, 498, 499 (1910). Italics mine.

ination along the line of the railroad first initiating the discrimination, but upon all other lines meeting its competition. The minimum-rate power could have solved the problems of Chattanooga in its conflict with Nashville,⁴ had the case arisen after 1920.

After 1920 authority to control carrier competition reposed in at least three diverse provisions of the regulatory law, as follows:

(1) The flat declaration of the law that unjust and undue discrimination and prejudice shall be unlawful and the provisions of the law for enforcement of the prohibitions of the Act.

(2) The provisions of Sec. 4 which have been designed to permit fourth-section discrimination where the same is lawful, except, as in later years, where in special cases the Commission believes that public policy requires a denial of relief.

(3) The provisions which empower the Commission to fix minimum rates. This power would be very important in controlling competition if it were extended to cover all carriers. It alone could control competition of all carriers, provided the persons affected, and the public, were willing to accept the judgment of the Commission as to sound public policy concerning the proper distribution of traffic among carriers.

⁴ East Tenn., Va., and Ga. Ry. Co. v. I. C. C., 181 U. S. 1 (1901).

CHAPTER V

MORE POWER TO THE COMMISSION: ACT OF 1910

IN 1910, Congress amended Sec. 4 by omitting the words, "under substantially similar circumstances and conditions," so that the Act as amended declared that the charging of less for the longer than the shorter haul was prohibited in all cases, except when the Commission, after investigation, granted permission for the lower charge for the longer haul.

The section as amended, taken by itself, appeared to grant wide discretionary power to the Commission. The Commission, however, held that Sec. 4 could be interpreted only in the light of other sections of the Act, notably Sec. 3, which flatly prohibited, not all discrimination and prejudice, but unjust discrimination and undue prejudice. After the amendment, as the cases discussed in the following pages will show, a lower rate for the longer haul was permissible if the discrimination and the prejudice were not undue and unjust as the meaning of these terms was established in cases before 1910. However, after 1910, any discrimination against the intermediate point must be authorized by the Commission even if there was no violation of Sec. 3.

In spite of the feeling against the railroads and in spite of vigorous insistence by certain western representatives that Congress adopt a rigid long-and-short-haul clause, Sec. 4 was retained in principle. The Commission itself had never in its history endorsed a rigid Sec. 4 which would make all discrimination illegal. It had recognized the desirability of variations in certain cases. Yet it deplored the uncertainty of the Act as it stood. It repeatedly asked Congress for amendments to make the section "more strong, more certain, more effective." The amendment of 1910 was drawn along lines which the Commission had tentatively approved. In its annual report for 1911, the Commission said:

. . . Congress intended that the law should say that, as a general rule, there should be no lesser charge to the more distant point, but it was not willing to say that there should not be some exceptions to this rule.¹

After the 1910 amendment the right to initiate rates which charged less for the longer than for the shorter haul did not lie with the railroads as in the past. The power of railroads to initiate dis-

¹ R. R. Commission of Nevada v. S. P. Co., 21 I. C. C. 329, 335 (1911).

crimutory rates had been clear after the *Alabama Midland Case*. Only when conditions and circumstances were substantially similar could the Commission exercise original jurisdiction. After this decision it could do nothing more than review rates after they had been put into effect by the railroad. It is significant, even if it is customary to minimize the fact, that, as pointed out above, the Commission did have jurisdiction when conditions were substantially similar or when rates were out of line with conditions and circumstances, and that it could order discontinued a rate which resulted in unjust and unfair discrimination. The amendment of 1910, as interpreted by the Supreme Court, did not change the power of the Commission; it merely changed the time for reviewing the rate from a point of time subsequent to the filing of the rate to a point of time preceding such filing. The law was intended to provide "stoppage at the source," rather than a remedy after the fact.

Although the amendment gave the Commission jurisdiction in the first instance instead of in a reviewing capacity, the new power could be exercised only as to future discrimination. Not one of the thousands of existing cases of discrimination was set aside by the Act, if an application were filed with the Commission. Moreover, no lawfully existing discrimination could be eliminated by the Commission within six months of the effective date of the Act, nor could any discrimination be eliminated after the expiration of six months unless the application filed with the Commission had been given a hearing and an order entered. Hundreds of cases continued to exist for many years after the effective date of the Act for the reason that it was impossible to dispose of the grist in orderly manner.²

Since the Act put upon the Commission the burden of removing discrimination in certain cases where it already existed, some discretion had of necessity to be exercised by the Commission. The Supreme Court chose to designate this discretion "legal discretion." Later it will be important for the reader to contrast legal discretion and legislative or policy-forming discretion. It seems obvious that the kind of discretion required to cancel rates which had been legally in force, and which were preserved under the terms of the Act until canceled, might be quite different from that which might be exercised

²The following language appears in the Mann-Elkins Act of 1910: "Provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where applications have been filed before the Commission in accordance with the provisions of this section, until a determination of such applications by the Commission." Ch. 309, sec. 8, 36 Stat. 547 (1910).

in a proposal to set up a discriminatory rate for the future. This distinction should be kept in mind when an attempt is made to interpret the ruling of the Supreme Court in the *Intermountain Cases*.

Railroads immediately attacked the new amendment on the ground that it delegated discretionary or legislative power to the Commission. The Supreme Court held that such a theory was untenable, since Sec. 4 was governed by the other provisions of the Act and the Commission was therefore limited in administration by the provisions of the Act in general. Hence there was no delegation of legislative power. The Court noted a distinction between delegating the power to make a law and conferring authority to execute a law.³

The foundation of the whole body of administrative law was accepted by the Court in its conclusion that:

The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore, be a subject of inquiry and determination outside the halls of legislation.⁴

In the *Intermountain Rate Cases* the Supreme Court held that the amendment to Sec. 4 did not minimize or change the application of the preference and discrimination clauses of Secs. 2 and 3. The section, according to the Court, did not state a new rule or principle, but simply took from the carriers the deposit of public power to determine railroad rates including rates lawfully discriminatory, previously lodged with them, and vested this power in the Commission as a primary instead of a reviewing function. The system of law remained the same, but a different tribunal was created for the enforcement of the existing law. The carrier might seek from the Commission permission to change a rate; and the Commission might exercise legal discretion and grant the privilege if the request were compatible with due consideration for private and public interests concerned, and not contrary to the preference and discrimination clauses of Secs. 2 and 3.⁵

It will be interesting to follow the decisions of the Commission under the new powers granted to it in 1910 to see whether in general

³ U. S. v. A. T. & S. Fe R. Co., et al., 234 U. S. 476 (1914); *Field v. Clark*, 143 U. S. 649, 694 (1892).

⁴ *McLain v. Locke*, 72 Penn. St. 491, 498 (1873), quoted in *Field v. Clark*, 143 U. S. 649, 700 (1892).

⁵ I. C. C. Annual Report (1914), p. 31; U. S. v. A. T. & S. Fe R. Co., et al., 234 U. S. 476 (1914); U. S. v. U. P. R. Co., et al., 234 U. S. 495 (1914); U. S. v. L. & N. R. Co., 235 U. S. 314 (1914).

its policies are consistent with the policies of the previous period. It must be remembered that, after the *Alabama Midland Case* in 1897, the railroads were masters of the situation and instituted freely rates that did not conform to the Commission's interpretation of the requirements of Sec. 4. The burden of proof of undue preference and unjust discrimination was upon the Commission. Administrative problems were insurmountable. In relatively few cases did the Commission succeed in establishing the fact that rates were unduly prejudicial and unjustly discriminatory. The impotence of the Commission, as shown in part by its inability to control discrimination, has given rise to an unfair charge that it was unduly liberal in dealing with fourth-section cases.

As soon as the amendment to Sec. 4 had conferred the necessary authority, the Commission began aggressively to eliminate abuses of Sec. 4 in connection with basing points in the Southeast. The attempt had been made long before, but the Supreme Court's decision in the *Alabama Midland Case* had made it impossible for the Commission to control the situation. After 1910, the Commission was restricted only by the provision of the amendment that existing departures might be protected, pending an investigation, by an application for fourth-section relief.

In 1914, after an extensive study of the administration of Sec. 4 in the Southeast, the Commission found relief under Sec. 4 desirable if:

- (1) The lower rate at the more distant point was necessitated by water competition, actual or potential.
- (2) The rates at the terminals were subnormal and less than fair, reasonable, and compensatory for the service performed.
- (3) The competitive rates, although subnormal, yielded rail carriers some profit over and above the actual cost of handling.
- (4) The rates to intermediate points were not unreasonable when measured by the usual standards by which the Commission tests rates.⁶

Routes from New York City to South Atlantic and Gulf ports and from Ohio River crossings to New Orleans and other Mississippi River crossings were found to be strongly influenced by water competition, and relief was afforded to the carriers operating routes between such points. Discriminatory rates to interior points such as Atlanta, Athens, Cordele, and Rome, Ga., and Meridian and Jackson, Miss., not located on navigable streams, were held by the Commission to be contrary to Sec. 4 and their discontinuance was ordered.

⁶ I. C. C. Annual Report (1914), pp. 20, 21.

In the Northwest the Commission found long-and-short-haul discrimination on eastbound wool, hides, and pelts. The transcontinental lines had made a rate from Portland, Ore. to Boston, Mass. of \$1.00 per hundred to meet the water rate, while charging a rate from interior points, such as Boise, Ida., of about \$2.00 per hundred to Boston. In 1912, the Railroad Commission of Oregon asked that the \$1.00 rate in force from the Pacific ports be made the rate from the intermediate points also. If the Interstate Commerce Commission had granted this request, a western blanket would have taken the place of the fourth-section variations. The Commission, however, held that the water-based rate was not a fair test of the reasonableness of the intermediate rates. Instead of creating a rate blanket with rates by water as the standard, the Commission found the intermediate rates unreasonable, *per se*, and ordered them revised and reduced. The Commission held that the real basis of the discrimination was water competition.

There is before us no question of rival cities or of contending markets, and we hold that, as this commodity is actually handled there is no undue discrimination. So long as every point of production is given a rate which we hold to be reasonable and so long as the effect of water competition is applied uniformly and without preference to these western points of origin, we are inclined to grant relief under the fourth section; that is, to permit the carriers to construct and maintain rates upon the basis above indicated, without reference to the rule of the fourth section.[†]

Another complaint involving long-and-short-haul discrimination arose between San Francisco and Portland, Ore. The Southern Pacific was charging 51 cents per hundred, first class, for a haul of 746 miles from San Francisco to Portland, while from San Francisco to Medford, Ore., an intermediate point 404 miles from San Francisco, the charge was \$1.63 per hundred, first class. From Sacramento, 90 miles north of San Francisco on the Sacramento River, the charge to Portland was 51 cents. The charge from Sacramento to Medford, 340 miles, was \$1.51 per hundred, almost 300 per cent of the through rate.

The Southern Pacific insisted that water competition justified its charges. According to facts set forth, the bulk of competitive traffic between the terminals moved by water for the fiscal year ending June 1911. Rates by water were lower than normal rail rates—35 cents per hundred for the first four classes, and 25 cents per hundred for the six other classes. The Commission found that water rates were not abnormally low as compared to rates for similar hauls on

[†] R. R. Commission of Oregon v. O. R. & N. Company, 23 I. C. C. 151, 179 (1912).

the Atlantic Coast; and decided that rates at the terminals were forced by water competition and that they were in part less than normal, fair, and reasonable if applied to all traffic. Consequently the railroad was granted permission to make lower rates at the terminals to enable the railroad to meet water competition.

But relief was not granted without restrictions. The Commission held that it had the right to examine the reasonableness of the intermediate rates as well as the compelling competition at the terminals. It found, in this case, that the rates to the intermediate Oregon points were unreasonable, and it ordered a readjustment so that they should in no case exceed the through rate by more than 100 per cent.

Since the Commission scaled down the rates to intermediate points from 300 per cent of the terminal rates to a maximum of 100 per cent and denied relief at important transshipment points where it had long existed, it is doubtful whether the Southern Pacific profited greatly by the decision, though the principle of granting relief where water competition was a compelling force was sustained. This case is hardly an example of unrestrained liberality on the part of the Commission in granting relief; it might better be considered an example of official antagonism towards variations from Sec. 4, especially variations which rest on what may be termed market competition. In this respect the Commission's decision was consistent with its policy in the Southeast.⁶

Immediately after the adoption of the Mann-Elkins amendment in 1910, the Commission considered variations from the long-and-short-haul section on westbound transcontinental traffic destined for Pacific Coast ports. Competition between ocean carriers and railroads was the basis upon which rail rates were made lower at the terminals than at intermediate points. From its investigations came two important cases, the *Reno Case* in the south, and the *Spokane Case* in the north.

In the *Reno Case* the Commission reviewed the history of competition as it affected the rate development in the West. It is impossible to present here the details of this development. Western traffic was carried by ships before the railroads reached the coast. The first competition between boats and carriers affected traffic originating on the eastern seaboard. From 1885 to 1891 the Southern Pacific Railroad was carrying from 75 to 90 per cent of this intercoastal competitive traffic. In 1885, railroads from Chicago entered the field and demanded the right to make rates from Chicago to compete with those from New York. Eventually the result was a rate blanket reaching from

⁶ In Matter of S. P. Application, 22 I. C. C. 267 (1912).

New York to Chicago, and finally to the Missouri River, with uniform rates to the Pacific Coast.

The Commission held that water competition was a problem which the railroads must face. In the *Reno Case* it said:

While they have subsidized, bought, and controlled the water carriers, there has always been present in the mind of the traffic manager of the transcontinental railroad the existence of the ocean and the possibility of its use. Without a ship upon it the ocean has the power to restrain, in some degree, the upward tendency of rail rates. A railroad may not safely indulge its desire to impose all the traffic will bear between two ocean ports, and it may truly be said that the least poetical of railroad traffic managers never looks upon the ocean without a sense of awe.⁹

This statement, like others made by the Commission at various times during this period of its history, might be evidence that the Commission, contrary to its usual practice, was basing relief to a certain extent upon potential water competition. In this case, in spite of the misleading language of the opinion, the Commission flatly disavowed any intent to allow relief on the ground of potential water competition, making it clear that relief was based upon water competition which was not only actual and present, but compelling.

The transcontinental rate problem was complicated by the rivalry of markets. Before the construction of the transcontinental railroads, goods consumed on the Pacific Coast were produced near the Atlantic Coast. With the construction of the transcontinental lines came the demands of the manufacturers of the Middle West for rates which would take their goods to the Pacific Coast in competition with the goods of eastern manufacturers. At the same time the railroads found it to their interest to give competitive rates from Chicago and the Middle West, in order that traffic might originate on transcontinental lines and so avoid a division of rates with carriers farther east. The result was that rates adjusted to suit the interests of transcontinental carriers also fitted nicely into the wishes of the Middle West manufacturers.

If the rates from the eastern producing area had been applied alike to the Pacific Coast and intermediate points, the Commission would have found a simple case of blanket rates, which had been ruled not to be a violation of Secs. 2 and 3 of the Act to Regulate Commerce. If the rates to intermediate points had not been so high as to violate Sec. 1 by being unreasonable, the Commission would have taken but little notice of an adjustment that gave Chicago an even chance with New York at Pacific Coast business.

⁹ R. R. Commission of Nevada v. S. P. Company, 21 I. C. C. 329, 352 (1911).

But the rates from New York to the Pacific Coast, by rail, involved a discrimination against intermediate points. There was no doubt that water competition forced these rates, and the Commission would not have hesitated to have granted an application for relief, as far as rates from New York were concerned. But the problem became complex when Chicago, as part of the eastern rate blanket, asked for similar rates. The difficulty arose from the fact that railroads were asking permission to violate the long-and-short-haul provision of Sec. 4 on rates from Chicago, on the ground that there was competition between water and rail carriers from New York. Since there was no water competition affecting the traffic originating at Chicago, the Commission held that the application rested in part on the competition of businessmen of Chicago and New York, rather than upon competition of water and rail carriers. In its final decision the Commission held that relief on shipments from the eastern blanket to the Pacific Coast was justified, but insisted that, as far as Chicago was concerned, the rate rested upon market competition rather than upon competition of water and rail carriers.

There can be no doubt in the mind of anyone who has followed the fourth-section policy of the Commission throughout its history that, by rates based on market competition, the Commission has at times meant rates granted by railway officials to build up business at points served by the given railroad. Where a higher rate was charged at the nearer intermediate point and a lower rate at the terminal in order to build up this traffic, the result was inequality and injustice. The Act to Regulate Commerce was largely aimed at just such practices. The Commission throughout its early history exercised its fullest authority in eliminating abuses of this kind. On preceding pages we have seen how great trade centers of the South, such as Atlanta, Ga., were required to give up the rates which violated the long-and-short-haul principle, on the ground that they rested on a type of market competition which was contrary to law.¹⁰ If the application of the transcontinental carriers rested on such market competition, as the Commission maintained, there is reason to see why it should hesitate to grant the application for relief.

But the Commission realized that it was not a simple case of market competition, as at Atlanta and certain other points in the South. Denial of relief to the railroads would not remove the discriminatory rates at the Pacific Coast as it did in the South. The element of water competition was present at the Pacific Coast, and water rates would continue to be made to the coast, regardless of

¹⁰ Fourth Sec. Violations in the Southeast, 30 I. C. C. 153-336 (1914).

what rates were charged by the transcontinental carriers. So the Commission decided to grant the relief for reasons advanced in its report of 1911:

The Commission desires to make plain at the outset that this principle has been fully recognized by it in passing upon applications under the amended section. Wherever the rate to the long-distance point is fixed and beyond the control of the applicant, we do not require the applicant to observe any relation between the long-distance and the intermediate rate; we have simply inquired whether the intermediate rate is reasonable.¹¹

Concerning the question whether the competition was market competition or competition of carriers, the Commission held in the Nevada cases that, while competition of carriers had always been a factor in determining whether the preferences given a locality was due or undue, strictly speaking there was no market competition distinct from the competition of carriers serving the market. Markets compete through carriers which seek to serve their own ends when they build up a market or locality.

One test of whether market competition is the legal type or not is whether or not the discrimination disappears when the fourth-section variations in question are withdrawn. The situation in the Southeast was such that a removal of the discriminatory railroad rates at Atlanta removed the discrimination. Hence, the discrimination in favor of Atlanta rested on illegal competition of markets of distribution. On the other hand, the discrimination against intermediate points in the transcontinental territory did not rest upon rates made by rail carriers. They rested primarily upon rates made by water carriers, a competition which the Commission, after 1910, held to be an ample justification for basing-point rates in the Southeast and elsewhere. By any test which the Commission had ever applied, relief under Sec. 4, if it rested upon market competition at all, rested upon competition of markets of supply as that term had been used in the Southeast.

Representatives of the transcontinental railroads, in presenting arguments before the Commission, frequently admitted that the applications, as far as Chicago rates were concerned, were based upon market competition. This seems to have been a damaging admission, since it failed to emphasize facts more important than the mere presence of market competition. It may have done much to muddy the waters in later controversies over relief for transcontinental carriers.¹²

In the *Spokane Case* the Commission seems to recognize potential competition as a justification for competitive rates. The Commission

¹¹ I. C. C. Annual Report (1911), p. 32.

¹² *City of Spokane v. N. P. R. Co.*, 21 I. C. C. 400, 514 (1911).

quoted from the *Alabama Midland Case* the words of the Supreme Court that ". . . the volume of carriage by water on the river is now comparatively small; but the controlling power of that water line remains in full force and must ever so remain so long as the river remains navigable to its present capacity." "So," the Commission held, "the ocean is ever present. The possibility of using it as an avenue of transportation is ever open, and the fact that it will be used, if for any considerable length of time the defendants maintain rates which are so high, or so adjusted as to render it profitable for shippers to resort to that means of transportation, is never doubtful."¹³

Whether or not potential water competition was influential in the transcontinental cases of 1911, in 1913 in the *Transcontinental Commodity Rate Case*, the Commission appeared to take a positive stand against allowing for potential competition, by holding that for the future only competition that was actually present, or reasonably to be apprehended, might be recognized, and then only to the extent that it actually existed and affected the circumstances surrounding the shipment.¹⁴

The Commission further decided that certain points on the Pacific Coast, such as Sacramento and Marysville, had been receiving discriminatory terminal rates unlawfully, since there was no water competition present at these points. The Commission, accordingly, ordered relief withdrawn from all cities near the Pacific Coast where active water competition could not be shown. The result was that lower rates were withdrawn from a large number of Pacific Coast cities, some of which had been receiving the benefits of relief for many years. Thus, after 1910, the Commission exercised its authority in the West precisely as it had in the South to reduce the cases of departure from the long-and-short-haul requirement to a minimum, by removing every variation which resulted in undue prejudice or unjust discrimination.

In 1911 the Commission decided to base the amount of discrimination against intermediate points upon differentials. Accordingly, the eastern half of the United States, as the point of origin of goods shipped to the Pacific Coast, was divided into five zones. The first one included Missouri River points. Rates from this zone to intermediate points, such as Spokane and Reno, were not to be higher than the rates to terminals, such as Seattle and San Francisco.

¹³ *Ibid.* at 418.

¹⁴ *Transcontinental Commodity Rates, Westbound*, 26 I. C. C. 456, 461 (1913).

In other words, there was to be no discrimination whatever. The second zone was the vicinity of Chicago. Rates from this zone to intermediate points might be not more than 7 per cent higher than the rate to the terminal. Thus, if the rate to Seattle were \$1.00 per hundred, the rate to Spokane might not exceed \$1.07. The third zone was permitted to have a discrimination of 15 per cent and the fourth a discrimination of 25 per cent. The fifth zone was established but no differential named, since there was no evidence of rail shipments to the Pacific Coast. The purpose of the differential arrangement was to allow the railroads some leeway in meeting water rates, which tended to fluctuate. Under the arrangements made, the railroads met the rates at the coast, and found rates at intermediate points by adding the differential to this rate.

In a later case, in 1915, the Commission made another significant readjustment of fourth-section variations in the West by dividing commodities into three groups according to their susceptibility of carriage by water. Class A commodities were those which could not be carried by water, or which originated in such a place that they went by rail more economically than by water and rail. On those commodities all relief was denied. Class B commodities admitted of competition in certain cases; hence fourth-section relief was adjusted to the amount of competition that was demonstrated. Class C commodities were those which originated in large quantities on the Atlantic seaboard, which were adapted to water competition, and upon which carriers by water made extremely low rates, so that rail carriers were under the necessity of making unusually or abnormally low rates from eastern and interior points to territories west in order to compete with water carriers. It was on those commodities that the greatest relief was necessary. The whole plan of classifying commodities according to the extent to which they were affected by water competition was a device through which the Commission attempted to reduce variations under Sec. 4 to a minimum.

In 1915, the carriers applied for permission to readjust rates to meet the new water competition by way of the Panama Canal. The carriers produced evidence to show that a large part of the tonnage for the Pacific Coast originated near the Atlantic Coast, and that it was reaching the Pacific Coast by way of the canal. The Commission concluded that a new era of competition was beginning, that "to secure any considerable percentage of this coast-to-coast traffic rates must be established by the rail lines materially lower than those now existing."¹⁸

¹⁸ *Transcontinental Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611, 621 (1915).

The Commission held that the government did not intend to foster canal carriage to the exclusion of rail. The government, it maintained, had encouraged and aided the construction both of railroads and of the canal.

As we view it, the Panama Canal is to be one of the agencies of transportation between the east and the west, but not necessarily the sole carrier of coast-to-coast business. If the railroads are able to make such rates from the Atlantic seaboard to the Pacific coast as will hold to their lines some portion of this traffic with profit to themselves, they should be permitted to do so. The acceptance of this traffic will add something to their net revenues, and to that extent decrease, and not increase, the burden that must be borne by other traffic. It will also give the shippers at the coast points the benefit of an additional and competitive service.¹⁶

In accordance with this conclusion, the Commission ruled that "these carriers should be permitted to compete for this long-distance traffic so long as it may be secured at rates which clearly cover the out-of-pocket cost." The Commission concluded that, since the new rates were about 45 per cent of the average revenue per ton mile, they should cover more than out-of-pocket cost and be compensatory.

The Commission gave as a reason for lowering these rates the fact that its previous order was allowing competitive business to go to water carriers and that it desired to preserve the earning power of the roads. The intermediate rates, because based on differentials, were reduced as the terminal rates were reduced. Refusal to allow the terminal rates to be lowered to compete with water rates, the Commission held, "would not benefit the intermediate points of destination in the least, and would result in serious injury to many intermediate points of origin." "The maximum of public benefit," said the Commission, "from the fourth section will result from the enforcement of conditions that will tend to preserve and promote and not to diminish or retard competition."¹⁷

Discrimination against the intermediate points would not be removed by denial of the rates asked by the railroads, as the Commission pointed out:

It is obvious that there is now, and will be under any scheme of rate making that may be devised to the back-haul territory, some discrimination against points further east in intermountain territory. This discrimination, however, under the plan suggested, does not appear to be unjust. . . . No evidence has been presented in this case to show that it is necessary to apply the coast terminal rates to any points except the ports of call on the Pacific coast, at which the Atlantic-Pacific steamship lines deliver freight. We shall authorize these carriers to establish the rate proposed to those ports upon all articles in the list, excepting those to which exceptions have been noted. We shall also

¹⁶ *Ibid.* at 622.

¹⁷ *Ibid.* at 628.

authorize the maintenance of higher rates as hereinbefore outlined to the intermountain points. . . .¹⁸

In 1916 the Commission found that the World War had drawn practically all the carriers away from the intercoastal service. There was a vast tonnage of vessels under construction, but the service actually available was infrequent, sporadic, and irregular. The Commission accordingly ordered all fourth-section variations suspended and required the railroads to readjust their rates accordingly. So vehement were the protests of shippers and others that the Commission postponed the order until the following year when the final order was issued.¹⁹

Railways protested the readjustment on the ground that, if they were forced to readjust their rates, they would be helpless to meet water competition when it should return, since much time generally elapses between the filing of an application for relief and the action of the Commission. They wished to be permitted to continue the lower rates as a protection against dormant water competition.

As a result of the orders of the Commission, both carload and less-than-carload commodity rates were realigned. Some were established at coast terminal rates and others were raised at the terminals to the level of the intermediate rates. By its language, the Commission seemed to assume that application for relief would be made as soon as water competition was restored:

When the water competition again becomes sufficiently controlling in the judgment of the carriers to necessitate the reduction of the rates to the coast cities to a lower level than can reasonably be applied at intermediate points, the carriers may bring the matter to our attention for such relief as the circumstances may justify.²⁰

In case a future application was made, the Commission would hold:

Competent proof must be submitted in connection with such applications of a fairly regular water service between the two coasts; the adaptability of the traffic to water competition; the principal points of origin of the traffic; range of rates afforded by the water lines; principal points of consumption and the ports upon the two seaboard at which the water carriers receive and deliver freight.²¹

Commissioner Harlan dissented from the order of the Commission rescinding relief on shipments to the Pacific Coast because the withdrawal of the water competition was purely temporary and the readjustments upset all rate relationships in the entire western territory. He cited case after case to show that the Commission had permitted

¹⁸ *Ibid.* at 634.

¹⁹ *Transcontinental Rates Cases*, 46 I. C. C. 236 (1917).

²⁰ *Ibid.* at 276.

²¹ *Ibid.* at 276.

relief to be perpetuated, even though water competition was discontinued, on the ground that the continuance of such rate relationships was sanctioned by the presence of potential competition. He thought that stability was essential to the welfare of the country at large. He held that there was no advantage to either coast or intermediate territory in a course that puts both out of line with what must necessarily be the course of their future relationships. He said:

In my judgment rates and trade relations, based on conditions as permanent and enduring as coast to coast water route through the Panama Canal, ought to be stable and secure against needless fluctuations, and I see no warrant either in the law or upon the record for now throwing both into sudden and violent confusion because of purely abnormal and temporary conditions.²²

As shown by the citations above, the Commission, after the adoption of the 1910 amendment, began a systematic attack upon long-and-short-haul variations which rested upon certain types of market competition. In the South, a wholesale revision of rates removed basing-point privileges from important cities, notably Atlanta, Ga. In the West, the Commission revised rates so that relief under Sec. 4 was allowed only on goods which were actually subject to water transportation, and only at points at which ocean carriers received and discharged freight.

On the other hand, even though the Commission felt that relief allowed on rates from Chicago to the Pacific Coast was based on market competition, it did not deny relief. It continually allowed relief on westbound traffic until its final order of 1917 readjusted rates to eliminate fourth-section variations.

Before water carriers had returned to intercoastal traffic to any extent after the World War, Congress adopted amendments which modified the Act to Regulate Commerce in important particulars. To understand the policy of the Commission after 1920, it will be necessary to note the changes which were made in the law by the Transportation Act of 1920.

²² *Ibid.* at 281.

CHAPTER VI

POSTWAR REGULATION OF COMPETITION

IN 1920, sweeping changes were made in regulatory law through the Esch-Cummins Act, officially known as the Transportation Act of 1920, which restored the railroads to private hands. No analysis of this Act can fail to disclose the fact that it was the purpose of Congress to provide the United States with a thoroughly developed, adequate, and well-coordinated national railroad transportation system. The need for such a system has been demonstrated by the difficulties which attended the war administration of railroads. The policy of Congress towards the railroads has varied with the times. There has been no clear-cut, long-time policy. At one time the policy is one of indulgence; at another it is one of restriction. Before 1920 Congress approached the railroad problem through a series of specific acts, each intended to solve some particular problem. In the Esch-Cummins Act, Congress sought to establish a comprehensive railroad policy for the country as a whole. Congress seemed, for once, to realize that public control implied a corresponding responsibility to permit or require adequate development.

There are many evidences of this new attitude towards railroads. Republicans in Congress were reminded that the party platform of 1919 contained the pledge of the party to provide suitable legislation for "the entire transportation system which has become essentially national."¹

In the Senate, Thomas J. Walsh of Montana, in urging that the provisions concerning labor be adopted, maintained that they were to avert "if possible, the unspeakable calamity involving 110,000,000 people which would result from a general tie-up of the railroad systems of the United States."²

Senator Henry L. Myers, also from Montana, expressed himself with equal force:

The railroads are the arteries of commercial and industrial life of the country. All commercial and industrial life are through them. . . . Much is involved. Stockholders in railroad corporations should have a fair return upon their investments; employees should have reasonable compensation and fair working conditions but the interest of the public is more extensive than that of either. It is highly important that there be adequate, continuous, unimpeded service.³

¹ Quoted, Cong. Rec., vol. 59, part 9, p. 8827, 66th Cong., 2nd Sess. (1920).

² Cong. Rec., vol. 59, part 1, p. 818 (1920).

³ Cong. Rec., vol. 59, part 1, p. 277 (1920).

Senator Albert Cummins of Iowa was quite clear on the subject:

I think we must look at transportation as a unit. Nor would I be willing to concede that the people along the line of the New York Central railroad are any more interested in the development of commerce of the lower half of Pennsylvania or of the lower half of Ohio or Indiana than they are in the development of the commerce of Illinois, Nebraska, or Kansas. . . . Congress should lift itself above the murky prejudices of former years and examine transportation from a national standpoint, and establish those regulations which are necessary for the welfare of all people. . . .⁴

Even railroads of weak earning power, he said, must be protected, since "it would be a catastrophe or a calamity, not only locally but nationally, if the roads were dismantled and abandoned."⁵

Some senators still showed tendencies toward "the murky prejudice of former years." Robert M. LaFollette, Sr., in an exhaustive debate against the Esch-Cummins Bill, said:

The public has a right to exact from a railroad a service that is adequate and impartial, and we ought to compensate it upon the capital that it put into the business at a certain rate that shall be reasonable. If there is another road lying beside it that was wrongfully, foolishly constructed, built perhaps out of spite, built out of folly, built to enrich regardless of public interest, and capitalized at an amount greatly in excess of a fair value, do you think there is any justification . . . in imposing a rate upon the public to pay for the folly and the iniquity and the crookedness that is back of that road? . . . The public is not responsible for their having been called into being. They were built as a part of the railroad game and expected to be imposed upon the public, and the public to be soaked and bled to sustain them.⁶

Many students are unwilling to admit that the former policy was entirely negative, as might seem to be here implied. The Act of 1920 they hold to be one stage in the evolution of a policy. This step, they say, would have been impossible if the former steps, inadequate though they may have been, had not been taken. Every step which contributed anything to the development of the railroad policy should, in their opinion, be considered positive rather than negative.

Certainly there are legislative provisions before 1920 which seem to be based upon a realization that railroads were not merely individual ventures, local in nature, but aggregations of capital assuming the responsibility for a function important to national economic life. Among such provisions are the requirements that railroads, even competing railroads, must make reasonable switch connections with each other; that rail carriers should afford all reasonable, proper, and equal facilities for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those con-

⁴ Cong. Rec., vol. 59, part 1, p. 137 (1920).

⁵ *Ibid.*, p. 127.

⁶ *Ibid.*, p. 509.

necting therewith;⁷ that the Commission might establish joint through routes, etc., in cases where carriers had refused or neglected to do so;⁸ that the Federal government, in time of war, might take possession of any systems of transportation, or any part thereof, for war purposes.⁹

However regardless of how we may interpret legislation before 1920, there can be little doubt that the purpose of the Act of that year was to provide an adequate national railway transportation system. A review of the provisions of the Act will substantiate this conclusion. It provided: that, in the event any carrier was unable to handle the traffic offered to it, the Commission might make reasonable directions as to handling, routing, etc., even to the extent of deciding on the matter of compensation, as between carriers, in the event that they cannot agree among themselves;¹⁰ that new lines cannot be built nor old ones abandoned, without certificates of public convenience and necessity from the Commission;¹¹ that the Commission may authorize or require any carrier to provide itself with safe and adequate facilities for performing as a common carrier;¹² that the Federal authority shall take precedence over state authority, in matters pertaining to interstate carriers;¹³ that the Commission might have authority, in the public interest, to require a carrier to share with another carrier its terminal facilities, including the use of mainline tracks for a reasonable distance outside such terminal.¹⁴

Sec. 4 of the original Act, which included the long-and-short-haul clause, was retained in modified form. It was retained, we may reasonably assume, for whatever it could contribute to the strength of the national transportation system.¹⁵ On this point more will be said later in this chapter.

