

# RAILWAY PROBLEMS

RIPLEY









SELECTIONS AND DOCUMENTS  
IN ECONOMICS

EDITED BY

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IN ECONOMICS

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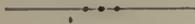
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EDITED, WITH AN INTRODUCTION

BY

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## PREFACE

This collection of reprints, like its predecessor, *Trusts, Pools, and Corporations*, is directed to the accomplishment of two purposes: not alone to render more easily accessible to the interested public, valuable technical material upon a question of paramount interest and importance at the present time, but also to facilitate the work of the college instructor in the economics of transportation. The worst evil of modern academic life, particularly under the elective system, is that the student may so seldom be called upon to think for himself;—not merely to “cram” and memorize, to absorb information predigested by an instructor, but rather to actively use his reasoning powers in effecting recombinations of ideas. Mere passive contact for a brief period of life with cultivating influences and high ideals, as exemplified in books, general environment, and, it is to be hoped, instructors of the right sort, tends to produce the dilettante, unless at the same time the mind is constantly invigorated by action. This is especially true of the economic and social sciences. To provide material, preferably of a debatable sort, which may be worked over under discussion in the class room, instead of being merely committed to memory, constitutes the pedagogical aim of this book. Some of the extracts, especially the historical ones, are of course not susceptible of such treatment. They are merely reference readings for convenient use. But the others, notably the decisions of the Interstate Commerce Commission, usually provide debatable matter of an admirable sort. This is peculiarly true of cases or decisions with a dissenting minority opinion. Another advantage which many of these economic cases possess, over propositions in mathematics, logic, or even law, as material for training the intelligence, is that they are always charged with human, and often with great public, interest; and that they incidentally involve an acquaintance with the underlying business conditions and trade relations of the country at large.

One point in connection with the reprints from decisions of the Interstate Commerce Commission is peculiarly deserving of note. This volume is a collection of cases in economics and not in law. While legal propositions are sometimes necessarily involved, they are subordinate for our purposes to questions of economic fact. Our interest, for example, in the Import Rate decisions of the Supreme Court arises primarily from the fact that in the settlement of a difficult point at law economic relationships and conditions are revealed. A certain practice may be illegal, and yet sound economically, or the reverse. This explains why many of these reprints have been entirely stripped of legal material in the process of editorial condensation. The case is thereby not only much abridged but at the same time simplified for the use of economic students.

The book is not intended to be used alone in the conduct of courses, but in connection with some standard treatise upon the economics of transportation, such as Hadley's, Johnson's, or the editor's discussion in the Final Report of the United States Industrial Commission of 1900 (pp. 259-485).

For permission to reprint the selections from books and technical journals, acknowledgment is due to the editors of the *Quarterly Journal of Economics*, the *Political Science Quarterly*, and the *Journal of Political Economy*; and to Messrs. McClure, Phillips & Co. and the University of Chicago Press. Honorable Martin A. Knapp, the distinguished chairman of the Interstate Commerce Commission, has in this, as in all other enterprises tending to a further elucidation of the difficult problems of railway economics, rendered most valuable aid. The various authors whose contributions are herein reprinted have given, in all instances, the most cordial permission. I wish, however, to acknowledge my peculiar indebtedness to the Honorable Charles Francis Adams, not alone for his willingness to permit an abbreviated reprint of his Chapters of Erie, now out of print, to be made, but for his friendly aid in the direct accomplishment of that purpose. May the volume, headed by his early contribution to the subject, help to further the public-spirited purpose which inspired his work a generation ago!

WILLIAM Z. RIPLEY

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## INTRODUCTION

The first impression conveyed by our historical selections is that they unduly emphasize certain infamous events in the development of the American transportation system. There is surely nothing more discreditable in the economic history of the United States than the defrauding of the government and of innocent investors by the use of development and construction companies, of which the Credit Mobilier was a leading example, by such men as Stanford, Durant, and Crocker; the wrecking of the Erie Railroad by Jay Gould and Jim Fisk; and the utterly unscrupulous manipulation of railroad rates by the Rockefellers and their associates, in order to destroy competition with the Standard Oil Company. Happily such occurrences are exceptional in the economic life of a nation. Nevertheless their description is essential to an understanding of the whole, just as pathological research is needed for a true comprehension of the normal and healthy physiological processes. It would have been far pleasanter to record in detail the course of events by which the wonderful achievement of opening up a great continent to settlement was accomplished. Practically this is impossible within reasonable limits of space. Not the prosaic and normal, but the spectacular, phases of our economic life have been as yet adequately described. The most that can be claimed for the selection of certain of these events is that, while perhaps extreme examples, they are significant as indicating possibilities under the then prevailing state of public opinion and law.

Another less practical, and in fact more important, reason for throwing these infamous events into high light, lies in their instructive character as illustrating the evils generally attendant upon a pioneer stage of development, together with the abuses which naturally arise under conditions of absolutely free

competition. The great advance in public morality which to-day refuses to tolerate such abuses becomes at once apparent. In the case of the chapters from the history of the Erie Railroad and its evil spirit, Jay Gould, the corruption of the state judiciary was perhaps the most deplorable feature of the affair. But the necessity of strict financial accountability of the directors of great public-service corporations, both to the government and to the stockholders, is made evident with equal clearness. Public sentiment — more sensitive to financial delinquencies to-day than it was a generation ago — has compelled the creation of governmental agencies for securing publicity. By such means scandalous abuses of trust are more easily detected and punished. Too often in the past, well-merited punishment has not taken place through the agency of the duly constituted legal authorities. The evil doers have received their just deserts only through condemnation by contemporary public opinion, perpetuated afterward by historical record. To keep alive some of these old scandals cannot fail to impress the fact that the evil which men do lives after them. It is not to be condoned, either by purely private morality, or by material success achieved during life, followed by large benefactions after death.

The chapter upon "Standard Oil Rebates" has had a more direct bearing upon contemporary affairs. The undoubtedly typical events therein described were a powerful factor in rousing public sentiment in favor of the original Act to Regulate Commerce of 1887. Their fearless republication, fully authenticated by documentary evidence, in the admirable History of the Standard Oil Company by Miss Tarbell, — confirmed as it was in its main conclusions by the masterly "Report upon the Transportation of Petroleum," by the United States Commissioner of Corporations,<sup>1</sup> — was an equally powerful influence in crystalizing public sentiment in favor of the recently enacted Hepburn Bill of 1906.<sup>2</sup> Public opinion to-day is unanimous in the

<sup>1</sup> Upon the findings in this report, the Standard Oil Company is now under indictment in the Federal Courts for more than fifteen hundred separate offenses of recent date, upon one single line into the southern states alone.

<sup>2</sup> This law is critically described and analyzed in Chapter XXII, p. 531, *infra*.

demand that railways as common carriers, enjoying inestimably valuable privileges by authority of the government, shall accord substantially equal treatment to all shippers alike, be they great or small.

*Rebates and discriminations* are not, however, matters of historical but of very present importance. As late as 1900, according to the opinion of experts, personal favoritism had become a thing of the past. This was in large measure probably true so far as the ordinary private businesses of the country were concerned. But a new and highly disturbing factor was the sudden rise of great industrial combinations, incident upon the phenomenal prosperity since 1897. Many of these trusts were floated upon glowing prophecies of economies in production. Prominent among these was to be a saving in freights through division of the market into districts, each supplied by the most conveniently located plant. The results have shown in too many cases that the real saving was not effected in this legitimate way at all. But their size and power were used as a club to force the carriers to grant secret favors in rates which were denied to the independent producers. The exposures of personal discrimination on a large scale started in Wisconsin in 1903, as a corollary to the investigation concerning railroad taxation under Governor La Follette. The so-called Elkins Bill, amending the Interstate Commerce Act in the interest of railroad revenues by greatly increasing the penalties for rebating, was enacted in the same year. Various investigations by the Interstate Commerce Commission since 1904 have uncovered intricate methods for evading even this more drastic prohibition. Prominent among these is the use of terminal railways owned by the shipper, which receive back an undue proportion of the through rate for a merely nominal service. The International Salt Company, the United States Steel Corporation, and the International Harvester Company, for example, have been detected in the utilization of this device. Another method, quite common, especially in securing rebates on grain and flour for the great Minneapolis millers, is the "midnight tariff," — a low tariff publicly filed but made effective only for one day, for the use of

shippers warned and prepared in advance. Discrimination in the use of coal cars, always operating of course in favor of the large shipper, was discovered on the Pennsylvania system even more recently. For years the use of private-car lines by the Chicago packers, known as the Beef Trust, to stifle all effective competition from independents, has been well known; but it was not fully disclosed until the general agitation for railroad reform was taken up by President Roosevelt. And all the time, as it now appears, the plain old-fashioned mode of direct repayment of a part of the published tariff rate has continued in secret. The American Sugar Refining Company (in 1906) and the Colorado Fuel & Iron Company (in 1905) have already been convicted of this offense in the Federal Courts. The climax is now capped by the masterly revelations of the United States Commissioner of Corporations, in his Report upon the Transportation of Petroleum of 1906. That hoary old offender, the Standard Oil Company, is now on trial in the Federal Courts, having been shown by an investigation of the books of the railways by expert accountants, to have been regularly in the enjoyment of preferential rates over competitors in all parts of the country. The evidence upon this point, taken in connection with the public professions of those charged with its management, is one of the most extraordinary exposures of loose business morality which this present generation is likely to witness. This revelation, together with that of the Armstrong Insurance Committee in New York, is unfortunately bound to furnish powerful ammunition for the use of political demagogues, in the furtherance of their selfish ends. For the dispassionate student of public affairs the argument is greatly strengthened in favor of an extension of public regulation both of railroads and trusts. The advantages of an enforced and ample publicity have been most effectively demonstrated by this rather remarkable series of events.

*Pooling*, or agreements between carriers for obviating competition, was commonly practiced prior to the Interstate Commerce Act of 1887. That law expressly prohibited it; and the courts have also interpreted the Anti-Trust Act of 1890 as applicable

to railway contracts of the same kind. Moreover the progress of railway consolidation since 1898 has been such, especially in the southern states, that the necessity for pooling agreements is far less obvious than it was twenty years ago. The enactment of Federal legislation for the prevention of rate cutting and secret discrimination insures a greater measure of stability. Cut-throat competition like that of earlier days has become almost impossible. Competition to-day is rather of service and facilities at established rates, than as between actual rates themselves. Consequently our chapter upon the Southern Railway & Steamship Association,<sup>1</sup> at once the most effective and enduring organization of its kind, is now seemingly of historic interest alone. Yet a cogent reason for describing such a railway pool in detail nevertheless exists, and derives great force from the nature of impending problems in railway operation. Many competent students, other than railroad men, are convinced that the present prohibition of pooling ought to be repealed now that the great principle of public supervision and control of rates has been reaffirmed and securely established by the Hepburn Act of 1906.

The United States Industrial Commission of 1900 in its final report included an elaborate discussion of this topic, leading to the conclusion that agreements between carriers, subject of course to approval by the Interstate Commerce Commission, would not only greatly facilitate railway operation but also contribute powerfully to stability of rates. Since drafting this report, I have been able to investigate the subject further, with particular reference to the economic wastes incident to even normal and healthy railway competition.<sup>2</sup> The conviction that the most certain remedy for many of these economic wastes in transportation will be found in a rehabilitation of pooling under governmental supervision, has been greatly strengthened also by a somewhat extended personal investigation of railway practice in Europe. In the British Isles, the broad principle that railways are essentially natural monopolies, and should both legally and administratively be treated as such, has always

<sup>1</sup> *Vide*, p. 98, *infra*.

<sup>2</sup> *Vide*, Chapter XX, p. 484, *infra*.

obtained. Pooling agreements are actually enforceable by legal process. This contrasts strongly with our American practice, where we have indiscriminately sought to perpetuate competition by law, both for railways and trusts, regardless of their economic differences. We have, for instance, failed to recognize that in the case of common carriers, as distinguished from industrial combinations, a remedy against unreasonable rates far more secure than competition, namely governmental control, may be exercised. Moreover this method is advantageous because it conduces to stability of rates, never possible under free competition, while at the same time it still permits of competition for business, not by cutting of rates, but under established rates through extension of better service and facilities. The necessity for prohibition of pooling in the United States has largely disappeared, now that the great principle of public regulation by the Federal government is definitely reenacted into law.

Observation in continental Europe, where government ownership of railways prevails, strongly impresses one with the economic advantages of entirely unified systems of operation. No devious routing of traffic is allowed. Certain lines, best situated and equipped for the business, are designated for each kind of traffic, and concentration on them follows to the exclusion of the weak lines, — that is to say, of the lines which are weak for that particular business. No roundabout circuits occur because of the complete absorption of all lines in the government system. No independent roads have to be placated. The sole problem is to cause the tonnage to be most directly and economically transported. The advantage of monopolistic operation is amply demonstrated. But added evidence of the desirability of eliminating competition, except in the matter of service and facilities, is found in the fact that wherever these unified government systems come in contact they immediately resort to pooling agreements with one another. Thus the Prussian system is party to a number of pools with the railways of Austria, Bavaria, and Baden. The emphasis is laid upon securing the most direct and efficient service as well as the maintenance of stable rates.

For all these reasons above stated, it has seemed desirable to reproduce a picture of one of our best old-fashioned pools at work. Had such an organization not been prohibited, so far as rate making is concerned, by the Act of 1887, one may reasonably doubt whether the gigantic consolidations now dominating the southern states would have arisen. This particular chapter is reprinted, therefore, not only because of its historical importance but also in the hope that some day the railway pool under strict governmental supervision and control may be legally restored to favor as an agency for more effective service and greater stability of rates.

*Traffic problems* may be roughly classified in four groups: those appertaining to the reasonableness of rates in and of themselves without reference to any other tariff; those which spring from an imputedly unreasonable relativity between rates for different and competing places or markets; those which concern the relation between rates upon different commodities; and finally those which deal with differences in rates for the same service between competing shippers. Of these four groups the last one concerning personal discrimination has already been discussed. The third group is mainly concerned with the intricate and technical problems of freight classification, commodity rates, and car-load tariffs. Such matters, decided for example by the Interstate Commerce Commission in a number of important cases,<sup>1</sup> are usually too elaborate for reproduction here, and moreover could subserve no useful purpose, as their decision depends rather upon mere questions of fact than of public policy. One simple concrete case alone, concerning the classification of fur hats,<sup>2</sup> will serve to indicate the principles involved, and their importance in any general scheme of rate making. The problem of relative rates upon grain and grain products, discussed in the Export Rate case,<sup>3</sup> incidentally involves issues of the same sort upon a large scale, as well

<sup>1</sup> Notably, the New York Board of Trade and Transportation Case, Interstate Commerce Commission Reports, Vol. III, pp. 473-511.

<sup>2</sup> P. 476, *infra*.

<sup>3</sup> *Vide*, p. 441, *infra*.

as the St. Louis-Pacific Coast jobbers' controversy.<sup>1</sup> Eliminating personal discrimination and classification, our remaining selections in this field of inquiry are thus narrowed down to two, — namely, absolutely reasonable rates and relative rates for competing markets.

The *inherent reasonableness of railroad rates* is a question less apt to arise with reference to a single commodity than to an entire schedule or tariff. It is a matter of far less concern to an individual merchant or group of traders that the absolute freight rate is high than that it (be it in general high or low) is higher than the rate enjoyed by a competitor. For even if it be unreasonably high, so long as it applies to all traders in the same market, the surcharge can immediately be levied upon the consumer by all dealers alike through an enhancement of prices. In the noted Cincinnati Freight Bureau case,<sup>2</sup> the Middle West was not solicitous for the welfare of the consuming public in the southeastern states when it complained that freight rates from western centers into the South were unduly high. The western merchants were interested in a reduction because their rates were in fact higher than those enjoyed by the Atlantic seaboard cities to the same points. Their complaint concerned itself essentially with the relativity of charges from different competing centers to a common market. The complainant as to the *absolute* reasonableness of southern freight rates should properly be the general consuming public in the region in question. In a similar fashion in another of our cases,<sup>3</sup> Danville complains, not primarily that her freight rates are high, but rather that they are higher than those granted to Richmond, Norfolk, and Lynchburg. The burden of complaint as to the absolute unreasonableness of the rates in question should properly proceed, not from the organized merchants of Danville but from her general consuming population. Nevertheless such questions as concern the absolute level of freight rates do sometimes arise, as in the notable case of the Chicago Stock Yards. In this instance an arbitrary switching charge of two dollars per car was imposed by the railroads in 1894, applicable to all

<sup>1</sup> *Vide*, p. 405, *infra*.

<sup>2</sup> *Vide*, p. 145, *infra*.

<sup>3</sup> *Vide*, p. 378, *infra*.

shippers alike. Issue was raised as to whether such an extra charge was justified by the circumstances and conditions under which this particular rate was imposed.<sup>1</sup>

Far more often, however, than in the case of individual or particular charges, for the reasons above outlined, issues of fact concerning the absolute reasonableness of rates in and of themselves are apt to be raised with reference to entire schedules and tariffs. The Interstate Commerce Commission, as in the case of the freight-rate increases subsequent to 1900, was called upon to act in the general interests of the consuming public. Were these general increases justified by the widespread rise of prices and were they commensurate with the enhancement of costs of operation? The problem in such cases is mainly one of fact, to be discussed and decided by experts. These facts vary in their significance from year to year. Reproduction of such investigations in a volume of this sort would be of little value. Of course the future development of the Interstate Commerce Commission is bound to bring it face to face with just such broad issues. Matters of paramount importance will be involved. But, like matters of classification, they are too technical for our immediate purpose.

While cases suitable for reproduction in this volume rarely turn entirely upon the absolute reasonableness of rates, such an issue is often incidentally involved, as for instance in the Cincinnati and St. Louis cases above mentioned and in those of Chattanooga<sup>2</sup> and Savannah.<sup>3</sup> Given the fact that the relativity of two rates is unreasonable, is the one too high or the other too low? Either contingency might give rise to the inequality called in question. A just decision as to relative reasonableness must therefore reckon with the problem of inherent reasonableness. But the main interest of such issues for the mere student of railway economics lies less in the bald facts as stated, which may vary from time to time, than in the opposing arguments and principles invoked, which are in their essence permanent.

<sup>1</sup> This long-standing controversy, with others concerning the general rates on cattle, seems likely to be made the occasion for a first test of the new Hepburn Act.

<sup>2</sup> P. 238, *infra*.

<sup>3</sup> Pp. 224 and 286, *infra*.

Alleged *relatively unreasonable rates for competing markets* constitute the basis for complaints before the Interstate Commerce Commission far more frequently than do those concerning the absolute amount of the rate charged. The reasons for this have been set forth in the preceding paragraphs. And, common as such complaints have been in the past, it is certain that in future, with the ever-increasing commercial interrelation between different parts of the United States, such alleged grievances will claim a preponderating share of the attention of any administrative commission. Veritable puzzles in rate adjustment constantly arise, which bring out in high relief the economic peculiarities of railway, as distinct from ordinary industrial, competition. For this reason a large number of the cases herein reprinted deal with this phase of the subject.

By and large, these cases may be roughly set apart into two classes corresponding respectively to two distinct aspects of the problem of relative adjustment of rates for competing localities. Of these the first and simplest arises as between two competing markets lying upon and served by the *same* line of railroad. The problem is to adjust with relative fairness the rates to near and distant points on the same line, one often a local or way station, while the other enjoys the benefit of low competitive rates. This is a problem as old as railroading, commonly designated as the long-and-short-haul question. The second class of problems is at once more recent and comprehensive in its scope. It concerns the relativity of rates to or from a common market from various points, not on the same but on *different* lines. A decision in this latter case amounts practically to a delimitation of the entire area of the market. The long-and-short-haul question raises issue as to the extent of a market by one dimension alone, while this second phase of the matter touches the circumscription of the market both in length and breadth, — and one might almost add, in thickness as well. Such is the daily problem of the professional traffic manager. It has not frequently been presented for settlement to the Interstate Commerce Commission, but is certain to do so increasingly often with every increment of regulative power conferred by Congress

or sanctioned by the courts. All these classes of problems alike fundamentally involve the principles concerning the element of distance as a factor in the carriage of goods. Transportation is in essence the elimination of the element of distance from markets. The most important and puzzling cases, therefore, naturally turn upon the definition of the due importance of distance as affecting cost of service, in comparison with competition which determines the value of service, and in which mere distance plays no part.<sup>1</sup>

Our cases illustrative of the *long-and-short-haul question* spring mainly from Section 4 of the Act to Regulate Commerce of 1887. That clause of the Federal statute, modeled upon the long-standing legislation of a number of states, prohibited the charging of a greater rate to any intermediate point than was charged to a more distant point on the same line; provided, however, that traffic moved from each under "substantially similar circumstances and conditions."<sup>2</sup> In the celebrated Louisville & Nashville case in 1889, the Interstate Commerce Commission promptly interpreted this latter clause as permitting carriers to charge less to the more distant point in three contingencies: viz., first, when there was water competition; secondly, when there was foreign railway competition at the more distant point; and thirdly, in certain "rare and peculiar cases" not conclusively defined. Under this interpretation of the law, both the railways and the Commission proceeded, until the final decision of the Supreme Court in 1897 in the Alabama Midland case, with which our reprints under this heading begin.<sup>3</sup> In substance this decision held: first, that the existence of railway competition at the more distant point justified the railway in charging what it pleased relatively at intermediate points; and secondly, it seemed to imply that the carrier was a competent

<sup>1</sup> This theoretical proposition is discussed in Chapter V, p. 123; and is worked out in practice in Chapter XIII, p. 309.

<sup>2</sup> For a more elaborate discussion of this topic, *vide*, Final Report United States Industrial Commission, 1900, p. 433.

<sup>3</sup> The original decision of the Interstate Commerce Commission, p. 333; and the opinion of the Supreme Court, p. 354.

judge as to the controlling force of this competition, without reference to the opinion of the Interstate Commerce Commission. How fully this opinion emasculated the original statute is vividly described by Justice Harlan in his dissenting opinion.<sup>1</sup>

The Alabama Midland decision was rendered in 1897. Three cases, — the Savannah Freight Bureau;<sup>2</sup> Dallas, Texas; and St. Cloud, Minnesota,<sup>3</sup> — decided during the next three years, illustrate the scope of authority exercised by the Commission under the long-and-short-haul clause as thus legally interpreted. In the first two exemption from its provisions was granted; that is to say, the railways were permitted to charge less to the more distant than to the intermediate points; while in the St. Cloud case the Commission held that this ought not to be allowed. For in this last case it appeared that the practice was actually prejudicial to St. Cloud, while in the other two the intermediate points suffered no peculiar damage. Many other interesting comparisons between these cases may be brought out in detailed analysis and discussion. Especial interest is lent to the St. Cloud case, however, because, although granting exemption to the carriers, the Commission was evidently struggling to regain some of the authority and prestige lost by the Alabama Midland decision. The arrogance of the railroads, especially in the southern states, seemed to render necessary either new legislation or a rehabilitation of the old. In the Danville, Virginia, case<sup>4</sup> in 1900 the Commission sought to shift its ground, mainly on the basis of another decision of the Supreme Court, as a reading of the case will show. It thus embarked upon a line of interpretation, not yet at this writing definitely settled by the court of last resort. Appeal to the Supreme Court is still pending. Meantime, however, the entire inadequacy of the law, unless the new powers granted by the Hepburn Bill of 1906 are construed to supplement the old long-and-short-haul clause (which appears doubtful), is amply shown by the Chattanooga case.<sup>5</sup> This, as well as the Danville case, presents a picture of intolerable

<sup>1</sup> *Vide*, p. 361. Compare also p. 260, *infra*, in the Chattanooga case.

<sup>2</sup> P. 286, *infra*. <sup>4</sup> P. 378, *infra*.

<sup>3</sup> P. 269, *infra*. <sup>5</sup> Pp. 238 and 260. Compare also pp. 554 and 611.

monopolistic abuse of power by the railways of the southern states, which would not be permitted in communities where public sentiment is more alert and better organized.<sup>1</sup> Unless some remedy can be found for the injustice indicated by these southern cases, either under a more liberal interpretation of the long-and-short-haul clause or by means of the newly enacted Hepburn Bill of 1906, a constant incentive to popular agitation will exist.

Two cases reprinted herein illustrate the complicated phase of *the distance problem*, wherein several shipping points at various degrees of remoteness from a common market are located, not on the same but on entirely different lines of railway. At Eau Claire, Wis.,<sup>2</sup> for example, it was a question of adjusting rates from a number of lumber-producing centers over a series of different railways converging on a market at the Missouri river. The convergence of these lines upon a common market renders this case somewhat analogous to that of the Trunk Line rate system, based upon distance percentages.<sup>3</sup> Both are entirely different from the Hutchinson salt case,<sup>4</sup> in which rates to a common market, St. Louis or New Orleans, not on converging lines, but on railways from entirely opposite directions, were called in question. A controversy was here involved as to whether St. Louis and the South should be supplied with salt from the Kansas or the Michigan fields; exactly the same contest involved of late in the struggle of the lumbermen of the far Northwest, of Louisiana, of the far Southeast, and of the northern central states, to gain entry on even terms to the great markets of Chicago and its tributary treeless territory.<sup>5</sup> In such cases as these we attain the climax of complexity in the problems of rate adjustment. Vast areas, a multitude of inter-related rates, and the welfare of large populations depend upon their just settlement. Fortunately in future a divided responsibility between the traffic managers and governmental experts

<sup>1</sup> Cf. especially the Savannah Naval Stores case, p. 224. The Troy case (p. 333), and that of Dawson, Ga. (p. 363), are typical of the flagrant discrimination which exists.   <sup>2</sup> P. 203, *infra*.   <sup>3</sup> P. 309, *infra*.   <sup>4</sup> P. 190, *infra*.

<sup>5</sup> This is ably discussed with a fine map in the Senate Committee on Interstate Commerce Hearings, 1905, Vol. II.

seems likely to obtain in this work since the enactment of the Hepburn Bill of 1906. The decision no longer rests solely with the traffic manager, representing only one of the many parties in interest.

Certain of our cases are intended to contrast the *general systems of railway rates* prevalent in different sections of the United States. Three main divisions are distinguishable; viz., those of Trunk Line territory, of the southern states, and of the transcontinental carriers, including the Pacific coast. The Trunk Line scheme,<sup>1</sup> as might be expected, is the most highly developed system, not only from the point of view of simplicity but of justice as well. It illustrates the dominating importance of distance as a factor in sound rate adjustment. The southern or "basing-point" system, exemplified in the Troy,<sup>2</sup> Dawson,<sup>3</sup> Chattanooga,<sup>4</sup> and Danville<sup>5</sup> cases, lies at the opposite extreme. It shows what evils may result from the exercise of absolutely arbitrary powers by railway managers, acting solely with a view to their own interests and regardless of the general public welfare. To be sure, certain geographical difficulties, no greater than those of Trunk Line territory, but peculiar to the South, have to be considered. But even making all due allowances, both for the sparseness of its population and the frequency of water competition, the defiance of the fundamental principles of justice in rate making are a constant incentive to governmental interference.

The transcontinental and Pacific coast rate systems are interesting and peculiar, involving as they do constant consideration of the relative merits of transportation by sea and railroad. The San Bernardino case<sup>6</sup> is indicative of this phase of the matter with reference to a particular class of goods; while the important case of the St. Louis jobbers<sup>7</sup> raises the same issue with reference to a long list of commodities. But the latter case is of even wider scope. It discusses an issue which

<sup>1</sup> P. 309, *infra*.

<sup>2</sup> P. 333, *infra*.

<sup>3</sup> P. 363, *infra*.

<sup>4</sup> P. 238, *infra*.

<sup>5</sup> P. 378, *infra*.

<sup>6</sup> Interstate Commerce Reports, Vol. IX, pp. 42-60.

<sup>7</sup> P. 405, *infra*.

constantly arises all over the country with reference to distributive business. Shall California be supplied with hardware, for example, by means of wholesale shipments to San Francisco, followed by redistribution from that center; or shall the primary distribution take place from Chicago and St. Louis direct? The very existence of San Francisco as a commercial center is involved. It is the everlasting contest for supremacy between the great cities and those of medium size, as well as the struggle of each locality for economic independence. All through this volume issues of this sort are manifest to the observant eye, underlying what may appear to be relatively trivial complaints from a financial standpoint. There will be no end to it all until the firm foundations of a system based upon some scientific principle, as in the Trunk Line scheme, shall have been devised and adopted here as well as in the southern states.

The Export Rate case<sup>1</sup> is important as bearing upon a most difficult problem of commercial adjustment, which is continually cropping up for settlement, not only in the United States but all over Europe.<sup>2</sup> It might have been better, perhaps, to have reproduced the noted Import Rate case,<sup>3</sup> in which the Interstate Commerce Commission was finally overruled by a bare majority opinion in the Supreme Court of the United States, after having been upheld in the two lower Federal Courts; but unfortunately both the length of that opinion and its unsatisfactory literary form rendered it impossible for republication. The issue raised concerned the legality of lower through rates on imports from Liverpool to San Francisco *via* New Orleans than were granted on domestic shipments from New Orleans to the same destination. Thus the rate on books, buttons, and hosiery, from Liverpool to San Francisco through New Orleans, was \$1.07 per hundred pounds. At the same time the domestic shipper was compelled to pay \$2.88, or two and one-half times as much, for a haul from New Orleans to San Francisco alone. In another important case tin plate was carried from Liverpool by steamer and rail through Philadelphia to Chicago for

<sup>1</sup> P. 441, *infra*.

<sup>2</sup> P. 618, *infra*.

<sup>3</sup> Interstate Commerce Commission Reports, Vol. IV, pp. 450-533.

twenty-four cents per hundred pounds. For the American merchant in Philadelphia the rate to the same market was twenty-six cents. For the inland haul alone the Pennsylvania Railroad was receiving sixteen cents on the foreign goods, while coincidentally charging American merchants ten cents more for the same service. Discrimination against the American merchant in favor of foreign competition, not infrequently more than sufficient to overbalance any supposed protection afforded by the tariff, has been repeatedly proved in such cases as this. The duty on imported cement is eight cents per hundredweight. In one instance this duty with the total freight rate added amounted to only eighteen cents, as against a rate of twenty cents for the domestic producer from New York to the same point. There are reasons for this grievous discrimination against the domestic shipper, mainly concerned with the vagaries of ocean freight rates. Steamers must have ballast for the return trip to equalize outgoing shipments of grain and other exports, and they will carry heavy commodities, such as salt, cement, crockery, and glass, at extremely low rates. Nevertheless such imported commodities can be sold to advantage in competition with domestic goods only when the railways will contribute equally low rates to complete the shipment.

The Interstate Commerce Commission in this Import Rate case originally held that such discriminations were unlawful. Finally, however, the Supreme Court decided, with three members, including the Chief Justice, dissenting, that the Act to Regulate Commerce as phrased did not expressly prohibit the practice. Everything turned upon the interpretation of certain clauses in the law. No question was ever raised as to the economic issues involved, nor was it competent to these tribunals to pass upon such issues. The question was simply and solely this: When the Act to Regulate Commerce forbade inequality or discrimination between shippers, did it contemplate competition between one shipment originating within the country and others from foreign ports? Was the Interstate Commerce Commission, in other words, empowered, in interpreting this act, to consider circumstances and conditions *without* as well as

*within* the boundaries of the United States? If it was entitled to consider solely domestic conditions, it was certainly right and economically sound in forbidding such practices; if, on the other hand, it was required to take account of commercial conditions the world over, irrespective of the effect upon the domestic producer and internal trade, its decision should have been favorable to the railroads. To appreciate fully the extreme nicety of the legal points involved and the delicacy of the economic interests at issue, one must needs read the extended opinions both of the majority of the Supreme Court and of the three dissenting justices, including Chief Justice Fuller. But to interpret the reversal of the original decision of the Interstate Commerce Commission by this tribunal as in the slightest degree involving incompetence or judicial unfairness is a misrepresentation of all the facts involved. As in the preceding cases touching the interpretation of the long-and-short-haul clause, it may fairly be said that the consensus of opinion among business men, and certainly among the professional economists of the country, is on the side of the Commission in condemning such practices. As to the law, that has been decided otherwise by a narrow majority. An important question before the country is as to whether a law thus construed should not be amended so as to permit a reasonable limitation of such abnormal traffic in future.

*Governmental regulation*, constituting the third division of this volume, is in fact a subject much wider in scope than the mere control of common carriers. It touches and includes the broad field of governmental supervision or control, not of railroads alone but of all public-service corporations. Many of the considerations, for example, in the chapters on "Reasonable Rates"<sup>1</sup> and "The Doctrine of Judicial Review,"<sup>2</sup> as applied to Federal control of railroads, are equally applicable to the problems of state regulation of street railways or of municipal control of gas and electric lighting or any other public service. Great underlying principles of constitutional law, as defined by the Federal Courts, are shown in the making.

<sup>1</sup> P. 557, *infra*.

<sup>2</sup> P. 579, *infra*.

As an episode in the history of governmental regulation of public-service companies the enactment of the Hepburn Bill of 1906<sup>1</sup> cannot fail to be of note. Not only on account of the scope and magnitude of the interests involved — covering, as the railway net does, the entire country, and representing an investment of \$12,000,000,000 — but also because of the powerful and well-organized opposition presented along the entire front, this piece of legislation is unique. It was a convincing demonstration of the power of public opinion when once thoroughly roused and ably led. The problem was vastly more difficult owing to the phenomenal growth of the business. The first law regulating railways was passed in 1887, after an agitation extending over nearly twenty years. Our domestic population from 1889 to 1903 increased slightly less than one third. The railroad mileage grew in about the same proportion. Yet the freight service of American railroads surpassed this rate of growth almost five times over. While population and mileage increased one third, the railroads in 1903 hauled the equivalent of two and one-half times the total volume of freight traffic handled in 1889. In other words, the ton mileage — representing the number of tons of freight hauled one mile — increased from 68,700,000,000 to 173,200,000,000.

Throughout the decade to 1900 the trend of affairs was all in favor of railway interests as against the government. The Alabama Midland decision of 1897<sup>2</sup> thoroughly emasculated the long-and-short-haul clause of the original act; and the Maximum Rate decision in the Cincinnati Freight Bureau cases<sup>3</sup> deprived the Commission of any effective power to remedy unreasonable rates. During the same period the Anti-Trust Act of 1890 was greatly limited in its scope by a number of legal decisions. The inevitable reaction ensued. Under the leadership of President Roosevelt, public opinion was thoroughly aroused. It became evident to all unprejudiced persons that radical

<sup>1</sup> Chapter XXII, p. 531, *infra*.

<sup>2</sup> P. 354, *infra*.

<sup>3</sup> P. 179, *infra*. This decision is fully discussed in the Final Report of the United States Industrial Commission, 1900, p. 426.

amendment of the law relating to railroad regulation was necessary, not only to protect the shippers and the public but to head off the possibility of government ownership of railways becoming a great political issue in 1908. And yet so powerfully organized was corporate influence that, in spite of aroused public opinion, dilatory and obstructive tactics seemed likely to prevent any effective legislation. Fortunately, however, at this critical juncture came the astounding revelations of fraud and corruption in the great New York life-insurance companies, and of filth and adulteration in the Chicago canning and packing houses. The Senate yielded to the pressure from the President and the House of Representatives, and even outdid the House in zeal for the public welfare by adding amendments of far-reaching importance. The Hepburn Bill of 1906 definitively extending the principle of detailed governmental supervision, previously exercised only in the case of national banks, over the common carriers of the country, is thus worthy of the closest study, not alone in its history and details but in respect of its influence upon the future welfare of the transportation system of the United States.

The chapter upon judicial determination of reasonable rates<sup>1</sup> is of peculiar interest as describing the slow process by which an entire reversal of opinion by the Supreme Court of the United States upon a fundamentally important question may be effected. The right-about-face by this tribunal, respecting the relative power of legislatures and courts in regulating the charges of public-service companies, carries the mind back to the reversal of judgment of that august body a generation ago in the matter of the issue of legal-tender paper. It affords a striking illustration of what, to coin a phrase, one may call the "elastic stability" of our fundamental law. By the enunciation of the "Doctrine of Judicial Review,"<sup>2</sup> the power of the legislative branch of our governments, Federal, state, or municipal, is definitely subordinated to that of the judiciary in all questions concerning the rates chargeable for public service. To the courts, therefore, must be submitted for final arbitrament, all controversies touching the reasonableness of railway rates. How

<sup>1</sup> P. 557, *infra*.

<sup>2</sup> Chapter XXIV, p. 579, *infra*.

profoundly this condition affected the form of the Hepburn Bill of 1906 may be seen from the debates in Congress, and particularly in the Senate.

Whether the Doctrine of Judicial Review, subordinating the primary law-making to the law-interpreting branch of the government, will permit of a satisfactory solution of the ever-pressing problem of public regulation of railway rates, is called in question in the chapter upon that subject.<sup>1</sup> The great issue of the opening of the twentieth century, both here and in Europe, concerns individual rights in the narrower sense and private property, on the one hand, as opposed to public welfare, on the other. Always conceding that the success of Anglo-Saxon institutions is attributable in large measure to insistence upon the rights of the individual, it is nevertheless incontrovertible that the swing of the pendulum, for good or ill, is at this time in the direction of the public welfare, more or less regardless of personal or property rights. One sees it in the domain of factory legislation, of taxation, of regulation of trusts and common carriers, of insurance, — a long series of statutes prescribing the conditions under which women and children and even adult men may labor; the quality and even the kind of food and drink which they may consume; the forms in which business enterprises may be organized and the subsequent manner in which they may be conducted; nay, even the precise form in which their accounts shall be kept. Thus the problem of determining which branch of the government shall be supreme in matters of this sort is one which is vital to the stability of our institutions, but also, be it observed, to their capacity for progress. That, within the narrow domain of regulation of railway rates, some modification of present judicial opinion is necessary if such progress — defining progress in the narrow sense of change conformable to the popular will — is to ensue, cannot reasonably be doubted. In any event, the matter is one open to discussion, and of such paramount importance that it cannot long be overlooked or postponed. Of course for the moment the courts stand as the natural champions of individual and

<sup>1</sup> P. 579, *infra*.

property rights, but it should never be forgotten that in truly democratic countries the judges are chosen by the people directly or through the medium of a selected executive, so that this condition is not necessarily an enduring one. The popular will when persistently bent upon a definite goal is bound to prevail in the end. In the best interests of conservatism, therefore, the safest course for the judiciary will be not flatly to dam the course of public opinion when once clearly defined, lest a flood sweeping all before it result. That happened in the case of our Civil War. The true function of the courts should be to hold back the impending waters until the issue is clear, and thenceforth to so shape or divert the current of affairs that both the individual and the public welfare may interact upon one another to the good of both. Reverting to the specific matter of regulation of railway rates, one cannot doubt that some such compromise will be the final outcome.

*European conditions and experience* in railroad matters, described in the final division of these reprints, have until recently received little attention in the United States. Our problems were unique in themselves; and in so vast an area rail transportation was from the outset so vital to extended existence that the United States has been rather a pioneer than an imitator of Europe in all matters pertaining to construction and operation. But now that affairs are entering upon another stage of development, what with governmental regulation and the increasing density of population, it appears that much valuable information may be gleaned from European experience. At the present time this is peculiarly true of the British Isles, where the economic condition of private ownership and operation prevails as in the United States. On the other hand, owing to its minute area, with omnipresent water carriage by sea, the problems imposed by British geographical conditions are less instructive perhaps than those upon the Continent, especially in Germany and France.

With private ownership and operation of railways, the British government has had an extended experience in regulation by

governmental authority. The last fruits of this are set forth in detail, in our chapter upon "The English Railway and Canal Commission."<sup>1</sup> The problem, however, is simpler than ours, by reason of the fact that all control flows from one source, not being divided as in the United States between a Federal Congress and administrative Commission and a host of entirely independent state legislatures and commissions. Moreover, in the British Isles, it should be noted, the difficult questions of authority raised by the presence of a Constitution do not come into play. Parliament is supreme in legislative matters; its word is law. The will of the people may be expressed statutorily, at any time, regardless alike of legislative and judicial precedent. Protection for vested interests lies in a restricted suffrage together with the innate conservatism and sense of fair play of the British people. Thus freed from judicial trammels, it is of interest to observe what has been accomplished in the line of regulation. Among the peculiarities of the situation one notes the entire absence of our great evil of personal discrimination and rebating;<sup>2</sup> and especially that much of the activity of the Railway and Canal Commission is analogous rather to the work of some of the best of our state commissions, Massachusetts and Wisconsin for example, than of the Federal Interstate Commerce Commission. Pooling, likewise, and contracts providing for division of the field, permitting of an avoidance of the evils of excessive competition are allowed, not forbidden as in the United States. The business consists to a far greater degree of small or retail shipments. The problems of classification arising from widely different climatic, industrial, and social conditions do not complicate matters. But, on the other hand, the radical step has been taken of detailed prescription by law both of freight rates and classification. The Dominion of Canada in 1903 has proceeded even farther in this direction, its law upon the subject being based upon the Report upon Railway Rate Grievances of 1902, drawn up by Professor S. J. McLean, author of our chapter upon the English Commission. The

<sup>1</sup> Chapter XXV, p. 602, *infra*.

<sup>2</sup> Cf. p. 617, *infra*.

Canadian Board of Railway Commissioners combines all the powers of the English Commission with those vested in the British Board of Trade. There is conferred a concentration of power over rates, both in England and Canada, beside which even our amended law of 1906 appears pale and colorless. Altogether the British experience is highly suggestive in all that concerns government regulation.

Government ownership of railroads is so obviously a remote possibility in the United States, so long as administrative regulation is effectively applied, that the experience of Germany in this field would seem to be unimportant. And yet, having due regard to her superb administrative system, and to her peculiar industrial problems, the service is so admirably adapted to her needs that it amply repays close investigation. From the point of view of public finance alone, the Prussian achievement of government ownership is extraordinary. In 1882, with a gross income of about \$109,000,000, a clear surplus above expenses and interest on debt of slightly more than \$10,000,000 resulted. This net profit has steadily risen. Ten years later it was about \$25,000,000; and in 1900 it had increased to \$99,000,000. In 1905, with a gross income of approximately \$405,000,000 (1,621,000,000 marks) expenses absorbed about \$250,000,000, and interest charges about \$28,000,000, leaving a net profit on the investment of more than \$125,000,000 (503,000,000 marks). A return of something like five and one-half per cent on the capital investment is indeed a notable result in government finance. This has been made possible because of two unique conditions; the wonderful industrial growth of Germany in the last two decades, and the high standard both of technical education and of the personnel of the government service. The railway net comprises only about one seventh of the mileage of our American roads, all operated in a densely populated country with high-grade traffic. No reasonable conclusion can be drawn from these results as to the advantages of government ownership in a vast, sparsely settled region like the United States. But we can learn much from certain features of the management of these German railroads, as set forth in

our chapter on the subject.<sup>1</sup> One of the most admirable features is the system of advisory councils, composed jointly of traffic officials and of prominent representatives of shippers. Extended deliberation upon every adjustment of rates ensues; all possible complications are considered, with reference to export trade, fiscal receipts, economy in operation, territorial competition, and the like. Observation in the field strengthens the conclusion that a degree of peace and coöperation between the railroads and the shipping public, far better than that which prevails to-day in the United States, has followed as a result. The avoidance of economic wastes, such as are described in our chapter on the subject,<sup>2</sup> are also strongly in contrast with our American practices. It is my conviction, all things considered, that our American transportation system is the best in the world. All the more reason why we should open our eyes to the excellences of the railroad systems of foreign countries.

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<sup>1</sup> P. 660, *infra*.

<sup>2</sup> P. 484, *infra*.

# RAILWAY PROBLEMS

## I

### A CHAPTER OF ERIE<sup>1</sup>

THE history of the Erie Railway has been a checkered one. Chartered in 1832, and organized in 1833, the cost of its construction was then estimated at three millions of dollars, of which but one million was subscribed. By the time the first report was made the estimated cost had increased to six millions, and the work of construction was actually begun on the strength of stock subscriptions of a million and a half, and a loan of three millions from the State. In 1842 the estimated cost had increased to twelve millions and a half, and both means in hand and credit were wholly exhausted. Subscription books were opened, but no names were entered in them; the city of New York was applied to, and refused a loan of its credit; again the legislature was besieged, but the aid from this quarter was now hampered with inadmissible conditions; accordingly work was suspended, and the property of the insolvent corporation passed into the hands of assignees. In 1845 the State came again to the rescue; it surrendered all claim to the three millions it had already lent to the company; and one half of their old subscriptions having been given up by the stockholders, and a new subscription of three millions raised, the whole property of the road was mortgaged for three millions more. At last, in 1851, eighteen years after its commencement, the road was opened from Lake Erie to tide water. Its financial troubles had, however, as yet only begun, for in 1859 it could not meet the interest on its mortgages, and passed into the hands of a

<sup>1</sup> From Chapters of Erie and Other Essays, by (Hons.) Charles Francis Adams and Henry Adams, New York, 1886. By permission.

receiver. In 1861 an arrangement of interests was effected, and a new company was organized. The next year the old New York & Erie Railroad Company disappeared under a foreclosure of the fifth mortgage, and the present Erie Railway Company rose from its ashes. Meanwhile the original estimate of three millions had developed into an actual outlay of fifty millions; the 470 miles of track opened in 1842 had expanded into 773 miles in 1868; and the revenue, which the projectors had "confidently" estimated at something less than two millions in 1833, amounted to over five millions when the road passed into the hands of a receiver in 1859, and in 1865 reached the enormous sum of sixteen millions and a half.

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The series of events in the Erie history which culminated in the struggle about to be narrated may be said to have had its origin some seventeen or eighteen years before, when Mr. Daniel Drew first made his appearance in the Board of Directors, where he remained down to the year 1868, generally holding also the office of treasurer of the corporation. Mr. Drew is what is known as a self-made man. Born in the year 1797, as a boy he drove cattle down from his native town of Carmel, in Putnam County, to the market of New York City, and, subsequently, was for years proprietor of the Bull's Head Tavern. Like his contemporary, and ally or opponent,—as the case might be, Cornelius Vanderbilt, he built up his fortunes in the steamboat interest, and subsequently extended his operations over the rapidly developing railroad system. Shrewd, unscrupulous, and very illiterate,—a strange combination of superstition and faithlessness, of daring and timidity,—often good-natured and sometimes generous,—he ever regarded his fiduciary position of director in a railroad as a means of manipulating its stock for his own advantage. For years he had been the leading bear of Wall Street, and his favorite haunts were the secret recesses of Erie. As treasurer of that corporation, he had, in its frequently recurring hours of need, advanced it sums which it could not have obtained elsewhere, and the obtaining of which was a necessity. He had been at once a good friend of the road and

the worst enemy it had as yet known. His management of his favorite stock had been cunning and recondite, and his ways inscrutable. Those who sought to follow him and those who sought to oppose him, alike found food for sad reflection; until at last he won for himself the expressive *sobriquet* of the Speculative Director. Sometimes, though rarely, he suffered greatly in the complications of Wall Street; more frequently he inflicted severe damage upon others. On the whole, however, his fortunes had greatly prospered, and the outbreak of the Erie war found him the actual possessor of some millions, and the reputed possessor of many more.

In the spring of 1866 Mr. Drew's manipulations of Erie culminated in an operation which was at the time regarded as a masterpiece; subsequent experience has, however, so improved upon it that it is now looked upon as an ordinary and inartistic piece of what is called "railroad financiering," a class of operations formerly known by a more opprobrious name. The stock of the road was then selling at about 95, and the corporation was, as usual, in debt, and in pressing need of money. As usual, also, it resorted to its treasurer. Mr. Drew stood ready to make the desired advances — upon security. Some twenty-eight thousand shares of its own authorized stock, which had never been issued, were at the time in the hands of the company, which also claimed, under the statutes of New York, the right of raising money by the issue of bonds, convertible, at the option of the holder, into stock. The twenty-eight thousand unissued shares, and bonds for three millions of dollars, convertible into stock, were placed by the company in the hands of its treasurer, as security for a cash loan of \$3,500,000. The negotiation had been quietly effected, and Mr. Drew's campaign now opened. Once more he was short of Erie. While Erie was buoyant, — while it steadily approximated to par, — while speculation was rampant, and that outside public, the delight and the prey of Wall Street, was gradually drawn in by the fascination of amassing wealth without labor, — quietly and stealthily, through his agents and brokers, the grave, desponding operator was daily concluding his contracts

for the future delivery of stock at current prices. At last the hour had come. Erie was rising, Erie was scarce, the great bear had many contracts to fulfill, and where was he to find the stock? His victims were not kept long in suspense. Mr. Treasurer Drew laid his hands upon his collateral. In an instant the bonds for three millions were converted into an equivalent amount of capital stock, and fifty-eight thousand shares, dumped, as it were, by the cartload in Broad Street, made Erie as plenty as even Drew could desire. Before the astonished bulls could rally their faculties, the quotations had fallen from 95 to 50, and they realized that they were hopelessly entrapped.

The whole transaction, of course, was in no respect more creditable than any result, supposed to be one of chance or skill, which, in fact, is made to depend upon the sorting of a pack of cards, the dosing of a race horse, or the selling out of his powers by a "walkist." But the gambler, the patron of the turf, or the pedestrian represents, as a rule, himself alone, and his character is generally so well understood as to be a warning to all the world. The case of the treasurer of a great corporation is different. He occupies a fiduciary position. He is a trustee, — a guardian. Vast interests are confided to his care; every shareholder of the corporation is his ward; if it is a railroad, the community itself is his *cestui que trust*. But passing events, accumulating more thickly with every year, have thoroughly corrupted the public morals on this subject. A directorship in certain great corporations has come to be regarded as a situation in which to make a fortune, the possession of which is no longer dishonorable. The method of accumulation is both simple and safe. It consists in giving contracts as a trustee to one's self as an individual, or in speculating in the property of one's *cestui que trust*, or in using the funds confided to one's charge, as treasurer or otherwise, to gamble with the real owners of those funds for their own property, and that with cards packed in advance. The wards themselves expect their guardians to throw the dice against them for their own property, and are surprised, as well as gratified,

if the dice are not loaded. These proceedings, too, are looked upon as hardly reprehensible, yet they strike at the very foundation of existing society. The theory of representation, whether in politics or in business, is of the essence of modern development. Our whole system rests upon the sanctity of the fiduciary relations. Whoever betrays them, a director of a railroad no less than a member of Congress or the trustee of an orphans' asylum, is the common enemy of every man, woman and child who lives under representative government. The unscrupulous director is far less entitled to mercy than the ordinary gambler, combining as he does the character of the traitor with the acts of the thief.

No acute moral sensibility on this point, however, has for some years troubled Wall Street, nor, indeed, the country at large. As a result of the transaction of 1866, Mr. Drew was looked upon as having effected a surprisingly clever operation, and he retired from the field hated, feared, wealthy, and admired. This episode of Wall Street history took its place as a brilliant success beside the famous Prairie du Chien and Harlem "corners," and, but for subsequent events, would soon have been forgotten. Its close connection, however, with more important though later incidents of Erie history seems likely to preserve its memory fresh. Great events were impending; a new man was looming up in the railroad world, introducing novel ideas and principles, and it could hardly be that the new and old would not come in conflict. Cornelius Vanderbilt, commonly known as Commodore Vanderbilt, was now developing his theory of the management of railroads.

Born in the year 1794, Vanderbilt was a somewhat older man than Drew. There are several points of resemblance in the early lives of the two men, and many points of curious contrast in their characters. Vanderbilt, like Drew, was born in very humble circumstances in the State of New York, and like him also received little education. He began life by ferrying passengers and produce from Staten Island to New York City. Subsequently, he too laid the foundation of his great fortune in the growing steamboat navigation, and likewise, in

due course of time, transferred himself to the railroad interest. When at last, in 1868, the two came into collision as representatives of the old system of railroad management and of the new, they were each threescore and ten years of age, and had both been successful in the accumulation of millions, — Vanderbilt even more so than Drew. They were probably equally unscrupulous and equally selfish; but, while the cast of Drew's mind was somber and bearish, Vanderbilt was gay and buoyant of temperament, little given to thoughts other than of this world, a lover of horses and of the good things of life. The first affects prayer meetings, and the last is a devotee of whist. Drew, in Wall Street, is by temperament a bear, while Vanderbilt could hardly be other than a bull. Vanderbilt must be allowed to be by far the superior man of the two. Drew is astute and full of resources, and at all times a dangerous opponent; but Vanderbilt takes larger, more comprehensive views, and his mind has a vigorous grasp which that of Drew seems to want.

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Two great lines of railway traverse the State of New York and connect it with the West, — the Erie and the New York Central. The latter communicates with the city by a great river and by two railroads. To get these two roads — the Harlem and the Hudson River — under his own absolute control, and then, so far as the connection with the Central was concerned, to abolish the river, was Vanderbilt's immediate object. First making himself master of the Harlem road, he there learned his early lessons in railroad management, and picked up a fortune by the way. A few years ago Harlem had no value. As late as 1860 it sold for eight or nine dollars per share; and in January, 1863, when Vanderbilt had got the control, it had risen only to 30. By July of that year it stood at 92, and in August was suddenly raised by a "corner" to 179. The next year witnessed a similar operation. The stock which sold in January at less than 90 was settled for in June in the neighborhood of 285. On one of these occasions Mr. Drew is reported to have contributed a sum approaching

half a million to his rival's wealth. More recently the stock had been floated at about 130. It was in the successful conduct of this first experiment that Vanderbilt showed his very manifest superiority over previous railroad managers. The Harlem was, after all, only a competing line, and competition was proverbially the rock ahead in all railroad enterprise. The success of Vanderbilt with the Harlem depended upon his getting rid of the competition of the Hudson River Railroad. An ordinary manager would have resorted to contracts, which are never carried out, or to opposition, which is apt to be ruinous. Vanderbilt, on the contrary, put an end to competition by buying up the competing line. This he did at about par, and, in due course of time, the stock was sent up to 180. Thus his plans had developed by another step, while through a judicious course of financiering and watering and dividing, a new fortune had been secured by him. By this time Vanderbilt's reputation as a railroad manager — as one who earned dividends, created stock, and invented wealth — had become very great, and the managers of the Central brought that road to him, and asked him to do with it as he had done with the Harlem and Hudson River. He accepted the proffered charge, and now, probably, the possibilities of his position and the magnitude of the prize within his grasp at last dawned on his mind. Unconsciously to himself, working more wisely than he knew, he had developed to its logical conclusion one potent element of modern civilization.

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The New York Central passed into Vanderbilt's hands in the winter of 1866-67, and he marked the Erie for his own in the succeeding autumn. As the annual meeting of the corporation approached, three parties were found in the field contending for control of the road. One party was represented by Drew, and might be called the party in possession, that which had long ruled the Erie, and made it what it was, — the Scarlet Woman of Wall Street. Next came Vanderbilt, flushed with success, and bent upon fully gratifying his great instinct for developing imperialism in corporate life. Lastly, a faction made its appearance composed of some shrewd and ambitious Wall

Street operators and of certain persons from Boston, who sustained for the occasion the novel character of railroad reformers. This party, it is needless to say, was as unscrupulous, and, as the result proved, as able as either of the others; it represented nothing but a raid made upon the Erie treasury in the interest of a thoroughly bankrupt New England corporation, of which its members had the control. The history of this corporation, known as the Boston, Hartford & Erie Railroad, — a projected feeder and connection of the Erie, — would be one curious to read, though very difficult to write. Its name was synonymous with bankruptcy, litigation, fraud, and failure. If the Erie was of doubtful repute in Wall Street, the Boston, Hartford & Erie had long been of worse than doubtful repute in State Street. Of late years, under able and persevering, if not scrupulous management, the bankrupt, moribund company had been slowly struggling into new life, and in the spring of 1867 it had obtained, under certain conditions, from the Commonwealth of Massachusetts, a subsidy in aid of the construction of its road. One of the conditions imposed obliged the corporation to raise a sum from other sources still larger than that granted by the State. Accordingly, those having the line in charge looked abroad for a victim, and fixed their eyes upon the Erie.

As the election day drew near, Erie was of course for sale. A controlling interest of stockholders stood ready to sell their proxies, with entire impartiality, to any of the three contending parties, or to any man who would pay the market price for them. Nay, more, the attorney of one of the contending parties, as it afterwards appeared, after an ineffectual effort to extort blackmail, actually sold the proxies of his principal to another of the contestants, and his doing so seemed to excite mirth rather than surprise. Meanwhile the representatives of the Eastern interest played their part to admiration. Taking advantage of some Wall Street complications just then existing between Vanderbilt and Drew, they induced the former to ally himself with them, and the latter saw that his defeat was inevitable. Even at this time the Vanderbilt party contemplated having recourse, if necessary, to the courts, and a petition for

an injunction had been prepared, setting forth the details of the "corner" of 1866. On the Sunday preceding the election Drew, in view of his impending defeat, called upon Vanderbilt. That gentleman, thereupon, very amicably read to him the legal documents prepared for his benefit; whereupon the ready treasurer at once turned about, and, having hitherto been hampering the Commodore by his bear operations, he now agreed to join hands with him in giving to the market a strong upward tendency. Meanwhile the other parties to the contest were not idle. At the same house, at a later hour in the day, Vanderbilt explained to the Eastern adventurers his new plan of operations, which included the continuance of Drew in his directorship. These gentlemen were puzzled, not to say confounded, by this sudden change of front. An explanation was demanded, some plain language followed, and the parties separated, leaving everything unsettled; but only to meet again at a later hour at the house of Drew. There Vanderbilt brought the new men to terms by proposing to Drew a bold *coup de main*, calculated to throw them entirely out of the direction. Before the parties separated that night a written agreement had been entered into, providing that, to save appearances, the new board should be elected without Drew, but that immediately thereafter a vacancy should be created, and Drew chosen to fill it. He was therefore to go in as one of two directors in the Vanderbilt interest, that gentleman's nephew, Mr. Work, being the other.

This programme was faithfully carried out, and on the 2d of October Wall Street was at once astonished, by the news of the defeat of the notorious leader of the bears, and bewildered by the immediate resignation of a member of the new board and the election of Drew in his place. Apparently he had given in his submission, the one obstacle to success was removed, and the ever-victorious Commodore had now but to close his fingers on his new prize. Virtual consolidation on the Vanderbilt interest seemed a foregone conclusion.

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The real conflict was now impending. Commodore Vanderbilt stretched out his hand to grasp Erie. Erie was to be

isolated and shut up within the limits of New York ; it was to be given over, bound hand and foot, to the lord of the Central. To perfect this programme, the representatives of all the competing lines met, and a proposition was submitted to the Erie party looking to a practical consolidation on certain terms of the Pennsylvania Central, the Erie, and the New York Central, and a division among the contracting parties of all the earnings from the New York City travel. A new illustration was thus to be afforded, at the expense of the trade and travel to and from the heart of a continent, of George Stephenson's famous aphorism, that where combination is possible competition is impossible. The Erie party, however, represented that their road earned more than half of the fund of which they were to receive only one third. They remonstrated and proposed modifications, but their opponents were inexorable. The terms were too hard ; the conference led to no result ; a ruinous competition seemed impending as the alternative to a fierce war of doubtful issue. Both parties now retired to their camps, and mustered their forces in preparation for the first overt act of hostility. They had not long to wait.

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The first open hostilities took place on the 17th of February. For some time Wall Street had been agitated with forebodings of the coming hostilities, but not until that day was recourse had to the courts. Vanderbilt had two ends in view when he sought to avail himself of the processes of law. In the first place, Drew's long connection with Erie, and especially the unsettled transactions arising out of the famous corner of 1866, afforded admirable ground for annoying offensive operations ; and, in the second place, these very proceedings, by throwing his opponent on the defensive, afforded an excellent cover for Vanderbilt's own transactions in Wall Street. It was essential to his success to corner Drew, but to corner Drew at all was not easy, and to corner him in Erie was difficult indeed. Very recent experiences, of which Vanderbilt was fully informed, no less than the memories of 1866, had fully warned the public how manifold and ingenious were the expedients through which the coming treasurer

furnished himself with Erie, when the exigencies of his position demanded fresh supplies. It was, therefore, very necessary for Vanderbilt that he should, while buying Erie with one hand in Wall Street, with the other close, so far as he could, that apparently inexhaustible spring from which such generous supplies of new stock were wont to flow. Accordingly, on the 17th of February, Mr. Frank Work, the only remaining representative of the Vanderbilt faction in the Erie direction, accompanied by Mr. Vanderbilt's attorneys, Messrs. Rapallo and Spenser, made his appearance before Judge Barnard, of the Supreme Court of New York, then sitting in chambers, and applied for an injunction against Treasurer Drew and his brother directors of the Erie Railway, restraining them from the payment of interest or principal of the three and a half millions borrowed of the treasurer in 1866, as well as from releasing Drew from any liability or cause of action the company might have against him, pending an investigation of his accounts as treasurer; on the other hand, Drew was to be enjoined from taking any legal steps towards compelling a settlement. A temporary injunction was granted in accordance with the petition, and a further hearing was assigned for the 21st. Two days later, however,—on the 19th of the month,—without waiting for the result of the first attack, the same attorneys appeared again before Judge Barnard, and now in the name of the people, acting through the Attorney-General, petitioned for the removal from office of Treasurer Drew. The papers in the case set forth some of the difficulties which beset the Commodore, and exposed the existence of a new fountain of Erie stock. It appeared that there was a recently enacted statute of New York which authorized any railroad company to create and issue its own stock in exchange for the stock of any other road under lease to it. The petition then alleged that Mr. Drew and certain of his brother directors, had quietly possessed themselves of a worthless road connecting with the Erie, and called the Buffalo, Bradford & Pittsburg Railroad, and had then, as occasion and their own exigencies required, proceeded to supply themselves with whatever Erie stock they wanted, by leasing their own road to the road of which they were

directors, and then creating stock and issuing it to themselves, in exchange, under the authority vested in them by law. The uncontradicted history of this transaction, as subsequently set forth on the very doubtful authority of a leading Erie director, affords, indeed, a most happy illustration of brilliant railroad financiering, whether true in this case or not. The road, it was stated, cost the purchasers, as financiers, some \$250,000; as proprietors, they then issued in its name bonds for two million dollars, payable to one of themselves, who now figured as trustee. This person, then, shifting his character, drew up, as counsel for both parties, a contract leasing this road to the Erie Railway for four hundred and ninety-nine years, the Erie agreeing to assume the bonds; reappearing in their original character of Erie directors, these gentlemen then ratified the lease, and thereafter it only remained for them to relapse into the rôle of financiers, and to divide the proceeds. All this was happily accomplished, and the Erie Railway lost and some one gained \$140,000 a year by the bargain. The skillful actors in this much shifting drama probably proceeded on the familiar theory that exchange is no robbery; and the expedient was certainly ingenious.

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It was not until the 3d of March, however, that any decisive action was taken by Judge Barnard on either of the petitions before him. Even then, that in the name of the Attorney-General was postponed for final hearing until the 10th of the month; but, on the application of Work, an injunction was issued restraining the Erie board from any new issue of capital stock, by conversion of bonds or otherwise, in addition to the 251,058 shares appearing in the previous reports of the road, and forbidding the guaranty by the Erie of the bonds of any connecting line of road. While this last provision of the order was calculated to furnish food for thought to the Boston party, matter for meditation was supplied to Mr. Drew by other clauses, which specially forbade him, his agents, attorneys, or brokers, to have any transactions in Erie, or fulfill any of his contracts already entered into, until he had returned to the company sixty-eight thousand shares of capital stock, alleged to be the number involved in the unsettled

transaction of 1866, and the more recent Buffalo, Bradford & Pittsburg exchange. A final hearing was fixed for the 10th of March on both injunctions.

Things certainly did not now promise well for Treasurer Drew and the bear party. Vanderbilt and the bulls seemed to arrange everything to meet their own views; apparently they had but to ask and it was granted. If any virtue existed in the processes of law, if any authority was wielded by a New York court, it now seemed as if the very head of the bear faction must needs be converted into a bull in his own despite, and to his manifest ruin. He, in this hour of his trial, was to be forced by his triumphant opponent to make Erie scarce by returning into its treasury sixty-eight thousand shares, — one fourth of its whole capital stock of every description. So far from manufacturing fresh Erie and pouring it into the street, he was to be cornered by a writ, and forced to work his own ruin in obedience to an injunction. Appearances are, however, proverbially deceptive, and all depended on the assumption that some virtue did exist in the processes of law, and that some authority was wielded by a New York court. In spite of the threatening aspect of his affairs, it was very evident that the nerves of Mr. Drew and his associates were not seriously affected. Wall Street watched him with curiosity not unmingled with alarm; for this was a conflict of Titans. Hedged all around with orders of the court, suspended, enjoined, and threatened with all manner of unheard-of processes, with Vanderbilt's wealth standing like a lion in his path, and all Wall Street ready to turn upon him and rend him, — in presence of all these accumulated terrors of the court room and of the exchange, the Speculative Director was not less speculative than was his wont. He seemed rushing on destruction. Day after day he pursued the same "short"<sup>1</sup> tactics; contract after contract was put out for the future delivery of stock at current prices, and this, too, in the face of a continually rising market. Evidently he did not yet consider himself at the end of his resources.

<sup>1</sup> An operator is said to be "short" when he has agreed to deliver that which he has not got. He wagers, in fact, on a fall.

It was equally evident, however, that he had not much time to lose. It was now the 3d of March, and the anticipated "corner" might be looked for about the 10th. As usual, some light skirmishing took place as a prelude to the heavy shock of decisive battle. The Erie party very freely and openly expressed a decided lack of respect, and something approaching contempt, for the purity of that particular fragment of the judicial ermine which was supposed to adorn the person of Mr. Justice Barnard. They did not pretend to conceal their conviction that this magistrate was a piece of the Vanderbilt property, and they very plainly announced their intention of seeking for justice elsewhere. With this end in view they betook themselves to their own town of Binghamton, in the county of Broome, where they duly presented themselves before Mr. Justice Balcom, of the Supreme Court. The existing judicial system of New York divides the State into eight distinct districts, each of which has an independent Supreme Court of four judges, elected by the citizens of that district. The first district alone enjoys five judges, the fifth being the Judge Barnard already referred to. These local judges, however, are clothed with certain equity powers in actions commenced before them, which run throughout the State. As one subject of litigation, therefore, might affect many individuals, each of whom might initiate legal proceedings before any of the thirty-three judges; which judge again might forbid proceedings before any or all of the other judges, or issue a stay of proceedings in suits already commenced, and then proceed to make orders, to consolidate actions, and to issue process for contempt,—it was not improbable that, sooner or later, strange and disgraceful conflicts of authority would arise, and that the law would fall into contempt. Such a system can, in fact, be sustained only so long as coördinate judges use the delicate powers of equity with a careful regard to private rights and the dignity of the law, and therefore, more than any which has ever been devised, it calls for a high average of learning, dignity, and personal character in the occupants of the bench. When, therefore, the ermine of the judge is flung into the kennel of party politics and becomes a part of the spoils of political victory; when by any

chance partisanship, brutality, and corruption become the qualities which especially recommend the successful aspirant to judicial honors, then the system described will be found to furnish peculiar facilities for the display of these characteristics.

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All this, however, was mere skirmishing, and now the decisive engagement was near at hand. The plans of the Erie ring were matured, and, if Commodore Vanderbilt wanted the stock of their road, they were prepared to let him have all he desired. As usual the Erie treasury was at this time deficient in funds. As usual, also, Daniel Drew stood ready to advance all the funds required, — on proper security. One kind of security, and only one, the company was disposed at this time to offer, — its convertible bonds under a pledge of conversion. The company could not issue stock outright, in any case, at less than par; its bonds bore interest and were useless on the street; an issue of convertible bonds was another name for an issue of stock to be sold at market rates. The treasurer readily agreed to find a purchaser, and, in fact, he himself stood just then in pressing need of some scores of thousands of shares. Already at the meeting of the Board of Directors, on the 19th of February, a very deceptive account of the condition of the road, jockeyed out of the general superintendent, had been read and made public; the increased depot facilities, the projected double track, and the everlasting steel rails, had been made to do vigorous duty; and the board had, in the vaguest and most general language conceivable, clothed the Executive Committee with full power in the premises. . . . Immediately after the Board of Directors adjourned a meeting of the Executive Committee was held, and a vote to issue at once convertible bonds for ten millions gave a meaning to the very ambiguous language of the directors' resolve; and thus, when apparently on the very threshold of his final triumph, this mighty mass of one hundred thousand shares of new stock was hanging like an avalanche over the head of Vanderbilt.

The Executive Committee had voted to sell the entire amount of these bonds at not less than  $72\frac{1}{2}$ . Five millions were placed

upon the market at once, and Mr. Drew's broker became the purchaser, Mr. Drew giving him a written guaranty against loss, and being entitled to any profit. It was all done in ten minutes after the committee adjourned,—the bonds issued, their conversion into stock demanded and complied with, and certificates for fifty thousand shares deposited in the broker's safe, subject to the orders of Daniel Drew. There they remained until the 29th, when they were issued, on his requisition, to certain others of that gentleman's army of brokers, much as ammunition might be issued before a general engagement. Three days later came the Barnard injunction, and Erie suddenly rose in the market. Then it was determined to bring up the reserves and let the eager bulls have the other five millions. The history of this second issue was, in all respects, an episode worthy of Erie, and deserves minute relation. It was decided upon on the 3d, but before the bonds were converted Barnard's injunction had been served on every one connected with the Erie Road or with Daniel Drew. The 10th was the return day of the writ, but the Erie operators needed even less time for their deliberations. Monday, the 9th, was settled upon as the day upon which to defeat the impending "corner." The night of Saturday, the 7th, was a busy one in the Erie camp. While one set of counsel and clerks were preparing affidavits and prayers for strange writs and injunctions, the enjoined vice president of the road was busy at home signing certificates of stock, to be ready for instant use in case a modification of the injunction could be obtained, and another set of counsel was in immediate attendance on the leaders themselves. Mr. Groesbeck, the chief of the Drew brokers, being himself enjoined, secured elsewhere, after one or two failures, a purchaser of the bonds, and took him to the house of the Erie counsel, where Drew and other directors and brokers then were. There the terms of the nominal sale were agreed upon, and a contract was drawn up transferring the bonds to this man of straw, who in return gave Mr. Drew a full power of attorney to convert or otherwise dispose of the bonds, in the form of a promissory note for their purchase money. Mr. Groesbeck, meanwhile, with the fear of

injunctions before his eyes, prudently withdrew into the next room, and amused himself by looking at the curiosities and conversing with the lawyers' young gentlemen. After the contract was closed, the purchaser was asked to sign an affidavit setting forth his ownership of the bonds and the refusal of the corporation to convert them into stock in compliance with their contract, upon which affidavit it was in contemplation to seek from some justice a writ of *mandamus* to compel the Erie Railway to convert them, the necessary papers for such a proceeding being then in course of preparation elsewhere. This the purchaser declined to do. One of the lawyers present then said, "Well, you can make the demand now; here is Mr. Drew, the treasurer of the company, and Mr. Gould, one of the Executive Committee." In accordance with this suggestion a demand for the stock was then made, and, of course, at once refused; thereupon the scruples of the man of straw being all removed, the desired affidavit was signed. All business now being finished, the parties separated; the legal papers were ready, the convertible bonds had been disposed of, and the certificates of stock, for which they were to be exchanged, were signed in blank and ready for delivery.

Early Monday morning the Erie people were at work. Mr. Drew, the director and treasurer, had agreed to sell on that day fifty thousand shares of the stock, at 80, to the firms of which Mr. Fisk and Mr. Gould were members, these gentlemen also being Erie directors and members of the Executive Committee. The new certificates, made out in the names of these firms on Saturday night, were in the hands of the secretary of the company, who was strictly enjoined from allowing their issue. On Monday morning this official directed an employee of the road to carry these books of certificates from the West Street office of the company to the transfer clerk in Pine Street, and there to deliver them carefully. The messenger left the room, but immediately returned empty-handed, and informed the astonished secretary that Mr. Fisk had met him outside the door, taken from him the books of unissued certificates, and "run away with them." It was true;—one essential step

towards conversion had been taken; the certificates of stock were beyond the control of an injunction. During the afternoon of the same day the convertible bonds were found upon the secretary's desk, where they had been placed by Mr. Belden, the partner in business of Director James Fisk, Jr.; the certificates were next seen in Broad Street.

Before launching the bolt thus provided, the conspirators had considered it not unadvisable to cover their proceedings, if they could, with some form of law. This probably was looked upon as an idle ceremony, but it could do no harm; and perhaps their next step was dictated by what has been called "a decent respect for the opinions of mankind," combined with a profound contempt for judges and courts of law.

Early on the morning of the 9th Judge Gilbert, a highly respected magistrate of the Second Judicial District, residing in Brooklyn, was waited upon by one of the Erie counsel, who desired to initiate before him a new suit in the Erie litigation, — this time, in the name of the Saturday evening purchaser of bonds and maker of affidavits. A writ of *mandamus* was asked for. This writ clearly did not lie in such a case; the magistrate very properly declined to grant it, and the only wonder is that counsel should have applied for it. New counsel were then hurriedly summoned, and a new petition, in a fresh name, was presented. This petition was for an injunction, in the name of Belden, the partner of Mr. Fisk, and the documents then and there presented were probably as eloquent an exposure as could possibly have been penned of the lamentable condition into which the once honored judiciary of New York had fallen. The petition alleged that some time in February certain persons, among whom was especially named George G. Barnard, — the justice of the Supreme Court of the First District, — had entered into a combination to speculate in the stock of the Erie Railway, and to use the process of the courts for the purpose of aiding their speculation; "and that, in furtherance of the plans of this combination," the actions in Work's name had been commenced before Barnard, who, the counsel asserted, was then issuing injunctions at the rate of half a dozen a day.

It is impossible by any criticism to do justice to such audacity as this: the dumb silence of amazement is the only fitting commentary. Apparently, however, nothing that could be stated of his colleague across the river exceeded the belief of Judge Gilbert, for, after some trifling delays and a few objections on the part of the judge to the form of the desired order, the Erie counsel hurried away, and returned to New York with a new injunction, restraining all the parties to all the other suits from further proceedings, and from doing any acts in "furtherance of said conspiracy"; — in one paragraph ordering the Erie directors, except Work, to continue in the discharge of their duties, in direct defiance of the injunction of one judge, and in the next, with an equal disregard of another judge, forbidding the directors to desist from converting bonds into stock. Judge Gilbert having, a few hours before signing this wonderful order, refused to issue a writ of *mandamus*, it may be proper to add that the process of equity here resorted to, compelling the performance of various acts, is of recent invention, and is known as a "mandatory injunction."

All was now ready. The Drew party were enjoined in every direction. One magistrate had forbidden them to move, and another magistrate had ordered them not to stand still. If the Erie board held meetings and transacted business, it violated one injunction; if it abstained from doing so, it violated another. By the further conversion of bonds into stock pains and penalties would be incurred at the hands of Judge Barnard; the refusal to convert would be an act of disobedience to Judge Gilbert. Strategically considered, the position could not be improved, and Mr. Drew and his friends were not the men to let the golden moment escape them. At once, before a new injunction could be obtained, even in New York, fifty thousand shares of new Erie stock were flung upon the market. That day Erie was buoyant, — Vanderbilt was purchasing. His agents caught at the new stock as eagerly as at the old, and the whole of it was absorbed before its origin was suspected, and almost without a falter in the price. Then the fresh certificates appeared, and the truth became known. Erie had that day opened at 80 and

risen rapidly to 83, while its rise even to par was predicted; suddenly it faltered, fell off, and then dropped suddenly to 71. Wall Street had never been subjected to a greater shock, and the market reeled to and fro like a drunken man between these giants, as they hurled about shares by the tens of thousands, and money by the million. When night put an end to the conflict, Erie stood at 78, the shock of battle was over, and the astonished brokers drew breath as they waited for the events of the morrow. The attempted "corner" was a failure, and Drew was victorious, — no doubt existed on that point. The question now was, could Vanderbilt sustain himself? In spite of all his wealth, must he not go down before his cunning opponent?

The morning of the 11th found the Erie leaders still transacting business at the office of the corporation in West Street. It would seem that these gentlemen, in spite of the glaring contempt for the process of the courts of which they had been guilty, had made no arrangements for an orderly retreat beyond the jurisdiction of the tribunals they had set at defiance. They were speedily roused from their real or affected tranquillity by trustworthy intelligence that processes for contempt were already issued against them, and that their only chance of escape from incarceration lay in precipitate flight. At ten o'clock the astonished police saw a throng of panic-stricken railway directors, — looking more like a frightened gang of thieves, disturbed in the division of their plunder, than like the wealthy representatives of a great corporation, — rush headlong from the doors of the Erie office, and dash off in the direction of the Jersey ferry. In their hands were packages and files of papers, and their pockets were crammed with assets and securities. One individual bore away with him in a hackney coach bales containing six millions of dollars in greenbacks. Other members of the board followed under cover of the night; some of them, not daring to expose themselves to the publicity of a ferry, attempted to cross in open boats concealed by the darkness and a March fog. Two directors, who lingered, were arrested; but a majority of the Executive Committee collected at the Erie Station in Jersey

City, and there, free from any apprehension of Judge Barnard's pursuing wrath, proceeded to the transaction of business.

Meanwhile, on the other side of the river, Vanderbilt was struggling in the toils. As usual in these Wall Street operations, there was a grim humor in the situation. Had Vanderbilt failed to sustain the market, a financial collapse and panic must have ensued which would have sent him to the wall. He had sustained it, and had absorbed a hundred thousand shares of Erie. Thus when Drew retired to Jersey City he carried with him seven millions of his opponent's money, and the Commodore had freely supplied the enemy with the sinews of war. He had grasped at Erie for his own sake, and now his opponents derisively promised to rehabilitate and vivify the old road with the money he had furnished them, so as more effectually to compete with the lines which he already possessed. Nor was this all. Had they done as they loudly claimed they meant to do, Vanderbilt might have hugged himself in the faith that, after all, it was but a question of time, and the prize would come to him in the end. He, however, knew well enough that the most pressing need of the Erie people was money with which to fight him. With this he had now furnished them abundantly, and he must have felt that no scruples would prevent their use of it.

Vanderbilt had, however, little leisure to devote to the enjoyment of the humorous side of his position. The situation was alarming. His opponents had carried with them in their flight seven millions in currency, which were withdrawn from circulation. An artificial stringency was thus created in Wall Street, and, while money rose, stocks fell, and unusual margins were called in. Vanderbilt was carrying a fearful load, and the least want of confidence, the faintest sign of faltering, might well bring on a crash. He already had a hundred thousand shares of Erie, not one of which he could sell. He was liable at any time to be called upon to carry as much more as his opponents, skilled by long practice in the manufacture of the article, might see fit to produce. Opposed to him were men who scrupled at nothing, and who knew every in and out of the money market. With every look and every gesture anxiously scrutinized, a

position more trying than his can hardly be conceived. It is not known from what source he drew the vast sums which enabled him to surmount his difficulties with such apparent ease. His nerve, however, stood him in at least as good stead as his financial resources. Like a great general, in the hour of trial he inspired confidence. While fighting for life he could "talk horse" and play whist. The manner in which he then emerged from his troubles, serene and confident, was as extraordinary as the financial resources he commanded.

Meanwhile, before turning to the tide of battle, which now swept away from the courts of law into the halls of legislation, there are two matters to be disposed of; the division of the spoils is to be recounted, and the old and useless lumber of conflict must be cleared away. The division of profits accruing to Mr. Treasurer Drew and his associate directors, acting as individuals, was a fit conclusion to the stock issue just described. The bonds for five millions, after their conversion, realized nearly four millions of dollars, of which \$3,625,000 passed into the treasury of the company. The trustees of the stockholders had therefore in this case secured a profit for some one of \$375,000. Confidence in the good faith of one's kind is very commendable, but possession is nine points of the law. Mr. James Fisk, Jr., through whom the sales were mainly effected, declined to make any payments in excess of the \$3,625,000, until a division of profits was agreed upon. It seems that, by virtue of a paper signed by Mr. Drew as early as the 19th of February, Gould, Fisk, and others were entitled to one half the profits he should make "in certain transactions." What these transactions were, or whether the official action of Directors Gould and Fisk was in any way influenced by the signing of this document, does not appear. Mr. Fisk now gave Mr. Drew, in lieu of cash, his uncertified check for the surplus \$375,000 remaining from this transaction, with stock as collateral amounting to about the half of that sum. With this settlement, and the redemption of the collateral, Mr. Drew was fain to be content. Seven months afterwards he still retained possession of the uncertified check, in the payment of which, if presented, he seemed to entertain

no great confidence. Everything, however, showed conclusively the advantage of operating from interior lines. While the Erie treasury was once more replete, three of the persons who had been mainly instrumental in filling it had not suffered in the transaction. The treasurer was richer by \$180,000 directly, and he himself only knew by how much more incidentally. In like manner his faithful adjutants had profited to an amount as much exceeding \$60,000 each as their sagacity had led them to provide for.

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When the Vanderbilt counsel moved to fix a day on which their opponents should show cause why a receiver of the proceeds of the last overissue of stock should not be appointed, the judge astonished the petitioners by outstripping their eagerness, and appointing Vanderbilt's own son-in-law receiver on the spot. Then followed a fierce altercation in court, in which bench and bar took equal part, and which closed with the not unusual threat of impeaching the presiding judge. . . . When Mr. John B. Haskin was placed upon the stand, there ensued a scene which Barnard himself not inaptly characterized the next day as "outrageous and scandalous, and insulting to the court." Upon this occasion the late Mr. James T. Brady seemed to be on the verge of a personal collision with the witness in open court; the purity of the presiding magistrate was impugned, his venality openly implied through a long cross-examination, and the witness acknowledged that he had himself in the course of his career undertaken for money to influence the mind of the judge privately "on the side of right." All the scandals of the practice of the law, and the private immoralities of lawyers, were dragged into the broad light of day; the whole system of favored counsel, of private argument, of referees, and of unblushing extortion, was freely discussed. . . . On a subsequent day the judge himself made inquiries as to a visit of two of the directors to one gentleman supposed to have peculiar influence over the judicial mind, and evinced great familiarity with the negotiations then carried on, and even showed some disposition to extend the inquiry indefinitely into periodical literature. . . .

Nor were the lawyers in any way behind the judge. At one moment they would indulge in personal wrangling, and accuse each other of the grossest malpractice, and the next, favor each other with remarks upon manners, more pointed than delicate. All this time injunctions were flying about like hailstones; but the crowning injunction of all was issued, in reference to the appointment of a receiver, by Judge Clerke, a colleague of Judge Barnard, at the time sitting as a member of the Court of Appeals at Albany. The Gilbert injunction had gone, it might have seemed, sufficiently far, in enjoining Barnard the individual, while distinctly disavowing all reference to him in his judicial functions. Judge Clerke made no such exception. He enjoined the individual and he enjoined the judge; he forbade his making any order appointing a receiver, and he forbade the clerks of his court from entering it if it were made, and the receiver from accepting it if it were entered. The signing of this extraordinary order by any judge in his senses admits of no explanation. The Erie counsel served it upon Judge Barnard as he sat upon the bench, and, having done so, withdrew from the court room; whereupon the judge immediately proceeded to vacate the order, and to appoint a receiver. This appointment was then entered by a clerk, who had also been enjoined, and the receiver was himself enjoined as soon as he could be caught. Finally the maze had become so intricate, and the whole litigation so evidently endless and aimless, that by a sort of agreement of parties, Judge Ingraham, another colleague of Judge Barnard, issued a final injunction of universal application, as it were, and to be held inviolable by common consent, under which proceedings were stayed, pending an appeal. It was high time. Judges were becoming very shy of anything connected with the name of Erie, and Judge McCunn had, in a lofty tone, informed counsel that he preferred to subject himself to the liability of a fine of a thousand dollars rather than, by issuing a writ of *habeas corpus*, allow his court "to have anything to do with the scandal."

The result of this extraordinary litigation may be summed up in a few words. It had two branches; one, the appointment

of a receiver of the proceeds of the hundred thousand shares of stock issued in violation of an injunction; the other, the processes against the persons of the directors for a contempt of court. As for the receiver, every dollar of the money this officer was intended to receive was well known to be in New Jersey, beyond his reach. Why one party cared to insist on the appointment, or why the other party objected to it, is not very apparent. Mr. Osgood, the son-in-law of Vanderbilt, was appointed, and immediately enjoined from acting; subsequently he resigned, when Mr. Peter B. Sweeney, the head of the Tammany ring, was appointed in his place, without notice to the other side. Of course he had nothing to do, as there was nothing to be done, and so he was subsequently allowed by Judge Barnard \$150,000 for his services. The contempt cases had even less result than that of the receivership. The settlement subsequently effected between the litigants seemed also to include the courts. The outraged majesty of the law, as represented in the person of Mr. Justice Barnard, was pacified, and everything was explained as having been said and done in a "Pickwickian sense"; so that, when the terms of peace had been arranged between the high contending parties, Barnard's roaring by degrees subsided, until he roared as gently as any sucking dove, and finally he ceased to roar at all. The penalty for violating an injunction in the manner described was fixed at the not unreasonable sum of ten dollars, except in the cases of Mr. Drew and certain of his more prominent associates; their contumacy His Honor held too gross to be estimated in money, and so they escaped without any punishment at all. Probably being as well read a lawyer as he was a dignified magistrate, Judge Barnard bore in mind, in imposing these penalties, that clause of the fundamental law which provides that "no excessive fines shall be imposed, or cruel or unusual punishments inflicted." The legal profession alone had cause to regret the cessation of this litigation; and, as the Erie counsel had \$150,000 divided among them in fees, it may be presumed that even they were finally comforted. And all this took place in the court of that State over which the immortal Chancellor

Kent had once presided. His great authority was still cited there, the halo which surrounds his name still shed a glory over the bench on which he had sat, and yet these, his immediate successors, could

On that high mountain cease to feed,  
And batten on this moor.

## II

It is now necessary to return to the real field of operations, which had ceased on the morning of the 11th of March to be in the courts of law. As the arena widened the proceedings became more complicated and more difficult to trace, embracing as they did the legislatures of two States, neither of them famed for purity. In the first shock of the catastrophe it was actually believed that Commodore Vanderbilt contemplated a resort to open violence and acts of private war. There were intimations that a scheme had been matured for kidnapping certain of the Erie directors, including Mr. Drew, and bringing them by force within reach of Judge Barnard's process. It appeared that on the 16th of March some fifty individuals, subsequently described, in an affidavit filed for the special benefit of Mr. Justice Barnard, as "disorderly characters, commonly known as roughs," crossed by the Pavonia Ferry and took possession of the Erie depot. From their conversation and inquiries it was divined that they came intending to "copp" Mr. Drew, or, in plainer phraseology, to take him by force to New York; and that they expected to receive the sum of \$50,000 as a reward for so doing. The exiles at once loudly charged Vanderbilt himself with originating this blundering scheme. They simulated intense alarm. From day to day new panics were started, until, on the 19th, Drew was secreted, a standing army was organized from the employees of the road, and a small navy equipped. The alarm spread through Jersey City; the militia was held in readiness; in the evening the stores were closed and the citizens began to arm; while a garrison of about one hundred and twenty-five men intrenched themselves around the directors, in their hotel. On the 21st

there was another alarm, and the fears of an attack continued, with lengthening intervals of quiet, until the 31st, when the guard was at last withdrawn. It is impossible to suppose that Vanderbilt ever had any knowledge of this ridiculous episode or of its cause, except through the press. A band of ruffians may have crossed the ferry, intending to kidnap Drew on speculation; but to suppose that the shrewd and energetic Commodore ever sent them to go gaping about a station, ignorant both of the person and the whereabouts of him they sought would be to impute to Vanderbilt at once a crime and a blunder. Such botching bears no trace of his clean handiwork.

The first serious effort of the Erie party was to intrench itself in New Jersey; and here it met with no opposition. A bill making the Erie Railway Company a corporation of New Jersey, with the same powers they enjoyed in New York, was hurried through the legislature in the space of two hours, and, after a little delay, signed by the Governor. The astonished citizens of the latter State saw their famous broad-gauge road thus metamorphosed before their eyes into a denizen of the kingdom of Camden and Amboy. Here was another dreadful hint to Wall Street. What further issues of stock might become legal under this charter, how the tenure of the present Board of Directors might be altered, what curious legal complications might arise, were questions more easily put than satisfactorily answered. The region of possibilities was considerably extended. The new act of incorporation, however, was but a precaution to secure for the directors of the Erie a retreat in case of need; the real field of conflict lay in the legislature of New York, and here Vanderbilt was first on the ground.

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One favorite method of procedure at Albany is through the appointment of committees to investigate the affairs of wealthy corporations. The stock of some great company is manipulated till it fluctuates violently, as was the case with Pacific Mail in 1867. Forthwith some member of the Assembly rises and calls for a committee of investigation. The instant the game is afoot, a rush is made for positions on the committee. The

proposer, of course, is a member, probably chairman. The advantages of the position are obvious. The committee constitutes a little temporary outside ring. If a member is corrupt, he has substantial advantages offered him to influence his action in regard to the report. If he is not open to bribery, he is nevertheless in possession of very valuable information, and an innocent little remark, casually let fall, may lead a son, a brother, or a loving cousin to make very judicious purchases of stock. Altogether, the position is one not to be avoided.

The investigation phase was the first which the Erie struggle assumed at Albany. During the early stages of the conflict the legislature had scented the carnage from afar. There was "money in it," and the struggle was watched with breathless interest. As early as the 5th of March the subject had been introduced into the State Senate, and an investigation into the circumstances of the company was called for. A committee of three was ordered, but the next day a senator, by name Mattoon, moved to increase the number to five, which was done, he himself being naturally one of the additional members. This committee had its first sitting on the 10th, at the very crisis of the great explosion. But before the investigation was entered upon, Mr. Mattoon thought it expedient to convince the contending parties of his own perfect impartiality and firm determination to hold in check the corrupt impulses of his associates. With this end in view, upon the 9th or the 10th he hurried down to New York, and visited West Street, where he had an interview with the leading Erie directors. He explained to them the corrupt motives which had led to the appointment of the committee, and how his sole object in obtaining an increase of the number had been to put himself in a position in which he might be able to prevent these evil practices and see fair play. Curiously enough, at the same interview he mentioned that his son was to be appointed an assistant sergeant-at-arms to aid in the investigation, and proved his disinterestedness by mentioning the fact that this son was to serve without pay. The labors of the committee continued until the 31st of March, and during that time Mr. Mattoon, and at least one other senator, pursued a course

of private inquiry which involved further visits to Jersey City. Naturally enough, Mr. Drew and his associates took it into their heads that the man wanted to be bought, and even affirmed subsequently that, at one interview, he had in pretty broad terms offered himself for sale. It has not been distinctly stated in evidence by any one that an attempt was made on his purity or on that of his public-spirited son; and it is difficult to believe that one who came to New York so full of high purpose could have been sufficiently corrupted by metropolitan influences to receive bribes from both sides. Whether he did so or not his proceedings were terribly suggestive as regards legislative morality at Albany. Here was a senator, a member of a committee of investigation, rousing gamblers from their beds at early hours of the morning to hold interviews in the faro-bank parlor of the establishment, and to give "points" on which to operate upon the joint account. Even then the wretched creature could not even keep faith with his very "pals"; he wrote to them to "go it heavy" for Drew, and then himself went over to Vanderbilt,—he made agreements to share profits and then submitted to exposure sooner than meet his part of the loss. A man more thoroughly, shamefacedly contemptible and corrupt,—a more perfect specimen of a legislator on sale haggling for his own price, could not well exist. In this case he cheated every one, including himself. Accident threw great opportunities in his way. On the 31st the draft of a proposed report, exonerating in great measure the Drew faction, was read to him by an associate, to which he not only made no objection, but was even understood to assent. On the same day another report was read in his presence, strongly denouncing the Drew faction, sustaining to the fullest extent the charges made against it, and characterizing its conduct as corrupt and disgraceful. Each report was signed by two of his associates, and Mr. Mattoon found himself in the position of holding the balance of power; whichever report he signed would be the report of the committee. He expressed a desire to think the matter over. It is natural to suppose that, in his eagerness to gain information privately, Mr. Mattoon had not confined his unofficial visits to the Drew camp.

In any case his mind was in a state of painful suspense. Finally, after arranging in consultation on Tuesday for a report favoring the Drew party, on Wednesday he signed a report strongly denouncing it, and by doing so settled the action of the committee. Mr. Jay Gould must have been acquainted with the circumstances of the case, and evidently supposed that Mr. Mattoon was "fixed," since he subsequently declared he was "astounded" when he heard that Mr. Mattoon had signed this report. The committee, however, with their patriotic sergeant-at-arms, whose services, by the way, cost the State but a hundred dollars, desisted at length from their labors, the result of which was one more point gained by Commodore Vanderbilt.

Indeed, Vanderbilt had thus far as much outgeneraled Drew in the manufacture of public opinion as Drew had outgeneraled Vanderbilt in the manufacture of Erie stock. His whole scheme was one of monopoly, which was opposed to every interest of the city and State of New York; yet into the support of this scheme he had brought all the leading papers of New York City, with a single exception. Now again he seemed to have it all his own way in the legislature, and the tide ran strongly against the exiles of Erie. The report of the investigation committee was signed on April 1st, and may be considered as marking the high-water point of Vanderbilt's success. Hitherto the Albany interests of the exiles had been confided to mere agents, and had not prospered; but, when fairly roused by a sense of danger, the Drew party showed at least as close a familiarity with the tactics of Albany as with those of Wall Street. The moment they felt themselves settled at Jersey City they had gone to work to excite a popular sympathy in their own behalf. The cry of monopoly was a sure card in their hands. They cared no more for the actual welfare of commerce, involved in railroad competition, than they did for the real interests of the Erie Railway; but they judged truly that there was no limit to the extent to which the public might be imposed upon. An active competition with the Vanderbilt roads, by land and water, was inaugurated; fares and freight on the Erie were reduced on an average by one third; sounding proclamations were issued; "interviewers"

from the press returned rejoicing from Taylor's Hotel to New York City, and the Jersey shore quaked under the clatter of this Chinese battle. The influence of these tactics made itself felt at once. By the middle of March memorials against monopoly began to flow in at Albany.

While popular sympathy was thus roused by the bribe of active competition, a bill was introduced into the Assembly, in the Erie interest, legalizing the recent issue of new stock, declaring and regulating the power of issuing convertible bonds, providing for a broad-gauge connection with Chicago and the guaranty of the bonds of the Boston, Hartford & Erie, and finally forbidding, in so far as any legislation could forbid, the consolidation of the Central and the Erie in the hands of Vanderbilt. This bill was referred to the Committee on Railroads on the 13th of March. On the 20th a public hearing was begun, and the committee proceeded to take evidence, aided by a long array of opposing counsel, most of whom had figured in the proceedings in the courts of law. In a few days the bill was adversely reported upon, and the report adopted in the Assembly by the decisive vote of eighty-three to thirty-two. This was upon the 27th of March. The hint was a broad one; the exiles must give closer attention to their interests. So soon as the news of this adverse action reached Jersey City, it was decided that Mr. Jay Gould should brave the terrors of the law, and personally superintend matters at Albany. Neither Mr. Drew nor his associates desired to become permanent residents of Jersey City; nor did they wish to return to New York as criminals on their way to jail. Mr. Gould was to pave the way to a different return by causing the recent issue of convertible bonds to be legalized. That once done, Commodore Vanderbilt was not the man to wage an unavailing war, and a compromise, in which Barnard and his processes of contempt would be thrown in as a makeweight, could easily be effected. A rumor was therefore started that Mr. Gould was to leave for Ohio, supplied with the necessary authority and funds to press vigorously to completion the eighty miles of broad-gauge track between Akron and Toledo, which would open to the Erie the

much-coveted connection with Chicago. Having hung out this false light, Mr. Jay Gould went on his mission, the president of the company having some time previously drawn half a million of dollars out of the overflowing Erie treasury.

This mission was by no means unattended by difficulties. In the first place, Judge Barnard's processes for contempt seemed to threaten the liberty of Mr. Gould's person. He left Jersey City and arrived at Albany on the 30th day of March, three days after the defeat of the Erie bill, and two days before Mr. Mattoon had made up his mind as to which report he would sign. Naturally his opponents were well satisfied with the present aspect of affairs, and saw no benefit likely to arise from Mr. Gould's presence in Albany. The day after his arrival, therefore, he was arrested, on the writ issued against him for contempt of court, and held to bail in half a million of dollars for his appearance in New York on the following Saturday. He was immediately bailed of course, and for the next few days devoted himself assiduously to the business he had in hand. On Saturday he appeared before Judge Barnard, and was duly put in charge of the sheriff to answer certain interrogatories. It would seem to have been perfectly easy for him to give the necessary bail, and to return from Barnard's presence at once to Albany; but the simple method seems never to have been resorted to throughout these complications: nothing was ever done without the interposition of a writ and the assistance of a crowd of counsel. In this case Judge Barrett of the Common Pleas was appealed to, who issued a writ of *habeas corpus*, by virtue of which Mr. Gould was taken out of the hands of the sheriff and again brought into court. Of course the hearing of the case was deferred, and it was equally a matter of course that Mr. Gould was bent on returning at once to his field of labor. The officer to whose care Mr. Gould was intrusted was especially warned by the court, in Mr. Gould's presence, that he was not to allow his charge to go out of his sight. This difficulty was easily surmounted. Mr. Gould went by an early train to Albany, taking the officer with him in the capacity of a traveling companion. Once in Albany he was naturally taken ill, —

not too ill to go to the Capitol in the midst of a snowstorm, but much too ill to think of returning to New York. On the 10th the trusty official and traveling companion signified to Mr. Gould that his presence was much desired before Judge Barrett, and intimated an intention of carrying him back to New York. Mr. Gould then pleaded the delicate condition of his health, and wholly declined to undergo the hardships of the proposed journey. Whereupon the officer, stimulated, as was alleged, by Gould's opponents, returned alone to New York, and reported his charge to the court as a runaway. A new spectacle of judicial indignation ensued, and a new process for contempt seemed imminent. Of course nothing came of it. A few affidavits from Albany pacified the indignant Barrett. The application for a *habeas corpus* was discharged, and Mr. Gould was theoretically returned into the custody of the sheriff. Thereupon the required security for his appearance when needed was given; and meanwhile, pending the recovery of his health, he assiduously devoted the tedious hours of convalescence to the task of cultivating a thorough understanding between himself and the members of the legislature.

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The full and true history of this legislative campaign will never be known. If the official reports of investigating committees are to be believed, Mr. Gould at about this time underwent a curious psychological metamorphosis, and suddenly became the veriest simpleton in money matters that ever fell into the hands of happy sharpers. Cunning lobby members had but to pretend to an influence over legislative minds, which every one knew they did not possess, to draw unlimited amounts from this verdant *habitué* of Wall Street. It seemed strange that he could have lived so long and learned so little. He dealt in large sums. He gave to one man, in whom he said "he did not take much stock," the sum of \$5000, "just to smooth him over." This man had just before received \$5000 of Erie money from another agent of the company. It would, therefore, be interesting to know what sums Mr. Gould paid to those individuals in whom he did "take much stock." Another individual

is reported to have received \$100,000 from one side "to influence legislation," and to have subsequently received \$70,000 from the other side to disappear with the money; which he accordingly did, and thereafter became a gentleman of elegant leisure. One senator was openly charged in the columns of the press with receiving a bribe of \$20,000 from one side, and a second bribe of \$15,000 from the other; but Mr. Gould's foggy mental condition only enabled him to be "perfectly astounded" at the action of this senator, though he knew nothing of any such transactions. Other senators were blessed with a sudden accession of wealth, but in no case was there any jot or tittle of proof of bribery. Mr. Gould's rooms at the Develin House overflowed with a joyous company, and his checks were numerous and heavy; but why he signed them, or what became of them, he seemed to know less than any man in Albany. This strange and expensive hallucination lasted until about the middle of April, when Mr. Gould was happily restored to his normal condition of a shrewd, acute, energetic man of business; nor is it known that he has since experienced any relapse into financial idiocy.

About the period of Mr. Gould's arrival in Albany the tide turned, and soon began to flow strongly in favor of Erie and against Vanderbilt. How much of this was due to the skillful manipulations of Gould, and how much to the rising popular feeling against the practical consolidation of competing lines, cannot be decided. The popular protests did indeed pour in by scores, but then again the Erie secret-service money poured out like water. Yet Mr. Gould's task was sufficiently difficult. After the adverse report of the Senate Committee, and the decisive defeat of the bill introduced into the Assembly, any favorable legislation seemed almost hopeless. Both Houses were committed. Vanderbilt had but to prevent action, — to keep things where they were, and the return of his opponents to New York was impracticable, unless with his consent; he appeared, in fact, to be absolute master of the situation. It seemed almost impossible to introduce a bill in the face of his great influence, and to navigate it through the many stages

of legislative action and executive approval, without somewhere giving him an opportunity to defeat it. This was the task Gould had before him, and he accomplished it. On the 13th of April a bill, which met the approval of the Erie party, and which Judge Barnard subsequently compared not inaptly to a bill legalizing counterfeit money, was taken up in the Senate; for some days it was warmly debated, and on the 18th was passed by the decisive vote of seventeen to twelve. Senator Mattoon had not listened to the debate in vain. Perhaps his reason was convinced, or perhaps he had sold out new "points" and was again cheating himself or somebody else; at any rate, that thrifty senator was found voting with the majority. The bill practically legalized the recent issues of bonds, but made it a felony to use the proceeds of the sale of these bonds except for completing, furthering, and operating the road. The guaranty of the bonds of connecting roads was authorized, all contracts for consolidation or division of receipts between the Erie and the Vanderbilt roads were forbidden, and a clumsy provision was enacted that no stockholder, director, or officer in one of the Vanderbilt roads should be an officer or director in the Erie, and *vice versa*. The bill was, in fact, an amended copy of the one voted down so decisively in the Assembly a few days before, and it was in this body that the tug of war was expected to come.

The lobby was now full of animation; fabulous stories were told of the amounts which the contending parties were willing to expend; never before had the market quotations of votes and influence stood so high. The wealth of Vanderbilt seemed pitted against the Erie treasury, and the vultures flocked to Albany from every part of the State. Suddenly, at the very last moment, and even while special trains were bringing up fresh contestants to take part in the fray, a rumor ran through Albany as of some great public disaster, spreading panic and terror through hotel and corridor. The observer was reminded of the dark days of the war, when tidings came of some great defeat, as that on the Chickahominy or at Fredericksburg. In a moment the lobby was smitten with despair, and the cheeks

of the legislators were blanched, for it was reported that Vanderbilt had withdrawn his opposition to the bill. The report was true. Either the Commodore had counted the cost and judged it excessive, or he despaired of the result. At any rate, he had yielded in advance. In a few moments the long struggle was over, and that bill which, in an unamended form, had but a few days before been thrown out of the Assembly by a vote of eighty-three to thirty-two, now passed it by a vote of one hundred and one to six, and was sent to the Governor for his signature. Then the wrath of the disappointed members turned on Vanderbilt. Decency was forgotten in a frenzied sense of disappointed avarice. That same night the *pro rata* freight bill, and a bill compelling the sale of through tickets by competing lines, were hurriedly passed, simply because they were thought hurtful to Vanderbilt; and the docket was ransacked in search of other measures, calculated to injure or annoy him. An adjournment, however, brought reflection, and subsequently, on this subject, the legislature stultified itself no more.

The bill had passed the legislature; would it receive the executive signature? Here was the last stage of danger. For some time doubts were entertained on this point, and the last real conflict between the opposing interests took place in the Executive Chamber at Albany. There, on the afternoon of the 21st of April, Commodore Vanderbilt's counsel appeared before Governor Fenton, and urged upon him their reasons why the bill should be returned by him to the Senate without his signature. The arguments were patiently listened to, but, when they had closed, the executive signature placed the seal of success upon Mr. Gould's labors at Albany. Even here the voice of calumny was not silent. As if this remarkable controversy was destined to leave a dark blot of suspicion upon every department of the civil service of New York, there were not wanting those who charged the Executive itself with the crowning act in this history of corruption. The very sum pretended to have been paid was named; the broker of executive action was pointed out, and the number of minutes was specified which

should intervene between the payment of the bribe and the signing of the law.<sup>1</sup>

Practically, the conflict was now over, and the period of negotiation had already begun. The combat in the courts was indeed kept up until far into May, for the angry passions of the lawyers and of the judges required time in which to wear themselves out. Day after day the columns of the press revealed fresh scandals to the astonished public, which at last grew indifferent to such revelations. Beneath all the wrangling of the courts, however, while the popular attention was distracted by the clatter of lawyers' tongues, the leaders in the controversy were quietly approaching a settlement.

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At last, upon the 2d of July, Mr. Eldridge formally announced to the Board of Directors that the terms of peace had been agreed upon. Commodore Vanderbilt was, in the first place, provided for. He was to be relieved of fifty thousand shares of Erie stock at 70, receiving therefor \$2,500,000 in cash, and \$1,250,000 in bonds of the Boston, Hartford & Erie at 80. He was also to receive a further sum of \$1,000,000 outright, as a consideration for the privilege the Erie road thus purchased of calling upon him for his remaining fifty thousand shares at 70 at any time within four months. He was also to have two seats in the Board of Directors, and all suits were to be dismissed and offenses condoned. The sum of \$429,250 was fixed upon as a proper amount to assuage the sense of wrong from which his two friends Work and Schell had suffered, and to efface from their memories all recollection of the unfortunate "pool" of the previous December. Why the owners of the Erie Railway should have paid this indemnity of \$4,000,000 is not very clear. The operations were apparently outside of the business of a railway company, and no more connected with

<sup>1</sup> It is but justice to Governor Fenton to say, that, though this charge was boldly advanced by respectable journals of his own party, it cannot be considered as sustained by the evidence. The testimony on the point will be found in the report of Senator Hale's investigating committee. Documents (Senate), 1869, No. 52, pp. 146-148, 151-155.

the stockholders of the Erie than were the butchers' bills of the individual directors.

While Vanderbilt and his friends were thus provided for, Mr. Drew was to be left in undisturbed enjoyment of the fruits of his recent operations, but was to pay into the treasury \$540,000 and interest, in full discharge of all claims and causes of action which the Erie company might have against him. The Boston party, as represented by Mr. Eldridge, was to be relieved of \$5,000,000 of their Boston, Hartford & Erie bonds, for which they were to receive \$4,000,000 of Erie acceptances. None of these parties, therefore, had anything to complain of, whatever might be the sensations of the real owners of the railway. A total amount of some \$9,000,000 in cash was drawn from the treasury in fulfillment of this *settlement*, as the persons concerned were pleased to term this remarkable disposition of property intrusted to their care.

Messrs. Gould and Fisk still remained to be taken care of, and to them their associates left—the Erie Railway. These gentlemen subsequently maintained that they had vehemently opposed this settlement, and had denounced it in the secret councils as a fraud and a robbery. Mr. Fisk was peculiarly outspoken in relation to it, and declared himself “thunder-struck and dumfounded” that his brother directors whom he had supposed respectable men should have had anything to do with any such proceeding. A small portion of this statement is not wholly improbable. The astonishment at the turpitude of his fellow-officials was a little unnecessary in one who had already seen “more robbery” during the year of his connection with the Erie Railway than he had “ever seen before in the same space of time,”—so much of it indeed that he dated his “gray hairs” from that 7th of October which saw his election to the board. That Mr. Fisk and Mr. Gould were extremely indignant at a partition of plunder from which they were excluded is, however, very certain. The rind of the orange is not generally considered the richest part of the fruit; a corporation on the verge of bankruptcy is less coveted, even by operators in Wall Street, than one rich in valuable assets.

Probably at this time these gentlemen seriously debated the expediency of resorting again to a war of injunctions, and carefully kept open a way for doing so; however this may have been, they seem finally to have concluded that there was yet plunder left in the poor old hulk, and so, after four stormy interviews, all opposition was at last withdrawn and the definitive treaty was finally signed. . . . Mr. Eldridge thereupon counted out his bonds and received his acceptances, which latter were cashed at once to close up the transaction, and at once he resigned his positions as director and president. The Boston raiders then retired, heavy with spoil, into their own North country, and there proceeded to build up an Erie influence for New England, in which task they labored with assiduity and success. Gradually they here introduced the more highly developed civilization of the land of their temporary adoption and boldly attempted to make good their private losses from the public treasury. A more barefaced scheme of plunder never was devised, and yet the executive veto alone stood between it and success. These, however, were the events of another year and unconnected with this narrative, from which these characters in the Erie management henceforth disappear. For the rest it is only necessary to say that Mr. Vanderbilt, relieved of his heavy load of its stock, apparently ceased to concern himself with Erie; while Daniel Drew, released from the anxieties of office, assumed for a space the novel character of a looker-on in Wall Street.

## III

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The appearance of calm lasted but about thirty days. Early in August it was evident that something was going on. Erie suddenly fell ten per cent; in a few days more it experienced a further fall of seven per cent, touching 44 by the 19th of the month, upon which day, to the astonishment of Wall Street, the transfer books of the company were closed preparatory to the annual election. As this election was not to take place until the 13th of October, and as the books had thus been

closed thirty days in advance of the usual time, it looked very much as though the managers were satisfied with the present disposition of the stock, and meant, by keeping it where it was, to preclude any such unpleasantness as an opposition ticket. The courts and a renewed war of injunctions were of course open to any contestants, including Commodore Vanderbilt, who might desire to avail themselves of them; probably, however, the memory of recent struggles was too fresh to permit any one to embark on those treacherous waters. At any rate, nothing of the sort was attempted. The election took place at the usual time, and the ring in control voted itself, without opposition, into a new lease of power. Two new names had meanwhile appeared in the list of Erie directors, — those of Peter B. Sweeney and William M. Tweed, the two most prominent leaders of that notorious ring which controls the proletariat of New York City and governs the politics of the State. The alliance was an ominous one, for the construction of the new board can be stated in few words, and calls for no comment. It consisted of the Erie ring and the Tammany ring, brought together in close political and financial union; and, for the rest, a working majority of supple tools and a hopeless minority of respectable figureheads. This formidable combination shot out its feelers far and wide: it wielded the influence of a great corporation with a capital of a hundred millions; it controlled the politics of the first city of the New World; it sent its representatives to the Senate of the State, and numbered among its agents, the judges of the courts. Compact, disciplined, and reckless, it knew its own power and would not scruple to use it.

It was now the month of October, and the harvest had been gathered. The ring and its allies determined to reap their harvest also, and that harvest was to be nothing less than a contribution levied, not only upon Wall Street and New York, but upon all the immense interests, commercial and financial, which radiate from New York all over the country. Like the Cæsar of old, they issued their edict that all the world should be taxed. The process was not novel, but it was effective. A monetary stringency may be looked for in New York at certain seasons of every

year. It is generally most severe in the autumn months, when the crops have to be moved, and the currency is drained steadily away from the financial center towards the extremities of the system. The method by which an artificial stringency is produced is thus explained in a recent report of the Comptroller of the Currency:

It is scarcely possible to avoid the inference that nearly one half of the available resources of the national banks in the city of New York are used in the operations of the stock and gold exchange; that they are loaned upon the security of stocks which are bought and sold largely on speculation, and which are manipulated by cliques and combinations, according as the bulls or bears are for the moment in the ascendency. . . . Taking advantage of an active demand for money to move the crops West and South, shrewd operators form their combination to depress the market by "locking up" money, — withdrawing all they can control or borrow from the common fund; money becomes scarce, the rate of interest advances, and stocks decline. The legitimate demand for money continues; and, fearful of trenching on their reserve, the banks are strained for means. They dare not call in their demand loans, for that would compel their customers to sell securities on a falling market, which would make matters worse. Habitually lending their means to the utmost limit of prudence, and their credit much beyond that limit, to brokers and speculators, they are powerless to afford relief; — their customers by the force of circumstances become their masters. The banks cannot hold back or withdraw from the dilemma in which their mode of doing business has placed them. They must carry the load to save their margins. A panic which should greatly reduce the price of securities would occasion serious, if not fatal, results to the banks most extensively engaged in such operations, and would produce a feeling of insecurity which would be very dangerous to the entire banking interest of the country.<sup>1</sup>

All this machinery was now put in motion; the banks and their customers were forced into the false position described, and towards the end of October it had become perfectly notorious in Wall Street that large new issues of Erie had been made, and that these new issues were intimately connected with the sharp stringency then existing in the money market. It was at last determined to investigate the matter, and upon the 27th of the month a committee of three was appointed by the Stock Exchange to wait upon the officers of the corporation with the

<sup>1</sup> Finance Report, 1868, pp. 20, 21.

view of procuring such information as they might be willing to impart. The committee called on Mr. Gould and stated the object of their visit. In reply to their inquiries Mr. Gould informed them that Erie convertible bonds for ten millions of dollars had been issued, half of which had already been, and the rest of which would be, converted into stock; that the money had been devoted to the purchase of Boston, Hartford & Erie bonds for five millions, and also — of course — to payments for steel rails. The committee desired to know if any further issue of stock was in contemplation, but were obliged to rest satisfied with a calm assurance that no new issue was just then contemplated except "in certain contingencies;" from which enigmatical utterances Wall Street was left to infer that the exigencies of Messrs. Gould and Fisk were elements not to be omitted from any calculations as to the future of Erie and the money market. The amount of these issues of new stock was, of course, soon whispered in a general way; but it was not till months afterwards that a sworn statement of the secretary of the Erie Railway revealed the fact that the stock of the corporation had been increased from \$34,265,300 on the 1st of July, 1868, the date when Drew and his associates had left it, to \$57,766,300 on the 24th of October of the same year, or by two hundred and thirty-five thousand shares in four months.<sup>1</sup> This, too, had been done without consultation with the board of directors, and with no other authority than that conferred by the ambiguous resolution of February 19th. Under that resolution the stock of the company had now been increased one hundred and thirty-eight per cent in eight months. Such a process of inflation may, perhaps, be justly considered the most extraordinary feat of financial legerdemain which history has yet recorded.

<sup>1</sup> In April, 1871, although the stock was then nominally registered, a further secret issue was made by which some \$600,000 in cash was realized on \$3,000,000 of stock. Periodical issues had then carried the gross amount up to the neighborhood of \$86,500,000; or from a total of 250,000 shares, when the management changed at the election of October 17, 1867, to 865,000 shares within four years. Apparently Mr. Fisk was more correct than usual in his statement, when he remarked, that, having once joined the robbers, "he had been with them ever since."

Now, however, when the committee of the Stock Exchange had returned to those who sent them, the mask was thrown off, and operations were conducted with vigor and determination. New issues of Erie were continually forced upon the market until the stock fell to 35; greenbacks were locked up in the vaults of the banks, until the unexampled sum of twelve millions was withdrawn from circulation; the prices of securities and merchandise declined; trade and the autumnal movement of the crops were brought almost to a standstill; and loans became more and more difficult to negotiate, until at length even one and a half per cent a day was paid for carrying stocks. Behind all this it was notorious that some one was pulling the wires, the slightest touch upon which sent a quiver through every nerve of the great financial organism, and wrung private gain from public agony. . . . The very revenues of the government were affected by the operations of gamblers. They were therefore informed that, if necessary, fifty millions of additional currency would be forthcoming to the relief of the community, and then, and not till then, the screws were loosened.

The harvest of the speculators, however, was still but half gathered. Hitherto the combination had operated for a fall. Now was the moment to change the tactics and take advantage of the rise. The time was calculated to a nicety. The London infatuation had wonderfully continued, and as fast as certificates of stock were issued they seemed to take wings across the Atlantic. Yet there was a limit even to English credulity, and in November it became evident that the agents of foreign houses were selling their stock to arrive. The price was about 40; the certificates might be expected by the steamer of the 23d. Instantly the combination changed front. As before they had depressed the market, they now ran it up, and, almost as if by magic, the stock, which had been heavy at 40, astonished every one by shooting up to 50. New developments were evidently at hand.

At this point Mr. Daniel Drew once more made his appearance on the stage. As was very natural, he had soon wearied of the sameness of his part as a mere looker-on in Wall Street, and had

relapsed into his old habits. He was no longer treasurer of the Erie, and could not therefore invite the public to the game, while he himself with somber piety shook the loaded dice. But it had become with him a second nature to operate in Erie, and once more he was deep in its movements. At first he had combined with his old friends, the present directors, in their "locking-up" conspiracy. He had agreed to assist them to the extent of four millions. The vacillating, timid nature of the man, however, could not keep pace with his more daring and determined associates, and, after embarking a million, becoming alarmed at the success of the joint operations and the remonstrances of those who were threatened with ruin, he withdrew his funds from the operators' control and himself from their councils. But though he did not care to run the risk or to incur the odium, he had no sort of objection to sharing the spoils. Knowing, therefore, or supposing that he knew, the plan of campaign, and that plan jumping with his own bearish inclinations, he continued, on his own account, operations looking to a fall. One may easily conceive the wrath of the Erie operators at such a treacherous policy; and it is not difficult to imagine their vows of vengeance. Meanwhile all went well with Daniel Drew. Erie looked worse and worse, and the golden harvest seemed drawing near. By the middle of November he had contracted for the delivery of some seventy thousand shares at current prices, averaging, perhaps, 38, and probably was counting his gains. He did not appreciate the full power and resources of his old associates. On the 14th of November their tactics changed, and he found himself involved in terrible entanglements,—hopelessly cornered. His position disclosed itself on Saturday. Naturally the first impulse was to have recourse to the courts. An injunction—a dozen injunctions—could be had for the asking, but, unfortunately, could be had by both parties. Drew's own recent experience, and his intimate acquaintance with the characters of Fisk and Gould, were not calculated to inspire him with much confidence in the efficacy of the law. But nothing else remained, and, after hurried consultations among the victims, the lawyers were applied to, the affidavits

were prepared, and it was decided to repair on the following Monday to the so-called courts of justice.

Nature, however, had not bestowed on Daniel Drew the steady nerve and sturdy gambler's pride of either Vanderbilt or of his old companions at Jersey City. His mind wavered and hesitated between different courses of action. His only care was for himself, his only thought was of his own position. He was willing to betray one party or the other, as the case might be. He had given his affidavit to those who were to bring the suit on the Monday, but he stood perfectly ready to employ Sunday in betraying their counsels to the defendants in the suit. A position more contemptible, a state of mind more pitiable, can hardly be conceived. After passing the night in this abject condition, on the morning of Sunday he sought out Mr. Fisk for purposes of self-humiliation and treachery.<sup>1</sup> He then partially revealed the difficulties of his situation, only to have his confidant prove to him how entirely he was caught, by completing to him the revelation. He betrayed the secrets of his new allies, and bemoaned his own hard fate; he was thereupon comforted by Mr. Fisk with the cheery remark that "he (Drew) was the last man who ought to whine over any position in which he placed himself in regard to Erie." The poor man begged to see Mr. Gould, and would take no denial. Finally Mr. Gould was brought in, and the scene was repeated for his edification. The two must have been satiated with revenge. At last they sent him away, promising to see him again that evening. At the hour named he again appeared, and, after waiting their convenience, — for they spared him no humiliation, — he again appealed to them, offering them great sums if they would issue new stock or lend him of their stock. He implored, he argued, he threatened. At the end of two hours of humiliation, persuaded that it was all in vain, that he was wholly in the power of antagonists without mercy, he took his hat, said, "I will bid you good night," and went his way.