The theory that Congress sought to create an adequate national transportation system is supported by the provisions of the Act for lawful pooling by carriers of traffic and income.¹⁶ Sec. 5 goes further by providing for voluntary, and even compulsory, consolidation of railroads, evidently in order to strengthen the weak links in the chain by joining weak roads to strong ones, so that the system as a whole might be strong.¹⁷

⁷ Rogers MacVeagh, *The Transportation Act of 1920* (1923), p. 250.

⁸ *Ibid.*, p. 361.

⁹ 39 Stat. 645 (1916).

¹⁰ U. S. Code, title 49, Ch. 1, sec. 1 (16).

¹¹ *Ibid.*, sec. 1 (18), (19), (20).

¹² *Ibid.*, sec. 1 (21).

¹³ *Ibid.*, sec. 1 (17).

¹⁴ *Ibid.*, sec. 3 (3), (4).

¹⁵ *Ibid.*, sec. 4 (1).

¹⁶ *Ibid.*, sec. 5 (1), (2).

¹⁷ *Ibid.*, sec. 5 (4), (5), (6).

However, the relative freedom of water carriers from rate control, backed up by the provisions of the section relating to joint rates (which are especially favorable to water carriers), seems to indicate that Congress, in spite of the fact that it realized the necessity for a national system, made up of coordinated rail and water carriers, was still obsessed by the idea that competition among water carriers and between water and rail carriers was a good thing.¹⁸

The theory of Congressional interest in an adequate national transportation system is further supported by the grant to the Commission of authority to require or permit a partial coordination of water and rail carriers in certain cases;¹⁹ by the provision that both rail and water carriers should be under the control of the Commission in cases in which goods were carried between points in the United States, whether by the canal or otherwise, if the carriage extends to points outside a single state; by the provision that physical connection between rail lines and docks might be required; by the provision for joint rail and water rates.²⁰

The intent to strengthen weak portions of a national system is indicated by the provision that the Commission may divide joint rates between two rail carriers, not on the basis of the distance or the relative portion of the service performed by the respective carriers, but upon many factors, important among them being the financial need of a given carrier.²¹ This has been construed to mean that Congress intended that the Commission should take from the strong road to build up the weak.

Another important section is Sec. 15a, which provides that rates be so adjusted that they will bring adequate returns to carriers as a group or as a whole. This is another evidence that a national system was contemplated. This section, if observed, would make it impossible for the railroads again to face a period like that of the World War with inadequate facilities. The section made it a duty of the Commission to initiate, modify, or establish rates which will provide an adequate return and hence make possible an adequate system.²²

In June 1933, Sec. 15a was amended by the addition of an interpretative paragraph:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and

¹⁸ *Ibid.*, sec. 15 (1), (3).

¹⁹ *Ibid.*, sec. 15 (9), (10), (11).

²⁰ *Ibid.*, sec. 6 (13) (a), (b), (c), (d).

²¹ *Ibid.*, sec. 6 (4), (5), (6).

²² *Ibid.*, sec. 15a (1), (2), (3), (4).

efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need for revenue sufficient to enable carriers, under honest, economical, and efficient management, to provide such service.²³

The amendment of 1933 may be considered another outstanding example of the attempt of Congress to face in all directions at once. Those who wish lower rates can interpret the new provision as a requirement that their interests be respected. Holders of railroad securities can without difficulty convince themselves that the law was designed to insure adequate and fair returns on railroad investments. Those who experienced the inadequacies of the transportation system under the stress of the World War will see in it the determination of Congress to insure adequate facilities for later war emergencies.

The Interstate Commerce Commission can repeat, what it has been able to say on former occasions, that the purpose of Congress was to enact into law what had been the practice of the Commission for many years, in regard to the several matters included in the amendment.

The preamble of the so-called recapture clause of the Act of 1920, even though its administration proved to be an impossible task, supports the theory that Congress sought to provide a national system of transportation:

In as much as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.²⁴

The repeal of the recapture clause in 1933 grew out of difficulties in the administration of the provision. Repeal does not reflect any change in policy as to the need for a national system of transportation, but rather a desire to bring about the end of an anomalous situation. In practice the recapture clause did not contribute to the settlement of any transportation problems, but did make for much uncertainty.²⁵

Provisions for the control of security issues may be interpreted

²³ *Ibid.*, sec. 15a (2).

²⁴ *Ibid.*, sec. 15a (5).

²⁵ *Ibid.*, sec. 15a (2).

in like manner. If railroad securities are to be kept in the confidence of the investing public, they should be issued only when projects are in the public interest; for only in such cases is the Commission under obligation to permit the acquisition of a fair return on property.²⁶

Congress did not intend to provide a system of transportation limited to railways. There is abundant evidence that, even before 1920, it was assumed that both rail and water transportation were essential. Since 1920 Congress has appeared to believe highway transportation equally essential. But recognition of the importance of all three in a national transportation system and regulation of destructive competition among them are two different matters. By 1920 competition was believed to be outdated. Most states had recognized the fact that competition between local utilities should be eliminated. The Act of 1920 applied this theory to the railroads and attempted to eliminate competition as a device to regulate railroad rates. But unfortunately it did not remove competition as a regulating device between rail and water carriers and between rail and highway carriers. Notwithstanding the fact that Congress recognized that all types of transportation were essential, it failed to provide control on an impartial basis, and left the shackled railroads to compete on uneven terms with free or even subsidized carriers.

Senator Cummins stated on the floor of the Senate that the provisions for water transportation were put into the bill at the insistence of Senator Ramsdell from Louisiana, "who stands as a sort of god-father for water transportation. We put it into the bill, believing that there ought to be some sort of recognition of the growing demand for water competition and water transportation. We thought we were meeting a real need in our regulatory system to include with it some concern for water transportation, which has hitherto been substantially neglected and forgotten."²⁷

Senator Cummins did not make it clear whether the thing desired was water and rail competition or adequate water-transportation facilities. Provision for adequate water-carrier facilities was consistent with the dominating idea of the act, the development of a national system of transportation. An attempt to maintain competition between water and rail carriers was not consistent with any experience in the regulation of transportation facilities in the past.

In 1926, Commissioner Lewis asserted that it was unjust to subject a regulated carrier to the cutthroat competition of an unregulated one.

²⁶ *Ibid.*, sec. 20a.

²⁷ Cong. Rec., vol. 59, part 1, p. 139 (1920).

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²⁶ *Ibid.*, sec. 20a.

²⁷ Cong. Rec., vol. 59, part 1, p. 139 (1920).

I fail to see the justice of subjecting one interstate carrier to regulation and leaving the other to sail the seas free to scuttle both itself and its land competitor, or how there can ever be brought about an understanding and solution of this contest until both carriers are placed under one agency of regulation. Such would be a natural corollary to the mandate of Congress that both forms of transportation be maintained in full vigor. . . .²⁸

The Transportation Act of 1920 attempted to preserve the water service developed during the War by providing for transfer of all government-owned boats, tugs, barges, and other transportation facilities on the inland, canal, and coast waterways to the Secretary of War. The Secretary of War was to operate, or cause to be operated, such transportation facilities so that lines of transportation established by or through the President during the Federal control should be continued.²⁹ The Secretary of War was to construct facilities for the interchange of traffic between carriers operated by him and other carriers, rail or water.³⁰ Very clearly Congress intended these inland water carriers to form an integral part of the national transportation system.

Another part of the Transportation Act of 1920, Sec. 500, announced the policy of Congress to "promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."³¹

This section of the Act seems to imply that a national system of transportation must include both rail and water facilities; that it was not the policy of the Congress to permit either type to engage in ruinous competition with the other; that healthy competition between them is the desired thing. In certain cases, as hereafter pointed out, it has been charged that the Commission has interpreted Sec. 500 as a mandate that it discriminate in favor of water carriers. While it is true that certain provisions of the Transportation Act of 1920 appear to demand that water carriers be favored over rail carriers, the declarations of Sec. 500 are against any undue favoritism.

The Federal-aid acts for highway improvement indicate an appreciation of motor transportation as a part of a national system of transportation. Highways are being built by government aid, according to government specifications, all over the United States as part of a definitely coordinated road program, which in an emergency will make possible motor transportation to all parts of the country.

²⁸ Transcontinental Rate Cases, 107 I. C. C. 421, 441 (1926).

²⁹ U. S. Code, title 49, ch. 5, sec. 141.

³⁰ *Ibid.*, sec. 141 (c).

³¹ *Ibid.*, sec. 142.

Federal aid in the development of airplanes and airships is another indication of the desire to develop all types of transportation.

But, if Congress has seen the importance of the several types of transportation, it has failed dismally to coordinate and balance them. The Interstate Commerce Commission has been helpless, since the powers granted it affect but part of the carriers involved. There has been division of authority between governmental agencies and little or no authority provided for regulation of water, highway, and air carriers by any agency. The Commission has long seen that the next necessary step is the creation of a central agency with authority to control all forms of transportation, so that inconsistencies and injustices may be eliminated.

Mention was made above of the retention of Sec. 4 in the Act of 1920 as evidence of an intent to strengthen the national system. Yet in 1920, as in 1887 and at all other times when Sec. 4 has been under consideration, there was a strong attempt to make the section rigid and absolute. Senator Poindexter of Washington strongly supported a rigid Sec. 4, urging that the existing law favored the terminals at the expense of the interior country. As he saw it, goods were hauled through the intermediate states across great mountain ranges to the coast at lower rates than if those same goods were deposited in transit. "The purpose, of course," said Senator Poindexter, "is to throttle and retard the development of the state of Utah."⁸² It need not be accepted as a fact that the purpose of the long-and-short-haul discrimination is, or has been, to throttle and retard the development of Utah or any other section or that the discrimination mentioned has had that effect. It has always been asserted by the railroads, and accepted by the Commission, that the intermediate sections may be benefited by the lower terminal rates, since greater total net income will eventually result in better service or lower rates all along the railroad line. The Poindexter amendment to make Sec. 4 rigid was defeated on a roll call in the Senate.⁸³

The next move was the introduction of an amendment by Senator Henderson of Nevada to add to Sec. 4 a provision that the Commission should not grant relief under the section in cases arising out of "conditions of water competition, actual or potential."⁸⁴ This amendment was defeated, both in the Committee of the Whole and in the Senate.⁸⁵

⁸² Cong. Rec., vol. 59, part 1, p. 594 (1920).

⁸³ *Ibid.*, p. 741.

⁸⁴ *Ibid.*, p. 828.

⁸⁵ *Ibid.*, pp. 881, 900.

Opponents of Sec. 4 have insisted that, while the nominal reason given for the discrimination in rates was water competition, the real reason, since there was little actual water competition, has been the tenacity with which the terminal cities held to their advantages over the intermediate points. The original reason for Sec. 4, they maintain, was to benefit the railroads, not to benefit places; but actually the section has been used to benefit certain places at the expense of others. The western group urged that removal of the discrimination would increase the population and the volume of business in the intermountain section until there would be more business than the railroads could handle. It would then, they argued, be in the interest of the country to allow the water lines to procure a portion of the business. Coast cities would become "in reality as well as in name" maritime cities, receiving the benefits that come from the building, operation, and supply of ships.⁸⁶

The railroads have charged that jobbers at Spokane, Salt Lake City, and other interior cities have sought to obstruct all relief at terminal points, in the hope that finally the railroads would be forced to offer ocean rates to the intermediate point in order to get part of the important business at ocean terminals. Such rates, they maintain, would then have the same effect as "digging an ocean canal" to Spokane, Salt Lake City, and Reno.

Although Congress in the Act of 1920 insisted on preserving a flexible long-and-short-haul provision, it did amend Sec. 4 by providing that no rate should be permitted to or from the more distant point that was not a reasonable compensation for the service performed. The amendment also provided that, if relief were granted on the ground of circuitry of a competing railroad, points on the circuitous line which were not further from the point of origin than the length of haul between the terminals over the more direct line should not be charged more than the charge at the terminal. There is a further provision that, in case of water competition, there should be no authorization on account of "merely potential water competition, not actually in existence."⁸⁷

There was considerable difference of opinion during the discussion of the bill as to just how sweeping the changes in Sec. 4 were. Senator Townsend of Michigan stated that members of the Commission had told him "that this is practically the rule which it is now following."⁸⁸

⁸⁶ *Ibid.*, p. 643.

⁸⁷ U. S. Code, title 49, ch. 1, sec. 4.

⁸⁸ Cong. Rec., vol. 59, part 1, p. 741 (1920).

Senator Cummins of Iowa, one of the sponsors of the bill, said, "The change that is made in this bill is to provide that the Interstate Commerce Commission may still authorize a higher charge for the shorter haul, but the rate for the longer distance must be a compensatory rate. That is the change and the only change."³⁹

Railroad opinion was that, as finally passed, the section was not changed radically. A vice-president of the Northern Pacific Railroad, in a letter to the chairman of the board of that road relative to the transcontinental applications of 1922 said that ". . . there was no change in the wording of the clause which made it impossible for the Commission to grant our application had they been so disposed, and the change in the law is an excuse rather than a reason for their unfavorable decision."⁴⁰

The Commission itself, in its annual report for 1920, said:

In administering this section we proceeded upon the theory that the Congress intended that we should in proper cases exercise the power to grant relief, observing the rules laid down in the other sections of the act, and that it was appropriate to grant relief when, in our opinion, the resulting rates or fares would not be unjust or unreasonable in violation of the first section or unduly prejudicial in violation of the third section.⁴¹

The new provisions of the Act of 1920—that rates must be reasonably compensatory, not greater for equidistant points on a circuitous route than for terminals, and not granted on grounds of merely potential water competition—would, the Commission believed, have little effect upon the actual administration of this section.⁴²

Even Sec. 500, which declared it to be the policy of the Congress to "promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation," the Commission held, had added nothing to the Act, since both courts and Commission had for years interpreted this to be the purpose of the Act to Regulate Commerce. In the famous *Skinner and Eddy Case*, the Supreme Court said that the purpose of the act was to prevent the "competition that kills."⁴³ The addition of Sec. 500 merely enacted into law the policy which the Commission had frequently announced and which it had been enforcing for many years.

It may be well at this point to note that, as the law stands after 1920, the railroads are still responsible for the initiation of rates

³⁹ *Ibid.*, p. 466.

⁴⁰ Administration of the Fourth Section, 87 I. C. C. 564, 601 (1924).

⁴¹ I. C. C. Annual Report (1920), p. 47.

⁴² *Ibid.*, pp. 47, 48.

⁴³ *Skinner and Eddy Corporation v. U. S.*, 249 U. S. 557, 567 (1919).

which are reasonable and adequate. Before the passage of the Act of 1920 the Supreme Court ruled that the railroads had the right to initiate their own rates subject to certain limitations.⁴⁴ Since the Act of 1920 was passed, the Commission has ruled that the initiative in rate making still rests with the railroads, subject to the injunction that rates shall be reasonable and just. This is a rather significant point, since there seems to be a popular impression that rates are made for the railroads by the Commission.⁴⁵

The Supreme Court and the Commission have had occasion in a number of cases since 1920 to pass upon the measures adopted by Congress to provide a national system of transportation. In the *Wisconsin Passenger Fares Cases* of 1922, the Commission and the Supreme Court held that Congress has the authority to control intrastate rates where equipment essential to interstate commerce is involved. Chief Justice Taft, in the majority opinion, held that the Act of 1920 made a new departure. Therefore, he said, the purpose of regulation was to prevent unreasonable discrimination against persons and localities; carriers had benefited only by provisions that rates could not be forced upon them lower than reasonable. But "the new measure [the Act of 1920] imposes an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in paragraph 15a to be one of the purposes of the bill. . . ."⁴⁶

The decision of the Commission in the *Dayton-Goosecreek Case*, arising out of the provisions of the Transportation Act of 1920 for the recapture of excess earnings, when appealed to the Supreme Court, led to statements by that body concerning the constructive purposes of the Act. Regulation in the sense intended by the Constitution, said the Court,

is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. . . . The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issues of certificates, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old

⁴⁴ *N. P. Ry. Co. v. N. Dak.*, 236 U. S. 585 (1919).

⁴⁵ *United Fig and Date Co. v. A. C. L. R. Co.*, 115 I. C. C. 643, 648 (1926).

⁴⁶ *R. R. Com. of Wis. v. C. B. & Q. R. Co.*, 257 U. S. 563, 585 (1922).

lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.⁴⁷

In a more recent case, the Court recognized the importance of the national system by ruling that the state of California could not require the construction of a terminal station in Los Angeles without the consent of the Interstate Commerce Commission, since it might possibly result in the impairment of the ability of the interstate carriers to discharge their interstate duties.⁴⁸

In deciding that the Interstate Commerce Commission had control over extensions and abandonments, even though these appear to be intrastate matters, the Court said that a short intrastate spur into territory adequately served by another interstate carrier requires a certificate of public convenience and necessity from the Interstate Commerce Commission.

By that measure [the Transportation Act of 1920] Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of financial resources of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as be benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. . . . invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.⁴⁹

In the *New England Divisions Cases*, the United States Supreme Court upheld the action of the Commission in giving greater than proportional shares of joint rates to the New England carriers.

Since, when the shares received by New England carriers were increased by the Commission, rates were not increased, the shares of the carriers west of the Hudson River on class rates were reduced. The western carriers sued to enjoin the enforcement of the order. The Court in upholding the Commission said:

The Transportation Act of 1920 introduced into the Federal legislation a new railroad policy. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly, those arising out of excessive or discriminatory rates.

The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new

⁴⁷ *Dayton-Goosecreek Ry. Co. v. U. S., et al.*, 263 U. S. 456, 478 (1924).

⁴⁸ *R. R. Com. of Cal. v. S. P. Co., et al.*, 264 U. S. 331 (1924).

⁴⁹ *Tex. & Pac. Ry. Co. v. G. Colo. & S. F. Ry.*, 270 U. S. 266, 277 (1926).

purpose was expressed in unequivocal language. To attain it, new rights, new obligations, new machinery were created. . . . To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. . . . To accomplish this two new devices were adopted; the group system of rate making, and the division of joint rates in the public interest. . . . This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. . . .⁵⁰

When a railroad participates in a joint haul, what is its just share? The Court's answer was: an amount to be fixed by the Commission, not by agreement of the parties or by mileage.

. . . Cost of service is one of the elements in rate making. It may be just to give the prosperous carriers a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenue derived therefrom.⁵¹

As the Court interprets the law, the Commission is expected to weigh the effects of its decisions on commerce and on the progress and welfare of the country or section of country involved, insofar as these are dependent upon transportation. Congress expects the Commission to look after public interests by providing adequately for those who supply the nation with transportation service. The rights and interests of individual carriers must give way to the superior right of the public.

Our discussion leads to a conclusion not only that Congress intended to establish a national system of railway transportation but that Congress had the concept, not altogether clear, of a composite national system in which various types of transportation play their parts. The railroads, as Congress saw them, were not individual roads or systems of roads, but individual units, essential to a national whole. Each part, no matter how small or how weak, was assumed to be important to the whole system, and the Commission was instructed to so adjust rates that each part of this system might bear its necessary part of the national burden. To this end the Commission was authorized to modify (or set aside entirely) competition—upon which the law and the Commission had originally depended for proper regulation. Regulation was no longer to be thought of as a list of prohibitions and restrictions, but as a list of constructive requirements designed "to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and secure its safety."

⁵⁰ *New England Division Cases*, 66 I. C. C. 196, 261 U. S. 184, 189-191 (1923).

⁵¹ *Ibid.* at 195.

The Supreme Court has been clear in its understanding of the purpose of Congress to provide adequate transportation facilities. The rulings of the Commission have long been directed to the same end. So there was less of a break in the policy of the Commission after 1920 than there was in the policy of Congress. The Commission has had to exercise discretion where the interests of rail and water carriers clashed, as in the case of long-and-short-haul adjustments in the Southeast and the transcontinental applications in the West. It is no easy thing to make a decision affecting the development of either water or rail carriers; yet the Commission has been forced to do this in a number of cases. The Commission has had to settle cases which have arisen under the Hoch-Smith Resolution, in which certain industries have sought special rates on the theory that the condition of the industry merited them. Here the question of the interest of a special industry compared with the needs of the country as a whole for adequate transportation facilities must be considered.

CHAPTER VII

LONG-AND-SHORT-HAUL COMPETITION SINCE 1920

IN 1924, the Commission, in response to a resolution of Congress, submitted to the Senate Committee on Interstate Commerce a complete record of all applications which had come before it under Sec. 4.¹ The record showed a total of 12,513 applications between 1910 and 1923, the period covered by the report.

The Commission noted three bases upon which applications for relief under Sec. 4 rested. One group of applications was based upon the circuitry of one of the rail competitors; a second group was based upon competitive rates made by water carriers; a third group was based upon the desire of one railroad, carrying goods from one producing territory to a given market, to meet the rates of another carrier (either rail or water) operating from another producing territory to the same market. Comparatively few applications were based exclusively upon the third type of competition, although it frequently appeared in combination with one or both of the other two types.

An extensive investigation was undertaken by the Commission to see to what extent the various communities, to secure marketing advantages, were attempting to force railroads to seek relief. The Commission found that in most cases the applications were filed by the railroads because they felt that their best interests would be served thereby, not because of pressure brought to bear upon them by communities interested in securing market advantages.²

Before beginning a discussion of administration after 1920, it would be well to recall the evidence presented in the foregoing chapters that the Commission has held consistently from the beginning that the Act to Regulate Commerce was designed to eliminate fourth-section variations based on arbitrary rail competition and on certain types of market competition. However, until 1910 the Supreme Court held that the Commission had not been given authority to regulate directly when rail, market, or water competition were present. If the Commission had any authority whatever in such cases, it was in the

¹ Administration of Section Four, Act to Regulate Commerce, 87 I. C. C. 564 (1924).

² *Ibid.* at 570.

nature of power to review rates already posted and in force.³ It had authority to investigate cases of discrimination in which conditions of shipment were similar; but this power failed because of inadequate administrative powers. For these and other reasons Sec. 4, along with the rest of the Act, proved ineffective.

After the increase in its mandatory powers in 1906 and the removal of the words "under substantially similar circumstances and conditions" from Sec. 4 in 1910, the Commission forthwith eliminated violations which rested upon railroad competition, as at Atlanta, Ga., and upon arbitrary acts of traffic managers, as at Cordele, Ga. This did not disturb relief in cases in which there was water and railroad competition. However, the number of cities enjoying fourth-section relief was cut from 121 to 31.⁴

Soon after the Act of 1920 was passed the Commission began an investigation of the southern class rates. This investigation was completed in 1925. The Commission then approved a new rate structure for the South, proposed largely by the carriers, which gave major attention to distance. Many cases of discrimination against intermediate points continued because of need for the preservation of group relationships and for financial aid to short or weak lines. However, it has been agreed that sweeping changes were made in the basis of rates in general. One outstanding feature of the new class-rate structure was the use of a basic mileage scale, and of scales of arbitraries for certain exceptional cases.⁵

The Commission thought that the readiness with which the changes in the rate structure were accepted by carriers was a result of recent economic changes in the South, which made different rate policies possible and desirable. First of all, in the twenty years ending in 1925, the South had changed from an agricultural to a mining, steel and iron producing, and manufacturing area. "The forms and currents of railroad traffic," said the Commission, "are quite different from what they used to be, and they are changing every day."⁶

Another significant change in the South was the consolidation of railroads into four great systems. The Southern System is a web of railroads over the entire South, from the four corners, St. Louis,

³ *I. C. C. v. Ala. Midland Ry. Co.*, 168 U. S. 144 (1897); *L. & N. R. Co. v. Behlmer*, 175 U. S. 648 (1900); *East Tenn. V. & G. Ry. Co. v. I. C. C.*, 181 U. S. 1 (1901); *I. C. C. v. Clyde S. S. Co.*, 181 U. S. 29 (1901); *I. C. C. v. L. & N. R. Co.*, 190 U. S. 273 (1903).

⁴ J. H. Donnell, *Railroad Freight Structure* (1926), p. 18; Fourth Sec. Viol. in the Southeast, 30 I. C. C. 153 (1914); Fourth Sec. Viol. in the Southeast, 32 I. C. C. 61 (1914).

⁵ J. H. Donnell, *Railroad Freight Structure* (1926), p. 123.

⁶ Southern Class Rate Investigation, 100 I. C. C. 513, 524 (1925).

New Orleans, Jacksonville, and Norfolk. The Louisville and Nashville-Atlantic Coast Line System is equally extensive. The Illinois Central, a great Mississippi Valley line, reaches the ports of the Southeast over the Central of Georgia Railroad. The Seaboard Air Line serves the eastern portion of the area, including Florida. Competition is keen between the big systems, but consolidations have modified the competition of the short lines running back from the coast, which formerly joined with water carriers to form water-and-rail routes, or rail-water-and-rail routes from outside points such as New York. Since these short-line roads have become parts of one or the other of the great railroad systems through the process of consolidation, they are less interested in the rail-water rates. The Illinois Central, with its Central of Georgia connections, may be an exception, since it can have connections with New York only by water and rail. But water competition has been almost completely eliminated, with the exception of the barges on the Mississippi and Warrior rivers and the Gulf and Atlantic steamers. The result of these changes was that the old basing-point system, introduced when local traffic was the principal source of income, no longer fitted the needs of the South. Consequently southern carriers and shippers were ready to cooperate with the Commission in a readjustment.

Another important change which the Commission noted as having occurred in the twenty years preceding 1925 was the adoption of the amendments to Sec. 4. In 1910 the elimination of the words "under substantially similar circumstances and conditions" from Sec. 4 placed the burden of justifying relief upon the railroads whereas before the burden had been upon the Commission to prove relief unlawful. This amendment gave the Commission the "whip hand." In 1920 the words "reasonably compensatory" were added as a requirement for rates under this section. Circuitous lines were limited in their discrimination against intermediate points by the equidistant rule. In addition the section now provides that competition must be actual, not potential, if it is to justify relief.

The new rate structure did not indicate a change in the attitude of the Commission. In a series of cases arising before 1920, the Commission had given evidence of a more rigorous policy with regard to Sec. 4. In a Tennessee case the Commission ruled that there was no water competition at Nashville which justified lower rates at that point than at intermediate points. The same year the Commission ruled that there was no water or rail competition which justified lower rates from St. Louis to Memphis or to New Orleans, than to intermediate points. Neither did the Commission see any longer any

justification for lower rates from Chicago and related points to Vicksburg, Natchez, New Orleans, or Mobile, than to Jackson and Meridian, Miss. These cases will be referred to later. The first two cases were settled in 1919, and the last one in 1920, eighteen days before the Act of 1920 was passed by Congress. The opinion of the Commission on these cases supports its statement that the Act of 1920 merely enacted into law existing practices of the Commission.⁷

After 1920 the Commission reported that carriers which showed willingness to cooperate "went still further and decided that the time had come to eliminate such fourth section departures generally in the South and to put to the test a system of rates wholly disregarding water competition, on what they termed a 'dry land' basis." This was worked out in the so-called Pitt readjustment, effective April 1, 1922. The result was a really new rate structure, not a "patched up" old one. Further readjustments were made in rates from Nashville and in class rates to, from, and between points south of the Ohio River.⁸

A definite principle was recognized in an interesting group of fourth-section cases which involved the needs of short and weak lines. By coincidence the early cases of this type arose in the South in connection with the general readjustment of rates. They deserve separate treatment for the reason that they set up a distinct and permanent basis for relief.

One case involved a joint route over the Southern and the Georgia and Florida railroads. The rate on block and sheet steel in carloads from Lynchburg, Va. to Nashville, Ga. was 66 cents per hundred, while the rate from Lynchburg to Sparks, Moultrie, and Valdosta, all more distant from Lynchburg than Nashville, over the same line, was 49 cents per hundred. On sixth-class goods, the less-than-carload rate to Nashville was 78 cents; to Moultrie and Valdosta, more distant points, the rate was 65 cents, and to Sparks, also more distant, the rate was 70 cents.

This case of fourth-section variation was allowed on the ground that the Georgia and Florida was a "weak road." The traffic over the line was sporadic. A reduction of the rate to Nashville to 49 cents would have resulted in undue prejudice against other points on the railroad between Lynchburg and Nashville. Only a blanket rate could eliminate the discrimination against all the intermediate points. Rates

⁷ *Murfreesboro Bd. of Trade v. L. & N. R. Co.*, 55 I. C. C. 648 (1919); *Memphis-Southwestern Investigation*, 55 I. C. C. 515 (1919); *Meridian Traffic Bureau v. Dir. Gen.*, 57 I. C. C. 107 (1920).

⁸ Rates to and from Nashville, 61 I. C. C. 308 (1921); Rates to, and from, and between Points South of the Ohio River, 64 I. C. C. 306 (1921); *Southern Class Rate Investigation*, 100 I. C. C. 513 (1925).

to the more distant points were formed by the use of the distance scale set up in the original order of the Commission, plus the arbitrariness allowed for weak and short lines. Consequently the Commission ruled that the discrimination against Nashville, Ga., though present, was not undue or unjust.⁹

In another case in 1922 the Commission allowed relief to the Tennessee Central Railroad to meet rates at Nashville, Tenn., which were out of the control of this road, on the ground that the Tennessee Central Railroad was important as a channel of commerce to the persons and communities served by it and was weak financially; that a reduction in rates to the intermediate points to enforce strict compliance with Sec. 4 would be unwarranted by the small volume of traffic involved in the application; and, finally, that refusal to grant relief would work a further injury to an already weak railroad.¹⁰

In this case it will be seen that the Commission granted relief solely upon the grounds of the financial need of the railway and the dependence of the intermediate communities upon the railway asking for relief. The decision conformed to the new policy of Congress to provide adequate transportation facilities for all localities as a part of the program of adequate transportation for the nation at large.

In 1928 the Commission authorized a rate of 86 cents per hundred on eggs on the longer haul from Nashville, Tenn. to Columbus, Ga.; from Algood, Tenn., an intermediate point to the same destination, the rate was \$1.31 per hundred. The Commission upheld the higher rate for the shorter haul because of the financially weak condition of the Tennessee Central Railway, the beneficiary of the relief.¹¹

In the *Jackson Traffic Bureau Case*, decided in 1929, the Commission granted relief to the New Orleans & Great Northern, on account of the weakness of the railroad and the seriousness of its competition with the Illinois Central Railroad at certain points.¹²

The Southwest, roughly the area west of the Mississippi River and south of the Missouri River, and extending as far as Colorado, and Oklahoma, and Texas, was the subject of an extensive investigation by the Commission, following the passage of the Transportation Act of 1920. Before 1920, as noted above, the Commission had rescinded relief applying to rates between Mississippi River points for the reason that water competition was no longer sufficient to justify the continuance of relief.¹³

⁹ *Traffic Bureau of Lynchburg v. Ga. & Fla. Ry.*, 109 I. C. C. 39 (1926).

¹⁰ *Murfreesboro Bd. of Trade v. L. & N. R. Co.*, 73 I. C. C. 228 (1922).

¹¹ *Tennessee Egg Co. v. Southern Ry. Co.*, 140 I. C. C. 441 (1928).

¹² *Jackson Traffic Bureau v. Ill. Cent.*, 153 I. C. C., 21, 26 (1929); *Logs to Nashville*, 186 I. C. C. 513 (1932).

¹³ *Memphis-Southwestern Investigation*, 55 I. C. C. 515 (1919).

The action of the Commission in removing this relief proved to be too drastic, as shown by the fact that in 1923 the Commission was forced to reopen the case and modify its order. Railroads on the west side of the Mississippi River maintained that they were unable to compete with railroads on the east bank between river points such as Memphis, Tenn., Helena, Ark., Natchez, Miss., Baton Rouge and New Orleans, La., and St. Louis, Mo., on account of the fact that the general rate level on the east side was lower than that on the west side because of the difference in traffic conditions, especially differences in classification. The routes on the west side were circuitous; however, circuitry was not offered as a basis for relief.

It was shown that the higher rates on the west side of the river forced certain roads receiving freight at St. Louis for lower Mississippi River crossings to send it across the river and transfer it to east-side railroads. For their services, they received only switching charges, though they might have had the longer haul if they had been able to compete in rates.

The Commission was forced to choose between three possible policies. It could adjust rates on the west side of the river to conform to rates on the east side; it could require carriers on the west side to be financially weakened by loss of business to the relatively stronger roads on the east side; or it could modify its former order which rescinded relief. It chose the last method and granted a measure of relief to carriers.¹⁴

Other applications for departures under Sec. 4 arose in the Southwest. In 1928, the Commission decided an important group of applications for permission to make lower rates on meat and packing-house products from Topeka, Wichita, Arkansas City, Oklahoma City, and Texas points to St. Louis, Kansas City, and Mississippi River crossings south of St. Louis than were in force from nearer intermediate points to the same destinations. The shippers at Oklahoma City urged that their plants had been constructed in belief that rates would be maintained to those crossings not in excess of rates from Kansas City. It was represented that the establishment of scale rates and the denial of relief would disrupt competitive relationships of long standing, some of which had been prescribed by the Commission, and that it would have detrimental effects upon the packing houses of the Southwest, upon the livestock growers, and upon the general prosperity of the territories as a whole. This was admittedly market competition of a type that involved the general welfare of the Southwest, as well as

¹⁴ Memphis-Southwestern Investigation, 80 I. C. C. 157 (1923); Memphis-Southwestern Investigation, 142 I. C. C. 139, 145 (1928).

the interests of particular shippers. The Commission ordered relief restored, provided the rates to the terminals should not be less than 75 per cent of the distance scale. Relief was granted to circuitous routes which were not over 70 per cent longer than the direct routes.¹⁵

Certain of the cases just reviewed contained strong elements of market competition; others appeared to be based entirely upon that ground. In Chapter III the Commission's treatment of this type of competition was analyzed. Two main types were distinguished, one of which was legal under existing law, the other illegal. The former, termed "competition of markets of supply," contained to a marked degree two elements of competition, that of two or more carriers each seeking to secure the traffic consigned to a given market and that of two or more rival cities of supply each likewise interested in securing the business of the same given market. If one carrier had a rate-making advantage because it operated a lower-cost route or because its rates were entirely beyond the control of regulatory bodies, the other carrier or carriers had a legal basis for the making of rates which discriminated against the short-haul intermediate points.