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<sup>1</sup> It ought perhaps to be stated that this portion of the narrative has no stronger foundation than an affidavit of Mr. Fisk, which has not, however, been publicly contradicted.

But to return to the course of events. With the lords of Erie forewarned was forearmed. They knew something of the method of procedure in New York courts of law. At this particular juncture Mr. Justice Sutherland, a magistrate of such pure character and unsullied reputation that it is inexplicable how he ever came to be elevated to the bench on which he sits, was holding chambers, according to assignment, for the four weeks between the first Monday in November and the first Monday in December. By a rule of the court, all applications for orders during that time were to be made before him, and he only, according to the courtesy of the Bench, took cognizance of such proceedings. Some general arrangement of this nature is manifestly necessary to avoid continual conflicts of jurisdiction. The details of the assault on the Erie directors having been settled, counsel appeared before Judge Sutherland on Monday morning and petitioned for an injunction restraining the Erie directors from any new issue of stock or the removal of the funds of the company beyond the jurisdiction of the court, and also asking that the road be placed in the hands of a receiver. The suit was brought in the name of Mr. August Belmont, who was supposed to represent large foreign holders. The petition set forth at length the alleged facts in the case, and was supported by the affidavits of Mr. Drew and others. Mr. Drew apparently did not inform the counsel of the manner in which he had passed his leisure hours on the previous day; had he done so, Mr. Belmont's counsel probably would have expedited their movements. The injunction was, however, duly signed, and, doubtless, immediately served.

Meanwhile Messrs. Gould and Fisk had not been idle. Applications for injunctions and receiverships were a game which two could play at, and long experience had taught these close observers the very great value of the initiative in law. Accordingly, some two hours before the Belmont application was made, they had sought no less a person than Mr. Justice Barnard, caught him, as it were, either in his bed or at his breakfast, whereupon he had held a *lit de justice*, and made divers astonishing orders. A petition was presented in the name of one

McIntosh, a salaried officer of the Erie Road, who claimed also to be a shareholder. It set forth the danger of injunctions and of the appointment of a receiver, the great injury likely to result therefrom, etc. After due consideration on the part of Judge Barnard, an injunction was issued, staying and restraining all suits, and actually appointing Jay Gould receiver, to hold and disburse the funds of the company in accordance with the resolutions of the Board of Directors and the Executive Committee. This certainly was a very brilliant flank movement, and testified not less emphatically to Gould's genius than to Barnard's law; but most of all did it testify to the efficacy of the new combination between Tammany Hall and the Erie Railway. Since the passage of the bill "to legalize counterfeit money," in April, and the present November, new light had burst upon the judicial mind, and as the news of one injunction and a vague rumor of the other crept through Wall Street that day, it was no wonder that operators stood aghast and that Erie fluctuated wildly from 50 to 61 and back to 48.

The Erie directors, however, did not rest satisfied with the position which they had won through Judge Barnard's order. That simply placed them, as it were, in a strong defensive attitude. They were not the men to stop there: they aspired to nothing less than a vigorous offensive. With a superb audacity, which excites admiration, the new trustee immediately filed a supplementary petition. Therein it was duly set forth that doubts had been raised as to the legality of the recent issue of some two hundred thousand shares of stock, and that only about this amount was to be had in America; the trustee therefore petitioned for authority to use the funds of the corporation to purchase and cancel the whole of this amount at any price less than the par value, without regard to the rate at which it had been issued. The desired authority was conferred by Mr. Justice Barnard as soon as asked. Human assurance could go no further. The petitioners had issued these shares in the bear interest at 40, and had run down the value of Erie to 35; they had then turned round, and were now empowered to buy back that very stock in the bull interest, and in the name and with

the funds of the corporation, at par. A law of the State distinctly forbade corporations from operating in their own stock; but this law was disregarded as if it had been only an injunction. An injunction forbade the treasurer from making any disposition of the funds of the company, and this injunction was respected no more than the law. These trustees had sold the property of their wards at 40; they were now prepared to use the money of their wards to buy the same property back at 80, and a judge had been found ready to confer on them the power to do so. Drew could not withstand such tactics, and indeed the annals of Wall Street furnished no precedent or parallel.

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When this last, undreamed-of act was made public on Wednesday at noon, it was apparent that the crisis was not far off. Daniel Drew was cornered. Erie was scarce and selling at 47, and would not become plenty until the arrival of the English steamer on Monday; and so, at 47, Mr. Drew flung himself into the breach to save his endangered credit, and, under his purchases, the stock rapidly rose, until at five o'clock Wednesday afternoon it reached 57. Contrary to expectation, the "corner" had not yet culminated. It became evident the next morning that before two o'clock that day the issue would be decided. Drew fought desperately. The Brokers' Board was wild with excitement. High words passed; collisions took place; the bears were savage, and the bulls pitiless. Erie touched 62, and there was a difference of sixteen per cent between cash stock and stock sold to be delivered in three days,—when the steamer would be in,—and a difference of ten per cent between stock to be delivered on the spot and that to be delivered at the usual time, which was a quarter after two o'clock. Millions were handled like thousands; fabulous rates of interest were paid; rumors of legal proceedings were flying about, and forays of the Erie chiefs on the Vanderbilt roads were confidently predicted. New York Central suddenly shot up seven per cent under these influences, and Vanderbilt seemed about to enter the field. The interest of the stock market centered in the combatants

and on these two great corporations. All other stocks were quiet and neglected while the giants were fighting it out. The battle was too fierce to last long. At a quarter before three o'clock the struggle would be over. Yet now, at the very last moment, the prize which trembled before them eluded the grasp of the Erie ring. Their opponent was not saved, but they shared his disaster. Their combination had turned on the fact, disclosed to them by the Erie books, that some three hundred thousand shares of its stock had been issued in the ten-share certificates which alone are transmitted to London. This amount they supposed to be out of the country; the balance they could account for as beyond the reach of Drew. Suddenly, as two o'clock approached, and Erie was trembling in the sixties, all Broadway — every tailor and bootmaker and cigar vender of New York — seemed pouring into Broad Street, and each newcomer held eagerly before him one or more of those ten-share certificates which should have been in London. Not only this, but the pockets of the agents of foreign bankers seemed bursting with them. Bedlam had suddenly broken loose in Wall Street. It was absolutely necessary for the conspirators to absorb this stock, to keep it from the hands of Drew. This they attempted to do, and manfully stood their ground, fighting against time. Suddenly, when the hour had almost come, — when five minutes more would have landed them in safety, — through one of those strange incidents which occur in Wall Street and which cannot be explained, they seemed smitten with panic. It is said their bank refused to certify their checks for the suddenly increased amount; the sellers insisted on having certified checks, and, in the delay caused by this unforeseen difficulty, the precious five minutes elapsed, and the crisis had passed. The fruits of their plot had escaped them. Drew made good his contracts at 57, the stock at once fell heavily to 42, and a dull quiet succeeded to the excitement of the morning. The hand of the government had made itself felt in Wall Street.

The Broad Street conflict was over, and some one had reaped a harvest. Who was it? It was not Drew, for his losses, apart from a ruined prestige, were estimated at nearly a million and

a half of dollars. The Erie directors were not the fortunate men, for their only trophies were great piles of certificates of Erie stock, which had cost them "corner" prices, and for which no demand existed. If Drew's loss was a million and a half, their loss was likely to be nearer three millions. Who, then, were the recipients of these missing millions? There is an ancient saying, which seems to have been tolerably verified in this case, that when certain persons fall out certain other persons come by their dues. The "corner" was very beautiful in all its details, and most admirably planned; but, unfortunately, those who engineered it had just previously made the volume of stock too large for accurate calculation. For once the outside public had been at hand and Wall Street had been found wanting. A large portion of the vast sum taken from the combatants found its way into the pockets of the agents of English bankers, and a part of it was accounted for by them to their principals; another portion went to relieve anxious holders among the American outside public; the remainder fell to professional operators, probably far more lucky than sagacious. Still, there had been a fall before there was a rise. The subsequent disaster, perhaps, no more than counterbalanced the earlier victory; at any rate, Messrs. Gould and Fisk did not succumb, but preserved a steady front, and Erie was more upon the street than ever. In fact, it was wholly there now. The recent operations had proved too outrageous even for the Brokers' Board. A new rule was passed, that no stock should be called, the issues of which were not registered at some respectable banking-house. The Erie directors declined to conform to this rule, and their road was stricken from the list of calls. Nothing daunted at this, these Protean creatures at once organized a new board of their own, and so far succeeded in their efforts as to have Erie quoted and bought and sold as regularly as ever.

Though the catastrophe had taken place on the 19th, the struggle was not yet over. The interests involved were so enormous, the developments so astounding, such passions had been aroused, that some safety valve through which suppressed

wrath could work itself off was absolutely necessary, and this the courts of law afforded. The attack was stimulated by various motives. The *bona fide* holders of the stock, especially the foreign holders, were alarmed for the existence of their property. The Erie ring had now boldly taken the position that their duty was, not to manage the road in the interests of its owners, not to make it a dividend-paying corporation, but to preserve it from consolidation with the Vanderbilt monopoly. This policy was openly proclaimed by Mr. Gould, at a later day, before an investigating committee at Albany. With unspeakable effrontery, — an effrontery so great as actually to impose on his audience and a portion of the press, and make them believe that the public ought to wish him success, — he described how stock issues at the proper time, to any required amount, could alone keep him in control of the road, and keep Mr. Vanderbilt out of it; it would be his duty, therefore, he argued, to issue as much new stock, at about the time of the annual election, as would suffice to keep a majority of all the stock in existence under his control; and he declared that he meant to do this. . . . The strangest thing of all was, that it never seemed to occur to his audience that the propounder of this comical sophistry was a trustee and guardian for the stockholders, and not a public benefactor; and that the owners of the Erie Road might possibly prefer not to be deprived of their property, in order to secure the blessing of competition. So unique a method of securing a reëlection was probably never before suggested with a grave face, and yet, if we may believe the reporters, Mr. Gould, in developing it, produced a very favorable impression on the committee. It was hardly to be expected that such advanced views as to the duties and powers of railway directors would favorably impress commonplace individuals who might not care to have their property scaled down to meet Mr. Gould's views of public welfare. These persons accordingly, popularly supposed to be represented by Mr. Belmont, wished to get their property out of the hands of such fanatics in the cause of cheap transportation and plentiful stock, with the least possible delay. Combined with these were the operators who had suffered in the late

“corner,” and who desired to fight for better terms and a more equal division of plunder. Behind them all, Vanderbilt was supposed to be keeping an eager eye on the long-coveted Erie. Thus the materials for litigation existed in abundance.

On Monday, the 23d, Judge Sutherland vacated Judge Barnard's order appointing Jay Gould receiver, and, after seven hours' argument and some exhibitions of vulgarity and indecency on the part of counsel, which vied with those of the previous April, he appointed Mr. Davies, an ex-chief-justice of the Court of Appeals, receiver of the road and its franchise, leaving the special terms of the order to be settled at a future day. The seven hours' struggle has not been without an object; that day Judge Barnard had been peculiarly active. The morning hours he had beguiled by the delivery to the grand jury of one of the most astounding charges ever recorded; and now, as the shades of evening were falling, he closed the labors of the day by issuing a stay of the proceedings then pending before his associate. . . . Tuesday had been named by Judge Sutherland, at the time he appointed his receiver, as the day upon which he would settle the details of the order. His first proceeding upon that day, on finding his action stayed by Judge Barnard, was to grant a motion to show cause, on the next day, why Barnard's order should not be vacated. This style of warfare, however, savored altogether too much of the tame defensive to meet successfully the bold strategy of Messrs. Gould and Fisk. They carried the war into Africa. In the twenty-four hours during which Judge Sutherland's order to show cause was pending three new actions were commenced by them. In the first place, they sued the suers. Alleging the immense injury likely to result to the Erie Road from actions commenced, as they alleged, solely with a view of extorting money in settlement, Mr. Belmont was sued for a million of dollars in damages. Their second suit was against Messrs. Work, Schell, and others, concerned in the litigations of the previous spring, to recover the \$429,250 then paid them, as was alleged, in a fraudulent settlement. These actions were, however, commonplace, and might have been brought by ordinary men. Messrs. Gould and Fisk were always

displaying the invention of genius. The same day they carried their quarrels into the United States courts. The whole press, both of New York and of the country, disgusted with the parody of justice enacted in the State courts, had cried aloud to have the whole matter transferred to the United States tribunals, the decisions of which might have some weight, and where, at least, no partisans upon the bench would shower each other with stays, injunctions, vacatings of orders, and other such pellets of the law. The Erie ring, as usual, took time by the forelock. While their slower antagonists were deliberating, they acted. On this Monday, the 23d, one Henry B. Whelpley, who had been a clerk of Gould's, and who claimed to be a stockholder in the Erie and a citizen of New Jersey, instituted a suit against the Erie Railway before Judge Blatchford, of the United States District Court. Alleging the doubts which hung over the validity of the recently issued stock, he petitioned that a receiver might be appointed, and the company directed to transfer into his hands enough property to secure from loss the plaintiff as well as all other holders of the new issues. The Erie counsel were on the ground, and, as soon as the petition was read, waived all further notice as to the matters contained in it; whereupon the court at once appointed Jay Gould receiver, and directed the Erie Company to place eight millions of dollars in his hands to protect the rights represented by the plaintiff. Of course the receiver was required to give bonds with sufficient sureties. Among the sureties was James Fisk, Jr. The brilliancy of this move was only surpassed by its success. It fell like a bombshell in the enemy's camp, and scattered dismay among those who still preserved a lingering faith in the virtue of law as administered by any known courts. The interference of the court was in this case asked for on the ground of fraud. If any fraud had been committed, the officers of the company alone could be the delinquents. To guard against the consequences of that fraud, a receivership was prayed for, and the court appointed as receiver the very officer in whom the alleged frauds, on which its action was based, must have originated. It is true, as was afterwards observed by Judge Nelson in setting

it aside, that a *prima facie* case, for the appointment of a receiver "was supposed to have been made out," that no objection to the person suggested was made, and that the right was expressly reserved to other parties to come into court, with any allegations they saw fit against Receiver Gould. The collusion in the case was, nevertheless, so evident, the facts were so notorious and so apparent from the very papers before the court, and the character of Judge Blatchford is so far above suspicion, that it is hard to believe that this order was not procured from him by surprise, or through the agency of some counsel in whom he reposed a misplaced confidence. The Erie ring, at least, had no occasion to be dissatisfied with this day's proceedings.

The next day Judge Sutherland made short work of his brother Barnard's stay of proceedings in regard to the Davies receivership. He vacated it at once, and incontinently proceeded, wholly ignoring the action of Judge Blatchford on the day before, to settle the terms of the order, which, covering as it did the whole of the Erie property and franchise, excepting only the operating of the road, bade fair to lead to a conflict of jurisdiction between the State and Federal courts.

And now a new judicial combatant appears in the arena. It is difficult to say why Judge Barnard, at this time, disappears from the narrative. Perhaps the notorious judicial violence of the man, which must have made his eagerness as dangerous to the cause he espoused as the eagerness of a too swift witness, had alarmed the Erie counsel. Perhaps the fact that Judge Sutherland's term in chambers would expire in a few days had made them wish to intrust their cause to the magistrate who was to succeed him. At any rate, the new order staying proceedings under Judge Sutherland's order was obtained from Judge Cardozo, — it is said, somewhat before the terms of the receivership had been finally settled. The change spoke well for the discrimination of those who made it, for Judge Cardozo is a very different man from Judge Barnard. Courteous but inflexible, subtle, clear-headed, and unscrupulous, this magistrate conceals the iron hand beneath the silken glove. Equally versed in the laws of New York and in the mysteries of

Tammany, he had earned his place by a partisan decision on the excise law, and was nominated for the bench by Mr. Fernando Wood, in a few remarks concluding as follows: "Judges were often called on to decide on political questions, and he was sorry to say the majority of them decided according to their political bias. It was therefore absolutely necessary to look to their candidate's political principles. He would nominate, as a fit man for the office of Judge of the Supreme Court, Albert Cardozo." Nominated as a partisan, a partisan Cardozo has always been, when the occasion demanded. Such was the new and far more formidable champion who now confronted Sutherland, in place of the vulgar Barnard. His first order in the matter—to show cause why the order of his brother judge should not be set aside—was not returnable until the 30th, and in the intervening five days many events were to happen.

Immediately after the settlement by Judge Sutherland of the order appointing Judge Davies receiver, that gentleman had proceeded to take possession of his trust. Upon arriving at the Erie building, he found it converted into a fortress, with a sentry patrolling behind the bolts and bars, to whom was confided the duty of scrutinizing all comers, and of admitting none but the faithful allies of the garrison. It so happened that Mr. Davies, himself unknown to the custodian, was accompanied by Mr. Eaton, the former attorney of the Erie corporation. This gentleman was recognized by the sentry, and forthwith the gates flew open for himself and his companion. In a few moments more the new receiver astonished Messrs. Gould and Fisk, and certain legal gentlemen with whom they happened to be in conference, by suddenly appearing in the midst of them. The apparition was not agreeable. Mr. Fisk, however, with a fair appearance of cordiality, welcomed the strangers, and shortly after left the room. Speedily returning, his manner underwent a change, and he requested the newcomers to go the way they came. As they did not comply at once, he opened the door, and directed their attention to some dozen men of forbidding aspect who stood outside, and who, he intimated, were prepared to eject them forcibly if they sought to prolong their unwelcome

stay. As an indication of the lengths to which Mr. Fisk was prepared to go, this was sufficiently significant. The movement, however, was a little too rapid for his companions; the lawyers protested, Mr. Gould apologized, Mr. Fisk cooled down, and his familiars retired. The receiver then proceeded to give written notice of his appointment, and the fact that he had taken possession; disregarding, in so doing, an order of Judge Cardozo, staying proceedings under Judge Sutherland's order, which one of the opposing counsel drew from his pocket, but which Mr. Davies not inaptly characterized as a "very singular order," seeing that it was signed before the terms of the order it sought to affect were finally settled. At length, however, at the earnest request of some of the subordinate officials, and satisfied with the formal possession he had taken, the new receiver delayed further action until Friday. He little knew the resources of his opponents, if he vainly supposed that a formal possession signified anything. The succeeding Friday found the directors again fortified within, and himself a much enjoined wanderer without. The vigilant guards were now no longer to be beguiled. Within the building, constant discussions and consultations were taking place; without, relays of detectives incessantly watched the premises. No rumor was too wild for public credence. It was confidently stated that the directors were about to fly the State and the county, — that the treasury had already been conveyed to Canada. At last, late on Sunday night, Mr. Fisk with certain of his associates left the building, and made for the Jersey Ferry; but on the way he was stopped by a vigilant lawyer, and many papers were served upon him. His plans were then changed. He returned to the office of the company, and presently the detectives saw a carriage leave the Erie portals, and heard a loud voice order it to be driven to the Fifth Avenue Hotel. Instead of going there, however, it drove to the ferry, and presently an engine, with an empty directors' car attached, dashed out of the Erie station in Jersey City, and disappeared in the darkness. The detectives met and consulted; the carriage and the empty car were put together, and the inference, announced in every

New York paper the succeeding day, was that Messrs. Fisk and Gould had absconded with millions of money to Canada.

That such a ridiculous story should have been published, much less believed, simply shows how utterly demoralized the public mind had become, and how prepared for any act of high-handed fraud or outrage. The libel did not long remain uncontradicted. The next day a card from Mr. Fisk was telegraphed to the newspapers, denying the calumny in indignant terms. The eternal steel rails were again made to do duty, and the midnight flitting became a harmless visit to Binghamton on business connected with a rolling mill. Judge Balcom, however, of injunction memory in the earlier records of the Erie suits, resides at Binghamton, and a leading New York paper not inaptly made the timid inquiry of Mr. Fisk, "If he really thought that Judge Balcom was running a rolling mill of the Erie Company, what did he think of Judge Barnard?" Mr. Fisk, however, as became him in his character of the Mæcenas of the bar, instituted suits claiming damages in fabulous sums, for defamation of character, against some half dozen of the leading papers, and nothing further was heard of the matter, nor, indeed, of the suits either. Not so of the trip to Binghamton. On Tuesday, the 1st of December, while one set of lawyers were arguing an appeal in the Whelpley case before Judge Nelson in the Federal courts, and another set were procuring orders from Judge Cardozo staying proceedings authorized by Judge Sutherland, a third set were aiding Judge Balcom in certain new proceedings instituted in the name of the Attorney-General against the Erie Road. The result arrived at was, of course, that Judge Balcom declared his to be the only shop where a regular, reliable article in the way of law was retailed, and then proceeded forthwith to restrain and shut up the opposition establishments. The action was brought to terminate the existence of the defendant as a corporation, and, by way of preliminary, application was made for an injunction and the appointment of a receiver. His Honor held that, as only three receivers had as yet been appointed, he was certainly entitled to appoint another. It was perfectly clear to him that it was his

duty to enjoin the defendant corporation from delivering the possession of its road, or of any of its assets, to either of the receivers already appointed; it was equally clear that the corporation would be obliged to deliver them to any receiver he might appoint. He was not prepared to name a receiver just then, however, though he intimated that he should not hesitate to do so if necessary. So he contented himself with the appointment of a referee to look into matters, and, generally, enjoined the directors from omitting to operate the road themselves, or from delivering the possession of it to "any person claiming to be a receiver."

This raiding upon the agricultural judges was not peculiar to the Erie party. On the contrary, in this proceeding it rather followed than set an example; for a day or two previous to Mr. Fisk's hurried journey, Judge Peckham of Albany had, upon papers identical with those in the Belmont suit, issued divers orders, similar to those of Judge Balcom, but on the other side, tying up the Erie directors in a most astonishing manner, and clearly hinting at the expediency of an additional receiver to be appointed at Albany. The amazing part of these Peckham and Balcom proceedings is, that they seem to have been initiated with perfect gravity, and neither to have been looked upon as jests, nor intended by their originators to bring the courts and the laws of New York into ridicule and contempt. Of course the several orders in these cases were of no more importance than so much waste paper, unless, indeed, some very cautious counsel may have considered an extra injunction or two very convenient things to have in his house; and yet, curiously enough, from a legal point of view, those in Judge Balcom's court seem to have been almost the only properly and regularly initiated proceedings in the whole case.

These little rural episodes in no way interfered with a renewal of vigorous hostilities in New York. While Judge Balcom was appointing his referee, Judge Cardozo granted an order for a reargument in the Belmont suit, — which brought up again the appointment of Judge Davies as receiver, — and assigned the hearing for the 6th of December. This step on his part bore a

curious resemblance to certain of his performances in the notorious case of the Wood leases, and made the plan of operations perfectly clear. The period during which Judge Sutherland was to sit in chambers was to expire on the 4th of December, and Cardozo himself was to succeed him; he now, therefore, proposed to signalize his associate's departure from chambers by reviewing his orders. No sooner had he granted the motion, than the opposing counsel applied to Judge Sutherland, who forthwith issued an order to show cause why the reargument ordered by Judge Cardozo should not take place at once. Upon which the counsel of the Erie Road instantly ran over to Judge Cardozo, who vacated Judge Sutherland's order out of hand. The lawyers then left him and ran back to Judge Sutherland with a motion to vacate this last order. The contest was now becoming altogether too ludicrous. Somebody must yield, and when it was reduced to that, the honest Sutherland was pretty sure to give way to the subtle Cardozo. Accordingly the hearing on this last motion was postponed until the next morning, when Judge Sutherland made a not undignified statement as to his position, and closed by remitting the whole subject to the succeeding Monday, at which time Judge Cardozo was to succeed him in chambers. Cardozo, therefore, was now in undisputed possession of the field.

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It was now very clear that Receiver Davies might abandon all hope of operating the Erie Railway, and that Messrs. Gould and Fisk were borne upon the swelling tide of victory. The prosperous aspect of their affairs encouraged these last-named gentlemen to yet more vigorous offensive operations. The next attack was upon Vanderbilt in person. On Saturday, the 5th of December, only two days after Judge Sutherland and Receiver Davies were disposed of, the indefatigable Fisk waited on Commodore Vanderbilt, and, in the name of the Erie Company, tendered him fifty thousand shares of Erie common stock at 70. . . . As the stock was then selling in Wall Street at 40, the Commodore naturally declined to avail himself of this liberal offer. He even went further, and, disregarding his usual wise policy of silence,

wrote to the New York Times a short communication, in which he referred to the alleged terms of settlement of the previous July, so far as they concerned himself, and denied them in the following explicit language: "I have had no dealings with the Erie Railway Company, nor have I ever sold that company any stock or received from them any *bonus*. As to the suits instituted by Mr. Schell and others, I had nothing to do with them, nor was I in any way concerned in their settlement." This was certainly an announcement calculated to confuse the public; but the confusion became confounded, when, upon the 10th, Mr. Fisk followed him in a card in which he reiterated the alleged terms of settlement, and reproduced two checks of the Erie Company, of July 11, 1868, made payable to the treasurer and by him indorsed to C. Vanderbilt, upon whose order they had been paid. These two checks were for the sum of a million of dollars. He further said that the company had a paper in Mr. Vanderbilt's own handwriting, stating that he had placed fifty thousand shares of Erie stock in the hands of certain persons, to be delivered on payment of \$3,500,000, which sum he declared had been paid. Undoubtedly these apparent discrepancies of statement admitted of an explanation; and some thin veil of equivocation, such as the transaction of the business through third parties, justified Vanderbilt's statements to his own conscience. Comment, however, is wholly superfluous, except to call attention to the amount of weight which is to be given to the statements and denials, apparently the most general and explicit, which from time to time were made by the parties to these proceedings. This short controversy merely added a little more discredit to what was already not deficient in that respect. On the 10th of December the Erie Company sued Commodore Vanderbilt for \$3,500,000, specially alleging in their complaint the particulars of that settlement, all knowledge of or connection with which the defendant had so emphatically denied.

None of the multifarious suits which had been brought as yet were aimed at Mr. Drew. The quondam treasurer had apparently wholly disappeared from the scene on the 19th of November. Mr. Fisk took advantage, however, of a leisure day, to remedy this oversight, and a suit was commenced against Drew, on the

ground of certain transactions between him, as treasurer, and the railway company, in relation to some steamboats concerned in the trade of Lake Erie. The usual allegations of fraud, breach of trust, and other trifling and, technically, not State prison offences, were made, and damages were set at a million of dollars.

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It was not until the 10th of February that Judge Cardozo published his decision setting aside the Sutherland receivership, and establishing on a basis of authority the right to overissue stock at pleasure. The subject was then as obsolete and forgotten as though it had never absorbed the public attention. And another "settlement" had already been effected. The details of this arrangement have not been dragged to light through the exposures of subsequent litigation. But it is not difficult to see where and how a combination of overpowering influence may have been effected, and a guess might even be hazarded as to its objects and its victims. The fact that a settlement had been arrived at was intimated in the papers of the 26th of December. On the 19th of the same month a stock dividend of eighty per cent in the New York Central had been suddenly declared by Vanderbilt. Presently the legislature met. While the Erie ring seemed to have good reasons for apprehending hostile legislation, Vanderbilt, on his part, might have feared for the success of a bill which was to legalize his new stock. But hardly a voice was raised against the Erie men, and the bill of the Central was safely carried through. This curious absence of opposition did not stop here, and soon the two parties were seen united in an active alliance. Vanderbilt wanted to consolidate his roads; the Erie directors wanted to avoid the formality of annual elections. Thereupon two other bills went hastily through this honest and patriotic legislature, the one authorizing the Erie board, which had been elected for one year, to classify itself so that one fifth only of its members should vacate office during each succeeding year, the other consolidating the Vanderbilt roads into one colossal monopoly. Public interests and private rights seem equally to have been the victims.

## II

### STANDARD OIL REBATES <sup>1</sup>

THE apathy and inaction which naturally flow from a great defeat lay over the Oil Regions of Northwestern Pennsylvania long after the compromise with John D. Rockefeller in 1880, followed, as it was, by the combination with the Standard of the great independent seaboard pipe line which had grown up under the oil men's encouragement and patronage. Years of war with a humiliating outcome had inspired the producers with the conviction that fighting was useless, that they were dealing with a power verging on the superhuman, — a power carrying concealed weapons, fighting in the dark, and endowed with an altogether diabolic cleverness. Strange as the statement may appear, there is no disputing that by 1884 the Oil Regions as a whole looked on Mr. Rockefeller with superstitious awe.

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The effect of this dread was deplorable, for it intensified the feeling, now widespread in the Oil Regions, that it was useless to make further effort at a combined resistance. And yet these men, who were now lying too supine in Mr. Rockefeller's steel glove even to squirm, had laid the foundation of freedom in the oil business. It has taken thirty years to demonstrate the inestimable value of the efforts which in 1884 they regarded as futile — thirty years to build even a small structure on the foundation they had laid, though that much has been done.

The situation was saved at this critical time by individuals scattered through the oil world who were resolved to test the validity of Mr. Rockefeller's claim that the coal-oil business belonged to him. "We have a right to do an independent business," they said, "and we propose to do it." They began

<sup>1</sup> From The History of the Standard Oil Company, by Ida M. Tarbell, published by McClure, Phillips & Co., New York, 1904. By permission.

this effort by an attack on the weak spot in Mr. Rockefeller's armor. The twelve years just passed had taught them that the realization of Mr. Rockefeller's great purpose had been made possible by his remarkable manipulation of the railroads. It was the rebate which had made the Standard Oil Trust, the rebate, amplified, systematized, glorified into a power never equaled before or since by any business of the country. The rebate had made the trust, and the rebate, in spite of ten years of combination, Petroleum Associations, Producers' Unions, resolutions, suits in equity, suits in quo warranto, appeals to Congress, legislative investigations — the rebate still was Mr. Rockefeller's most effective weapon. If they could wrest it from his hand they could do business. They had learned something else in this period — that the whole force of public opinion and the spirit of the law were against the rebate, and that the railroads, knowing this, feared exposure of discrimination, and could be made to settle rather than have their practices made public. Therefore, said these individuals, we propose to sue for rebates and collect charges until we make it so harassing and dangerous for the railroads that they will shut down on Mr. Rockefeller.

The most interesting and certainly the most influential of these private cases was that of Scofield, Shurmer & Teagle, of Cleveland, one of the firms which, in 1876, entered into a "joint adventure" with Mr. Rockefeller for limiting the output and so holding up prices. The adventure had been most successful. The profits were enormous. Scofield, Shurmer & Teagle had made thirty-four cents a barrel out of their refinery the year before the "adventure." With the same methods of manufacture, and enjoying simply Mr. Rockefeller's control of transportation rates and the enhanced prices caused by limiting output, they made \$2.52 a barrel the first year after. This was the year of the Standard's first great coup in refined oil. The dividends on 88,000 barrels this year were \$222,047, against \$41,000 the year before. In four years Scofield, Shurmer & Teagle paid Mr. Rockefeller \$315,345 on his investment of \$10,000 — and rebates.

After four years the Standard began to complain that their partners in the adventure were refining too much oil — the first year the books showed they had exceeded their 85,000-barrel limitation by nearly 3000, the second year by 2000, the third by 15,000, the fourth by 5000. Dissatisfied, the Standard demanded that the firm pay them the entire profit upon the excess refined; for, claimed Mr. Rockefeller, our monopoly is so perfect that we would have sold the excess if you had not broken the contract, consequently the profits belong to us. Scofield, Shurmer & Teagle paid half the profit on the excess, but refused more, and they persisted in exceeding their quota; then Mr. Rockefeller, controlling by this time the crude supply in Cleveland through ownership of the pipe lines, shut down on their crude supply. If they would not obey the contract of their own will they could not do business. The firm seems not to have been frightened. "We are sorry that you refuse to furnish us crude oil as agreed," they wrote Mr. Rockefeller; "we do not regard the limitation of 85,000 barrels as binding upon us, and as we have a large number of orders for refined oil we must fill them, and if you refuse to furnish us crude oil on the same favorable terms as yourselves, we shall get it elsewhere as best we can and hold you responsible for its difference in cost."

Mr. Rockefeller's reply was a prayer for an injunction against the members of the firm, restraining them individually and collectively "from distilling at their said works at Cleveland, Ohio, more than 85,000 barrels of crude petroleum of forty-two gallons each in every year, and also from distilling any more than 42,500 barrels of crude petroleum of forty-two gallons each, each and every six months, and also from distilling any more crude petroleum until the expiration of six months from and after July 20, 1880, and also from directly and indirectly engaging in or being concerned in any business connected with petroleum or any of its products except in connection with the plaintiff under their said agreement, and that on the final hearing of this case the said defendants may in like manner be restrained and enjoined from doing any of said acts until the expiration of said agreement, and for such other and further

relief in the premises as equity can give." In this petition, really remarkable for its unconsciousness of what seems obvious — that the agreement was preposterous and void because confessedly in restraint of trade — the terms of the joint adventure are renewed in a way to illustrate admirably the sort of tactics with refiners which, at this time, was giving Mr. Rockefeller his extraordinary power over the price of oil.<sup>1</sup>

Scofield, Shurmer & Teagle did not hesitate to take up the gauntlet, and a remarkable defence they made. In their answer they declared the so-called agreement had at all times been "utterly void and of no effect as being by its terms in restraint of trade and against public policy." They declared that the Standard Oil Company had never kept the terms of the agreement, that it had intentionally withheld the benefits of the advantages it enjoyed in freight contracts, and that it now was pumping crude oil from the oil regions to Cleveland at a cost of about twelve cents a barrel and charging them (Scofield, Shurmer & Teagle) twenty cents. They denied that the Standard had sustained any damage through them, but claimed that their business had been carried on at a large profit. "There is such a large margin between the price of crude oil and refined," declared the defendants, "that the manufacture and sale of refined oil is attended with large profit; it is impossible to supply the demand of the public for oil if the business and refineries of both plaintiff and defendant are carried on and run to their full capacities, and if the business of the defendants were stopped, as prayed for by the plaintiff, it would result in a still higher price for refined oil and the establishment of more perfect monopoly in the manufacture and sale of the same by plaintiff." To establish such a monopoly, the defendants went on to declare, had been the sole object of the Standard Oil Company in making this contract with them, and similar ones with other firms, to establish a monopoly and so maintain unnaturally high prices,<sup>2</sup> and

<sup>1</sup> See Appendix, Number 42, Standard Oil Company's Petition for Relief and Injunction.

<sup>2</sup> See Appendix, Number 43, Answer of William C. Scofield *et al.*

certainly Scofield, Shurmer & Teagle knew whereof they swore, for they had shared in the spoils of the winter of 1876 and 1877, and at this very period, October, 1880, they were witnessing an attempt to repeat the coup.

The charge of monopoly Scofield, Shurmer & Teagle sustained by a remarkable array of affidavits — the most damaging set for the Standard Oil Company which had ever been brought together. It contained the affidavits of various individuals who had been in the refining business in Cleveland at the time of the South Improvement Company and who had sold out in the panic caused by it. It contained a review of the havoc which that scheme and the manipulation of the railroads by the Standard which followed it had caused in the refining trade in Pennsylvania, and it gave the affidavits of Mrs. B—— and of her secretary and others concerning the circumstances of her sale in 1878. The affidavits filed by John D. Rockefeller, Oliver H. Payne, and Henry M. Flagler in reply to the set presented by Scofield, Shurmer & Teagle are curious reading. From the point of view of our present knowledge they deny a number of things now known to be true.<sup>1</sup>

It was not necessary, however, for the defendants to have presented their elaborate array of evidence to support the charge of intended monopoly. The character of the agreement itself was sufficient to prevent any judge from attempting to enforce it. The amazement was that the Standard Oil Company ever had the hardihood to ask for its enforcement. "That it should venture to ask the assistance of a court of equity to enforce a contract to limit the production and raise the price of an article of so universal use as kerosene oil," said the Chicago Tribune, "shows that the Standard Oil Company believed itself to have reached a height of power and wealth that made it safe to defy public opinion." This case is not the only one belonging to the period which goes to support the opinion of the Tribune.

Scofield, Shurmer & Teagle were now obliged to stand on their own feet. They could refine all the oil they wished, but

<sup>1</sup> See Appendix, Number 44, Affidavit of John D. Rockefeller.

they must make their own freight contracts, and they found rates when you worked with Mr. Rockefeller were vastly different from rates when you competed with him. The agent of the Lake Shore Railroad, by which most of their shipments went, told them frankly that they could not have the rates of the Standard unless they gave the same volume of business. The discrimination against them was serious. For instance, in 1880, when the Standard paid sixty-five cents a barrel from Cleveland to Chicago, Scofield, Shurmer & Teagle paid eighty. From April 1 to July 1, 1881, the Standard paid fifty-five cents and their rival eighty cents; from July 1 to November 1, 1881, the rates were thirty-five and seventy cents respectively, and so it went on for three years, when the firm, despairing of any change, took the case into court. This case, fought through all the courts of Ohio, and in 1886 taken to the Supreme Court of the United States, is one of the clearest and cleanest in existence for studying all the factors in the rebate problem — the argument and pressure by which the big shipper secures and keeps his advantage, the theory and defence of the railroad in granting the discrimination, the theory on which the suffering small shipper protests, and finally the law's point of view. The first trial of the case was in the Court of Common Pleas, and the refiners won. The railroad then appealed to the District Court (the present Circuit Court), where it was argued. So "important and difficult" did the judges of the District Court find the questions involved to be, that on the plea of the railroad they sent their findings of the facts in the case to the Supreme Court of the state for decision, — a privilege they had under the law in force at that time.

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Now, as a matter of fact, other propositions in this same set from which the above are quoted, find that Scofield, Shurmer & Teagle offered the railroad exactly the same facilities as the Standard, a switch, loading racks, exemption from loss by fire or accident.<sup>1</sup> "The manner of making shipments for plaintiffs and for the Standard Oil Company was precisely the same,

<sup>1</sup> See Appendix, Number 45.

and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped," said Judge Atherton, of the Supreme Court, who gave the decision on the findings of fact, and he held in common with his predecessors that a rebate on account of volume of business only was "a discrimination in favor of capital," and contrary to a sound public policy, violation of that equality of rights guaranteed to every citizen, and a wrong to the disfavored person. "We hold, . . ." he said, "that a discrimination in the rate of freights resting extensively on such a basis ought not to be sustained. The principle is opposed to sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine, as contended for by the defendants, recognized and enforced by the courts, what will prevent the great grain interest of the Northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country bound together by the power and influence of aggregated wealth and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves?" Judge Atherton was scathing enough in his opinion of the contract between the Lake Shore and the Standard. Look at it, he said, and see just what is shown. In consideration of the company giving to the railroad its entire freight business in oil, they transport this freight about ten cents a barrel cheaper than for any other customer. "The understanding was to keep the price *down* for the favored customer, but *up* for all others, and the inevitable tendency and effect of this contract was to enable the Standard Oil Company to establish and maintain an overshadowing monopoly, to ruin all other operators and drive them out of business in all the region supplied by the defendant's road, its branches, and connecting lines."

Judge Atherton was particularly hard on the portion of the contract<sup>1</sup> which pledged the Standard to give the Lake Shore

<sup>1</sup> Number 20, Findings of Facts. See Appendix, Number 45.

*all* its freight in return for the rebates, and for this reason: In 1883 a new road Westward was opened from Cleveland, the New York, Cincinnati & St. Louis. It might become an active competitor in transporting petroleum for customers other than the Standard Oil Company. It might establish such a tariff of rates that other operators in oil might successfully compete with the Standard Oil Company. To prevent this, the Lake Shore road, on the completion of the new road, entered into a tariff arrangement giving to it a portion of the Westward shipments of the Standard Oil Company, on condition of its uniting in carrying out the understanding in regard to rebates to the Standard Oil Company. "How peculiar!" exclaimed Judge Atherton. "The defendant, by a contract made in 1875, was entitled to all the freights of the Standard Oil Company, and yet, say the District Court, 'for the purpose of securing the *greater part* of said trade,' they entered into a contract to divide with the new railroad, if the latter would only help to keep the rates *down* for the Standard and *up* for everybody else." Such a contract so carried out was, in the opinion of the court, "not only contrary to a sound public policy, but to the lax demands of the commercial honesty and ordinary methods of business."

Another fact found by the District Court incensed Judge Atherton. This was that the contract "was not made or continued with any intention on the part of the defendant to injure the plaintiffs in any manner." It does not "make any difference in the case," he declared. "The plaintiffs were not doing business in 1875, when the contract was entered into, and, of course, it was not made to injure them in particular. If a man rides a dangerous horse into a crowd of people, or discharges loaded firearms among them, he might, with the same propriety, select the man he injures and say he had no intention of wounding him. And yet the law holds him to have intended the probable consequences of his unlawful act as fully as if purposely directed against the innocent victim, and punishes him accordingly. And this contract, made to build up a monopoly for the Standard Oil Company and to drive its competitors from the

field, is just as unlawful as if its provisions had been aimed directly against the interests of the plaintiffs.”<sup>1</sup>

Having lost their case in the Supreme Court of the state, the Lake Shore now appealed to the Supreme Court of the United States, and the record was filed in November, 1886. It was never heard; the railroad evidently concluded it was useless, and finally withdrew its petition, thereby accepting the decision of the Supreme Court of Ohio restraining it from further discrimination against Scofield, Shurmer & Teagle.

This case, which was before the public constantly during the six or seven years following the breaking up of the Producers' Union, in which the Oil Regions presented no united front to Mr. Rockefeller, served to keep public attention on the ruinous effect of the rebate and to strengthen the feeling that drastic legislation must be taken if Mr. Rockefeller's exploit was to be prevented in other industries.

One other case came out in this war of individuals on the rebate system, which heightened the popular indignation against the Standard. It was a case showing that the Standard Oil Company had not yet abandoned that unique feature of its railroad contracts by which a portion of the money which other people paid for their freight was handed over to them! This peculiar development of the rebate system seems to have belonged exclusively to Mr. Rockefeller. Indeed, a careful search of all the tremendous mass of materials which the various investigations of railroads produced shows no other case — so far as the writer knows — of this practice. It was the clause of the South Improvement contracts which provoked the greatest outcry. It was the feature of Mr. Cassatt's revelations in 1877 which dumfounded the public and which no one would believe until they saw the actual agreements Mr. Cassatt presented. The Oil Regions as a whole did not hesitate to say that they believed this practice was still in operation, but, naturally, proof was most difficult to secure. The demonstration came in 1885, through one of the most aggressive and violent independents which the war in oil has produced, George Rice, of

<sup>1</sup> Ohio State Reports, Vol. 43, pp. 571-623.

Marietta, Ohio. Mr. Rice, an oil producer, had built a refinery at Marietta in 1873. He sold his oil in the state, the West, and South. Six years later his business was practically stopped by a sudden raise in rates on the Ohio roads — an advance of fully 100 per cent being made on freights from Marietta, where there were several independent refineries, although no similar advance was made from Wheeling and Cleveland, where the Standard refineries were located. These discriminations were fully shown in an investigation by the Ohio State Legislature in 1879. From that time on Mr. Rice was in constant difficulty about rates. He seems to have taken rebates when he could get them, but he could never get anything like what his big competitors got.

In 1883 Mr. Rice began to draw the crude supply for his refinery from his own production in the Macksburg field of Southeastern Ohio, not far from Marietta. The Standard had not at that time taken its pipe lines into the Macksburg field; the oil was gathered by a line owned by A. J. Brundred, and carried to the Cincinnati & Marietta Railroad. Now, Mr. Brundred had made a contract with this railroad by which his oil was to be carried for fifteen cents a barrel, and all other shippers were to pay thirty cents. Rice, who conveyed his oil to the railroad by his own pipe line, got a rate of twenty-five cents by using his own tank car. Later he succeeded in getting a rate of  $17\frac{1}{2}$  cents a barrel. Thus the rebate system was established on this road from the opening of the Macksburg field. In 1883 the Standard Oil Company took their line into the field, and soon after Brundred retired from the pipe line business there. When he went out he tried to sell the Standard people his contract with the railroad, but they refused it. They describe this contract as the worst they ever saw, but they seem to have gone Mr. Brundred one better, for they immediately contracted with the road for a rate of ten cents on their own oil, instead of the fifteen cents he was getting, and a rate of thirty-five on independent oil. And in addition they asked that the extra twenty-five cents the independents paid *be turned over to them!* If this was not done the

Standard would be under the painful necessity of taking away its shipments and building pipe lines to Marietta. The Cincinnati & Marietta Railroad at that time was in the hands of a receiver, one Phineas Pease, described as a "fussy old gentleman, proud of his position and fond of riding up and down the road in his private car." It is probably a good description. Certainly it is evident from what follows that the receiver was much "fussed up" ethically. Anxious to keep up the income of his road, Mr. Pease finally consented to the arrangement the Standard demanded. But he was worried lest his immoral arrangement be dragged into court, and wrote to his counsel, Edward S. Rapallo, of New York City, asking if there was any way of evading conviction in case of discovery.

Upon my taking possession of this road [the receiver wrote], the question came up as to whether I would agree to carry the Standard Company's oil to Marietta for ten cents a barrel, in lieu of their laying a pipe line and piping their oil. I, of course, assented to this, as the matter had been fully talked over with the Western & Lake Erie Railroad Company before my taking possession of the road, and I wanted all the revenue that could be had in this trade.

Mr. O'Day, manager of the Standard Oil Company, met the general freight agent of the Western & Lake Erie Railroad and our Mr. Terry, at Toledo, about February 12, and made an agreement (verbal) to carry their oil at ten cents per barrel. But Mr. O'Day compelled Mr. Terry to make a thirty-five cent rate on all other oil going to Marietta, and that we should make the rebate of twenty-five cents per barrel on all oil shipped by other parties, and that the rebate should be paid over to them (the Standard Oil Company), thus giving us ten cents per barrel for all oil shipped to Marietta, and the rebate of twenty-five cents per barrel going to the Standard Oil Company, making that company say twenty-five dollars per day clear money on George Rice's oil alone.

In order to save the oil trade along our line, and especially to save the Standard Oil trade, which would amount to seven times as much as Mr. Rice's, Mr. Terry verbally agreed to the arrangement, which, upon his report to me, I reluctantly acquiesced in, feeling that I could not afford to lose the shipment of 700 barrels of oil per day from the Standard Oil Company. But when Mr. Terry issued instructions that on and after February 23 the rate of oil would be thirty-five cents per barrel to Marietta, George Rice, who has a refinery in Marietta, very naturally called on me yesterday and notified me that he would not submit to the advance, because the business would not justify it, and that the move was made by

the Standard Oil Company to crush him out. (Too true.) Mr. Rice said: "I am willing to continue the 17½ cent rate which I have been paying from December to this date."

Now, the question naturally presents itself to my mind, if George Rice should see fit to prosecute the case on the ground of unjust discrimination, would the receiver be held, as the manager of this property, for violation of the law? While I am determined to use all honorable means to secure traffic for the company, I am not willing to do an illegal act (if this can be called illegal), and lay this company liable for damages. Mr. Terry is able to explain all minor questions relative to this matter.<sup>1</sup>

Mr. Rapallo, after consulting his partner and "representative bondholders," "fixed it" for the receiver in the following amazing decision:

You may, with propriety, allow the Standard Oil Company to charge twenty-five cents per barrel for all oil transported through their pipes to your road; and I understand from Mr. Terry that it is practicable to so arrange the details that the company can, in effect, collect this direct without its passing through your hands. You may agree to carry all such oil of the Standard Oil Company, or of others, delivered to your road through their pipes, at ten cents per barrel. You may also charge all other shippers thirty-five cents per barrel freight, *even though they deliver oil to your road through their own pipes*; and this, I gather from your letter and from Mr. Terry, would include Mr. Rice.<sup>2</sup>

Now, how was this to be done "with propriety"? Simply enough. The Standard Oil Company was to be charged ten cents per barrel, less an amount equivalent to twenty-five cents per barrel upon all oil shipped by Rice. "Provided your accounts, bills, vouchers, etc., are consistent with the real arrangement actually made, you will incur no personal responsibility by carrying out such an arrangement as I suggest." Even in case the receiver was discovered nothing would happen to *him*, so decided the counsel. "It is possible that, by a proper application to the court, some person may prevent you, in future, from permitting any discrimination. Even if Mr. Rice should compel you, subsequently, to refund to him the excess charge

<sup>1</sup> Proceedings in Relation to Trusts, House of Representatives, 1888, Report No. 3112, pp. 575-576.

<sup>2</sup> See Appendix, Number 46, Letter of Edward S. Rapallo to General Phineas Pease, receiver Cleveland & Marietta Railroad Company.

over the Standard Oil Company, the result would not be a loss to your road, taking into consideration the receipts from the Standard Oil Company."

Fortified by his counsel, Receiver Pease put the arrangement into force, and beginning with March 20, 1885, a joint agent of the Standard pipe line and of the Cincinnati & Marietta road collected thirty-five cents per barrel on the oil of all independent shippers from Macksburg to Marietta. Ten cents of this sum he turned over to the receiver and twenty-five cents to the pipe line. When Mr. Rice found that the rate was certainly to be enforced he began to build a pipe of his own to the Muskingum River, whence he was to ship by barge to Marietta. By April 26 he was able to discontinue his shipments over the Cincinnati & Marietta road. This was not done until a rebate of twenty-five cents a barrel had been paid to the Standard Oil Company on 1360 barrels of his oil, — \$340 in all.

Mr. Rice, outraged as he was by the discrimination, was looking for evidence to bring suit against the receiver, but it was not until October that he was ready to take the matter into court. On the 13th of that month he applied to Judge Baxter of the United States Circuit Court for an order that Phineas Pease, receiver of the Cleveland & Marietta Railroad, report to the court touching his freight rates and other matters complained of in the application. The order was granted on the same day the application was made. It was specific. Mr. Pease was to report his rates, drawbacks, methods of accounting for discrimination, terms of contracts, and all other details connected with his shipment of oil. No sooner was this order of the court to Receiver Pease known than the general freight agent, Mr. Terry, hurried to Cleveland, Ohio, to meet Mr. O'Day of the Standard Oil Company, with whom he had made the contract. The upshot of that interview was that on October 29, twelve days *after* the judge had ordered the contracts produced, a check for \$340, signed by J. R. Campbell, Treasurer (a Standard pipe-line official), was received from Oil City, headquarters of the Standard pipe line, by the agent who had been collecting and dividing the freight money. This

check for \$340 was the amount the pipe line had received on Mr. Rice's shipments between March 20 and April 25. The agent was instructed to send the money to the receiver, and later, by order of the court, the money was refunded to Mr. Rice. But the Standard was not out of the scrape so easily.

Receiver Pease filed his report on November 2, but the judge found it "evasive and unsatisfactory," and further information was asked for. Finally the judge succeeded in securing the correspondence between Mr. Pease and Mr. Rapallo, quoted above, and enough other facts to show the nature of the discrimination. He lost no time in pronouncing a judgment, and he did not mince his words in doing it:

But why should Rice be required to pay 250 per cent more for the carriage of his oil than was exacted from his competitor? The answer is that thereby the receiver could increase his earnings. This pretense is not true; but suppose it was, would that fact justify, or even mitigate, the injustice done to Rice? May a receiver of a court, in the management of a railroad, thus discriminate between parties having equal claim upon him, because thereby he can accumulate money for the litigants? It has been repeatedly adjudged that he cannot legally do so. Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation of individuals owning them, and to that extent private property, they are by the law and consent of the owners dedicated to the public use. By its charter and the general contemporaneous laws of the state which constitute the contract between the public and the railroad company—the state, in consideration of the undertaking of the corporators to build, equip, keep in repair and operate said road for the public accommodation, authorized it to demand reasonable compensation from every one availing himself of its facilities, for the service rendered. But this franchise carried with it other and correlative obligations.

Among these is the obligation to carry for every person offering business under like circumstances, at the same rate. All unjust discriminations are in violation of the sound public policy, and are forbidden by law. We have had frequent occasions to enunciate and enforce this doctrine in the past few years. If it were not so, the managers of railways in collusion with others in command of large capital could control the business of the country, at least to the extent that the business was dependent on railroad transportation for its success, and make and unmake the fortunes of men at will.

The idea is justly abhorrent to all fair minds. No such dangerous power can be tolerated. Except in the modes of using them, every citizen

has the same right to demand the service of railroads on equal terms that they have to the use of a public highway or the government mails. And hence when, in the vicissitudes of business, a railroad corporation becomes insolvent and is seized by the court and placed in the hands of a receiver to be by him operated pending the litigation, and until the rights of the litigants can be judicially ascertained and declared, the court is as much bound to protect the public interests therein as it is to protect and enforce the rights of the mortgagers and mortgagees. But after the receiver has performed all obligations due the public and every member of it — that is to say, after carrying passengers and freight offered, for a reasonable compensation not exceeding the maximum authorized by law, if such maximum rates shall have been prescribed, upon equal terms to all, he may make for the litigants as much money as the road thus managed is capable of earning.

But all attempts to accumulate money for the benefit of corporators or their creditors, by making one shipper pay tribute to his rival in business at the rate of twenty-five dollars per day, or any greater or less sum, thereby enriching one and impoverishing another, is a gross, illegal, inexcusable abuse of a public trust that calls for the severest reprehension. The discrimination complained of in this case is so wanton and oppressive it could hardly have been accepted by an honest man having due regard for the rights of others, or conceded by a just and competent receiver who comprehended the nature and responsibility of his office; and a judge who would tolerate such a wrong or retain a receiver capable of perpetrating it ought to be impeached and degraded from his position.

A good deal more might be said in condemnation of the unparalleled wrong complained of, but we forbear. The receiver will be removed. The matter will be referred to a master to ascertain and report the amount that has been as aforesaid unlawfully exacted by the receiver from Rice, which sum, when ascertained, will be repaid to him. The master will also inquire and report whether any part of the money collected by the receiver from Rice has been paid to the Standard Oil Company, and if so, how much, to the end that, if any such payments have been made, suit may be instituted for its recovery.<sup>1</sup>

On December 18 George K. Nash, a former governor of Ohio, was appointed master commissioner to take testimony and clear up the point doubtful in the judge's mind — to whom had the extra money paid by Rice been paid; the receiver declared that he never paid the Standard Oil Company any

<sup>1</sup> Proceedings in Relation to Trusts, House of Representatives, 1880, Report No. 3112, pp. 577-578.

part of Rice's money. Mr. Nash summoned a large number of witnesses and gradually untangled the story told above. Mr. Pease spoke truly, he had never paid the Standard Oil Company any part of Mr. Rice's money. A joint agent of the railroad and the pipe line had been appointed, at a salary of eighty-five dollars a month, sixty dollars paid by Pease and twenty-five dollars by the Standard, who collected the freight on independent shipments and divided the money between the two parties. It was from this agent that it was learned that, twelve days *after* Judge Baxter ordered Receiver Pease to bring his contracts into court, the money paid on Mr. Rice's oil had been returned by the Standard Oil Company.<sup>1</sup> While the investigation in regard to Mr. Rice's oil was going on, complaints came to Commissioner Nash from two other oil works at Marietta that they had been suffering a like discrimination for a much longer time. The commissioner investigated the cases and found the complaints justified. The Standard Oil Company had received \$649.15 out of the money paid by one concern to the railroad for carrying its oil, and \$639.75 out of the sum paid by another concern! Both of these sums were returned by the Standard.<sup>2</sup>

Of course the case aroused violent comment. In 1888 it came before the Congressional Committee which was investigating trusts, and an effort was made to explain the twenty-five cents extra as a charge of the pipe line for carrying oil to the railway. Now, the practice in vogue in the Oil Regions then and now is that the *purchaser of the oil pays the pipe-line charge*. The railroad has nothing to do with it. Even if the Standard Oil Company puts a tax on railroads for allowing them to take oil carried by its pipe lines — thus collecting double pay — the tax would not apply in Mr. Rice's case, for the oil came to the Cincinnati & Marietta road not through Standard pipes but through Mr. Rice's own pipes.

<sup>1</sup> See Appendix, Number 47, Testimony of F. G. Carrel, freight agent of the Cleveland & Marietta Railroad Company.

<sup>2</sup> See Appendix, Number 48, Report of the Special Master Commissioner George K. Nash to the Circuit Court.

### III

## THE BUILDING AND THE COST OF THE UNION PACIFIC<sup>1</sup>

IT was not long after the passage of the Act of 1862 that work under it began. The Central Pacific Railroad Company, to which the building of the western end of the line was assigned, had been organized, in 1861, under California state law. On October 7, 1862, it formally accepted the terms offered by Congress, and the work of construction began January 8, 1863.

The Union Pacific Railroad Company, which was to build the eastern part of the line, effected its temporary organization according to the terms of the act, and books for stock subscriptions were opened in the leading cities of the country. Thirty-one shares<sup>2</sup> of \$1000 each were subscribed for, and \$17,300 paid in. There the matter stopped. Railway men knew that a mile of road in Illinois cost \$33,000; in Iowa, \$35,000; in the level parts of California, \$34,000.<sup>3</sup> A considerable proportion of the able-bodied men of the country was in the army, and the prices of both labor and materials were abnormally high. Between the eastern system of railways and the initial point of the proposed road was a gap of hundreds of miles, making it necessary to carry materials by way of the Missouri River, a hazardous and costly mode of transportation. Under the circumstances, the capitalists of the country did not consider the Union Pacific a promising investment.

Meanwhile, Thomas C. Durant, of New York, a man of wide experience in railway building and of large resources, became

<sup>1</sup> From History of the Union Pacific Railway by Henry Kirke White. The University of Chicago Press, 1895. By permission.

<sup>2</sup> Forty-second Congress, third session; House Report No. 78, February 20, 1873 (Affairs of the Union Pacific Railroad Company—Mr. J. M. Wilson, Chairman), Testimony taken by the Committee, p. 604.

<sup>3</sup> *Congressional Globe*, Fortieth Congress, second session, p. 2427.

interested in the enterprise and took hold of it with characteristic vigor. He not only made a stock subscription of his own, but also secured subscriptions among his friends. To do this he advanced for them the 10 per cent required by law to be paid in before the permanent organization could be effected, and agreed to find persons to take it off their hands in case they wished to withdraw from the venture. On October 29, 1863, 2177 shares of \$1000 each had been subscribed for<sup>1</sup> and a board of thirty directors was chosen. In the list we find such names as August Belmont, of New York; C. A. Lambard, of Boston; C. S. Bushnell, of New Haven; Joseph H. Scranton, of Scranton, Pennsylvania; J. Edgar Thompson, of Philadelphia; S. C. Pomeroy, of Atchison, Kansas, besides those who were next day chosen officers. These were: President, General John A. Dix; Vice President, Thomas C. Durant; Secretary, H. V. Poor, and Treasurer, J. J. Cisco, all of New York. Immediately after organization was effected men were put to work, ground being broken at Omaha December 2, 1863.<sup>3</sup> The sum of \$218,000 which had been paid in on stock subscriptions was used up, and debts contracted for from \$200,000 to \$300,000 more. The company was so hard pressed on these debts that it finally resorted to the expedient of selling part of the materials and cars to raise funds.<sup>4</sup>

The line as first projected ran west from Omaha, but as heavy grades would thus be encountered, a somewhat circuitous route was finally settled upon, starting south from the city.<sup>5</sup> Still the first thirty or forty miles were expensive.