The other type of market competition, termed "competition of markets of distribution," does not interest us at this point. We shall merely recall that there were three competitive elements present instead of two, as in case of "competitive markets of supply," or one as in case of simple competition of carriers. The three elements of competition were competition of the several different carriers serving the several sources of supply of goods; competition of the producers and merchants as suppliers of goods at the several points of origin of the competitive traffic; competition of wholesalers and distributors at the localities which formed the points of destination of the competitive traffic. Discriminatory rates would be illegal in any such case, because the discrimination would be unjust and undue, as those terms had long been used in the common law.

Once again it is important to recall the fact that until 1920 there were no restrictions on certain types of competition which might involve all of the competitive elements here mentioned. Rail carriers could cut their rates at competitive centers at will, as long as they did not discriminate against intermediate territory. They could destroy each other, and drive water carriers off the water courses.¹⁶

In 1924 two important cases involved to a very large extent what the commission had termed competition of markets of supply. In the *Wisconsin Paper Cases* it was proposed to authorize a rate of 42 cents

¹⁵ Fourth Sec. Departures, 136 I. C. C. 516 (1928).

¹⁶ Chapter II above.

per hundred on paper from the Fox River, Wis. group of producing points to New Orleans, with a rate of 54 cents to Monroe, La., an intermediate point. It was also proposed to make a rate of 53 cents from the International Falls, Minn. group of producing points to New Orleans, and a rate of 59.5 cents to Monroe, the intermediate point. The intermediate territory was of wide extent, running from lines of the Missouri Pacific Railroad, west of the Mississippi River, to eastern Alabama, and from New Orleans on the south almost to Memphis, Tenn. on the north. The reason given for relief was that New Orleans was an important market for print paper and that, consequently, the volume of business made the low rate important, while the intermediate territory was so large that a general cut to the whole area would unduly impair revenues.

The record showed that, in 1922, 15,033,542 pounds of newsprint had been received from Scandinavian countries. There was no duty on newsprint under 8 cents a pound, while other paper was dutiable. The Department of Commerce reported an increase of 800 per cent in the import of paper in 1922 over 1921. In the first eight months of 1923 the import tonnage exceeded the 1921 tonnage by 1,300 per cent. The petitioning carriers contended that the existing rates restricted the movement of paper from the northern points to New Orleans and that, unless rates were lowered, shipments would cease altogether, since the business was being gradually absorbed by water carriers operating from New England ports or from foreign countries. The Commission in its opinion said:

The proposed rates will partially restore the adjustment existing prior to June 25, 1917, and, in the opinion of the applicants, will place the northern mills on a parity with the eastern mills. But the primary object of the reduction is to enable them to get a portion of the tonnage which has been lost to steamers operating from Scandinavian countries.¹⁷

Very plainly the purpose to place northern mills on a parity with eastern mills is a clear example of market competition, which the Commission has always examined critically when it is advanced as a ground for granting fourth-section relief. The second reason assigned is a form of carrier competition involving the Mississippi Valley railroads and other American railroads and domestic and foreign water carriers, though not for carriage which originated and terminated at common points. According to established doctrines of the Commission, this case involved predominantly competition of markets of supply.

¹⁷ Paper and Paper Articles, Wis., etc., to New Orleans, 88 I. C. C. 345, 349 (1924).

In the *Paper Cases* the influence of foreign competition was present. It was urged that Americans should be enabled to use American paper. The quality was slightly better, the movement more regular, the supply more uniform than that of the foreign producers. There was a patriotic desire to patronize home industry. If these advantages really existed, as the Commission assumed, American paper might have been able to stand slightly higher rates to New Orleans than the inferior competitive supply. The conclusion of the Commission was that

applicants have established that the routes from the northern mill points to New Orleans are under a material and substantial disadvantage in meeting the competition of water routes serving foreign mills. The rates proposed are reasonably compensatory and so far as this record shows no undue prejudice will result. We are of the opinion that applicants have made out a special case within the meaning of the fourth section, and the application for relief will be granted.¹⁸

The dissenting opinion of Commissioners Eastman, Campbell, and McManamy is interesting. They maintained that the Commission ought to deny the application on the ground that it was based upon market competition and that, in the long run, the country would not benefit from fourth-section relief permitted on that ground.¹⁹

A second case involving the Commission in an apparent inconsistency, when compared to the transcontinental cases, arose when railroads serving Portland, Ore. and Puget Sound cities asked permission to lower rates from those points on less-than-carload commodity shipments to Aberdeen, South Aberdeen, Cosmopolis, South Bend, Raymond, and Hoquiam, Wash., without reduction at intermediate points. The reason advanced by the railroads was that they were forced to meet out-of-pocket water rates from San Francisco offered by boats seeking to avoid a trip in ballast to these points for lumber. The railroads proved a heavy empty-car movement to the same destinations, on account of lumber outbound. The regularity of the lumber schooners was shown to depend upon the lumber movement. But, for such service as was available, extremely low rates from San Francisco were made. Relief had formerly existed but had been rescinded by the Commission in a former case.²⁰

There can be little doubt that the case involved competition between water and rail carriers. However, the carriers did not compete

¹⁸ Paper and Paper Articles, Wis. etc., to New Orleans, 88 I. C. C. 345, 351 (1924).

¹⁹ *Ibid.* at 352.

²⁰ Class and Commodity Rates between North Pacific Coast Points, 64 I. C. C. 159 (1921).

between two given points, as they did in the case of water and rail competition between San Francisco and Portland. The result of the competition was that the boats, the unregulated proteges of Congress, used their power to cut rates to throw favors into the laps of San Francisco merchants, at the expense of Portland and Puget Sound merchants, who likewise desired the Willapa Bay and Gray's Harbor business. According to the Commission's definition of the term, this injected competition of markets of supply into the problem. From evidence presented in this case it appeared to the Commission that relief was justifiable and the application was granted.

In justifying its action the Commission asserted the desirability of preserving the advantages of geographic location.

As above shown, Gray's Harbor and Willapa Bay markets, geographically tributary to Portland and Puget Sound, are dominated by San Francisco merchants . . . to the virtual exclusion of the former. The terminal rate of 30c . . . will be reasonably compensatory. This rate will also enable Portland to compete in these markets, with resultant benefits to the consuming public. The parity of rates from Portland and from Puget Sound should be continued. The publication of this rate will create no apparent unduly prejudicial situation under existing carload rates from Portland or Puget Sound, and the latter should remain unchanged.²¹

The assumptions of this statement should be examined critically. It should be noted that Gray's Harbor was assumed to be geographically tributary to Portland and Puget Sound cities. It is true that San Francisco's rate was abnormally low, but no more artificial than other rates where the carriers use capital facilities, in the form of public improvements, at less than their money value, or where they have the use of vessels purchased from the government at a fraction of their cost, as in the case of competition for the business of the Pacific Coast.

The Commission noted that the lower rate would enable Portland merchants to compete in the terminal markets in question with "resulting benefits to the consuming public." Benefits to consumers may be an argument for lower rates, even for blanket rates, but the Commission has repeatedly ruled that it is not a justification for fourth-section discrimination. Similar advantages to consumers are involved in any and every case of competition of markets of distribution that has ever existed. The most flagrant violation of Sec. 4 in the South through arbitrary basing points could have been justified on this ground. There is no doubt that consumers at the terminals might benefit; but that does not create a special case in which it would be lawful to discriminate against the intermediate points.

²¹ Commodity Rates to Gray's Harbor, etc., 88 I. C. C. 512, 517 (1924).

There is a wide difference between permitting a railroad to lower a rate to enable some of its shippers to meet competition and permitting it to lower a rate at a competitive market and not at the intermediate, noncompetitive points. The latter violates both Secs. 3 and 4 of the Act to Regulate Commerce, unless there are different conditions at the terminals which keep the discrimination from being undue and unjust.

Commissioner Eastman, in dissenting, held that water rates from San Francisco to North Pacific points were a business advantage to which San Francisco was entitled, and that he could see no reason why the Commission should neutralize that advantage in favor of Portland.

It will be interesting to keep in mind the facts in the *Paper Cases* and in the *Gray's Harbor Case* when the postwar history of long-and-short-haul discrimination in transcontinental territory is discussed in the chapter which follows.

Another group of fourth-section cases involve circuitry. In the light of the Commission's attitude toward geographic advantage as expressed in certain cases, there would seem to be no place for relief on the ground of circuitry. If certain railroad builders were wise in selecting the most advantageous location and in building a road with the most natural geographic advantages, why should they not expect to receive the advantages of its use? If shippers were wise in locating along the direct route, why should they not receive the benefit of their location and of the railroad's geographic advantages in the form of lower rates?

On the other hand, if relief is granted to the circuitous line, there can be no doubt that the loss of part of the traffic by the more direct line will lower its traffic density and increase the cost per unit over what it might be if the road could secure all the business. It is also evident that the community served by the direct line may lose the advantage of lower rates through loss of traffic and revenue to the circuitous line.

However, the preservation of Sec. 4 in the Act of 1920 seems to indicate that all railroads, direct or circuitous, short or long, strong or weak, are considered by Congress to be necessary parts of the national system and that all shippers of the United States are interested in the preservation of all railroads in the system, even though they do not patronize certain of them directly. The diversion of part of the traffic from the direct line to the indirect one, even though it may increase to a certain extent the rates charged the patrons of the direct

line, may bolster up the earnings of the indirect line and insure its ability to perform its functions as part of the national system. This interpretation appears to be consistent with the apparent purposes of the Act.

The Commission has definitely approved of circuitry as a basis for relief under Sec. 4. But, as cases based upon circuitry have come before it in relatively great numbers, it has gradually adopted a policy of limiting the amount of circuitry which it would recognize as economical.²² The extent of circuitry recognized as a basis for relief has come to be related to the distances involved. Where the distance is relatively short, the amount of circuitry may be greater than where the distance is over a thousand miles. The maximum percentage of circuitry allowed for long hauls (over a thousand miles) became settled at 33½ per cent while for short hauls a circuitry of 70 per cent might be permitted. There are a few exceptions to this rule. In the transportation of coal and cement from Superior to International Falls, the Commission allowed the Northern Pacific to make a 311.8-mile haul via Brainerd, Minn., at the rates charged by the more direct route of 171.3 miles, a circuitry of 82 per cent. The reasons advanced were that there was an empty-car movement towards International Falls on account of heavy movement of forest products. The out-of-pocket costs for this traffic would thus be very low. "Hence," the Commission said, "any revenue from this source in excess of bare additional expense of handling seems to be desirable for economy of operation."²³

Occasionally the Commission has considered cases involving hauls of considerable length. For example, rates on shipments from Utah common points to Portland, Ore. were allowed whereby the Southern Pacific, via Roseville, Cal., a distance of 1,342 miles, could compete with the Union Pacific to Portland, 853 miles. The circuitry was in this case 57 per cent. In the same case, the Southern Pacific was granted rates on certain commodities from the same points to Seattle, 1,559 miles, to compete with the rates of the Union Pacific to the same point, 1,070 miles, a circuitry of 46 per cent. The Commission held that the rates allowed appeared to be reasonably compensatory, since they would result in increased net revenue for the road involved, and would give an additional route to both terminal and intermediate points. Commissioner Campbell dissented on

²² Brick and Clay Products in Southern Territory, 88 I. C. C. 543 (1924).

²³ Coal and Cement from Duluth and Superior, 91 I. C. C. 627 (1924); Cement in the South, 210 I. C. C. 173 (1935); Hay and Straw to South Dak., 210 I. C. C. 739 (1935); Western Cement Rates, 213 I. C. C. 611 (1935).

the ground that a rate reasonable for one distance could not be reasonable for a route nearly 50 per cent longer.²⁴

Interesting problems present themselves when, for special reasons, such as an operating convenience to the carrier, shipments are carried through a higher-rate group and back into a lower-rate group. If there have been no schedules published for such a route and no reason for using it except convenience of the carrier, or similar reason, the Commission has held that the services are not those which a shipper may require as his right. Hence there is no violation of Sec. 4, relief is not required, and the equidistant clause is not applicable.²⁵

Another interesting limitation on the right of the shipper to demand service is found in the ruling of the Commission that, if a railroad has the choice of two routes, one of them more circuitous than the other, and it makes its rate over the more direct route, it cannot be required to ship over the longer route at the same rate, if such shipment would lead to a violation of Sec. 4.²⁶

A railroad which has two routes of its own may not be held to have violated Sec. 4 merely because its charge at some point on the more indirect route is greater than the rate at the common terminal of the two routes.²⁷

In certain cases involving traffic from the Pacific Coast to eastern territory, fourth-section relief was requested to preserve rate groupings. The cases serve to show that the Commission was uncertain concerning the equidistant clause. The first case, settled in 1928, was heard by Division No. 2 of the Commission, composed of Commissioners Aitchison, Esch, and Campbell. The transcontinental carriers asked permission to establish or continue rates from the Pacific Coast origin territory and intermediate groups on certain classes and commodities, for the purpose of preserving long-established groups and

²⁴ Class and Commodity Rates, Utah Com. Points to Cal. and Ore., 95 I. C. C. 417 (1924); Sand and Related Articles in the Southwest, 195 I. C. C. 493 (1933).

²⁵ Railroad Operating Practices, 209 I. C. C. 775, 781 (1935); Meats and Packing House Products to and from the South, 214 I. C. C. 438, 451 (1936); Refined Petroleum Products in the Southwest, 203 I. C. C. 103, 112 (1934); Citrus Fruits and Pineapples from the South, 203 I. C. C. 128, 133 (1934); Agric. Implements to Ida., Ore., and Utah, 214 I. C. C. 691 (1936); Sea Foods from New Eng. and Canada, 215 I. C. C. 178 (1936); Lumber from Pacific Coast to Mississippi River, 215 I. C. C. 304 (1936).

²⁶ Crowley v. A. T. & S. Fe Ry. Co., 206 I. C. C. 221, 226 (1935); John Clark Co. v. Alton & E. R. Co., 206 I. C. C. 621 (1935); Nolan v. A. T. & S. Fe Ry., 213 I. C. C. 366, 371 (1935); Middle Rio Grande Cons. Dist. v. A. T. & S. Fe Ry. Co., 209 I. C. C. 165, 166 (1935).

²⁷ Producers Co-operative Com. Assoc. v. B. & O. R. Co., 211 I. C. C. 105 (1935).

group relationships. The application embraced all territory lying north of the Ohio River and east of the Mississippi River, and applied to traffic originating west of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico. The Pacific Coast was blanketed as a producing region, and competed in each zone of this territory on common rates. Distance was not a governing factor in the rates charged. Rates at all points on the direct routes were, and under the application were to continue to be, free from discrimination against intermediate points.

A good illustration of the problem is found in shipments over the Chicago, Milwaukee, St. Paul & Pacific from Seattle which reached Omaha, Neb., a Group F point taking a rate of 62.5 cents by way of Manila, Iowa, located in a group taking the higher rate of 69.5 cents. The necessity for relief is apparent. The cause was not circuitry *per se*, but the traversing of a higher-rate group in reaching a destination in a lower-rate group.

Some lines may be circuitous and yet be able to reach a given destination without asking relief if they are not required to traverse any higher-rate group. In other cases such circuitous lines may need relief. There are examples of both types of circuitous lines. One route over the Southern Pacific, via New Orleans, to Chicago over the Louisville and Nashville Railway and the Chicago and East Illinois Railway, had a circuitry of 38 per cent and was forced to have relief under Sec. 4 because of a swing through a higher-rate group in Indiana back into the lower-rate group at Chicago; on the other hand, a route via the Illinois Central from the same points had a circuitry of 35 per cent, but had no need for such departures because higher-rate groups were not traversed. The Commission concluded that, when departures were due to group arrangements, rather than to circuitry, the equidistant provision might be waived. Refusal to waive the equidistant rule would actually have had the effect of breaking up the groupings and forcing a complete revision of the whole rate structure as far as the given points were concerned. The result would be a system of rates based upon distance alone or upon blanket conditions alone.²⁸

The following year a similar case involving lumber from the southern Pacific Coast to Central Freight Association territory came before the Commission; here the majority insisted that the equidistant provision be observed. This had the effect of closing the circuitous

²⁸ Class and Commodity Rates, Pac. Coast to Eastern Territory, 144 I. C. C. 28 (1928).

routes, leaving only direct routes to compete for this business. Commissioner Eastman, in a strong dissenting opinion, urged that rate groups were absolutely necessary to make tariffs workable, since a distance scale would be undesirable. The revision of the southern rates illustrates well the problem of rate adjustment. On a distance scale 16,000 stations would require 128,000,000 rates. If grouped about cities of 2,000 population or more, 2,000,000 would still be required. He held that very large rate groups were necessary to avoid these difficulties. Refusal to allow relief where the circuitous line goes through a higher-rate group might start a chain of adjustments whose end would not be reached until rates were placed on a point-to-point basis.⁸⁹

Since 1929 the Commission appears to have resolved this uncertainty by ruling that it must follow the equidistant requirement only where circuitry is the principal basis for relief. The presence of circuitry in cases which involve other problems, such as the preservation of rate groupings, is not of itself sufficient reason to require the application of the equidistant provision.⁹⁰

Another class of applications for fourth-section relief arose because of the fact that "breaks" in classification territories created long-and-short-haul discrimination. For example, the rate to Lynchburg, Va., in southern territory, from New York was \$1.025 per hundred first class, while the rates on similar shipments, through Lynchburg, to Forest, Roanoke, and Reusens, in official territory, took rates of 91.5 cents, 97 cents, and 90 cents, respectively. The difference in rates arose because of differences in classes between the official and southern districts. The Commission issued a temporary grant of fourth-section relief, pending a general rate survey and adjustment. Manifestly, it would be impossible to readjust rates to Lynchburg without causing fourth-section violations to appear at other points intermediate between New York and Lynchburg.⁹¹

⁸⁹ Commodity Rates on Lumber, etc., 151 I. C. C. 753 (1929); 165 I. C. C. 561 (1930). See also: Iron and Steel in the South, 195 I. C. C. 256 (1933); Stone, Marble and Granite from the South, 195 I. C. C. 255 (1933); Cement from the Southwest to the South, 195 I. C. C. 396 (1933); Charcoal from Michigan and Wisconsin, 213 I. C. C. 728 (1935); Coal to Rhode Island Points and North Haven, Conn., 213 I. C. C. 787 (1935); Coal from Indiana to Illinois, 213 I. C. C. 725 (1935); Iron and Steel Articles in Illinois, 213 I. C. C. 797 (1935); Vegetable Oils from Atlantic Points, 213 I. C. C. 669 (1935).

⁹⁰ Cabbage to Springfield, Mo., 204 I. C. C. 301 (1934). See also: Transcontinental Rates on Deciduous Fruits, 204 I. C. C. 549, 553 (1934); Canned Goods in Southwestern Territory, 208 I. C. C. 497 (1935); Boxes to and from North Carolina, 211 I. C. C. 117 (1935); Petroleum Products from Wyo. and Mont., 215 I. C. C. 43 (1936).

⁹¹ Traffic Bureau, C. of C. v. B. & O. R. Co., 115 I. C. C. 721 (1926).

On the Pacific Coast, fourth-section relief on account of rail and water competition between Portland, Ore. and San Francisco has long been in force. In 1927 the railways asked a revision of existing rates which left rates at intermediate points at from 108 to 247 per cent of the rates at the terminals. The Commission decided to grant relief; but it ruled that rates to intermediate points could not be more than 100 per cent higher than terminal rates in any case. The details of these cases have been discussed above.

This is probably the best example of the type of competition which was contemplated by Sec. 4. There is a minimum of market competition, since the traffic by both rail and water begins at a common point and ends at a common destination. Competition is entirely carrier competition.²²

The spread of surfaced highways over the United States and the resultant encouragement of contract and common carriers by motor vehicle has given rise to competitive conditions which have been most serious for the railroads. At this point we are interested in but one development which has resulted from this competition, the demand on the part of railroads for fourth-section relief to meet truck competition. As will be seen later, the motor carriers do not labor under fourth-section restraints. They were not subjected to any control before the Act to Regulate Highway Carriers was passed. The Act itself, while it was designed to subject motor carriers to regulation by the Interstate Commerce Commission, does not contain any provisions analogous to those of Sec. 4, applicable to railroads. Provisions similar to Sec. 3 of the Act to Regulate Commerce do apply to common carriers by highway, but such provisions cannot interfere with long-and-short-haul variations where the discrimination is not unjust or undue. There are but few instances of unjust and undue discrimination; so there will be but few instances where the motor carriers will be unable to discriminate against the shippers at intermediate points. One or two out of a vast number of instances will suffice to illustrate this type of competition.

A typical case of relief involving competition between a motor carrier and a rail carrier arose when the Northern Pacific Railroad and its affiliate, the Spokane, Portland & Seattle Railroad, sought permission to make a rate of 28.5 cents per hundred on petroleum products between Portland and Pendleton, Ore., via Pasco, Wash., without a corresponding reduction at intermediate points. The former

²² Pacific Coast Fourth Section Applications, 129 I. C. C. 3 (1927), 165 I. C. C. 373 (1930), 173 I. C. C. 577 (1931), 190 I. C. C. 273 (1932), 196 I. C. C. 296 (1933), 200 I. C. C. 259 (1934).

rate of the O. W. R. & N. had been 54.5 cents per hundred for the direct route from Portland to Pendleton, a distance of 218 miles. The Northern Pacific-Spokane, Portland, & Seattle route, which goes out of Oregon into the state of Washington and then back into Oregon before reaching Pendleton, had been able to meet this rail rate, though the distance was 285 miles. With the advent of motor competition, the rate by truck and by the direct rail route of the O. W. R. & N. Railroad had been reduced to 28.5 cents per hundred. The circuitous route was granted permission to reduce its rate to 28.5 cents per hundred, and to keep its rate to intermediate points, notably Kennewick and Pasco, Wash., at 31.5 cents per hundred.⁸³

A second illustration is found in transportation conditions at Hershey, Pa., long a market for thousands of tons of Cuban sugar annually, which for many years had reached Hershey by two rail-and-water routes, one by way of Philadelphia and the other by way of Baltimore. Trucks later entered the field, and made a rate of 12 cents per hundred from Philadelphia to Hershey. The Reading Railroad was able to meet this competition by making a comparable rate. Railroads from Baltimore, in order to recover a portion of this business, successfully petitioned for fourth-section relief which permitted a rate of 12 cents from Baltimore to Hershey over the Pennsylvania, the Reading, and the Western Maryland, while at intermediate points rates remained at 14 and 16 cents per hundred respectively.⁸⁴

Only in the past few years has barge-line competition become so insistent that railroads have felt impelled to seek relief at points served by both railroad and barge lines. Two outstanding groups of cases will illustrate.

In 1933 railroads asked for fourth-section relief on shipments of commercial gasoline, kerosene, and naphtha from New Orleans and Baton Rouge, La. to Memphis, Tenn. and other points served by water carriers, to meet competition of barges operated by oil companies and by independent barge lines. The proposal of the railroads would set aside the so-called "dry land" rates by substituting special competitive rates at Memphis and other points without giving the same rates to intermediate points. The Commission allowed the dis-

⁸³ Petroleum from Portland, Oregon, 186 I. C. C. 727 (1932).

⁸⁴ Sugar to Hershey, Penn., 200 I. C. C. 757 (1934). See also: Petroleum Products to Wyoming Points, 211 I. C. C. 108 (1935); Sugar to Fayetteville, N. C., 213 I. C. C. 723 (1935); Automobiles and Parts to Shreveport, La., 213 I. C. C. 638 (1935); Automobile to Shawnee and Oklahoma City, 213 I. C. C. 658 (1935); Canned Goods in S. W. Territory, 208 I. C. C. 497 (1935); Cement from Hudson, N. Y., 186 I. C. C. 8 (1932); Soap from New England and Trunk Line Territory, 215 I. C. C. 368 (1936); Nolan v. A. T. & S. Fe Ry. Co., 213 I. C. C. 366, 371 (1935).

crimination at Memphis, but denied it at other points where the showing of competition was not considered adequate.

Commissioner Eastman, while concurring in the decision, expressed his fears that such a general policy would lead to destructive competition and to the chaotic conditions which antedated the Act to Regulate Commerce.⁸⁵

Five applications were filed in 1933 by railroads for fourth-section relief to meet barge and truck-barge competition on sugar from New Orleans to upper Mississippi destinations. In one application the railroads asserted that barge lines, principally the Federal Barge Line, operated by the Inland Waterways Corporation, owned and financed by the government of the United States, had carried ten times as much sugar as the railroads from New Orleans to northern destinations. The barge-line representatives urged that the granting of lower, competitive rates to the railroads would deal a staggering blow to water lines, since sugar tonnage was vital to barges while it was but a small item in the total tonnage of the railroads.

The Commission found the proposed rates high enough to pay the cost of the service and to bring a revenue comparable to sugar rates from New York. Moreover, the Commission held that the railroads, as well as the barge lines and highway carriers, had a right to attempt to secure a share of the traffic. In no sense, the decision stated, could it be held that the law conferred upon the water carriers a vested right to sugar traffic.⁸⁶

In the *Mississippi Barge Line Case*, the Supreme Court upheld the Commission in its finding that the rates authorized would establish a fair competition between the railroads and the barge lines, notwithstanding the assertions and the plea of the latter that they would be unable to compete under the new rates. The Court found that, since the Commission was duly equipped to determine such a matter, the Court had performed its judicial function when it had determined that the Commission had a rational basis for its conclusion. By no method could it be established, the Court stated, that Sec. 500 meant that railroads must be made to keep their rates so high that they could not compete with water carriers.⁸⁷

In view of the definite assertion of Sec. 4 that relief shall not

⁸⁵ *Petroleum Products from New Orleans, etc., to Memphis, Tenn.*, 194 I. C. C. 31 (1933).

⁸⁶ *Sugar Cases of 1933*, 195 I. C. C. 127 (1933). See also: *Paint Materials to Baton Rouge and New Orleans, La.*, 204 I. C. C. 509 (1934); *Barrel Heads and Sheet Steel to New Orleans, La.*, 206 I. C. C. 281 (1935); *Lumber from Clower, Fla.*, 206 I. C. C. 668 (1935).

⁸⁷ *The Mississippi Valley Barge Line Co. v. U. S.*, 292 U. S. 282 (1933).

be authorized because of potential competition, not actually in existence, the Commission has been forced frequently of late to decide whether competition in a given case is actual and compelling. It has been shown above that the Commission, long before the provisions of Sec. 4 were amended to forbid relief for potential competition, had taken the stand that relief could not legally be allowed for purely potential competition. The principle has at times been difficult to administer, for the reason that it must be determined, in given instances, whether competition is present or is purely potential. Railroad spokesmen have asserted that the Commission's definition of potential competition refuses to take account of water competition until the railroads have lost a vast amount of important traffic, which they can then never hope to regain because of the powerful position of water carriers in protesting the granting of relief under Sec. 4.

In a recent case the Commission ruled that the possibility of installing barge service did not constitute competition which justified the granting of relief.³⁸ On the other hand, the Commission later ruled that nothing in the statute indicates that an actual movement of the particular commodity by water is necessary to establish the existence of water competition. Such a movement, or absence of movement, merely shows whether or not the water carrier has been successful in obtaining the competitive traffic. The essential elements of competition, the Commission held, are all present when a going water carrier has made a *bona fide* offer to perform competitive service and is ready, willing, and able to carry the traffic if the offer is accepted, particularly if every facility for the performance of that service is at hand.³⁹

However, before the competition shall be held compelling, the railroad must do more than show that rates have been quoted. It must produce persuasive evidence that applicant railroads cannot obtain, and hold, a fair share of the available traffic under the competitive rate then in existence. This would require a comparison of the advantages to shippers of the two types of service, as well as a comparison of the two rate levels.⁴⁰ Railroad spokesmen might reply that the only real evidence would be the actual loss of tonnage. Other evidence may be theoretically possible, but practically unusable.

In the cases discussed above, involving a variety of competitive

³⁸ Gasoline to Cordova and Jasper, Ala., 206 I. C. C. 521, 524 (1935).

³⁹ Rags and Paper to Newark, N. Y., 208 I. C. C. 327 (1935); Gasoline to Greenville, Miss., 215 I. C. C. 502 (1936).

⁴⁰ Red Arsenic from New York and Warners, N. Y., 203 I. C. C. 215, 217 (1934).

problems, the Commission seems gradually to have evolved a fairly definite group of principles, to which it adheres with considerable consistency. However, it should be noted that the applications cover matters which are largely local in nature, or which are of minor importance to both railroads and water carriers. The reader no doubt has speculated whether cases involving broader areas, or questions of major importance to both railroads and water carriers, will show the same definiteness and the same consistency on the part of the Commission. In the chapters which follow such cases will be examined to see whether the Commission's decisions are in line with those outlined above.

CHAPTER VIII

PRESSURE GROUPS AND TRANSCONTINENTAL COMPETITION

IN a study of long-and-short-haul administration, the transcontinental cases cannot be treated casually. Unlike most of the tens of thousands of ordinary cases which involve only minor local interests, the transcontinental cases involve the vital interests of every important industrial, commercial, or transportation group in the United States. The decisions of the Commission in these cases determine the well-being of whole groups and whole areas to an extent that can be matched only by the laws of Congress itself.

The importance of Commission decisions in these cases is indicated by the feverish activities of interested groups, which, with the manner and technique of lobbyists, come before the Commission to testify in these cases just as they do before committees of Congress to oppose or support transportation legislation. When the bulky testimony is analyzed, no student can doubt that in some way every locality and every interest in the United States, north, south, east, and west, are affected by the issues.¹

A brief survey of the situation will indicate some of the major interests affected by the applications. First of all, there are the transcontinental railroads which face financial problems as a result of the loss of business to water-carrier competitors. They have maintained, and the Commission has admitted, that the railroads of the West are not financially in a position to lose, without serious effects, a vast amount of their long-haul traffic to water carriers. Moreover, the transcontinental carriers must be recognized, not as mere business enterprises, but as vital parts of the national system which it was the purpose of Congress, as stated in the Transportation Act of 1920, to develop. In the cases reviewed above, short and relatively unimportant railroads in the South and railway carriers in New England and other parts of the country were given special treatment. Transcontinental railways maintain that their welfare is not less important, since the railroads of half a continent are involved.

¹ 74 I. C. C. 48 (1922); 107 I. C. C. 421 (1926); 209 I. C. C. 549 (1935). Senate Hearings, S. 2327, 68th Cong., 1st Sess. (1924); House Hearings, S. 2327, 68th Cong., 2nd Sess. (1925); Senate Hearings, S. 575, 69th Cong., 1st Sess. (1926); Senate Hearings, S. 563, 71st Cong., 2nd Sess. (1930); House Hearings, H. R. 3263 (Pettengill Bill), 74th Cong., 1st Sess. (1935); Senate Hearings, H. R. 3263, 74th Cong., 2nd Sess. (1936); House Hearings, H. R. 1668 (second Pettengill Bill), 75th Cong., 1st Sess. (1937).

For a study of this problem it is difficult to secure necessary data concerning competitive traffic and rates of the water carriers. Records essential to such a study are not kept, and reports are not made. It is possible to get a fairly accurate estimate of the strictly intercoastal traffic, and to segregate this into competitive and noncompetitive classes. However, part of the traffic that might be classed as competitive because its value is high enough to permit rail transportation might not actually be competitive because of conditions surrounding production. It is also true that part of the traffic listed as foreign might actually be intercoastal. The cargoes of intercoastal ships which touch at foreign ports, such as Havana, Kingston, Vera Cruz, Vancouver, etc., would not appear in Panama Canal records as domestic, hence competitive, tonnage. Moreover, portions of the traffic properly classed as foreign may be more or less competitive, if, for example, it is shipped to foreign countries by water from Atlantic ports, when it might have been shipped by rail to Pacific ports and thence to foreign destinations.

The Commission, in dealing with transcontinental problems, has been forced to depend upon assumptions or estimates made by interested parties. No governmental agency has ever been set up to secure data of this kind, and there is evidence that water carriers would not welcome such an agency. As the matter now stands, shipping interests are apparently as much in the dark about facts concerning the tonnage and rates of water carriers as are the railroads. Congress, which usually exhibits a passion for statistics, appears here to have studiously avoided any requirement for facts and figures.

It was definitely charged by a witness during the Senate hearings on the Pettengill Bill that railroads possessed secret information concerning intercoastal tonnage and rates through an agreement with the Treasury Department which admitted them to shipping manifests at San Francisco, a divulgence of information strictly against the law. If this were true, the railroads would have information not only concerning the tonnage but also concerning the actual rates charged. But no evidence was presented, apart from the allegation of this witness, that railroad agencies have, or have used, such information.²

Though actual figures are meager, it is certain that the volume of traffic involved is very large. In an article published some years ago, the author pointed out that the competitive tonnage moving through the Panama Canal in intercoastal trade in 1924 would, if carried by

² Joseph J. Geary in Senate Hearings, H. R. 3263, 74th Cong., 2nd Sess. (1936), pp. 551-2.

transcontinental railroads, have amounted to 11,000,000,000 ton miles.³ This ton mileage, if correct, would have been greater than the traffic of any western carrier for that year except the Santa Fe and the Chicago, Milwaukee, and St. Paul systems. The Panama Canal and the water carriers are the equivalent of another transcontinental railroad. The canal was constructed and water carriage established after the last transcontinental railroad was built. If, as is sometimes alleged, there has been an unnecessary duplication of transportation facilities to the West Coast, water transportation may be said to have duplicated existing transportation facilities.⁴

According to canal reports the competitive tonnage for 1929 was over 7,000,000 tons. By this method of computation, the ton-mileage equivalent would be over 14,000,000,000 ton miles, an important item to the roads which span the sparsely populated and undeveloped territory of the mountain states. The problem of the railroads in "bridging" this unprofitable area is made more difficult by the diversion of nearly enough tonnage, expressed in ton miles, to support in 1929 two great transcontinental railroads like the Great Northern and the Northern Pacific.

In sharp contrast to this analysis is the assertion of opponents of fourth-section relief in the West that the few million tons carried by the water carriers is "not a drop in the bucket" compared to the hundreds of millions of tons carried by western railroads. The matter of ton miles seems to have been neglected until recently. In 1936 it received some recognition in the House and Senate hearings on the Pettengill Bill and related measures. But most of the references are hazy and uncertain.

The testimony of opponents of fourth-section relief shows clearly an attempt to prove that even the ton-mile analysis would indicate that the competitive water traffic would be of minor importance to the western railroads if they could secure it all. The misleading nature of much of this testimony is illustrated by the use made of a letter from Director Max O. Lorenz of the Bureau of Statistics of the Interstate Commerce Commission in the testimony of Frank Lyon in opposition to the Pettengill Bill of 1935. The letter purported to be an answer to a telephone inquiry from Johnston B. Campbell as to the probable ton miles and probable revenue which would accrue to western rail-

³ Calvin Crumbaker, "The Panama Canal and the West," *Journal of Business*, vol. 2 (April 2, 1929), p. 156 ff. It was estimated that the competitive tonnage for 1924 was a little over 5,000,000 tons, and that the haul, if made by railroads, would have averaged at least 2,000 miles for each ton carried.

⁴ *Ibid.*, p. 158.

roads if they succeeded in taking from water carriers all of the 4,000,000 tons of competitive freight alleged to have been carried through the canal in 1934. To arrive at the number of ton miles which would result from a haul of 4,000,000, Dr. Lorenz multiplied this figure by the average distance a ton is carried on *all* railroads of the United States, 342 miles. The result was an insignificant amount, 1,368,000,000 ton miles. To determine the revenue involved, he multiplied the ton miles by the average rate on *all* freight carried in the United States, one cent per ton mile. The result was another insignificant amount, \$13,680,000. Dr. Lorenz then clinched the matter, as far as Mr. Campbell's purposes were concerned, by contrasting these insignificant amounts with the total ton miles and the total revenues, respectively, of all roads.⁶

Mr. Campbell appears to have intended to inquire concerning the probable number of ton miles which would have accrued to certain western railroads had they carried the entire 4,000,000 tons of competitive freight which went through the Panama Canal in 1934; the probable revenues which would have accrued to these railroads for carrying this traffic; and the relative importance of this traffic and

⁶ This letter will be found on p. 646 of the printed report of the House hearings on H. R. 3263 and related bills. Mr. Lyon appeared for certain intercoastal carriers. The text of the letter is as follows:

Interstate Commerce Commission,
Bureau of Statistics,
Washington, June 18, 1935.

Hon. Johnston B. Campbell,
Southern Building,
Washington, D. C.

Dear Mr. Campbell:

In reply to your inquiry by telephone, the following computations have been made:

You ask what 4,000,000 tons of miscellaneous freight said to have been moved through the Panama Canal in 1934, intercoastal, exclusive of oil and lumber, would amount to in ton-miles and freight revenue if carried all rail.

If we apply to the 4,000,000 tons the average haul of all freight on classes I, II, and III railways in the United States, considered as one system, which was approximately 342 miles, we get 1,368,000,000 ton-miles. At an approximate ton-mile revenue of 1 cent per ton-mile, the freight revenue would be \$13,680,000. In 1933 the freight revenue of these railways was \$2,528,968,000. The ton-miles carried by them in that year amounted to 250,651,190,000. For 1934, freight revenue of class I railways only was \$2,631,490,319, compared with \$2,491,330,028 for the class I roads in 1933.

The number of revenue ton-miles in 1934 of class I railways only was 269,005,993,000.

Very truly yours,
Lorenz, Director

revenue when compared to total existing traffic and revenue of the western railroads.

If Mr. Campbell wished an estimate of the possible increase in ton miles the 4,000,000 tons of intercoastal freight would have made for railroad carriers, manifestly Director Lorenz did not give it to him. It would be impossible to have an average transcontinental haul of 342 miles unless one makes the preposterous assumption that the traffic was all between coast termini and points 342 miles away, in western Arizona and Nevada and in eastern Washington and Oregon. The fact is that the shortest possible haul would have been to or from the eastern base of the Rockies; most hauls would probably have been to or from Chicago; some would have been to or from trunk-line territory. The application of the average haul of all traffic in the United States, 342 miles, must have seemed ridiculous to Mr. Campbell, who for several years was a member of the Interstate Commerce Commission. Clearly enough, the shortest possible haul would have been at least three times the length assumed by Director Lorenz and the longest possible haul would have been nearly ten times his estimate; and experience seems to justify the assumption that the typical haul would have been approximately six times the figure used by Mr. Lorenz. If so, the ton-mile figure should have been approximately 8,000,000,000 instead of 1,368,000,000, as estimated by Director Lorenz. The importance of the traffic to western railroads would appear to be many times as great as Director Lorenz' answer would indicate.

By the same token, the estimate of revenue to be collected is likewise misleading. Clearly, one cent per ton mile would result in a revenue nearer \$80,000,000 than \$13,690,000. The revenue might, however, have been less than \$80,000,000, since the rate would probably have been lower than one cent per ton mile, as shown by the schedule of rates proposed in the transcontinental applications of 1924.* Even if all the freight had been carried west on the lowest rate proposed, \$14.286 per ton, the revenue received from the 4,000,000 tons would have been approximately \$57,000,000. Even this sum differs considerably from the \$13,680,000 estimated by Director Lorenz.

There is still another reason why the statement of Director Lo-

* Reduced Rates to Pacific Terminal, 107 I. C. C. 421, 431 (1926). Carriers proposed to establish rates to Pacific terminals as follows:

40,000 minimum car.	\$1.00	per	hundred	pounds
50,000	" "	0.90	"	"	"
60,000	" "	0.75	"	"	"
80,000	" "	0.7143	"	"	"

renz does not fit the particular case which Mr. Campbell attempted to cover. To arrive at figures for the total revenue and total ton miles of western railroads for purposes of comparison, it is unreasonable to include all of the railroads which have been placed by the Interstate Commerce Commission in the western classification district. Such a district includes the Mississippi Valley roads, the great southwestern roads, the cornbelt roads, and the northwestern roads. Some of these railroads are not at all affected by the traffic here being discussed, some of them are slightly affected, and some of them haul to gulf points and so are actually competitors of the western roads.⁷ For a really significant comparison, the possible ton miles of competitive traffic and the possible revenue from it should be compared to the traffic and revenues of the railroads which actually reach tidewater (though the traffic would not be restricted entirely to these carriers, even though it moved to the Pacific Coast entirely by rail). If the ton miles of these roads and the revenues earned by them in 1934 are considered, it will appear that the competitive tonnage would constitute a very substantial addition to the total, instead of the fraction of one per cent indicated by the figures of Director Lorenz.⁸

It is one thing to add \$13,680,000 to a total revenue actually received by all class I railroads of \$2,631,490,000. It is quite a different thing to add \$80,000,000 to the meager \$493,006,601 received by the tidewater railroads in 1934. It is the difference between adding 0.5 per cent and adding nearly 18 per cent. It is one thing to add 1,368,000,000 ton miles of traffic to a total already received of 269,005,993,000 ton miles; it is quite a different thing to add 8,000,000,000 ton miles to the 45,807,318,383 carried by the tidewater roads in 1934—the difference between adding less than 0.5 per cent and adding be-

⁷ Calvin Crumbaker, "The Panama Canal and the West," *Journal of Business*, vol. 2 (April 2, 1929), p. 155.

⁸ *Ibid.*, p. 156. *Statistics of Railways in the United States* (1934), at the pages indicated, gives the following data for the so-called tidewater roads:

Railroad	Freight Operating Revenues	Ton Miles Revenue Freight
A. T. & S. Fe	\$104,720,632 (p. 98)	9,351,567,968 (p. 107)
Northern Pacific	43,205,825 (p. 99)	3,939,247,066 (p. 107)
Great Northern	60,348,273 (p. 99)	6,137,693,978 (p. 107)
C. M. St. P. & P.	73,382,543 (p. 98)	7,540,899,349 (p. 106)
So. Pac. (including s. s. lines) ..	85,757,493 (p. 116)	7,632,638,126 (p. 124)
Union Pacific	65,159,406 (p. 117)	5,987,442,057 (p. 125)
O. W. R. & N.	12,395,745 (p. 99)	897,920,288 (p. 107)
L. A. & S. L.	13,311,301 (p. 117)	1,048,741,657 (p. 125)
Oregon Short Line	18,660,667 (p. 117)	1,488,823,357 (p. 125)
Western Pacific	11,292,542 (p. 117)	1,293,669,670 (p. 125)
S. P. & S.	4,772,146 (p. 99)	488,674,866 (p. 107)

Totals, all tidewater roads...\$493,006,601

45,807,318,382 ton miles

tween 17 and 18 per cent. If the facts Mr. Lorenz submitted to Mr. Campbell were really significant, it might properly be said that the competitive traffic is "but a drop in the bucket." But, with facts as they actually are, it is proper to say that this traffic is vital to those portions of the western network which must bear the brunt of competition.⁹

As pointed out above, the kind of information here discussed cannot be secured with any accuracy. Consequently, the question propounded by Mr. Campbell cannot be answered accurately, and one cannot believe that Director Lorenz understood that he was giving such an answer. It seems more probable that Mr. Campbell undertook to distort a general statement of Director Lorenz into one which would support him in his opposition to the Pettengill Bill, the controversial matter in which he at the time had a political interest.

What is said here about the importance of the western railroads and their problems need not be construed as an argument that existing laws ought to be violated to provide for the financial need of these roads. Congress, in providing for an adequate national transportation system, authorized the Commission to permit practices to this end which would be illegal if carried out without such permission. The railroads have urged that relief is not only legal but mandatory upon the Commission, in order that the railways of the area may be developed by all lawful means, because of their importance in the national system.

Another interest vitally concerned with relief is the great Middle West, which had come to look to the Pacific Coast for a market for its products. One result of inflated prices during the World War was a raise in railroad rates from the Middle West to all of its markets, and one result of the opening of the Panama Canal was a lowering of water rates from the Atlantic to the Pacific Coast, via the Panama Canal. The loss of market opportunities to the Middle West was shown by a study made by the Department of Commerce in 1926, which compared the freight rates on a ton of steel goods, such as harvesters, plows, harrows, etc., from the Atlantic Coast to the Pacific Coast and from Chicago to the Pacific Coast before and after the World War. Before the canal was put into operation in 1914, New York was 1904 cents per ton away from San Francisco. In 1926, because of favorable canal rates, though there had been no appreciable change in ocean rates as a whole, it was but 1680 cents away.

⁹ This discussion does not assume that the railroads could, or should, regain the entire competitive intercoastal tonnage here discussed. I wish merely to point out the significance of water competition and to indicate the seriousness of losses already realized by rail carriers.

Before the war, Chicago was 2610 cents per ton away from San Francisco; in 1926, because of increased rail rates, it was 2946 cents away.

Chicago's raise of rates has a double explanation. (1) In 1918, during the period of government operation of the railroads, relief under Sec. 4 was withdrawn and rates to the Pacific Coast were raised to the level of rates at intermediate points; (2) the general level of railroad freight rates on shipments to all parts of the United States were raised during and following the war. Chicago, according to the calculation, had moved 336 cents per ton farther away from the Pacific Coast, while New York had moved 224 cents closer.¹⁰ That Chicago's relative disadvantage was not greater in 1926 was in part due to the fact that in 1923 the transcontinental railroads voluntarily lowered rates on certain competitive commodities by amounts running as high as 35 cents per hundred or \$7.00 per ton.¹¹

Hearings before the House and Senate committees on the several Gooding bills, which had as their purpose the prohibition of all relief at the Pacific Coast, were replete with testimony of the adverse effects of the existing rate situation on the business of the Middle West. There was testimony that a great relocation of population and industry was in progress in the Middle West as a result of these rates to the Pacific Coast.

It goes without saying that the Atlantic Coast manufacturers, enjoying the advantages of a cheaper competitive route, are benefited by a situation so adverse to the Middle West. Statistics of transportation by water show that an increasing portion of the Pacific Coast trade now comes from the Atlantic seaboard. Naturally an allowance of relief under Sec. 4 which would relieve middle western interests would be adverse to interests on the Atlantic Coast.

On the Pacific Coast it is possible to distinguish several classes of interests on the basis of their reaction toward fourth-section relief. There is the jobber interest, which is now able to secure goods on the Atlantic Coast, ship them by the lower water rate to the Pacific Coast, and undersell jobbers of the intermountain region. Coast jobbers favor relief on account of the advantages which would accrue to them as a result of the competition of the Middle West and Atlantic Coast markets for this business.

¹⁰ Calvin Crumbaker, "The Panama Canal and the West," *Journal of Business*, vol. 2 (April 2, 1929), p. 139. St. Lawrence Waterway Project, Sen. Doc. No. 183, 69th Cong., 2nd Sess. (1927), p. 2.

¹¹ W. P. Kenney in Senate Hearings, S. 2327, 68th Cong., 1st Sess. (1924), p. 575; Reduced Commod. Rates to Pac. Coast Term., 88 I. C. C. 512, 514 (1924); Commod. Rates to Pac. Coast Term., 107 I. C. C. 421, 437 (1926).

In a second group are Pacific Coast manufacturers of articles affected by the competition of eastern producers. They naturally oppose relief which will bring the middle western producers actively into competition with them. They would also favor methods which would raise the costs of transportation by water to the Pacific Coast. A third group consists of producers of goods which must be shipped from the Pacific Coast to other sections for sale. These producers have actively supported relief for the railroads, on the ground that their rates will be more advantageous if the railroads can secure any financial advantage from the competitive business. It will also insure their car supply, they say, by furnishing a load for the equipment on the westward haul. We should include in this group of producers the vast number of fruit raisers from the Canadian border to Mexico, manufacturers of lumber and lumber products, manufacturers of grain products, producers of potatoes and vegetables, and producers of livestock and of grains.

Another important group on the Pacific Coast which will be aided by relief is composed of merchants who aspire to develop extensive foreign trade with the Orient. Because of high transportation rates, they find the Middle West cut off as a source of supply; consequently they must supply their stocks from the Atlantic seaboard in order to compete with merchants on the Atlantic in the matter of price. But the costs of transshipment, etc. are such that the Oriental trade can be more cheaply supplied directly from the producers at the Atlantic seaboard through the canal. Records of the Panama Canal for several years showed that, of the total export business of the United States to the Far East and to Australasia, the percentage which originated on the East Coast and went west by way of the canal was in general on the increase.

It is not easy to secure the data to prove the extent to which Pacific ports are affected in their foreign-trade relationships by the Panama Canal; but it is commonly conceded that such business is handicapped seriously by the low rates of water carriers and the higher rail rates from the Middle West. An officer of the Northern Pacific Railroad is authority for the statement that, while the volume of business with the Orient in goods produced in the eastern part of the United States "has greatly increased, the movement by way of Pacific ports is actually less than it was twenty years ago."¹²

The producers of copper, wheat, livestock, and lumber of the intermountain area are interested in low rates for shipping their prod-

¹² J. G. Woodworth, *The Panama Canal* (1924), p. 5.

ucts out of the territory. In the fourth-section cases, relief was supported by many of these interests, notwithstanding the bitter fight waged by the jobber interests of the same territory to prevent relief. Freight is a cost of production of all products which must be shipped from the area of production and sold on an organized market.

The jobbers located in intermountain territory, who must pay higher rates on their stocks of goods than Pacific Coast competitors, made up an important group adversely affected by the lower water rates. The intermountain jobbers have always bitterly opposed relief on hauls to the Pacific, though the railroads maintained and the Commission, in general, has admitted that relief was not the cause of their disadvantages. The low rate on water shipments to the coast was the source of the trouble; to deny railroads the right to meet the water rates would not help the intermountain area. Advantages might come to the intermountain jobbers, however, if they were able, by obstructing relief on rates to the coast, to force the railroads to cut their rates at intermediate points to the level of the water rates. This has been described as an effort to force the railroads to "dig a sea canal" from the coast to intermediate points such as Spokane and Salt Lake City. In this way, and in no other way, can jobbers of the interior points find relief from coast competition.

Two other groups are affected by relief to transcontinental carriers. Railroads serving the eastern and southern sections of the United States make up one group and water carriers using the canal the other. The greater part of the goods manufactured at, or shipped through, an Atlantic or Gulf port originates in the interior, either as raw material or as finished product; hence there is generally a rail haul to tidewater on most goods which are shipped to the Pacific Coast by water. This is true of goods which originate in eastern United States and which are shipped through north Atlantic ports, and of goods which originate in south Atlantic and Gulf regions. Naturally these railroad interests will be adversely affected by any rate adjustment which could benefit the producer of the Middle West and the transcontinental railroads.

The water carriers using the canal will stand to lose heavily, if railroads are given rates which will allow them to compete with water routes.

Water-carrier tonnage has had a phenomenal growth since the World War. Many ships have been available at reduced prices, and rate adjustments have been particularly favorable to water carriers. Attention has been called to the fact that tolls charged for passage through the canal do not bear proper relation to the actual cost of

supplying the service.¹³ No taxes are paid on the canal investment of nearly \$400,000,000 (the railroads of the country, as a whole, pay 6 per cent to 8 per cent of their gross revenues as taxes); canal accounting does not include interest on the investment at the rate paid by railroads; the canal does not provide adequate reserves to cover depreciation and dangers of extraordinary damage or destruction by earthquake, etc. Unless all such items are covered, the cost of the service is not being paid by the user.¹⁴ If all costs of the type borne by the railroads were added to the costs to the canal and charged to the shippers through higher toll charges, between \$25,000,000 and \$30,000,000 more per year would have to be paid by shippers, and the vast paper profit claimed for the canal since its opening would be reduced materially.¹⁵

The United States Shipping Board took note of this situation in its annual report for 1929, and noted that the railroads and midwest cities were interested in having canal tolls increased, hoping thereby to lessen the advantage of water traffic.¹⁶ It might well have been added that an increase in canal tolls would afford complete relief to jobbers of the intermountain district.

It has also been charged that ships passing through the canal in intercoastal service have in some cases been bought from the government at prices far below their cost and their value. Rear Admiral Emory Land, chairman of the Maritime Commission, said in an address in 1939 that the war-built fleet was sold at an average price of \$20.98 per ton as against a construction cost of approximately \$200 per ton.¹⁷ An interesting report on the status of the accounts of the Shipping Board, made in 1929 by the Comptroller General of the United States, contains this statement:

It appears from the audit that in certain cases ships were sold at exceedingly low prices, compared to their construction costs; that a successful bidder was granted terms materially advantageous to him, which terms were not announced in the advertisement for bids; that ships were sold to irresponsible companies, who evidently would not or could not meet their obligations under the contract, which failure resulted in losses to the United States; and that in some cases one year and more elapsed between the date of sale and the date of making final returns for the proceeds.¹⁸

¹³ Calvin Crumbaker, "The Panama Canal and the West," *Journal of Business*, vol. 2 (April 2, 1929), p. 164.

¹⁴ *Ibid.*, p. 167.

¹⁵ *Ibid.*, p. 167.

¹⁶ Annual Report, U. S. Shipping Board (1929), p. 32.

¹⁷ U. S. Maritime Commission, P. R. 319, Mar. 23, 1939.

¹⁸ Report of the Comptroller General of the U. S., H. R. Doc. No. 111, 71st Cong., 1st Sess. (1929), p. 12.

As an example, the Comptroller set forth the record of one sale. Three hundred twenty-one vessels were sold. The construction cost was \$408,062,898.58; the sale price was \$43,962,308.00, a little over 10 per cent of the construction cost; the actual cash received by the Shipping Board was \$15,413,919.54.¹⁹

The government's policy of charging less than the full cost of transit through the canal and of selling vessels at less than their value is in reality a policy of subsidizing the canal carriers as competitors of the western railroads. To say the least, there is little consistency between this policy and the mandate of the Transportation Act of 1920 that an adequate national system be developed, including full development of both railroads and water carriers.

Enough has been said to indicate the intense interest of various widely diversified interests in fourth-section relief on the transcontinental railroads. It is now desirable to recall here that, since 1916, railroads have not been permitted to make rates which vary from the provisions of Sec. 4. In that year, the Commission, finding that water competition was no longer important, directed that all rates be readjusted to eliminate long-and-short-haul variations. There was nothing in the order to indicate that the principle upon which relief had long been granted had been abandoned by the Commission as far as future cases involving transcontinental carriers were concerned. In fact the reverse was true. It was stated that transcontinental carriers might bring the matter to the attention of the Commission "for such disposition as the circumstances may justify."

The transcontinental carriers did not voluntarily abandon relief but were directed to do so by the Commission. As a matter of fact the order was suspended until 1918, when it became final. The Intermediate Rate Association then began proceedings against the director general to force a stepping up of rates from the East to the West, so that coast points would have higher rates from the East than the intermediate points. Whether this was a *bona fide* attempt to readjust rates or an attempt to block any future application of the railroads for relief is, of course, a matter of conjecture. The Commission denied the association's application on the ground that water competition seemed about to begin with renewed vigor and that rate schedules then existing were not an improper adjustment.²⁰

Applications for relief since 1921 have been made in this setting. All discrimination had been withdrawn at the insistence of the Commission. The burden of proof has been heavy upon the railroads to

¹⁹ *Ibid.*, p. 13.

²⁰ *Intermediate Rate Association v. Dir. Gen.*, 61 I. C. C. 226 (1921).

support their contentions that its return was legitimate. Powerful economic and political interests which would be injured by relief have presented a formidable opposition, based not so much upon the law as upon their own economic interests and desires. The energetic campaigns of the transcontinental railroads have been based similarly upon the needs and interests of the railroads and of the geographic areas they serve, rather than upon the law covering the matter. The Commission, which usually does nothing more than administer the provisions of existing law, has found itself, in the transcontinental cases, forced to give consideration to the selfish interests and desires of conflicting parties as well as to rights under existing law. This will appear as the transcontinental cases are analyzed in the chapter which follows.

CHAPTER IX

DENIAL OF RELIEF TO TRANSCONTINENTAL RAILROADS

IN 1921 the transcontinental railroads made their first postwar application for permission to re-establish rates to and from the Pacific ports of call to eastern defined territory which would be less than the rates to intermediate points. They based their application on renewed competition of water carriers through the Panama Canal. The intermediate territory included such cities as: Spokane, Wash.; Salt Lake City, Utah; Phoenix, Ariz.; Reno, Nev.; etc. The territory of origin in the East ranged from New York to the foot of the Rocky Mountains on certain commodities. The proposal to reduce the rates was grounded on the low rates by steamship lines from the Atlantic and Gulf ports and upon the movement of a substantial volume of traffic over the water routes. The Southern Pacific joined in the application and asked for water-and-rail rates from New York by its steamship lines to Galveston and its Sunset Route from Galveston to the Pacific Coast.

This application received careful consideration by the Commission, and its decision may be interpreted as setting forth the factors which in the future would govern the Commission in similar transcontinental applications.

The record before the Commission showed that, for some time before the filing date and before the hearings, traffic destined for the coast

had been moving by water in heavy volume. Competition was keener and water service more efficient than at any time before the war. The rail lines and the water lines, respectively, upon request furnished statements of the tonnage moved from the defined territories to the Pacific coast during June, July, and August 1921. These statements show that considerably more than half of the traffic in most all the commodities involved were shipped by water. As to some commodities the movement was nearly all by water. All but a small portion of the water-borne traffic originated in and east of the Buffalo-Pittsburgh territory, indicating that the Pacific coast interests were making their purchases in that part of the East which is tributary to the water lines and from which they can secure low rates. . . .¹

Lower rates were proposed only on commodities subject to the most severe competition. The proposed rates were not the same as port-to-port water rates. Water carriage entails certain incidental

¹ Transcontinental Cases of 1922, 74 I. C. C. 48, 53 (1922).

charges as insurance (.5 to 5.5 cents per hundred), wharfage, tolls, unloading charges, which were not incurred in the case of rail shipments.² Besides the incidental charges, there are other disadvantages of water transportation, such as slower service, transshipment at ports, irregular ship movements, special requirements as to marking, packing, etc. There is possibility of damages from changes in atmospheric conditions, from the rolling of the ship, and from mixing cargoes. In shipment by water, fancy labels may be scratched, boxes broken, cans bent, linoleum chafed, sheet iron crumpled, plates dented, bars bent, and steam radiators cracked. As a general rule, it would require a water rate of 10 to 25 cents per hundred lower than the rail rate to make equality of conditions, though for iron and steel articles the rate could be more nearly the same.

In 1922 there was no legislation conferring authority to regulate the actual rates of water carriers in intercoastal trade. There was a general requirement governing the filing and the modification of maximum rates but nothing at all as to minimum rates. The Shipping Board was as ineffective as a regulating agency as was the Interstate Commerce Commission before 1906.

The Shipping Act of 1916 contained provisions intended to eliminate certain unfair practices of shipping companies. Sec. 14, for example, provided that no common carrier by water should pay rebates of any kind to any shipper, should use any "fighting ship" against a competitor (either separately or in conjunction with any other carrier), or should attempt to discriminate against shippers for using a competitor's service for any reason. Apparently this portion of the act was intended to eliminate the same sort of practices which Sec. 2 of the Act of 1887 had prohibited among railroads.

Sec. 16 of the Shipping Act contained a prohibition against discrimination which made it unlawful for any common carrier by water to give any undue preference or advantage to any particular locality, kind of traffic, or person, or to interfere unduly with competition.

Sec. 15 of the Shipping Act required that conference agreements must be filed with the Shipping Board. It was stated in 1929 that there have been but few complaints of violation of the sections relating to rebating and agreements, which would seem to indicate the absence of agreements, oral or otherwise, in violation of the sections here named.³

² *Ibid.*, p. 59.

³ Arnold Kahle Henry, *The Panama Canal and the Intercoastal Trade* (1929), p. 34.

Sec. 18 of the Shipping Act contained the Act's only provisions governing rates. It stipulated that rates, charges, classifications, etc., should be just and reasonable, that maximum tariffs should be filed with the Shipping Board and be open to public inspection, and that charges should not be increased above the maximum rates filed without ten days' notice to the Board. Whenever rates, fares, classifications, tariffs, etc., were found to be unjust and unreasonable, the Board might prescribe just and reasonable fares, rates, classifications, etc. to be observed. These provisions, applied only to maximum charges, and did not in any way provide for control of rate cutting by water carriers in their competition with railroads. Apparently, as far as Congress was concerned, the railroads were considered fair "game" for water carriers at any rates they might choose to make for their various hauls. The whole Act, like the Act of 1887, was marked by the implicit faith of Congress in competition as a regulator of rates. It shows little of the spirit of 1920, which mistrusts and attempts to control competition.

Even with this scant provision for regulation, it is not to be assumed that the water carriers cooperated fully with the Shipping Board. As directed in the Act, they filed lists of charges which purported to be their maxima. But actually, the Shipping Board found after a lengthy investigation in 1926, the tariffs filed were not true maxima in any sense. One of the schedules purporting to be a schedule of maximum rates was found to have been taken from a transcontinental rail tariff then in force.⁴

The Board found that actual rates in force had been announced by the Intercoastal Conference through the issuance of "Minimum Rate Lists," which lists were not "filed" nor "posted" within the meaning of the Act. Instead, shippers subscribed for the "service" which set forth these rates. The Shipping Board thereupon ruled that the rates filed were not the maxima provided for in the Act, and that the actual maximum rates received by the carriers as compensation were the maxima intended to be filed. Each carrier was directed to comply with the Act by filing the actual maximum rates received.

The spread between maximum recorded rates and conference-list rates as set forth in the report of the Shipping Board shows that

⁴ *Ibid.*, p. 35; Intercoastal Rate Investigation, Ex parte 3, decided by U. S. Shipping Board Nov. 4, 1926.

whatever protection Congress expected shippers to receive from the posting of maximum rates would not be realized.⁵

The water carriers objected that the ruling of the Shipping Board would in effect make their highest charges actually collected a maximum above which they could not go, except with the permission of the Board and upon ten days' notice. The Board ruled that this was the intent of the Act. The purpose of the Act appears to have been to protect shippers from undue raises in rates and, at the same time, to make possible any sort of cut that might be necessary to compete with rail carriers.

Obviously, there is no way to determine what water carriers were actually charging for transportation, since only maximum rates were filed and the actual rates might vary considerably from these maximum rates. It would be difficult, if not impossible, to compare charges for transportation by transcontinental railroads with those of inter-coastal carriers.

Railroads could not hope to meet the port-to-port rates of the water carriers, partly because water rates were so low and partly because they were more flexible and more easily adjusted to conditions than would be possible with rail rates. Consequently, they chose a point, Pittsburgh, which had water-and-rail rates to the Pacific Coast via the Atlantic ports high enough to allow railroads to meet

⁵ Ex parte 3, Nov. 4, 1926. A few of the most important, showing the discrepancies in these two lists, follow:

<i>Commodity</i>	<i>Maximum Rate Filed (per cwt.)</i>	<i>Conference List Rate (per cwt.)</i>
WESTBOUND		
Agricultural implements	\$3.065	\$.75
Boots and shoes.....	5.735	2.00
Coffee, roasted	2.42	1.00
Cotton, bales	2.00	.75
Drugs, L. C. L.....	4.165	1.00
Flour, in bags.....	1.14	.50
Machinery	3.20	1.00
Paper, print	1.92	.65
Roofing material	1.92	.60
Tobacco, unmanufactured	3.085	.70
EASTBOUND		
Beans, dried	1.42	.45
Canned goods	1.205	.45
Drugs, L. C. L.	4.165	1.20
Flour, in bags.....	1.75	.33
Fruit, dried	1.835	.75
Hides, dry	2.165	1.40
Leather, L. C. L.....	2.085	1.00
Nuts, in bags.....	2.335	1.00
Stone, marble, onyx, rough.....	1.15	.55
Wool in grease, L. C. L.....	1.665	1.00

the competition profitably. The railroads then proposed to apply these rates to any point of origin from the Atlantic Coast to the Missouri River on shipments to Pacific terminals.

Naturally western carriers hoped that heavy traffic would originate in the Middle West, so they could avoid a division of rates with the roads to the east of Chicago. The railroads held that keeping the Middle West on a parity with the East would be "wholesome in its economic effects in that it tends to distribute manufacturing industry and avoid its concentration in the East." Stated otherwise, it would tend to prevent the development of the country within range of the seaboard to the disadvantage of the interior.⁶

This proposal of the railroads appears to have been a tactical blunder, since it gave the Commission opportunity to reassert what it had long maintained, namely, that the purpose of such proposals was to encourage competitive shipments from the Middle West to the Pacific Coast. The preferential rate structure, according to the Commission, was based upon market competition. The carriers sought to justify this by showing that their proposed rates would beneficially distribute manufacturing throughout the Middle West and Central West. "But this," said the Commission, "they may not do, unless it can be done without creating undue rate preferences."⁷

There may be some question concerning whether the Commission allowed its denial of the relief in 1922 to be dictated by the presence of "market competition." It certainly noted the presence of market competition, though it made no attempt to decide what particular type of market competition it was. It did say that, if the rates proposed would unduly and unjustly prejudice the Atlantic Coast region in favor of the region between Pittsburgh and the Missouri River, and unduly and unjustly prejudice the intermountain region in favor of the Pacific terminals, they would violate Sec. 3 of the Act to Regulate Commerce. Immediately following its observations concerning competition of markets, it ruled that the westbound applications "on this record" should be denied.

It is certainly true that competition of eastern and midwestern markets of origin might have been greatly affected by the rates; but it does not follow that the prejudice or preference would be undue or unjust. The fundamental reason for the application was the competition of railroads and water carriers under the same conditions which, at Montgomery, had been termed by the Commission "com-

⁶ Transcontinental Cases, 74 I. C. C. 48, 57 (1922).

⁷ *Ibid.* at 82.

petition of markets of supply." There was abundance of precedent in the decisions of the Commission and of the courts to support the conclusion that the prejudice and preference was neither undue nor unjust. The Commission certainly leaves itself open to the charge that it allowed its decision to be controlled by the factor of market competition.

In addition to raising the question of market competition, the Commission held that the application must conform to the requirement that rates must be "reasonably compensatory." Intermountain interests held that reasonable compensation should include operating expenses, interest on the funded debt, rent on equipment and joint facilities, taxes, and a percentage of fair return under Sec. 15a. In other words, the phrase was construed to change Sec. 4 into a rigid long-and-short-haul requirement. Certain interested state commissions interpreted the words to require a rate high enough to escape being confiscatory. The carriers insisted that "reasonably compensatory" meant "out-of-pocket cost plus some profit."