As this section of the road approached completion it was seen that New York capitalists were not to be induced to put the enterprise through;<sup>6</sup> work must soon cease for lack of funds. On May 12, 1864, therefore, a committee was appointed to let a contract for building one hundred miles of road.<sup>7</sup>

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 599.

<sup>3</sup> Report of the Directors of the Union Pacific Railroad Company for 1884.

<sup>4</sup> Affairs of the Union Pacific Railroad Company, p. 63.

<sup>5</sup> *Ibid.*, p. 39.

<sup>6</sup> *Ibid.*, p. 39.

<sup>7</sup> Forty-second Congress, third session; House Report No. 77, February 18, 1873 (Credit Mobilier Investigation — Mr. Poland, Chairman), Testimony taken by the Committee, p. 365.

The enactment of the Act of 1864 followed soon after this, doubling, as has been said, the funds from which to build the road.

Even then the friends of Durant were so doubtful of the success of the enterprise that they availed themselves of the offer made them when they subscribed, and Durant was made responsible for three fourths of the sum (\$2,000,000) required to be subscribed before organization was authorized.<sup>1</sup>

As a result of the labors of the committee appointed in the preceding May, a proposal was received on August 8, 1864, from H. M. Hoxie, to build one hundred miles of road at \$50,000 per mile. This matter was arranged at New York between Durant and H. C. Crane, who acted as Hoxie's attorney.<sup>2</sup> Crane was intimately connected with the Union Pacific as stockholder, director and otherwise; Hoxie was an employee of the road. Oliver Ames says distinctly that Hoxie was a man of no means,<sup>3</sup> of no responsibility.<sup>4</sup> Still Durant declares that the Hoxie contract was made in good faith.<sup>5</sup> At any rate it was accepted,<sup>6</sup> and October 4, 1864, Hoxie proposed its extension to cover the line from Omaha to the one hundredth meridian. This proposal was likewise accepted.<sup>7</sup> So H. M. Hoxie, whatever his financial standing may have been, stood bound to construct for the Union Pacific Company  $247\frac{45}{100}$  miles of road, for which he was to receive over \$12,000,000.

Aside from the relations existing between Durant, Crane and Hoxie, the terms of the contract would lead one to suspect that there was some purpose in mind other than that which appeared on the face of the matter. The contractor was specifically exempted from paying more than \$85,000 for any one bridge; the excess in price of iron above \$130 per ton at Omaha was to be borne by the Company; if required to Burnetize<sup>8</sup> ties, an

<sup>1</sup> Credit Mobilier Investigation, p. 388; Affairs of the Union Pacific Railroad Company, p. 515.

<sup>2</sup> Affairs of the Union Pacific Railroad Company, Part II, p. 2.

<sup>3</sup> *Ibid.*, p. 256.

<sup>5</sup> *Ibid.*, p. 69.

<sup>4</sup> *Ibid.*, p. 285.

<sup>6</sup> *Ibid.*, Part II, p. 4.

<sup>7</sup> *Ibid.*, Part II, p. 4.

<sup>8</sup> A process by which cottonwood ties were made more durable.

additional 16 cents per tie was to be paid; and, most important, acceptance of the contract bound the contractor to subscribe, or cause to be subscribed to the capital stock of the Union Pacific, \$500,000.<sup>1</sup>

As early as September 30, 1864, that is, some time before its extension had been voted, Hoxie had agreed with Durant to assign his contract to such parties as he (Durant) might designate. October 7, 1864, an agreement was drawn up binding its signers to take the contract from Hoxie and to subscribe for carrying it out the sum of \$1,600,000. This liability was divided as follows: Thomas C. Durant, \$600,000; C. S. Bushnell, \$400,000; Charles A. Lambard, \$100,000; H. S. McComb, \$100,000; H. W. Gray, \$200,000; etc.<sup>2</sup> According to the terms of the agreement one fourth of the sums subscribed was paid in, \$400,000 in all, and this amount was used on the road. The men who had assumed the Hoxie contract now stood in the relation of partners, liable not only for the sums subscribed, but to the extent of their fortunes. Some of them became fearful and concluded that it would be better to lose the sums already sunk in the enterprise than to go on and take greater risks.<sup>3</sup> They therefore failed to respond to the call for the second installment of their subscriptions.<sup>4</sup>

About this time, August 1865, an important step was taken in getting the brothers, Oakes and Oliver Ames, to take hold of the project.<sup>5</sup> Oakes Ames had become interested in the Pacific railway while a member of the Committee on Railroads in the House of Representatives,<sup>6</sup> and his personal influence in Massachusetts, together with his great financial strength, made him a valuable ally of those who had started the road. Plans for proceeding were again discussed, and it was agreed that the only feasible way to enlist the necessary capital was to make use of a construction company. The scheme of building railways by

<sup>1</sup> Affairs of the Union Pacific Railroad Company, Part II, p. 2.

<sup>2</sup> *Ibid.*, Part II, p. 5.

<sup>3</sup> *Ibid.*, p. 64, and Credit Mobilier Investigation, p. 365.

<sup>4</sup> Affairs of the Union Pacific Railroad Company, p. 365.

<sup>5</sup> *Ibid.*, p. 4.

<sup>6</sup> Oakes Ames Memoir, p. 5.

construction companies organized among the stockholders was not new; it had been tried successfully in Iowa.<sup>1</sup> Exhaustive contracts were not a new device.<sup>2</sup> So all the Union Pacific people had to do was to adapt to their own uses methods which others had elaborated.

It having been decided to make use of a construction company, an examination of charters followed. This led to the rejection of one which Bushnell had bought in Connecticut,<sup>3</sup> and to the choice of a Pennsylvania corporation as better meeting their needs. This was the Pennsylvania Fiscal Agency, which had been chartered to build railways in the South and West<sup>4</sup> by an act of the state legislature of Pennsylvania, approved November 1, 1859.<sup>5</sup> On the fifth of the same month books had been opened in Philadelphia and stock subscribed for.<sup>6</sup> Later it became known that the organization then effected was irregular, and it was treated as a nullity.<sup>7</sup> May 29, 1863, books were again opened, stock subscribed, the required per cent paid in, and organization properly effected.<sup>8</sup> March 2, 1864, Durant opened negotiations for the purchase of the charter rights of the Fiscal Agency, and on the following day the bargain was closed, Durant paying to the original subscribers what they had invested, they assigning their stock.<sup>9</sup> Previous to this time there had been no connection whatever between the men of the Union Pacific and of the Fiscal Agency.

On March 26, 1864, an amendatory act changed the name from the Pennsylvania Fiscal Agency to the Credit Mobilier of America,<sup>10</sup> and as such it later became widely known. Thus the Credit Mobilier became an adjunct of the Union Pacific Railroad Company.

The reason for securing such a company as the Credit Mobilier is obvious. No firm could be induced to undertake

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 164.

<sup>2</sup> *Ibid.*, p. 420.

<sup>3</sup> *Ibid.*, p. 39.

<sup>4</sup> Credit Mobilier Investigation, p. 199.

<sup>5</sup> Affairs of the Union Pacific Railroad Company, p. 7.

<sup>6</sup> *Ibid.*, p. 144.

<sup>8</sup> *Ibid.*, p. 146.

<sup>7</sup> *Ibid.*, p. 146.

<sup>9</sup> *Ibid.*, p. 147.

<sup>10</sup> Affairs of the Union Pacific Railroad Company, p. 9.

the building of the road if each member was liable to the extent of his property.<sup>1</sup> The risk was too great. But it was believed that if a company was secured in which the liability was limited to the amount of the subscription to stock, as in the Credit Mobilier, capital could be enlisted. This proved to be the case, and the necessary funds were quickly subscribed.

As a matter of convenience the offices of the Credit Mobilier were to be in New York, where the headquarters of the railway were located, but under the terms of its charter it could not cease to be a Pennsylvania corporation. To get around this difficulty, the device of a New York branch was resorted to. The corporate existence of the Credit Mobilier was maintained in Pennsylvania, the board of directors, the officers, and the executive committee being elected at meetings held in Philadelphia. This executive committee then chose from among the stockholders of the Credit Mobilier and of the Union Pacific, a number of men to constitute what they called a railway bureau.<sup>2</sup> This body had its office in a room adjoining the offices of the Union Pacific.<sup>3</sup> The executive committee attended to all the larger fiscal transactions, while the railway bureau had charge of the construction of the road, payments for work, and other details.<sup>4</sup> Under this arrangement the work progressed satisfactorily. Part of the necessary capital of the Credit Mobilier was secured by transferring to its books the subscriptions which had been made for carrying out the Hoxie contract by the men who assumed it.<sup>5</sup> They were relieved of their former obligations by the transfer of the Hoxie contract to the corporation of which they had just become stockholders. This change was made March 15, 1865,<sup>6</sup> some six months after they had taken the contract off Hoxie's hands. The transferred subscriptions, \$1,600,000, were supplemented by others, securing for the Credit Mobilier a working capital of upwards of \$2,000,000,<sup>7</sup>

<sup>1</sup> Affairs of the Union Pacific Railroad Company, pp. 39-40.

<sup>2</sup> *Ibid.*, pp. 131, 148.

<sup>3</sup> *Ibid.*, p. 153.

<sup>4</sup> *Ibid.*, p. 148.

<sup>5</sup> Credit Mobilier Investigation, p. 366.

<sup>6</sup> Affairs of the Union Pacific Railroad Company, p. 64.

<sup>7</sup> Credit Mobilier Investigation, p. 366.

and the work, which otherwise must have stopped within sixty days, was pushed vigorously.<sup>1</sup>

But note how incongruous was this arrangement. The Credit Mobilier was nominally a Pennsylvania corporation, while at the Pennsylvania office no business was done. The New York concern was in form only a branch of the Pennsylvania corporation, yet it transacted all the business which the Credit Mobilier ever had. The Union Pacific Railroad was being built, not by the Union Pacific Company, but by the Credit Mobilier, and the Union Pacific officers simply got the resources into available shape and turned them over to the Credit Mobilier. The United States bonds it sold and transferred the cash. Sometimes it turned over the proceeds of the sale of first-mortgage bonds, sometimes the bonds themselves.

This state of affairs was in part due to the unfortunate looseness with which the Pennsylvania legislature had framed the Credit Mobilier charter. The practice of granting charters containing almost no limitations was at that time common. Unfortunately it is not yet unknown.

Under the new impulse which the Credit Mobilier gave to the enterprise, the work of construction was carried forward so rapidly that during the year 1866 the government passed upon and accepted 270 miles of track as meeting the requirements of the law.

About the time when the road had reached the one hundredth meridian, quite a number of the stockholders of the Credit Mobilier had become large stockholders of the Union Pacific, among them Mr. Ames, Mr. Dillon, and Mr. Duff. Naturally they desired to be represented on the Union Pacific board, and Oliver Ames and two or three others, at the election of October 3, 1866, went into the directory of the Union Pacific.<sup>2</sup> From this time on there were two factions among the Union Pacific people, one headed by Durant, the other by Oakes Ames. Durant's claim to leadership lay in the importance of what he had already accomplished. Ames had yet to win his spurs. It

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 659.

<sup>2</sup> *Ibid.*, p. 598.

has repeatedly been said that the struggle between Durant and Ames was due to their different views as to the Union Pacific enterprise and their different motives in taking it up. Durant is said to have believed that the road would be a commercial failure, and that the only money to be made out of it was to be made on construction contracts; while Ames believed in the future of the road and looked to the legitimate business of the road after its completion for his profit. The evidence as to contracts made by these men for construction, however, does not exhibit any great rapacity on Durant's part, nor any great tenderness toward the road on Ames's part. It seems that the friction between these men was rather of a personal nature. Durant carried the enterprise as far as his resources would allow, and then had to give way to Ames. Whoever had succeeded him as leader would probably have aroused Durant's jealousy and had his opposition to contend with.

Be that as it may, the decided friction between the two parties manifested itself repeatedly when the letting of contracts was under discussion, and the execution of several engagements which had been formally entered into was prevented. Of this sort were five which deserve attention. Their history shows the internal difficulties of the company, which were at times so serious as to carry the questions into court. It also shows the evolution of the terms of the contract under which the most difficult parts of the road were built, the Ames contract.

The first of these never-executed agreements is known as the Boomer contract.<sup>1</sup> Late in 1866 Durant made a contract with L. B. Boomer, of Chicago, which called for the building of 150 miles of road, beginning at the one hundredth meridian. East of the North Platte River the price stipulated was \$19,500 per mile, exclusive of equipment. The bridge over that stream was to be paid for at actual cost. West of the river the price was \$20,000 per mile. By paying for work already done and giving ten days' notice, Durant could at any time terminate this

<sup>1</sup> On the books it is called the Gessner contract. Boomer appointed Gessner his agent and later sold the contract to him (*Affairs of the Union Pacific Railroad Company*, p. 69).

arrangement.<sup>1</sup> President Dix, Treasurer Cisco, and other conservative members of the board sustained Durant in his action in regard to this contract,<sup>2</sup> but it was never approved by the board as a whole.<sup>3</sup> Oliver Ames afterward declared that the Boomer contract was a secret arrangement, a bogus thing of Dr. Durant's, and that Boomer was a man of no responsibility.<sup>4</sup> At any rate, the Credit Mobilier, although it had received no new contract, continued to build the road west of the one hundredth meridian precisely as it had done east of that point. This was done in expectation of another contract on the same terms as the Hoxie contract, and as the stockholders of the Credit Mobilier and of the Union Pacific were the same persons<sup>5</sup> this expectation was not likely to prove without foundation.

Durant's move in regard to the Boomer contract having been successfully met, the next one was made by the other side. There was presented to the board of directors of the Union Pacific, on the 5th of January 1867, a resolution extending the Hoxie contract to the point then completed, namely, 305 miles west of Omaha, and authorizing the officers to settle with the Credit Mobilier for the added 58 miles at \$50,000 per mile. By a vote of eight to four the resolution was passed.<sup>6</sup> According to the Act of 1864, the President of the United States appointed five members of the board of directors of the Union Pacific who should protect the interests of the government. The four votes against the extension of the Hoxie contract were cast by government directors, one voting in favor of it.<sup>7</sup> Durant, who was absent on necessary business of the company when this resolution was passed, entered a protest against its being carried out, and also served an injunction on the officers to prevent their making the proposed payments. His objections were that, although the Hoxie contract was originally let in good faith, no one being interested in it, the Credit Mobilier and the Union Pacific had since become identical in interest,

<sup>1</sup> Affairs of the Union Pacific Railroad Company, Part II, p. 7.

<sup>2</sup> Credit Mobilier Investigation, p. 368.

<sup>3</sup> Affairs of the Union Pacific Railroad Company, p. 67.

<sup>4</sup> *Ibid.*, p. 285.

<sup>5</sup> *Ibid.*, p. 284.

<sup>6</sup> *Ibid.*, p. 67.

<sup>7</sup> *Ibid.*, p. 67.

and that this extension was simply letting a contract to themselves; that no new subscriptions to the Union Pacific stock were required because of this extension; that this strip of road, built at much less cost than the proposed price, had been accepted by the government as completed, and so that carrying out this contract would entail heavy loss upon the company, as the actual cost of this part of the road, when fully equipped, was about \$27,500 per mile. January 24, nineteen days after its passage, the order to extend the contract was rescinded.<sup>1</sup>

The condition of the finances of the two closely allied corporations made it necessary, early in 1867, earnestly to attempt measures of betterment. One form which this effort took is shown by a letter of February 13. The Credit Mobilier proposed to purchase of the Union Pacific, land-grant bonds to the amount of \$3,000,000, at 80; first-mortgage bonds to the amount of \$2,060,000, at 85; certificates convertible into first-mortgage bonds to the amount of \$750,000, at 80, these certificates to bear 6 per cent interest until exchanged. The Credit Mobilier further proposed to loan or procure to be loaned to the Union Pacific \$1,250,000 on four months' time, at 7 per cent annual interest and  $2\frac{1}{2}$  per cent commission, with first-mortgage bonds at  $66\frac{2}{3}$  per cent as security. On the other hand, the Union Pacific was to pay to the Credit Mobilier the balances due on previous debts at least as soon as the Credit Mobilier had paid for the securities named above. It was also provided that the Hoxie contract should be extended 100 miles west of the one hundredth meridian at \$42,000 per mile.<sup>2</sup> This arrangement would have given the Union Pacific \$6,001,000 of ready funds. As the contract price was considerably in excess of what this part of the road was actually costing, it would have given the Credit Mobilier a profit in hand on that part of the 100 miles of road which had at that time been completed, and an inconsiderable risk on the remainder of what the contract covered. The executive committee of the Union Pacific accepted this proposition,<sup>3</sup> but it was not carried out.

<sup>1</sup> Affairs of the Union Pacific Railroad Company, pp. 68-70.

<sup>2</sup> Credit Mobilier Investigation, p. 171.

<sup>3</sup> Affairs of the Union Pacific Railroad Company, p. 172.

However, an understanding was reached about this time that whenever a contract was entered into, it should be so placed that the benefit would inure to the stockholders of the Credit Mobilier. On the strength of this understanding the capital stock of the Credit Mobilier was increased. This was originally intended to be \$2,000,000; September 21, 1865,<sup>1</sup> it was made \$2,500,000 nominally, although not all of the new stock was taken up;<sup>2</sup> now, in February 1867, it was increased to \$3,750,000. The difficulty in getting the old subscribers to take this new stock was met in this way: for \$1000 in cash there was promised \$1000 in Credit Mobilier stock and a \$1000 first-mortgage bond of the Union Pacific. That this offer would prove attractive will appear when it is considered that the first-mortgage bonds were then worth 85, thus leaving the Credit Mobilier stock to represent 15 per cent of the price paid. On these terms the new stock was all taken and the cash turned over to the Union Pacific in payment for bonds. The \$1,250,000 thus put into the Union Pacific treasury was used to cancel a part of the \$3,500,000 or \$4,000,000 of debt which it then owed.<sup>3</sup>

Having spent this sum, things came to a standstill again almost as bad as before. The Union Pacific then allowed Bushnell to undertake the sale of a large block of first-mortgage bonds which it had on hand and on which it was borrowing money at extravagant rates of interest, up to 14½ per cent.<sup>4</sup> By wide advertising and great diligence Bushnell met with marked success, and in less than six months bonds were sold to the amount of \$10,000,000, the price being put up from 90 to 95.<sup>5</sup> Thus the financial difficulties were removed.

To carry out the tacit agreement made in February, that the Credit Mobilier stockholders should have the profits on constructing the road, attempts were made to let contracts direct to that corporation, but Durant objected on account of the identity of the two organizations and twice prevented such action by injunctions.<sup>6</sup>

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 78.

<sup>2</sup> *Ibid.*, p. 15.

<sup>4</sup> *Ibid.*, p. 41.

<sup>6</sup> *Ibid.*, p. 41.

<sup>3</sup> *Ibid.*, p. 40.

<sup>5</sup> *Ibid.*, p. 42.

One of these attempts gave rise to what is known as the Williams contract. March 1, 1867, John M. S. Williams proposed to the company to take the building of 267.57 miles of road westward from the one hundredth meridian as the initial point, the price for the first 100 miles being \$42,000 per mile, for the remainder \$45,000 per mile. As another feature of the contract Williams was to bind himself to procure subscriptions for Union Pacific stock to the amount of \$1,500,000. The board accepted his offer and gave instructions that a contract be drawn up on this basis. Williams assigned the contract to the Credit Mobilier, and the Credit Mobilier accepted the assignment. Then Durant, on March 27, entered a protest against letting this contract, stating as grounds that part of the road was already built and accepted by the government, that the price was too high, that no time limit for completing the work was specified. His protest was backed up by an injunction, so nothing was done in the matter. This protest shared the same fate as his previous one—both were expunged from the minutes.<sup>1</sup>

June 24, 1867, Williams again made a written proposal to the Union Pacific. It was this: To build the road from the one hundredth meridian to the base of the Rocky Mountains, 267.52 miles, at \$50,000 per mile, the work to be completed before January 1, 1868. The provision for a stock subscription was omitted this time. Another proposal accompanying this one was to assign the contract, if received, to the Credit Mobilier.<sup>2</sup> The June proposal, like the one made in March, came to naught. This ends the series of failures at contract making.

It had been anticipated that great difficulty and heavy expense would be met in crossing the Rocky Mountains, but during 1867 it became generally known that there was an easy route by way of the Black Hills, requiring no grade heavier than ninety feet to the mile, and knowledge of this fact greatly strengthened confidence in the completion of the road. This route lay through what had previously been called the Cheyenne Pass, Cheyenne and Sherman being located there. From this time on it was

<sup>1</sup> Affairs of the Union Pacific Railroad Company, pp. 70-71.

<sup>2</sup> *Ibid.*, pp. 162-163.

called the Evans Pass, it having been discovered by an engineer named Evans, acting under the guidance of the chief engineer of the road, General Dodge.

Meanwhile construction was being pushed. The Hoxie contract had been completed to the one hundredth meridian October 5, 1866,<sup>1</sup> and beyond that point the Union Pacific made all its bargains for work subject to any future contract which might be let.<sup>2</sup> By August 16, 1867, 188 miles more had been built,<sup>3</sup> and a letter of that date from Oakes Ames proposed the terms on which he would become responsible for building the 667 miles of road beginning at the one hundredth meridian.<sup>4</sup> The board passed a resolution the same day directing the officers to obtain the written consent of the stockholders, a provision upon which Durant insisted,<sup>5</sup> and then to ratify the contract, giving Ames the option of extending it westward to Salt Lake if he chose.<sup>6</sup> The prices specified were: 100 miles at \$42,000 per mile, 167 at \$45,000, 100 at \$96,000, 100 at \$80,000, 100 at \$90,000, 100 at \$96,000.<sup>7</sup> Thus Ames assumed a contract aggregating \$47,915,000.

These prices, although high for the eastern sections of the part which they covered, were, on the whole, perhaps not exorbitant. The rates for the western sections would undoubtedly have been made considerably higher if the eastern part with its assured profit had not been included. Moreover, this contract insured the building of the difficult portions by providing that when the proceeds of the bonds were not sufficient to pay the contract prices, the contractor should subscribe for enough stock to furnish the money for paying the balance. In other words, Ames was bound to take in stock, at par, that part of his pay which was not produced by selling the two kinds of bonds. In no other way could security have been obtained for the building of the difficult and risky portions of the road. In fact, it was impossible to let contracts to outsiders for even the

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 65.      <sup>2</sup> *Ibid.*, p. 115.

<sup>3</sup> *Ibid.*, p. 113.

<sup>4</sup> Credit Mobilier Investigation, p. 365.

<sup>5</sup> Affairs of the Union Pacific Railroad Company, p. 542.

<sup>6</sup> *Ibid.*, Part II, p. 12.

<sup>7</sup> *Ibid.*, p. 10.

easy portions of the road. John Duff, who had done a great deal of work of this sort, made repeated efforts to let contracts among experienced and competent contractors, appealing to his own subcontractors in his attempts to find some one who would do the work, but he was unable to get any one to go out there.<sup>1</sup> Horace Clarke said, in 1873, that he thought the Ames contract the wildest contract he ever knew to be made by a civilized man.<sup>2</sup> Be that as it may, the work was pushed to completion under it.

Although this contract did not intimate in its terms that any one besides Oakes Ames and the Union Pacific Railroad Company was in any way concerned in the matter, there undoubtedly existed a more or less definite understanding that the persons to profit thereby were the stockholders of the Credit Mobilier.<sup>3</sup> The arrangement by which the profits were distributed to them is described in the tripartite agreement, which was signed October 15, 1867.<sup>4</sup> General Benjamin F. Butler suggested this form of contract as obviating the difficulty which would arise if any single stockholders of the Credit Mobilier should object to the transfer of responsibility to that organization.<sup>5</sup> The party of the first part was Oakes Ames, who then held the contract, and who assigned it to the party of the second part. Seven trustees constituted the party of the second part, and they bound themselves to carry out the contract according to its terms, and to distribute the profits thereupon among those stockholders of the Credit Mobilier who should execute to them an irrevocable proxy on at least six tenths of any Union Pacific stock which they then owned, or which they in future might own. This power to vote a majority of the Union Pacific stock insured the trustees against the election of a Union Pacific board hostile to the interests of the Credit Mobilier. The men named as trustees were Oliver Ames, T. C. Durant, J. B. Alley, Sidney Dillon, C. S. Bushnell, H. S. McComb, and Benjamin E. Bates. The party of the third part was the Credit Mobilier, which guaranteed the carrying out of the contract and bound

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 493.

<sup>2</sup> *Ibid.*, p. 405.

<sup>4</sup> *Ibid.*, Part II, pp. 13-16.

<sup>3</sup> *Ibid.*, p. 5.

<sup>5</sup> *Ibid.*, p. 684.

itself to loan the trustees what funds they needed, receiving therefor 7 per cent interest and  $2\frac{1}{2}$  per cent commission.

Noteworthy changes in the standing of the Union Pacific enterprise had taken place since 1864. Then the Credit Mobilier had to be secured in order to limit liability and get enough capital to continue construction. In 1868 there was no difficulty in getting capital to take hold of the Ames contract. The proxies which were required, and which were readily given to the trustees, were so worded that they made each stockholder of the Credit Mobilier a partner in the enterprise — just what the Credit Mobilier had been made use of to avoid — and the trustees went to work with \$50,000,000 back of them. Until the connection of the Credit Mobilier with the Ames contract was known, the stock of that corporation had never had a market value. Then it immediately went far above par, and what few sales were made were at fancy figures like 260.

As has already been said, the Credit Mobilier continued to build the road beyond the one hundredth meridian, where its contract ceased, knowing that proper credit for its work would be given when the final contract was let. We have seen that when Ames's proposal was made, 188 miles had already been built. By the time he assigned the contract to the trustees, 50 miles more had been finished.<sup>1</sup> This first part of the work embraced under the Ames contract was not expensive, and what was to be paid for it was some \$2,500,000 or \$3,000,000 in excess of its cost to the builder.<sup>2</sup> So the trustees, with this sum in hand, made haste to carry out their obligations.

As Ames did not wish to extend his contract beyond the 667 miles which it originally covered,<sup>3</sup> Durant, to avoid delay, made a contract in November 1868, with James W. Davis, a subcontractor, to build the remainder of the road. The Davis contract took the Ames contract as its basis, and an accompanying agreement provided for its assignment to the same trustees who executed the Ames contract. A resolution of the board of directors of the Union Pacific approved Durant's action, and a committee

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 114.

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

<sup>3</sup> *Ibid.*, p. 4.

was appointed to obtain the necessary consent of the Union Pacific stockholders.<sup>1</sup> Thus without any change of machinery the work went on.

Construction on the western part of the road was pushed with unprecedented vigor, winter not being allowed to stop work. There were several reasons for this haste. Public opinion, which the government directors voiced, urged it.<sup>2</sup> To put capital into the road and postpone its productiveness by not opening it to traffic until 1875, the limit set by the Act of 1864, would have crushed the company under the accumulation of interest. The Salt Lake business and a "governing point" for the traffic of that region was a prize to be gained only by rapid work.<sup>3</sup> Late in the construction period the desire to meet the Central Pacific as far west as possible became a motive. So the work was done with marvelous speed. Four or five miles of track were laid per day, and items of expense which should have been \$600 per mile were made \$1500 instead.<sup>4</sup> By such methods the Union Pacific and the Central Pacific were joined May 10, 1869.<sup>5</sup>

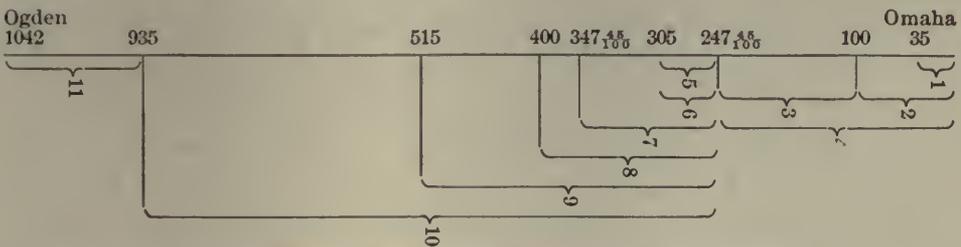
<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 17.

<sup>2</sup> *Ibid.*, p. 664.

<sup>3</sup> *Ibid.*, p. 563.

<sup>4</sup> *Ibid.*, p. 510.

<sup>5</sup> The facts of the construction period thus far related may be brought together by the aid of the accompanying diagram :



1. Built by Union Pacific Company, largely with Durant's money.
2. Hoxie Contract.
3. Hoxie Contract Extension.
4. Assigned to Credit Mobilier.
5. Built by Credit Mobilier.
6. First proposed extension to Hoxie Contract.
7. Proposed Hoxie Contract extension, coupled with purchase of \$6,000,000 of securities.
8. Boomer Contract.
9. I. Williams Contract of March 1, 1867.  
II. Williams Contract of June 24, 1867.
10. Ames Contract.
11. Davis Contract.

This saving of six years of the time allowed by the law for completing the road doubled the cost to the builders. By increasing the working force the chance of accidental delays was increased, and the costliness of such delays likewise increased. Just before the Ames contract was let, the Union Pacific was obliged to borrow money in New York to use on the road, for which it paid 18 or 19 per cent.<sup>1</sup> By pushing the road out beyond the bounds of civilization and not waiting for the slower pace of the settler, it often became necessary for one half the force to stand guard while the other half worked.<sup>2</sup> Hundreds of workmen were killed by the Indians.<sup>3</sup>

Thus far the managers of the enterprise were responsible for the increased cost; they could have avoided it by adopting a different policy. But there were other items of needless cost which they could not avoid. For these the government alone was to blame.

The requirement that only American iron be used on the road increased the cost \$10 for every ton of rails laid.<sup>4</sup> An incident, typical rather than intrinsically important, is that of two government directors who insisted that a cut should be made through each rise in the Laramie plains, giving the track a dead level, instead of conforming it to the profile of the ground. As snow blockades made it necessary to refill these cuts later, there was a waste of from \$5,000,000 to \$10,000,000. At the crossing of the North Platte, machine shops were called for which cost perhaps \$300,000. To the company they were not worth three cents.<sup>5</sup> Another of a worse sort concerned a government commissioner, Cornelius Wendell, appointed to examine the road and report whether or not it met the requirements of the law, who flatly demanded \$25,000 before he would proceed to perform his duty. As a considerable section of road awaited acceptance, and as acceptance must precede the drawing of subsidies, his demand was paid in the same spirit in which it was made — as just so much blood money.<sup>6</sup> Such results were

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 252.

<sup>2</sup> *Ibid.*, p. 431.

<sup>3</sup> *Ibid.*, p. 494.

<sup>4</sup> Credit Mobilier Investigation, p. 255.

<sup>5</sup> Affairs of the Union Pacific Railroad Company, p. 432. <sup>6</sup> *Ibid.*, p. 471.

bound to follow when the government made its power to appoint commissioners a means of distributing political patronage.<sup>1</sup>

As steps toward answering the question, What did the building of the Union Pacific yield as profit? the capitalization and the cost must be considered.

The property, at the close of the period of construction, stood burdened with four kinds of bonds — United States bonds, its own first-mortgage bonds, land-grant bonds, and income bonds. Of the government bonds there were issued the full quota — \$27,266,512 on 1038.68 miles of road.<sup>2</sup> The aggregate of first-mortgage bonds was slightly less than this sum, \$27,213,000.<sup>3</sup> Of land-grant bonds there were outstanding \$10,400,000, and of income bonds, \$9,355,000. Thus the total indebtedness represented by the four kinds of bonds was \$74,204,512.

The stock of the road subscribed for when organization was effected was slightly in excess of the \$2,000,000 required,<sup>4</sup> and was owned in various quarters. As early as December 1, 1864, the Credit Mobilier began to buy in these shares, and succeeded in acquiring almost all of them.<sup>5</sup> By the time the Ames contract was let, the \$2,000,000 had increased to about \$5,000,000.<sup>6</sup> Under the Ames and Davis contracts the trustees subscribed, at various times as the work proceeded, according to the terms of those contracts, for \$30,096,000 of stock,<sup>7</sup> and when the road was done the stock issued was \$36,762,300. Thus the total capitalization of the road was \$110,966,812.

But this sum does not represent the cost of the road. From the books of the Union Pacific and the Credit Mobilier, it appears that the expenditures by the Union Pacific directly amounted to \$9,746,683.33; and that the actual expenditures under the Hoxie, Ames, and Davis contracts were \$50,720,957.94, making the total cost of the road \$60,467,641.27.<sup>8</sup>

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 431.

<sup>2</sup> *Ibid.*, p. 738.

<sup>4</sup> *Ibid.*, p. 599.

<sup>6</sup> *Ibid.*, p. 72.

<sup>3</sup> *Ibid.*, p. 590.

<sup>5</sup> *Ibid.*, p. 20.

<sup>7</sup> *Ibid.*, p. 642.

<sup>8</sup> The figures upon which this estimate is based were compiled by Mr. Benjamin F. Ham, who was assistant secretary and treasurer of the Credit Mobilier during most of the period of its active existence (Affairs of the Union Pacific Railroad Company, p. 371).

This should be compared with the sum received for bonds, which is shown by the following table: <sup>1</sup>

First-mortgage bonds . . . . .	\$27,213,000.00	
Loss on same . . . . .	3,494,991.23	
	<hr/>	\$23,718,008.77
Land-grant bonds . . . . .	10,400,000.00	
Loss on same . . . . .	4,336,007.96	
	<hr/>	6,063,992.04
Government bonds . . . . .	27,236,512.00	
Loss on same . . . . .	91,348.72	
	<hr/>	27,145,163.28
Income bonds . . . . .	9,355,000.00	
Loss on same . . . . .	2,818,400.00	
	<hr/>	6,536,600.00
Total . . . . .		\$63,463,764.09
Cost of road . . . . .		\$60,467,641.27
		<hr/>
Excess of receipts from bonds over cost of road		\$2,993,122.82

There must be added to this sum, in order to get the cash profit on building the road, the amount which was paid to the Union Pacific by the Central Pacific for the section of road lying between Promontory, which had been settled upon as the meeting place of the two roads, and the point which is now the end of the Union Pacific, some four or five miles west of Ogden.<sup>2</sup> For this transfer of the ownership of some fifty miles of road the Union Pacific received the sum of \$2,698,620. This makes the cash profit on the enterprise \$5,691,742.82.

Then, in order to ascertain the total profit on construction, there must be added the value of the whole amount of stock issued. But what that value is cannot be said. The leading men of the enterprise seemed unanimous in the opinion that a fair valuation was 30. But Union Pacific stock has certainly

<sup>1</sup> Affairs of the Union Pacific Railroad Company, p. 590.

<sup>2</sup> Those provisions of the chartering acts which were intended to spur the eastern and the western companies to rapid building, in competition for the subsidies offered, worked only too well. Instead of bringing the ends of the road together as soon as possible, the two construction parties passed within sight of each other, and graded two parallel lines. The Central Pacific went almost to Ogden and the Union Pacific to Humboldt—points 170 miles apart—before a compromise was effected. The terms of the compromise are indicated in the text (Affairs of the Union Pacific Railroad Company, p. 11).

been above that point repeatedly, and it was down at one time to 9. It has always been a speculative stock, the sales amounting in a year to several times the total amount outstanding. But, for the sake of getting an estimate of the profits made by the builders of the Union Pacific, even though that estimate be admittedly unreliable, the valuation given above may be taken. At 30, the \$36,762,300 of stock would be worth \$11,028,690. Adding this to the cash profit as stated above, the total profit appears to be \$16,710,432.82, or slightly above  $27\frac{1}{2}$  per cent of the cost of the road. Considering the character of the undertaking and the time when it was carried through, this does not seem an immoderate profit.

## IV

### THE SOUTHERN RAILWAY & STEAMSHIP ASSOCIATION<sup>1</sup>

#### A TYPICAL POOL

ABOUT the year 1860, after the railroads from the East had been pushed through to Chicago, and the short independent roads began to be united in interest and in management, the sharp competition that has become such a marked feature in modern railroad operations first came into prominent notice. Up to that time, each road had used only its own cars, the freight and passengers being transferred at the terminus. As it became necessary for connecting roads to work together, and make through lines requiring no transfers, each road began to work for the whole line of which it formed a part as against other similar lines or combinations.

The development in the South was much slower; and combination and competition, though inevitable, came more tardily. It was not till the Southern country had been laid waste by the contending armies, and its business brought to a standstill, that really sharp competition became the rule. Then the country was found to be supplied with more roads than were needed. According to Mr. Powers, afterwards Commissioner of the Southern Railway & Steamship Association, "there was not as much business as all could do. Indeed, any one of these lines, with a comparatively small output for rolling stock, can do all the business to any, indeed to all, competitive points named in our circulars."<sup>2</sup> With such a condition of affairs, it

<sup>1</sup> From the *Quarterly Journal of Economics*, Vol. V, 1891, pp. 70-94. Circular Letters of the Southern Railway Steamship Association are simply referred to hereafter as Circular Letters. The number preceding the title indicates the volume.

<sup>2</sup> 3 Circular Letters, 991.

was inevitable that each road should try to get all the business possible. This was done by means of rebates or open cutting of rates, which soon brought them to a ruinously low range. At this stage of events, agreements to restore and maintain rates were not infrequently made; but, as Mr. Fink subsequently remarked in one of his reports to the Association, these agreements were generally made by the managers "with the purpose merely of practising deception upon each other. Starting from a higher scale of rates, they secured, for a short period at least, some remuneration for the work performed, until the low rates were reached again."<sup>1</sup> Mr. Fink estimated that by means of these rate wars the gross earnings of the Southern railroads were reduced about forty-two per cent below what regular rates would have yielded.<sup>2</sup> This forty-two per cent was in many cases equal to the whole net earnings which could have been derived from the competitive business at the regular rates, showing that the business was really unprofitable. The roads in the South were, in consequence, practically worthless to their owners. The following language was used in 1876 by a committee of the stockholders of the Central Railroad & Banking Company of Georgia: "It is conceded that the property of your stockholders is on the brink of being sunk forever; and the bankruptcy of a number of your roads is imminent, if not even now a fact."<sup>3</sup> This was the condition of affairs which led to the formation of the Southern Railway & Steamship Association.

Several isolated attempts were made to bring about a division of business before the final comprehensive scheme was adopted. Thus, in 1873, the roads running out of Atlanta, the Central, the Georgia, the Western & Atlantic, and the Atlanta & Charlotte Air Line, agreed upon divisions of the cotton business.<sup>4</sup> The accounts were kept by the superintendent of the Western & Atlantic, and were settled after some delay and dispute. This agreement covered only the cotton season of 1873.

On December 21, 1874, a meeting of the Southern roads was held at Macon, Georgia, to devise some permanent means of

<sup>1</sup> 1 Circular Letters, 277.

<sup>2</sup> 1 *Ibid.*, 278.

<sup>3</sup> 2 *Ibid.*, 338.

<sup>4</sup> 22 *Ibid.*, 1619 (Report of the General Commissioner).

settling the difficulties that were constantly arising between them. Adjourned meetings were held in January, 1875, when an agreement was drawn up and a provisional division of business agreed upon for the principal competitive points. Several meetings for perfecting the agreement were held during 1875; and on October 13 of that year Mr. Albert Fink was elected General Commissioner.<sup>1</sup> This was in itself a favorable omen for the experiment; for Mr. Fink had been General Superintendent of the Louisville & Nashville Road, and was familiar with the railroad business of the South. Furthermore, it was largely on a plan laid down by him in a letter to the president of the convention that the Association was formed. He accepted office only for the purpose of organizing the pool and setting it in motion, and served but six months. Notwithstanding his short term of office, it is to Mr. Fink that the Association owes much of its success. The Southern Association was his first experiment in arranging railroad pools and agreements, and was, in fact, with one exception, the first practical pooling arrangement in this country.<sup>2</sup>

The Association, as its name implies, was intended to include all of the Southern transportation companies. Any road south of the Ohio and Potomac Rivers and east of the Mississippi could become a member. Any steamship company connecting these roads with Boston, Providence, New York, Philadelphia, or Baltimore was eligible. Its main object was to remedy the evil of excessive competition, which was working the destruction of all Southern roads, by maintaining rates and securing a fair distribution of business. To accomplish these ends, an annual convention was held, to which each road sent a representative. This convention elected the President, a permanent General Commissioner, a Secretary and Auditor, a Board of Arbitration, and an Executive Committee. It voted on the admission of new members, and adjusted all matters that could not be determined by the General Commissioner, a two-thirds vote being necessary for any action.

<sup>1</sup> 1 Circular Letters, 18.

<sup>2</sup> The exception was the so-called "Omaha Pool," first formed in 1870 between the Burlington, Rock Island, and North-Western Roads.

The Commissioner had general charge of the business of the Association, but referred to the convention, or to the managers of the roads interested, whatever delicate matters he did not feel able himself to deal with. His decisions, orders, recommendations, statistics, together with the minutes of the conventions and committee meetings, were communicated to the various roads by means of circular letters. These have been collected, and the twenty-four volumes in which they are preserved form the chief source of information regarding the history of the Association.

The practice of referring details to the convention, adopted in the first agreement, proved cumbersome and impracticable. Accordingly, there were occasional informal meetings of the various managers; and in 1883<sup>1</sup> an Executive Committee was appointed, consisting of the manager or executive officer of each of the principal lines in the Association. This Executive Committee was given jurisdiction over all matters relating to the joint traffic, but could act only by unanimous consent. It could delegate to subcommittees jurisdiction over matters especially committed to their charge. Such a subcommittee was the Rate Committee; though a Rate Committee, with powers derived from a different source (the convention), had existed for several years before this. Having charge, in the first instance at least, of rates and classifications, this subcommittee became one of the most important branches of the organization. It consisted of the general freight agents of each of the lines in the Association. The Rate Committee, like the Executive Committee, could act only by a unanimous vote; and any member could demand that a question be referred to the Executive Committee.<sup>2</sup> This condition of a unanimous vote was probably meant to prevent any combination or clique of lines from bettering themselves at the expense of the others. But the result, as might be expected, was that it was often impossible to reach a decision, even on comparatively unimportant matters. The question would then go to the Executive Committee, where a similar state of affairs was likely to be met, and finally to the Board of Arbitration.

<sup>1</sup> 22 Circular Letters, 352.

<sup>2</sup> See the Agreement, Articles 7 and 10.

This involved much time and expense, even in cases where a majority vote in either committee should have been amply sufficient. But it may be said, on the other side, that by this reference of the matter to arbitration the dissenting roads were sure of an entirely impartial decision, and would be much more likely to abide by it than when outvoted in the committees.

By the first agreement (1875),<sup>1</sup> provision was made for reference of any disputes that might arise to the Commissioner as arbitrator. Then, if any member disapproved of his decision, the matter was referred to outsiders selected by the contestants in the case. In one case, Mr. Charles Francis Adams was so chosen as referee.<sup>2</sup> But this scheme of bringing in strangers, busy with affairs of their own, was not always practicable. Accordingly, some years later, an Arbitrator was elected as a permanent officer of the Association. His duty was to receive written arguments, and, in connection with the Commissioner, to decide all cases that might be referred to him. At the ninth annual convention,<sup>3</sup> October 24, 1883, the number of the Arbitrators was increased to three, the present number.

As soon as possible after the completion of the organization and the election of the Commissioner, a permanent division of business was agreed upon for Atlanta, Augusta, and Macon. This was put into effect on November 19, 1875. Each road was expected to carry, as nearly as possible, the appointed amount. In case the exact proportions could not be secured, one half a cent per ton per mile was allowed each road for any excess carried by it, to cover the expense of carriage; and the remainder of the revenue was paid to the Commissioner to be transferred to the credit of those roads carrying less than their proportions.<sup>4</sup> Daily returns of the competitive business were made to the Commissioner, whose duty it was to publish monthly tables of the amount of freight carried by each road.

This would have done very well if all the roads had honestly performed their part. But such was not the case. Down to

<sup>1</sup> 1 Circular Letters, 7.

<sup>2</sup> 14 *Ibid.*, 35.

<sup>3</sup> 14 *Ibid.*, 45.

<sup>4</sup> This was changed later. Twenty per cent of the revenue was allowed in the last years of the pooling arrangement.

July 31, 1876, when Mr. Virgil Powers took the place of Mr. Fink, only 62½ per cent of the merchandise balances had been settled.<sup>1</sup> The remaining 37½ per cent, and all the balances on cotton, still remained unpaid. A compromise was arranged for the remainder, and the amount agreed upon was at last nearly all paid. But, as the same trouble was likely to recur, the Commissioner proposed that each road should deposit to his order a certain percentage of the revenue on each waybill of pooled business. In June, 1877, a convention of the roads agreed to a deposit of twenty per cent.<sup>2</sup> In 1887, in his annual report,<sup>3</sup> the Commissioner was able to say that "since 1877 all balances have been paid and rates thoroughly maintained, except for about a month from February 14 to March 15, 1878, during which time there was a war of rates between the roads."

At the outset the pool covered only the business with the Eastern cities. The Western business was not pooled till the year before the Interstate Commerce Act was passed. On this unpooled business, rates were being constantly cut, and there was much complaint both by the roads and by the public. To remedy this evil, another organization of Southern roads was formed in 1886, known as the "Associated Roads of Kentucky, Alabama, and Tennessee,"<sup>4</sup> and the pooling arrangement, which had operated so successfully with the Eastern business, was extended to the business to and from the West. In 1887, the new organization was united with the Southern Railway & Steamship Association; and the Commissioner of the former Association, Mr. J. R. Ogden, was elected Vice-Commissioner of the latter and given charge of the Western business.<sup>5</sup>

One further point in the history of the organization needs to be spoken of before we turn to its practical workings. The agreement contemplated putting both passenger and freight business under the rules of the Association. At first, however, freight traffic alone was regulated. In 1885 the Commissioner

<sup>1</sup> 21 Circular Letters, 1679.

<sup>3</sup> 21 *Ibid.*, 1620.

<sup>2</sup> 3 *Ibid.*, 861.

<sup>4</sup> 21 *Ibid.*, 1620.

<sup>5</sup> 22 *Ibid.*, 138, 1621. At the end of the year, however, this office of Vice-Commissioner was abolished.

was asked to submit a plan for bringing the passenger business under the control of the Association, and in November a plan was submitted to the Executive Committee.<sup>1</sup> It was never acted on by the Association as such; but it was taken in hand by the roads, and another Association was formed, called the Southern Passenger Association. It is distinct more in name than in practice. The two Associations are composed of the same roads, and the same person is their General Commissioner. The Southern Passenger Association is now practically a part of the Southern Railway & Steamship Association.

So much for the history and general organization of the Association. The Commissioner, the Executive and Rate Committees, and the Arbitrators are the effective parts of the machinery; and to their functions and the modes of exercising them we will now turn.

The General Commissioner has always been the executive officer of the Association. His duty was primarily to carry out all laws passed by the convention or the committees. But it went beyond this. He had a conditional legislative power. By written authority he was actually made a special agent of each of the roads, and was supposed to look after the interests of all alike. One of his most important duties was, in connection with the Auditor, to collect and publish accounts of the business transacted, and statistics on any other matters that would be of assistance to the roads. As an example of this function, we may mention certain tables in regard to the capacity of the different Tank Line cars for the transportation of oils. It had often been impossible to ascertain the exact weight of shipments of oil; and it was arranged that in future the capacity of the cars, as given in these tables, should be taken as the basis in calculating the charges.<sup>2</sup>

The Commissioner and Auditor were to keep accounts of the business done. To enable them to do this the agents of the initial roads were ordered to forward daily to the Commissioner copies of all waybills of through business.<sup>3</sup> At the same time,

<sup>1</sup> 17 Circular Letters, 1622; 18 *Ibid.*, 193.

<sup>2</sup> 20 *Ibid.*, 107; and 22 *Ibid.*, 391.

<sup>3</sup> See the Agreement, Article 18.

they were to deposit in bank to the order of the Commissioner twenty per cent of the revenue from such business. The accounts, which were to be made out and published monthly, were divided into nine tables. Table A showed the movements of merchandise during the month from each Eastern city to all division points; the route, amount performed in pounds and revenue, allowance for carriage and net revenue to be divided, percentages and revenue allotment, excess in the amount carried, and the cash deposited to the order of the Commissioner.<sup>1</sup> Table B gave similar information for the two months previous, enabling a manager to tell whether his road was gaining or falling behind the other lines. Tables C and D gave similar information about the cotton business. E and F showed the gross revenue and balances for the month at each point and at all points combined, for merchandise and cotton respectively.

<sup>1</sup> By way of illustration, I give the Commissioner's Table A for October, 1882, on New York traffic:—

NEW YORK TO ATHENS, GA.	Gross Pounds	Gross Revenue	Allowance for Transportation	Net Revenue Di- vided. Debit	Per cent agreed on for Each Line	Net Revenue Al- lotted. Credit	Revenue in Ex- cess. Net Debit	Revenue in Defi- cit. Net Credit	General Com'r's Deposit, 20%
Name of Road and Route									
N. E. R.R. via Pied. A. L. . .	149,687	\$1,045.85	\$209.17	\$836.68	57.5%	\$1,029.69 . . .	\$193.01		\$201.55
Ga. R.R. via Savannah . .	18,800	181.85	36.37	145.48	17.	304.43 . . .	158.95		34.18
Ga. R.R. via Charleston . .	149,332	971.94	194.39	777.55	17.	304.43 \$473.12 . . .			194.12
Ga. R.R. via A. C. L. . . .	2,205	22.11	4.42	17.69	5.1	91.33 . . .	73.64		4.43
Ga. R.R. via Port Royal . .	2,280	16.70	3.34	13.36	3.4	60.88 . . .	47.52		3.34
Totals . . .	322,304	\$2,238.45	\$447.69	\$1,790.76	100%	\$1,790.76	\$473.12	\$473.12	\$437.62

To keep these various accounts, of course a larger force of clerks was necessary, entailing a considerable expense. This expense was met, first, by a yearly membership fee of \$300 for each road, and, second, by assessments on the various roads in proportion to their revenue from competitive business. For the year ending May 31, 1889, the expenses of the Association were a little more than \$51,000.

G gave the gross revenue and balances for merchandise and cotton combined, at all points, and the cash deposited for the month. This is the table upon which the settlements were made. H gave the gross revenue from merchandise and cotton, and the two combined, for the two months previous. I gave the amount of the Commissioner's deposits, where deposited, the character of the business on which deposit was made, and by whom it was made. In 1883 another set of tables was added, showing the movements of cotton factory goods. By means of these various tables, the manager of each road was enabled to see at a glance just what business there was to compete for, and what share his road was getting. They showed him, also, the basis on which the percentages of division were calculated.

Having informed the roads by means of these tables of the amount of their indebtedness, and of the business from which it arose, the Commissioner and Auditor acted as clearing-house agents for the settlement of the accounts. The twenty per cent deposit of the debtor companies was applied as far as possible to paying their balances, and sight drafts were drawn by the Commissioner for any excess. The deposits were relied on, however, to pay the greater part of the indebtedness. In September, 1884, — to take a month at random, — out of the sixty lines (routes) for which accounts were kept, twenty-one had carried more than their share of freight. Out of these twenty-one, ten had deposits large enough to cover all indebtedness. With five more, the excess was less than \$100; while only six of the twenty-one owed more than \$100 in addition to what their deposits would cover. The deposit practically assured a prompt settlement of all balances. Whatever remained of the twenty per cent after paying the debts was returned monthly to the depositing companies.

The Commissioner's accounts and statements obviously could not be accepted as conclusive unless the right was given him to examine the books of any member of the Association, as a safeguard against fraudulent or irregular reports. This right was given by Article 18 of the Agreement. Some instances

of the mode in which it was enforced will serve to illustrate the practical working of the Association. In the fall of 1886, one of the Inspectors, at the order of the Auditor, attempted to examine the books of the Alabama Great Southern Road at Chattanooga, in order to trace some cotton shipped from Atlanta. The officials of the road refused to allow this examination; and the matter was brought up in the Executive Committee. A vote of censure on the road was there passed, and the action of the Alabama Great Southern in this case was treated by the committee simply as a breach of the agreement.<sup>1</sup> In 1883, however, the power was more vigorously exercised. It had been charged that rebates were being paid on compressed cotton via the Atlantic ports; and the Commissioner was instructed by the Executive Committee to examine the books of the railroad companies and the steamship companies carrying to and from these ports, for the purpose of ascertaining whether such rebates had been paid.<sup>2</sup> Another case, even more striking, came up in July, 1885.<sup>3</sup> The matter of rates and rebilling from the West was under discussion. The Rate Committee requested the Commissioner to examine the rebilling records of the Nashville, Chattanooga & St. Louis Railroad, and to report the extent of such business, making a separate statement of each class of freight rebilled, under what divisions and to what points; and also a statement of the quantity of similar business shipped at Nashville rates. The examination was made, and a report of fifteen or more printed pages presented a few weeks later.<sup>4</sup>

<sup>1</sup> 20 Circular Letters, 121.

<sup>2</sup> 14 *Ibid.*, 213.

<sup>3</sup> 17 *Ibid.*, 1625.

<sup>4</sup> 18 *Ibid.*, 364. Other statistics were collected by the Commissioner. Among them were some that must have been gathered in any case; but the matter was much simplified when one man gathered the information for all the roads. Such, for example, were the tables of the "arbitraries" charged by the Northern roads. The Southern Association made rates to New York, Providence, Boston, and other cities. To find the rates on cotton (the chief North-bound business) to the interior New England manufacturing town, the arbitraries given in these tables were added to the regular Boston rates, and gave a desirable uniformity in the rates.

We turn now to another important part of the Commissioner's functions. The object of the Association was primarily to maintain rates. Theoretically, this was done; but in practice there were many irregularities. Goods were often classified wrongly or were underweighed. Shippers often misrepresent the goods when the railroad agents are unable to ascertain for themselves their quality and class. Often the agents are willfully negligent; by not being too watchful in classifying and weighing, they cut rates and draw the traffic to their lines. To remedy this evil, in 1886 (July 16) the Commissioner was empowered<sup>1</sup> to appoint two Inspectors of Weights and Classifications. The same experiment had been tried by the South-western Association, and some others, and had proved very successful.<sup>2</sup> The need that had existed for some such check is shown by the following table of the work accomplished by the Inspectors in the first year after they were appointed:<sup>3</sup>—

	NUMBER OF SHIPMENTS CORRECTED	WEIGHT CORRECTED	INCREASE IN REVENUE
Oct. 1, 1886, to June 1, 1887	10,173	11,992,037	\$32,057.35
One month, May, 1887 . .	1,829	1,649,348	5,112.21

This of itself shows a substantial increase in revenue. But the effect of the new method was much greater than the figures of corrections would indicate. "The knowledge that checks have been provided makes shippers more careful than they would be otherwise. Hence attempts to evade the classification are not so numerous as they formerly were, or as they would be, did not the shippers know that we were watching to prevent irregularities."<sup>4</sup> Whenever the Commissioner suspected that fraudulent practices were being followed, he would

<sup>1</sup> 19 Circular Letters, 1717. The number of Inspectors has since been increased.

<sup>2</sup> 19 *Ibid.*, 1689.

<sup>3</sup> 21 *Ibid.*, 1627.

<sup>4</sup> Letter from J. W. Midgeley, Commissioner of the South-western Association, to Mr. Powers, in 19 *Ibid.*, 1690.

send an Inspector to examine and, if possible, stop them. The Inspectors were also sent to examine the books of a company, if it was suspected that business was done without being reported. In 1886, the East Tennessee, Virginia & Georgia road was charged with failing to report all the cotton carried to Brunswick. An Inspector examined the books of the company, and watched the shipments for some time, in this case without bringing to light any irregularity.

\* \* \* \* \*

The second important part of the machinery of the Association consists of the Executive Committee and the Rate Committee, whose formation and powers have already been described. We may now examine some particular cases illustrative of these powers. It will be most convenient to describe them irrespective of whether they came up in the Rate Committee or Executive Committee. The reader will remember that the Executive Committee is the higher court, as it were, and that any matter can be appealed to it from the Rate Committee.

Of course, the first duty of the Rate Committee is to make rates to and from the competitive points. This statement seems simple, but it involves more than appears at the first glance. It brings up the questions of (1) division of the business on which rates have been made; (2) differentials between different towns; (3) classification of goods.

A fixed rate having been agreed upon for the competitive business, a division of the business follows almost of necessity. There are always differences in the position or equipment of the competing roads. The best equipped and most convenient road would naturally get most of the business. This would ordinarily lead to a cutting of rates, and that, too, as is usual in such cases, by the road least able to give low rates. The only way to prevent a continual struggle is to assure the weaker road a certain proportion of the business. In the early days of the Association, divisions were agreed upon by the managers of the roads for eight points, — Atlanta, Augusta, Macon, Newnan, West Point, Opelika, Montgomery, and Selma. These divisions

were based on the normal carrying capacity of the roads, as shown in the business of the years past. For example, the divisions for Atlanta were :<sup>1</sup>—

	COTTON	MERCHANDISE
Central R.R. . . . . .	31.7%	26 $\frac{2}{3}$ %
Georgia R.R. . . . . .	31.7	40
Atlantic & Richmond Air Line R.R. . . . .	15.8	16 $\frac{2}{3}$
Western & Atlantic R.R. . . . . .	15.8	16 $\frac{2}{3}$
Atlanta & West Point R.R. . . . . .	5.	....

As new roads were built, new allotments of business were demanded or allotments at new places. In 1886, the merchandise business of 15 places was pooled; and at Atlanta the number of pooled routes had grown from 5 to 12.

Again, some of the old lines, by offering greater facilities, might feel able to demand a larger proportion of the business. There was an important case of this sort in 1884, on the Montgomery cotton business. From January, 1881, to August, 1883, the business had been pooled on the following percentages :<sup>2</sup>—

East Tennessee, Virginia & Georgia, via Calera . . . . .	14%
Louisville & Nashville, via Mobile, and North, via Louisville & Nashville . . . . .	48
Montgomery & Eufaula and Western of Alabama . . . . .	38

In 1883, the East Tennessee became dissatisfied with this division, and refused to renew the agreement, asserting that, to avoid paying the heavy penalty of \$1.50 per bale for excess carried, they had been compelled to turn over to their competitors several thousand bales of cotton. In 1883-84, the cotton business from the point in question was not pooled, and the East Tennessee Road carried over twenty-seven per cent of the business, even though full Association rates had been charged. The next year, the matter came up in the Executive Committee,

<sup>1</sup> 1 Circular Letters, 1.

<sup>2</sup> Argument before the Board of Arbitration by the East Tennessee, Virginia & Georgia Railroad.

where an attempt was made to settle it. This failing, it went to the Arbitrators for a decision. They gave a division of the business as follows:<sup>1</sup>—

	NEW DIVISION	OLD
East Tennessee . . . . .	22%	14%
Louisville & Nashville . . . . .	42	48
Western of Alabama and Montgomery & Eufaula	36	38

A similar dispute arose at about the same time over the Selma cotton business. The Executive Committee agreed to refer the matter to an arbitrator. Immediately thereafter, the initial roads entered into a contract, as provided in Article 20 of the Agreement, dividing the business according to his decision.

In close connection with the making of rates is the matter of classification. In the classification of the Association, as it stood in 1886, there were specified in round numbers 1250 articles. The classification of the Association was adopted in the first instance by the annual convention of 1878, but since then has been in the hands of the Rate Committee. Even the first classification was drawn up and proposed by a committee corresponding to the present Rate Committee.<sup>2</sup> The result has been a single uniform classification for the whole Southern territory, in place of the chaos which had existed before. "In July, 1876, the Eastern lines had two classifications. The Savannah line used 9 classes, and the Charleston and Coast lines worked 5 and 6 classes. The Western lines were using the 'Green Line' classification, with a number of 'Specials.'"<sup>3</sup> The advantage of having one classification for all the roads in

<sup>1</sup> 16 Circular Letters, 41.