The Commission rejected the definitions of all the interested parties.⁸ It had long held that the railroads might voluntarily put into force a rate which neither the Commission nor Congress could force them to put into effect. In other words, the interpretation of "compensatory" in a voluntary reduction by the carriers would be different from its interpretation in a compulsory reduction by order of the Commission. Hence the definitions of the intermountain interests and of the state commissions were rejected. But the Commission disagreed with the carriers' interpretation also and, in doing so, apparently made use of a discredited fallacy. It held that the new law meant more than "out-of-pocket costs plus some profit." The addition of Sec. 15a limited the provisions of Sec. 4. The Commission said:

. . . it must be borne in mind that where the out-of-pocket theory is used as a rate basis, there is inevitably thrown upon the rest of the traffic the task of providing the bulk of the net return contemplated in Section 15a. Too wide an extension of the out-of-pocket theory would transpose the entire burden of producing dividends and interest and meeting other fixed charges upon only a part of the traffic carried.⁹

The ambiguity of this statement leaves the Commission open to charges of inconsistency or of faulty reasoning. Of course, it is not doubted that an unnecessary application of the out-of-pocket theory would place a burden upon other traffic; but a rate of this kind, if it involved discrimination of any type, would be unlawful in any case

⁸ *Ibid.* at 69.

⁹ *Ibid.* at 71.

under Secs. 1 and 3. But certainly no one would assert, least of all the Commission, that applying an "out-of-pocket plus some profit" rate to traffic which would otherwise go to water carriers would add to the burdens of other rail traffic. Quite the reverse may be true, and the Commission has repeatedly so found. It is unfortunate that the Commission in this opinion made a statement which may be misunderstood or misinterpreted or misrepresented to mean that the application of lower rates to terminal ports than to intermediate points, which cover and more than cover out-of-pocket costs, adds to the financial burdens of other traffic on the same lines (it being understood, as was the assumption in this entire case, that water competitors would secure the traffic if such rail rates were not made).

If the statement means that the out-of-pocket rates of the transcontinental carriers would add to the burdens of the roads of the eastern districts by diverting traffic from a rail-water to an all-rail haul, there may be some grounds for the statement; but certainly there is none so far as the transcontinental roads alone are concerned.

The Commission finally accepted, as "reasonably compensatory," rates that:

- (1) Cover and more than cover the extra or additional expense incurred in handling the traffic to which they apply.
- (2) Are not lower than necessary to meet existing competition.
- (3) Are not so low as to threaten the extinction of legitimate competition by water carriers.
- (4) Do not impose an undue burden on other traffic.
- (5) Do not jeopardize an appropriate return on the value of carrier property as generally provided in Sec. 15a of the Act. (The Commission could not have meant that rates could not be made which would "affect" the appropriate return of a given road, or even of roads of another entire district, since the Act specifically made provisions for rates of various kinds which would affect intentionally and, in certain cases, adversely the return of other carriers.)
- (6) Do not violate other provisions of the Act, notably Sec. 3.

The burden of proof, the Commission held, was upon the applicants to show that these provisions were fully complied with in their application.

In attempting to demonstrate their contention that the proposed rates were compensatory, the carriers estimated costs on the basis of distance, on whether or not added train miles would be required, on the size of the cars, on the presence of 25 per cent of empty-car

movement westward, and on the absence of any empty haul eastward. Very interesting figures resulted.¹⁰

While not prepared to accept fully the estimates of the railroads in deciding whether or not the proposed rates were compensatory, the Commission held: that it would be difficult to demonstrate that the revenues returned per car would not be reasonably compensatory when compared to other rates in force; that, so far as revenue was concerned, taking the additional business by itself, the proposed rates generally and easily covered the extra out-of-pocket expenses involved; and that they were not lower than was presumably necessary to meet water competition.¹¹

However, the Commission held that, even if rates were compensatory in the sense of covering out-of-pocket costs, they might violate Sec. 15a, since carriers would be forced to take a collateral loss on that portion of the traffic which would, regardless of differences in rail and water rates, go by rail. In addition to collateral losses to western carriers, the Commission pointed out that there would be losses by eastern carriers of the local rates on goods carried to the Atlantic seaboard for shipment to the Pacific Coast, with only a small share of a joint rate to offset such losses. Only if it were assumed that the railroads were getting little or no competitive business could they hope to show a net profit from the business they would draw from the boats. Lines east of Chicago had little, if any, reason to expect increased gross or net income from the proposed rates; on the contrary, the probability was that they would suffer substantial losses. The Commission ruled that, under Sec. 15a, the carriers must show that the competitive rates would not threaten the fair return of carriers in any rate district.

For these several reasons, the Commission in 1922 denied the application for fourth-section relief on westbound traffic.¹² Following the denial of relief the railroads published a rate to the Pacific Coast terminals lower than the existing rates but higher than the competitive rates asked in the application of 1922. To avoid fourth-section violations, these rates were blanketed to the intermediate points, so that the intermediate territory had lower rates on certain commodities, notably iron and steel products, than those theretofore in force.¹³

In October 1924, the transcontinental railroads renewed their application for relief on certain commodities shipped to the Pacific

¹⁰ *Ibid.*, Appendix 3.

¹¹ *Ibid.*, at 76.

¹² *Ibid.*, at 48, 83.

¹³ Reduced Commod. Rates to Pacific Coast, 89 I. C. C. 512 (1924).

terminals. This application involved fewer commodities than the application of 1922. An attempt was made to restrict the application to those goods which were moving in large volume through the canal. The application also differed in that the included territory of origin did not extend east of Group D, roughly the Chicago area. It differed also in that the eastern carriers did not join in the application, manifestly because any grant of relief would be at their expense, since they would lose both the short haul to the Atlantic and also the joint haul to the Pacific Coast on all goods which originated in the Chicago area under the terms of this application.

The rates proposed in the application of 1924, the commodities affected, and the port-to-port rates were set forth in the appendix to the report of the Commission on the cases, rendered two years later in 1926. In the main, the proposed rates were decidedly lower than existing rail rates but higher than water-rail rates.¹⁴

The reason for the renewal of the application for relief in 1924 was that the intercoastal movement through the canal had taken on such large proportions that the transcontinental railroads felt justified in proposing rates lower than those asked in the former application. Some commodities were dropped from the list because a study showed that the movement by water was relatively light.

In its discussion of the case, the Commission proceeded to review the transportation situation faced by the transcontinental railroads. It found that the growth of population on the coast had led to a growth of the total traffic of the western transcontinental lines, but that the all-rail movement in many commodities to the coast had fallen to a great degree. It noted, on the other hand, that the tonnage moving

¹⁴ 107 I. C. C. 421, 468, Appendix (1926). A fairly representative list follows:

<i>Commodity</i>	<i>Present Railroad Rates</i>	<i>Proposed Rail Rates</i>	<i>Port-to-Port Rates</i>
Ammunition	\$1.40	\$1.10	\$0.65
Dry goods	1.58	1.10	.75
I. & S. articles, bars, bands	1.00	.80	.40
Castings, forgings, etc.	1.20	.90	.56
Nails, spikes, fencing	1.30	1.05	.55
Structural iron and steel	1.25	1.00	.55
Packing house products	1.60	1.20	.50
Paint	1.25	1.00	.65
Paper and paper art., labels	1.35	1.00	.65
Book paper	1.25	1.00	.70
Rail fastenings	1.00	.80	.40
Axle wheels and forgings	1.00	.85	.45
Roofing, etc.	1.10	.90	.60
Rosin	1.20	.75	.50
Soap	1.25	1.00	.50
Wire cable	1.20	.90	.45
Rods, wire	1.00	.80	.40

by water to the same destinations had greatly increased, as had the number of vessels in the service.

The proposed point of origin was fixed at the vicinity of Chicago because the rail carriers had given up hope of being able to compete for traffic originating near the Atlantic or Gulf coasts. In the application of 1922 points such as Buffalo and Pittsburgh were selected as the points of origin, and an effort was made to fix all-rail rates to the Pacific Coast which would be comparable to rail-and-water rates from these points. In arriving at such rates, the main items considered were: rail cost, Pittsburgh to Baltimore, at the rate of 31 cents per hundred, and water cost through the canal at 40 cents per hundred, or a total rail-and-water rate from Pittsburgh to the Pacific Coast of 71 cents per hundred. To these costs were added incidental costs, such as insurance, wharfage, switching, etc., amounting to from 5.5 to 6.5 cents per hundred. In all, the rail carriers had to meet a water rate of 76.5 to 77.5 cents per hundred in order to place their rates on an equality with rail-and-water rates from points of origin on the Atlantic Coast. It was doubted by the Commission whether the rate of 80 cents proposed in the application would attract much traffic, since the United States Steel Company would probably continue to serve the Pacific Coast from its mills in the East, shipping by way of the canal on its own ship lines. Independent mills, it was conceded, might supply some traffic from the Middle West.

The intermediate territory quite generally opposed the application—with the exception of important interests engaged in lumber, fruit raising, mining, and flour milling, which must look to outside markets to dispose of their products. There was bitter opposition among jobbers, manufacturers, and distributors on the ground that their field of operations would be further restricted by the lower rates by rail to the coast.¹⁵

Eastern manufacturers and shippers generally opposed the application on the ground that the relief sought was based upon market competition rather than water competition and that such competition was not a lawful ground for fourth-section relief. Those interests maintained that there was no justification for extending the advantages of proximity to economical water transportation inland to Chicago, where no water competition exists, first, because it would deprive the Atlantic interests of their geographical advantages, and, second, because it might interfere with the efficiency of the water service, through loss of traffic.¹⁶

¹⁵ 107 I. C. C. 421, 428 (1926).

¹⁶ *Ibid.* at 429.

In 1926 the Commission flatly rejected the application of 1924 as it had rejected the previous application in 1922. Several of the reasons assigned for the rejection were the same as those noted in the preceding case in 1922. The emphasis however was different.

The language of the Commission leads the reader to believe that the presence of market competition was a decisive factor in the denial of relief. In what other way could the following statements in the decision of 1926 be interpreted?

The relief sought is based primarily on market competition. Because Pittsburgh enjoys certain rail-and-water rates on iron and steel to the Pacific coast, the western carriers are proposing all-rail rates, not from Pittsburgh but from Chicago, approximately the same as the rail-and-water rates from Pittsburgh, and are blanketing those rates as to origin territory as far as the Colorado common-point line. . . . Thus the natural advantage of location near the Atlantic sea board which Pittsburgh enjoys is to be neutralized by extending it to points from 500 to 1500 miles farther away. Manufacturers of other commodities in the Middle West would likewise be accorded a basis of rates to which they are not legitimately entitled by any natural advantage they possess, whereas the manufacturers of the same commodities on the seaboard would have their advantage taken from them or diminished. While the manufacturers in the Middle West, in effect, would thus have accorded to them the advantage of proximity to water transportation, and would be placed more nearly on an equality with the eastern manufacturers with respect to shipments of the latter moving to the Pacific coast ports through the canal, they would not only continue to enjoy the advantage of their more westerly location on traffic moving all rail from the East, but this advantage would be increased. . . .¹⁷

The Commission saw further effects of market competition in the fact that Pacific Coast dealers would gain an added advantage from the opening of the Middle West as a market of supply, whereas they had formerly depended upon the Atlantic seaboard. Dealers in the intermountain region would suffer a corresponding disadvantage. The Commission did not flatly state that these considerations of market competition governed its decision, but they are decidedly a part of the record which the Commission held justified a denial of the application.

Similarities between this case and the Gray's Harbor, the Wisconsin paper, and the Montgomery situations discussed in previous chapters will suggest themselves. In each of these cases, as here, there were two or more carriers carrying from two or more rival sources of supply to a single market. It is unfortunate that the words of the Commission give the impression that the identical situation which led to the granting of the applications in the three cases mentioned above should be used as a basis for the denial of this application.

¹⁷ *Ibid.* at 436, 437.

Sec. 15a figured in an important way when the question of collateral losses was considered in the 1926 case. The Commission held that: "If the applicants are to benefit through the establishment of the rates here sought to be made effective they must necessarily first offset the losses which would result on the traffic now moving all rail." This is in conformity with the attitude taken in the 1922 case. The Commission estimated collateral losses to the applicant carriers of \$861,553 per year, losses to eastern carriers of \$1,000,000, and losses to water carriers of an amount in excess of \$1,000,000.¹⁸ The gain to the western lines would have about offset the loss to the eastern carriers and the water lines. In addition, the eastern carriers would have lost revenue on all-rail traffic to the Pacific Coast, since the joint rate is a percentage of the Chicago rate, and a reduction of the Chicago rate would result in a reduction of the share allotted to the eastern carriers.

The Commission called particular attention to the probability that water carriers would cut rates to hold their share of business. They would be impelled by their own interest and would be urged to do so by eastern manufacturers, who would in this way hold their business against the inroads of producers in the Middle West. Transcontinental carriers would have to make further reductions in rates or lose the business to water carriers. The Commission therefore concluded that either a disastrous rate war or transportation at unprofitable rates would result, to the detriment of all interests.

Advantages to the railroads from securing competitive traffic were held to be slight, while disadvantages to the water carriers were held to be fatal. The Commission said:

It is evident, therefore, that the diversion of any substantial tonnage from the water lines would have but an inappreciable effect on the net revenues of the rail carriers. On the other hand, it might very seriously impair the ability of the water lines to maintain their present standard of service.¹⁹

Transcontinental carriers applied in 1934 for permission to establish and maintain railroad rates on automobiles and parts from eastern producing points to California, to meet rail-and-water rates from and to the same points without observing the requirements of the long-and-short-haul clause. Producing points were grouped according to their distance from the Atlantic seaboard, as follows: Group B, Buffalo, Pittsburgh, and Cleveland; Group C, Flint, Detroit, South Bend, and Cincinnati; Group D, Chicago and Kenosha, Racine, and Menasha, Wis. The railroads sought to make terminal rates to

¹⁸ *Ibid.* at 438.

¹⁹ *Ibid.* at 439.

Pacific ports from the several groups at 30 cents above the rail-water rates, to permit them to recover a share of the tonnage to Pacific ports and to prevent further losses.²⁰

The investigation of the case brought to light several startling facts. The first was that water rates between Atlantic and Pacific ports, the conditions of shipment being identical in every particular except the point of origin of the goods, varied inversely with the distance of the point of origin from the Atlantic port of origin. Thus, automobiles which originated in group B, closest to New York, Philadelphia, or Baltimore, took the highest port-to-port water rate, \$3.00 per hundred. Automobiles which originated in Group C, Detroit for example, farther from the Atlantic ports, took a lower port-to-port water rate, \$2.65 per hundred. Automobiles which originated in Group D, the Wisconsin district, the greatest distance from the Atlantic ports, took the lowest port-to-port water rate, \$2.25 per hundred. The differences were asserted to be the result of competitive conditions which required the water carriers to absorb part of the rail rates from the more distant points. This discrimination was not in violation of the provisions of the Shipping Act forbidding discrimination, because the rates were the result of competitive conditions, hence were not unjust and undue.

Even the through rail-and-water rates were discriminatory. If the absorption of differences in rail rates to the seaboard was the cause of the discrimination in identical shipments between ports, the through rates, when rail and water rates were added together, ought to have been identical. Thus, the rail rate of 91 cents per hundred from Cleveland to New York, plus the water rate of \$3.00 per hundred, with a few cents added for surcharge, a total of \$4.00 per hundred, ought also to have been the rate from Detroit and Milwaukee, located respectively in the other two groups. This, however, was not the case. The Detroit rate to San Francisco was made up of a rail rate to New York of \$1.20 per hundred, a water rate of \$2.25 per hundred, and a few cents surcharge, a total rate of \$3.52 per hundred. Combined rail-and-water rates from Milwaukee and other Wisconsin points were still lower than the rate from Detroit.

Thus automobiles shipped from the Detroit rate group to San Francisco, via New York, at the \$3.52 rate would pass through the Cleveland rate group, which took a rate of \$4.00 to the same destination. Notwithstanding the assertions of opponents of fourth-section relief for railroads that long-and-short-haul variations do not

²⁰ Transcontinental Westbound Automobile Rates, 209 I. C. C. 549 (1935).

exist in water or highway transportation, here is an example of fourth-section discrimination as vicious as any ever found in the heyday of the southern basing point or of transcontinental competition. The reason is, of course, a desire to meet the rates from the several groups by transcontinental railroads to the Pacific ports. Obviously, the discrimination was set up by water carriers to divert business from the transcontinental railroads to the intercoastal carriers. The absence in the Shipping Act of provisions similar to Sec. 4 makes such a discrimination in rates possible, just as similar rail rates would now be beyond regulation under Sec. 3 of the Act to Regulate Commerce, if there were no provisions governing minimum rates.

To meet this situation railroads proposed competitive terminal rates which discriminated against intermediate points. In this case opposition came from substantially the same sources noted in previous transcontinental cases.

In denying the application the Commission held that the railroads did not bear the burden of proof placed upon them in such applications. They did not take satisfactory account of the losses of eastern carriers which would offset the advantages claimed for the transcontinental roads. Moreover, the Commission held, as it did in the cases of 1922 and 1926, that the railroads must treat as deductions from increases in revenue the collateral losses, which would result from the lowering of the competitive rates, on the traffic they would receive anyway.

In this case the Commission seems to have advanced a new principle which logically follows the principle adopted in earlier cases—that collateral losses must be deducted from prospective increases in income. It justified denial of the application of 1935 on the ground that the railroads did not “show probability of an increase in net revenue as a result of the proposed rate cuts,” and that merely taking traffic from the water lines was not justified unless net revenues would actually increase. The Commission attempted to console the applicants by an unsupported assertion that, if and when there was an improvement in economic and business conditions, speed might become so important in the delivery of automobiles that the railroads might recover part of this traffic without sacrificing profits.

There was also a reiteration of the fear that a cut by the railroads to meet the water rates might lead to a further cut by water carriers, and that earnings of all types of carriers might thereby be needlessly reduced by a disastrous competitive situation. Advantages might temporarily accrue to certain Pacific Coast shippers, but the ultimate

result of which might be financial loss for all carriers and demoralization of service for shippers.²¹

Denial seems also to have been influenced as in former cases by the Commission's desire to give weight to the declared policy of Congress "to promote, encourage, and develop water transportation, service and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation."²²

Since the field of operation of the water carriers was the "comparatively narrow area along the Atlantic seaboard and a much narrower area along the Pacific Coast," and since they have no intermediate territory such as the railroads have, it was strongly urged, and apparently agreed to by the Commission, that to permit the western carriers to publish the proposed rates from Chicago for the avowed purpose of depriving the water lines of whatever substantial portion of such traffic they were able to obtain would be to disregard wholly the policy of Congress to promote, encourage, and develop water transportation.

Put another way, the Commission interpreted the command that competition be perpetuated between water and rail carriers as authority to establish rates which would preserve the water carriers by excluding the rail carriers entirely from certain classes of traffic. By being given such a monopoly, water transportation was thereby fostered and preserved in full monopoly vigor, while rail transportation was required to carry on from its revenues from other traffic. Although this neglect of the interests of the rail carriers might not prove fatal or even of great expense to shippers, it may well be contrary to the command of Congress in Sec. 500. This point will be more fully discussed in a later chapter.

²¹ *Ibid.*

²² U. S. Code, title 49, ch. 5, sec. 142; sec. 500 of Transportation Act of 1920.

CHAPTER X

USURPATION OF LEGISLATIVE POWER BY THE COMMISSION

MENTION of the exercise of legislative power by the Interstate Commerce Commission has been made several times in earlier chapters. In this connection two questions will suggest themselves to the student of fourth-section regulation. The first question is whether the Act to Regulate Commerce as amended conferred legislative powers upon the Commission. The Supreme Court gave a negative answer in the only cases which have been before it, the *Intermountain Cases* decided soon after the Mann-Elkins amendment of 1910. No change in the law since that time has changed that general conclusion. The second question is whether the Commission has arrogated to itself the power to exercise legislative discretion in carrying out its regulatory functions. The answer will depend upon the approach made to the problem by the student.

If he confines his analysis to the powers explicitly conferred upon the Commission by the Act to Regulate Commerce and the several amendments thereto, he may find much evidence that the Commission has converted itself into a full-fledged legislative body, without the authority of law. This chapter will attempt to present the evidence which seems to sustain this conclusion.

Any attempt to fix a division line between administrative and legislative acts will doubtless lead to violent disagreement. Yet such a distinction is necessary if this study is to be at all complete. Among the decisions involving Sec. 4, the following may be classed as administrative:

- (1) The determination of the existence of competition and the determination of the extent to which competition is controlling in rate making.
- (2) Denial of relief where competition is not present or denial of relief in excess of that required by existing competition.
- (3) Permitting a railroad to meet competition when the existence and the extent of the competition have been determined.
- (4) The determination of whether rates are reasonably compensatory and whether they jeopardize the national transportation system.

The following may be classed as legislative: the denial of fourth-section relief when it has been determined that the legal requirements for the granting of relief have been fully met.

Why the granting of relief where the tests have been met is an administrative act while the denial of relief under the same circumstances is a legislative act will be made obvious by a study of the several Supreme Court cases outlined below.

The distinction between administrative or quasi-legislative functions and true legislative functions has been made by the Supreme Court in a number of instances, and tests have been worked out by which the question has been decided. In one type of case, of which there are many examples, the Supreme Court has upheld the power of administrative officers to issue drastic orders having the force and effect of law, where it was clearly shown that the orders merely carried out a policy established by Congress. In another type of case, the Supreme Court has overruled the orders of administrative officers, not because the orders were more drastic or more sweeping than in other cases, but because Congress, unable to lay down a policy to be followed by the administrative body, authorized the administrative officers, first, to lay down the policy and, second, to administer it, thus combining both legislative and administrative functions in the same body.

For over a hundred years it has been accepted that the American system of government would be impossible if legislatures could not delegate some of their functions to administrative or quasi-legislative bodies. Such a delegation is constitutional, if it is accompanied by the pronouncement of a definite or determinable policy. A few cases selected more or less at random will illustrate.

Two such cases arose in connection with the tariff, which has long been considered a purely political matter directly and solely under the control of Congress. One of the cases grew out of the addition to the tariff law of a reciprocal clause, which declared it to be the policy of Congress to treat differently those foreign countries which reciprocated with the United States from those which did not. The power to suspend by proclamation the existing tariff laws or to put into effect different rates in certain specified cases was delegated to the President of the United States. *Marshall Field and Co. of Chicago* attacked this provision of the law as an unconstitutional delegation of legislative power to the executive department. The Court set aside the allegations of *Marshall Field and Co.*, on the ground that Congress had laid down all the terms and conditions of reciprocal trade and had authorized the President, as an administrator, to suspend the

terms governing import of goods when he found the actions of certain foreign countries to be "reciprocally unfair and unreasonable." Congress, not the President, had prescribed in advance the duties to be levied, collected, and paid on the particular commodities, while the suspension lasted. Said the Court:

Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. It became his duty to issue a proclamation declaring the suspension . . . Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.¹

A second case, which will further illustrate the point, arose out of an act which authorized the President, under certain conditions, to raise or lower the legal tariff schedules by amounts not to exceed 50 per cent. Acting under this law, President Coolidge ordered a 50 per cent increase in the tariff on barium dioxide, which changed the statutory rate from four cents per pound to six cents per pound, upon the finding of the Tariff Commission that this raise was necessary to equalize the cost of barium dioxide in the United States and in the principal competing country abroad. The Supreme Court found that Congress had declared the policy that costs should be equalized; that it had provided the method and the machinery for determining the costs; and that it had established, as the proper measure of the tariff, the difference in costs. The actual tariff rate was not a matter of policy, determinable by legislation, but a question of fact to be determined by qualified experts. Congress had the right to call upon the administrative branch of the government to assist it in putting its policy into effect. The Court said:

"They [the legislature] have not delegated to the Commission any authority or discretion as to what the law shall be . . . but have merely conferred upon it an authority and discretion to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. The Commission is entrusted with no authority or discretion upon these questions.' . . . If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power . . ."²

In a case involving a state commission, Chief Justice Taft made a similar statement that, in creating an administrative agency, "The legislature to prevent its being a pure delegation of legislative power,

¹ Field v. Clark, 143 U. S. 649, 693 (1892).

²Hampton v. U. S., 276 U. S. 394, 408 (1928).

must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. . . .”³

In another case the Court upheld the orders of the Secretary of War that a bridge company make alterations in its bridge to remove obstructions to commerce, although the bridge had been in operation for some 30 years. The orders of the Secretary of War were held not to be legislation, since Congress had declared the policy that rivers should be freed and kept free from obstruction to navigation. The Secretary of War was authorized and instructed to determine whether a given structure or use was an unreasonable obstruction and to require its removal if found so to be. The real legislation did not lay in the order of the Secretary but in the original declaration of Congressional policy.⁴

The Court also upheld the orders of the Secretary of Agriculture regulating the use of the public domain for grazing purposes, maintaining that the true policy was determined when Congress laid down the basic rule that public lands should be protected from depredation and harmful use and provided penalties for the violation of this basic rule. The duty imposed upon the Secretary of Agriculture was to adopt and enforce administrative rules which would accomplish these ends of Congress. Congress declared the policy and Congress provided the penalty. When one Grimaud entered the public lands contrary to the rules of the Secretary of Agriculture, the Court held that “the offense is not against the Secretary, but . . . the laws of the United States, and the peace and dignity thereof.”⁵

By similar reasoning, the Court upheld the requirements of the Interstate Commerce Commission that accounts of common carriers be kept in the detail specified by it. These rules were necessary to assure fulfillment of the general requirement of the Act to Regulate Commerce that rates be just and reasonable. So also the orders of the Secretary of Labor deporting certain aliens were held not to be legislation, in spite of the fact that the control of immigration and naturalization has long been held to be a political matter. Congress had already laid down the law with regard to the immigration of undesirable foreigners, and had declared the policy to be followed in deporting them. The Secretary was instructed to find out facts concerning aliens and to proceed to deport those found to be undesirable as defined in the Act of Congress.⁶

³ *Wichita R. R. and Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59 (1922).

⁴ *Union Bridge Co. v. U. S.*, 204 U. S. 364 (1907).

⁵ *U. S. v. Grimaud*, 220 U. S. 506 (1911).

⁶ *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194 (1912); *Mahler v. Eby*, 264 U. S. 32 (1924).

In contrast with the decisions of the Supreme Court cited above, which permit wide latitude in the orders of administrative officers, are the decisions of the Court which have set aside acts of Congress because they delegate legislative power. Two of these will serve to illustrate the distinction between acts which the Court holds provide for quasi-legislative or administrative powers and acts which it holds provide for the exercise of true legislative power.

In 1933 the Congress authorized the President to promulgate orders controlling the shipment of oil in interstate commerce, and made provisions for fine and imprisonment for violation of such orders. It is popularly assumed that Congress intended to support the restrictive laws of certain oil-producing states designed to limit the output of crude petroleum. The Supreme Court of the United States was unable to establish this purpose from the language of the Act. Congress did not declare in an intelligible manner any policy with regard to either the production or the shipment of oil, which could serve to govern and control the orders of the President. As stated by the Court, the Act did not say

whether, or in what circumstances, or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress . . . declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.⁷

Congress had "left the matter to the President without standard or rule, to be dealt with as he pleased." Such a grant of authority, the Court held, was a delegation of legislative power which could not be justified by the assumption that the President had acted or would act for what he believed to be the public good. The point, said the Court, was not one of motives, but one of constitutional authority.

The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. . . . The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. . . . But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitation of the authority to delegate, if our constitutional system is to be maintained.^{8a}

⁷ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 415 (1935).

^{8a} *Ibid.* at 421.

In the *Schechter Case*, the Supreme Court found that the National Industrial Recovery Act contained a similar unconstitutional delegation of legislative power in its provision for the imposition of "codes," by vote of the industry or by order of the President, which would set up standards of "fair competition," fix the hours of labor, fix the number of work days per week, determine other labor conditions, and establish standards for classifying and grading stock to be sold. Under the terms of the Act, a code, when imposed, was binding upon all individuals in the industry, whether they participated in the establishment of the code or not. Violations were punishable by fine or imprisonment, or both. Enforcement was through an advisory committee and a "code supervisor," to be appointed and approved as provided in the Act.

In providing for this machinery to regulate business and industry, Congress declared no policy and set up no standards by which the codes were to be measured. The matter was left either to the resolutions of the members of the industry, subject to the approval of the President, or to the President, who might impose a code upon the industry in case it did not act in its own behalf.

This the Supreme Court found to be an unconstitutional delegation of legislative power, on the one hand to the President in giving him power to impose "penal codes" upon an industry, and on the other hand to the members of an industry, in permitting them to act as a legislative body in deciding what practices should be permitted as fair, subject to the veto of the President.

The Court made it clear that, while there was no constitutional objection to the delegation of broad powers to administrative agencies, since constitutional government in some cases could not function effectively in any other way, Congress could not use this fact to justify its abdication of the essential legislative functions with which it is vested, as was done in this case.

The Court noted that, while Congress forbade "unfair competition," it did not set up any standard by which it might be tested. The Court's development of this point was as follows: The definition must be made, and would be made, by those who set up the code. It might be different in different codes. The common law could not help, as it did in defining the terms "fair return" and "fair value" in railroad regulations. "Unfair competition" was known to the common law, but its meaning there was restricted, and could not be stretched to mean everything that code authorities would want it to mean. Neither could the "fair trade practices" activities of the Federal Trade Commission be helpful. The Trade Commission's approval of

practices is advisory only, and neither the Federal Trade Commission nor the trade associations can define "fair competition" or "fair trade practices" with any finality.

To the question of whether Congress could delegate to trade or industrial associations the power to legislate upon matters which concern them, the Court said: "such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." For the same reason it ruled that Congress could not "delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." The Court said that the Recovery Act was without precedent.

It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . . In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.⁶

From these cases it is evident that the Supreme Court has seen nothing illegal about administrative orders, no matter how broad and how sweeping they may be, if they conform to a definite or a determinable policy set out by the legislative branch. But it has refused to uphold the legality of orders of executive or administrative officials or bodies who not only administer the policy but also formulate it. This form of legislation is repugnant to the whole theory of a constitutional division of powers.

If the Interstate Commerce Commission has exercised discretionary or legislative power in granting or refusing relief under Sec. 4, it must have been either under a specific grant of authority by Congress or through a seizure of legislative power by the Commission.

Read superficially, the language of Sec. 4 seems to indicate the purpose of Congress to prohibit long-and-short-haul discrimination. The words, "It shall be unlawful . . . to charge or to receive any greater compensation in the aggregate . . . for a shorter than for a longer distance . . .", lifted from the context and read apart from its history, can mean only that long-and-short-haul discrimination is outlawed. That this was not the intention of Congress is indicated by other portions of the section, as the Supreme Court has pointed out.

⁶ *Schechter Corporation v. U. S.*, 295 U. S. 495, 541-542 (1935).

One is a provision that rates and charges lawfully in force at the time the Act was passed would not be required to be changed for a period of six months, or until applications were acted upon by the Commission. Certainly Congress would not have included a saving clause if it intended to declare generally that fourth-section discrimination was against public policy. When this provision is considered together with the prohibitory portion of the section, there is no reason to assume that it was the purpose of Congress to express disapproval of long-and-short-haul discrimination or to indicate any wish that the Interstate Commerce Commission should be either more or less liberal in its treatment of applications for relief. Such was the conclusion of the Supreme Court, as will be seen when the *Intermountain Cases* are reviewed later in this chapter.

Further evidence of an intent on the part of Congress to continue long-and-short-haul discrimination is found in a provision of Sec. 4 "that upon application to the Commission such common carrier may in special cases after investigation, be authorized by the Commission to charge less for longer than for shorter distances . . . and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section. . . ." This provision answers one question and raises another. It indicates conclusively that there was nothing inherently contrary to the policy of Congress in long-and-short-haul discrimination, although it was to be prohibited in all except special cases. The question raised by the provision is what is to be considered a special case and what discretion the Commission may exercise in its prescription of the extent of relief "from time to time."

Is the definition of the term "special case" left to the discretion of the Commission, or is it governed by the provisions of Secs. 2 and 3 of the Act? Would discrimination or prejudice that was not undue and unjust constitute such a special case, and would the Commission be bound to grant relief where such a special case was established? Would its power to prescribe the extent of relief from time to time mean merely that the Commission must keep the rates adjusted to take account of changes in the dissimilar conditions which formed the basis for discrimination? If fourth-section relief were legal under Secs. 2 and 3 of the Act and under the "reasonable return" section, would relief be discretionary or mandatory upon the Commission? If there has been either a delegation or a usurpation of legislative power by the Commission, it will be found at this point. Certainly, if relief were unjust or undue, there would be no discretion on the part of the Commission. But would permission be mandatory upon the

Commission if the discrimination were otherwise legal, or could the Commission decide the matter entirely upon what it thought to be sound public policy?

Commissioner Eastman has frequently expressed his personal opinion that the Commission has discretion in granting relief. In the *Paper Cases*, his dissenting opinion decried relief on the ground of market competition, though he apparently recognized the existence of competition between carriers which enjoyed different degrees of advantage. The fact that the points of origin were widely separated and that a carrier serving one area had an advantage over a carrier serving another area did not impress him as justifying relief, though his objection did not appear to rest upon law but upon his idea of good public policy. He said, "We have discretion to grant or deny this relief, and in my opinion it ought to be denied. Indeed I think that we ought in all cases to deny relief where market competition is offered as the justification." The basis of his objection did not lie in the justice or the injustice of the discrimination but in the fact that market competition was pervasive. There might come a time when railroads serving Chicago with paper from New England or Scandinavian countries might be at a disadvantage with railroads from Wisconsin and Minnesota and ask for relief at Chicago, while discriminating against Toledo or Cleveland. This type of competition might be present in numberless cases, and it might give rise to an endless number of applications for relief. Mr. Eastman would settle the whole matter by a blanket denial of all relief on this ground.

It seems clear that Mr. Eastman is here asserting a right to declare a policy, through Commission channels, which would amend a policy declared by Congress. Congress did not, by the Act of 1910 or any subsequent act, affect in any way the legality of competition of this type; neither did it in any way indicate that it meant to discourage lawful relief under Sec. 4. Mr. Eastman insists that authority to permit relief in special cases implies discretion to deny relief under the same conditions and circumstances. Such a fiat by the Commission would change the intent and purpose of Sec. 4 as passed by Congress, and justify a charge of usurpation of legislative power by the Commission.⁹

Other statements by Commissioner Eastman are of special interest, since he has long been recognized as an outstanding member of the Commission. Before the House Committee on Interstate and Foreign Commerce in its hearings on the second Pettengill Bill in

⁹ Paper and Paper Articles to New Orleans, 88 I. C. C. 345 (1924).

1937, he seemed to express belief that the Commission has discretionary power, which is another way of saying legislative power. For example, he implied a responsibility on the part of the Commission for the welfare of transportation generally, in his statement that the Commission had never from the start sought to throttle competition in transportation, and that it had interpreted the law in such a way as to allow carriers considerable leeway in making competitive rates. The only question as he saw it was "how far they ought to be permitted to go in that direction, and certainly they ought not to be allowed to go so far as to do damage to the entire transportation situation."¹⁰

Critics may feel that there is an astute political appeal in the commissioner's statement. But regardless of whether there is or not, and regardless of whether his conclusion is correct or not, the fact remains that he is suggesting that the Commission decide what the needs of the whole transportation situation are. Congress refused to pass legislation designed to protect railroads from the competition of unregulated carriers, or to protect water carriers against their own self-destruction. Commissioner Eastman suggests that the Commission write into the law which it administers policies which Congress deliberately refused to include in its statutes, presumably because it did not adhere to his theory that competition should be restricted in transportation.

He indicates a similar claim of legislative powers for the Commission in his discussion of the effects of carrier competition on labor. In the same hearing he said:

On this question of employment, I may say also, that it is merely a question of transfer. What the railroads add to employment is going to be lost by water lines or some other form of transportation. You do not add to the total employment of the country, and, so far as I can see, one working man is entitled to just as much consideration as another. I do not know why you should give any more consideration to the man working on a railroad than you should to the man working on a ship.¹¹

With regard to competition between water carriers and railroads, he says further at another place:

If such a war should result, I imagine one of the results would be the forcing out of business of some of the intercoastal lines, because there are more boats now than the traffic demands, and, of course, if the traffic were cut in two, there would be a great many more boats than the traffic demands. . . . Now, how much benefit, even if they got all that tonnage—deprived the water lines of all of it—how much actual benefit under those circumstances would they really gain?¹²

¹⁰ House Hearings, H. R. 1668, 75th Cong., 1st Sess. (1937), p. 480.

¹¹ *Ibid.*, p. 472.

¹² *Ibid.*, p. 471.

In response to a question whether the Commission, in reaching its decision, would consider the fact that a rate was so low that it would injure water carriers, Mr. Eastman answered that it would be considered under Sec. 4 unless the rail carriers were plainly the most efficient and economical form of transportation. This statement does not square with his answer made just previously to the chairman's question, "Do you at the present time give separate consideration to the costs to the water carrier of carrying a competitive product?" Mr. Eastman replied, "The water carriers are not under our jurisdiction, in general, at the present time. I think they should be."¹³

The fact is that the Commission has no information concerning the costs to water carriers upon which it could base any sound conclusions concerning the actual effects of any proposed competitive rates. And it does not have this information because Congress has deliberately refused to provide it, though the need had been forcibly brought to its attention. Why should the Commission feel impelled to decide whether competitive rates which allowed railroads to recapture lost traffic would be destructive to water competition or not? True, Sec. 500 said something about preserving in full vigor both rail and water transportation; but that statement like many other gestures of Congress is meaningless. Though Congress piously inserted Sec. 500 in the Act of 1920 and similar provisions in other acts affecting water transportation, it still omitted all requirements as to minimum rates, reports, and cost studies for water carriers. Congress has no definite consistent policy with regard to building up water transportation. It builds with one hand and destroys with the other. Mr. Eastman has expressed his opinion that the Commission should step into the breach and write into the law, so far as it can, matters upon which Congress has intentionally remained silent.

Mr. Eastman made it plain that in the testimony quoted above he spoke only for himself. However the personal opinions he expressed are in line with the decisions of the Commission in the transcontinental rate cases of 1922, 1926, and 1935, discussed at length above. Hence his opinion must be closely in line with the opinion of the majority of the Commission.¹⁴

Without doubt the average reader will agree that in the main the policies approved and advocated by Mr. Eastman are sound. Failure to follow their general trend would be unsound. But the present ques-

¹³ *Ibid.*, pp. 448, 449.

¹⁴ Transcontinental Cases, 74 I. C. C. 48 (1922); Transcontinental Cases, 107 I. C. C. 421 (1926); Transcontinental Westbound Automobile Rates, 209 I. C. C. 549 (1935).

tion does not concern their soundness. The question is whether the Commission or Congress is responsible for the adoption of an intelligent and constructive policy on these points.

The peculiar language of Sec. 4, as it stood after it was amended in 1910, seemed flatly to prohibit fourth-section relief and then to confer dictatorial discretion upon the Commission to allow exceptions in their wisdom. The section was attacked soon after its adoption in 1910 in the *Intermountain Cases*, which grew out of the application of some seventeen railways for blanket permission to continue all the fourth-section rates then in force in the four corners of the United States. The basis advanced for relief in all cases was a general allegation of carrier competition. The railroads took the view that, since Congress did not declare a policy with regard to the granting of relief, the grant of discretion to the Commission to permit discrimination in special cases constituted an unconstitutional grant of legislative power to the Commission, an administrative body.

After a full hearing, the Commission denied blanket assent for all existing cases of fourth-section discrimination, but granted such specific portions of the applications as were sufficiently supported by facts elicited in hearings and investigations. The Commission, at that time repudiated any idea that it was authorized to exercise legislative discretion in the matter, holding that it was restricted from so doing by other portions of the Act, just as it had been before the amendment of 1910 was passed. Presumably it would have felt obliged to deny all applications in which prejudice and discrimination were unjust and undue and to grant all applications in which the showing of lawfulness could be made. In this way and in this way only could it avoid being guilty of the exercise of legislative authority.

When the Supreme Court received the cases on appeal, it upheld the contentions of the Commission that the Act of 1910 did not grant legislative powers to the Commission. In order to take this position, the Court had to adopt a different interpretation of the Act of 1910 than that urged by the railroad attorneys, and, parenthetically, a different interpretation than that assumed by the Interstate Commerce Commission in recent years. The Court's reasoning was as follows: The appearance in the Act of a flat prohibition of fourth-section relief was a denial in appearance but not in fact. It denied relief until the railroads had submitted to the Commission the facts upon which it proposed to justify the proposed discrimination. As to all existing discriminatory rates, there was no prohibition, because provisions of the Act preserved all rates lawfully existing for a period of six months and thereafter until the particular rates could be investigated by the

Commission. The Court found the policy of Congress to be that all existing cases of long-and-short-haul discrimination were to be kept in force until it was proven that they were unjust or undue under other provisions of the Act, notably Secs. 2 and 3. In spite of the seeming prohibition of the new section, it was impossible for the Supreme Court to see in it a Congressional purpose to declare that long-and-short-haul discrimination was against public policy.

The Supreme Court further ruled that the great change in the law was in procedure and not in substance. The procedure of passing on fourth-section rates was to be reversed. Instead of the railroads taking the initiative and posting rates which the Commission must set aside *after* it had determined that they were unlawful, the railroads in the future must give the Commission the opportunity to reject proposed rates *before* they went into effect. The Commission had neither more nor less power to approve or reject such rates than it had had before. The improved mechanism for administering the law was justified solely upon the ground of efficiency. Fourth-section variations were still in line with public policy whenever the prejudice and discrimination was not undue or unjust.¹⁵

Not only were the powers of the Commission not changed by the Act; the rights of carriers to compete for business were not changed in the slightest. The power to decide in the first instance what a proper rate should be was withdrawn from the carriers, where it had previously lodged, and reposed in the Commission, as representative of the public. The Commission had formerly had the same power through its reviewing function. Yet carriers retained full right to make lawful rates, as shown by the Court's statement:

*the right of the carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition, or for other adequate reasons, is expressly preserved and if not is, in any event by necessary implication granted.*¹⁶

It would be difficult to find a clearer expression of denial of the delegation of discretionary power than was here made by the Court. Only by this assertion of the continuance of the rights of carriers to ask and receive relief was the Court able to decide that the amendment of 1910 had not made an unconstitutional grant of legislative power to the Commission. The rights of the railroads were construed to be exactly what they had been before; the powers of the Commission were exactly what they had been before; the only change was in administrative procedure.

¹⁵ U. S. v. A. T. & S. Fe et al., 234 U. S. 476, 485 (1914).

¹⁶ *Ibid.* Italics mine.

The Court not only declared that the carriers have the right to seek and obtain relief under the amended law, but added that the

authority of the Commission to grant on request the right sought is made by the statute to depend upon the *facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned*, and in view of the preferences and discrimination clauses of the second and third sections.¹⁷

The language of the Court deserves more careful treatment than it generally receives. The words "with a due consideration of the private and public interests concerned" lifted from their context may appear to mean "with a due consideration of sound public policy as determined by the Commission." There is little sanction for such a construction of the language of the Court. It seems to mean that the discretion of the Commission is limited to the discovery and preservation of the rights with which private persons and the public had come to be vested in the given situation. There was in the language of the Court nothing concerning policy, and nothing concerning legislative discretion. The discretion involved was that of an administrative body as it exercised diligence and sound judgment in determining the facts concerning the legal rights of all parties. This interpretation is supported by a later statement of the Court:

. . . the provisions as to undue preference and discrimination, while involving of course a certain latitude of judgment and discretion are no more undefined or uncertain in the section as amended than they have been from the beginning and therefore the argument comes once more to the complaint that because public powers have been transferred from the carriers to the Commission, the wrongs suggested will arise.^{17a}

The gist of this statement seems to be that the legal status of fourth-section relief was not changed by the transfer of primary authority from the railroads to the Commission. There was neither more nor less right to make rates which violated Sec. 4 than before. The difference, as the Court saw it, was that the Commission took jurisdiction at the beginning, rather than later as a reviewing function. The Court saw the transfer of initial jurisdiction to be the only question settled by Congress in the amendment. The Court did not see in the Act any change in Congressional policy toward fourth-section relief or any delegation of authority to the Commission to decide matters of public policy with regard to private and public interests concerned.

¹⁷ *Ibid.* Italics mine.

^{17a} *Ibid.* at 488.

Events of the World War so affected transportation that, without any apparent realization on the part of anyone, the relationship of Sec. 4 to competition changed entirely from what it had been in the period preceding the War. Before the War thousands of cases of fourth-section discrimination continued to exist, protected by the terms of existing law as administered by the Commission and as interpreted by the Supreme Court. The burden of proof rested upon the Commission to discover grounds upon which existing fourth-section relief might be set aside. The general understanding was that, where legal, railroads might continue their fourth-section rates as a matter of right rather than as a matter of privilege.

After the War a drastic change in the administration of Sec. 4 came, not from any change in the law, but from a new attitude on the part of the Commission toward applications for fourth-section relief, especially in the transcontinental area and from a new tactical disadvantage on the part of applicant railroads. The burden of proof shifted from the Commission to the railroads. What the Supreme Court referred to as the *right to seek and receive relief* was interpreted to be a privilege to be granted or denied at the discretion of the Commission. The significance of this change to transcontinental carriers grew out of the fact that the withdrawal of water carriers from the intercoastal service to participate in the more lucrative war trade prompted the Commission to order all discrimination in the transcontinental area removed in 1918. For the first time since carrier competition had begun, all long-and-short-haul discrimination was eliminated from this area.

Elimination of fourth-section relief made a difference in the strategic position of the railroads when they sought to restore their fourth-section rates. Before the War, because relief was in existence, and protected by the statutes, railroads had a legal right to retain such rates as were lawful. The Commission had exercised only *sound legal discretion* in deciding whether existing rates were lawful. After the War, no fourth-section rates were in existence in this area. The railroads were, therefore, required to justify a new structure of competitive rates. The burden of proof placed upon them, as events proved, was not merely to establish the legality of the proposed rates, but to justify a major disturbance in the vested rights of individuals and communities which had grown up after competition had been eliminated.

The real difference appears to have been in the Commission, rather than in the law, or in circumstances. When, after the War, the transcontinental railroads applied for relief, the Commission could choose

either of two courses. It could exercise sound legal discretion as an administrative body and recognize the right of carriers to ask and receive relief according to the decision of the Supreme Court in the *Intermountain Cases* of 1914, or it could set to one side the question of the legality of the proposed rates and make the answer rest, not upon sound legal discretion, peculiar to administrative bodies, but upon legislative discretion which takes into account the whole matter of public policy. It chose the latter course. The burden placed upon the applicant railroads by the Commission was not the establishment of the legality of their proposed rates but the establishment of the soundness of the rates from the standpoint of public policy.

There are those who choose to believe that the assertion of the Supreme Court in the *Intermountain Cases*, that the amendment of 1910 did not delegate legislative power, has laid to rest for all time any charge that legislative acts have been performed by the Commission. Nevertheless, certain present-day fourth-section cases involve the exercise by the Commission of a type of discretion which was never even remotely considered by the Court in the *Intermountain Cases*. A statement of the Court that the Act of 1910 did not delegate legislative power is not a statement that the Commission might not later usurp, or that it has not in fact usurped, legislative power under the Act.

It must be understood that this discussion is based upon an interpretation of facts in the several cases. It is not suggested that this interpretation would be accepted by the Supreme Court. The practical difficulties surrounding the performance of constitutional administrative duties by the Commission are such that the Supreme Court would hesitate to accept a classification of Commission acts which would weaken its effectiveness in other cases within its legal powers. However, if the Commission has been exercising power to judge public policies and to favor one or the other of several contending parties at the expense of others on grounds of public policy, it is proper to recognize the fact. If the Commission has become an agency to decide how trade and commerce should be developed, where population and industry should be located or, in some instances, relocated, and what degree of prosperity or well-being should be enjoyed by carriers, producers, or consumers of given areas, it should be given corresponding responsibility.

The nature of Commission hearings on transcontinental rate questions is indirect evidence of the legislative character of its decisions. These hearings bear a close resemblance to such Congressional hearings as, for example, a change in the tariff. A Commission investigation is the

signal for the unloosing of the floodgates of propaganda from various public and private lobbies. High-pressure representatives appear for various railroads or railroad associations, for water carriers, for jobbers, for shippers, for manufacturing associations, and for commercial organizations. Influential members of both houses of Congress do their bit before the Commission. It would be difficult to distinguish these groups from typical legislative lobbies. The type of information given, the arguments advanced, and the methods employed are the same.

It is interesting to examine the record to see just how wide the variety of questions involved in some of the cases has been. How extensively should the western, especially the tidewater, railroads be developed? Are they already sufficiently developed, or are they overdeveloped? Can they get along in some way without the traffic they claim to have lost to their water competitors? Are the producers served by the transcontinental carriers entitled to the economic advantages which they allege would accrue to them as a result of fourth-section relief? If fourth-section relief would further develop the western portion of the United States, is it good public policy to allow it? It must be remembered that western railroads are the key to the entire western half of the United States; they form the only dependable contacts between eastern points and the exposed western coast; they tap the timber, the minerals, and the food supplies upon which the nation must depend in case of war. Are the decisions of the Commission on these matters administrative acquiescence with a policy predetermined by Congress, or is it a determination of a public policy by the Commission acting on its own initiative?

The question of whether legislative or administrative functions are being exercised is present in every case involving fourth-section relief; but its importance does not stand out in most of the thousands of cases which have been passed upon by the Commission. Ordinarily, the principal questions to be decided are whether the discrimination involved is unjust or undue and whether the rates requested are reasonably compensatory. The opinion of the Commission on these points usually closes the matter, regardless of which way the decision goes. Thus the S. P. and S.-Northern Pacific application for permission to charge rates on petroleum and petroleum products from Portland to Pendleton, Ore. lower than to Kennewick and Pasco, Wash., the intermediate points, affected relatively few important interests. Only three parties, the applicant roads, the Union Pacific Railroad, and the competing truck carriers were affected by the competition. Oil refiners and dealers in Portland and elsewhere were not concerned,

nor were dealers in Pendleton. Citizens of Kennewick and Pasco, though technically discriminated against by the proposed rates, were not concerned, since they were not in competition with Pendleton. No national group or interests were moved, as in the "big" cases, to protest or to put pressure upon the Commission or to have recourse to the courts. Since the Commission granted the application, the question of legislative discretion did not enter, as it would have, according to the analysis above, if the Commission had denied it.

But the question is inescapable in important cases, such as the transcontinental fourth-section cases, in which the decisions, when made by the Commission, involve something more than mere administration in accordance with a predetermined policy. The evidence points to a legislative balancing by the Commission of the rival desires of producers and manufacturers of the Middle West, and the South, and the East, as well as the Far West and the intermountain country. The decisions involve the relocation of industry and of population. They affect the growth and development of highway carriers as well as railroads and water carriers. They control the competition of Pacific and Atlantic seaboard markets for import and export business.

That the Commission determines public policy in certain important cases is indicated by the fact that it adapts its rulings to circumstances. It permits full and free competition between certain rail and water carriers, for example, between Portland, Ore. and San Francisco; it permits competition between rail and water carriers, even when market competition is present, as at Gray's Harbor and in the *Wisconsin Paper Cases*. But it denied a similar privilege in the transcontinental cases, although similar requirements of the law were met. In the latter group of cases, the rights of rail carriers were far more seriously affected than in the other cases. However, the conclusion that legislative powers were exercised does not rest upon the fact that relief was denied or that railroads found the denial a severe financial blow. It rests entirely upon differences in the procedure of the Commission and in the grounds for its decisions.

The charge made by Commissioner Esch that the Commission adopted a policy which permitted the establishment of a virtual monopoly for water carriers may be true. His further charge that the decision of the Commission violated Sec. 500 is not necessarily true, for Sec. 500 contains two parts. As a whole, it declares no public policy, for the reason that Congress lacked the courage or the ability to declare such a policy. The Commission felt called upon to assume this function of the legislature, but without admitting it has done so. As far as results are concerned, the Commission decided that sound

public policy demanded that transcontinental railroads, producers of the Middle West, intermountain shippers, and others take losses in order that Atlantic Coast producers and water carriers be built up or preserved. Until Congress speaks on the matter, nobody, not even the Supreme Court, can say that public interest was not best subserved by the policy adopted by the Commission. The author does not challenge the soundness of the decision. He challenges the right of the Commission to make a decision of this nature.¹⁸

Commission decisions involving matters of policy are not limited to fourth-section matters. The Commission is now inclined to limit the power of railroads to make rates for particular purposes, even where no discrimination is involved and where there is no evidence that a particular rate actually violates Sec. 15a. The following statement of the Commission confirms this conclusion:

. . . in our judgment our authority under section 15a, in the exercise of our power to prescribe just and reasonable rates to 'initiate, modify, establish, or adjust' rates is not mere transitory authority to establish in the first instance a general rate structure calculated to produce a fair return, but is continuing authority to see that such a rate structure shall not be undermined and its purposes thwarted by new rates, either increases or reductions, proposed by particular carriers for the purpose of augmenting the traffic on certain carrier lines, or on certain descriptions of traffic, or for the immediate and special benefit of particular persons, companies, firms, corporations, localities, or particular descriptions of traffic, in *disregard of the more general and seemingly inevitable consequences of such rates newly proposed. To upset or seriously to menace a general rate structure lawfully established suffices to make proposed rates calculated to effect such a disruption unreasonable and unlawful.*¹⁹

There is danger in a declaration of policy which makes proposals to change rates secondary to vested rights already created and established under the existing rate structure. Such a practice would make the Commission a moderator of all business conflicts including those through which change and progress come. It has not generally been assumed that the transportation legislation was intended to make the Commission moderator, arbiter, or dictator in dealing with conflicting interests of businessmen. Congress, a purely legislative body, has exercised such policy-forming functions from the beginning. The control of tariffs and national recovery legislation with its NRA and its AAA are outstanding examples of the exercise of discretion with intent to determine the economic destiny of individuals, groups, classes, or localities. The borderline between purely administrative

¹⁸ Transcontinental Cases, 107 I. C. C. 421, 467 (1926).

¹⁹ Truck Line Ore Rates, 69 I. C. C. 589, 611 (1922). Italics mine. See also Grain and Grain Products, 115 I. C. C. 153, 164 (1926); Canned Goods from the Pacific Coast, 132 I. C. C. 520, 535 (1927).

orders which *affect* economic welfare or persons and legislative orders of administrative officers designed to establish or preserve economic policy is so hazy that it is difficult to know when it has actually been crossed.

The Supreme Court seems to have taken this view of the matter in its ruling that an order of the Commission annulling the reduction of certain rates from coal fields in Indiana to Illinois points, to equalize reductions put into effect in that state from other fields, was invalid. The Court said:

. . . the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in its struggle. . . .²⁰

The Court noted that every rate or schedule disrupts in some measure the rate structure theretofore prevailing. In rejecting the sufficiency of disruption as a basis for annulling rates the Court said, "Plainly such disruption without more is no sufficient reason for prohibiting the change." There must be showing that the new rates were impracticable for other lines, that rates were less than compensatory, or that the capacity of the carriers to serve the public would be put in jeopardy. Even a diminution of profits would not of itself make it wrongful for the railroad to reduce rates to restore its parity with other lines. The language of the Court is rather sharp in its conclusion:

The schedules are to be congealed as they exist, because if not congealed they will be fluid, fluidity is change, and change has the potency, if not the promise of disturbance. . . . The point of the decision is not that the present rates are sound, but that they must be maintained even if unsound, for fear of a rate war which might spread beyond control. . . .^{20a}

Clearly enough, the question of vested rights is related to market competition, which was given such prominent mention in the cases of 1926 that it might well be understood that the presence of market competition was one of the major reasons for refusing relief to applicant carriers. The Commission seems to have concluded that rail carriers were trying to nullify the advantages of the East by seeking all-rail rates from the Middle West which would be practically the same as from Pittsburgh points. Thus the natural advantages of Pittsburgh and other centers located near the Atlantic seaboard were

²⁰ U. S. v. C. M. St. P. & P. R. Co., 294 U. S. 499, 506-507 (1935).

^{20a} *Ibid.* at 508-509.

to be neutralized by establishing comparable rates at points hundreds of miles from the Atlantic coast. Manufacturers and producers of the Middle West would thus be given market opportunities to which their location did not entitle them, whereas manufacturers of the same goods near the seaboard would have their natural advantages taken from them.

Even if the proposed rates from Chicago in the transcontinental cases rested upon market competition, before accepting that fact as a basis for denying the applications, both in 1922 and 1926, it should have been necessary, according to previous policy, to have examined the type of market competition involved in order to determine whether it was competition of "markets of supply" as at Montgomery in the case involving violations in the Southeast, or whether it was competition of "markets of distribution" as at Birmingham in the same case. This matter was discussed at length above.²¹

Competition in the *Willapa Bay-Gray's Harbor Case* and the *Wisconsin Paper Cases* seems to parallel fully the situation at Montgomery and to be properly classed as competition of markets of supply. The decision of the Commission that competition at Gray's Harbor and at New Orleans should be permitted, under Sec. 4, was fully in accord with the principles laid down at Montgomery. It will be noted that the Commission did not mention a perfectly obvious fact, that competition, whether between carriers or markets of supply, both of which were involved in these cases, does take geographic advantage from one group or one locality and give it to another. Loss of geographic advantage by the carrier and loss of markets by the producing area with the greatest advantages are just as painful and significant when they result from discriminatory rates based on markets of supply (at Montgomery, Gray's Harbor, or New Orleans) as when they result from rates based upon competition of markets of distribution (as at Birmingham prior to the Commission's rescinding of relief). From this comparison of cases it might be assumed that geographic advantage is not controlling if carrier competition or competition of markets of supply is involved; it would seem only nullification of geographic advantage by *arbitrary* rates demands denial of relief.

Transcontinental rates requested in the applications of 1922 and 1926 seem to rest upon differences in advantages enjoyed by carriers serving separate sources of supply and upon the desires of a section of the country, such as the Middle West, to reach a profitable Pacific

²¹ Chapter III.

Coast market. In this particular, the cases parallel the Montgomery, Gray's Harbor, and Wisconsin paper situations. The discrimination against intermediate points, such as Spokane, was based upon competitive conditions. To allow transcontinental carriers to make competitive rates to Seattle, or to refuse to allow that privilege, would not take from Seattle the low water rates which allowed that city to undersell Spokane in territory open to both, nor would it increase or decrease any of the rate disadvantages of inland points.²²

It is true that Chicago and related points would have gained markets through the proposed discriminatory rates, and it is true that coast cities would have gained a new source of supply. It is true that the Atlantic Coast would have lost its monopoly of the Pacific markets and that Spokane would have had to compete with coast jobbers who bought goods in two separate markets instead of one. But, as suggested above, this situation was likewise present in the Gray's Harbor and Wisconsin paper applications. Why transcontinental applications alone, of all important applications, should be disallowed because of redistribution of geographic advantages is not obvious.

Much has been said about the preservation and shift of geographic advantage, but little has been done to make clear what constitutes such an advantage. Geographic advantage may rest upon a large number of factors or conditions. In the Willapa Bay-Gray's Harbor application, distance was made a governing factor in determining geographic advantage. The ports in question were adjudged a part of the geographic area tributary to Portland and Puget Sound cities, as well as of the area tributary to San Francisco.²³ If a comparison of rates had been the test, the lumber-schooner rates, which were well below the established rail rates, would have made these ports exclusively tributary to San Francisco. On the basis of shorter distance overland relief was granted to the railroads, allowing them to charge less at the ports than at intermediate points, so that the geographic advantages of Portland and the Puget Sound cities might be recovered.

The Commission, from the prominence given the matter in its opinion, must have had in mind, as one of its principal reasons for rejecting the fourth-section applications of the transcontinental railroads in 1926, the fact that proposed rates took from the Atlantic Coast the advantages of its geographic location. The applicant rail-

²² *Louisville & Nashville R. Co. v. Behlmer*, 175 U. S. 646, 669 (1900); *Fourth Section Violation in the Southeast*, 30 I. C. C. 153 (1914); *Paper and Paper Articles to New Orleans*, 88 I. C. C. 345 (1924); *Commodity Rates to Gray's Harbor*, 88 I. C. C. 512 (1924).

²³ *Commod. Rates to Gray's Harbor*, 88 I. C. C. 512 (1924).

roads established, and the Commission admitted, that the proposed discriminatory rates, even though market competition were present, did not result in undue discrimination, since the disadvantages of intermediate points would largely continue to exist whether the railroads made the proposed competitive rates or not. Unjust discrimination may therefore be dismissed as a controlling factor in the decision and weight given to the statement that the proposed rates neutralized the geographic advantages of the Atlantic seaboard.

It may be well to inquire what the respective advantages of New York and Chicago are, if the decision as to fourth-section relief is to turn on this question, rather than on the question of whether the discrimination is undue or unjust. One of the advantages open to New York City is the use of a canal constructed across the state of New York and operated toll free. Goods may be laid down on the pier in New York at less than the actual transportation cost, because of inadequate payment for the use of the vast sums of capital employed in the construction of the canal. Another advantage is the development of the port of New York by the expenditure of many millions of dollars by the Federal government and the state of New York. For the use of these expenditures, the shippers do not make adequate payment. Another advantage is contiguity to the Atlantic Ocean. Another advantage, vital to the competition of New York and of the Atlantic seaboard, is the use of the Panama Canal, built by the government of the United States, operated as a government venture without adequate charge to shippers for interest, depreciation, or taxes. The shippers using the canal benefit from the investment of vast sums of capital without paying the full market return thereon. Another advantage of the Atlantic Coast in its competition with the Pacific Coast since the World War has been the intercoastal trade of ships built by the government during the War and sold to steamship companies at a fraction of their cost and value.²⁴

It seems to be assumed by the Commission that all of the facilities for cheap transportation which New York and other Atlantic ports have been exploiting in past years are part of the geographic advantages of the Atlantic Coast. Many of these advantages are the result of subsidies, direct or indirect, and are not in any sense a part of the natural geographic advantages of the Atlantic seaboard. Rates, otherwise legal, to equalize some of these unnatural advantages would not remove geographic advantages in the ordinary sense. The Commission so ruled in the *Willapa Bay-Gray's Harbor Case*, over the vigorous

²⁴ U. S. Maritime Commission, P. R. 319, Mar. 23, 1939, p. 4.

protest of San Francisco that it was being deprived of a geographic advantage.

Admittedly, the Middle West does not have the "geographic advantages" of New York. But the Middle West has other advantages which inhere in its location and which may with equal reasonableness be termed "geographic." Vast expenditures have been made in building a network of railroads which radiate from Chicago and the Middle West towards the Pacific. From the very nature of railroads their total capacity greatly exceeded all available tonnage as soon as the tracks were laid. Their major problem was to find or develop greater tonnage. A factory built and operating under similar conditions with comparable overcapacity would be described as "overbuilt." Yet in railroads this condition does not arise alone from the number of railroads built, or from the extent to which service has been extended. It is found to a great degree in all railroads, or in some departments or activities of all railroads at all times.

The existence of overcapacity explains why railroads are usually classed as industries of increasing returns or decreasing costs. It explains why rates on added traffic, other things being equal, if high enough to cover the variable expenses and something more are considered profitable, not only to the carriers but to shippers as a whole and individually. It explains in part why transcontinental railroads proposed lower rates to the Pacific Coast. Countless numbers of rates have been made on this basis, the object being to utilize more fully the capacity of the railroads.

This peculiarity becomes important in any discussion of geographic advantages. The Commission has applied the term "geographic advantages" to the fact that carriers located at New York and elsewhere on the Atlantic seaboard, and the manufacturers who supply goods for shipment, can use without payment, or at least without appropriate payment, millions of dollars worth of capital invested by the government in harbors, in the Erie Canal (now toll free), and in the Panama Canal (which makes little connection between actual cost of service and toll charges). They have access to vessels that have been in many cases bought at a ridiculous fraction of their cost to the government. Among the same geographic advantages is to be found the fact that until recently water carriers have been practically without regulation, free to enter and leave the service at the whim of their managers, and free to make whatever changes in rates they deem advisable.

Would it not be equally reasonable to designate as a "geographic advantage" the availability to Chicago (and the Middle West in general) of a vast network of transcontinental railroads spreading

over the entire West and Southwest, which operate at but a part of their capacity and which are willing and anxious to transport goods to the Pacific Coast at less than their usual rates because of the principle of decreasing costs? New York may make use of capital investment without paying full value for such use. The privilege is termed "geographic advantage." Chicago might also have the use of expenditures of capital at less than the full value of its use. Is not this also a "geographic advantage" from which Chicago and the Middle West are entitled to benefit? As a matter of fact, it is obvious that no natural geographic advantage is involved in either case. Rather it is the play of one form of transportation subsidy against another, both being peculiar to the geographic location of the respective sections.

Another approach to the question of geographic advantage was made by Commissioner Esch, in a dissenting opinion in the transcontinental cases of 1926, in which he denied that permitting the Middle West carriers to meet the rates from the Atlantic Coast took away the geographic advantage from the latter. He maintained that, as long as the railroads were not allowed to do more than meet the water rates, the Atlantic Coast was not being deprived of the advantages of geographical location. It was being deprived only of the monopoly right to exploit that location with regard to Pacific Coast trade. Only when rail rates lower than water rates were permitted would the geographic advantage be removed.²⁵

A study of the apparent purposes of the Act of 1920 leads to the conclusion that Sec. 4 was not an accident, and that it was not a political sop thrown to railroads or shippers who protested against its removal. It is better interpreted as one of several devices by which Congress attempted to strengthen various portions of the system of national transportation for their value to the whole, and not as a device for the advancement of the interests of one portion of the system at the expense of another portion. Thus, advancement of the interests of shippers dependent upon circuitous lines and of carriers operating indirect lines was recognized, if not authorized, by Sec. 4. In the same way, the interests of water carriers from Ohio River points to Montgomery, Ala. (via the Mississippi River, Gulf, and Alabama River) must, in a measure, be sacrificed to permit rail carriers from New York to Montgomery to meet the competition, to the obvious advantage of producers in New York and carriers from New York but to the obvious disadvantage of water carriers and

²⁵ *Commod. Rates to Pac. Terminal*, 107 I. C. C. 421, 461 (1926).

producers in another section. The general practices of the Commission seem to indicate that it has allowed variations which would conform to the general policy Congress had laid down.

Too much emphasis on the effect upon localities, upon individuals, or upon particular carriers would bring about a different policy and a different purpose from that declared by Congress. Instead of using the rate-making power for the purpose for which it was designed, to strengthen the transportation system, there might be a temptation to use this power to regulate business interests, to preserve vested rights, or to confer or withdraw rights in other ways. An order of the Commission might be sought to shelter one economic group on the Atlantic seaboard, upon intercoastal waters, in the midcontinent oil fields, or elsewhere, from the competition of producers in other sections, thereby denying economic opportunity to other groups or sections. There is danger that preservation of geographic advantage, without any intention on the part of the Commission, may come to involve the determination by the Commission of matters of public policy which affect the nation as a whole. By Commission action manufacturers of the Middle West might be impoverished for the benefit of manufacturers of the East, or the railroads of the transcontinental area injured for the enhancement of water carriers.