<sup>2</sup> 19 *Ibid.*, 1687.

<sup>3</sup> 19 Circular Letters, 1687. In January, 1888, a committee was appointed by our Association to confer with the Joint Classification Committee of the Trunk Lines Association and others, for the purpose of ascertaining what possibility existed for establishing a uniform classification. But thus far none has been agreed upon; and it is questionable whether an agreement is reached at an early day, unless the Interstate Commerce Commission succeeds in bringing enough pressure on the roads.

a section of the country, or even for the whole country, if that were possible, is obvious.

The third task involved in the making of rates is the fixing of the differentials between neighboring cities. The general object in fixing the differentials was to make such rates that all cities similarly situated should have the same chance in the competition of trade. Thus a New York merchant would have to pay the same rates, whether he shipped his goods to Chattanooga, Dalton, Rome, Atlanta, Athens, Gainesville, Anniston, or Birmingham. On the other hand, Boston, New York, Philadelphia, were treated alike, the rates to and from any given Southern point being the same. Norfolk, Portsmouth, and Richmond formed another group; and, again, Charleston, Port Royal, Savannah, and Brunswick. From the West, rates were the same from Chicago to all Eastern ports, such as Jacksonville, Fernandina, Charleston, Port Royal, Savannah, and Brunswick; and in like manner from either Louisville or Memphis to the Eastern ports. These examples suffice to indicate the principle on which differentials were adjusted. As new roads were built, of course new places had to be considered. Thus, in 1886, the East Tennessee, Virginia & Georgia moved, in the Rate Committee, that the rates to and from Rockmart, Georgia, be the same as to Cedartown, Georgia. The two towns were between ten and twenty miles apart, and were doing substantially the same business. The motion was lost, and the matter referred to the Executive Committee. There again it was lost, and referred to the Arbitrators, who finally directed that the rates to Rockmart be the same as to Rome and Cedartown.<sup>1</sup> At another time, in August, 1886, a question arose as to differentials on cotton from Atlanta to New Orleans and to Savannah. The old differentials had been 7 cents per 100 pounds in favor of Savannah. The motion now was to reduce this to 3 cents. The Arbitrators finally agreed on a compromise differential of 5 cents, the rate to New Orleans being put at 50 cents per 100 pounds, and that to Savannah at 45 cents.<sup>2</sup>

\* \* \* \* \*

<sup>1</sup> 20 Circular Letters, 102, 114, 121, 467.

<sup>2</sup> 19 *Ibid.*, 2041; 20 *Ibid.*, 47.

Next, as to the relations of the Association lines with outside lines. In its dealings with these, the Association has not always been lenient, especially when there was competition between its members and the outsiders. In the revised rules adopted in December, 1876, there was the following provision: "If any company owning or operating a line of transportation in connection with the roads or lines of companies, parties hereto, shall refuse to become a member of the Association, . . . such line shall, as far as practicable, be refused recognition as part of a through line."<sup>1</sup> This practically amounted to boycotting such lines. The provision for a boycott does not appear in the later agreement, though there have been recent cases where some such rule would, no doubt, have been very acceptable to the roads of the Association; as when the Chesapeake & Ohio was completed to Newport News, and again when the Kansas City, Memphis & Birmingham was built to Birmingham. These roads, being outside of the Association, often reduced the rates and materially affected the business. Following up the policy here indicated, the Commissioner, in August 6, 1877, issued a circular authorizing greatly reduced rates to Boston and New York and to the South Atlantic ports. The reason was that the steamship lines to and from these points had refused to cooperate with the Association in carrying out its rules. Within three weeks, all the steamship lines had signed the agreement, and rates were restored.<sup>2</sup>

Equally troublesome was the competition of the river steamboat lines. Often the differentials between two cities, such as St. Louis and East Cairo, were sufficient to allow the boats to cut rates, even after paying insurance. To prevent this, in the case referred to, the rates to East Cairo were advanced enough to make them the same as to Cairo, across the river, thereby reducing the differential between East Cairo and St. Louis two cents per hundred pounds on Classes C and D, and four cents per barrel on flour.<sup>3</sup> Rates to Selma and Montgomery from the East were cut in a similar way by the New York & Mobile Steamship Line. The Association changed their rates to stop

<sup>1</sup> 2 Circular Letters, 598.

<sup>2</sup> 3 *Ibid.*, 897, 931.

<sup>3</sup> 22 *Ibid.*, 131.

this : a few months later, the competition being withdrawn, they were restored.<sup>1</sup>

Next, let us turn our attention to the Board of Arbitration. The duties of the Board have already been referred to in a general way, and in treating of other subjects examples have incidentally been given of the exercise of their powers. It will be helpful to give other examples, illustrating the variety of cases which come before them.

Perhaps the matter that they had to consider most often was that of making divisions of the competitive business, of which one instance, the Montgomery and Selma pool settlement, was considered on page 110. We there saw that the business from these points was pooled from 1881 to 1883. Then, the East Tennessee, Virginia & Georgia becoming dissatisfied with its share, a year followed without the pool. But in 1884 a new division of the business was made by the Arbitrators, whereby the East Tennessee got more nearly the share of the business which it demanded. In 1886 this question came before the Arbitrators again, but in a more complicated form.<sup>2</sup> In the first place, the East Tennessee renewed its claim for a larger share of the business from these points. This was refused in the case of Montgomery, but from Selma the East Tennessee got one per cent in addition to its previous proportion. Next, when the annual convention was held, and the agreement presented as usual for signature, the Louisville & Nashville refused to sign, on the ground that balances to the amount of \$5500 were still due it on the Montgomery and Selma pool. This amount was said to be due from the East Tennessee Road, which had lately gone out of existence by the foreclosure of a mortgage, becoming the East Tennessee, Virginia & Georgia Railway Company, and from which, in consequence, the money could not be collected. After having been debated in the Executive Committee, the matter was handed over to the Arbitrators to decide what balances, if any, were due, and how they were to

<sup>1</sup> 22 Circular Letters, 21.

<sup>2</sup> 20 *Ibid.*, 53.

be divided among the several roads. They agreed that the condition of the accounts before August 31, 1884, the date on which the second pool went into effect, was too confused to admit of any unraveling. Hence all balances before that date were considered canceled and discharged. On the business after that date, they decided that a balance of \$3700 was due the Louisville & Nashville, of which the East Tennessee should pay \$976. These had been the precise amounts given in the accounts of the Commissioner.<sup>1</sup>

Another typical case, showing the usefulness of the Arbitrators in allotting business, came up in connection with the traffic of Memphis and Nashville. There had been no previous division of the business to these points, and rates had been irregular for a considerable time. Finally, in the summer of 1885, an agreement was made by the East Tennessee and the Louisville & Nashville Roads, the competitors for the business, to maintain rates, and ask the Arbitrators to allot the business. This allotment was made, and accepted by both roads.<sup>2</sup>

Another case, of a somewhat different sort, was brought up by the Louisville & Nashville<sup>3</sup> at a later period. Under the terms of the agreement, the initial lines from any point "shall determine the subdivisions of its business among its connections." The Louisville & Nashville claimed that it was not receiving from the Atlanta & West Point, with which it connected, its fair share of the Atlanta cotton, and so demanded an apportionment, extending back to 1877, or at least to 1884-85. The two claims differed only in regard to the dates. In regard to the second, it was decided that a fixed share of the Atlanta & West Point business should be given to the Louisville & Nashville, the share to be determined by the Auditors' accounts.<sup>4</sup> In regard to the other, no division was allowed, on the grounds that previous to January 17, 1883, the part of the Louisville & Nashville for which this claim was made had not been a member of the Association; that until 1884 it would not have been obliged to pay over the receipts from any

<sup>1</sup> 19 Circular Letters, 2048; 20 *Ibid.*, 55.

<sup>2</sup> 17 *Ibid.*, 1490.

<sup>3</sup> 20 *Ibid.*, 263.

<sup>4</sup> 20 *Ibid.*, 469.

excess that might have fallen to it, and so should have no claim for a deficit of freight carried.<sup>1</sup>

At another time, cotton was shipped from a local station to Montgomery, a competitive point, on a local bill of lading, and then reshipped. This was held to be subject to the regular pool divisions of Montgomery, according to the agreement, by which "all business from or to a crossing or meeting point of two or more roads is joint traffic."<sup>2</sup>

A peculiar dispute, important as illustrating one of the articles of the agreement, came before the Board in 1887.<sup>3</sup> It is spoken of here because closely connected with the matter of allotting business. Complaint had been made that the East Tennessee Road had carried some cotton from Selma which it had failed to report for division. In answer, it was stated that the cotton in question had been refused by the Western Railroad of Alabama and others. The Board held that, according to Article 19 of the Agreement, this cotton should be eliminated from the pool, and need not be reported. Article 19 reads that "each company shall be required to carry, as nearly as possible, its allotted proportion," but "no penalty shall be imposed upon a company or line which carries an excess for the benefit of any company that refuses or willfully neglects to carry its allotted proportion." The object of the article was, of course, to keep all the roads in the market. Its effect was to maintain competition, notwithstanding the pool.

Next in number, but less varied in character, are the cases relating to rates and differentials. Some of these have already been noted. The dispute on New Orleans and Savannah differentials, and the difficulties that arose in regard to steamship competition on Ohio and Mississippi River points, were in the end settled by the Board. Another, of a typical sort, referred to the rates on iron from Birmingham and Chattanooga to St. Louis.

<sup>1</sup> These cases are interesting in another way. The Louisville & Nashville were dissatisfied with the decisions given, and asked for a reopening of the matter. Although such a thing may be allowed, and at times has been allowed, the Arbitrators at this time did not see fit to grant the rehearing. 21 *Ibid.*, 1107.

<sup>2</sup> 18 *Ibid.*, 205.

<sup>3</sup> 22 *Ibid.*, 155.

The Kansas City, Memphis & Birmingham Railroad (not in the Association) had lowered the rate from Birmingham to St. Louis. This was followed by a similar reduction by the Association, but without a corresponding reduction in the Chattanooga rates. On reference to the Arbitrators, it was decided that the old differential of \$0.25 between Chattanooga and Birmingham should continue in force, and that any reduction in the rates from Birmingham should carry with it a corresponding reduction from Chattanooga.<sup>1</sup>

The Board of Arbitration have also had to consider various other questions. Points in regard to classification have arisen, as in regard to the classification of cotton goods, the products of Southern mills. These goods, which had been favored from the outset by a low classification, were raised in 1887 from the sixth to the fourth class, thereby removing in part one of the "protective" features of the system. Even after this change the rates were not the same both ways. Cotton factory goods South bound went first class at \$1.14 per 100 pounds, New York to Atlanta. Southern factory goods North bound paid now, as fourth class, instead of 49 cents, 73 cents. "But for the fact," the Arbitrators said, in giving their decision, "that finer fabrics shipped South bound, some of them without discovery, are of higher value than those shipped North bound, the still existing inequality would be unjustifiable."<sup>2</sup> Another minor matter which has come before the Board has been the question of insured bills of lading. The agreement provides, in Article 21, that, "in cases of competition between all rail lines and water or combined water and rail lines, the latter may assume the whole burden of insuring against marine risks; and bills of lading to that effect may be issued." The Arbitrators decided that such insured bills of lading could be issued in competition with all rail lines only, the privilege not applying between two combined rail and water lines.<sup>3</sup> Another decision was as to what were "initial roads" under the agreement. It was held that the phrase "initial roads" is not used in distinction to "terminal roads," but that the responsible road at any given point was

<sup>1</sup> 22 Circular Letters, 363.    <sup>2</sup> 20 *Ibid.*, 261; 21 *Ibid.*, 1105.    <sup>3</sup> 16 *Ibid.*, 45.

the initial road.<sup>1</sup> Still another decision was in regard to "milling in transit," which was held to be a form of rebilling, and hence prohibited.<sup>2</sup>

These cases have been cited, not because in themselves of great importance, but because they show the great variety of matters which the Arbitrators had to deal with. They are all types of cases that come up often. They include, either directly or indirectly, nearly all the matters over which the Association had control. The task of the Board has been by no means an easy one. There were many masters to please, but it has performed its functions without even a suspicion of dishonesty or partiality.

We have thus far been considering in detail the organization and workings of the Association as it existed down to 1887. It now remains to note the changes which were brought about by the Interstate Commerce Act passed in that year.<sup>3</sup> The Act, first of all, stopped the pooling feature of the Association. The twenty per cent deposits were no longer called for, and the payment by one road to another of any excess of earnings above allotment was put an end to. The daily reports of business and the monthly tables, however, were still continued. The act also required some readjustment of rates. While each road reported its rates to the Interstate Commerce Commission directly, and aimed to keep them, as nearly as possible, in line with the decisions of that Commission, yet the through rates were, in the main, discussed and arranged as before by the Rate Committee of the Association. At first the committee of the Association had some difficulty in arranging rates so as to compete successfully with the river lines, and therefore asked for and obtained a suspension for ninety days of the long and short haul clause of the act. The delay was asked mainly to give time for rearranging the rates without disturbing more than was necessary the interests of the shippers. In making the rearrangement, a partial reclassification was necessary; and the number of places

<sup>1</sup> 18 Circular Letters, 203.

<sup>2</sup> 20 *Ibid.*, 259.

<sup>3</sup> Later details are given in the Cincinnati Freight Bureau Cases, *vide*, p. 154, *infra*. — ED.

to which through rates were made was somewhat reduced, in order to get more nearly in line with the requirements of the law. The Association was recognized by the Interstate Commerce Commission, and on several cases has been summoned to appear before it for examination.<sup>1</sup> Complaints have also been brought against the Association before the Commission for illegal rates. At times the roads over which the rates in question were given were joined as codefendants, but this has not always been the case.

The prohibition of pooling by the Interstate Commerce Act by no means put an end to the power of the Association. It still continues, having for its object the saving of revenue by the maintenance of rates. Though pool divisions may no longer be made use of, fines may be imposed to accomplish the same end. A recent case will serve to show how this is done.

In the adjustment of rates from Eastern cities to Southeastern points, it happened that a combination of "locals" from Baltimore to some of these cities was less than the through rates. This was not true from any other city. The business, however, from Baltimore to the points in question was so small that the differences amounted to nothing. One road, without consulting the Commissioner, reduced the through rates to this combination of locals, thereby affecting all through rates from New York and Philadelphia to these Southeastern points. The Interstate Act requires that notice of reductions of rates must be filed in the office of the Commission at least three days before they can go into effect ; for the Southern Railway & Steamship Association territory the practice is that all changes are made by the Rate Committee, and notice is given at Washington by the Commissioner. The road in question filed notice of reduction itself with the Interstate Commerce Commission, and then notified the Commissioner of the Southern Association of the intended change. That officer at once notified the other roads interested ; but these protested against the reduction as unnecessary and unwise, and asked that the rates be not put into effect until the matter could be brought before the Rate Committee. Notwithstanding

<sup>1</sup> Interstate Commerce Reports, Vol. III, p. 7.

these remonstrances, the rates were put into force as originally planned. Thereupon one road, connecting with a water line, in retaliation issued insured bills of lading; another refused to authorize the reduced rates except upon order of the Commissioner of the Association. Permission to use them was given by the Commissioner; but, as the rates were not officially announced by him, the road still refused to use the reduction or honor bills of lading given at the reduced rates. The matter was very soon brought before the Executive Committee in the shape of a complaint. It was referred by them to the Arbitrators, who, after a full hearing, ordered the original rates to be restored and the offending road to pay a fine of \$5000. The fine was paid, and rates were restored within three weeks after the original reduction.

This brings the Association to date. Let us now glance at its effects on the roads and on the public.

There can be no doubt that it has been of great benefit to the roads. It has secured the maintenance of rates, and an adjusted share of business to each line. The stronger lines would perhaps have survived without this division, but hardly the weaker. As to the public, the regularity of rates has helped the growth of the country, and this has reacted in turn to the benefit of the roads. The traffic has increased enormously. The amount of cotton carried North from all pooled points has more than doubled from 1877-78 to 1885-86. In 1877 it was 297,284 bales; in 1885-86 it was 664,337.<sup>1</sup> The amount of merchandise South bound has increased in the same time from seventy million pounds to nearly one hundred and fifty million. The total of merchandise carried South in this time to all pooled points was 1,285,928,199 pounds, with a revenue of \$8,747,564. The total cotton revenue in this time was \$10,905,000. During the same period, the General Commissioner's deposits, referred to above, were \$1,636,270.

The regularity of rates under the Association is the advantage to the public most distinctly due to its existence. Changes in rates have been comparatively few, and secret rebates rare.

<sup>1</sup> 21 Circular Letters, 1626.

Such changes as took place have been almost uniformly downward; and, as reasonable notice of these has been given, there has been no offset to the public's gain such as sudden and fluctuating reductions bring. The figures in the note show the steady downward trend of rates, and prove at least that the effect of the Association was not to maintain rates at any fixed high figure.<sup>1</sup> Certainly, that part of the public which had to do directly with the roads in the Association was not dissatisfied with the working of the pool. In 1887 the General Commissioner was able to say at the annual convention, "There has been literally no complaint of discrimination between individuals in the same locality, and very little (and that unreasonable) between localities."<sup>2</sup>

In conclusion, a word may be said of the effect of the Association in maintaining rather than suppressing competition among the roads. Pools of which this is a type do indeed limit competition. But it is a great mistake to suppose that they destroy competition. On the contrary, as Professor Seligman puts it,<sup>3</sup> "they maintain the advantages of a healthy competition. Each of the roads will still attempt to procure as much

<sup>1</sup> The rates, in cents per hundred pounds on numbered classes, from Eastern cities to Atlanta on the first of January of each year, have been: —

YEAR	FROM BOSTON, NEW YORK, PHILADELPHIA						FROM BALTIMORE					
	1	2	3	4	5	6	1	2	3	4	5	6
1875 . .	170	140	110	90	80	70	160	130	100	85	75	65
1876 . .	170	140	110	90	80	70	160	130	100	85	75	65
1877 . .	145	125	100	80	60	50	135	115	90	75	55	45
1878 . .	145	125	100	80	60	50	135	115	90	75	55	45
1879 . .	125	110	85	75	60	45	119	104	79	71	56	41
1880 . .	125	110	85	75	60	45	119	104	79	71	56	41
1881 . .	126	110	94	81	65	41	119	104	89	76	61	46
1882 . .	100	90	80	70	58	48	95	85	75	65	55	45
1883 . .	125	108	93	78	63	49	118	102	88	73	59	46
1884 . .	114	98	86	73	60	49	107	92	81	68	56	46
1885 . .	114	98	86	73	60	49	107	92	81	68	56	46
1886 . .	114	98	86	73	60	49	107	92	81	68	56	46
1887 . .	114	98	86	73	60	49	107	92	81	68	56	46

<sup>2</sup> 21 Circular Letters, 1620.

<sup>3</sup> In the *Political Science Quarterly*, Vol. II, p. 389.

business as can possibly be obtained in a fair and open manner." The agreement of the Southern Railway & Steamship Association was renewed yearly, and most of the contracts for division of business were made for a year at a time. Each road tried to carry as much freight as possible, so that, when the next contract came to be made, it might demand with some show of reason a larger share of the business. It is competition of this sort that is advantageous, not competition with little or no regard to the cost of doing the work.

HENRY HUDSON

## V

A CONTRIBUTION TO THE THEORY OF  
RAILWAY RATES<sup>1</sup>

IN the volume supplementary to his history of English railway experience, Professor Cohn has put forth an explanation of railway rates which has won wide acceptance, and which deserves, both for its ingenuity and for the deservedly high reputation of the author, a more careful examination than it seems yet to have received.<sup>2</sup> Briefly, the theory is that railway charges are fundamentally like taxes. All experience shows that railway rates are based, not on the cost of furnishing the service, but on what the purchasers can afford to pay. As with taxes, the fundamental principle is that of *Leistungsfähigkeit*: the charge based on what the purchaser can afford to pay, and ought to pay. The problem, therefore, is at bottom one of ethics, involving those considerations of public policy and of right and wrong which recur in the discussions of proportional or progressive taxation. The need of considering the means and the purchasing power of the passengers and shippers forces itself on every railway manager, whether he will or no; and it supplies a striking illustration of the indestructible link between ethics and economics.

To illustrate by particulars. Cohn explains that the higher rates for first-class than for third-class passengers are not due to the more expensive accommodations of the former, — and here he is right beyond doubt, for the difference in expense would account for only an insignificant part of the greater charge, — but to the fact that their means are larger. They can afford to pay more; railway managers feel that in justice they

<sup>1</sup> From the *Quarterly Journal of Economics*, 1891, Vol. V, pp. 438–465.

<sup>2</sup> G. Cohn, *Die englische Eisenbahnpolitik der letzten zehn Jahre*, Leipzig, 1883, pp. 65–84.

ought to pay more; and they are charged higher fares. Cohn makes no detailed application of this ethical point of view to freight rates, and his tentative style leaves it somewhat uncertain how far he would carry the principle. Indeed, there is an obvious difficulty here. It is true that freight charges are usually lower on cheap goods than on dear goods; but how are we to know that cheap goods — say, coal and ores — serve for the consumption of the poor? Cohn, however, expresses more than once his conviction that the fundamental question is the same, — one of justice and *Leistungsfähigkeit*. He cites, as a clear illustration, a provision of the German Constitution by which railroads are obliged, in times of scarcity, to carry food at low rates. Again, he notes that in regard to ordinary freight the means of the ultimate consumer are not easily ascertained: therefore, we have, in freight rates, only a rough and uncertain adaptation of the charge to his means, analogous to those common and unavoidable devices in taxation, by which we resort to some rough and more or less uncertain indication of the taxpayer's means. It suffices for his general conclusions that the adjustment of passenger fares on the basis of the means of the passengers, and of freight rates according to what the goods will bear, have something in common. Both sets of discriminations have an ethical basis: they rest on a sense of justice which the railway manager cannot put aside.

The conclusion finally deduced from this train of reasoning is that public ownership of railways, or at least public regulation of rates, is imperative. In every case where we find the price of a set of services inevitably settled on grounds of right and wrong, no private person or corporation can be safely intrusted with their administration. So delicate a process, involving necessarily an interference in distribution of a more or less arbitrary sort, must be in the hands of the State.

I have referred at some length to the speculations of the distinguished professor at Göttingen, because they are significant of a general trend of opinion among writers on railway topics, that the principles which apply to the ordinary phenomena of exchange do not help us in explaining the returns which a

railway gets for its services. Sometimes this rejection of the general theory of value is stated in so many words. Sometimes it is rather implied, in statements that railway rates are governed, not by cost of service, but by value of service; by what the traffic will bear; by cost to some extent and by other things to a greater extent. The object of the present paper is to examine some of the characteristics of railway rates, and more especially to enter on the inquiry suggested by Professor Cohn's speculations, whether railway rates must really be explained on separate and peculiar grounds.

The central point in such an inquiry is the bearing of cost of service on railway rates. We may begin, therefore, with some consideration of the nature of a railway's expenses. Analyzing these, the most striking peculiarity is the great proportion of the total which falls to return on capital sunk. The investment of fixed capital is very large, not only in itself, but in comparison to the business done. There is a tradition in England that the turn-over of a railway — that is, its gross receipts — must be at least ten per cent of the capital invested, in order to make the enterprise profitable; and in recent years the English roads have certainly not exceeded that proportion. Where the plant is less elaborate than in England, the gross receipts form a larger percentage of the investment. The roads of the State of Massachusetts have received in recent years in gross over twenty per cent on the investment. But even at twenty per cent the proportion of turn-over to capital is, in comparison with other industries, extraordinarily small. The consequence is that a very large proportion of the gross receipts must be devoted to the payment of a return on capital at the usual rate. Return to capital thus forms by far the largest single item in the expenses of a railway. Operating expenses usually absorb from fifty to sixty per cent of the gross receipts, leaving from forty to fifty per cent for payments to capital. In the language of everyday life, we do not ordinarily speak of the whole of these payments as expenses: only the so-called "fixed charges" come under that head. But, for the purposes of economic theory, dividends enter into expenses as much as interest on

debt, in so far as the dividends yield only that return which in the long run is necessary to induce the investment of capital. If the profits on investments in railways have not proved unusually high, and if dividends and interest combined have not formed an exceptionally large return on the capital sunk, we may say that the entire payments to capital form part of the expenses necessary for yielding the railway service. The evidence is strong that railways have not been, at least in England and the United States, on the whole exceptionally profitable. Certainly, they have not yielded returns to the investors so much above those got in other directions that there is any substantial inaccuracy in the statement that the forty or fifty per cent of gross receipts which goes to interest and dividends is part of their necessary expenses. So much must be paid in the long run if railroads are to be built by private railroads, or by governments with capital borrowed from private individuals.

But this, the largest item in a railway's outgo, has no influence on railway rates: so much is admitted by all careful writers, and by all railway managers. The grounds of the conclusion are not always stated in the same way. Very often it is said that the investment in a railway plant is irrevocable; the railway is there, and cannot be moved or turned to other use; it will continue to be run so long as it yields anything over operating expenses, whether or not the excess brings the usual return to the capital invested; this return, or the need of getting it, consequently does not affect rates. The reasoning holds good for a given road or group of roads at any particular time. But, looking at railroad operations as a whole, it hardly gives a sufficient basis for the sweeping proposition that railway services are rendered quite without regard to profit on capital. In the long run, even after admitting everything that may be said of speculative building and indirect profits of projectors, railroads will not be built and run unless the capital sunk in them gets something like the return it may expect in other directions. A road once built may be maintained and operated, even though it yields little or nothing on the capital sunk in it; but new roads will not be built or old ones extended under such

conditions. Where we find the railway net steadily enlarging, new roads being built, and old ones adding branches, new tracks, and extensions, we may infer that the capital put into them expects to find and in the long run does find its account, and that rates are adjusted so as to yield to capital at least its ordinary return. Looking at the general range of rates as they develop in the long run, we cannot conclude, therefore, that return to capital may be dropped from the list of factors determining them.

But looking at any particular rate, at the charge on this or that item of traffic, we can reach the conclusion unreservedly; and this is the sense, to my mind, in which it is true and important that return to capital is not a factor in determining rates. As to any particular item of traffic, the only question is whether it pays more than the cost of moving it. If it does, the traffic is advantageous to the railway, even though the excess over operating expenses is so small that, if the same proportion held on all traffic, very little would be earned towards interest and dividends. It is a commonplace in the discussions of railway rates that different sorts of traffic contribute in very different degrees towards paying fixed charges and dividends. Some classes of traffic, of the sort that can be got only if the rates are low, contribute little: others, of the sort that will come even though rates be high, contribute much. In the rates on one article of freight as compared with those on another, or in passenger fares as compared with freight charges, the item of return to capital is indifferent. Even though the traffic as a whole is mulcted enough to yield this return, the rate on any individual part is settled without regard to it.

Looking at the matter broadly, we have here commodities produced, in part at least, at joint cost. For the explanation of the values of commodities produced under such conditions, the classic economists developed a theory which they applied chiefly to cases like wool and mutton, gas and coke, where practically the whole of the cost was incurred jointly for several commodities. But obviously it also applies, *pro tanto*, to cases where only part of the cost is joint. The conditions for its application

exist in any industry in which there is a large plant, turning out, not one homogeneous commodity, but several commodities, subject to demand from different quarters with different degrees of intensity. Under such circumstances, while part of the cost is incurred separately for the individual commodities, a part is incurred jointly for all of them. The nature of the demand, then, has a permanent effect on their values. No one commodity, of course, will be sold for less than the separate cost incurred in regard to it. Wool will not be sold for less than the cost of shearing, nor mutton for less than the cost of dressing; and in railroad operations no traffic will be carried for less than the separate cost of moving it. We may assume, for convenience in the present stage of the reasoning, that the several commodities in any one group — the several railway services in the group now under consideration — will be sold at prices which will make up a total sufficient to yield ordinary returns on the capital embarked. There will remain then a gap between the prices which must be charged to get back the items of separate cost on each commodity, and the total price which must be charged to get a return on the whole outlay; this gap representing the elements of cost jointly incurred. To this joint cost, each commodity or service will contribute in proportion to the demand for it. It will contribute more and sell proportionately high if the demand does not need to be tempted by low prices, and will contribute less and sell proportionately low if a high price tends to choke off the demand. The familiar reasoning need not be further restated: we are concerned here not so much with the theory as with its application to the case in hand.<sup>1</sup> The labor which built the railway — or, to put the same thing in other words, the capital which is sunk in it — serves equally to aid in carrying on every item of traffic, and represents joint cost for the whole of it. The traffic, on the other hand, is of very various sorts, subject to demand from different quarters with varying degrees of intensity. It is, therefore, in accord with what we might expect from general theory that the different sorts of

<sup>1</sup> The best statement of the general reasoning is in Mill's *Principles of Political Economy*, Book III, chap. xvi, § 1.

traffic contribute in very different proportions towards paying the fixed charges, or the return to capital, — the element in railway operations which represents joint cost. Traffic which will continue to come even at comparatively high rates will continue to be taxed high, and will contribute largely towards fixed charges. Traffic for which the demand is sensitive to price, and which can be got only at low rates, will contribute little.

The most complete illustration of a plant which serves to yield various services at joint cost is in a canal or common highway. Here the operating expenses are insignificant, and interest on capital is almost the only current expense. We need not therefore be surprised to find that the canal and turnpike tolls of former days were not uniform, but varied with the character of the traffic. Canal tolls, like railway charges in our own day, were lower on the bulky goods, which would be offered for transportation only if rates were low, and higher on "merchandise" of greater value, which could bear a higher charge, and which railways had not yet diverted from the canals. Similarly, turnpike tolls, as Adam Smith tells us, were higher on carriages of luxury than on wagoners' carts.<sup>1</sup>

This application of the theory of joint cost has been explained at what may seem to be tedious length, because I believe that the same principle can be applied much more widely, and can be made helpful for the understanding of the bearing on rates of all the items of railway cost. Not only the fixed capital of a railway, but a very large part, in fact much the largest part, of the operating expenses, represents outlay not separate for each item of traffic, but common to the whole of it or to great groups of it. Operating expenses also form joint cost, and necessitate an accommodation of rates to demand rather than to specific cost.

<sup>1</sup> Examples of classified tolls on canals may be found in Ringwalt's *Development of Transportation Systems in the United States*, p. 47, and in Chevalier's *Voies de Communication aux États-Unis*, Vol. I, p. 255. Compare Cohn's *Englische Eisenbahnpolitik*, Vol. I, p. 15; Vol. II, p. 475. In Sax's *Verkehrsmittel*, Vol. I, pp. 57-61, attention is called to the large proportion of plant in all transportation agencies, and to the element of joint cost in them. Here, as elsewhere in Sax's discussion, the principle of joint cost is rather implied than explicitly worked out.

To the further consideration of this extension of the theory I now proceed, resuming for that purpose the analysis of the expenses of a railway undertaking.

The operating expenses of a railway are usually divided, in the best arranged reports concerning English and American roads, into five parts: (1) maintenance of way; (2) motive power; (3) maintenance of car equipment; (4) conducting transportation; (5) general expenses and taxes. In the appended note, the proportions borne by these items are given for some English and American railways.<sup>1</sup> It will be seen that by far the largest items are for motive power and for conducting transportation, each of which accounts for between twenty-five and thirty per cent of the operating expenses. Next comes the item of maintenance of way; then, general expenses and taxes; last, maintenance of cars, which indeed is often classed, with good reason, among the expenses of conducting transportation.

But it is obvious that this analysis, interesting as it may be in showing the directions which a railway's outgo takes, helps little for the particular inquiry now in hand. It helps little in determining how far the operating expenses are jointly incurred for all the traffic or for great groups of it, and how far they are

<sup>1</sup> The figures given below are taken from the reports of the Union Pacific Railway and the Pennsylvania Railway (main line) for 1889, and of the London & Northwestern Railway for 1890. The figures state the percentage which the various classes of expenses bear to the total operating expenses. The classification of individual items is not the same for the three, though there is little difference between the Union Pacific and the Pennsylvania, except as to taxes. Between the English railway and the two American roads there are more important differences. But the figures are on a sufficiently uniform basis to serve for illustration of what is said in the text.

	PENN. R.R.	U. P. R.R.	L. & N. W.
Maintenance of way . . . . .	18.6%	18.1%	17.6%
Motive power . . . . .	26.6	33.1	26.2
Maintenance of cars . . . . .	15.0	9.5	7.1
Conducting transportation . . . . .	36.7	30.0	36.9
General expenses . . . . .	3.1*	9.0†	12.0†

\* Not including taxes.

† Including taxes.

incurred separately for separate items of the traffic. Some items, to be sure, are obviously in the nature of joint cost. Practically, all of what goes for maintenance of way is of that sort. The wear and tear of roadbed, bridges, track, fences, is chiefly the result of the disintegrating forces of nature, and goes on whether there be much traffic, little, or none at all. Such an item as the wearing away of rails is indeed partly the direct effect of the traffic; but it is impossible to apportion it in any measurable way to the particular items of traffic. For practical purposes, this item, like other expenditures for maintenance of way, is joint cost incurred for the traffic as a whole. The same holds good of the last set of expenditures, the general expenses for administration, insurance, legal expenses, and taxes (which, for the present purposes, we may consider to be "cost" as much as any other part of the railway's outgo). They are independent of the volume of traffic, and may be classed as joint cost. These two items — maintenance of way and general expenses — alone form about one third of the total operating expenses. But, looking at the items which make up the other two thirds, we find a great mass of expenditures similarly incurred for the traffic as a whole. Under the head of conducting transportation, or, in the English phrase, traffic charges, we have the expenses for switchmen and yardmen, telegraph expenses, many station expenses: practically all of them serving for the traffic as a whole. Under the head of motive power we have a large item for repairs of locomotives, and under that of maintenance of cars a similar large item for repairs of cars; both of them, it is obvious, due chiefly to wear and tear from the traffic as a whole, and not assignable to any particular part of it.

Professor Sax, in the chapter of his treatise on railways which discusses rates, has approached the problem from a point of view very close to that suggested in this paper, and has endeavored to ascertain how great a proportion of the expenses of a railway is independent of the volume of traffic. He distinguishes the "general" and the "special" costs; the former being of the expenses which must be incurred if the railway is to be operated at all, the latter those which depend more or

less on the volume of traffic. He reaches, in the rough, the surprising result that the items of "general" cost constitute one half of the operating expenses. But operating expenses themselves are only one half of a railway's outgo; the other half consists of return for capital sunk. Looking, therefore, at the whole of a railway's expenses, Sax concludes that three quarters are independent of the items of the traffic. In other words, by far the largest part of the cost of performing railway service is joint cost.<sup>1</sup>

But this by no means states the full extent to which the principle applies. Sax includes among "special" costs every expense which is affected at all by the volume of the traffic. A large proportion of these more flexible expenses are not of a sort which can be split up and charged to any particular items or groups of traffic; they vary only with the volume of business as a whole, and not even in any fixed proportion as to that. Thus among Sax's "special" costs are included switching and signaling expenses, all station expenses, water supply, telegraph expenses, payments for damages, renewal and repair of rails. No doubt such expenses expand and shrink in some degree as the volume of traffic is greater or smaller; and therefore they may fairly be classed as of a less "general" sort than those for maintenance of way and return to capital, which must be incurred in order that there shall be any traffic at all. Yet, clearly, they cannot be apportioned to the different parts of the traffic. Switching and signaling expenses, for instance, tend to increase as traffic grows; yet it is impossible to say that any given train or any given branch of the traffic entails any specific part of the expense. So as to renewal and repair of rails. Heavier and more frequent traffic pounds the rails to pieces somewhat more quickly; but it is practically impossible to say how much expense of the sort one train or a dozen trains entail.

<sup>1</sup> E. Sax, *Die Eisenbahnen*, Part 3, B, chap. ii. Practically the same proportion is pointed at by Kirkman (*Railway Accounts*, Vol. I, p. 305), when he states that about three fifths of operating expenses are incurred jointly for passengers and freight. It may fairly be inferred that most of the expenditures not assignable to one or the other of these great divisions are indispensable for conducting the traffic at all.

Figures are, indeed, sometimes given as to the average expense per train-mile for renewal and repair of rails. But, in calculating them, it is assumed, for example, that the greater speed of passenger trains offsets the greater weight of freight trains, and that a train-mile of either class can therefore be debited with the same share of this expense. The averages are purely fictitious. In fact, these expenses serve for carrying on the traffic as a whole; they cannot be charged to one part more than another. They may be classed, for all practical purposes, with those inflexible items which we have already found to constitute by far the larger portion of a railway's outgo. They swell still more the list of items of joint cost.

Even so, however, we have not stated fully the extent to which this peculiarity runs through a railway's operations. There are certain groups of traffic which entail separate and specific expenses for them alone; but there is again a large element of joint cost for the various services included within each group. The great groups are passenger and freight traffic. To each of these separately are chargeable certain expenses which, while not a large proportion of the railway's total outgo, are yet considerable in themselves. To freight service alone must be charged, for instance, wages of freight train men and engineers, fuel, repairs of freight cars and locomotives, loss and damage on freight, station expenses incurred solely for freight. If there were no freight traffic, these expenses would cease; and if a particular train were taken off, so much expenditure for wages and fuel would cease. But, obviously, for the particular train there is a large element of joint cost. A train of thirty cars may contain an assortment of various kinds of freight, coal and lumber, silks and sugar, for all of which there is one joint cost of train movement. Further, for at least a large part of the freight expenses as a whole, the same principle can be applied. A good share of the station expenses and of expense for repairs of equipment is incurred for the traffic as a whole, and cannot be split up among the separate trains and tons that go to make it up. So in regard to passenger traffic. Most of the station expenses and of the expenses for

repairs of cars and locomotives are incurred for the passenger traffic as a whole. Others are partially separable. Suburban traffic and local traffic entail certain expenses of their own, and every train causes so much outgo for wages and fuel. But for the suburban traffic as a whole, again, many expenses are joint; and for any one train, which may contain through and local passengers, commuters and casuals, practically the entire expense is joint.

Attempts have indeed been made at various times, both by railway managers and by writers on railway topics, to apportion the expenses, and assign to each item of traffic the sums which it costs. Thus it is a common practice to assign the expenditures for maintenance of way to passengers and freight, respectively, in proportion to the train mileage. The Interstate Commerce Commission has instructed the railroads of the United States, in their reports to it, to make an apportionment on this basis of their expenses for maintenance of way, and indeed for all items not separately chargeable to the one service or the other. Yet surely the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.<sup>1</sup>

Again, Mr. Albert Fink has constructed an elaborate formula for ascertaining the cost of carrying freight per ton per mile. By this the cost of each of the great divisions of railway expenditures — maintenance of way, interest, station expenses, movement expenses — is separately calculated per ton-mile. The cost of maintenance of way per ton-mile, for example, is

<sup>1</sup> See the first annual report on the Statistics of Railways in the United States, 1888, p. 19. In the days before the Interstate Commerce Act was passed the practice varied. Thus the Pennsylvania assigned one third of the joint expenses to passengers, two thirds to freight; the Erie, two fifths to passengers, three fifths to freight (Kirkman, *Railway Accounts*, Vol. I, p. 314). In all cases the division is purely arbitrary, and, it is safe to say, is never thought of by any railway manager when considering at what rates he can afford to carry passengers or freight.

reached by assigning to freight traffic that proportion of maintenance expense which freight train mileage bears to total train mileage, and then dividing by the number of ton-miles of freight moved. Other items are similarly split up, and thus we get a final figure of "cost" per ton-mile, — which represents no real thing whatsoever. No one knows better than its able and ingenious author that it does not in the least show that each ton costs so many cents to carry, in the sense that, if the ton were not there, so much expense would disappear. Such calculations have their uses. Their results for successive years help to make more clear and specific the general tendency towards reduction in railway cost and rates. But the attempt to split up a railway's expenses in this way obscures the real nature of its operations; and as a basis for fixing or criticising railway rates, the averages are useless and indifferent alike for the railway manager and for the student of economics.<sup>1</sup>

<sup>1</sup> Mr. Fink's formula is given in Ringwalt's *Transportation Systems*, p. 259. Compare the interesting analysis of the expenses of the Louisville & Nashville Railroad in his *Cost of Railroad Transportation* (Louisville, 1875), where an endeavor is made to figure out the operating expenses per ton-mile and passenger-mile. A similar careful endeavor is made for the Illinois Central in Mr. L. P. Morehouse's *Concerning the Cost of Transportation by Railroads* (New York, *The Railroad Gazette*, 1874). Mr. Morehouse goes so far as to divide the expense for maintenance of way into two parts, direct and indirect, the direct being those "due to the actual transportation" and the indirect those "due to the general operation of the road." His figures result in the following division of the maintenance expenses: —

	DIRECT	INDIRECT
Renewal of rails . . . . .	25%	—%
Joints, spikes, frogs, switches . . . . .	7	—
Ties . . . . .	6	6
Labor on track, watchmen . . . . .	21	21
Repairs and watching of bridges . . . . .	4	8
Other items . . . . .	1	1
	64	36
	} 100%	

I cannot help suspecting that this apportionment between the direct and indirect expenses rests largely on guesswork; and I doubt greatly whether in practice the so-called direct share affects rates more than the indirect.

The impossibility of reaching helpful results by investigating the specific cost of any item of railway service is nowhere better illustrated than in the curious assumptions of some European writers, who have tried to ascertain whether the fares for first-class and third-class passengers are justly apportioned to the costs of carrying the two classes respectively. In one such investigation, it was assumed at the start that a first-class passenger cost twice as much as a third-class passenger; then that a passenger car cost twice as much to move as a freight car; and, finally, that the difference in cost for different classes of freight and passengers corresponded to the differences in rates on them, — a veritable putting of the cart before the horse.<sup>1</sup> In another case, an English writer,<sup>2</sup> who wished similarly to ascertain the ratio of working expenses to gross receipts for first-class and third-class passengers respectively, began by apportioning the working expense to the different classes in proportion to the number of carriages of each class. But obviously, so long as the different carriages are always run together on the trains, this is a pure fiction. The case, in fact, is one typical of the impossibility of apportioning railway expenses. The items which are separable — such as the more expensive fitting of the first-class carriages — are insignificant. Wages of train men and engineer, the only considerable remnant of expenses which can under any circumstances be separated from “general” costs, are here incurred for all three classes of passengers together. It would be difficult to find a more complete illustration of the application of the principle of joint cost.<sup>3</sup>

<sup>1</sup> The calculation is quoted in Schreiber's *Tarifwesen der Eisenbahnen*, p. 50.

<sup>2</sup> Quoted in Jeans's *Railway Problems*, p. 265.

<sup>3</sup> The scope for the operation of the principle of joint cost evidently is wider as a railway's traffic is more varied. It applies most widely to a great trunk line, whose traffic is in great volume and of heterogeneous character. On some of our Western roads, where one item — the through carriage of agricultural produce — forms a very large part of the total traffic, there is less play for its application. A road like the Reading, whose coal traffic is (or was) of preponderating importance, must get back from the coal tonnage some considerable contribution towards meeting the joint expenses. If a railway carried one commodity only, say coal, between two terminal points only, there would be no case at all for the principle.

We may sum up the result of the preceding discussion as follows. The greater part of railway expenses is entirely independent of the traffic: it must be incurred in order to do any business at all. Of the remaining smaller part of the expenses, a large proportion consists of items which vary with the volume of the traffic as a whole. The rest contains items which, while confined to certain great groups, are yet incurred jointly for the traffic within each group. When we look at any particular car load or ton of freight, any particular passenger or group of passengers, we can find hardly an item of expense which is not incurred jointly for the entire traffic or for some large group of it. Meanwhile, as has already been noted, and as indeed is obvious, the services or commodities produced are not homogeneous: they are of very various sorts, and subject to demand from different quarters and with different degrees of intensiveness. Railways present on an enormous scale a case of the production at joint cost of different commodities. #

The application of this conclusion is obvious. As with all commodities produced at joint cost, demand has a permanent effect on values or prices (for the purposes of this investigation the terms may be used indiscriminately). We may continue to assume, as we did in discussing the mode in which return to capital affects railway rates, the conditions of free competition: that the total receipts of a railway will no more than repay the expenses, — return to capital being included among the expenses. Total receipts will then equal total cost. But that cost will be distributed among the different items of traffic according to the nature of the demand. Coal, lumber, ores, will be offered for transportation only if rates are so low that, if they were applied to the whole traffic, the enterprise would not pay. Nevertheless, if these articles yield anything over the separate expenses incurred for them alone, the road will take them, because the other expenses are incurred for the traffic as a whole, and will not cease if the heavy traffic is given up. Other goods, of greater value in proportion to bulk and weight, will be offered for transportation in much the same quantities, whether the rate be as low as on coal and ores, or a good deal

higher; and they will be charged rates which, if applied to the traffic as a whole, would yield very high profits for the enterprise. We do not usually think of the demand for the transportation of coal as small, or of that for the transportation of silk as large; but in the sense pertinent for this investigation — sensitiveness to change in prices — the demands are small and large respectively. A considerable coal traffic can be got only at low rates: a considerable traffic in dry goods will come even at high rates. Their cost is mainly joint, and the services will be sold at rates determined by the nature of the demand.

This seems to me to be the fundamental explanation of the classification of freight. All the early railroad tariffs were simple, and made little discrimination between different sorts of commodities. As time went on, experience forced on managers, whether in charge of public or of private railways, that adaptation of rates to demand which is the inevitable outcome of the peculiarities of the industry. In the early days of the Pennsylvania Railway, it was doubted whether the road could undertake to carry coal. It was argued that any freight which did not yield two cents per ton per mile must be carried at a loss. But a clear-headed officer pointed out that many general and constant expenses must be incurred, whether or not the coal was carried, and that the items which alone would be affected by the new coal business were comparatively small. The experiment was tried of carrying coal at what then seemed very low rates, and the traffic soon assumed large proportions.<sup>1</sup> In Germany, also, the early tariffs were simple; and the development of the system of classification was slow and gradual. In recent years, an endeavor has been made in the “car-space” or “natural”

<sup>1</sup> See the passages quoted in Ringwalt's *Transportation Systems in the United States*, p. 130. Coal traffic presents a case as little favorable to the application of principle of joint cost as could be selected. Coal is carried in cars which are used ordinarily for no other traffic; and roads like the Pennsylvania carry the coal from the mines on trains which usually haul no other freight. All movement expenses and car-repair expenses are therefore chargeable separately and distinctly to the coal traffic. Yet even here the joint expenses so far outweigh that the key to the understanding of rates must be sought in the principle applicable to them.

tariffs to return to the older and simpler way; and the virtual failure of the experiment supplies the latest illustration of the impossibility of fixing rates on the basis of the cost of the particular items of traffic. That tariff, first applied in Alsace-Lorraine, and afterwards extended to the adjoining parts of Germany, made a fixed charge for terminal expenses, and thereafter an equal charge per ton per mile on all goods. The reasoning was that dear goods cost no more to carry than cheap goods, and therefore should be charged no more. The vital mistake was the failure to perceive that neither dear goods nor cheap goods had, to any considerable extent, a separate cost of their own. After a few years' trial, the system was superseded by what was called a compromise tariff, but was virtually a classified tariff, in which demand, and not an assumed cost, became the prime factor in rate making.<sup>1</sup>

“Charging what the tariff will bear” is only a larger phrase for describing the general practice of which the classification of freight is a part. Wherever commodities are produced at joint cost, they are charged what the traffic will bear, — wool and mutton, beef and hides, silver and lead. We need not attempt to follow the principle to all of its applications, — to the rates on long-distance traffic as compared with short-distance traffic, to the rates on freight subject to competitions as compared with noncompetitive freight, to “back loading” (a striking case of joint cost), to special and excursion rates in passenger traffic, — all of them cases in which the explanation of apparent anomalies lies in the fact that by far the greater part of the cost of rendering the service is incurred, not for the particular traffic in hand, but for the traffic as a whole. The fierceness of railway competition, due in part to the fact that the enormous plant is irrevocably committed to that particular business, is

<sup>1</sup> For the details, consult Ulrich's *Eisenbahntarifwesen*, and more particularly the passage at pp. 283-287, where Ulrich, himself much averse to “*Werthclassification*,” yet admits the need, in the present compromise system, of a further step towards classification in the rates on freight in less than car-load lots. The new tariff is called a “reform tariff,” and did introduce reform in the way of simplifying the classification; but it is still a classified tariff, — that is, varies rates according to the nature of the demand.

increased by the same circumstance. On competitive business, as on all business, the separable cost is small. Most of the expense of doing it is incurred, in any event, in the course of carrying on the transportation as a whole; and a railway will not retire from the competitive business as long as it yields anything above the small fragment of expense directly traceable to that particular traffic.

There is one further aspect of the practice of charging what the traffic will bear of which a word may be said. That obnoxious phrase is used to describe two distinct things; on the one hand, the adaptation of rates to demand which results from joint cost; on the other hand, the adaptation to demand which results from monopoly. Thus Professor Hadley remarks that "wherever there is an industrial monopoly of any kind, there is a liability to discrimination."<sup>1</sup> For simplicity of reasoning, it has been assumed, in the preceding paragraphs, that a railroad's business is carried on under the circumstances of free competition, and that therefore in the long run total cost determines total charges. But a railroad always has a monopoly as to some parts of its traffic; and, even where competition exists, it usually ends in combination of some sort, and in charges controlled only remotely and indirectly by competition. To the extent to which the element of monopoly enters, rates are again permanently affected by demand, or by what the traffic will bear. Any particular rate may be the result of the working of the two factors of monopoly and joint cost. The general range of charges on local traffic, for instance, may be determined quite without regard to cost or competition on the monopoly principle of getting the largest net return. The apportionment of these charges among the rates for different goods and from different places must be affected by the circumstances that all the transportation is produced, more or less, at joint cost. The traffic is charged what it will bear in two distinct senses.

Returning now to the main thread of the discussion, we may note some conclusions of practical importance which follow from the principle of joint cost. Obviously, there are peculiar

<sup>1</sup> Railroad Transportation, p. 124.

difficulties in saying what is a "fair" or "reasonable" price for a commodity produced at joint cost with others. The Interstate Commerce Act prescribes that all charges shall be "reasonable and just"; and the Commission has been led by this provision, among others, to the slippery problem of directly fixing rates. If the government were to undertake to regulate the price at which pig iron or steel rails should be sold, the task would be difficult enough, but the guiding principle would be comparatively simple: let pig iron be sold for what it costs to make, "cost" including ordinary profits. But suppose it were attempted to fix the fair price for hides, horns, fat, rump, tenderloin? The complex conditions suggested by this question exist on a huge scale, in regard to railroad rates; and this even in the simplest case, where the total return got by a railroad in all its traffic is assumed to be determined by the total cost. When we bear in mind the actual situation in the United States, — on the one hand, the extraordinary complexity of the business, the constant transfer and rearrangement of industry, and the corresponding shifting in the demand for transportation; on the other hand, the monopoly element in a railroad's business, the extent to which many roads are in the position of rent-yielding natural agents, the enormous vested interests, — the difficulties of saying what are "reasonable" rates seem well-nigh insuperable. The Interstate Commerce Commission, in its interpretation of the phrase, has wisely refrained from putting the test of reasonableness in any assumed cost of services, and in practice has accepted the existing system of rate making as on the whole reasonable.

These considerations do not show, nor are they here presented with any intention of showing, that public regulation of rates is impolitic or impracticable. But they may help to make clear how delicate and difficult a task the regulation of rates must be; and they seem to me to show clearly that, of the anomalies in railroad rates which are the subject of most complaint, some at least would not disappear under the most extreme form of public regulation, — state ownership and management.

We may return now to the point at which we started, and consider again Professor Cohn's speculations as to the characteristics of a railway's operations. If the reasoning presented in the preceding pages is sound, obviously his conclusions are not tenable. If the true explanation of the apparent anomalies in the adjustment of railway rates is to be sought in the principle of joint cost, the ethical principle of *Leistungsfähigkeit* may be brushed aside, and the analogy to taxation disappears. The whole train of reasoning is doubtless but a phase of the general reaction in economics. The attempt to draw a sharp line of distinction between ethics and economics has led to a counter disposition to bring in the ethical element at every possible point of contact with economic discussion, with results, in this case at least, that are not helpful for a true understanding of the phenomena. No doubt a railway, whether in the hands of a private corporation or of the State, might fix its rates, if it chose, on some basis of justice. There is an industry, nowadays always in the hands of the State, in which some effects of public policy, as distinct from mere business expediency, can be readily seen. This is the postal service, in which the rates on printed matter, low as compared with those on written matter, are the result, in part at least, of general policy. No doubt the fact that the cost of carrying the printed matter is largely joint, helps in explaining the apparent anomaly; but the educational advantage of the community has been the main motive for the low postage on printed matter. The case is indeed one in which the motive is a general one of public policy rather than an intention of lightening the burdens of the poor; but the motive is different, and the explanation of the varying prices different, from those which we should find in the usual phenomena of exchange. But with railway rates the case is different. I trust I have succeeded in showing that the main peculiarities in railway rates, those which have appeared under government management as well as under private management, are not to be explained on a supposed basis of justice and right by which the well-to-do are charged high, and the needy are let off easily. One might as well say that the prices of rump steak and of tenderloin were fixed as a matter of mercy on the poor

consumers of rump and of tax on the rich consumers of tenderloin, and argue thence that, since the delicate business of adjusting this apportionment could not be intrusted with safety to private persons, the State should take into its hands the business of cattle raising. If the explanation of railway rates from *Leistungsfähigkeit* is untenable, the particular argument for government ownership which rests on it must also go; and to my mind the case for public management is not much weakened by the loss.

No doubt it is often said in popular discussions — Professor Cohn takes pains to cite utterances of the sort — that it is “right” that expensive goods should pay high rates, and cheap goods low rates. But such phrases are only a part of the disposition, common among those untrained in economic reasoning, to accept as right and just that which has worked itself out in the long run from the play of ordinary economic forces. They are like the phrases that fair wages and fair profits should be allowed, which at bottom mean nothing more than usual wages and usual profits. The true explanation of classification based on the value of the goods is simple enough: on goods that have high value for little bulk and weight, a given charge of so much per hundredweight will usually have much less effect in checking traffic than the same charge on goods of great bulk and low price.

Sometimes, indeed, the common though not necessary connection between the value of the goods and the rates charged on them has led to statements that assume a more scientific form. Thus it has been laid down that the true principle governing railway rates is not cost of service, but “value of service.” . . .

So far as the phrase is a convenient mode of stating to the general public the consequences which flow from the element of joint cost in railway services, and of calling attention to the inevitable effects of demand on rates, it may be useful. But surely it gives no real help towards solving the difficulties of the problem. It cannot mean that rates are based on the value in use, or the intrinsic utility, of the service. On that ground, grain and coal presumably would be charged higher rates than silks and spices. If it means that rates depend on the value of

service in the sense of its value in exchange, we are confronted with the obvious difficulty that the rates *are* the value in exchange of the service. The explanation then says simply that charges are determined by what is charged; which does not much advance matters.

The explanation from joint cost, which is put forward in this paper as the key to many of the apparent anomalies in railway rates, is applicable not only to the great and conspicuous case of railways, but to many other industrial operations. The practical importance of the theory of value which rests on production at joint cost, becomes greater and greater with the general tendency to use a large plant for varied purposes, and with that better utilization of products formerly waste which results from the advance in arts. Cotton, cotton-seed oil, and cotton-seed cake; beet sugar and beet cake; the various articles into which coal oil is converted; silver and lead from lead ores,— these are familiar illustrations. Some other cases which, like railroad rates, have puzzled writers on economics, can be referred to the same principle. The prices charged to the playgoers for opera chairs, seats in the pit, and gallery standing room have been discussed, as if they were quite anomalous, and inexplicable on the general theory of the bearing of cost on value. Similarly, the relative prices of first-floor and fifth-floor apartments have proved puzzling. Obviously, the element of joint cost is largely present in these cases; and the principle helps to clear up such real difficulties and anomalies as they present.<sup>1</sup>

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F. W. TAUSSIG

<sup>1</sup> The cases last mentioned are referred to by Professor F. J. Neumann in Schönberg's *Handbuch der politischen Oekonomie*, Vol. I, pp. 230, 233 (1st ed.). The explanation suggested in the text does not seem to have occurred to this ingenious writer.

## VI

### UNREASONABLE RATES

#### THE CINCINNATI FREIGHT BUREAU CASE<sup>1</sup>

CLEMENTS, *Commissioner* :

The complaints in these cases, which were heard and may be disposed of together, were filed, respectively, by the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau. The former will hereinafter be referred to as the Cincinnati case, and the latter as the Chicago case.

In both complaints, Baltimore, Philadelphia, New York, Boston and contiguous territory, are designated "Eastern Seaboard territory;" Knoxville and Chattanooga, Tenn., Rome and Atlanta, Ga., Birmingham, Anniston and Selma, Ala., Meridian, Miss., and contiguous territory, "Southern territory;" and Cincinnati, Ohio, Louisville, Ky., Indianapolis and Evansville, Ind., Chicago and Cairo, Ill., St. Louis, Mo., and contiguous territory, "Central territory." These designations will be so applied in this opinion.

The general ground of complaint in the Cincinnati case is that the rates of freight established by the defendant carriers from the Eastern Seaboard and Central territories, respectively, to Southern territory, "unjustly discriminate in favor of the merchants and manufacturers whose business is located and transacted in Eastern Seaboard territory and against the merchants and manufacturers whose business is located and transacted in Cincinnati and other points in Central territory." It is stated that "the burden of the complaint lies against the *relation* which exists between the current rates of freight on *manufactured*

<sup>1</sup> Decided May 29, 1894. Interstate Commerce Reports, Vol. VI, pp. 195-256. Overruled by the Supreme Court, *vide*, p. 179, *infra*.

*articles and merchandise*" (numbered classes) "from Eastern Seaboard territory to Southern territory, and the current rates of freight exacted upon like commodities when shipped from Central territory to the South, and against the unfair basis of general construction of the tariffs under consideration whereby the rates charged for transportation of commodities classified under 'numbered classes' bear a much higher percentage relation to the rates from New York than do the rates on commodities enumerated under the lettered classes" (food products and similar heavy traffic); and it is alleged, "that this improper relation between rates has the effect of restraining and impeding the growth of productive industries in Central territory and encouraging and promoting similar industries in Eastern Seaboard territory, and is the direct result of an agreement established by convention between the officers of defendants, whereby in order to secure stability in rates and to prevent competition between the lines leading respectively from the Eastern Seaboard and Central territories to the South, it was decided to secure to the Eastern lines and Eastern territory the traffic in merchandise and manufactured articles and to the Western territory the traffic in food products and similar heavy commodities." In support of these charges as to the alleged "improper relation" between the rates from Eastern territory and Central territory to Southern territory, and between those on the numbered and lettered classes, tabular statements are given of the distances, and class rates from leading points in the Eastern and Central territories to the points named above in Southern territory and of the percentage relation borne by rates and distances from Cincinnati to those from New York.

The complaint in the Chicago case contains similar tabular statements and charges, made applicable to Chicago, and in addition calls in question the *reasonableness in themselves* of the through rates from Chicago to Southern territory by the averments "that traffic between Chicago and the Southern territory is through traffic and it is unjust to Chicago that rates from that point should be exacted by defendants based upon unreasonably high rates between Cincinnati and other Ohio river crossings





and Southern territory, to which are added substantially the local rates in effect from Chicago to Cincinnati and said other Ohio river crossings," and that "if Cincinnati rates are to be taken as a basis, the rates from Chicago to Southern territory should be some fair percentage above the rates from Cincinnati, or some other arbitraries above the Cincinnati rates as the present New York and Boston rates are above the rates from Baltimore." It is also alleged that "the same rates are charged from New York and from Boston to points in Southern territory whose distances vary more than 500 miles," and it is claimed, that "if equal rates prevail from points widely separated in Eastern territory such as New York and Boston to Southern territory, the same basis should govern in rate making to the same Southern points from stations in Central territory, such as Cincinnati and Chicago, which are much nearer together than New York and Boston." The prayer of the complainants in both cases is for an order commanding the defendants to desist from the alleged violations of the Act to Regulate Commerce and requiring them to so adjust their several freight tariffs as to afford the merchants and manufacturers of Cincinnati and Chicago and other points in contiguous territory "a fair and equal opportunity to deliver their products to consumers in the South upon such terms of equality compared with their competitors in Eastern Seaboard territory, as their geographical position, commercial ability and ample transportation facilities will justify."

In the Cincinnati case answers are filed by the Cincinnati, New Orleans & Texas Pacific Railway Company *et al.* . . . They all deny the general charge, that the rates over the respective lines of transportation from the Central and Eastern Seaboard territories to Southern territory unjustly discriminate against Central territory in favor of Eastern Seaboard territory. It is alleged in substance that the all rail rates from Eastern Seaboard to Southern territory are determined by the combined rail and water rates from Boston, New York, Philadelphia and Baltimore *via* Steamship lines to Charleston and Savannah and thence by rail to the interior, and that the rates from Cincinnati and other

points in Central territory are not thus controlled by water competition. The other allegations of the complaint stated above are also denied, and it is claimed by most of the respondents that the transportation in which they, as members of through lines from their respective territories to the South, are engaged, is not "*under a common control, management or arrangement, for a continuous carriage or shipment,*" within the meaning of those words as used in the first section of the Act to Regulate Commerce.

In the Chicago case answers are filed by the following railway companies: the Louisville, New Albany & Chicago, *et al.* . . . These answers present substantially the same issues as are raised in the Cincinnati case. It will be noted, that in addition to the railroad and steamship companies made parties defendants in the Cincinnati case, the complaint in the Chicago case is filed against a number of railroad companies running from Chicago to Cincinnati and other Ohio river points. These roads allege that their "rates are confined to the Ohio river, and that the through rate to any point south of the Ohio river is made by adding their rates to the Ohio (exclusively made by them) to the rates established by the lines south thereof, to the point of destination, over which rates south of the Ohio they neither possess nor exercise any control whatever, either as to the making or enforcement thereof." They also affirm the reasonableness of their rates north of the Ohio.

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### *Facts*

1. The tabular statements mentioned above as being contained in the complaints purporting to show distances and class rates from Cincinnati and Chicago in Central territory and from Boston, New York, Philadelphia and Baltimore, in Eastern Seaboard territory, to the points designated as being in Southern territory, and also giving the percentage relation borne by such distances and rates from Cincinnati and Chicago to those from New York are found to be correct with a few immaterial exceptions. The following are those statements corrected and showing current rates and percentages: [Abridged. — ED.]

TABULAR STATEMENT OF DISTANCES, CURRENT RATES, AND PERCENTAGES BETWEEN CINCINNATI AND CHICAGO AND NEW YORK, PHILADELPHIA, BOSTON AND BALTIMORE AND SOUTHERN POINTS

To KNOXVILLE, TENN.

FROM	DIST.	CLASSES										PER BBL.		
		1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati . .	290	76	65	57	47	40	30	20	26	23	19	34	38	33
Chicago . . .	560	116	99	82	64	55	42	32	38	33	29	47	58	48
New York . . .	735	100	85	70	55	48	40	36	40	36	36	48	55	72
Philadelphia .	645	108	92	83	71	58	47	34	46	38	37	56	74	66
Boston . . .	948	100	85	70	55	48	40	36	40	36	36	48	72	55
Baltimore . .	549	95	80	65	50	45	37	33	37	33	33	45	66	52
Percentage														
Chic. of N. Y. .	78	116	116	117	116	115	105	89	95	92	81	98	105	67
Cinn. of N. Y. .	39	76	76	81	85	83	75	56	65	64	53	71	69	46

To CHATTANOOGA, TENN.

Cincinnati . .	335	76	65	57	47	40	30	20	26	23	19	34	38	33
Chicago . . .	595	116	99	82	64	55	42	32	38	33	29	47	58	48
New York . . .	847	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia .	757	108	92	84	71	58	47	34	46	38	37	56	74	66
Boston . . .	1060	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore . .	661	106	90	83	70	57	46	33	45	37	36	55	72	65
Percentage														
Chic. of N. Y. .	70	102	101	95	88	92	86	89	79	82	74	81	74	70
Cinn. of N. Y. .	40	67	66	66	64	67	61	56	54	58	49	59	49	49

To ATLANTA, GA.

Cincinnati . .	475	107	92	81	68	56	46	28	35	28	24	48	48	53
Chicago . . .	733	147	126	106	85	71	58	40	47	38	34	61	68	68
New York . . .	876	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia .	786	114	98	86	73	60	49	36	48	40	39	58	78	68
Boston . . .	1089	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore . .	690	107	92	81	68	56	46	34	45	37	36	55	72	65
Percentage														
Chic. of N. Y. .	84	129	128	123	116	118	118	111	98	95	87	105	87	100
Cinn. of N. Y. .	54	94	94	94	93	93	94	78	73	70	62	83	62	78

2. The distances from the Eastern Seaboard cities in the above statements are *all rail*, while the rates are *rail and water*, or based on the rail and water rates; both the distances and rates from Cincinnati and Chicago are *all rail*. There are a number of steamship lines running from the Eastern Seaboard to Charleston, Savannah and other southern ports, namely, the Ocean Steamship, the Mallory, the Morgan, the Clyde, and the Merchants and Miners; and the above combined *rail and water* rates appear to be made by adding the rate of the steamer lines to the rate of the rail lines from the ports to interior points. The actual mileage by water from New York to Charleston and Savannah is estimated at about 750 miles, but the rates of the steamer lines are made on the basis of what is termed by the witnesses a "constructive mileage" of 230 miles to Charleston and 250 miles to Savannah, that is, the water rate from New York to Charleston is equal to the rail rate for 230 miles by land, and to Savannah, to the rail rate for 250 miles. The all rail distance from New York to Charleston is 799 miles and to Savannah 914 miles. The following are the distances from Charleston and Savannah by rail to the interior points named:

FROM CHARLESTON TO	MILES	FROM SAVANNAH TO	MILES
Knoxville . . . . .	533	Knoxville . . . . .	520
Chattanooga . . . . .	446	Chattanooga . . . . .	433
Atlanta . . . . .	308	Atlanta . . . . .	295
Rome . . . . .	367	Rome . . . . .	367
Birmingham . . . . .	475	Birmingham . . . . .	462
Anniston . . . . .	412	Anniston . . . . .	399
Selma ( <i>via</i> E. T. V. & G.) . .	561	Selma ( <i>via</i> S. F. R. R.) . .	462
Meridian ( <i>via</i> E. T. V. & G.) .	671	Meridian ( <i>via</i> E. T. V. & G.)	669

The sums of the "constructive" mileages of 230 miles from New York to Charleston and 250 miles to Savannah, plus the actual rail mileages to interior points above given, are shown by the following table:

FROM N.Y. VIA CHARLESTON TO	MILES	FROM N.Y. VIA SAVANNAH TO	MILES
Knoxville . . . . .	763	Knoxville . . . . .	770
Chattanooga . . . . .	676	Chattanooga . . . . .	683
Atlanta . . . . .	538	Atlanta . . . . .	545
Rome . . . . .	597	Rome . . . . .	617
Birmingham . . . . .	705	Birmingham . . . . .	712
Anniston . . . . .	642	Anniston . . . . .	649
Selma . . . . .	791	Selma . . . . .	712
Meridian . . . . .	901	Meridian . . . . .	919

These are what are termed the "rate-making mileages" from New York by water to Charleston and Savannah and thence by rail to the interior points named, upon which the combined *rail and water* rates from New York are based. The rail and water rates from the Eastern Seaboard cities to Southern territory practically control the all rail rates. The all rail rates are the same as the rail and water rates to Knoxville, Chattanooga, Birmingham, Selma and Meridian, but to Rome, Atlanta, Anniston and points east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola, the all rail rates are higher than the rail and water rates by the following differentials.

Classes . . . . .	1	2	3	4	5	6	A	B	C	D	E	H	F
Differentials in cents	8	6	5	4	3	2	2	2	2	2	3	4	4

3. The lines regularly engaged in the transportation of traffic from Cincinnati, Chicago and contiguous territory, to Southern territory, are *all rail*. There appears to be no through water or rail and water line in regular operation for the transportation of traffic in the numbered classes between those territories. There is a line by lake from Chicago to Buffalo and from that point by rail or canal to New York, which has a *direct* effect on the rail rates between Chicago and the seaboard — particularly the rates on grain and grain products. As to rates on articles of the higher classes, the influence of the water competition does not appear to be so controlling. The rates from Chicago to New

York are the basis of the rates from Central and Trunk Line territory to the Northeastern seaboard, the latter being percentages of the former, and the water competition by lake and canal thus *indirectly* exerts an influence upon the rates to the seaboard from as far south as St. Louis and Cincinnati. Traffic may be transported by the lake and canal or lake and rail line from Chicago to New York and thence on the Atlantic to Charleston, Savannah and other southern ports, and thence by rail to interior points in Southern territory, and there is evidence tending to show that in the past, some shipments have been made that way, but mostly of grain and heavy articles such as are embraced in Class 6 of the Official Classification and the lettered classes of the Southern Classification. The traffic shipped from Chicago by lake to Buffalo and from that point by canal or rail to New York is principally wheat, corn and other grains, which can be transferred through an elevator at Buffalo to the canal boat, or car. If the transportation be continued by ocean to a southern seaport the same process of transfer is necessary at the seaboard and these transfers add to the expense. . . .

Merchandise may also be carried from Central territory by rail to Baltimore and thence by steamer to Charleston, Savannah and other southern ports for shipment by rail to the interior. The class rates from Cincinnati to Baltimore are :

Class . . . . .	1	2	3	4	5	6
Rates in cents per 100 lbs. . . . .	62	53½	40½	27½	23	18½

4. The rates on through shipments from Chicago *via* the Ohio river crossings, Cincinnati, Louisville and Evansville, to points in Southern territory, are not prorated the entire distance but are the sum of the regular rate to the Ohio, of the roads north of that river, plus that of those south. The shipments are almost invariably, however, under a through bill of lading, quoting a total through rate (made up as above stated) and issued at Chicago by the agent of the initial carrier, and the goods when in car loads are carried through without transfer or

“breaking bulk” at the river. When shipments are in less than car loads, it is stated a transfer is generally made at the river because of the disinclination of the southern roads to pay for the use of cars of other roads. The rates both north and south of the river appear to be influenced to a large extent by competition of the various railway lines, and are not, strictly speaking, local rates. The rates of the roads north of the river are lower per mile than those of the southern roads, this being attributed to the greater volume of tonnage in the territory of the former than in that of the latter. The effect of prorating on a mileage basis the rate from Chicago to points in Southern territory would be to advance the proportion of the lines north of the Ohio and to reduce the proportion of the lines south. The rates for transportation between Chicago and the Ohio are what are known as Trunk Line rates, and are governed by the Official Classification and those for transportation between the Ohio and Southern territory are governed by the Classification of the Southern Railway & Steamship Association. The class rates and distances by the short lines from Chicago to the Ohio river points, Cincinnati, Louisville, and Evansville, and to Cairo, are shown below :

To	DISTANCES	RATES IN CENTS PER 100 POUNDS					
		1	2	3	4	5	6
Cincinnati . . .	298 miles	40	34	25	17	15	12
Louisville . . .	304 “	42	36	27	19	17	14
Evansville . . .	287 “	40	34	25	17	15	12
Cairo . . . . .	364 “	45	35	25	20	15	12

(The distances and rates from Cincinnati to points in Southern territory, are hereinbefore given in the tables taken from the complaints.)

In the tables of rates which we have given, those containing only the six numbered classes are under the Official Classification, which is applied east of Chicago and the Mississippi and north of the Ohio and Potomac rivers, and those embracing also

lettered classes are under the Classification of the Southern Railway & Steamship Association, which applies south of the Ohio and Potomac and east of the Mississippi rivers. As above stated, grain and grain products fall under Class 6 of the Official Classification; in the Southern Classification, grain and its products and heavy freight are in the lettered classes. Manufactures and costly commodities are in the higher classes.

5. It appears from tariffs on file with the Commission that there were in existence when the Interstate Commerce Law was passed and up to April 17, 1893, through rates from New York *via* Cincinnati to Chattanooga, Meridian and Birmingham, less than the sum of the rates to Cincinnati and the rates thence on to those cities, and there are such rates still in effect to Nashville, Memphis, Mobile, and a number of Mississippi river points.

Those through rates to Chattanooga, Meridian, and Birmingham, were as follows :

1	2	3	4	5	6
114	98	86	73	60	49

The following are the rates from New York to Cincinnati :

1	2	3	4	5	6
65	57	44	30	26	22

\* \* \* \* \*

9. All the defendants (including the steamship lines) in the Cincinnati case are also defendants in the Chicago case and are for the most part members of the Southern Railway & Steamship Association. The latter case, as before stated, embraces as defendants, in addition to those in the former, roads north of the Ohio participating in the transportation of traffic from Central territory to that river. *None of these are members of the Southern Railway & Steamship Association except the Illinois Central Railroad*, which, as we have seen, extends into territory south of the Ohio. This Association is composed of

transportation lines (including the steamship lines from northeastern cities to southern ports) engaged in the traffic of the territory south of the Potomac and Ohio rivers and east of the Mississippi, and the rates involved in these cases from both Eastern and Central to Southern territory are established and maintained under its rules and regulations. As to the origin of this Association,<sup>1</sup> it is set forth in a report of March 4, 1891, by Commissioner Wilson to the Cincinnati Freight Bureau (which report was put in evidence), that "subsequent to the close of the war and closely following the reestablishment of transportation lines and through rates into the South, there arose lively competition between what are known as Eastern Coastwise Lines and the Western lines which reached the South from the West *via* Ohio and Mississippi river gateways. Each commenced operations in the territory of the other, and while corn from Chicago was carried *via* Boston and Charleston to Atlanta and Chattanooga, the manufactured products of the East were not infrequently brought west *via* Cincinnati and Louisville, or Chicago and Cairo, for delivery to southern destinations. Rate wars were much more fierce and frequent than they are now. It was to check competition of this character and to protect the revenues of transportation lines generally that the Southern Railway & Steamship Association was established."

The records of proceedings of the Association from as far back as 1878 and up to January 14, 1892, have been introduced in evidence. From these records, it appears that in 1878, the roads leading south from Chicago, St. Louis, Cincinnati, Louisville and other western cities (then combined in an organization known as the "Green Line") met in convention with the steamer lines from eastern cities and the roads south of the Potomac engaged in the transportation of eastern traffic. At this meeting its object was disclosed to be "to protect to the Green Line Roads *the business which is peculiar to the Northwest* and to the Eastern lines, *the business peculiar to their territory*, and to maintain equal rates on business common to the two sections." The Green Line rates appear to have then

<sup>1</sup> *Vide*, Chapter IV.

been advanced and the rates of the two systems of carriers adjusted with a view to the transportation by western lines of *western products* (that is, products from territory west of Pittsburg and east of the Mississippi and between the Ohio and the lakes) and the transportation by eastern lines of *eastern manufactures*.

Up to 1885 this adjustment of rates appears to have been the means employed to carry out the above-stated object of the convention of 1878. In 1885 a division of territory was established and a provision was inserted in the agreement for that year requiring the exaction of local rates by the eastern and western lines, with a view to the protection to those lines, respectively (so far as it was possible in that way), of what is termed "the revenue derived by them from transportation."

By a resolution adopted by the Executive Committee of the Association in April, 1885, it was provided in connection with the division of territory above referred to that "in case eastern lines take western business or western lines take eastern business, they are to pay the *pool* the entire revenue accruing thereon from points of junction with Association roads, to be given to the lines composing the eastern or western lines as the case may be." The agreement of that year and those of subsequent years up to at least as late a date as that of the agreement which terminated July 1, 1887, make provision for such pooling or as it is termed "actual apportionment." In those agreements two methods of apportionment are provided for—namely, apportionment of *tonnage* and apportionment of *revenue*. Subsequent agreements do not so distinctly provide for pooling, but in the last agreement introduced in evidence (that of January 14, 1892), it is declared that "the principle of an apportionment of business subject to arbitration shall be recognized in the operation of the Association so far as this can be *lawfully* done." Provision is, also, made in that and the last agreement entered into since the hearing in these cases, for raising a fund for payment of what are termed fines for violations of the agreement, as will hereinafter appear.

The provisions as to division of territory and the exaction of local rates have been carried forward in the various agreements

entered into from 1885<sup>o</sup> to the present time. The last agreement introduced in evidence is that dated, January 14, 1892, and it is substantially the same as those of preceding years as far back as 1885. Its clauses as to the exaction of local rates and division of territory are as follows :

Art. II, sec. 2. For the mutual protection of the various interests, and for the purpose of securing the greatest amount of net revenue to all the companies parties to this agreement, it is agreed that what are termed western lines shall protect the revenue derived from transportation by what are known as eastern lines, *under the rates as fixed by this Association*, so far as can be done by the exaction of local rates, and that eastern lines shall in like manner protect *like* revenue of western lines.

Sec. 3. That a line from Buffalo through Salamanca, Pittsburg, Wheeling and Parkersburg, to Huntington, West Virginia, be made the dividing line between eastern and western lines for the territory hereinafter outlined. That the western lines shall not make joint rates from points east of that line for any points east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola.

Sec. 4. The eastern lines, including the Richmond & Danville railroad *via* Strasburg or points east of Strasburg, and the East Tennessee, Virginia & Georgia Railway *via* Bristol, shall not make joint rates on traffic from points west of that line (Buffalo, etc.) to any points on or west of a line drawn from Chattanooga through Athens, Augusta and Macon, to Live Oak, Florida.

Sec. 5. The traffic from Buffalo through Salamanca, Pittsburg, Wheeling and Parkersburg to Huntington, West Virginia, and points on that line, to and east of Chattanooga, Calera and Selma, shall be carried by either the eastern or western lines only at such rates as may be agreed upon.

Sec. 6. It is understood that the eastern and western lines will coöperate in the enforcement of the 3d and 4th sections of this second article.

The objects of the Association as alleged in the preamble to this agreement, are "the establishment and maintenance of tariffs of uniform rates, to prevent unjust discrimination such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation lines" and the securing as to business in which the carriers have a common interest "a proper co-relation of rates, such as will protect the *interests of competing markets* without unjust discriminations in favor of or against any city or section."

The agreement provides for an annual convention of the representatives of the several companies, members of the Association, at which each company shall have one vote, two thirds of the whole vote of the members present being required to make the action of the convention binding. At this meeting, among other business to be transacted, there are to be elected a President, a Commissioner, a Secretary and three Arbitrators. The members of the Association are each required to designate a representative, authorized "to represent them in all matters of business with the Association or its members," and the representatives so designated constitute an "Executive Board." The "Executive Board," it is provided, "shall have jurisdiction over all matters relating to traffic covered by the agreement, but shall act only by *unanimous consent* of all its members" and "in the event of failure to agree, the questions at issue shall be settled by the Board of Arbitration." The "Executive Board" are authorized "at their discretion to appoint *Rate Committees* and other subcommittees, either of their own number or from among the officers and agents of the Companies; members of the Association." It is provided that, "with a view to a proper relative adjustment of all rates, and especially a proper relative adjustment of rates on similar articles from the East and West to common territory, the *Rate Committees* shall have *sole authority to make all rates and classifications on all traffic covered by the agreement*, subject to decision of the Commissioner, the Executive Board or Board of Arbitration in case such Rate Committees cannot agree." If the "Rate Committees" fail or omit to make rates, the Commissioner is given authority to make such rates, so that, it is stated, "there shall be properly authenticated tariffs of rates on all traffic covered by the agreement." The subcommittees appointed by the "Executive Board" can "only act by *unanimous consent*, and failing to agree, the questions at issue may, upon demand of any member, be referred to the Executive Board for action at their next meeting, and such questions may be submitted direct to the Board of Arbitration, when so authorized by a majority of the Executive Board. The decisions of the Board of Arbitration are made "final and conclusive on all

questions which may be submitted to them under the agreement or by consent of the parties." The Commissioner is Chairman of the Executive Board, and also of the subcommittees and is authorized to represent absent members of subcommittees as well as of the Executive Board, and "during the interim between the reference of any matter of difference from a subcommittee to the Executive Board and the final determination of such matter," he is given authority "if he deem it a matter requiring prompt action, to decide it temporarily" and his decision is made "binding on all parties until reversed by the Executive Board or by arbitration;" he is declared to be "the chief executive officer of the Association, and as a representative of its members, both *severally and jointly*," is empowered to "act for them in all matters which come within the jurisdiction of the Association, in conformity with the requirements of the agreement and the instructions of the Executive Board and subcommittees, but *exercising his discretion in all cases* which are not provided for either by the agreement or by the Executive Board and committees acting under its authority and sanction;" and he is also authorized "to reduce the rates when necessary to meet the competition of lines or roads not parties to the agreement and at the same time to make corresponding reductions from other points from which relative rates are made," and is given "such authority over the traffic officers and their subordinates and over the accounting departments of the parties to the agreements as may be necessary to enforce its terms relative to the maintenance of rates." When rates have been fixed under the provisions of the agreement by the Rate Committees, the Commissioner, the Executive Board or by arbitration, there is to be "no reduction from such rates without the consent of the Commissioner" and in all cases changes therein are to be made by the Rate Committees or the Commissioner. The agreement declares "that the maintenance of rates as established under the rules of the Association is of its very essence and that the parties thereto pledge themselves to require all their connections to maintain such rates, and in the event of any company or line, or its connections, not members of the Association, failing to conform to this obligation, the

other parties in interest *pledge themselves to increase their proportion of through rates sufficiently to protect the authorized rate whenever required by the Commissioner, to do so;*" and further, that it is "one of the fundamental principles of the agreement that no party thereto shall take *separate* action in any matter affecting the interests of one or more of the other parties, contrary to the spirit and intent of the agreement," and that "all measures necessary to carry out the purpose of the agreement shall be taken *jointly* by the parties thereto." In cases of violation of the agreement, the Board of Arbitration, after hearing, is required to "impose such penalties therefor as it may deem proper and necessary to secure the maintenance of the rates of the Association." These penalties are to be enforced by the Commissioner, and "in order to provide for the prompt payment of any fines that may be assessed against any member of the Association for violating its rules, each company is required to deposit with the Commissioner an amount equivalent to five dollars (\$5.00) for each mile of the road operated by said company under the provisions of the agreement, or in case a company operates a water line, five dollars (\$5.00) for each mile allowed as a prorating distance in the division of through rates — provided such amounts shall not exceed the sum of five thousand dollars (\$5000.00) for any one company." Of this fund thus raised it is provided, that "any surplus over and above the *amount that may be awarded by the Board of Arbitration to indemnify any members for losses sustained* shall be applied to the payment of the expenses of the Association."

The agreement now in force (made July 14, 1893, since the hearings in these cases) extends the territorial line commencing at Buffalo and terminating at Huntington to "Toronto on the north shore of Lake Ontario, through Lewiston and Niagara Falls," and provides that points on this line (from Toronto to Huntington) "shall be common to lines through the eastern and western gateways, together with such points adjacent thereto from which the rates shall be the same as from the points above named" (points on said line) "through the gateways of Cincinnati and Louisville, the Rate Committees to agree upon the

common points adjacent to said line." To the clause requiring members of the Association "to increase their proportions of through rates sufficiently to protect the authorized rates" in the event of any company or line or its connections not members of the Association failing to conform to the rates established by the Association, it adds the further requirement, that they (members of the Association interested) shall "*apply full local rates upon all traffic subject to the Association Agreement coming from or going to such offending lines, when required by the Commissioner to do so.*" The clause requiring the Board of Arbitration in cases of violations of the Agreement by any member, to impose "such penalties therefor as it may deem proper and necessary to secure the *maintenance of the rates of the Association,*" is altered so as to read "such penalties therefor as it may deem proper and *commensurate with the injuries inflicted upon the Association and of competing lines parties to this Agreement.*" The other material terms of this agreement are substantially the same as those of the agreement of January 14, 1892, above given.

\* \* \* \* \*

10. At the convention of the eastern and western lines in 1878, it was announced by Mr. Peck, General Manager of the Southern Railway & Steamship Association, that the western lines "concede that the transportation of manufactured articles into the territory embraced by the Association should be left to the eastern lines and undertake by *prohibitory* rates to prevent such articles from eastern cities reaching Association points over their lines." Accordingly a basis of rates was then adopted, by which rates on the western lines for "articles peculiar to the East" were to be at least 10 cents higher than the rates on the eastern lines and rates on eastern lines for "western products" were to be at least 10 cents higher than the rates on western lines. At the time of this adjustment it appears that the west (or Central territory) contributed "principally food products in the solid and liquid forms of corn, bacon, flour, whiskey, etc.," for southern consumption, while "manufactured articles and notions" came for the most part from the Eastern Seaboard. These conditions have, however, materially changed; "the cen-

ters of food production have moved westward" and Central territory has engaged much more extensively in manufacturing enterprises. In the Annual Report made to the Southern Railway & Steamship Association by its Commissioner, July 6, 1889, he says: "Formerly, agricultural products constituted a large excess of the western business, but the proportion of miscellaneous commodities—traffic formerly from the East—is steadily growing from the West. Especially is this true in all manufactured articles of wood, such as furniture, wagons, carriages of all kinds, etc., and manufactures from the cheap grades of iron from the South, such as stoves, agricultural implements, etc." Central territory has also entered upon the manufacture on a large scale and shipment South of boots, shoes, clothing, saddlery, harness and other articles of general merchandise. It is estimated that manufactures in Central territory have increased 100 per cent in twenty years.

These manufactured articles are shipped south from Central territory under the rates applied to the numbered classes in the Southern Railway & Steamship Association Classification, and bagging, ties, grain (and its products including liquors) and packing-house products are shipped under the rates applied to the lettered classes. The testimony is to the effect that articles falling within the lettered classes are of more general consumption in the Southern territory than those in the numbered classes. No reliable data is furnished as to the proportion the south-bound tonnage of the former bears to that of the latter, but it appears to be much larger. In their reports on file with the Commission the railways do not give separately the south-bound and north-bound tonnage, but it appears that boots, shoes, clothing, wooden ware, furniture, saddlery, harness, groceries and "everything that goes under the head of general merchandise" constituted in 1891 not quite 25 per cent of the total south-bound tonnage of the Cincinnati, New Orleans & Texas Pacific Road, and that bagging, ties, grain (and its products) and packing-house products, "covered the bulk of the business south-bound."

Articles in the numbered classes manufactured in Wisconsin, Michigan, Illinois, Indiana and Ohio, are sold as far east as

Rochester and Albany, New York, as far west as the Pacific coast, and to a greater or less extent over the South from Texas and Arkansas to the Virginias. The testimony tends to show that in the Southeast, in the territory embracing Alabama, East Tennessee, Florida, Georgia, the Carolinas and Virginias, and particularly at points near the Atlantic coast, the merchants and manufacturers of Central territory meet with strong competition in the sale of these goods from New York and the other Eastern Seaboard cities. They do not appear to be driven out of this territory altogether by this competition, but their business and the profit on it are not so great as a general rule as in other markets reached by them. In some instances they are required by their customers to "equalize the rates," or in other words, to refund the excess of the rates on their goods over those on goods of the same kind and class from Eastern Seaboard territory.

11. L. R. Brockenborough, General Freight Agent of the Chicago & Eastern Illinois Railway Company (whose road runs from Chicago to the Ohio at Evansville) stated that "his impression (is) that the general impression seems to be that the rates from the Central territory into Southern territory are out of line with those from the seaboard," and that his road "would be willing to reduce its rate to bring the through rate in line with the New York rate." John C. Gault, General Manager of the Queen & Crescent System (in which are defendants, the Cincinnati, New Orleans & Texas Pacific and the Alabama Great Southern Companies) stated that he "always thought rates from Chicago to southern points on higher classes ought to be the same as those from Boston and New York;" and that this "would not harm New York and hardly be enough in favor of the west." He also, under date of August 14, 1888, wrote to the Commissioner of the Chicago Board of Trade, that "the roads interested in Chicago business ought in my (his) judgment to take such action as is necessary to insure a reduction of the rates" from the West. M. C. Markham, Assistant Traffic Manager of the Illinois Central R.R. Co., testified that he had made an effort to have the Southern Railway & Steamship

Association reduce the rates from Central territory, and said, "Looking at the disparity between the rates from Eastern and Central territories, it appears there might be in them an element of unfairness to the latter. If it is true, that rates from Eastern territory into the southeast were made on account of water competition along the Atlantic seaboard, and if all rail lines leading from the East into that territory can afford to carry the goods for those rates made by water lines, then the western through lines *could afford to carry for the same rates a less distance*, provided all conditions governing the matter were equal." S. R. Knott, Traffic Manager of the Louisville & Nashville Road in a letter to G. J. Grammar of April 14, 1890, wrote that "While the adjustment may be *unfair, as we think it is*, yet it can hardly be said to be arbitrary or wholly unreasonable;" and that his company, "together with other lines interested in western traffic, then members of the Southern Railway & Steamship Association, urged a modification of the difference" (between eastern and western rates) "and succeeded in having the matter brought, under the rules of the Association, before the Board of Arbitration;" and that "the question was fully presented from both sides of the case and the decision of the Board at that time (May, 1888) was that the best protection of *all interests* did not warrant the change in the adjustment of rates which we, with the other western lines, had requested, that is, changing the adjustment from Ohio river points and points north as compared with the rates from eastern cities." B. E. Hand, Assistant General Freight Agent of the Michigan Central Road, stated that he had made "repeated efforts with railroads operating in Southern territory for a reduction of rates on manufactures from the West to the Southeast." G. J. Grammar, Chairman of the Central Traffic Association's Committee on relations with southern roads, in a letter to N. G. Iglehart, of April 2, 1890, says, "All our efforts thus far have been unavailing to get the southern roads to more justly equalize the rates. You doubtless understand southern roads' rates from the Ohio river are arbitrary, their rates on all classes south-bound being from 50 to 100 per cent greater per mile than by lines

north of the River on similar traffic." In a letter, dated April 8, 1890, to S. R. Knott, he says, "The injustice of the present basis of rates" (from the Ohio) "must of necessity be apparent."

### *Conclusions*

The principal charge in both cases it is stated is based on the first paragraph of section 3 of the Act to Regulate Commerce, which declares,

"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 advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The specific ground of complaint under this charge is in substance that the rates on *manufactured* goods from Eastern Seaboard territory to Southern territory, and those on the same classes of goods from Central territory to Southern territory, are so fixed or adjusted with reference to each other as to give to merchants and manufacturers in Eastern Seaboard territory an "undue or unreasonable preference or advantage" over those in Central territory, and consequently subject the latter to "an undue or unreasonable prejudice or disadvantage" with respect to the former, when they meet in competition in the southern markets.

\* \* \* \* \*

The reasonableness in themselves of the rates from Central territory is a matter material to the issue raised by the charge in both cases, that the relation between those rates and the eastern rates is *unjustly* prejudicial to Central territory, and the question is directly presented in the Chicago case by the allegation that the rates from Cincinnati and other Ohio river crossings to Southern territory are "unreasonably high." Where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers—

the value of the comparison being dependent in all cases upon the *degree* of similarity of circumstances and conditions attending the transportation for which the rates compared are charged. It appears from the tabular statements in our findings of fact, giving *all rail* distances and class rates from Cincinnati and Chicago in Central territory and from New York and other northeastern cities, to points in Southern territory, that on a *mileage* basis the rates from the former (particularly, those on the higher or numbered classes) are largely in excess of those from the latter. For the purpose of illustration the following table is given, which shows the current rates on goods of Class 1 from Cincinnati and Chicago and from New York to points named in Southern territory, and what the rates from Cincinnati and Chicago would be on the basis of the (all rail) mileage rates from New York :

To	CURRENT CLASS 1 RATES			RATES ON BASIS OF MILEAGE RATES FROM NEW YORK	
	From Cincinnati	From Chicago	From New York	From Cincinnati	From Chicago
Knoxville . . . . .	76	116	100	39	78
Chattanooga . . . . .	76	116	114	45	79
Rome . . . . .	107	147	114	51	83
Atlanta . . . . .	107	147	114	61	95
Meridian . . . . .	122	134	124	62	71
Birmingham . . . . .	89	119	114	54	75
Anniston . . . . .	107	147	114	57	85
Selma . . . . .	108	138	114	62	78

The excess of the Class 1 rates in the above table from Cincinnati and Chicago over the New York rates from a mileage standpoint is, as follows :

To	FROM CINCINNATI	FROM CHICAGO	To	FROM CINCINNATI	FROM CHICAGO
Knoxville . .	37	38	Meridian . .	60	63
Chattanooga .	31	37	Birmingham	35	44
Rome . . .	56	64	Anniston . .	50	62
Atlanta . . .	46	52	Selma . . .	46	60

As to the other *numbered* classes and the other northeastern cities, the relation or difference between the two sets of rates is to a large extent substantially the same as shown in the above tables.

Many striking disparities in rates will be observed on an inspection of the tabular statements of rates and distances in our findings of facts, and particularly, in the Class 1 rates from Chicago, on the one hand, and Boston and New York, on the other — the latter two cities being given for the most part the same rates. For example, while the distance from Chicago to Chattanooga is 595 miles, and from Boston and New York, respectively, 1060 and 847 miles, the rate from Chicago is 116 cents and from Boston and New York, 114 cents, and while the distance from Chicago to Meridian, Miss., is 723 miles and from Boston and New York, respectively, 1355 and 1142 miles, the rate from Chicago is 134 cents, and from Boston and New York, 124 cents. Under the rate last named, a shipper of a car load of 25000 pounds, of Class 1 goods from Boston and New York to Meridian would pay \$25.00 less than a shipper of a like car load from Chicago, notwithstanding the relative proximity of the latter city to the common point of destination. (Up to March 16, 1894, the rate from New York and Boston to Meridian was 114 cents.) Further examples of similar import might be taken from the tabular statements of rates and distances, but the above are deemed sufficient.

\* \* \* \* \*

The plea that the all rail lines from northeastern cities to Southern territory are subjected to water competition *via* the Atlantic and that this competition has naturally a controlling influence on their rates, is sustained by the proof.

\* \* \* \* \*

The defendants in their proof have furnished a measure or given *their estimate* of the influence of the water competition from the northeastern cities to the southeastern ports. It is that, while the distance by water from New York to Charleston and Savannah is approximately 750 miles, the rates by the steamer lines are made on the basis of what is termed a “constructive

mileage" of 230 miles to Charleston and 250 miles to Savannah, or, in other words, the water rate from New York to Charleston is equal to the rail rate for 230 miles by land, and to Savannah, to the rail rate for 250 miles by land. These "constructive mileages" plus the actual distances by rail from those ports to interior points in Southern territory are called the "rate-making mileages," upon which the combined rail and water rates from New York to the interior points are based. As is claimed by defendants, the proof tends to show that the rail and water rates regulate the all rail rates, and the rail and water and all rail rates are the same to all the points named in Southern territory except *Rome*, *Anniston* and *Atlanta*, to which the all rail rates are higher than the rail and water by certain differentials ranging from 2 to 8 cents per 100 pounds as appears from our findings of facts. A comparison of these "rate-making mileages" (rail and water) with the all rail distances from New York to southern points may be instructive as indicating the *estimate by the roads* of the extent of the influence of water competition on the eastern rates. Those "mileages" (*via* Charleston) and all rail distances are given in the following table :

To	FROM NEW YORK	
	All Rail Distances	"Rate-making Mileages" <i>via</i> Charleston—Rail and Water
Knoxville . . . . .	735 miles	763 miles
Chattanooga . . . . .	847 "	676 "
Rome . . . . .	925 "	597 "
Atlanta . . . . .	876 "	538 "
Meridian . . . . .	1142 "	901 "
Birmingham . . . . .	990 "	705 "
Anniston . . . . .	949 "	642 "
Selma . . . . .	1080 "	791 "

From the following table a comparison may be made of the "rate-making mileages," rail and water, from New York to southern points, with the actual all rail distances from Cincinnati and Chicago to the same.

To	FROM NEW YORK	FROM CHICAGO	FROM CINCINNATI
	"Rate-making Mileages" via Charleston — Rail and Water	All Rail Distances	All Rail Distances
Knoxville . . . . .	763 miles	560 miles	290 miles
Chattanooga . . . . .	676 "	595 "	335 "
Rome . . . . .	597 "	673 "	413 "
Atlanta . . . . .	538 "	733 "	475 "
Meridian . . . . .	901 "	723 "	630 "
Birmingham . . . . .	705 "	652 "	478 "
Anniston . . . . .	642 "	715 "	476 "
Selma . . . . .	791 "	746 "	598 "

It will be seen from the above table that the "rate-making mileages" from New York, *which are arrived at by an allowance for the estimated effect of water competition — the estimate being that of the defendants*, are greater than the actual all-rail distances from Chicago, as follows: to Knoxville, by 203 miles; to Chattanooga, by 81 miles; to Meridian, by 178 miles; to Birmingham, by 53 miles; and to Selma, by 45 miles. They are less to Rome by 76 miles, to Anniston by 73 miles and to Atlanta by 195 miles. They are in every instance much greater than the distances by rail from Cincinnati. The all rail distances from Cincinnati and Chicago are the following percentages of the "rate-making mileage" from New York:

To	FROM CINCINNATI	FROM CHICAGO
Knoxville . . . . .	38%	73%
Chattanooga . . . . .	50	88
Rome . . . . .	69	112
Atlanta . . . . .	88	136
Meridian . . . . .	70	80
Birmingham . . . . .	68	92
Anniston . . . . .	74	111
Selma . . . . .	80	94

On the above basis — that is, making the rates from Cincinnati and Chicago the same percentages of the current New York

rates as the distances by rail from the former cities are of the "rate-making mileages" from the latter—the rates from Cincinnati will be materially less than they now are on the *numbered* classes in all cases and also from Chicago, *except those to Atlanta and those on classes 4, 5, and 6 to Birmingham and 4 and 6 to Chattanooga*. They will also be less to a large, but not so great an extent, on the lettered classes. It thus appears that, giving full weight to the claim of defendants that water competition *via* the Atlantic necessitates rates from the East relatively lower than those from the West and as a consequence rates from the West relatively higher than those from the East, it does not with the exceptions above named account for or justify the existing disparity between them.

The evidence shows that the rates from Eastern Seaboard and Central territories, respectively, were adjusted with reference to each other by mutual agreement between the eastern and western carriers through the medium of the Southern Railway & Steamship Association and that in making this adjustment *other considerations* than those of water competition, or other dissimilarity of circumstances or condition affecting transportation, had a controlling influence. It appears that lively competition resulting in rate wars had arisen between the eastern and western lines in the transportation into the South by each of traffic from territory claimed by the other. This led to the convention in 1878 (referred to in our statement of facts) of the carriers interested, the object of which was stated to be the establishment of such a co-relation of rates as would "protect to the eastern lines the *business peculiar to their territory*" and to the western lines (then known as the "Green Line Roads") the business relating to "*their peculiar commodities*"—in other words, to secure to the eastern lines the transportation of "articles manufactured in the East, and in other countries and imported into eastern cities, embraced under the general terms of dry goods, groceries, crockery and hardware" and classified for the most part under the first four of the numbered classes, and to the western lines, the transportation of "articles of western produce, comprising the produce of animals and the field" and embraced principally

in the lettered classes. The only way to accomplish this result through the agency of rate adjustment or manipulation was to place relatively high rates on manufactured articles and relatively low rates on food products shipped from or *via* the West, and *vice versa*, as to such shipments from or *via* the East; and at the opening of the convention, Mr. Peck, the General Manager of the Association, being called on by the chairman to state its object, said among other things, that the western lines conceded that the transportation of manufactured articles "into the territory embraced by the Southern Railway & Steamship Association should be left to the eastern lines, and *undertake by prohibitory rates to prevent such articles from eastern cities reaching the Association points over their lines.*" A basis of rates, at least ten cents higher by the eastern lines than the western on western products and at least ten cents higher by the western lines than the eastern on "articles peculiar to the East," was then adopted, with a view to effecting the announced object of the convention. It is manifest that at that time the influence of water competition on the eastern rates was not regarded as a controlling factor in determining what the excess of the western should be over the eastern rates on manufactured goods and the reasonableness in themselves of those western rates was a matter of secondary, if any, consideration. While there have since been fluctuations and changes in the two sets of rates, the principle regulating their co-relation or adjustment with reference to each other has remained practically the same to the present time. The leading idea of securing to each system of carriers the traffic of what is termed its territory by the adjustment and manipulation of rates and in other ways, is prominent throughout all the Association Agreements. In the last, as in those preceding, it distinctly appears, and the provisions, among others, for a geographical division of territory, for the exaction of local rates to protect Association rates, and for penalties, all look to this end. It is, also, apparent on an inspection of the current rates themselves, which disclose the broad distinction made between the rates on the numbered and lettered classes — the relation between the two sets of rates on the former

being advantageous to the East, while that between the rates on the latter are not nearly so favorable to that territory. As a fair illustration, the rates from Chicago to Chattanooga on the lettered classes are from seventy to eighty-nine per cent of the New York rates, while on the numbered classes 1, 2 and 3, — they are respectively, 102, 101 and 95 per cent. It is true, rates upon the heavy and cheap articles in the lettered classes should be less than rates upon the comparatively light weighted and valuable articles in the numbered classes, because, as respects the latter, the value of the service to the shipper and the risk to the carrier are greater. These considerations, however, apply equally to shipments of traffic from both territories, and do not, therefore, justify or account for the distinction to which we have just adverted. The fact, that the tonnage of traffic in the lettered classes from Central territory is larger than of traffic in the numbered classes, and doubtless, also, larger than the tonnage of traffic in the lettered classes from Eastern territory is not in our opinion sufficient to authorize or account for the great difference apparent on the face of the tariffs. This difference finds a natural solution in the avowed purposes of the Southern Railway & Steamship Association to secure, by an adjustment of rates calculated to bring about that result, the transportation by the eastern lines of goods in the numbered classes from the territory set apart as theirs and to the western lines the transportation of traffic in the lettered classes from the territory apportioned to them.

The relation established between the eastern and western rates in 1878 was, doubtless, suggested by, and found a plausible pretext in, the fact that at that time the West contributed principally articles in the lettered classes for southern consumption, while goods in the numbered classes came for the most part from the East. The situation in this respect has, however, as appears from our statement of facts, materially changed, and it is estimated that the manufacture in Central territory of goods in the numbered classes has increased 100 per cent in twenty years. If, therefore, the condition as to manufactures and products in 1878 could have been set up in justification of

the adjustment of rates then made, that justification no longer exists and the change in those conditions is an argument in favor of a corresponding change in the rate adjustment. We are of opinion, however, that the situation in 1878 in the respect named constituted no justification. The tendency of such an adjustment of rates was to encourage and build up manufactures in the East and discourage and retard them in the West and thus maintain the *status quo*. In this connection may be noticed the claim of the defendants, that the great growth in Central territory of the manufacture and sale of articles in the numbered classes shows that the rates in question to Southern territory have not been prejudicial to manufacturers and shippers in Central territory. This does not appear to be a legitimate inference in view of the fact that Central territory is not limited to Southern territory as a market, but also sells its manufactures and products as far west as the Pacific coast, as far east as Rochester and Albany, and in the Southwest. The proof is that the shipments of goods in the numbered classes from Central to Southern territory (the Southeast) are small in comparison with those of goods in the lettered classes and this may be, in part at least, due to the rate adjustment complained of. If the fact, that one section is a large producer and another a small producer of certain classes of traffic, is a factor to be considered in fixing rates from them to a common market, which is not conceded, it would seem that it should operate to give more favorable rates to the latter with a view of stimulating and increasing its production. Considerations of this character, however, if they are to be allowed any weight by carriers in fixing rates from rival territories, should always be held in strict subordination to the invariable rule, that in all cases rates shall be reasonable in themselves. No departure from this rule can be justified on the ground, that it is necessary in order to maintain existing trade relations, or to "protect the interests of competing markets," or to "equalize commercial conditions," or to secure to carriers traffic from certain territory assumed to be exclusively theirs. It is not the duty of carriers, nor is it proper, that they undertake by adjustment of rates or otherwise to impair or neutralize the natural commercial

advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market. Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages. *James & M. Buggy Co. v. Cincinnati N. O. & T. P. R. Co.*, 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744; *Raworth v. Northern Pac. R. Co.*, 3 Inters. Com. Rep. 857, 5 I. C. C. Rep. 234; *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 4 Inters. Com. Rep. 65, 5 I. C. C. Rep. 264; *Chamber of Commerce of Minneapolis v. Great Northern R. Co.*, 4 Inters. Com. Rep. 230, 5 I. C. C. Rep. 571. If this result in prejudice to one and advantage to another, it is not the *undue* prejudice or advantage forbidden by the statute, but flows naturally from conditions *beyond the legitimate sphere of legal or other regulation*. "Carriers," moreover, "in making rates cannot arrange them from an exclusive regard to their own interests, but must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice which the Act prescribes." (Second Annual Report.) The provision in the Association Agreements for the "exaction of local rates" to "protect" to each system of carriers the revenue which would come to them, respectively, under a strict enforcement of Association rates and under the division of territory between them, is stated to be for "the purpose," among others, "of securing the *greatest amount of net revenue to all the companies parties to the agreement.*" This is, doubtless, the *controlling* consideration. The interests of the public, certainly, cannot be subserved in this way. The division of territory is wholly without warrant in law and is practically a denial to shippers in such territory of the right to ship their goods or produce to market by the line or route they may prefer. The exaction of higher rates on certain articles shipped from Central to Southern territory *than would otherwise prevail*, for the purpose of securing to eastern lines the transportation of that traffic from territory apportioned to them, is manifestly unlawful, and results in injury to both Central and Southern territory.

RATES PER TON PER MILE ON THE NUMBERED CLASSES FROM CHICAGO  
TO CINCINNATI

1	2	3	4	5	6
2 68 cents	2 28 cents	1 68 cents	1 14 cents	1 00 cents	80 cents

RATES PER TON PER MILE ON THE NUMBERED CLASSES FROM CINCINNATI

To	1	2	3	4	5	6
	Cents	Cents	Cents	Cents	Cents	Cents
Knoxville . . .	5 24	4 48	3 93	3 24	2 75	2 06
Chattanooga . .	4 53	3 88	3 40	2 80	2 38	1 79
Rome . . . . .	5 18	4 45	3 92	3 29	2 71	2 22
Atlanta . . . .	4 50	3 87	3 41	2 86	2 35	1 93
Meridian . . . .	3 87	3 23	2 82	2 38	1 96	1 71
Birmingham . .	3 72	3 30	2 84	2 30	1 96	1 50
Anniston . . . .	4 49	3 86	3 40	2 85	2 35	1 93
Selma . . . . .	3 61	3 41	2 94	2 37	1 97	1 57

The fact, which clearly appears, that rates on the numbered classes from Central territory are made *higher than they otherwise would be*, for the purpose of securing to the eastern lines the transportation of that traffic from the territory set apart to them under the Southern Railway & Steamship Association Agreement, itself raises a *prima facie* presumption of the unreasonableness of those rates. In the Cincinnati case, the complainant does not directly question the reasonableness of the rates from Cincinnati, but in the Chicago case it is charged, that the rates on through traffic from Chicago to Southern territory are made up of "substantially the local rates in effect from Chicago to Cincinnati and other Ohio river crossings" and "*unreasonably high* rates" from the Ohio on to Southern territory. It appears that the Chicago rates are made up of the two rates as charged — the rates from that city to the Ohio being the regular Trunk Line rates and from the Ohio southward, the Southern Railway & Steamship Association rates. The shipments being through shipments, under a through bill of lading quoting a total through rate, and without breakage of bulk at the

river, this method of making up the rates is a departure from the general rule under which through rates established by two or more connecting carriers *are less than the sum of their separate rates*. The Trunk Line rates per ton per mile from Chicago to Cincinnati and the Association rates per ton per mile from Cincinnati to Southern territory are given in the tables on page 175.

From these tables it will be seen that the rates per ton per mile from Cincinnati south are in all cases much higher, and in many instances a hundred per cent or more higher, than those from Chicago to Cincinnati.

The averages of the rates per ton per mile on all the classes, lettered as well as numbered, from Cincinnati, are approximately:

FROM CINCINNATI TO	AVERAGE OF RATES PER TON PER MILE ON ALL CLASSES
	Cents
Knoxville . . . . .	2 70
Chattanooga . . . . .	2 33
Rome . . . . .	2 62
Atlanta . . . . .	2 31
Meridian . . . . .	2 00
Birmingham . . . . .	1 96
Anniston . . . . .	2 27
Selma . . . . .	1 85

By reference to the tables in our statement of facts giving freight revenue per ton per mile and cost per ton per mile, it will be seen that the above averages are largely in excess of that revenue and cost on the roads taken as a whole in, respectively, Southern territory, Central territory, and the country at large.

\* \* \* \* \*

The weight of the testimony of railroad officials connected with the roads and lines leading from Central territory to the South, as appears from our finding of facts, tends to show that the idea is prevalent in western railroad circles, that the adjustment of rates from Central and Eastern territories is unjustly prejudicial to the former, and that those roads and lines, south as well as north of the Ohio, are disposed to favor a readjustment of their rates on a basis more favorable to Central territory, but that they have not done so on account of their

alliance with the eastern lines as members of the Southern Railway & Steamship Association, the latter lines not being willing to agree to such readjustment.

Our conclusion upon the whole is, that, as charged in the complaint in the Chicago case, the rates on the numbered classes from Cincinnati and the Ohio river crossings to the south are "unreasonably high," and as they enter into the through rates from Chicago, that those through rates, as well as the rates from Cincinnati, are excessive. There is no complaint that the rates from Chicago to Cincinnati and the other crossings are unreasonable in themselves and no evidence authorizing us to so find. They are the regular Trunk Line rates and are *not* subject to the objection, as in the case of the Association rates south of the river, that they are made higher than they otherwise would be for the purpose of securing to the Eastern Seaboard lines traffic from territory set apart to them. The cost on freight in general per ton per mile on the roads south of the river appears to have been for the years named in the tables heretofore given about 25 per cent on an average greater than the cost per ton per mile on the roads from Chicago to the river. The tonnage of the latter roads is also greater than that of the former as shown in the tables. Rates from Cincinnati to Southern territory from 35 to 50 per cent higher per ton per mile than those from Chicago to Cincinnati and other Ohio river crossings will, in our opinion, make full allowance for these differences in cost and tonnage, and be at least not unreasonably low as maximum rates. The rates in cents per 100 pounds given below are approximately upon this basis.

FROM CINCINNATI TO	1	2	3	4	5	6
Knoxville . . . . .	53	45	37	27	22	20
Chattanooga . . . . .	60	54	40	30	24	22
Rome . . . . .	75	64	54	44	34	24
Atlanta . . . . .	86	73	60	45	35	27
Meridian . . . . .	114	98	80	62	49	38
Birmingham . . . . .	87	74	60	46	36	28
Anniston . . . . .	86	73	60	45	35	27
Selma . . . . .	108	92	78	60	48	36

\* \* \* \* \*

An order will be issued directing the defendants engaged in transporting traffic from Chicago and Cincinnati to Southern territory to desist from charging higher rates on the traffic embraced in the numbered classes from those cities, respectively, than those in the two preceding tables and to make all the necessary readjustments of their tariffs. These rates are a conservative reduction of the existing rates and, while it is believed they will go far to do away with the "undue prejudice" to which Central territory is now subjected, they are probably not so low as they might be made if fuller and more accurate data were accessible. If the rates by the Eastern Seaboard lines be taken as the standard of comparison, the rates in these tables will be found to make in the main due allowance for the estimated effect on those rates of water competition *via* the Atlantic. They are also higher than the proportions of the through rates from New York *via* Cincinnati to Chattanooga, Birmingham and Meridian, allowed for the hauls from Cincinnati to those points, and which were in effect for a long period of years; and they yield a rate per ton per mile largely in excess of the reported cost per ton per mile of freight on the roads from the Ohio south (and in other sections of the country) and much above the average of their receipts per ton per mile. (See tables in statement of facts.) They are, it seems scarcely necessary to add, prescribed as maximum rates and are not intended to be prohibitory of such lower rates as the carriers interested may find to be just and reasonable.

We are not unmindful that a compliance with the order in these cases may and probably will necessitate a readjustment of rates from Central territory to other points in Southern territory than those named, but as we took occasion to say in the case of the *Board of Trade of Troy v. Alabama M. R. Co.*, 4 Inters. Com. Rep. 348, 6 I. C. C. R. 1, "it cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction to other localities."

Even pecuniary embarrassment of a road by reason of insufficient receipts from all sources is not a fact that will warrant making rates on a portion of its traffic unreasonably high for

the accomplishment of a purpose such as is disclosed in these cases. Excessive rates on certain classes of traffic may be made the basis of proportionately low rates on other classes, and thus shippers of the former are taxed with burdens which in justice should be borne by the latter and without any addition to the general aggregate revenue of the carrier. It is believed, moreover, that the reduction in rates ordered in these cases will result in a corresponding increase in the tonnage of the roads in the traffic affected, and that the revenue therefrom will be augmented rather than lessened. This, at any rate, will be the natural tendency of the change.

## POWER TO PRESCRIBE RATES

### INTERSTATE COMMERCE COMMISSION *v.* CINCINNATI, N. O., & T. P. RY. CO. ETC.<sup>1</sup>

On May 29, 1894, the Interstate Commerce Commission entered an order, of which the following is a copy :

At a general session of the Interstate Commerce Commission held at its office in Washington, D.C., on the 29th day of May, A.D. 1894.

The Commission having found and decided that the rates complained of and set forth in said report and opinion as in force over roads operated by carriers defendant herein, and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala., Anniston, Ala., and Selma, Ala., are unreasonable and unjust, and in violation of the provisions of the act to regulate commerce :

It is ordered and adjudged that the above-named defendants, engaged or participating in the transportation of freight articles enumerated in the Southern Railway & Steamship Association classification as articles of the first, second, third, fourth, fifth, or sixth class, do from and after the tenth

<sup>1</sup> "The Maximum Freight Rate" case. Decided by the Supreme Court of the United States, May 24, 1897. 167 U. S. 479.

day of July, 1894, wholly cease and desist and thenceforth abstain from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, or from Chicago, to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala., Anniston, Ala., or Selma, Ala., than is below specified in cents per hundred pounds under said numbered classes, respectively, and set opposite to said points of destination ; that is to say :

## ON SHIPMENTS OF FREIGHT FROM CINCINNATI

To	CLASS 1 RATES PER 100 LBS.	CLASS 2 RATES PER 100 LBS.	CLASS 3 RATES PER 100 LBS.	CLASS 4 RATES PER 100 LBS.	CLASS 5 RATES PER 100 LBS.	CLASS 6 RATES PER 100 LBS.
	Cents	Cents	Cents	Cents	Cents	Cents
Knoxville . . .	53	45	37	27	22	20
Chattanooga . .	60	54	40	30	24	22
Rome . . . . .	75	64	54	44	34	24
Atlanta . . . .	86	73	60	45	35	27
Meridian . . .	114	98	80	62	49	38
Birmingham . .	87	74	60	46	36	28
Anniston . . .	86	73	60	45	35	27
Selma . . . . .	108	92	78	60	48	36

## ON SHIPMENTS OF FREIGHT FROM CHICAGO

Knoxville . . .	93	79	62	44	37	32
Chattanooga . .	100	88	65	47	39	34
Rome . . . . .	114	97	79	61	49	38
Atlanta . . . .	127	107	85	62	50	39
Meridian . . .	114	98	82	60	47	38
Birmingham . .	111	95	72	52	44	34
Anniston . . .	126	107	85	62	50	39
Selma . . . . .	128	112	89	66	53	38

And said defendants, and each of them, are also hereby notified and required to further readjust their tariffs of rates and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

The railroad companies having failed to comply with the order, the Interstate Commerce Commission instituted this suit in the circuit court of the United States for the southern district of

Ohio to compel obedience thereto. The court, upon a hearing, entered a decree dismissing the bill (76 Fed. 183), from which decree an appeal was taken to the court of appeals, and that court, reciting the order, submits to us the following question: "Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth; all proceedings preceding said order being due and regular, so far as procedure is concerned?"

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

In view of its importance, and the full arguments that have been presented, we have deemed it our duty to reëxamine the question in its entirety, and to determine what powers Congress has given to this Commission in respect to the matter of rates. The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country, and subjected to varying and diverse conditions.

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected, and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the Commission the power and the duty to fix rates, and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the states of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice has been varying. Notice the provisions in the legislation of different states. We quote the exact language, following some of the quotations with citations of cases in which the statute has been construed: [Abridged. — ED.]

Alabama. Code 1886, p. 295, § 1130: "Exercise a watchful and careful supervision over all tariffs and their operations, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just."

California. In the constitution going into effect January 1, 1880 (article 12, § 22): "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make."

Georgia. Code 1882, p. 159, § 719: "Make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof." *Railroad v. Smith*, 70 Ga. 694.

Illinois. St. 1878 (Underwood's Ed.) p. 114, § 93: "To make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights on cars on each of said railroads."

Minnesota. Laws 1887, c. 10, p. 55: "In case the commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power, and is hereby authorized and directed to compel any common carrier to change the same and adopt such rate, fare, charge or classification as said commission shall declare to be equal and reasonable." *State v. Chicago, St. P., M. & O. Ry. Co.*, 40 Minn. 267, 41 N. W. 1047.

New Hampshire. Laws 1883, p. 79, § 4: "Fix tables of maximum charges for the transportation of passengers and freight upon the several railroads operating within this state, and shall change the same from time to time, as in the judgment of said board the public good may require; and said rates shall be binding upon the respective railroads." *Merrill v. Railroad Co.*, 63 N. H. 259.

On the other hand, in —

Kansas. Laws 1883, p. 186, § 11, reads:

No railroad company shall charge, demand or receive from any person, company or corporation, an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad company. And upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and if sustained shall make a certificate under their seal, setting forth what is a reasonable charge for the service rendered, which shall be *prima facie* evidence of the matters therein stated.

Section 18 authorized an inquiry upon the application of parties named in reference to freight tariffs, and an adjudication upon such inquiry as to the reasonable charge for such freights; section 14 required a notice of the determination to be given to the railroad company, and a communication of a failure to comply with such determination in a report to the governor; and section 19 reads:

Any railroad company which shall violate any of the provisions of this Act shall forfeit for every such offense, to the person, company, or corporation aggrieved thereby, three times the actual damages sustained by the said party aggrieved, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court: and if an appeal be taken from the judgment, or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in appellate court or courts.

The effect of these provisions was to make the determination of the commission *prima facie* evidence of what were reasonable rates, and to subject the railroad company failing to respect such determination or to prove error therein to the large penalties prescribed in section 19.