What sort of process is involved in denying applications for relief when it appears that the railroads of the West can gain some advantage from the new sources of income, that there are no legal obstructions to the publishing of the proposed rates, and that the producers of the region affected would be able to develop the region more fully? What sort of process is involved in deciding that more weight should be given to the fact that railroads of the East or the water carriers would suffer some financial losses or that manufacturers of the East, or of the Pacific Coast, would lose some of their present profitable markets? Clearly, the process, as soon as it ceases to be a question of ascertaining the legality of the proposed discrimination and becomes an attempt to allocate economic advantage to various groups or sections, is a matter of legislation. Upon the decision, one community or one group of interests will go up and another down, precisely as happens when Congress makes a political decision on the matter of the tariff. The purpose of the Commission may not be to advance one interest and retard another, but the effect may be just that.

Similar to the question discussed above is the related question of the propriety of requiring railroads to show offsets to collateral losses to themselves from the granting of fourth-section relief, as well as offsets to losses to other rail and to water carriers. There was much

emphasis on these factors, it will be recalled, in all the transcontinental cases; yet the same factors were given scant attention in the *Gray's Harbor Case* and the *Wisconsin Paper Cases*. Yet there is no reason to believe that lumber schooners from San Francisco to Gray's Harbor and Willapa Bay could afford to lose the revenues recaptured by rail carriers through fourth-section relief; neither is there reason to believe that the coastal water or rail carriers that served rival centers of paper production in northeastern United States could any better afford to lose revenues recaptured by the Mississippi Valley railroads as a result of relief in the *Paper Cases*. Even the boats bearing paper from Sweden must have missed the revenues they lost when American paper was substituted for Swedish through the action of the Interstate Commerce Commission, though the trade involved was foreign instead of domestic. Questions of collateral losses were ignored in these cases, as they have been in most others where administrative powers are exercised by the Commission.

In the transcontinental cases, the Commission put much emphasis upon its responsibility under Secs. 15a and 500 to protect the revenues of carriers. It regarded this responsibility as a command to allow no diversion of traffic or revenues from eastern railroads and water carriers to transcontinental carriers. Yet obviously that was not the purpose of the sections. Instead, they seem to place an affirmative duty upon the Commission to make such a diversion, as it did in the *New England Divisions Cases*, when it would strengthen weak links in the national system of transportation. Instead of implying that offsets to losses must be set forth to justify relief, the Act of 1920 says plainly that the Commission must determine whether the major aim of the legislation, which is to provide adequate rail and water transportation, will be fulfilled.

The presumption is that the Commission, as an administrative body, was under obligation in the transcontinental cases to discover the relative earning position of the several carriers involved and to make its final decision rest upon the facts disclosed. No one knows what such a survey would have disclosed. It might well have shown the eastern railroads so strong compared to the western roads that diversion through fourth-section relief would have been imperative under Sec. 15a. It might have found them so weak that all thought of relief might well have been given up. But the Commission made no such investigation; its conclusions rested upon no such grounds. Its answer was a decided "No," on the ground that income of eastern carriers or water carriers might be *affected* by the relief.

The Commission ruled that, under Sec. 15a, it must deny western carriers the right to make adjustments which would recapture business they formerly carried. The decision lends support to the statement made earlier that the greatest handicap the transcontinental railroads had after the War was the fact that eastern producers and shippers and eastern rail and water carriers had entrenched themselves in the business handed over to them by the Commission in its order rescinding all relief in the transcontinental area in 1917.⁸⁶ In 1922, 1926, and 1935 these entrenched interests were disposed to assert vested rights in this business. The Commission accepted their point of view and threw the weight of its authority upon their side.

The inconsistency of the position of the Commission in the transcontinental cases, when compared to smaller cases involving identical problems, and the differences in the legal requirements set up in the two groups of cases support the charge that the Commission, in the transcontinental cases, was not functioning as an administrative body at all but as a legislative body, guided in its decision entirely by the arguments advanced by interested parties as to the public policy appropriate under the circumstances.

In the transcontinental cases, the Commission on several occasions reiterated a fear that the lowering of transcontinental rates through fourth-section relief would lead to a corresponding cut by water carriers, which would be followed by further cuts by railroads under Sec. 4, and so on, until both water and rail carriers had destroyed themselves. This fear may be well founded. But the most casual study will lead to the conclusion that the situation which makes such a rate war possible results solely from the chaotic policy of Congress, which is still based on the naive belief dominant two generations ago that competition between rail and water carriers is a reliable regulator of freight rates. Under this theory, until 1938, water carriers were left with full power to fix rates, subject only to the more or less useless provision against raising rates above a maximum and the equally useless provision that actual rates of common carriers in intercoastal service shall be filed with the Shipping Board or the Maritime Commission.

Before 1938 no recognition of the desirability of establishing minimum rates for water carriers was given by Congress, although this appears to have been the only effective means to control cutthroat competition. On the other hand, part of the same chaotic policy is to leave the railroads the privilege, if not the right, of making dis-

⁸⁶ Transcontinental Rate Cases, 46 I. C. C. 236 (1917).

criminary rates under Sec. 4 which would preserve competition between water and rail carriers. If water carriers proceed to cut their own throats and if rail carriers retaliate by cutting their own throats, the blame rests with Congress. If the results are undesirable, they can be eliminated by Congress at any time. The fact that until 1938 Congress took no step to eliminate the danger of such cutthroat competition, as it did for interrailroad competition in 1920, seems to leave but one inference, that Congress believed that public policy required such competition.

The chaos in competitive rates provided for and preserved by Congress is in part eliminated by orders of the Commission which deny the railroads whatever legitimate right they might have to meet water competition under existing law, on the ground that to allow the railroads to exercise their legal rights would lead water carriers to exercise an equally legal right to cut rates still further. The perfectly legal though disastrous rate situation which would arise would, the Commission believes, be against good public policy. In other words, the Interstate Commerce Commission acts as if it believed that it should veto and set aside the public policies ordered by Congress because it has a superior knowledge of what good public policy would be. The Commission makes itself a superlegislative body to review the decision of Congress.

The Commission's policy of preventing transcontinental railroads from meeting water rates, and thereby tempting water carriers to reduce their rates to still lower levels, helps to postpone the day when the gross faults in Congressional policy will be exposed and the needs for adequate regulation of intercoastal and inland carriers will be realized. The assumption by the Commission of the power to cover up the shortcomings of Congress transfers to it the responsibility for whatever evils are perpetuated.

In fairness to the Commission, it should be said that it has on many occasions implored Congress to correct its incongruous and inconsistent transportation policies. The Commission cannot prevent the ultimate injury which will accrue to the national transportation system. It can only decide that the injury shall come through the weakening of certain railroad systems, instead of through demoralization of both railroad and water systems, as Congress seems to have decreed. It cannot prevent the demoralization of water carriers through cutthroat competition among themselves; but it can make sure that water carriers shall not be jeopardized by rail competition.

The Commission helps preserve the popular fallacy, dominant in Congress and out of it, that intercoastal transportation is in some

way analogous to the highly competitive water transportation which has existed for centuries on the high seas in world commerce. It helps gloss over the fact that intercoastal water transportation is at best but an example of protected and subsidized interstate commerce, watched over and pampered by an indulgent Congress. It helps to conceal the fact that regulation to insure an adequate national system of transportation must be able to keep all agencies of transportation within the bounds established by broad public policy.

CHAPTER XI

THE COMMISSION AND CONGRESSIONAL PRESSURE METHODS

IN the preceding chapter evidence was presented which indicated that, as far as formal legislation is concerned, the Interstate Commerce Commission in the transcontinental cases had abandoned what the Supreme Court in the *Intermountain Cases* termed *legal discretion*—the right to determine what relief is legal under Sec. 4—and assumed *legislative discretion*—the right to permit or deny relief on the basis of public policy as the Commission sees it. The conclusion reached was that in such cases administrative functions and duties of the Commission had been replaced by legislative functions.

Before concluding this study, however, it is proper to note that the Commission is concerned with a great number of matters of policy besides those found in statutes dealing directly with railroad transportation. It must deal with a vast number of provisions affecting transportation which are attached as "riders" to legislation intended to accomplish some purpose indirectly related to transportation. Moreover, it has to face pressure-group activities of members of Congress, in both their personal and their official capacities. In more recent years it has had to take account of what appear to be political activities of the chief executive of the United States, designed to affect the work of the Interstate Commerce Commission. Needless to say, these various types of political activity are not related to any clearly defined plan or policy. Often they are mutually inconsistent and antagonistic. In certain instances, however, they may color the decisions of the Commission.

In the opening chapter the assertion was made that Congress is the really pathetic figure in the regulation of transportation. This is true whether emphasis is placed upon the inadequacy and inconsistency of legislation designed to regulate transportation, or upon the partisanship and provincialism shown in "riders" attached to legislation which pertains immediately to other matters, but which is intended to exert an indirect influence upon transportation. Through such legislation senators and representatives serve as spokesmen for personal, group, or sectional interests with scant consideration for the interests of the country as a whole.

One of the prominent members of the Commission has expressed the opinion that that body is influenced by matters outside of the

specific content of regulatory statutes. At the hearing on the second Pettengill Bill before the House committee in 1937, this was advanced as an explanation of the opposition of certain members of the Commission to the bill. It was thought that repeal of certain features of Sec. 4 might be taken by the Commission as an indication that Congress disagreed with the Commission's general policy with regard to Sec. 4, and particularly with its decisions in the transcontinental cases. While the legislation here referred to was not "rider" legislation, the commissioner's statement is illustrative of the psychology of the Commission in reading into statutes more than is actually expressed. This commissioner, Mr. Eastman, thought that the Commission would interpret amendments to Sec. 4 as a demand by Congress that the Commission change its policy, although the proposed amendments would not change the legal status of discrimination in any particular. He seems to feel that, as far as he himself is concerned, indirect purposes of Congressional legislation affecting transportation are as binding upon the Commission as direct. More important still, he regards the incidental and collateral purposes which may be determined by surmise and implication as equally binding upon the Commission.

This seems to be a reasonable interpretation of the following statement:

In the first place the Commission—and the same thing is true of the courts—always assumes that a law is not passed idly by Congress and that where the present provisions are substantially changed, there is some intent in changing the results and *that intent is read into the law*. In other words, this might be construed, and I am inclined to think it would be construed, as a declaration of intent by Congress that the *policy of the Commission* with respect to the long-and-short-haul matter *should be changed* and that a policy for the future should be followed which will be *more favorable and give more traffic to the railroads and be less favorable and give less traffic to the water lines*, or perhaps to other competitors. . . .¹

Mr. Eastman reiterated his belief that any change in Sec. 4 would affect the administration of the Act:

. . . I think that the Commission, and probably the courts, would construe this law as having been passed with the *intent to change something* and to produce results that are different from those that are being produced now, and that the Commission *in all probability for that reason would pursue a different policy* from what it has pursued in the past and no doubt the courts would be inclined the same.²

¹ House Hearings, H. R. 1668, 75th Cong., 1st Sess. (1937), p. 435. Italics mine.

² *Ibid.*, p. 440. Italics mine. See also p. 469.

Later, in explaining why he had changed his mind about a previous statement approving the repeal of the "reasonably compensatory" clause, he said he had begun

to think . . . of the fact that the courts have a tendency . . . to assume that Congress intends to change something when it changes the law and that by striking out the words "reasonably compensatory" there would be a feeling that Congress disapproved the definition that the Commission had put upon those words before.³

In response to a question whether, if Sec. 4 were amended, the water carriers could be adequately protected, Mr. Eastman replied that in his opinion they could be. He added a remark which is rather startling when made by one who considers himself an administrative rather than a political officer: "I have several times said that I am afraid of how this bill would be interpreted under all of the circumstances."⁴ The implication would seem to be that the amendment jeopardized certain ends which the speaker desired to preserve as a matter of policy.

When existing legislation is searched for collateral statements which might influence the Commission in its administration of Sec. 4, it will be found that all through the regulatory legislation there runs a thread of special treatment for water carriers, which might persuade the Commission that Congress intended that these carriers should be specially favored. This is as true of railroad legislation as it is of legislation directly affecting water transportation. The words of Sec. 500 of the Act of 1920 will come to mind immediately. "It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States." While this language is toned down and modified somewhat by the addition of a further purpose "to foster and preserve in full vigor both rail and water transportation," the general effect of the section, as suggested by Mr. Eastman above, would be to create a presumption in favor of water carriers, especially in the minds of commissioners chosen because they resided in areas with special interests in the matter.⁵

Under the Act of 1920, railroads were required to cooperate with water carriers in providing docks and other facilities necessary for an interchange of traffic. In the provision for joint rates which would be necessary as the result of the interchange, the Commission was given jurisdiction over the rail portion of the haul, both as to maximum and

³ *Ibid.*, p. 441.

⁴ *Ibid.*, p. 449. Italics mine.

⁵ U. S. Code, title 49, ch. 5, sec. 142.

as to minimum rates, while its jurisdiction over the water portion of the joint rate applied to maximum rates only. The Commission might be inclined to believe that Congress purposely omitted the control of minimum water rates in order that the deadly water competition which later developed might proceed without interference from it. If so, here is an important declaration of Congressional policy by implication.⁶

Sec. 15 of the Act to Regulate Commerce, as it stood after 1920, seems to indicate a very clear intention on the part of Congress to favor water carriers. In paragraph four of this section the Act denies to the Commission the authority to require an originating carrier to "short-haul" itself in delivering goods to a connecting carrier in a joint or through route, "except where one of the carriers is a water carrier." While the Commission has never attempted to force railroads to "short-haul" themselves for the benefit of water carriers, this section seems clearly to imply that Congress anticipated that it might be desirable that this be done. If put into force, this provision would work even greater havoc than is now apparent in railroad-water carrier competition in the lower Mississippi River area.⁷

Another indication of interest in water carriers is to be found in the provision for the disposal, by the Secretary of War, of the mighty fleet of vessels accumulated by the government during the World War to those who would use them actively in transportation service.⁸ In this connection, it is necessary also to remember the Inland Waterways Act of 1924, which seriously sought to establish and preserve transportation on inland waterways on the assumption, probably almost entirely political, that the service was required in the public interest.⁹

Consideration of the Merchant Marine Act of 1920 is important in any attempt to study collateral policies of Congress which might be held to supplement the Act to Regulate Commerce and so to influence the Interstate Commerce Commission. This Act and later amendments provided for the establishment of a merchant marine and for the control of shipping interests by the Shipping Board created by the Act of 1920. In 1928, provision was made for construction loans, for mail subsidies and contracts, and for requisition by the United States in case of need. Sec. 7 of the Act of 1920 declared, and the Act of 1928 reaffirmed, that the national defense and the development of

⁶ *Ibid.*, ch. 1, sec. 1 (9), (10), (11).

⁷ *Ibid.*, ch. 1, sec. 15 (3), (4).

⁸ *Ibid.*, ch. 5, sec. 141(c).

⁹ *Ibid.*, ch. 5, secs. 151, 153.

foreign and domestic commerce required for the United States a merchant marine "of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce" and to serve as a naval auxiliary in case of war. Accordingly the Act declared it to be the policy of Congress "*to do whatever may be necessary to develop and encourage the development of such a merchant marine.*"¹⁰

In the ship-subsidy legislation of 1936, a still more elaborate declaration of policy towards the merchant marine was expressed. It was held to be necessary, for the national defense and for the development of foreign and domestic commerce, that the United States have a merchant marine sufficient to carry its domestic water-borne commerce and a substantial portion of its foreign commerce and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times. The Act provided that such ships were to be the best-equipped, safest, and most-suitable type, constructed in the United States, and manned with a trained and efficient citizen personnel. When Congress says in the Act, "*It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine,*"¹¹ should it be concluded that this policy governs every decision by an administrative body on any matter which affects the financial or general welfare of intercoastal or other ships? If so, should it control the Interstate Commerce Commission, in its rulings concerning railroads which affect water carriers?

The surmise as to the true sentiment of Congress concerning water-railway competition is strengthened as one searches in vain through the several acts affecting water carriers, passed prior to the amendments of 1938, for a single bit of evidence that the Congress intended to make it possible for any administrative body to regulate water rates in order to prevent unfair competition with rail carriers. There was not even a provision for the establishment of minimum rates to prevent the ships from scuttling each other by recurrent rate wars comparable to those of the railroads of the 80's and 90's. The Act of 1936 transfers to the Maritime Commission the insignificant powers of the old Shipping Board which had been transferred to the Shipping Bureau of the Department of Commerce. At that time no additional powers were given to provide adequate regulation of water-carrier rates. Even the conditional provision for transfer, after the lapse of two years, of the powers and duties of the Maritime Com-

¹⁰ U. S. Code, title 46, ch. 24, sec. 861, as adopted in 1920. Italics mine. *Ibid.*, ch. 24a, sec. 891, as adopted in 1928.

¹¹ *Ibid.*, ch. 27, sec. 1101. Italics mine.

mission to the Interstate Commerce Commission contained no hint of a purpose to increase the power of the Commission to regulate the rates of water carriers. While the ultimate transfer of powers to the Interstate Commerce Commission would be desirable, because it would concentrate all authority in a single body, it could do little to improve the competitive situation unless power to regulate the rates of water carriers were given the Commission.

The Act of 1936 did prohibit certain discriminatory practices by common carriers by water, but it did not in any manner cover the questions involved in rail and water competition, as is shown by the following language:

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly. . . to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage whatsoever.¹²

Substantially this same language has been in Sec. 3 of the Act to Regulate Commerce from the first day of its passage in 1887. Much of the fourth-section discrimination discussed in this study has been perfectly legal under it. Most of the fourth-section discrimination which arises under water and rail competition is neither undue nor unreasonable; hence it is not prohibited by the Act. The language of the Act of 1936 may deceive the uninformed public into believing that Congress is at last attempting to regulate water carriers; but neither the Interstate Commerce Commission nor the Maritime Commission will be at all deceived by it. It cannot by any means be twisted or distorted into an expression of disapproval by Congress of long-and-short-haul discrimination by water carriers when in competition with railroads.

The discrimination brought to light by the Commission in the *Transcontinental Automobile Cases* of 1935, outlined in a preceding chapter,¹³ in which automobiles were shipped from Detroit through the Buffalo zone to New York and thence by water carrier to San Francisco for \$3.52 per hundred, while the rate for the shorter haul from the Buffalo zone was \$4.00 per hundred, is perfectly legal. So also is the port-to-port discrimination in this case—the actual rate for the water haul from New York to San Francisco was \$2.65 per hundred if the automobiles originated in Detroit, but \$3.00 per hundred if they originated in the Buffalo zone.¹⁴

¹² *Ibid.*, title 46, ch. 23, sec. 815, as amended June 16, 1936.

¹³ Chapter IX above.

¹⁴ *Transcontinental Westbound Automobile Rates*, 209 I. C. C. 459 (1935).

Would it be strange if the Commission understood the language of the water-carrier acts to be an expression of the determination of Congress that water carriers shall be permitted to practice long-and-short-haul discrimination, although the Commission has worked assiduously for two generations to eliminate such discrimination from railroad practices?

Similar confusion in what is expected of the Commission is found in legislation designed to regulate highway carriers. In its statement of policy Congress declared that it recognized and sought to preserve the inherent advantages of highway carriers and sought, in the public interest, to foster sound economic practices among carriers in such transportation. It sought to promote adequate, economical, and efficient service by motor carriers; to assure reasonable charges and rates devoid of unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; to improve relations between motor carriers and other types of transportation; to develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense.

The Act imposed on highway common carriers the duty of establishing reasonable through routes and rates and joint routes and rates, of providing adequate equipment, of laying down reasonable rules and regulations affecting the service, and of making a just and reasonable division of all joint rates and fares.

Like the Act regulating water-carrier competition, the Highway Act prohibits undue or unreasonable preference or prejudice for or against any person, port, gateway, locality, or description of traffic. This, as was true of the similar provision relating to water-carrier regulation, utterly fails to touch the cutthroat competition between rail and highway carriers, since every definition of undue and unfair discrimination accepted and applied by the courts would exempt the most significant competitive rates made by highway carriers from these prohibitions. The section could apply only where a highway carrier deliberately decided to favor one shipper at the expense of another. The provision is worse than meaningless; it is a travesty on regulation, since it makes a pretense of limiting rail and highway competition.

It is obvious that Congress did not intend, through the Highway Act, to set limits to the right of highway carriers to take business from railroads by discriminatory rates. Evidence to the effect is found in the provision of the Act prohibiting unjust discrimination and preference, which says, "provided, however, that this paragraph

shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." This language appears to say that no carrier by highway shall give undue advantage or subject any person, port, gateway, etc., to any type of unjust discrimination or any undue or unreasonable prejudice, in any manner whatsoever, unless the person discriminated against chanced to be another type of carrier, for example a rail carrier. In the latter case, it would be lawful for the highway carrier to apply any type of prejudice and discrimination to the traffic of that carrier.¹⁵

Equally interesting and puzzling language is to be found in the proviso attached to the section which directs the Commission—when it finds that any rate, charge, fare, practice, regulation, etc., is or will be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial—to determine and prescribe the lawful rate, fare, or charge, or the maximum and the minimum rate, charge, fare, or the lawful classification, rule, regulation, or practice. But "nothing in this chapter shall empower the Commission to prescribe or in any manner regulate, the rate, fare, charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce, or for any purpose whatever."¹⁶

It seems reasonable to conclude from these provisions that, whatever may have been the purpose of the chapter designed to regulate highway carriers, it was not to ease up the disastrous competition between them and the railroads. The proviso just quoted seems to be designed to make sure that the *Shreveport Cases*, the *Wisconsin Passenger Fares Cases*, and *Stephenson v. Binford* shall not be relied upon by the Commission to justify it in calling a halt to practices of intrastate highway carriers which demoralize interstate carriers. This is another way of saying that the Commission shall not attempt to protect interstate railroads from the depredations of intrastate trucks and busses. The Act was not drawn to protect railroads from the disastrous competition of highway carriers, but to protect highway carriers from undue competition among themselves.

Many cases involving the level of competitive rates of highway carriers have now been before the Commission. In many instances in which the Commission has ruled against the proposed rates the decisions have seemed to turn on whether the rates were reasonable and compensatory rather than on how they would affect competitors. Thus the Commission rejected competitive rates proposed on paper and

¹⁵ U. S. Code, title 49, ch. 8, sec. 302.

¹⁶ *Ibid.*, ch. 8, sec. 316 (e).

paper articles to the Southwest on the ground that such rates were so unreasonably low that they would cause unnecessary reductions in carriers' revenues and threaten carriers' financial responsibility.^{16a}

In this and in other cases effects of proposed motor-carrier rates on rail carriers have been noted; yet it cannot be said that protection to rail carriers has ever been more than incidental to the main purpose—protection of the carrier proposing the rates. So far no adequately compensatory rate has been rejected under conditions which indicate that the Commission's major purpose was to protect competing rail carriers.

These provisions of the Act do not affect the power of the Commission to grant relief to railways on account of competition with highway carriers, except as the Commission may see an implication that it must be less liberal with railroad applications than before the Act was passed. But it does appear to make it impossible for the Commission to order highway carriers to abandon the competitive rates because of adverse effects on rail carriers. Unless and until the Commission attempts to regulate highway carriers to relieve pressure upon rail carriers, it will not be definitely known how completely this typical Congressional "joker" has nullified what would seem to have been one of the important purposes of the Highway Act.

In view of this "joker," the power of the Commission to fix maximum, minimum, or lawful rates of highway common carriers appears to lose some of its significance. The railroads are still left to shift for themselves, shackled by every rule laid down by the Commission and relieved in no particular by similar restraints put upon highway carriers or, until 1938, upon water carriers.

With regard to contract carriers by highway, regulation seemed to be limited to the requirement that minimum rates be filed, that rate changes be made effective not less than thirty days after filing, and that minimum rates be prescribed by the Commission when necessary or desirable in the public interest to prevent an undue advantage over common carriers by highway. Apparently the ambiguous purpose of Congress to "improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers" is nothing more than a pious wish that the more closely regulated common carriers by highway will be provided some protection against the

^{16a} Paper Articles, Illinois Freight Assoc. Territory to Southwest, 10 Motor Carrier Cases 329 (1938). See also: Commodity Rates of Oklahoma and Texas Transfer Co., 6 M. C. C. 259 (1938); Middle Atlantic States Motor Car Rates, 10 M. C. C. 193, 10 M. C. C. 299 (1938); Cotton Fabrics and Cotton Piece Goods, 10 M. C. C. 275, 282 (1938); Gulf Ports etc. Commodity Rates, 10 M. C. C. 106, 109-10 (1938); S. W. Freight Bureau, Inc. v. Gill, 11 M. C. C. 91, 98-100 (1939).

more obnoxious competition of the less closely regulated contract carriers by highway.¹⁷

It may also be held that the Act decrees that railroads and other carriers shall cooperate in full with highway carriers in making through routes and rates so that highway carriers may share in through traffic, which is now in general not open to them. This meaning is supported by the general tone of the Highway Act. If ever put into effect, this interpretation may completely demoralize what is left of rail transportation.

In 1938 changes were made in the sections providing for the regulation of water carriers by the addition of a new chapter designated as Chapter 23a.¹⁸ The term "common carrier" is made to include both common and contract carriers in intercoastal service via the Panama Canal. Moreover, the term "common carrier by water" as originally defined in the Act is declared to apply to every common carrier by water in interstate commerce. This would make common carriers on inland waterways and lakes subject to the Act.

The new chapter provides that schedules of rates, terminal charges, etc., covering all ports served shall be filed with the Maritime Commission and posted at wharves, docks, or in offices where passengers and freight are received. Through rates and classification sheets shall also be filed. No change in such rates shall be effective for thirty days, unless the Commission permits a change in a shorter time for good cause. The Commission may call a hearing on a proposed rate on complaint or on its own motion, and may suspend a proposed rate for not to exceed four months. The most important powers conferred on the Maritime Commission in this Act are those covering maximum or minimum or maximum and minimum rates if existing rates are unjust and unreasonable. Just how these powers will affect competition between rail and water carriers cannot be known until it is seen whether the Maritime Commission looks upon this question from the same point of view as the Interstate Commerce Commission. In March 1939, the Maritime Commission forwarded to Congress an extensive report on intercoastal and inland water transportation, and announced a broad hearing on the entire intercoastal shipping rate structure.¹⁹

In 1938 Congress made slight changes in the statutes providing for the regulation of highway carriers. One new section provides for

¹⁷ *Ibid.*, ch. 8, secs. 302 (a) and 318 (b).

¹⁸ U. S. Code, title 46, ch. 23a.

¹⁹ Maritime Commission Docket 514. Announced in Public Releases 177 and 317, Mar. 10, 1939.

the submission of questions involving highway carriers to joint boards made up of representatives for the states and the Interstate Commerce Commission. Where three or fewer states are involved submission to such a joint board is required. Where more than three states are involved submission is optional with the Interstate Commerce Commission. Whether provision for these joint boards represents an attempt to get a broader view of the whole problem of competition between rail and highway carriers, or an attempt to provide machinery whereby a given state may preserve and protect the intrastate carrier competition which gives it peculiar local advantages at the expense of interstate railroads, only time will tell. In the later sections of the Highway Carrier Act there is nothing which seems to indicate that Congress intended that regulation of competition should be more drastic.

The intention of Congress to provide rigid regulation for rail carriers and an ineffective, indulgent regulation for water and highway carriers may have been shown in its attitude towards the proposals to modify or eliminate Sec. 4 of the Act to Regulate Commerce and in its treatment of certain recommendations of the Federal Co-ordinator of Transportation.

Had Congress passed the Pettengill Bill of 1936, which proposed to repeal the limitations of Sec. 4, long-and-short-haul discriminations by railroads would have stood upon the same basis as similar discrimination by other carriers, after the amendments of 1938 to the Water Carrier Act were adopted. Discrimination would have been prohibited if it were undue or unjust, but not otherwise. Railroads could have done nothing more and nothing less, after the Pettengill Bill had been passed, than can be done and is being done by both highway and water carriers.³⁰

There would, however, have been some effective checks upon the railroads in their power to make discriminatory rates which would not have been enforceable against other carriers. One is to be found in the requirements of Sec. 15a as recently amended that, in making rates, the Commission shall give due consideration to the following: the need of the carriers for revenues sufficient to enable them to provide adequate service, the effect of the proposed rates upon the movement of traffic, and the effect of the rates upon the adequacy and efficiency and cheapness of the supply of transportation services from the standpoint of the public.

³⁰ House Hearings, H. R. 3263, 74th Cong., 1st Sess. (1935); Senate Hearings, H. R. 3263, 74th Cong., 2nd Sess. (1936).

Another check upon discriminatory rates would come from the power of the Commission to fix minimum rates. This power, coupled with the rate policy of the amended Sec. 15a, would, so it was urged by the railroad spokesmen for the Pettengill Bill, effectively guard the public and competing carriers against uncontrolled rate wars.

The hearings on this bill before House and Senate committees were marked by heated testimony and discussions. The Interstate Commerce Commission officially opposed the bill, as did the Federal Co-ordinator, also a member of the Commission. The latter's report to Congress on the matter is of special interest. He said :

As above indicated, the choice is between unleashing the railroads, so that they may compete on more equal terms with the water lines, and bringing the latter under a similar degree of control. The first alternative will in the end be ruinous, and not less to the water lines than to the railroads. The second alternate is in accord with what has already been done with respect to the motor carriers and will permit the Commission to deal constructively with the whole transportation problem. It will not do away with competition, but it will make it possible to curb the abuses and excesses which characterize competition when no such control exists.²¹

The views of the Co-ordinator are of importance for any attempt to determine the extrastatutory policy of Congress toward fourth-section competition between railroads and other forms of transportation. His assumption that the Highway Act had already put the highway carriers on a par with the railroads in regard to regulation may have some basis as far as competition among common carriers by highway and between common carriers by highway and contract carriers by highway are concerned; but there is no reason to believe that the Act covers, or was intended to cover, competition between railroad and highway carriers. Congress apparently did not intend to put a single straw in the way of the attempts of highway carriers to secure competitive traffic. The law does not imply that the Commission's minimum-rate power over highway carriers can be legitimately used to relieve railroads from highway-carrier competition in any degree whatever.

The Co-ordinator's endorsement of the regulation of water carriers seems to have been based upon an assumption that Senate Bill 1632, centering regulation in one agency and giving effective power to control rates, would be passed substantially as he proposed it. The Act actually passed created a new agency, the Maritime Commission, and so failed to center control immediately in the Interstate Commerce Commission, as the Co-ordinator proposed. It failed utterly to give any control over such long-and-short-haul discrimination as was

²¹ Fourth Report of the Federal Co-ordinator, H. Doc., No. 394, 74th Cong., 2nd Sess. (1936), p. 14.

not undue and unlawful or over minimum rates. In general the whole attitude of Congress has been to turn thumbs down upon all legislation designed to relieve railroads from competitive handicaps. It remains to be seen how far the amendments of 1938 change the situation.

An examination of utterances and activities of members of Congress may throw light on the policies affecting Sec. 4. There may be more than one way for Congress to declare a policy. A real declaration of Congressional policy may perhaps be found in official acts and in personal activities of congressmen that are peculiarly significant because of the official status of the individual congressman. Such activities are generally observable when a bill to modify or repeal Sec. 4 is under consideration, when a nominee for a place on the Interstate Commerce Commission is before the Senate for confirmation, or when, for some reason political or otherwise, Commission acts are subjected to Congressional scrutiny.

Notwithstanding the significance of personal activities and views of legislators in establishing public transportation policy, no careful study of them has been made. Yet here one may find the very "stuff" of representative democracy. In this present discussion no attempt will be made to do more than indicate the possibilities of such a study.

Some hearings on proposals affecting Sec. 4 are long-drawn-out affairs which thoroughly air the whole question of regulation. Such hearings have followed legislative proposals, such as the Esch-Cummins Bill, which became the Transportation Act of 1920, the Gooding bills of 1924 and 1926, Senate Bill 563 of 1930, and the so-called Pettengill bills of 1936 and 1937.²² At these hearings transportation interests are present in full force with well-organized cases to present to the committee in charge of the investigation. Other interests affected by transportation are also fully represented. The array of witnesses looks like any legislative "third house." It is not unusual for the committee conducting the hearing to take on the appearance and manner of a trial court, with some politically active committee member or members, perhaps the chairman, acting as prosecutor and judge. Committee members are frequently openly biased in favor of particular policies demanded by their respective localities. Opponents, whether witnesses representing various interests, or members of the Commission, or members of the committee, may be browbeaten and bullied by the chairman or other committee members in an attempt to discredit their positions on proposed legislation.

²² See note 1, Chapter VIII, above.

The houses of Congress are so organized that committee policies easily become Congressional policies. Under this organization Congress may allow its decisions to be controlled by well-organized minorities. If such a committee kills legislation designed to liberalize the long-and-short-haul clause, should not the Commission, as Commissioner Eastman seems to suggest, interpret this to be an informal demand of Congress that the Commission be less liberal in administering Sec. 4? If the committee approves and Congress enacts the proposed changes, should the Commission regard this as a demand for a general change in policy, as Commissioner Eastman seems to conclude? Would such a conclusion explain why the transcontinental cases were settled with an emphasis on rules quite different from those applied in other cases involving quite similar economic circumstances and conditions?

The independence of the Commission may also be affected by practices followed by the President of the United States in nominating, and by the Senate in ratifying, members to serve on the Commission. When a President recognizes a particular section of the country which has been actively involved in disputes with the Commission over its policies or conclusions by appointing a person from that section who has served as spokesman for a particular point of view, should the Commission treat the appointment as an executive endorsement of the demands of that section? When a citizen of Spokane, Wash., who had actively fought transcontinental relief before the Commission, received an appointment to the Commission and accepted it, should he feel, and should his colleagues feel, that the executive branch of the government was endorsing the claims of that section? Such an appointment might have the effect of converting the Commission from an administrative, quasi-judicial body into a little Congress, with each member decidedly conscious of the immediate demands of the constituency he represents. No surer way to demoralize a quasi-judicial body could be imagined than this process of "packing" the Commission to insure "representation" of particular points of view.