Kentucky. The act of April 6, 1882, § 1 (Gen. St. p. 1021), provided that "if any railroad corporation shall wilfully charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state . . . it shall be guilty of extortion," etc. Further sections created a commission, and by section 19 the commissioners were authorized to hear and determine complaints under the first and second sections of this act, and upon such complaint and hearing file their award with the clerk of the circuit court, which might be traversed by any party dissatisfied, and the controversy thereafter submitted to the court for consideration and judgment.

Massachusetts. Pub. St. 1882, p. 603, § 14: "The board shall have the general supervision of all the railroads and railways, and shall examine the same." By section 15, if it finds that any corporation has violated the provisions of the act, or any law of the commonwealth, it shall give notice thereof in writing, and if the violation shall continue after such notice shall present the facts to the Attorney-General, who shall take such proceedings thereon as he may deem expedient. By section 193 special authority is given to the board to revise the tariffs and fix rates for the transportation of milk. See *Littlefield v. Railroad Co.*, 158 Mass. 1, 32 N. E. 859.

\* \* \* \* \*

The legislation of other states is referred to in the Fourth Annual Report of the Interstate Commerce Commission, Append. E., p. 243 *et seq.* It is true that some of these statutes were passed after the Interstate Commerce Act, but most were before, and they all show what phraseology has been deemed necessary whenever the intent has been to give to the Commissioners the legislative power of fixing rates.

It is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, etc.

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should

control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the Interstate Commerce Act do we find words similar to those in the statute referred to, giving to the Commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rate, charge or classification as said Commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the first section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the Commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that, in enforcing and executing the provisions of the act, it is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges, and, as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not, in terms, given the Commission

the power to determine what are just and reasonable rates, for the future, yet, as no other tribunal has been provided, it must have intended that the Commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section, commanding reasonable rates, and the twelfth, empowering the Commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the Commission the power to prescribe any tariff, and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees :

Article 2, § 3, of the Constitution of the United States, ordains that the President "shall take care that the laws be faithfully executed." The act to regulate commerce is one of those laws. But it will not be argued that the president, by implication, possesses the power to make rates for carriers engaged in interstate commerce. . . .

The first section simply enacted the common-law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts "to execute and enforce" the common-law requirement that "all charges shall be reasonable and just," and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers.

But the power of fixing rates under the Interstate Commerce Act is not to be determined by any mere considerations of omission or implication. The act contemplates the fixing of rates, and recognizes the authority in which the power exists. Section 6 provides, etc. . . .

Finally, the section provides that, if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the Commission. Now, but for this act it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This section 6 recognizes that right, and provides for its continuance. It speaks

of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the Commission, are subject, in any way, to the latter's approval. Filing with the Commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by 10 days' public notice, and on reduction by 3 days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line; but, further, when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the Commission, and nothing but the kind and extent of publication thereof is left to the discretion of the Commission.

It will be perceived that the section contemplates a change in rates, either by increase or reduction, and provides the condition therefor; but of what significance is the grant of this privilege to the carrier, if the future rate has been prescribed by an order of the Commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order, unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to, and dependent upon the judgment of, the Commission.

We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common

carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the Commission this power of fixing rates is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action — First, publication ; and, second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission.

These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the Commission no functions to perform in respect to the matter of rates, no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And, with this knowledge, it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions, and enforcing obedience to all these provisions, tends, as observed by Commissioner Cooley in *Re Chicago, St. P. & K. C. Ry. Co.*, 2 Interst. Commerce Com. R. 231, 261, to both reasonableness and equality of rate, as contemplated by the Interstate Commerce Act. \* \* \* \*

Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

The question certified must be answered in the negative, and it is so ordered.

Mr. Justice HARLAN dissented.

## VII

### RELATIVE RATES ON SALT

#### ANTHONY SALT CO. *v.* MISSOURI PACIFIC RAILWAY CO., ETC.<sup>1</sup>

McDILL, *Commissioner* :

The general complaint made by all these plaintiffs is that the several defendants give an undue advantage in rates to the manufacturers of salt in and about Saginaw, Michigan, over that enjoyed by the manufacturers of salt-producing points in Kansas. Some mention is also made of New York salt as being granted similar and undue advantages over Kansas salt.

Instances are given in the complaint as follows :

Rate on Bay City, Michigan, salt to St. Louis, Missouri, 611 miles, per hundred pounds . . . . .	10 cents
New York salt pays to St. Louis, Missouri, 806 miles, per hundred .	13 “
While Anthony, Kansas, salt pays to St. Louis, Missouri, 575 miles	23 $\frac{3}{8}$ “
Rate on Michigan salt from St. Louis, Missouri, to Fairbury, Ne- braska, per hundred pounds, distance 504 miles . . . . .	15 $\frac{3}{8}$ “
Hutchinson, Kansas, to Fairbury, Nebraska, 247 miles . . . . .	19 “
Hutchinson, Kansas, to Ft. Madison, Iowa . . . . .	23 $\frac{1}{8}$ “
Chicago to Kansas City, Michigan, salt . . . . .	15 “
Michigan salt to Ft. Worth, Texas, 1387 miles, per hundred . . . . .	43 $\frac{1}{2}$ “
Kansas salt to Ft. Worth, Texas, 427 miles, per hundred . . . . .	35 $\frac{1}{2}$ “
Michigan salt from Ft. Madison, Iowa, to Ft. Worth, Texas, 826 miles	35 $\frac{1}{2}$ “
Hutchinson, Kansas, salt to Clio, Iowa, 372 miles, per hundred . . .	23 “
Chicago to Clio, 373 miles, per hundred . . . . .	15 “

It is claimed that the defendants by charging the rates above set forth, and by making similar differences at other points, are violating the Act to Regulate Commerce, and a restraining order is sought. The defendants say substantially, while generally admitting the statements of the plaintiffs as to rates, that those lines which make the rates complained of are other and

<sup>1</sup> Decided April 23, 1892. Interstate Commerce Commission Reports, Vol. V, pp. 299-323.

different than those named as defendants; that defendants have no voice or part in making the rates from Chicago to the Mississippi and Missouri river points, nor from Bay City and the Michigan salt field to Chicago and St. Louis. That these rates were brought about by water competition, and other forces uncontrollable by any of the carrier lines and adjusted and agreed upon long before the Kansas salt fields were discovered and developed and that to make the charges sought by complainant would disturb the whole system of rates, and result in a compulsory rearrangement of all rates from Chicago and East St. Louis westward; that many independent lines extend from Chicago and St. Louis westward and southward, which do not reach the Kansas salt points, that the requirement of the law as to long and short haul, greater volume of business on the eastern portion of the lines and greater number of empty cars going westward and numerous other causes, beyond the control of the carriers, have operated to fix rates. Those rates that are complained of from Kansas to southeastern Nebraska and other points are said by defendants to be reasonable, the service being in a sparsely settled country and necessarily made by circuitous routes, and over branch lines and also controlled by circumstances and conditions which are altogether dissimilar to those controlling the fixing of the Michigan salt rates. That the rate on salt is everywhere very low, it being a commodity which will not bear any but very low rates. \* \* \*

#### *Finding of Fact*

Salt is manufactured in great quantities in the northeastern part of the southern peninsula of Michigan. The principal points of that field are Bay City and Saginaw. Salt is also manufactured in large quantities in the southern and central parts of Kansas. Hutchinson, Kansas, is an important point in the Kansas field, but Anthony, Kingman, Sterling, Nickerson and Wellington are also prominent points.

The productive capacity of each field is practically unmeasured, and probably equal to any demand that is likely to exist for the product in regions within reach of either.

The cost of producing the salt and putting it in the barrel ready for shipment, including the cost of the barrel, is estimated in the Kansas field at from 60 to 70 cents per barrel. The cost is probably about five cents per barrel less in the Michigan field. A salt barrel weighs about 20 pounds and contains about 280 pounds of salt.

The cooperage materials from which salt barrels are made for use in Kansas come from Michigan and from the vicinity of the Saginaw salt region, being brought by rail to Kansas. The fuel used at the Kansas salt fields is slack coal brought by rail from various points in southeastern Kansas and northwestern Arkansas. The Michigan salt manufacturers get their cooperage material from near the salt plants. In some instances they use as fuel the slabs and refuse from sawmills. When they use coal, they get it principally from Cleveland and other lake points. This coal costs more than the slack used at the Kansas plants. The Kansas brine is much stronger than the Michigan, and the Kansas wells are not so deep. All things considered, it would seem, there is but little difference in the cost of getting salt ready for market at the two points, the advantage, if any, being with the Michigan salt.

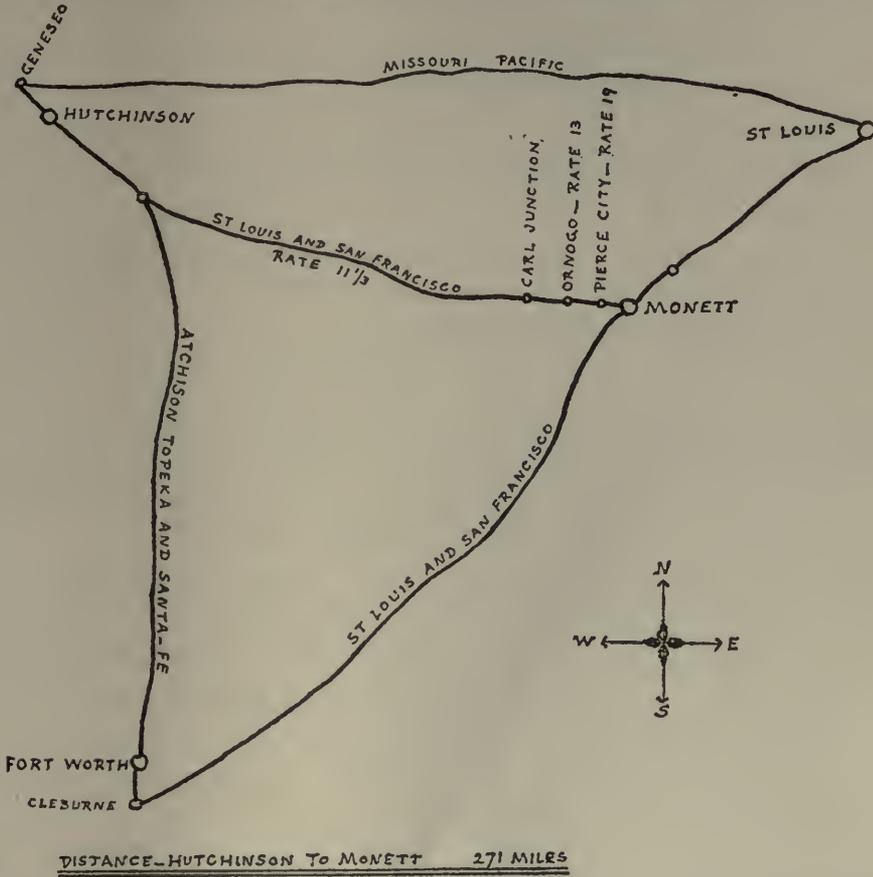
The production and output of salt in Michigan, began in 1861 ; the amount that year was . . . . .	125,000 barrels
In 1875 . . . . .	1,000,000 “
In 1890 . . . . .	4,000,000 “

— and Michigan now produces a very large portion of the salt supply in the United States.

Kansas salt production began in 1888, and for the year ending March 31, 1891, it reached 1,000,000 barrels. The area of territory embraced in the Kansas salt fields is large, being from east to west about 75 miles, and from north to south about 150 miles. The quality of it is good. Great quantities of salt are produced in other parts of the United States, namely, in New York, in the valley of the Ohio, in Louisiana, in Texas, and in Utah.

The United States annually consumes about 12,000,000 barrels of salt.

Salt from Michigan and New York reaches St. Louis and Chicago at very low rates. The St. Louis rate on Michigan salt exceeds the Chicago rate in the amount of  $3\frac{1}{3}$  cents per hundred, or 10 cents per barrel. On New York salt the rate varies during the year, the St. Louis rate being at all times from 3 to 4 cents per hundred more than to Chicago, according to the season of the year.



Great quantities of Michigan and New York salt are stored at all times at Chicago and St. Louis for distribution south to Texas points, and west to the country lying between the Mississippi river and the Rocky Mountains. \* \* \* \*

The tonnage east-bound on the defendant lines greatly exceeds the tonnage west-bound.

The amount of freight passing over the Rock Island bridge for the year ending March 31, 1891, east-bound was 23,000,000 pounds; west-bound 1,300,000 pounds.

The tariff sheets of the St. Louis & San Francisco road reveal the use of the following rates :

Hutchinson east to Carl Junction, distance 225 miles,  $11\frac{2}{3}$  cents.

Oronogo, distance 231 miles, 13 cents.

Pierce City, distance 266 miles, 18 cents.

\* \* \* \* \*

Springfield, 237 miles, the rate is  $15\frac{2}{3}$  cents.

Pierce City, 287 miles, the rate is  $15\frac{2}{3}$  cents.

Oronogo, 322 miles, the rate is  $15\frac{2}{3}$  cents.

On the Atchinson, Topeka & Santa Fé line rates are made to Texas points as follows :

	Per Ton per Mile
Hutchinson to Ft. Worth, a distance of 427 miles, rate $35\frac{1}{2}$ . . . . .	1.662
Ft. Madison to Ft. Worth, 826 miles, rate $35\frac{1}{2}$ . . . . .	.859
Chicago to Ft. Worth, 1065 miles, rate $41\frac{1}{2}$ . . . . .	.779
Bay City to Ft. Worth, 1388 miles, rate $43\frac{1}{2}$ . . . . .	.625

At Austin, distance from Hutchinson 669 miles, the rate is  $35\frac{1}{2}$  cents, or 1.061 cents per ton per mile, while Michigan salt is given a rate from Ft. Madison to Austin 1069 miles of  $35\frac{1}{2}$  cents or .664 of a cent per ton per mile.

Relative differences of a kindred character are found in the charges for transporting the product manufactured at the two points, to Houston, Galveston, Laredo, San Antonio, Nacogdoches and San Angelo, the advantage in the rate per ton per mile being at all times in favor of the Michigan salt.

The question raised is one of relative rates and resulting discrimination which is claimed to be unjust, because it is said to bring about an undue preference of the Michigan region over the Kansas region both engaged in manufacturing salt, and to result in prejudice to the Kansas locality. The giving of undue or unreasonable preference or advantage of any particular locality over another or subjecting any particular locality to any undue or unreasonable prejudice or disadvantage as to any other locality is declared in section three of the "Act to Regulate Commerce," to be unlawful. The facts are scarcely in dispute. It is practically conceded, that salt transported from Michigan, south and west, has more favorable rates than salt

transported from Hutchinson and other points in Kansas, north, south and east, but defendants say that they are not responsible for the rates on Michigan salt. Its transportation, they allege, is forced to a very low mark by causes outside of any territory occupied by their lines, and where such forces are at work as to make a dominating necessity for the maintenance of present low rates, which have been established (for a long time acquiesced in), and regarded as absolute necessities for the work of transportation, in such manner as to secure the greatest good to the greatest number. That therefore, the rates complained of are, even if in violation of the law, not the acts of these defendants. They however insist, that the rates given the Michigan salt are reasonable, proper, and necessary; that the conditions and circumstances of controlling force and effect are dissimilar in reference to the two localities brought into question, namely, the Michigan and the Kansas salt fields, and finally, if there should be found a necessity for readjustment of rates, that it can only be done by making parties to the proceedings all lines interested by location and actual traffic operations in the business of either locality, with reference to the salt shipped therefrom, and carried to market over such carriers' lines.

A comparison of rates is invoked by these complaints, between rates on salt manufactured in Michigan and moving south and west, and rates on salt manufactured in Kansas and moving north and east. The commodities shipped, though similar in quality, are moving in a different, not the same direction.

From the fact that in the one case the product moves south and west to market, and in the other north and east, it follows that the lines serving in part the two localities run through differently situated countries, the one sparsely settled and not furnishing a very large local trade, the other more thickly settled, furnishing a larger local trade, and a greater volume of business. The lines leading from the Michigan salt region, besides the advantages just mentioned, have been forced, it is claimed, to make lower rates, than would probably have been acquiesced in, under other conditions, on account of water competition. And these rates were established before the Kansas

salt fields were discovered, so that, it is evident, that at the time of their establishment there could have been no intention to unduly prefer the Michigan salt region, as compared with the Kansas salt region.

Not only is it claimed that water competition has lowered rates for the Michigan salt but that certain other established conditions have had the same tendency. These as set forth are, the great volume of business moving west and south from Chicago over the lines carrying Michigan salt, the heavy preponderance of east-bound freight over west-bound, principally caused by the large number of stock, or cattle and grain cars, used in transporting live stock and grain from western states and territories to Chicago and eastern points, thus throwing upon the lines terminating at Chicago large numbers of empty grain and cattle cars, which must return as empties to the west unless some product can be loaded into these cars, and transported west at a rate slightly remunerative. It is evident that these conditions have powerfully aided the Michigan salt in obtaining a low rate on its western and southern haul. These dissimilar circumstances and conditions are mentioned in section two of the Act to Regulate Commerce as matters to be considered. The proposition of the law seems to be that, where the circumstances and conditions of two localities are substantially similar, there shall be no advantage of preference given to one which is not also freely offered to the other. To give an advantage or preference, under such circumstances, to one place would be undue, or, in other words, would be giving to the favored locality an advantage, which did not of right belong to it, and producing an undue prejudice against the other locality.

It was urged with earnestness by the complainants, that the proof was that a great number of empty cars from Colorado and westward of Hutchinson and Kansas salt points were to be found in the region of these points, which could be conveniently and profitably loaded with salt and sent eastward, but, in our judgment, the force of this reasoning is broken by the fact that Hutchinson and the salt points of Kansas are within the grain belt, and the demand for grain cars, during a considerable part

of the year, is greater than the supply; that loaded with grain these empties would yield a profit on the eastward haul which would be in excess of the profit on salt. To require carriers to take an unremunerative commodity, which demands a rate lower than the classes, in preference to another article which also takes a commodity rate, but will yield a greater profit to the carrier than the carriage of the former commodity, might be an unjustifiable requirement as revenues should not be arbitrarily reduced.

So far as the rate on Michigan salt from Bay City to Chicago is concerned, it appears it was originally charged 33 cents per barrel, but this rate was reduced to 20 cents per barrel prior to the discovery and development of the Kansas salt, and has for a long time been the fixed rate.

The difference in charge for transportation of freight to St. Louis over the charge to Chicago is and seems to have been for a long time prior to the discovery of the Kansas salt fixed, as claimed by the railway, upon the following rule; that St. Louis should have a rate from the east as much greater than the Chicago rate as its rates westward, along distributing lines, were less than the Chicago rates, on its distributing lines, thus placing the two cities upon an equality as distributing centers. The Michigan salt reaches the Mississippi river at a rate apparently compulsory in its character on the entire line from the field of production either direct from Bay City or *via* Chicago. Forces beyond the control of the defendants have fixed this rate, and they must carry at this rate from Chicago to the Mississippi river or go out of the business. Other great advantages here concur in favor of the Michigan salt moving from Chicago. These are, great numbers of west-bound empty cars, facilities for speedy loading of cars, and a minimum time of idleness for the unloaded cattle cars coming in from the west. Coal is cheaper in the region of supply for the eastern portions of the Rock Island and Atchison lines than the western portions.

It cannot be urged that the defendants are responsible for, or that they have arbitrarily fixed the rate on Michigan salt to either Chicago or St. Louis.

Nor can any comparison of rates from Hutchinson, Kansas, eastward to St. Louis with rates from Bay City to Chicago or St. Louis be of any advantage, for the conditions and circumstances are not substantially similar.

For these reasons, a comparison as to relative rates if of any value, should be as between St. Louis and Kansas City on the one hand, and Kansas City and Hutchinson, Kansas, and the several Kansas salt points on the other hand. The distance from St. Louis to Kansas City is 283 miles. The rate on salt  $11\frac{2}{3}$  cents.

The distance from Hutchinson and the salt points to Kansas City is 235 miles. The rate on salt is  $11\frac{2}{3}$  cents. The shortest rail line distances from St. Louis to Kansas City is *via* the Wabash Road being 277 miles. This road does not reach the Kansas salt regions nor is it a party defendant in this case.

The roads leading from Chicago to Kansas City cannot, as rates are now arranged, charge more than the rate from St. Louis to Kansas City plus the difference between Chicago and St. Louis,  $11\frac{2}{3}$  cents plus  $3\frac{1}{3}$  cents, or 15 cents the rate charged. If these roads charged more than 15 cents, all the Michigan salt would go *via* St. Louis and they would carry none and would lose the profit of carrying salt.

It is claimed by the plaintiffs in this case, that the rate from Kansas salt points to St. Louis should be 15 cents, and that discrimination against Kansas salt consists in a rate of  $23\frac{1}{3}$  cents to that point, which was the rate at the time the complaint was made, it now being 18 cents.

It must be noted, however, that lines from Chicago reach Kansas City that do not reach the Kansas salt fields. For instance, the Chicago, Burlington & Quincy railroad reaches Kansas City, the distance being 499 miles, and by a route substantially the same it reaches St. Joseph, Mo., the distance being 471 miles; and carries salt to this point and others at a 15 cent rate, if it carries at all, that being the maximum rate it is able to charge.

The claim of the plaintiffs to be allowed a 15 cent rate to St. Louis, would, we think, disarrange and disturb relations of

rates to places considered alone as to distance. If salt were carried from Kansas salt points to St. Louis for 15 cents, a distance of 512 miles, while Michigan salt pays  $11\frac{2}{3}$  cents for going from St. Louis to Kansas City, a distance of 283 miles, it seems apparent that the shorter distance over the same line would pay a greater rate relatively than the longer distance. From St. Louis to Kansas City being 283 miles, if it be conceded that  $11\frac{2}{3}$  cents is a proper rate for that distance, distance alone now being considered, then the additional 235 miles from Hutchinson to Kansas City should (distance alone now being considered), pay for the additional haul  $11\frac{2}{3}$  more, or a rate of  $23\frac{1}{3}$  cents, and this was the precise rate charged at the time of complaint, now being 18 cents. If the rate asked by plaintiffs were established and the rate on Michigan salt were continued as at present, namely,  $11\frac{2}{3}$  cents for the 283 miles from St. Louis to Kansas City, a continuance of which latter rate is contemplated by defendants, then at a 15 cent rate for Kansas salt from Hutchinson to St. Louis there would only be left to pay for the distance hauled to Kansas City, which is 235 miles,  $3\frac{1}{3}$  cents per hundred, or the rate would be less for hauling practically the same distance west of the Missouri river than charged for the same distance east of the Missouri river, and this low rate would be established, being low and unequal, on freight passing eastward on a line running through a sparsely settled country, which often suffers for want of a sufficient number of cars to carry its grain and other products eastward, and on a line which had a great number of empty cars moving westward. The effect of such a rate upon the lines which extend into the country west of the Missouri river from Chicago, but which do not reach the Kansas salt field, could not be otherwise than disastrous and disturbing.

Being forced, either to abandon salt transportation, or to meet the lowered salt rate from Kansas, such lines would, if any appreciable margin of remuneration were left at the lower rate, undoubtedly choose the latter alternative. This would again destroy the equilibrium of rates, and Kansas salt would be in a position to demand another reduction which, if granted,

would call for another lowering of rates from Chicago westward and so on indefinitely. Now while this would not be undesirable when brought about by the removal of artificial and unnatural differences, yet when the difference is, as in this case, one resulting from dissimilar circumstances and conditions, and when made to operate on commodity rates, concerning which no one has in this case shown that they are unreasonable or high rates, it does not appear to be right to inaugurate such continuing disturbances, when the real difficulty seems to be a real and natural advantage which the one region has and enjoys over the other. \* \* \* \* \*

When we come to a consideration of the evidence as to the rates on salt from Michigan to Texas, as compared with Kansas salt shipped to the same points, we find rates that we cannot approve. The Atchison, Tópeka & Sante Fé road has a line running from Hutchinson in the Kansas salt fields to points in Texas. This line extends from Hutchinson in a general southerly direction.

The salt fields of Kansas lie nearer to some points in Texas than does St. Louis, the distributing point in question for Michigan salt going south. The limitations and conditions which are brought forward as tending to control the rates on salt moving westerly from Chicago, do not control the movement of Hutchinson salt southerly along the line to Texas points. \* \*

The St. Louis & San Francisco Railway extends to the same southern and southwestern points, and is leased and operated by the Atchison road.

The Atchison has a direct line south from Hutchinson to Ft. Worth, San Antonio, and other Texas points. It has another direct line to the same points from St. Louis *via* the St. Louis & San Francisco road. The latter road has a line from Hutchinson southeast toward Springfield, Mo., and at Monett Junction it intersects the line coming southwestwardly from St. Louis. The exact situation may be more clearly understood by the accompanying map on page 193.

By a reference to the map (p.193), it seems that the consumers of salt are hedged away from the Kansas salt, on the line of

the St. Louis & San Francisco Railroad, at Oronogo, and Pierce City not far from 250 miles distant from the field of its production, the distance from Hutchinson to Monett Junction being about 271 miles, while the Michigan salt from St. Louis has a clear way from St. Louis to Ft. Worth *via* the Atchison line, and in turn the Kansas salt gets no relief from the direct line from Hutchinson to Ft. Worth, for the reason that the rate on salt from St. Louis to Ft. Worth is fixed at  $35\frac{1}{2}$  cents while the rate from Hutchinson to Ft. Worth is  $35\frac{1}{2}$  cents. Yet the distance from Hutchinson to Ft. Worth is 427 miles, while the distance from Bay City, Michigan, to Ft. Worth is 1388.

The rate from Bay City to Ft. Worth, 1388 miles, is  $43\frac{1}{2}$  cents per hundred on salt, while from Hutchinson, Kansas, to Ft. Worth, 427 miles, the rate is  $35\frac{1}{2}$ . The excess in haul from Bay City only pays 8 cents per hundred, and the excess is twice as great as the total distance from Hutchinson to Ft. Worth.

As St. Louis is the distributing point for Michigan salt moving south and west, it would seem right to make the comparison between St. Louis and Hutchinson. St. Louis for the purpose of this inquiry may be treated as the point of origin of Michigan salt, the cost of getting it to the distributing point being perhaps an element of the original cost of the article in preparation for market. St. Louis is 743 miles from Ft. Worth, Texas; Hutchinson is 427 miles from the same point. If the common rate  $35\frac{1}{2}$  cents per hundred is the proper rate for the 427 miles haul from Hutchinson to Ft. Worth, then the excess of haul from St. Louis to Ft. Worth which is 316 miles, without any reason shown in the record, is a carriage without charge. While many other considerations than distance may be considered in determining what shall constitute a proper rate, yet in this case nothing is shown to justify the apparent discrepancy of charge, and it is believed to work an undue preference to Michigan salt over Kansas salt going to Texas and southerly points.

It can hardly be disputed that there is here a disadvantage brought about to the Kansas, and a preference given to the Michigan, salt, both undue and unreasonable. It seems that this arrangement is wholly under the control of the Atchison

Railroad, and the lines leased and operated by it, and we see nothing in the situation, as proven, which can be given as a valid reason for not putting the Kansas salt fields in possession of all these natural advantages in the territory traversed by these lines. We think that, in all this territory, where the Texas points are as near to Hutchinson as to St. Louis, the Kansas salt should by a rearrangement of rates be carried for an equal charge, and where Hutchinson is nearer than St. Louis, the Kansas salt should have the reasonable advantage of its proximity to the market, at all times, however, observing the requirements of the law as to the long and short hauls.

We find and conclude, with reference to all the other defendants, except the Atchison, Topeka & Santa Fé, and its leased and operated lines, and with reference to that portion of *its* line leading directly from Chicago west, that the advantages given to Michigan salt, by which it reaches Chicago and East St. Louis, are advantages it enjoys by reason of its natural situation. That the advantage, by which it reaches the Missouri river on a very low rate, is fixed by conditions beyond the control of the defendant roads, and that such conditions existed by reason of the situation before the Kansas salt was discovered.

With reference to the Atchison, Topeka & Santa Fé Railroad, and its lines, operated and leased, running from St. Louis and Hutchinson south and southwest, and connecting with such lines, the present adjustment of rates we think *does* operate so as to bring about an undue advantage to and undue preference of Michigan salt over Kansas salt, and said defendant, the Atchison, Topeka & Santa Fé Railroad, is now advised that said rates as now adjusted are in violation of the provisions of section three of the Act to Regulate Commerce, and it is hereby ordered to desist from the enforcement of the present rates, and at once to readjust rates on its last-named lines, at all times observing the requirements of the law as to the long and short haul, so as to give the advantages of distance belonging to Kansas salt, in all the territories supplied by its lines, that lie as near or nearer to Hutchinson than St. Louis.

## VIII

### RELATIVE RATES

#### THE EAU CLAIRE LUMBER CASE<sup>1</sup>

KNAPP, *Commissioner* :

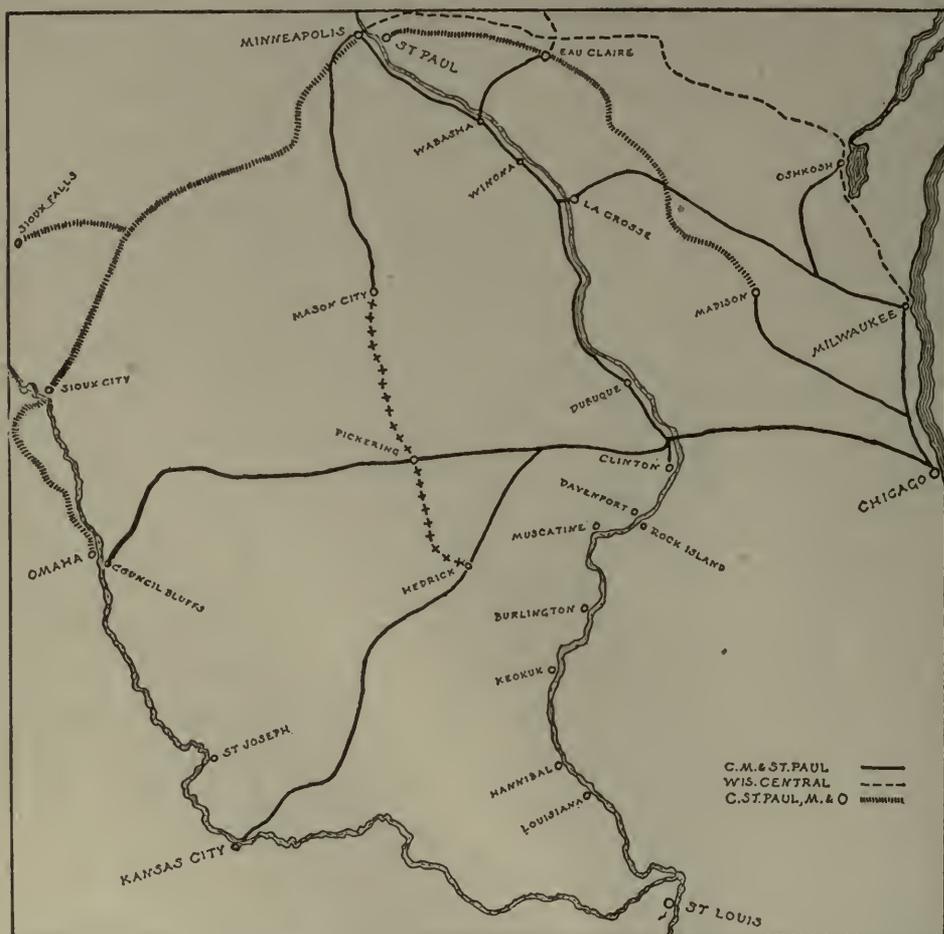
\* \* \* \* \*

1. The complainant, the Eau Claire Board of Trade, is an association of citizens and residents of the city of Eau Claire, Wisconsin, organized to promote the business interests of that city. The defendant railroad companies are severally common carriers engaged in the interstate transportation of lumber and other freight. The sources of supply of the west-bound lumber shipped over these roads are the forests of northern Michigan, Wisconsin and Minnesota; and the main points from which such shipments are made are Minneapolis, Eau Claire, Winona, La Crosse, Oshkosh, Milwaukee and Chicago, and the following towns on the Mississippi river, south of La Crosse, to wit: Dubuque, Clinton, Lyons, Fulton, Moline, Rock Island, Davenport, Muscatine, Burlington, Keokuk, Hannibal and Louisiana. The market or distributing towns to which these shipments are made are for the most part the "Missouri river points," Sioux City, Omaha, Council Bluffs, St. Joseph and Kansas City.

2. No one of the defendant roads reaches all these points of production. From Eau Claire shipments of lumber are made to the Missouri river over the Chicago, Milwaukee & St. Paul, the Chicago, St. Paul, Minneapolis & Omaha, and the Wisconsin Central. The Chicago, Milwaukee & St. Paul road, (hereinafter designated the "Milwaukee,") has main lines as follows: from Chicago to Council Bluffs; from Marion, Iowa, on said former

<sup>1</sup> Decided June 17, 1892. Interstate Commerce Commission Reports, Vol. V, pp. 264-298.

line, to Kansas City; from Oshkosh to Milwaukee; from Milwaukee to Sabula Junction; from Minneapolis *via* Wabasha to Sabula Junction, called the "river line;" from Minneapolis to Mason City, called the "Iowa & Minnesota line." Minneapolis, Winona and La Crosse are on the "river line," but Eau Claire is on a branch forty-eight miles in length connecting with that



line at Wabasha. The Milwaukee road has an arrangement with the Iowa Central by which, in hauling from Eau Claire and Winona to Council Bluffs, it uses the latter road from Mason City to Pickering, a distance of 97 miles, and, in hauling to Kansas City, it uses the same road from Mason City to Hedrick, a distance of 167 miles. The distances *via* the Iowa Central are considerably less than those over the Milwaukee line proper.

The Chicago, St. Paul, Minneapolis & Omaha road (hereinafter styled the "Omaha") has a line extending from Eau Claire through St. Paul and Minneapolis to Sioux City, Omaha, and Council Bluffs. \* \* \* \* \*

3. As above stated, the sources of supply of the lumber carried by these roads are the forests of Northern Minnesota, Wisconsin and Michigan. The Minnesota timber is manufactured into lumber largely at Minneapolis, and thence transported to market; the Michigan timber is manufactured into lumber in that state and carried by water to Milwaukee, Chicago and other lake ports; the Wisconsin timber is manufactured extensively at Eau Claire, Winona, La Crosse and Oshkosh. Eau Claire and La Crosse are in western Wisconsin, the former about 75 miles by water from the Mississippi river, and the latter on its eastern bank; Winona is in Minnesota, on the western bank of the Mississippi, and Oshkosh is on Lake Winnebago in eastern Wisconsin. Minneapolis is about 100 miles from Eau Claire; Winona about 80 miles, and La Crosse about 108 miles. Eau Claire is situated at the junction of the Eau Claire and Chippewa rivers; the Eau Claire is a branch of the Chippewa, and the latter empties into the Mississippi. Logs are floated down the Eau Claire and Chippewa rivers to Eau Claire, and thence on the Chippewa and Mississippi rivers to Winona and La Crosse, and also to Mississippi river points below. Logs are also floated down the Black river to La Crosse and other Mississippi river towns. A large part of the timber on the Eau Claire and Black rivers can be floated with about equal facility down either stream and taken to Winona and La Crosse on the one hand or Eau Claire on the other. Eau Claire, Winona, La Crosse and Oshkosh are small cities, each having from 18,000 to 20,000 inhabitants, while Minneapolis has about 150,000. These cities are all natural lumber markets; they have large sawmills, and the manufacture, sale and shipment of lumber are conducted on a large scale at Minneapolis, and constitute the principal business of the other places. Eau Claire and all the cities of Wisconsin, Minnesota and the northern peninsula of Michigan, and also Mississippi river points engaged in the manufacture and

shipment of lumber to the Missouri river, may be said to be in competition in this business, but the most active competitors of Eau Claire are Winona and La Crosse. The principal distributing points for Eau Claire lumber are, and for 20 or 25 years have been, the Missouri river towns, which are also the principal markets for other shipping points both on the Mississippi river and in the interior. Eau Claire seems to be more rigidly confined than its competitors to the Missouri river market. Since 1884 when the Bogue award was made, southern yellow pine from the states of Georgia, the Carolinas, Southern Missouri, Arkansas and Texas, has come into competition with the white pine from Minnesota, Wisconsin and Michigan. This competition extends north to the southern line of Minnesota, and is strong in Missouri, Kansas, Nebraska and Iowa. The natural tendency of this competition is to reduce the price of the northern pine, and in that way affect transportation rates on the latter, but it does not appear to have an appreciable effect on the *relation* of rates on lumber between Eau Claire and its immediate competitors. \* \* \*

5. The Omaha road was built to Eau Claire in 1878 or 1879, and the Milwaukee road about 1882. Prior to the building of these roads, lumber produced at that place was rafted and then floated down the Chippewa and Mississippi to various towns on the latter river, from which it was distributed by rail to market destinations mainly in the west. These towns on the Mississippi have been engaged in this business since 1850 or 1852. After these roads were constructed, Eau Claire entered largely into the business of "piling, drying and manufacturing lumber" and shipping the same to market by rail. About half the cut at Eau Claire in 1890 was shipped in this way, and the other half was rafted to Mississippi river towns; and it is estimated that eighty per cent of the lumber rafted to points below Winona comes from the Chippewa river. Eau Claire appears to be adapted by location and in other respects for the manufacture and sale of lumber; it has a natural booming ground or place for the safe storage of logs, cheap transportation from the stump to the mills, proximity to the timber and locations suitable for mills and yards:

Being situated nearer the pine forests, the sources of timber supply, and at the confluence of two rivers which penetrate those forests, the Eau Claire and Chippewa, it appears to have natural advantages over its neighboring competitors. . . . After lumber is in the raft, the cost of its transportation by water down the Mississippi is less than for the same distance by rail; but, including the rafting and preceding expenses, the testimony is to the effect that lumber can be shipped from Eau Claire by rail direct to Missouri river markets at as little if not less, cost than it can be floated to Mississippi river points and thence transported by rail to those markets. The railway companies whose lines run from Chicago across the Mississippi to the Missouri river territory naturally desire that lumber be carried by water down the Mississippi to shipping points on that river, and be thence shipped over their roads to the Missouri river markets. The Omaha road is also interested in maintaining high lumber rates at Eau Claire, because of an agreement between that road and the purchasers of its timber lands in northwestern Wisconsin, by which those purchasers bound themselves to ship over its line the timber from such lands, (which is further from the Missouri river markets than Eau Claire timber), on condition of receiving the same rates as might be charged by that road on such shipments from Eau Claire.

6. The rates from Eau Claire and the other shipping points to the Missouri river markets are based on the rate from Chicago, being certain differentials over or under that rate, and the same rate is made from any one of the shipping points to all the Missouri river markets, although the distances to the latter vary materially.       \*       \*       \*       \*       \*       \*

In the early history of the lumber industry in this territory the principal points of competition were Chicago on the one hand, and St. Louis, Hannibal and Louisiana on the other. Chicago received its lumber from Michigan by way of the lake, and the other towns received theirs by way of the Mississippi. As railroads were built from time to time into the northern pineries, and numerous towns engaged in the manufacture of lumber, the conflict of rates increased and much uncertainty and

demoralization resulted. After several unsuccessful attempts to adjust these differences, the railway companies finally submitted the matter to Mr. George M. Bogue, under an agreement between them to abide by his arbitration. The decision rendered by him, known as the "Bogue Award" was made May 26, 1884, and is as follows:

AWARD OF THE ARBITRATOR AS TO THE DIFFERENTIALS WHICH  
SHALL GOVERN ON LUMBER TO MISSOURI RIVER POINTS

J. W. Midgley, Esq.,  
Chairman, etc., — Chicago.

Chicago, May 10, 1884.

Dear Sir:— The question as to what difference shall govern in rates from the several shipping points on or east of the Mississippi river on lumber destined to Missouri river points, referred to me for arbitration, has had my careful consideration. \* \* \* \* \*

I am impressed with the idea that, instead of this question being settled on the basis of the cost of lumber, the question at issue is, "What rate will enable each line party to this arbitration to place its fair proportion of lumber in the territory under consideration? for it is fair to assume that no road will see its principal lumber points dismantled and dried up till all efforts to retain their prominence have been exhausted; and, meantime, in the effort to do this, a great deal of money will be wasted. It is no doubt true that the roads reaching Chicago — which is the largest primary grain and stock receiving point in the world — can in their return make rates on lumber without loss, which would net a loss if applied to the roads reaching the pineries direct; and it is doubtless true, also, that the actual cost of the haul from Chicago does not greatly exceed the shorter haul from the Mississippi river; and so long as this is the case, it is natural to expect that the Chicago roads will support the Chicago market.

This theory must not, however, be carried to the extreme, for if transportation costs anything, it certainly costs something for the haul from Chicago to the Mississippi river; and it is neither just nor politic for any road to claim that the rate from the Mississippi river should be as much or more than the Chicago rate, whatever may be the cost or the price at the two markets.

While, therefore, it seems easily apparent that lumber can be sold at the Mississippi river at as low, or lower, prices than at Chicago, it cannot be safely argued that the same rate should be made for so much greater distance.

After a most careful investigation of the subject in all its bearings, and with a keen appreciation of the delicate and difficult duty confided to me, I shall make the following award: [Abridged. — Ed.]

From St. Louis . . . . .	6½ cents per cwt. less than Chicago
“ La Crosse and Winona . . . .	1 cent “ above “
“ Minneapolis and St. Paul . . .	2 cents “ “ “
“ Menomonie (Wis.), Eau Claire and Chippewa Falls . . . . .	6½ cents “ “ “

All of which is respectfully submitted.

George M. Bogue, Arbitrator.

7. To show the construction placed upon this award by railroad authorities and their understanding of the principle upon which it was based, we make the following extracts from the testimony: A. C. Bird, Traffic Manager of the “Milwaukee” road, stated that “the acknowledged principle of the award was that each company was entitled to all the lumber it could carry at reasonable rates — that is, rates that were *relatively fair as between the railroads*, and to put all the manufacturers on any one road on a fair equality with the manufacturers on another road, to the end that each road might thereby receive the benefit of its manufacturing industries;” and, again, that “primarily the object of the Bogue award was to place each line in a position to carry its fair share of the Missouri river lumber, and further to place each manufacturing locality upon an even footing with its competitors. . . . *If Eau Claire could produce lumber cheaper than Winona or La Crosse, then the latter points were to have a lower rate so as to enable them to compete.*”

This award appears to have been observed by the defendant roads since its date, May 26, 1884, except that from February 8, to June 20, 1888, the Milwaukee road had a four-cent differential in force on shipments from Eau Claire. . . . It is plain that if the rate from Eau Claire should be reduced, a corresponding reduction could be made by the roads leading from other lumber-producing and shipping points which would restore the present relation of rates between Eau Claire and such other points.

8. At the time the complaint was filed, July 7, 1890, the Chicago rate to Missouri river points was ten cents per hundred pounds. It has since been advanced to fifteen cents.

The following table shows the rates from the towns named therein to Missouri river points, with the “Bogue differentials”

applied to the rates from Chicago of ten and fifteen cents, respectively; also the present rates as announced by the tariffs of the Western Freight Association: [Abridged. — ED.]

	RATES UNDER BOGUE DIFFERENTIALS		PRESENT RATES AS PER TARIFFS OF WESTERN FREIGHT ASSOCIATION
	Cents	Cents	Cents
Chicago . . . . .	10	15	15
Minneapolis . . . . .	12	17	17
Eau Claire . . . . .	16½	21½	21½
Winona . . . . .	11	16	16
La Crosse . . . . .	11	16	16
Oshkosh . . . . .	15½	20½	20½
Rock Island . . . . .	6½	11½	13
Burlington . . . . .	5½	10½	11½
St. Louis . . . . .	3½	8½	8½

While these rates are based on the Chicago rate, it appears that the building of large sawmills at other points, and the extension of railways into the timber regions of the northwest, have, to a large extent, withdrawn from Chicago the business of supplying lumber to western markets. Chicago, however, does as large a business as heretofore in supplying its local demand

#### DISTANCES BY SHORT LINES

FROM	To SIOUX CITY	To COUNCIL BLUFFS	To ST. JOSEPH	To KANSAS CITY
	Miles	Miles	Miles	Miles
Chicago . . . . .	517	488	479	458
Eau Claire . . . . .	358	457	586	605
Winona . . . . .	328	427	556	560
La Crosse . . . . .	356	443	546	540
Minneapolis . . . . .	263	362	491	531
Oshkosh . . . . .	580	604	655	647
Rock Island . . . . .	416	317	319	337
Burlington . . . . .	355	291	273	341
St. Louis . . . . .	511	412	307	277

and in shipping east. Lumber from Oshkosh is also shipped extensively through Chicago to the east; and it appears that the western shipments from both Chicago and Oshkosh are mainly the surplus remaining after eastern markets have been supplied. \* \* \* \* \*

10. As before stated, Minneapolis, Winona and La Crosse are on the main line of the Milwaukee road from Chicago to Minneapolis, while Eau Claire is 48 miles distant from the main line on a branch road from Wabasha. On an average there is a train and a half each way per day on this branch road, which is about one tenth of the business of the main line. This branch road is comparatively level, with no difficult grades, and the cost of "physical movement" of a train over it is not greater than over the main line. It appears, however, that a full train cannot always be made up on this branch line, and hence engines employed there cannot always be utilized to their full capacity. As a general rule the operating expenses per ton per mile are greater on branch than on main lines. Eau Claire is, however, on the main line of the Omaha road, and is reached by the Wisconsin Central and other roads hereinbefore named. Oshkosh is also on a branch of the Milwaukee road about 40 or 50 miles from the main line. It may be stated as in the nature of an admission that Mr. E. P. Ripley, Third Vice President of the Milwaukee road, testified that he knew of no "conditions that should make the rate higher from Eau Claire than from Oshkosh except that Eau Claire is nearer the lumber-producing territory and perhaps may be said to be able to pay more," and that "there are no dissimilar conditions existing at Winona, La Crosse and Minneapolis as compared with Eau Claire which would justify the charge of a higher rate per car per mile on lumber from Eau Claire to the Missouri river points than from the points first named, except that they are farther from the supply and it costs more to get the logs there." \* \* \* \* \*

11. The average weight of a car load of lumber being about 35,000 lbs., the total freight per car load to Missouri river points, under the Bogue differentials, is about \$75.25 from Eau Claire; from Winona and La Crosse about \$56.00, from Minneapolis

about \$59.50, from Chicago about \$52.50 and from Oshkosh about \$71.75, making the differences per car load against Eau Claire in favor of Winona and La Crosse about \$19.25, in favor of Chicago about \$22.75, in favor of Minneapolis about \$15.75 and in favor of Oshkosh about \$3.50. As is shown by the table of distances above given, the mileage from Eau Claire is somewhat greater than from Winona and La Crosse.

Eau Claire, Winona and La Crosse procure their lumber from practically the same region of country, but, as before stated, Eau Claire has natural advantages of location over the latter towns in being nearer the sources of supply. Under the system of differentials in force, timber can be and is hauled from points three or four miles west of Eau Claire across the Eau Claire river to Black river, a distance of seven miles, and carried by the latter to La Crosse. The differentials are important factors in making up the price lists on lumber from the several shipping points, and it is estimated that the difference in rates prevailing at Eau Claire, Winona and La Crosse has practically depreciated Eau Claire lumber, as compared with Winona and La Crosse lumber, about \$300,000.00 each year since the Bogue award went into effect. It further appears that since the system of rates established by that award has been in force many mills in and about Eau Claire have gone out of business or been moved to other points, its population has decreased from about 22,000 to 18,000, and, as shown by the table heretofore given, the cut of lumber in the district including Eau Claire has fallen off from 454,544,723 feet in 1884 to 394,622,292 feet in 1890. From 1878, about the time the first railroad (the Omaha) was built to Eau Claire, the cut of lumber in the Eau Claire district had annually increased up to and including 1884. On the other hand, the cut of lumber at Winona increased from 90,630,550 feet in 1884 to 145,000,000 feet in 1890, and in the district including La Crosse it increased from 187,700,000 feet in 1884 to 243,195,583 feet in 1890. . . . After the Bogue award was put in effect, the shipment of lumber from Eau Claire over the Omaha road was substantially abandoned. The evidence is to the effect that, under the existing differential, Eau Claire cannot

successfully compete with Winona and La Crosse in piling lumber and shipping it by rail to Missouri river markets.

12. About a year previous to the commencement of the present proceeding, a similar proceeding was begun in behalf of Eau Claire, but was subsequently discontinued at the request of the traffic manager of the Milwaukee road and the general freight agents of the Omaha and the Wisconsin Central. These railway officers substantially admitted that the  $6\frac{1}{2}$  cent differential was too high, and promised on the withdrawal of that proceeding to have the Eau Claire differential lowered if they could induce the other lumber roads to agree to it. At a meeting of railroad officials held for the consideration of this matter, the representatives of these roads voted for a reduction of the Eau Claire rate, but the proposition did not receive the support of the other roads, and was defeated. \* \* \* \* \*

#### *Conclusions*

The case presented by the complainant rests upon the general averment that rates on lumber from the city of Eau Claire to certain specified points on the Missouri river are unreasonable and oppressive in comparison with rates on the same article from Minneapolis, Oshkosh, La Crosse and Winona. The lower rates from Minneapolis and Oshkosh are not made the leading feature of this contention, the more distinct and special ground of complaint being the alleged disparity between Eau Claire and its immediate rivals, La Crosse and Winona. These three towns have considerable similarity in location, industries, population and distance from western centers of distribution, and they are active competitors with each other in the various lumber markets which they seek to supply. So far as has been made to appear, the west-bound rates on this commodity from La Crosse and Winona have at all times been the same; but since May, 1884, when the so-called "Bogue award" went into effect, the rate from Eau Claire has always been greater by five and one-half cents per hundred pounds, except for a period of about four months in the spring of 1888 when this excess was only three cents a hundred.

The first circumstance to arrest attention is the attitude of the Chicago, Milwaukee & St. Paul road. This carrier is the only defendant named in the original complaint, and the only one against which relief is now distinctly demanded. The great system of railways operated by this company embraces in its mileage lines which connect each of these three towns with the principal lumber markets on the Missouri river, and its alleged discrimination against Eau Claire is the essential grievance sought to be redressed in this proceeding. In the answers filed by this defendant there is no denial that the lumber rate from Eau Claire is out of proportion to the rate from La Crosse to Winona, nor is there any disclosure of facts concerning the location and business of these rival places, and its own relation to them as a common carrier, which are claimed to justify this disparity. No witness was produced upon the trial at the direct instance of this company, and the argument of its counsel at the final hearing was mainly confined to a statement of its position. If this position is correctly apprehended by us, the Milwaukee road virtually concedes that the existing rates on west-bound lumber discriminate against Eau Claire, and that it is entitled to lower charges on this article as compared with the competing towns of La Crosse and Winona. This admission is coupled with a professed willingness to make a substantial reduction in the Eau Claire rate, provided other defendant carriers engaged in transportation of lumber to Missouri river markets, from various producing points on their lines, will not make a corresponding reduction at those places to neutralize the effect of lower charges at Eau Claire. As evidence of its good faith in taking this position, the Milwaukee company shows that the reduced rate which it conceded to Eau Claire in 1888 was followed by equivalent reductions granted at once to those other towns by rival carriers, which rendered its own action in aid of Eau Claire wholly ineffectual, and claims that it was compelled to restore the present differential rather than continue a contest injurious to itself and of no benefit to that community. In effect, therefore, this defendant acknowledges that Eau Claire is unjustly treated, but alleges in extenuation that it is powerless to afford relief.

A brief examination of the findings discloses the reasons for this anomalous situation. At a number of places on the Mississippi south of La Crosse, the manufacture of lumber is extensively carried on, the timber from which it is produced being mainly obtained along the tributary streams north of that point. Each of these towns is connected with the Missouri river by one or more of the defendant railroads other than the Milwaukee. These towns compete in the same markets with the lumber-manufacturing districts nearer the timber supply, and they naturally desire to retain and develop an industry in which they are so largely interested. The railroads extending westerly from those places are equally anxious for the traffic which this industry supplies, and they appear to have some advantage over their northern competitors in shorter distances and greater aggregate tonnage. Any reduction, therefore, in the rate established at Eau Claire, which would tend to increase the output of lumber in that locality at the expense of lumber towns more remote from the forest sources, is deemed by those towns and the carriers identified with them inimical to their common interests, and meets, almost as a matter of course, their combined opposition. Under these circumstances it is obvious that the lumber-carrying roads which do not reach Eau Claire, and which are quite independent of the Milwaukee system, *have it in their power* to perpetuate the inequality of which that town complains by making a reduction in rates from other points equal to any reduction which the Milwaukee company may make at Eau Claire. This in substance is the excuse offered by the original defendant for maintaining rates on lumber shipments from Eau Claire which it admits to be relatively unjust, and its request that other carriers acting under the Bogue award be made parties to the proceeding was an indirect invitation to them to answer the accusation of the complainant.

So far as the defense interposed by these parties goes to the merits of the controversy, it rests ultimately upon two propositions. One is, that under the schedule of rates fixed by the Bogue arbitration Eau Claire is now paying less for the transportation in question than the lower Mississippi towns, *in*

*proportion to their respective distances from the common markets*; the other is, that any interference with a system of charges which numerous carriers have so long enforced, and to which the lumber interests of so many towns have become adjusted, would result in a demoralizing "rate war" between these competing roads, and inflict injury upon other localities much greater than any advantage which might accrue to Eau Claire.

The first of these positions is readily seen to be untenable. The doctrine that transportation charges should be in proportion to the distances between different points, *where those distances are greatly dissimilar*, has never been advocated by the railroads or recommended by the Commission. It may be the rule to which tariff construction will some time approximate, but there is no opportunity for its application under present conditions. To fix the rate for a thousand miles at twice the sum prescribed for half the distance would be most arbitrary and intolerable. It does not follow, therefore, that Eau Claire should pay  $21\frac{1}{2}$  cents for a haul of 603 miles to Kansas City, because Keokuk pays  $11\frac{1}{2}$  cents for a haul of 213 miles to the same place. The whole practice of rate making is opposed to the principle of exact proportion, and even in theory there is little reason for its adoption. But distance, nevertheless, is an ever-present element in the problem of rates and not unfrequently a controlling consideration. Where all the distances brought into comparison are considerable, and the differences between them relatively small, we should expect substantial similarity in the respective rates, unless other modifying circumstances justified a disparity. It is doubtless true that the present adjustment of charges gives Eau Claire a rate per ton per mile not greater than the rate per mile from some of the shipping points on the lower Mississippi; but how does that fact excuse inequality between Eau Claire and places nearer by, whose competition is much more active and direct? The rates now in force may be relatively just as between Eau Claire and Davenport, and yet seriously unequal as between Eau Claire and Winona. Every locality in a producing region of such wide extent as the one in question is more or less interested in the rates on a common

commodity from all other shipping places in that territory, but at the same time each of them is chiefly concerned with the rates from contiguous towns whose situation and facilities are not greatly unlike its own, and which are its actual and constant rivals in the same markets. It is, therefore, no sufficient answer to complainant's charge to show that the rate from Eau Claire is not proportionally higher than the rates from remote lumber towns in Missouri and Southern Iowa which only indirectly and casually compete with Eau Claire; nor does any suggestion come from the interveners in this case which seems to counteract the force of the admission made by Mr. E. P. Ripley, Third Vice President of the Milwaukee road, that "there are no dissimilar conditions existing at Winona, La Crosse and Minneapolis, as compared with Eau Claire, which would justify the charge of a higher rate per car per mile on lumber from Eau Claire to Missouri river points than from the points first named except that they are farther from the supply, and it costs more to get the logs there." This statement seems to us a confession of injustice to the shippers of Eau Claire, which is neither explained nor excused by any facts bearing legitimately upon the rates in question. The discrimination is admitted, and stands without adequate defense.

If rates from different points of shipment to common terminals could properly be fixed on the basis of mileage, there would be great persuasiveness in the argument of the learned counsel for the Atchison road, who contends that the relief, to which he virtually concedes Eau Claire is entitled, can be effectively secured only by increasing the rates from La Crosse and Winona. But charges for distances greatly dissimilar cannot be adjusted on that principle, and it furnishes no practical rule for establishing rates from different places unequally remote from the same destination. It may be that the rates from these northerly towns are generally too high in comparison with the rates from lower Mississippi points, but that question is not before us and we have no occasion to consider it in this proceeding. The distinct issue now presented is the relative reasonableness of the Eau Claire rate, and that must mainly be determined by comparing

it with the rates from the neighboring towns, similar in size, situation and volume of competing traffic, and at approximately the same distance from common markets. Bearing in mind, also, that since this investigation was commenced all these rates have been advanced by an addition equal to fifty per cent of the rate upon which the others were based, viz., the ten-cent rate from Chicago to the Missouri river, we deem it quite unsuitable to attempt the correction of the inequality complained of by ordering a further advance in the rates from competing points in the vicinity of Eau Claire. For this reason it is unnecessary to discuss the power of the Commission, in dealing with discriminations between different localities, to require an increase in rates deemed relatively preferential.

The further general argument against a reduction of the Eau Claire differential does not persuade us that the present rate should be continued. This impression involves some consideration of the Bogue award as it affects the town making this complaint, and the consequences to be apprehended from lowering the lumber rate at that point. The most noticeable fact in this connection is that the results apparently experienced do not accord with the principle upon which that award avowedly proceeds. Mr. Bogue expressly declares the question to be, "What rate will enable each line party to this arbitration to place its fair proportion of lumber in the territory under consideration?" This appears to us equivalent to asking, "What rate will enable each town in this territory to place its fair proportion of lumber in the common markets?" for the arbitrator surely did not intend to imply that a "line" which, as compared with some rival road, gets its "fair proportion" of lumber tonnage, taking into account the aggregate shipments from all the towns which it serves, may so discriminate *between those towns* as to stimulate production at one and prevent it at the others. The Milwaukee road, for instance, may have a "fair proportion" of the lumber business under the present schedule, but that circumstance furnishes no reason for favoring La Crosse and Winona at the expense of Eau Claire. It could not have been the design of Mr. Bogue to equalize this traffic between the railroads without regard to the

interests of competing localities, and his award does not appear to have been so interpreted by the carriers. What he evidently intended was that lumber should cost the producer approximately the same *when delivered at destination*, whether manufactured at one place or another. Increased charges for transportation were to offset advantages of location or other natural facilities for cheap production. In this way the tonnage was to be fairly divided between the roads, and the prosperity of all these towns secured by enabling them to compete on an even footing in the common markets. But the rate prescribed for Eau Claire hardly permitted a result consistent with this theory. As it seems to us, this town has been placed at a manifest disadvantage. So far from enjoying equal opportunity with its rivals, it appears to have been overweighted with a differential which has excluded it, to a great extent, from the field of competition. A number of its establishments have gone out of business, its industrial development has been checked and its population seriously diminished. While neighboring towns have been prosperous, Eau Claire has not held its own. These adverse consequences may not have been caused by the operation of the Bogue award, but no other explanation is suggested. Obviously, such an outcome was not designed, and the fact that it has occurred indicates an injustice to this locality which ought to be corrected.