The intermediate territory might be said to have been given recognition when an able jurist was appointed from a state that had been most bitter in its fight against relief under Sec. 4. In the Senate committee investigation of his fitness to be a member of the Commission, the candidate, when asked about the long-and-short-haul, is said to have replied that he knew about it only in a general way. But the committee took official note of the fact that he came from the "heart of the country most concerned about the fourth section."²⁸

²⁸ Washington Bureau correspondence, *Traffic World*, vol. 45 (Jan. 18, 1930), p. 157.

It thereafter unanimously recommended the ratification of this appointment and the Senate voted ratification on the following day. Should this member feel that he bears a mandate to deny fourth-section relief? Should the rest of the Commission see in this appointment and ratification a declaration of policy on the part of the President and the Senate which should control them?

More recently the problems of the Commission in maintaining an administrative attitude have been made more difficult by the policy of President Franklin D. Roosevelt in nominating members of the Commission. One nominee, an excongressman, so it was asserted by the President's critics, was chosen because it was believed that he would "jazz up" the work of the Interstate Commerce Commission. He was alleged to have a contempt for the accepted or established principles and procedures of Commission regulation. Such an attitude would be appropriate for one performing a political function, since the end usually receives more attention than the means in political matters. But such an attitude is not appropriate for administrative matters, since policies are presumed to have been decided long since by legislative agencies or by the common law. The withdrawal of the nomination by the President leaves the significance of the original appointment in the realm of conjecture.

Another appointment received the prompt ratification of the Senate. Newspaper accounts at the time assumed as true an allegation that the President had made the appointment, not merely because the nominee was a man of outstanding ability and experience, but because, as transportation economist for the TVA, he had committed himself to the policy of revising downward the entire southern rate structure as the most essential step in the rejuvenation of the South. News columns asserted that the appointment should be treated as an "important gesture by President Roosevelt in support of this viewpoint." Added significance in the appointment may be seen from the fact that a petition for lower freight rates for the South, presented by nine southern governors to the Interstate Commerce Commission in 1937, was thought to be about due for decision by the Commission. Would it be surprising if the Interstate Commerce Commission should interpret the appointment and ratification of a man with publicly announced views as a "mandate" from the Chief Executive and the Senate that the Commission approve a rate revision for the South?²⁴

²⁴ For typical newspaper comment on the appointment and ratification of Mr. J. H. Alldredge, see "A Battle of Railway Rates: Is the South Treated Fairly?", *United States News*, Feb. 27, 1939, p. 13.

On the other hand, those whose records on Sec. 4 has aroused the ire of powerful members of the Senate and of the Senate Committee on Interstate Commerce do not fare well. A one-time member, who hailed from Wisconsin, the "heart" of the country which would profit most from relief for transcontinental railroads, and who wrote vigorous dissenting opinions on certain of the transcontinental cases, was denied ratification when appointed to succeed himself at the expiration of his term. Would his rejection inspire an independent attitude towards Sec. 4, or would it create in members of the Commission an attitude of acquiescence to the demands of sections of the country powerfully represented in the Senate and on the Senate Committee on Interstate Commerce? Was the summary rejection of this nominee, among others things, a declaration by the Senate of a policy on fourth-section relief? Should the Commission so regard it?²⁵

Appointments are sometimes rejected because of the Senate's objection to the general attitude of the appointee on other matters of policy. Submission of a name to the Senate for ratification may turn loose upon the nominee a flood of charges, countercharges, and defenses, quite the same in nature as the political attacks and defenses undergone by individual members of the Senate committee during their own campaigns for election and reelection. The whole record of the nominee, and sometimes of the Commission, may be dragged forth and subjected to bitter political analysis. A good example is the extensive investigation conducted in the Senate when a citizen of Pennsylvania was nominated to be a member of the Interstate Commerce Commission in 1927. His relation to the coal producers in one field, or his residence in that field, subjected him to bitter attacks by senators from other coal districts, because of the sensitiveness of coal to rates to lake ports. Since manifestly no other factors were involved, his rejection might seem to declare plainly the policy of the Senate on lake-cargo coal rates for the future guidance of the Commission when that question should again come before the Commission.²⁶

The procedures and practices of Senate committees in dealing with matters affecting the Interstate Commerce Commission clearly allows the committee or committee members to threaten the political independence of the Commission. No nominee could hope to get far over the opposition of the chairman of the Senate Committee on Inter-

²⁵ Hearings before Committee on Interstate Commerce, United States Senate, on the confirmation of John J. Esch to be a member of the Interstate Commerce Commission, 70th Cong., 1st Sess. (1928).

²⁶ Hearings before the Committee on Interstate Commerce, United States Senate, on the nomination of Cyrus E. Woods to be a member of the Interstate Commerce Commission, 69th Cong., 2d Sess. (1927).

state Commerce, for example. Usually the chairman of a Senate committee is chosen on the basis of seniority, not experience or ability. If his party remains in power in the Senate long enough, each member of the Commission sooner or later will have to stand before him, hat in hand, waiting for the nod of approval of his reappointment. To what extent should the Interstate Commerce Commission recognize the demands of such a chairman as policies of the Senate or of Congress binding upon the Commission?

This type of abuse of power by Senate committee members has led to an amendment of the transportation law providing that a member of the Commission shall continue in office until his successor is appointed and qualified. The new amendment weakens a committee member's power to delay action on ratification until a nominee develops a "proper attitude of co-operation."

From these activities of Senate committees and committee members two conflicting conclusions may be drawn. The first is that there may be more than one way for Congress to declare the policies which are to govern the Commission. It can be plausibly argued that, pieced together, the various acts of Congress, the activities of Congressional committees and members, and the nominations of the President do declare policies which may be at variance with the formal declarations of Congressional policy as set forth in legislation directly affecting railroad regulation. What appears on the surface to be a usurpation of legislative power by the Commission is, it may be held, nothing more than an effective administration of a Congressional policy synthesized out of these inconsistent parts. This conclusion would put to rest any charge that the Commission has become a legislative body in some of its activities.

On the other hand, it may be argued from the same facts (with great force the author believes) that the partisan treatment which is accorded to the Commission and to its members and nominees for membership by Congressional committees, committee members, and the Chief Executive of the United States is evidence that the important activities of the Commission are legislative in nature. In the trans-continental cases the Commission decided what areas and what groups should secure the business in question. In the *Lake Cargo Coal Cases* it decided what coal fields should have access to markets at the head of the Great Lakes and elsewhere. In these decisions the Commission did the same thing Congress does when it passes or modifies a tariff law, as far as effects on economic interests are concerned. These political attacks on the Commission do not "drag it into politics." They grow out of the fact that the Commission is already in politics,

in the sense that it declares public policy. Only by the partisan means resorted to by Congress, or the President as head of the party in power, can control over policy determination be retained by the political arm of the government.

It matters little whether the Commission willingly reached out for this legislative power, or whether, with greatest reluctance, it felt that it was forced to assume the duties by the negligence of Congress, the exigencies of particular cases, or the pressures exerted by interested groups in Congress and out. The exercise of policy-forming powers by the Commission exposes it and its members to the type of political attack to which all political agencies are subjected. There is, however, this difference—there is no way for the Commission or the individual members of the Commission to fight back, or to seek vindication. They can only become more and more involved in political activities as they undertake further exercise of the discretion which Commissioner Eastman asserts lies in their hands.

The Commission can avoid political attacks only by passing back to Congress the full responsibility for Congressional acts or failure to act. Ultimately Congress would be forced to work out a comprehensive transportation policy. Meanwhile Congress would have to take full responsibility for whatever damage results from its inaction or its favoritism to one group or another. The Commission will have to decide whether it fits into the American scheme of government as the eyes, ears, hands, and feet of Congress in carrying out declared public policy, or whether it rather than Congress is to supply intelligence and conscience in the declaration of public transportation policy.

CHAPTER XII

THE FUTURE OF CARRIER COMPETITION: POLITICS OR ECONOMICS

THIS study would not be complete without at least a brief discussion of what may lie ahead in the regulation of long-and-short-haul discrimination. All can agree that future regulation is to be determined in large measure by the character of future competition. The long-and-short-haul controversy would lose its importance if injurious competition among and between carriers could be displaced by regulation of all carriers, just as regulation largely displaced uneconomic competition among railroads in 1920.

Since Congress attempted to solve the transportation problem by the Act of 1920, sweeping changes have taken place in transportation. Highways and motor carriers have been developed and perfected, pipe lines have been utilized more intensively, water carriers in domestic commerce have been encouraged by subsidies, and air carriers have passed well into the serious experimental stage. The Federal Co-ordinator in 1934 estimated that, in the development and expansion of all types of public transportation, except electric railways, at least \$25,000,000,000 had been expended in plant and equipment since 1920. This amount is equal to the entire investment in railroad properties before 1920.¹

It is interesting to recall that the Brookings Institute report on *America's Capacity to Produce*, which found in all American industries an average estimated overcapacity of 19 per cent in 1929, found more than double that amount for public transportation agencies. In other words, the one field of economic activity in which purely political considerations have been most dominant, in which heaviest direct or indirect political subsidies have been absorbed, and in which reasonable regulation has been most stubbornly resisted, has the greatest wasted capacity of all the industries of the nation.²

¹ Report of the Federal Co-ordinator of Transportation, Sen. Doc. No. 152, 73rd Cong., 2nd Sess. (1934).

² Edwin G. Nourse and Associates, *America's Capacity to Produce* (1934). It was estimated in this report that 19 per cent could have been added to the total national income in 1929, and that an additional income of \$125 per man, woman, and child would have absorbed it all (pp. 429-30). Concerning transportation, the study makes the following observations:

- (1) In 1929, only 21 per cent of Pullman space was occupied (p. 356).
- (2) Trackage and locomotives were not used to 50 per cent of their practical

The Federal Co-ordinator recognized these conditions in his final report to Congress in 1936 in which he said :

The chief trouble has been that the new conditions have created great waste of one kind or another. The supply of facilities has grown so fast that it has much exceeded the demand, and this has been true, not only of transportation as a whole, but of individual forms of transportation. In consequence, competition has gone beyond normal and wholesome bounds. Carriers have struggled to get and hold business which they could not handle economically. In the pursuit of traffic, rates have often been cut below sound levels, so that carriers have been impoverished. Labor and the public service have frequently suffered, as well as owners or investors. The immediate advantages to shippers have gone more to big business than to smaller concerns. Instability and uncertainty in rates and changes have developed which, in the long run, hurt shipping interests.³

The "new conditions" noted by the Co-ordinator are properly called "new" only in the sense that they have developed since 1920. They are not new in the sense that they mark the advent of a new era, as did the railroad when it displaced canal and turnpike carriers. There has been no revolution in the economic order. But there has been a vast amount of political promotion of various transportation agencies with taxpayers' capital.

The Co-ordinator believed that it was necessary for the government to recognize the problems which have grown out of this overdevelopment of facilities. Any action by Congress relating to transportation, he thought, should be taken "with full knowledge of transportation conditions, with fairness to all concerned, and as promptly and effectively as possible."⁴

The conditions here pointed out exist in large measure because Congress has not only expressed its belief in the efficacy of competition between highway, water, rail carriers, but has also shielded highway carriers from reasonable regulation, and has made special provision for the perpetuation and development of uneconomic water carriage. The Transportation Act of 1920, which provided adequately for the control of railroad competition, was shortsighted in its pro-

capacity, and freight cars not beyond 70 per cent. Terminals had a substantially greater capacity than was necessary for existing traffic (p. 356).

(3) Waterways, canals, and improved rivers were one-sixth to one-fifth used (p. 359).

(4) The American merchant marine could have carried 70 per cent more than it did in 1929 (p. 361).

(5) There existed on the American highways generally a great unused capacity. Actual use was probably not beyond one-third of capacity (p. 363).

(6) Pipe-line traffic at the peak in 1939 did not use over 45 per cent of the potential capacity (p. 366).

³ Fourth Report of Federal Co-ordinator of Transportation, H. Doc. No. 394, 74th Cong., 2nd Sess. (1936), p. 2.

⁴ *Ibid.*, p. 3.

vision for the perpetuation of what at the time was a nebulous competition between rail and water carriers. It made no attempt to provide adequate control for that competition and indicated no recognition that regulation and control should be applied to all types of carriers. There was no pretense of coordination. There was not even a proposal to change the Panama Canal Act of 1912, which made it not only unlawful for railroads to own vessels plying through the canal, but also unlawful for them to own vessels anywhere in domestic trade unless it could be shown that such ownership was necessary in the public interest.

It is generally agreed that the whole question of carrier competition should be settled on the basis of broad public policy. The main difficulty now seems to be the inability of private owners and operators of railroads, highway carriers, water carriers, and air carriers to agree on broad public policy. Instead each sees an advantage in putting pressure on certain leaders in Congress to secure special legislation in their respective selfish interests. "Friends" of carriage by water are anxious to "encourage" water transportation, no matter by what means or at what expense to other carriers or to the public. Highway enthusiasts insist on the expenditure of billions on public highways, and countless thousands of carriers spring up to compete with railroads. Railroads do not fare so well. While it is heroic to pose as spokesman for highway and water carriers, railroads find that few members of Congress have the courage to insist that competition against the railroads be controlled in the public interest. The odium of being called a "railroad senator" or a "railroad congressman" is still to be avoided. The almost complete absence of public conviction that railroad interests may be public interests precludes intelligent leadership in their defense. The result is an inconsistent program, with little or no effective regulation for water and highway competition on the one hand and with no relaxation of the rigid regulation of rail competition on the other.

The Federal Co-ordinator made recommendations which took full cognizance of this situation. He noted the sorry condition not only of rail transportation but of other forms of transportation as well. He realized that railroads cannot forever hold up under present conditions. He concluded that Congress must choose one of three courses: (1) it must provide more regulation for water and highway carriers; or (2) it must relieve the railroads from present restrictions; or (3) it must be prepared to nationalize railroad transportation and presumably other types of transportation as they prove themselves unable to survive.

The Co-ordinator, while accepting nationalization as the ultimate solution of the problem, rejected it as impractical at the present time. That left only a choice between reducing the regulations now imposed upon railroads or increasing that upon other carriers. He rejected any proposal to reduce the regulation set up for railroads. Already the water and highway carriers were destroying themselves by unrestricted internal competition. No public purpose, he believed, could be served by freeing railroads to join them in competition, which in the end could only result in serious damage or destruction for all.

Rightly or wrongly the carriers and the Co-ordinator have considered long-and-short-haul discrimination the outstanding problem involved in this competition. Railroads insist that part of the difficulty grows out of the fact that the Commission is obdurate in every instance in which the long-and-short-haul controversy is of national significance. They have endorsed the several Pettengill bills designed to repeal the restrictive portions of Sec. 4.

The Co-ordinator actively opposed these bills, apparently on two premises. The first was that Sec. 4 must be preserved if further destructive competition between rail and water carriers is to be prevented. The second was that similar regulation could and should be imposed upon other carriers. These two premises are not as sound as they seem to be at first glance. They require further examination.

The first raises the question of how significant long-and-short-haul discrimination is in carrier competition. In the Co-ordinator's report of January 21, 1936 this statement occurs: "Many years before there had been fleets of steamboats on every navigable river in the South. The railroads cut their rates to meet this competition, maintaining higher rates to and from intermediate points, until the boats gave up the battle."⁵ Apparently the statement referred to the period which preceded the amendment of 1910, when the Commission was first given primary jurisdiction over such discrimination. So also did a similar statement of Johnston B. Campbell, a former member of the Commission who before, during, and since his term on the Commission has shown partisan opposition to all relief under Sec. 4. He said to the House Committee on Interstate and Foreign Commerce, which had under consideration the Pettengill bill, ". . . as I have shown you, and as Congress has recognized, the water lines had been put out of business by the use of the fourth section. . . ."⁶ He then quoted from a speech which he said was delivered by the Federal Co-ordinator

⁵ *Ibid.*, p. 10.

⁶ House Hearings H.R. 3263, 74th Cong., 1st Sess. (1936), p. 477.

before the National Rivers and Harbors Congress in April 1934, as follows:

So far as water transportation is concerned you know what happened in the past when the railroads had a free hand, and swept the inland waterways practically free of competing craft. . . . In that connection I suggest that you who have the interest of water transportation at heart may well keep an eye on the attempts being made to wipe out the long-and-short-haul clause of the Interstate Commerce Act. I venture this suggestion lest there be a repetition of our early experience with destructive competition.⁷

No one would wish to accuse the Co-ordinator of making statements for the mere purpose of tickling the ears of those actively campaigning against fourth-section relief or of those members of the powerful Senate Committee on Interstate Commerce who were equally opposed to relief. Yet it cannot be denied that, if long-and-short-haul variations conformed to the requirements of Secs. 3 and 4, even when the law was weakest, they could not have driven water carriers from the waterways. The Commission, from the beginning, ruled that Secs. 3 and 4 permitted only rates which met competitive water rates. Such rates could not destroy competitors. If railroad rates were dropped to a point below water rates, they immediately became unjustly discriminatory and in violation of Secs. 3 and 4. There has never been a day since the first passage of the Act to Regulate Commerce in 1887 when such rates would not have been clearly unlawful.

An explanation of the damage done to water competition must lie outside of the long-and-short-haul clause. Either the Commission winked at wholesale violations of the law, as the results set forth in the Co-ordinator's statement might imply, or the Commission was powerless to enforce the law as it then existed because of the lack of administrative powers, as was suggested in Chapter IV above, or there were other causes of the damage. If the Commission winked at violations of the law, it must assume blame for the damage done. These discussions have very carefully set forth evidence that the Commission was not negligent in its attempt to enforce the law. If the Commission was powerless to enforce the law and prevent its open violation, then the fault did not lie either with the Commission or with Secs. 3 and 4, but with Secs. 15 and 16 which purported to set up procedures for the enforcement of the law. If there were still other causes, they should be given appropriate consideration and emphasis.

As suggested above, the courts have from the beginning recognized

⁷ *Ibid.*, p. 479.

the correctness of the Commission's tests of legality of long-and-short-haul rates. They have always held that the moment rail rates go below competitive water rates, the discrimination becomes unjust and undue and subject to the prohibitions of Sec. 3. It will be worthwhile at this point to summarize the statements of the courts on this point as set forth at length in Chapter IV.

The significant thing is that the courts in the early fourth-section cases held that the legality of the discrimination in each case was an incidental matter and not, as is usually stated, the main question before the courts. The Supreme Court did not understand that competition made any degree of discrimination lawful. It held in 1896 that competition to justify discrimination must produce a "*substantial and material effect upon traffic and rate making.*"⁸

In the *Behlmer Case*, decided shortly after the *Alabama Midland Case*, the Supreme Court made this point very clear when it said, ". . . we do not hold that the mere fact of competition, no matter what its character or extent, *necessarily relieves the carrier from the restraints of the third and fourth sections.*"⁹

Even the *Alabama Midland Case*, which for over forty years has been blamed for the "emasculatation" of the Act of 1887 and the consequent destruction of water competition, bears the clear assertion of the Supreme Court that the mere fact of competition, no matter what its character or extent, did not necessarily relieve the carrier from the restraints of Secs. 3 and 4. The significant statement of the Court was that Congress did not intend that Secs. 3 and 4 should be prohibitive. If competition was present, some degree of discrimination might not be unjust and undue, since competition makes dissimilar circumstances and conditions.¹⁰

Certainly the Supreme Court did not understand that the railroads were left to determine for themselves the extent to which discrimination was justified by circumstances and conditions. Railroads were better fitted to adjust their rates to circumstances and conditions than courts and commissions, but their rates were always subject to

⁸ *Tex. & Pac. Ry. Co. v. I. C. C.*, 163 U. S. 211 (1896). Italics mine.

⁹ *L. & N. R. Co. v. Behlmer*, 175 U. S. 649 (1900). Italics mine.

¹⁰ *Alabama Midland Ry. Co. v. U. S.*, 168 U. S. 144, 167 (1897). On the point the Court made the following statement: "In order to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what the character or the extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions'."

"revision by the Commission and the courts" where it was alleged that they were unlawful.¹¹

In fact, the real question in the *Alabama Midland Case* did not involve the legality of the discrimination at all, but the right of the carriers to make the rates without first coming to the Commission for permission. The Commission had held that its consent must first be secured. The railroads had held that, since circumstances and conditions were dissimilar, they had the right under Sec. 4 to initiate the rates. The Court upheld the railroad's contention.¹²

If the language of these cases means anything, it means that the Act of 1887, as it originally stood before any amendments had been made to it, prohibited discrimination against intermediate points which exceeded the differential in competitive rates at the terminus. While the mere fact of competition gave the railroads the initiative in publishing a discriminatory rate before 1910, it did not in any sense relieve them from the law which flatly forbade discrimination that was unjust and prejudice that was undue. The measure of competition was then, as it has always been since, the measure of lawful discrimination.

It is not a mere matter of quibbling to repeat the statement made above that there has never been a minute since the Act of 1887 was passed, even though at first it was weak and impotent as far as enforcement was concerned, when Secs. 3 and 4 of the Act did not prohibit rates which would destroy water carriers, provided the rates discriminated against intermediate points. The moment the discriminatory rates went below those of the water competitors, they became unlawful.

If, as is here suggested, the lawful use of Sec. 4 did not lead to the destruction of water transportation, other competitive factors not so conspicuous or sensational as long-and-short-haul discrimination must have accounted for the disaster. Two or three such factors

¹¹ *Ibid.* at 173. The language of the Court was as follows: ". . . we understand the statement, read in the connection in which it occurs to mean only that, when once a substantial dissimilarity in circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; . . . But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the commission and the courts when it is charged that such action has resulted in rates unjust or unreasonable, or unjust discrimination and preferences."

¹² *Ibid.* at 169. The Court's statement is as follows: "We are unable to suppose that Congress intended by the fourth section and proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them to do so."

should suggest themselves to the student of transportation. Any one of them, if present, could explain the destruction of water transportation and completely refute the charge that fourth-section rates were the sole cause of its ruin.

One very probable explanation combines the right of a railroad to meet rates made by water carriers with the power peculiar to water carriers to determine their own minimum rates. Either right taken separately is more or less innocuous. Together they make a deadly combination. Suppose a railroad exercised its lawful power to meet a rate made by a water carrier. The water carrier might then exercise its lawful right to set a new minimum rate below that fixed by the railroad. As soon as the new low water rate became a reality, the railroad would have a lawful right to again drop its rates to the new level, since discrimination would not be unlawful under the circumstances. Water carriers could then take another step toward their own destruction by lowering rates again, thereby automatically extending to the railroad the lawful right to meet the new rate, and so on.

Obviously this type of competition would annihilate water carriers. The cause of such competition would not be found in the weakness of Sec. 4, since the railroad was doing precisely what it was assumed it would need to do to secure its fair share of traffic. The real difficulty lay in the power of the water carrier to fix its own minimum rates. The simple step of granting to the Interstate Commerce Commission the power to fix minimum rates for both rail and water carriers would have solved the entire problem.

Another explanation of the disappearance of water carriers from the inland waterways is to be found in the economic conditions surrounding the industry, and the relation of the watercourses to major markets. In the first place, water carriers were definitely restricted to the territory adjacent to main streams and tributaries. The vast and rich inland areas could not be adequately served by boats. Railroads were peculiarly designed to reach such areas. The greater part of freight traffic originated on the lines of railroads, which formed direct all-rail routes to primary markets. These routes cut across the water routes. Railroads were able to tap every source of traffic available to water carriers, and the water carriers had no compensating advantage. Chicago and New York became the great railroad centers. St. Louis and New Orleans ceased to be on the direct lines of commerce and fell far short of the prospects held out for them in the days when river transportation dominated. When railroads had reached the peak of construction, every ton of freight originating in the territory served by water could be picked up more readily by railroads and shot

directly across watercourses to Atlantic ports for direct shipment abroad. Small wonder that water carriers perished. It is an interesting matter of speculation whether their passing justifies anything more than a sentimental and emotional regret. Political efforts at their resuscitation are so far little more than attempts to redistribute geographic advantages apportioned by railroads during the developmental period.

There is still another factor frequently overlooked which seems to have helped in eliminating water competition. It lies entirely outside of the immediate question of railroad traffic. This is the fact that from the 80's on there was an abundance of opportunities in industry, agriculture, commerce, and railroading for the investment of capital funds better than those afforded by either inland water carriers or ocean carriers. Both latter types of transportation were largely abandoned by American investors during this period to the dismay of those politically minded. Some of the handicaps of water carriers might have lain in the competition of railroads, and some in their abuse of their minimum-rate powers. But, in the main, the competition which so seriously affected water carriers was the competition of desirable speculative investments with less profitable and less speculative investments in water carriers for the available investment funds of the United States. Direct competition of the two types of carriers for traffic probably had comparatively little to do with the matter. The economic advantage of railroads lay in the closeness of their relationship to the general economic expansion of the country.

Another explanation of the destruction of water competition was discussed in an earlier chapter—the right of a railroad to make blanket rates. No matter how low such rates might be, they would not have been subject to the Commission until after the amendment of 1920. The only limitation to this power was that such blanket rates must not discriminate against intermediate points, except where there was no violation of Secs. 3 and 4.¹³ By this rate-making power alone, the railroads could have accidentally or deliberately cleared every river and waterway in the United States of competing carriers, without any recourse whatever to Sec. 4 and long-and-short-haul discrimination. Such blanket rates were extremely common during this period.¹⁴

The real remedy, as far as blanket rates were concerned, would not have been to tinker with Sec. 4, as proposed and accomplished in

¹³ *Skinner & Eddy Corporation v. U. S.*, 249 U. S. 557 (1919).

¹⁴ For example, the Texas common-point rate system. *Dallas Freight Bureau v. M. K. & T. Ry. Co.*, 12 I. C. C. 427 (1906), gives a history of these rates.

1910 and 1920, but to have conferred upon the Commission full power to fix minimum rates at a compensatory level.

When all of the facts are taken into account, statements similar to those of the Co-ordinator, while interesting in the extreme if taken as broad generalizations descriptive of the history of water transportation, become useless or downright harmful to the cause of regulation if taken as a diagnosis of the causes of the changes recorded, and dangerously misleading if taken as an indicator of proper public policy.

Granted, for the sake of argument, that the analysis of the Federal Co-ordinator is correct and that all existing railroad regulation should be preserved intact, what is the probability that regulation, such as is now applied to railroads, can be extended to other forms of transportation and, if so extended, that it can solve the problems of transportation? The Co-ordinator indicated the extent of his faith in his own analysis by the legislation he proposed for both water and highway carriers. It is notable that both bills contained provisions similar to Sec. 3 of the Act to Regulate Commerce, but that neither of them contained anything analogous to Sec. 4, though no one can pretend that long-and-short-haul abuses do not exist on both highways and waterways. Both bills included provisions for minimum rates.

If Congress would declare that competition which undermines or weakens any form of transportation is against public policy and enact a mandatory requirement that the Commission use its minimum-rate powers to prevent destructive competition, the problem would be adequately solved. There would then be no further use for Sec. 4. It could only serve as a device to show favoritism to water or highway carriers by excluding the railroads entirely from some traffic. The principle should be adopted that all carriers are to be treated alike and that all alike are to be required to serve where they may best serve, in public not in private interest.

Even after carrier competition has been adjusted, there will still be problems ultimately insurmountable for certain areas and certain shippers. It is usual to assume blandly that highway-carrier services can completely replace railroad services, or that railroads, after their choicest traffic has been lost, can in some miraculous manner continue their former complete service to all communities.

What is overlooked is the fact that it has required over one hundred years to convert the railroads from local and special carriers into national and universal carriers. There is no point on a railroad that cannot insist upon a fairly adequate service. There is no kind of transportation service of any importance which it is not the duty

of the railroad to supply. If any new service becomes desirable, it becomes an obligation of the railroad to supply it almost as soon as it is recognized. The railroad has equipment for almost every type of service. It can be required to get other types of equipment as soon as the need is demonstrated. The nature of the train, both passenger and freight, is such that a great variety of services can be performed by it simultaneously. It is assumed that the railroad has undertaken to serve all and that it can be held to that service.

The railroad is peculiarly fitted to take the most important role in a system of national transportation, which means just what the name implies. A shipper can send almost any kind of commodity to almost any destination, over a dozen railroads if necessary, under a single bill of lading. If rail service is displaced in part by highway carriers or by any other type of carrier, a universal carrier is replaced by what can never be anything more than a special carrier, limited as to schedule, route, and type of commodity carried. Local and through rates and routes can be arranged and enforced only with greatest difficulty.

At the present time railroads are attempting to abandon portions of the national system. The Commission reported, for 1935, applications to abandon lines or service on lines aggregating more than 2,500 miles. The mileage of railways in receivership in 1935 was 64,301, or 25 per cent of the total mileage of the United States. In 1937 the figures were 72,883 and 29 per cent, respectively. In view of these figures, loss of railroad service to certain communities is not a remote possibility. Trucks, even great truck lines, cannot be held to have engaged in complete and universal common-carrier service, even over the lines or routes specified. Administrative difficulties in enforcing upon highway carriers the duty to serve will be insurmountable for many if not all areas. Localities which lose their adequate universal rail service may get in exchange no service at all or a purely local service which will in the end give them rates entirely out of line with what the railroad formerly charged or with what other communities are receiving. The dense centers of population may attract a great enough variety of highway carriers to give adequate service. By the use of joint and through rates and routes, such centers can get a fairly adequate auxiliary service and fair rates. But these advantages may come only at tremendous cost to smaller isolated areas. In this way, the goal of a national system of transportation, giving each part of the nation a connection with every other part, will have been lost. By no stretch of the imagination can one believe that individual trucks or truck lines can be held to serve adequately all the points on their route, to say nothing of points off their line. To allow undirected

substitution of highway for railway carriage is to make for the ultimate breakdown of the only type of transportation that has ever been or ever can be truly national in scope.

It is a discouraging fact that Congress failed utterly to grasp the problem the Co-ordinator presented as a matter of national significance. So many members of Congress saw in the proposal a chance to "get something" for their constituents that the proposed program was emasculated, and Congress passed instead an incongruous mass of legislation. Highway carriers, it is true, were placed under the Interstate Commerce Commission, but with instructions in no uncertain terms that powers granted were not to be used to regulate competition between highway carriers and railroads. The proposed legislation affecting water carriers was completely devitalized before it was passed. What the Co-ordinator hoped would be constructive legislation proved to be another hopeless Congressional "straddle." There was some degree of regulation, through minimum-rate powers, over cutthroat competition among highway carriers. But there was no authority to prevent "discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." For water carriers there was created a new Maritime Commission; but until 1938 there were no provisions whatever for minimum-rate powers or for authority to control competition between rail and water carriers. The "undue preference-prejudice" provision can no more control this competition than could Sec. 3 of the Act to Regulate Commerce without the minimum-rate power.

The able report of the Co-ordinator and the legislation he proposed, notwithstanding the thoroughness with which the need was set forth in the reports and notwithstanding the urgency of the situation, came largely to naught. Nothing more clearly shows the fact that members of Congress stand in the dual capacity as representatives of the country at large on the one hand and representatives of local interests on the other.

Little reassurance may be gained by an examination of the general outlook of Congress upon transportation, as shown by actual or proposed legislation. For example, the law providing for the appointment of the Co-ordinator specifically provided that not one job should be eliminated by him in the name of efficiency and that a worker should be reimbursed by the carrier for any sacrifice required in moving from one job to another. Railroads, Congress decided, were not to be suppliers of transportation but suppliers of jobs.

During the portion of the depression from 1932 to 1936, various members of Congress proposed, and one or both houses seriously

considered, bills which had no purpose except to pad pay rolls and increase the income of various individuals at the expense of railroads and shippers. In addition to the limitations upon the right to discharge workers in any effort to bring about efficiency, there were train-length bills, full-crew bills, pension and retirement bills, grade-crossing elimination bills, and what not. If all had passed, the cost of railroad transportation would have been increased, so it is said, by over \$1,000,000,000 per year.

The hopelessness of the situation lies in the fact that such political parasitism upon economic life is a rising spiral. Each act passed makes another probable. The handicaps artificially set up by political maneuvering cause rates to go up to cover added costs. Shippers, finding themselves excluded from their former markets by higher rates, raise a political din for new agencies which may make lower rates, either because such carriers have not yet been subjected to political exploitation or because they have the advantage of a more or less poorly concealed subsidy. It is upon such grounds that shippers have assisted highway carriers in avoiding regulation and have given inland water carriers loyal protection and support.

Notice should be taken of the fact that there is now in progress a movement to reorganize Federal administrative offices. In certain proposals the Interstate Commerce Commission would be ousted from its present status of an independent administrative body and placed under a member of the President's Cabinet. This suggestion is even more ominous than most of the events or proposals discussed above, because of the danger that political pressure may be exerted upon or by the President. Such a regulatory system might result in a political dictatorship of the most extreme and dangerous kind. While a sane and capable President might go far in solving the problems of transportation, a presumptuous or an unscrupulous one could plunge transportation into still greater distress and despair.

Certain it is that every type of transportation is now faced with financial disaster because of the relative oversupply of services brought about by the activities of "friends" and "godfathers" of special transportation interests. Railroads are in a particularly difficult position. The real problem is how government agencies may contribute to the economic advantage of all—how political agencies may develop the long-time rather than the short-time interests of the country. The long-and-short-haul problem is but one aspect of this broader problem. It will be solved through the processes which solve other parts of the problem, if and when politicians prove themselves capable of sound economic action.

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