We are not to be understood as indorsing the principle which governs that award. On the contrary we consider it radically unsound. That rates should be fixed in inverse proportion to the natural advantages of competing towns, with the view of equalizing "commercial conditions," as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and any exaction of charges unreasonable in themselves or relatively unjust by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute. There is no occasion for enlarging upon this point, as it is only incidentally involved in the discussion. Our chief object in commenting on the Bogue award in this connection is

to draw attention to the fact that its declared purpose, so far as Eau Claire is concerned, has not been accomplished. Its effect upon that town has proved oppressive. Even if we could accept the theory upon which it is based, we should still be convinced that the rate fixed for Eau Claire was excessive, because its operation has prevented that town, as it seems to us, from retaining its "fair proportion" of the lumber business. As no such result was intended, the rate which produced it cannot be upheld by the rule adopted. \* \* \* \* \*

We are unable to discover how other localities can reasonably object to a more equitable rate for Eau Claire, and our belief is that apprehensions based on a reduction at that point are not well founded. Relatively lower charges may enable Eau Claire to increase its lumber production, but that this will result in serious injury to competing towns is an unwarranted assumption. Remote places on the lower Mississippi can scarcely be affected by the removal of inequalities between Eau Claire and its neighboring rivals, and the latter cannot justly complain because the former is accorded a rate fairly proportioned to their own. The relative volume of lumber shipments from La Crosse and Winona may be somewhat reduced by lower charges at Eau Claire, but any such effect will be attributable to natural advantages of which that town cannot justly be deprived. In short we see no reason why justice to Eau Claire should work injustice to any other community, much less result in the general disturbance of an established industry.

Nor will any such consequences follow a reduction of the Eau Claire differential as would justify other carriers in lowering their rates at competing points, for the purpose of preserving the co-relation of rates created by the Bogue arbitration. Undoubtedly those roads have it in their power to continue the present disparity, but we do not anticipate, and certainly cannot assume, that they will resort to such inconsiderate and arbitrary action in order to nullify the lawful order of this Commission. Even if we believed otherwise, it would still be our duty to render a decision in accordance with our convictions, and thus place the responsibility upon them, if they should attempt to defeat our ruling.

A further position was taken in this proceeding which is apart from the merits of the principal issue. The roads which were made parties at the request of the original defendant insist that no case has been made against them, and that the Commission has no authority to include them in any order based upon the complaint of Eau Claire. We are disposed to agree with this contention. The sole complaint in this case is discrimination, and Eau Claire is the sole complainant. It is not easy to see how any carrier can "discriminate" against a town which it does not reach, and in whose carrying trade it does not participate. None of the roads so brought into the case run to Eau Claire or engage, even indirectly, in the transportation of lumber from that point. Of what offense *against that town* can they be legally guilty? It would be quite absurd to charge a railroad with giving preference or advantage to a community which it does not serve, and it is equally illogical to say that it can prejudice or discriminate against such a community. All these terms imply comparison, and the basis of comparison is wanting unless the rates compared are made by the same carrier. These views are so fully concurred in by counsel for the respective parties that further argument is unsuitable. They lead to the conclusion that no order can properly be made in this proceeding against the roads which do not run to Eau Claire. This determination must also include the intervening manufacturers and dealers, who have obviously no standing in the case independent of the lines which extend from their respective localities. It does not follow that these roads will be legally free to reduce their rates at other points to correspond with any lower rate which may be fixed for Eau Claire. They have responded to the demand that they should defend the differential complained of, and they have endeavored to justify it by evidence and argument. They have presented their case and will be formally notified of our decision. While they are not legally connected with the rate claimed to be excessive, and not technically subject to an order for its correction, they will have no better right to render it ineffectual than they would have to openly disregard a direction clearly within the scope of our authority.

The attitude of the Omaha road is somewhat peculiar. It was not proceeded against originally, and the Milwaukee company did not ask to have it made a defendant. It voluntarily sought an opportunity to oppose the complainant, and was made a party on its own application. After engaging in the litigation with considerable vigor, it now earnestly asks to be exempted from any order reducing the Eau Claire differential. These circumstances might well justify us in denying this request, but we incline to the opinion that it should be granted. Measured by the lumber rates which it maintains at other places on its line, the Omaha road cannot be said to discriminate against Eau Claire, nor is it charged with enforcing rates at different points which are relatively unequal. For this reason much embarrassment might result to that company from an order requiring it to reduce its rate at the place in question, and as such an order is not demanded by the complainant or deemed necessary for the relief which it seeks, we are disposed to leave that carrier the option of accepting the Eau Claire rate prescribed for the Milwaukee company or going out of the Eau Claire business. No order, therefore, will be made against the Omaha road at this time, but the case will be held as against that company for such directions as may hereafter seem to be required. \* \* \* \* \*

We hold that the lumber rates in question discriminate against the shippers of Eau Claire, and that such discrimination is unjust and unlawful. The undue prejudice and disadvantage to which Eau Claire is thus subjected consists generally in the lower relative rates accorded to competing towns, especially those granted to La Crosse and Winona, and the complainant is entitled to an order correcting the inequality between these rival places.

The extent to which the Eau Claire differential should be reduced has been the subject of much deliberation. We have not considered it as an abstract proposition, based on mileage and cost of service, but have endeavored to make proper allowance for other existing circumstances and actual conditions. It is our desire to prescribe a rate which will be reasonably just to Eau Claire, and which the Milwaukee road will be fairly satisfied

to accept. No mathematical rule has been followed and no particular theory applied, but that rate has been selected which, on the whole, best satisfies our judgment. To a certain extent our determination is arbitrary, but equally so is the fixing of a rate in the first instance. As the injustice which Eau Claire suffers arises mainly from the lower rates at La Crosse and Winona, the rate from the former should bear a fixed and permanent relation to the rates from the latter, independent of the Chicago rate upon which all the others are based under the Bogue arbitration. Taking everything into account, we think the rate from Eau Claire should not exceed the rate from La Crosse and Winona by more than 2 cents per hundred pounds, when the latter rate is not over 11 cents per hundred; and that such excess over the present rate of 16 cents from La Crosse and Winona should not be greater than  $2\frac{1}{2}$  cents per hundred. Compared with the 16-cent rate now in force at these competing towns the rate thus fixed for Eau Claire will be higher by \$8.75 per car; and the rate per car per mile and per ton per mile to the several Missouri river markets will still be considerably greater from Eau Claire than from La Crosse or Winona. All things considered, however, we believe that an addition of  $2\frac{1}{2}$  cents to the present rate from those places will not be unjust to Eau Claire, and that a greater reduction in the differential now in force against that town should not at this time be required. If the operation of this rate fails to give equitable results, the complainant will not be debarred from making a further application for relief. \* \* \*

The order of the Commission is that from and after the tenth day of July, 1892, the Chicago, Milwaukee & St. Paul Railway Company cease and desist from charging, collecting, or receiving for or on account of lumber transported by it, in car-load quantities, from Eau Claire, Wisconsin, to the various Missouri river points mentioned in this report, any greater sum or amount than two and one-half cents per hundred pounds more than shall or may from time to time be charged, collected or received by that company for the like transportation from the towns of La Crosse and Winona aforesaid.

## IX

### RELATIVE RATES

#### THE SAVANNAH NAVAL STORES CASE<sup>1</sup>

##### *Facts*

CLEMENTS, *Commissioner* : \* \* \* \*

1. The complainants are the Savannah Bureau of Freight & Transportation, an association of business men of the city of Savannah, Ga., organized to protect the transportation interests of that city, and certain general merchants, naval-stores manufacturers and cotton shippers, most of whom are located along the line of the Pensacola & Atlantic division of the Louisville & Nashville Railroad. The defendant railroad and steamship companies are severally common carriers and engaged in the interstate transportation of freight articles. The lines of the defendants, the Alabama Midland Railway Company, the Savannah, Florida & Western Railway Company and the Charleston & Savannah Railway Company, are, with other lines of road, operated by the "Plant System."

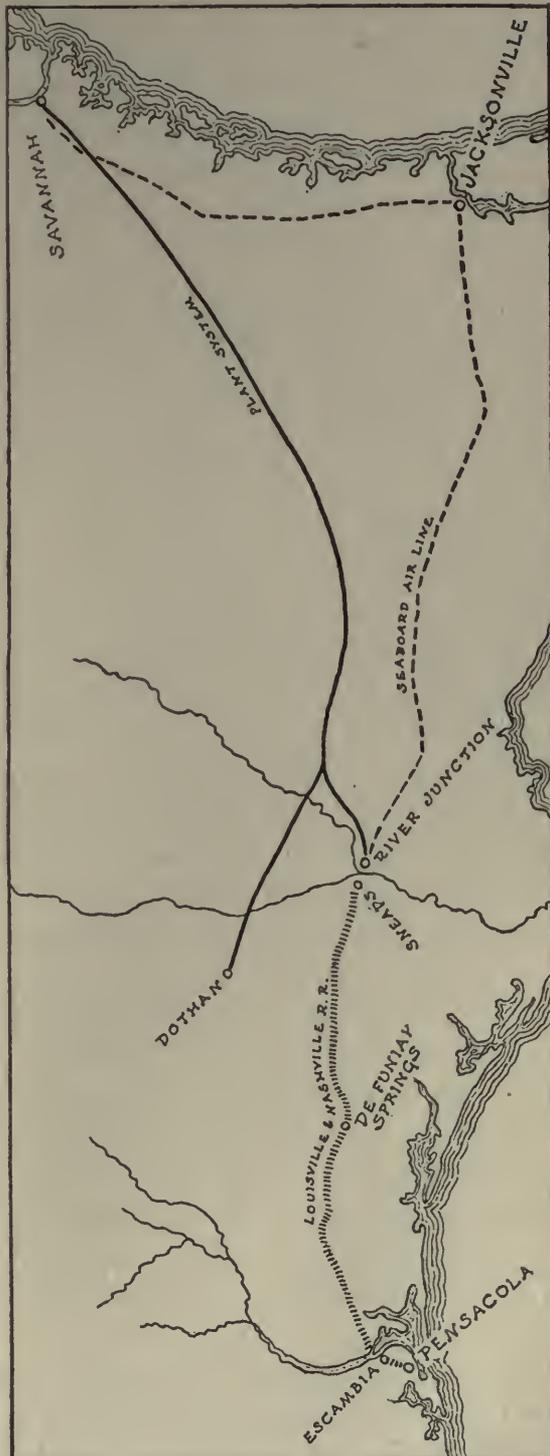
2. The Pensacola & Atlantic division of the Louisville & Nashville Railroad System extends from Pensacola, Fla., to River Junction, Fla., a distance of 161 miles. At River Junction it connects with the Savannah, Florida & Western Railway for Savannah (Plant System), and also with the Florida Central & Peninsular Railroad (Seaboard Air Line) for Jacksonville and Savannah. The distance from River Junction to Savannah by the former route is 259 miles, and by the latter route it is 347

<sup>1</sup> Decided January 8, 1900. Interstate Commerce Reports, Vol. VIII, pp. 376-408. Sustained by the United States Circuit Court. 118 Fed. Rep. 613.

The main contention in this case related to rates on naval stores, turpentine and rosin; but inasmuch as the same principles involved are more simply and briefly stated with reference to rates on cotton, that issue is mainly described in this abstract. — ED.

miles. The distance from River Junction to Pensacola is 161 miles, and as Pensacola is distant from Mobile and New Orleans 104 miles and 245 miles, respectively, the distance from River Junction to Mobile and New Orleans is 265 miles and 406 miles, respectively.

The Pensacola & Atlantic division lies wholly within the State of Florida. It was built by the Pensacola & Atlantic Railroad Company with the assistance of the Louisville & Nashville Railroad Company, and subsequently purchased under a mortgage sale by the latter company. The State of Florida granted to the Pensacola & Atlantic Railroad Company 3,890,619 acres of land. This company had sold of said grant up to June 12, 1891, 668,590.05 acres for \$552,330.50. The Louisville & Nashville Railroad Company from June 12, 1891, to April 30, 1897, sold 571,985.85 acres for \$516,503.76. Some of the deeds, however, were



canceled, and the total net sales by both roads amounted on April 30, 1897, to 995,481.34 acres for \$860,343.65.

According to a statement put in evidence for the defense, the Pensacola & Atlantic, considered as a distinct line, does not earn sufficient to pay operating expenses and interest on its fixed charges. It appears that the Louisville & Nashville has been operating the road since the beginning of the year 1885, and that it bought the property under foreclosure sale in May, 1891. The road is operated in connection with the other portions of this large system, and serves as a connection with the Plant System and Florida Central & Peninsular in Florida. The Louisville & Nashville Railroad Company is solvent and prosperous. It has increased its funded debt from \$79,158,660 in 1895 to \$110,693,660 in 1899, and during the fiscal year ended June 30, 1899, it paid its accruing funded debt obligations and declared a dividend of  $3\frac{1}{2}$  per cent on its stock. The amount of stock outstanding was reported at \$54,911,520.

3. West Florida, through which the Pensacola & Atlantic division runs, is very sparsely settled between Pensacola and River Junction, the termini of the road, there being, according to the census of 1890, no town on the line except the city of Pensacola, with a population of 1000 inhabitants. The volume of traffic originating along the road is comparatively small. The principal articles received for shipment are cotton, naval stores and lumber. Some wool and a few melons are also shipped. According to the census of 1890 Pensacola had a population of 11,750 inhabitants and Savannah a population of 43,189. Lumber from Pensacola & Atlantic stations is shipped principally to Pensacola, one of the largest markets for exporting lumber in sail vessels along the coast. Savannah, Ga., is the largest naval-stores market in the world, while Pensacola is a small market for rosin and turpentine, receiving these commodities principally from stations on the Louisville & Nashville system.

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5. The Louisville & Nashville Railroad Company does not own or control any line of road entering Savannah. In the transportation of cotton or naval stores to Savannah from

Pensacola & Atlantic stations the interest of that company ends with the delivery to its connection, the Savannah, Florida & Western Railway Company or the Florida Central & Peninsular Railway Company, at River Junction. The only revenue it can receive from east-bound shipments is for the short haul to River Junction. The conditions are reversed on traffic going westward.

Most of the naval stores shipped from Pensacola & Atlantic stations westward are ultimately destined to interior points, such as Louisville, Cincinnati and Chicago, and on these shipments the Louisville & Nashville generally receives a long haul from Pensacola. The Louisville & Nashville therefore has a substantial interest in having this freight move west to or through Pensacola instead of east *via* River Junction to Savannah or other destinations, and its rates are made with a view of inducing such westward movement. Efforts to build up the naval-stores industry on the Pensacola & Atlantic division had failed until about two years prior to the filing of the complaint in this case. At that time the Pensacola naval-stores firm began business, and the Louisville & Nashville put in a lower schedule of rates from stations on that division, pursuant to an agreement it had made with the Pensacola firm. The rates to Savannah were not raised when the rates to Pensacola were reduced. A result of such action on the part of the railroad company has been to largely increase the volume of shipments of this class of traffic to Pensacola. The proportion of the total product of rosin and turpentine at the Pensacola & Atlantic stations which formerly went to Savannah has decreased under present rates, so that very little of either commodity is shipped to Savannah.

A former agent of the railroad company at a station on the Pensacola & Atlantic division testified that his salary was made to depend in some degree upon whether these shipments were sent west or east, that he received a larger commission when the traffic was destined west. There is evidence to the effect that shippers have had difficulty in ascertaining the rates in force on shipments to Savannah, and also that solid car loads of rosin or of turpentine were required when the destination was Savannah,

while mixed car loads were permitted in the west-bound movement. These practices, if enforced, tend, as a matter of fact, to discriminate unjustly against shippers desiring to use the Savannah market.

\*       \*       \*       \*       \*       \*       \*       \*

On a shipment of rosin from Sneads, Fla., to Savannah, the Louisville & Nashville would receive 15 cents per 100 pounds, or 75 cents per barrel of 500 pounds, for a haul of 6 miles to River Junction, while the connecting roads, the Savannah, Florida & Western or the Florida Central & Peninsular, would only receive  $9\frac{1}{4}$  cents per 100 pounds, or  $46\frac{1}{4}$  cents per barrel of 500 pounds, for the haul respectively of 259 miles or 347 miles from River Junction to Savannah. On a west-bound shipment of rosin from Sneads to Pensacola, a distance of 155 miles, the rate is  $9\frac{1}{2}$  cents per 100 pounds, or  $47\frac{1}{2}$  cents per barrel of 500 pounds, and from Bohemia to Pensacola, a distance of 6 miles, the rate is 5 cents per 100 pounds, or 25 cents per barrel of 500 pounds. From De Funiak Springs, which is about half-way between Pensacola and River Junction, the Louisville & Nashville receives for the transportation of rosin  $7\frac{1}{2}$  cents per 100 pounds for the haul to Pensacola, and 15 cents per 100 pounds to River Junction, as its proportion of the through rate to Savannah.

Dothan, Ala., on the Plant System, and Cottondale, Fla., on the Pensacola & Atlantic division, are each about 294 miles from Savannah. The line of the Plant System runs from Dothan north of the Pensacola & Atlantic division of the Louisville & Nashville, and connects with the short branch to River Junction, about 65 miles from Dothan. The rate on rosin from Dothan by the Plant System to Savannah is 12 cents per 100 pounds, or about 8 mills per ton per mile.       \*       \*       \*       \*

9. There are, however, some other facts connected with the question. The Louisville & Nashville has made these rates with a view, not only of providing a market at Pensacola for naval stores shipped from its Pensacola & Atlantic division, but of encouraging the production of such commodities in that section; and it is a fact that the output at its Pensacola & Atlantic

stations is much greater than it was before the establishment of the present rates to Pensacola. The building up of the Pensacola market has benefited producers and dealers along this division. The present rates to Savannah were in effect before the Louisville & Nashville made these rates to Pensacola, and whatever wrong now exists has not been caused by changes in the Savannah rates, but by the relation in rates as between Pensacola and Savannah, which causes the great bulk of the traffic to go to Pensacola.

Another consideration is that the Louisville & Nashville by inducing this traffic to go to Pensacola is able to secure return local loading for cars which have been used to haul supplies from or through Pensacola to its Pensacola & Atlantic stations. It must also furnish cars for naval-stores shipments to Savannah, but it cannot rely upon those cars coming back with supplies for stations on that division. The car passes from its control at River Junction, and it may reach its line again at some point far distant from its Pensacola & Atlantic division. This might not be material with free interchange of cars carrying a large traffic to and from the Pensacola & Atlantic division, but it is of some importance in view of the present small volume of business which is done at points on that part of the Louisville & Nashville system.

It is urged by the Louisville & Nashville that these rates to Pensacola are applied in large degree on naval stores which are reshipped from Pensacola to points north, like Cincinnati and Louisville, and that it thereby gets a long haul which it could not obtain from shipments to Savannah. The rates to Pensacola are not necessarily the proportion which the Louisville & Nashville must take into account in fixing rates on shipments from the Pensacola & Atlantic stations to Louisville or Cincinnati. It can make low rates over its own line for the long haul to those points, with no other regard to the local rates to Pensacola than that the charge to Cincinnati or Louisville should not be less than the rate to Pensacola. It does in fact make through rates from its Pensacola & Atlantic stations *via* Pensacola to various points which are considerably less than the sum of rates

to and from Pensacola. The Louisville & Nashville has in effect a special rate over its own line of 25 cents on turpentine from Pensacola to Evansville, Ind., a distance of 621 miles. This is no more than the share it exacts out of the through rate to Savannah from points on the Pensacola & Atlantic division for which it carries the turpentine no greater distance than 155 miles from Bohemia to River Junction, and its haul to River Junction may be as low as 6 miles. The Louisville & Nashville rates to Pensacola are intended to draw naval stores to that market for sale and subsequent reshipment, and the Louisville & Nashville secures the carriage of all shipments from Pensacola. The roads to Savannah make naval-stores rates low to Savannah, not for consumption there, but because it is a market, a point of concentration and reshipment, for such stores. A large part of the domestic shipments of this traffic from Savannah is shipped north by water, and the Plant System and Florida Central & Peninsular must share the rail shipments from Savannah with the other roads entering that city. The Louisville & Nashville can justly claim that its rates on naval stores to the near-by market of Pensacola from these Pensacola & Atlantic division stations, as compared with the through rate to Savannah, the much more distant market, should give some advantage to Pensacola, which it has contributed largely to build up as a concentrating point for these commodities.

\* \* \* \* \*

11. Both upland and sea-island cotton are produced along the line of the Pensacola & Atlantic division, and about 10 per cent of the crop is of the long staple or sea-island variety. The sea-island grade is generally worth 3 or 4 cents a pound more than upland cotton. Most, if not all, of the sea-island cotton appears to go to Savannah. During the year 1896-97 the shipments of cotton from Pensacola & Atlantic stations to Savannah, New Orleans and Mobile were as follows: To Savannah, 4077 bales; to New Orleans, 3713 bales; to Mobile, 2021 bales. Pensacola is not a cotton market and practically no cotton is shipped to that point. The rate on cotton from Pensacola & Atlantic stations to Savannah at the time of complaint and at the date of the

hearing in this case was \$2.75 per bale, and the bale is estimated to weigh 500 pounds. This resulted in a rate of 55 cents per 100 pounds. The rate applied from all stations and had been in effect for a number of years. The Louisville & Nashville share of the \$2.75 rate was \$1.75 per bale for its haul to River Junction, while connecting roads only received \$1.00. There are no compresses on the Pensacola & Atlantic division, and if the cotton was compressed by the carrier in transit it was done by the road east of River Junction. Notwithstanding the blanket-cotton rate from Pensacola & Atlantic stations to Savannah is challenged by the complaint in this case, that rate was increased by the defendants after the hearing from \$2.75 to \$3.30 per bale, and if for export the rate was still higher, \$3.45 per bale. The special export rate was afterwards canceled, and the rate to Savannah for all purposes is now \$3.30 per bale of 500 pounds. From most stations on the Pensacola & Atlantic division the rate to Pensacola was \$1.50 per bale of 500 pounds. A few stations comparatively near Pensacola, including Galt City and Escambia, took rates of 26 and 27 cents, the former being the lowest rate to Pensacola. These rates were also in effect at the time of the hearing.

The rate on cotton from all Pensacola & Atlantic stations to Mobile was, at the time of the complaint, and still is, \$2.00 per bale, and to New Orleans it was and still is \$2.50 per bale. The rates to Mobile and New Orleans commence with Escambia, 10 miles from Pensacola, and include River Junction, 161 miles from Pensacola. The distance from Escambia to Mobile is 114 miles and to New Orleans 255 miles. From Sneads, 6 miles west of River Junction, these distances are 259 miles to Mobile and 400 miles to New Orleans. From Escambia to Savannah the distance is 410 miles, and the distance from Sneads to Savannah is 265 miles. From De Funiak Springs, a central point on the Pensacola & Atlantic division, the distance to Mobile is 183 miles and to New Orleans 324 miles. That point is distant from Savannah 341 miles. The Louisville & Nashville obtained \$1.75 out of the former rate to Savannah, and it actually gets as much or more out of the higher rate now in force. It received

that sum for the short haul to River Junction, and only charges 75 cents more for, in most cases, more than double the distance to New Orleans. From only three or four Pensacola & Atlantic stations near Pensacola is the distance to Mobile less than the distance to River Junction, and it is not understood that any cotton is sent from those stations near Pensacola. From De Funiak Springs the mileage is much greater to Mobile than to River Junction. The rate to Pensacola, Mobile and New Orleans does not include the cost of compression.

It was testified by the vice president of the Louisville & Nashville that having reached a basis of, say, 50 cents to 55 cents per 100 pounds on cotton, it has been found from experience that that is about the maximum rate which can be secured; and we find that to be the fact in this southern territory.

On account of risk of fire, bulk and loading expenses, cotton is not an attractive commodity to a carrier on a short haul of 50 miles or less. The rate to Savannah is a joint rate, while the rates to Mobile and New Orleans are only those of the Louisville & Nashville. The rate to New Orleans must be fixed with reference to the obtainable price in that large cotton market. \*

It is not found that the entire rate of \$2.75 is excessive, unreasonable or unjust in itself or in comparison with the rate to Mobile or New Orleans; but we do find that the present rate of \$3.30 per bale, equal to 3.8 cents per ton per mile for a haul of 341 miles, is excessive, and that the action of the Louisville & Nashville and its connections to Savannah in advancing the rate above the former existing charge of \$2.75 per bale was altogether unreasonable and unjust. \* \* \*

### *Conclusions*

\* \* \* \* \*

We shall dispose of the cotton rate first. When the complaint was filed the rate was \$2.75 per bale, of which the Louisville & Nashville obtained \$1.75 for its short haul to River Junction. This rate was still in effect at the time of the hearing. It was testified for the defense that the rate of \$2.75 per bale was reasonable, and the rate had been in force for a considerable

period. It was also asserted by the same witness that a rate of 50 to 55 cents a hundred, equal to \$2.50 and \$2.75 per bale of 500 pounds, was about as high a rate as could be charged without prohibiting the shipment. Under that rate, of a given year's crop, about 4000 bales moved to Savannah, while the remainder, about 5700 bales, went to Mobile and New Orleans, but the quantity sent to Savannah included the sea-island variety, amounting to about 10 per cent of the total amount shipped from the Pensacola & Atlantic stations, and for which Savannah is the principal market. Sea-island cotton is more valuable than upland cotton, and it may be that it could stand a somewhat higher rate, but the amount produced and shipped from Pensacola & Atlantic stations is very small as compared with upland cotton, and the carriers in fixing their rates have not made any distinction between the two kinds. Some time after the hearing the carriers to Savannah made the rate from Pensacola & Atlantic stations \$3.30 per bale. This was an increase of 55 cents. The rate of \$3.30 per bale is still in force. No advance was made in the rate of \$2.00 to Mobile, or in the rate of \$2.50 to New Orleans. Under such a rate adjustment the cotton (except the sea-island) must go to Mobile or New Orleans, or the shipper to Savannah must bear the large additional expense occasioned by the advance of 55 cents per bale. In making this advance in rates the carriers acted unjustly and unreasonably to the producer and to the shipper of cotton carried from these Pensacola & Atlantic stations, and subjected them to unlawful prejudice. The carriers to Savannah, also, by so advancing the cotton rate to that city gave undue and unreasonable preference and advantage to Mobile and New Orleans and to dealers in cotton at and the traffic in cotton to those places; and they subjected Savannah and her cotton merchants and shipments of cotton to that market to wrongful prejudice and disadvantage. The whole advance was unlawful. It violated sections 1 and 3 of the Act; and any higher rate on uncompressed cotton from any of these Pensacola & Atlantic stations to Savannah than the former difference of 25 cents per bale above the rate in force from the same stations to New Orleans is unlawful under those sections. \*

The Louisville & Nashville insists that the near-by market of Pensacola is entitled to all of this great advantage.<sup>1</sup> It claims that the lower rates to Pensacola were necessary to create a market there for these stores, and, further, that the carriage to Pensacola is only part of its haul on the great majority of the shipments, while on shipments to Savannah it can only have the short haul to River Junction, where it must turn the traffic over to one of its connecting roads. Whatever difference in rates may have seemed necessary at the outset to create a demand in the Pensacola market, it is apparent now, after several years' trial, that the rates to Savannah as compared with the Pensacola rates give an unwarranted advantage to Pensacola. In endeavoring to build up a near-by market at Pensacola, and so furnish these products with a market in addition to the one existing at Savannah, the Louisville & Nashville was acting in the interest of producers of and dealers in naval stores on its Pensacola & Atlantic division. It went beyond this, however, and so controlled the adjustment of rates to the two markets as to give Pensacola a practical monopoly of the trade. A carrier cannot lawfully establish and maintain an adjustment of rates which in practice prevents shippers on its line from availing themselves of a principal market which they have long been using, and confers a substantial monopoly upon a new market in which, for reasons of its own, it has greater interest. That is what has been done in this case.

The further and perhaps chief ground relied upon to justify this abnormal relation in rates on traffic which is competitive mainly as between Savannah and Pensacola is that the present lower scale of rates to Pensacola is required to hold the traffic for long hauls on the Louisville & Nashville system. This company can and does make through rates on naval stores from its Pensacola & Atlantic division *via* Pensacola to numerous points. Its claim goes further than this, however. It also aims to compel shipments locally to Pensacola, that it may get the benefit

<sup>1</sup> The conclusions of the Commission as to rates on naval stores are so interwoven with those relating to cotton rates that they are reproduced in full.  
—ED.

of the reshipments from that point, and it has the only railroad entering that city. A shipment billed and transported to Pensacola for local delivery there constitutes a complete transaction, just as a shipment billed and transported for delivery in Savannah is a complete transaction. As between two transactions of this character the Louisville & Nashville may prefer itself in the matter of rates to the extent of its fair interest as a common carrier, but it can no more be permitted to create a monopoly in its west-bound movement as compared with the east-bound than Pensacola can be permitted as a new market to have a monopoly of the traffic, and so shut out the old market of Savannah. We hold, in other words, that when a carrier makes rates to two competing localities which give the one a practical monopoly over the other because it can secure reshipments from the favored locality and none from the other, it goes beyond serving its fair interest, and disregards the statutory requirement of relative equality as between persons, localities and particular descriptions of traffic.

Our ruling in *Colorado Fuel & Iron Co. v. Southern P. Co.*, 6 I. C. C. Rep. 488, bears upon this point. In that case the rate to San Francisco on iron articles produced at Pueblo, Colo., was prohibitive, while on iron shipped from Chicago to San Francisco the rate was low. The Southern Pacific was the delivering line in San Francisco on shipments from both Pueblo, and Chicago, but it would get a much longer haul on Chicago traffic sent over a circuitous route *via* New Orleans than it would on either Pueblo or Chicago traffic sent direct to San Francisco. The testimony tended to show that the Southern Pacific secured greater compensation if shipments came to San Francisco *via* New Orleans. The Commission held that inequality in the treatment of shippers, having no other justification than this end, was indefensible.

The Louisville & Nashville insists also that it is unusual for a carrier reaching a seaport on its own line to make joint rates with another carrier which will divert traffic originating on its road to a rival seaport. In the view we take of this contention, it is unnecessary to discuss whether this is or is not a railway practice. It is not understood that the complainants are here asking for an order which will so divert traffic from Pensacola as to place

it at a disadvantage as compared with Savannah. If a railroad company cannot secure other than an unreasonably low share of the joint rate to a seaport on another road, it may be justified in declining to join in such a rate, especially when it can take the traffic to a seaport reached by its own road; but a carrier engaged in transportation over the through line finds no such justification when it is able to secure for itself a share of the joint rate which fully equals the rate established by it for purely local service over like distances on its own road. That is this case under the readjustment indicated by the findings.

We think that readjustment fully meets the objections to the complaint which are raised by the Louisville & Nashville Company. It still gives considerable advantage to Pensacola; it gives the Louisville & Nashville for the less service involved in the haul to River Junction on shipments to Savannah the same compensation that it obtains on purely local shipments carried for like distances to Pensacola, and on turpentine from the more easterly stations it gives more.

We hold that the present shares of the Louisville & Nashville in the through rates to Savannah are unreasonable and unjust, and that they operate to make the entire through rates unjust and unreasonable as compared with the rates charged by the Louisville & Nashville to Pensacola; that because of such excessive shares of the Louisville & Nashville in the through rates to Savannah such through rates do, as related to the rates to Pensacola, subject producers and shippers along the Pensacola & Atlantic division of the Louisville & Nashville Railroad to wrongful prejudice and disadvantage; that such through rates as related to the rates to Pensacola also subject Savannah, naval stores dealers in Savannah, and the traffic in naval stores to that city, to undue and unreasonable prejudice and disadvantage, and they result in undue and unreasonable preference and advantage to Pensacola, dealers in naval stores in Pensacola, and the traffic in naval stores to that city. It results, therefore, that the present rates to Savannah are in violation of sections 1 and 3 of the Act.

The wrong and injustice so inflicted, and the unjust favoritism so resulting, would be remedied by charges on rosin and

turpentine to Savannah which will embrace the proportions now and for several years accepted by the carriers east of River Junction, and also give the Louisville & Nashville for its hauls to River Junction its full local rates for approximately the same distances to Pensacola, with the exception that on turpentine from stations east of Mossy Head the rate to Savannah should exceed the rate from Sneads to Pensacola to the extent of 6 cents per hundred pounds, thereby giving the Louisville & Nashville on turpentine from such stations more than its local rate for the like distance to Pensacola.

We determine, therefore, that the rates on rosin and turpentine from these Pensacola & Atlantic stations to Savannah should bear the following definite relations to the rates on those commodities to Pensacola. The rate from any such station to Savannah is to be adjusted by adding to the local rate of the Louisville & Nashville for the distance to Pensacola which is nearest to the distance from that station to River Junction the present share accepted by the carriers to Savannah from River Junction. Provided, however, that from all stations east of Mossy Head the rates on turpentine to Savannah shall be determined by adding 6 cents to the rate fixed by the Louisville & Nashville from Sneads to Pensacola, the carriers east of River Junction accepting their present share from such stations east of Mossy Head. In the event that the defendant carriers operating east of River Junction should decline to accept their present proportions, any party may apply for a further or modified order. While the Louisville & Nashville share of the Savannah rate is held to be unreasonable, we base the remedy upon the relation of rates to the two competing markets. This will enable the Louisville & Nashville to increase the rates to Pensacola, or in conjunction with its connections east of River Junction reduce the rates to Savannah, or to use both means in conforming to the adjustment which appears to be required by the facts in this case; provided, of course, that the rates to Pensacola should not be made unreasonable.

Order will be issued in accordance with these conclusions.

# X

## RELATIVE RATES

### THE CHATTANOOGA CASE<sup>1</sup>

(Map at p. 146, *supra*)

KNAPP, *Chairman* : \* \* \* \* \*

The complaint relates to the rates of the defendants on the six numbered classes of traffic and on a large number of commodities from Boston, Providence, New York, Philadelphia, and Baltimore to Chattanooga and Nashville, respectively, both by the direct lines to Chattanooga and *via* Chattanooga to Nashville, and by the lines *via* Cincinnati to Chattanooga and *via* Cincinnati to Nashville, and it charges :

First, That the rates to Chattanooga are unjust and unreasonable in themselves, in violation of section 1 of the Act to regulate commerce, which requires all rate charges for any service rendered in the transportation of property or in connection therewith to be reasonable and just and prohibits and declares unlawful every unjust and unreasonable charge.

Second, That the rates to Chattanooga are higher than for the longer haul through Chattanooga and 151 miles on to Nashville, and are in violation of the provision of section 4 of the Act to regulate commerce which declares it to be unlawful for any common carrier subject to the provisions of the Act "to charge or receive any greater compensation in the aggregate for the transportation of a 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."

<sup>1</sup> Originally decided March 12, 1904. Interstate Commerce Reports, Vol. X, pp. 111-147. Decision, originally rendered in favor of Chattanooga in 1892, was sustained by both the United States Circuit Court and the Circuit Court of Appeals; was then reversed by the Supreme Court (181 U. S. 29) under its interpretation of the law in the Alabama Midland case (*vide*, p. 354, *infra*), but without prejudice to the right of the Commission to reopen the case. This is the case as thus reopened. The dissenting opinion, herein reproduced, represents the claims of Chattanooga.

Third, That "the merchants and other business men of Chattanooga and Nashville, respectively, compete for business largely in the same territory; that the excesses of the Chattanooga rates over the Nashville rates amount in most, if not all, instances to a reasonable profit on the traffic and subject Chattanooga merchants to an undue or unreasonable prejudice or disadvantage in such competition and give Nashville an undue or unreasonable preference or advantage over Chattanooga in such competition, and that the rates in question to Chattanooga and Nashville are, therefore, in violation of section 3 of the Act to regulate commerce, which declares unlawful such undue or unreasonable prejudice or disadvantage and such undue preference or advantage."

It is alleged in the complaint that if there should be any difference in rates as between Chattanooga and Nashville, such difference should be made by making the Chattanooga rates lower than the Nashville rates, because, (1) of Chattanooga's greater proximity to the points of shipment, Boston, Providence, New York, Philadelphia and Baltimore; (2) of transportation by the Tennessee river to Chattanooga; and (3) of the greater number of rail lines which enter Chattanooga and compete for business from those cities to Chattanooga than enter Nashville and compete for such business to Nashville. \* \*

The defendants admit that the rates in question are higher for the shorter haul to Chattanooga than for the longer haul by 151 miles through Chattanooga to Nashville; that the rates are correctly set forth in the complaint and that they participate in those rates either as members of the lines to Chattanooga and through Chattanooga to Nashville, or as members of the lines through Cincinnati to Chattanooga and to Nashville, but they deny that those rates are in violation of either section 1, 3 or 4 of the law as charged in the complaint.

In justification of the lower rates from New York and other eastern seaboard cities to Nashville than to Chattanooga, it is alleged that those rates were primarily made by the Trunk Line roads through the Ohio river crossings, Cincinnati, Louisville and Evansville, "and are controlled by the following competitive circumstances and conditions:"

First, Water competition by the Hudson river, the St. Lawrence river, the Erie canal and the lakes, which fixes the rail rates from New York to

Chicago and to which latter rates, it is alleged, the rates from New York and other eastern seaboard cities to Cincinnati, Louisville and Evansville "are made to bear certain fixed relations."

Second, Water competition between Paducah and Evansville on the Ohio river, on the one hand, and Nashville on the Cumberland river, on the other, by means of boats on the Cumberland river which connect with boats on the Ohio river.

Third, Water competition from New York and the other eastern seaboard cities to Cincinnati, Louisville and Evansville by way of the ocean, the gulf and the Mississippi and Ohio rivers.

Fourth, Competition by ocean from New York and other eastern seaboard cities to Norfolk and Newport News, Virginia, and thence by the rail lines, the Norfolk & Western and the Chesapeake & Ohio railways, from those cities to Louisville, Cincinnati and Evansville.

It is alleged that the rates from said eastern seaboard cities to Cincinnati and Louisville having been fixed by these competitive circumstances and conditions, the rates from said eastern seaboard cities to Nashville cannot greatly exceed the rates to Cincinnati or Louisville added to the rates which can be obtained by steamboats from Cincinnati or Louisville over the Ohio and Cumberland rivers to Nashville, but that there is no effective open water route from the eastern seaboard cities to Chattanooga, nor from Cincinnati or Louisville to Chattanooga and the water competition which forces down the through rail rates from Cincinnati and Louisville, respectively, to Nashville, does not extend to Chattanooga.

It is further alleged that Nashville enjoys a position geographically which is not enjoyed by Chattanooga, being practically the center of a circle, of which Cincinnati, Louisville, Evansville, Cairo and Memphis may be regarded as points on the circumference, and that there is a large territory tributary to Cincinnati, Louisville, Evansville, Cairo and Memphis, south of the Ohio river, which is also tributary to Nashville, and the rate adjustment to Nashville relatively to the points specified above has been, is, and should be such as to enable it to do business in comparison with those cities.

The Southern Railway Company alleges in its answer that all rates from eastern seaboard cities to Chattanooga are fixed by the eastern lines and are made relative to the rates from

those cities to Atlanta, Rome, Birmingham and Anniston, which cities compete directly with Chattanooga in territory common to those cities and to Chattanooga, and that this is the basis upon which the Chattanooga rates are made.

The Louisville & Nashville road denies that it is engaged in the transportation of traffic *through Chattanooga* to Nashville.

\* \* \* \* \*

It is also alleged in behalf of the defendants that the Chattanooga and Nashville rates are governed by different classifications; the Chattanooga rates by the Southern Classification and the Nashville rates by the Official Classification.

### *Facts*

1. The defendants . . . are common carriers engaged as parts of through lines and under joint tariffs of rates in transporting traffic from New York and other eastern seaboard cities to Chattanooga and to Nashville.

2. The following table gives the rates in question from Boston, Providence and New York to Chattanooga and Nashville, respectively, on the six numbered classes in cents per hundred pounds, and also shows the excesses in cents per hundred pounds and per car loads of 30,000 pounds of the Chattanooga rates over the Nashville rates.

	1	2	3	4	5	6
Chattanooga . . . . .	114	98	86	73	60	49
Nashville . . . . .	91	78	60	42	36	31
Excess per 100 lbs. of Chattanooga rates	23	20	26	31	24	18
Excess per car load of 30,000 lbs. . .	\$69	\$60	\$78	\$93	\$72	\$54

The same excesses of the rates to Chattanooga over those to Nashville as are shown in the above table in rates from Boston, Providence and New York, exist under the rates from Philadelphia and Baltimore.

The following table [Abridged.—ED.] gives the rates in cents per hundred pounds from Boston, Providence and New York

to Chattanooga and Nashville, respectively, and the excesses of the Chattanooga rates over the Nashville rates on car loads of 30,000 pounds on a few commodities. Those rates are given as illustrating the differences in rates in favor of Nashville on the entire list of commodities.

## COMMODITY RATES

Canned goods Boston and New York to Chattanooga, C/L . . . .	\$0.48
Canned goods Boston and New York to Nashville . . . . .	.36
Difference on a car load of 30,000 pounds in favor of Nashville . . .	36.00
Green coffee Boston and New York to Chattanooga, C/L . . . . .	.60
Green coffee Boston and New York to Nashville . . . . .	.36
Difference on a car load of 30,000 pounds in favor of Nashville . . .	72.00
Agate ware Boston and New York to Chattanooga, C/L . . . . .	.73
Agate ware Boston and New York to Nashville . . . . .	.42
Difference on a car load of 30,000 pounds in favor of Nashville . . .	93.00
Cartridges Boston and New York to Chattanooga, C/L . . . . .	.60
Cartridges Boston and New York to Nashville . . . . .	.42
Difference on a car load of 30,000 pounds in favor of Nashville . . .	54.00

The same differences in rates in favor of Nashville as are shown in the above table in rates from Boston, Providence and New York, exist under the rates from Philadelphia and Baltimore.

The rates by all the lines to Chattanooga are the same and the rates by all the lines to Nashville are the same.

3. Chattanooga class rates are governed by the Southern Classification, and Nashville class rates by the Official. A large number of articles are in the same class in both classifications; there are some articles which are classed higher under the Official Classification than under the Southern, and some that are classed higher under the Southern Classification than under the Official; but even where articles are classed higher under the Official Classification than under the Southern, they still have lower rates under the Official Classification than under the Southern, because the Southern Classification rates are so much higher per class than the Official Classification rates. For example, the class 6 rate of the Southern Classification is higher than the class 4 rate of the Official Classification.

4. By the lines from New York and other eastern seaboard cities through Chattanooga, Huntsville is a longer-distance point than Chattanooga by 97 miles, Decatur by 122 miles, Tusculumbia by 165 miles, Sheffield by 170 miles, and Florence by 173 miles, but the rates to all these points are the same as the rates for the shorter haul to Chattanooga (map, p. 146). The testimony shows that these rates as applied to the longer hauls to these longer-distance points yield the carriers a remuneration in excess of operating expenses and fixed charges.

The rates for the haul from eastern seaboard cities through Chattanooga and 310 miles on to Memphis are lower than for the shorter haul to Chattanooga. For example, the class 1 rate from New York to Memphis is 100 cents as against a rate of 114 cents to Chattanooga. The testimony is that if this rate of 100 cents were applied to the shorter haul to Chattanooga "it would not be unremunerative." The Memphis rail rates are made with a view of meeting competition by the Mississippi river on which Memphis is located.

The rates from eastern seaboard cities by ocean to Norfolk and thence by rail to Evansville are lower than the rates to Chattanooga. For example, the class 1 rate by that route to Evansville is 73 cents per hundred pounds. The class 1 rate by that route to Chattanooga is \$1.14, 41 cents higher than the Evansville rate. The testimony tends to show that the 73-cent rate as applied to the haul to Evansville is reasonably remunerative, and it is testified that the same rate as applied to the haul to Chattanooga "would yield more than the cost of transportation to Chattanooga."

5. The Chattanooga rates from eastern seaboard cities yield rates per ton per mile much greater than — in some instances more than double — the average receipts per ton per mile of the principal defendants, of roads throughout southern territory and of roads throughout the United States.

6. The rates in question from New York and other eastern seaboard cities to Chattanooga were established by the roads as members of the Southern Railway & Steamship Association,<sup>1</sup>

<sup>1</sup> *Vide*, p. 98, *supra*.

and are still with immaterial exceptions maintained as originally fixed. The Southern Railway & Steamship Association ceased to exist under that name in about 1895, but it was succeeded by the Southern States Freight Association, which in turn was succeeded, May 1, 1897, by the Southeastern Freight Association. The existing association names rates and fixes classifications through joint committees, each road having a representative on the committee, and the rates are, as a rule, concurred in and maintained as under the Southern Railway & Steamship Association, although the succeeding association has not the power, which the Southern Railway & Steamship Association had, of enforcing the maintenance of rates by fines. The roads not belonging to the association conform to the association rates. The Chattanooga rates as now fixed have been in force more than 18 years and were established long before the Southern Railway & Steamship Association was dissolved.

7. In establishing rates from eastern seaboard cities to Chattanooga, the Southern Railway & Steamship Association grouped Chattanooga with the following cities and towns and perhaps others, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines and Griffin, in the State of Georgia; Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma and Eufaula, in the State of Alabama and Meridian, in the State of Mississippi. The sea and rail rates to all these points are the same as to Chattanooga, although many of them are longer-distance points from the east than Chattanooga and the haul to them is through Chattanooga, for example, Huntsville, Decatur, Florence, Tuscumbia and Sheffield. The sea and rail rates are the rates by ocean to Norfolk, Pinner's Point, Charleston or Savannah and thence by rail, and are the rates complained of in this case. The bulk of the traffic to Chattanooga and the Chattanooga group comes by these sea and rail lines and these sea and rail rates are applied to that traffic. Of the cities and towns named above as belonging to the Chattanooga group, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika and

Eufaula have higher all rail class rates than Chattanooga — their all rail rates on the six numbered classes being as follows :

1	2	3	4	5	6
126	108	95	81	66	54

The all rail rates to the other points in the group are the same as to Chattanooga.

It is claimed and the testimony is to the effect that a reduction in the rates to Chattanooga would necessitate a reduction in the rates to all the points in the same group with Chattanooga, as without such reduction, Chattanooga would be given an unjust advantage in rates over those points.

8. Nashville is situated on the Cumberland river and is reached by the Louisville & Nashville road, the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad.

Chattanooga is located on the Tennessee river and is reached by the following nine originally independent railroads, to wit: The Cincinnati Southern Railway; the Southern Railway; the Georgia Division of the Southern Railway; the Western & Atlantic Railroad; the Chattanooga, Rome & Southern Railroad; the Chattanooga Southern; the Alabama Great Southern; the Memphis & Charleston Railroad; and the Nashville, Chattanooga & St. Louis Railway.

These nine roads are now operated by about four distinct companies or systems.

9. In the former case the only lines involved were the direct lines, all rail or sea and rail, to Chattanooga and through Chattanooga to Nashville, and the order of the Commission related to rates over those lines alone. The lines involved under the complaint in the present case are the lines from New York and other eastern seaboard cities, either all rail, or sea and rail, *via* Norfolk, Charleston or Savannah, to Chattanooga and through Chattanooga to Nashville, and also the lines *via* Cincinnati to Chattanooga and to Nashville.

The short all rail line from New York *via* Cincinnati to Nashville is made up of the Pennsylvania Railroad from New York to Cincinnati and the Louisville & Nashville road from Cincinnati to Nashville, and is 1058 miles in length.

The short all rail line from New York to Chattanooga is by the Pennsylvania Railroad from New York to Alexandria, the Southern Railway from Alexandria to Lynchburg, the Norfolk & Western Railway from Lynchburg to Bristol and the Southern Railway from Bristol to Chattanooga, and is 846 miles in length.

The excess of the distance by the above line *via* Cincinnati to Nashville over the above line to Chattanooga is 212 miles.

The short all rail line from New York *via* Chattanooga to Nashville is by the line above given to Chattanooga and thence over the Nashville, Chattanooga & St. Louis Railway 151 miles on to Nashville. By this line and by all lines through Chattanooga to Nashville, Nashville is the longer-distance point by 151 miles.       \*       \*       \*       \*       \*       \*       \*

10. The Louisville & Nashville Railroad Company owns and operates the road from Evansville to Nashville and the road from Cincinnati through Louisville to Nashville, and is part of the short through line from New York and other eastern seaboard cities *via* Cincinnati to Nashville. It also operates jointly with the Atlantic Coast Line Railroad the road from Augusta to Atlanta, Georgia, and it owns a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, which latter road, having leased the Western & Atlantic extending from Atlanta to Chattanooga, operates the line all the way from Atlanta through Chattanooga to Nashville.

The Louisville & Nashville road by virtue of its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway, can name the entire board of directors and has the power to control the operations of the latter road. If competition of the Nashville, Chattanooga & St. Louis Railway Company with the Louisville & Nashville Railroad Company on traffic from the east to Nashville should for any reason become objectionable to the Louisville & Nashville road, it possesses the power to control or put an end to that competition.

The two roads, however, have separate and distinct corps of officers and employees and appear to be in active competition for traffic from eastern seaboard cities to Nashville. The Louisville & Nashville road has no interest, as stockholder or otherwise, in any railroad east of Augusta or in any ocean steamship company whose vessels ply from South Atlantic ports to New York and other eastern seaboard cities.<sup>1</sup>

The competition of the Nashville, Chattanooga & St. Louis Railway, as a member of the lines through Chattanooga to Nashville, with the Louisville & Nashville Railroad, as a member of the lines through Cincinnati to Nashville, for traffic from eastern seaboard cities to Nashville does not affect the rates to Nashville. The rates of the lines through Chattanooga and through Cincinnati are the same and have been the same as now for a long period of time. There is active competition between the two sets of lines for business, but *that competition is at the "established rates."* There has been no competition *affecting rates* since the rates were established by the Southern Railway & Steamship Association more than 18 years ago. \*

11. By steamboats operating on the Cumberland river and connecting with Ohio and Mississippi river boats, Nashville has water communication with Cincinnati, Louisville, Evansville, Brookport or Paducah, and Cairo.

The Cumberland river is navigable from  $7\frac{1}{2}$  to 10 months in the year, an average of about  $8\frac{1}{2}$  months. On shipments by the Ohio and Cumberland rivers from Cincinnati to Nashville, the traffic is transferred from the Ohio river boat to the Cumberland river boat at Evansville or Paducah.

The distance from Cincinnati to Nashville by the Ohio and Cumberland rivers is 690 miles and by all rail (the Louisville & Nashville road) 295 miles. From Evansville to Nashville by river the distance is 340 miles and by rail 154 miles. The time by boat from Cincinnati to Nashville is 6 days, and for the round trip 12 days. The time from Evansville to Nashville is  $2\frac{1}{2}$  days and for the round trip about 6 days.

<sup>1</sup> The Atlantic Coast Line has since then absorbed the entire Louisville and Nashville system. — ED.

There is no material amount of traffic from New York and other eastern seaboard cities which moves to Nashville by boat on the Cumberland river. There are no through rates published or agreed upon from eastern seaboard cities by rail to Cincinnati or Evansville and thence by river to Nashville, and there never have been such through rates. The boat lines from Cincinnati and from Evansville to Nashville have no published rates. The largest business done by boats on the Cumberland river from Ohio river points to Nashville is the grain business. The bulk of the traffic besides grain transported on the Cumberland river from Evansville to Nashville consists of buckets, brooms, sieves, wooden ware, molasses and glucose.

The rail lines have great advantages over the river lines and merchants much prefer the former. It is only when the rail rates are excessive or unreasonable that they resort to the river. And the goods and commodities shipped by Nashville merchants by river to Nashville are for the most part, if not entirely, traffic as to which time is not an element of importance. The risk by river is greater than by rail and river traffic from Cincinnati to Nashville is insured.

Since the advent of railways, the business of river lines on long through hauls has almost entirely ceased and, although the rail rates from Cincinnati, Louisville and Evansville to Nashville are much higher than the river rates, the railroads get all but an inconsiderable portion of the business.

Nashville merchants testify that they have the Cumberland river to rely upon for protection from excessive rates by rail and that a material increase in the present rail rates would force them to resort to a large extent to the river line.

Before the rail lines were completed to Nashville, traffic came from eastern seaboard cities by the Pennsylvania Railroad to Pittsburg and thence by the Ohio and Cumberland rivers to Nashville, but there were no through rates and no through billing.

The Nashville, Chattanooga & St. Louis road, connecting Chattanooga with Nashville, was completed in 1854, five years before the completion of the Louisville & Nashville road to

Nashville. The construction of the former road commenced at Nashville and extended east to Chattanooga. After it had been completed as far east as Stevenson, a point 38 miles from Chattanooga, rates were made from New York for the transportation of traffic *via* Charleston to Chattanooga, thence by the Tennessee river to Caperton's Landing, thence 4 miles by wagon to Stevenson and thence by rail to Nashville. The first through rates from the east to Nashville were made over this line through Chattanooga.

The testimony is that when the Nashville, Chattanooga & St. Louis road was completed from Nashville to Chattanooga the competition it met on traffic from the east to Nashville was that of the Cumberland river, and that when the Louisville & Nashville road was subsequently completed from Cincinnati to Nashville the Cumberland river competition was "transferred" to that road, and the Nashville, Chattanooga & St. Louis road had to meet the rates of that road thus influenced by Cumberland river competition.

The Cumberland river is stated by defendants' witnesses to be and to have been the controlling competitive force, or in the language of a witness, the "common enemy," which the rail lines from the east to Nashville have to meet; and that because of this competition by the Cumberland river the Nashville rates even before the completion of the roads to Nashville were lower than the Chattanooga rates. It is to be noted that at that time and until a comparatively recent period, the Tennessee river was not, as it now is by the completion of the canal through the Mussel Shoals referred to in the next subdivision of this report and opinion, opened up for continuous transportation from Chattanooga to the Ohio river.

Nevertheless, upon all the evidence in this case and our general knowledge of the situation, we are convinced and find that the rates accepted for the transportation of eastern merchandise to Nashville are not forced upon the carriers by water competition for that traffic. The competition which the lines *via Chattanooga* meet is distinctly the competition of the trunk lines and the Louisville & Nashville road whose northern termini

are at points on the Ohio river; it results from the fact that the Trunk Line basis of rates was long ago extended to Nashville. In this connection we repeat the finding in the former case, as follows:

The river rates are now considerably lower than the rail rates, and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

12. By means of boats on the Tennessee river, Chattanooga now has continuous water transportation from Chattanooga to Paducah at the confluence of the Tennessee and Ohio rivers and to Ohio and Mississippi river points, St. Louis, Cairo, Evansville, Louisville and Cincinnati. The Tennessee river is navigable from Chattanooga to the Ohio river from 8 to 10 months during the year, an average of 9 months. The distance by the Tennessee river from Paducah to Chattanooga is 464 miles and it takes from 3 to 4 days for a boat to go from Paducah to Chattanooga.

When the complaint in the former case before the Commission was filed, continuous transportation by the Tennessee river from Chattanooga to Paducah and the Ohio river was interrupted by the Mussel Shoals. A canal was then being built by the government through the shoals and it was opened in November, 1890. Since that time it has been maintained "in a state of efficiency and readiness for use throughout the entire year, and there has been a steady annual increase in the number of vessels passing through the canal." (Annual Report upon Improvements of Tennessee river by the United States Chief of Engineers for the year 1901, p. 466.)

The boats on the Tennessee river running from Chattanooga to Florence and Paducah have increased from 16 in 1890 to 54 in 1899, and the tonnage of traffic has increased from 78,820 tons in 1892 to 253,340 tons in 1899.

The bulk of the traffic from New York and other eastern seaboard cities to Chattanooga is shipped by ocean to Norfolk and thence by rail to Chattanooga, but shipment from those cities to Cincinnati or Paducah and thence by river to Chattanooga is practicable. Such shipments are made but not to any material extent in consequence of the great advantage of the direct all rail or rail and ocean lines *via* Norfolk to Chattanooga.

A large proportion of the business of boats on the Tennessee river originates in Chicago, St. Louis and Louisville and there is a considerable tonnage of traffic from Cincinnati and Evansville. Traffic from Cincinnati, Louisville and Evansville is transferred at Paducah.

In order to protect themselves from excessive rates by rail and to meet the discrimination in rates against Chattanooga and in favor of Nashville, the Chattanooga merchants have established a boat line on the Tennessee river operating between Chattanooga and Paducah and points on the Ohio river. The steamer Avalon of this line has a tonnage of 305 tons and from February 6 to July 4, 1901, it made 15 round trips through the Mussel Shoals to Paducah carrying 674 passengers and 3,557 tons of freight. This steamer also goes to Cairo.

The principal traffic transported on the Tennessee river consists of general merchandise, lumber, hay and grain, cotton and cotton seed, flour, peanuts, produce, fertilizers, live stock, logs and wood, railroad ties, staves, stone, sand and gravel. \*

13. Chattanooga is entitled to the benefit of low Trunk Line rates to Cincinnati and has it to practically the same extent as Nashville. The difference in rates between the two cities begins at Cincinnati and results from the higher rates charged by the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga than are charged by the Louisville & Nashville road from Cincinnati to Nashville.

If the proportions of the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga were reduced so as to make them not higher than the proportions of the Louisville & Nashville road from Cincinnati to Nashville, the Chattanooga rates would be about as high as, or not materially different from, the Nashville rates from the eastern seaboard cities. The distance by the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga exceeds the distance by the Louisville & Nashville road from Cincinnati to Nashville by about 37 miles. It is testified that this "slight difference" in distance is immaterial and had nothing to do with fixing the rates.

Some traffic from the east comes to Chattanooga *via* Cincinnati, but the most of it comes, as before stated, *via* the Virginia ports, Norfolk and Newport News, and the direct short rail lines to Chattanooga.

There is no evidence that any traffic from the east comes to Chattanooga *via* Cincinnati and Nashville or *via* Evansville and Nashville.

14. Trunk Line territory *proper* lies east of the Mississippi and north of the Ohio and Potomac rivers and Southern territory is that east of the Mississippi and south of those rivers. Nashville, as well as Chattanooga, is in Southern territory, but Nashville is not as far removed from Trunk Line territory as Chattanooga. Nashville by the Louisville & Nashville road is 155 miles from Trunk Line territory at Evansville, 185 miles at Louisville and 301 miles at Cincinnati. Chattanooga by the Cincinnati, New Orleans & Texas Pacific Railway is 338 miles from Trunk Line territory at Cincinnati and by the Louisville & Nashville road *via* Nashville is 306 miles at Evansville.

Because of the greater density of population and greater volume of traffic in Trunk Line territory than in Southern territory, the rates charged by the Trunk Line roads can be and are made lower than in Southern territory.

The transportation by the Louisville & Nashville road of eastern traffic from Cincinnati to Nashville is through Southern territory, but the rates charged by that road for the portion of

the through haul from Cincinnati to Nashville are practically extensions of Trunk Line rates, the rate per ton per mile under those rates being about the same as the rate per ton per mile under the Trunk Line rates from the east to Cincinnati. . . . The through rates from New York and other eastern cities *via* Cincinnati to Nashville are, in the language of the witnesses, "*prorated* all the way to Nashville," while the through rates *via* Cincinnati to Chattanooga are not prorated.

15. Nashville competes with Cincinnati, Louisville, Evansville, Paducah, Cairo and Memphis, in territory between Nashville and those cities. Cincinnati, Louisville and Evansville are shorter-distance points than Nashville from eastern seaboard cities by the direct rail or rail and water lines and their rates are lower than the Nashville rates.

Any material advance in the Nashville rates would injure Nashville in that competition and would also increase the river business on the Cumberland river.

16. Nashville also competes with Chattanooga in territory between Nashville and Chattanooga on the line of the Nashville, Chattanooga & St. Louis Railway and in territory south and west of Chattanooga in Tennessee, Georgia and Alabama on the Memphis & Charleston, Alabama Great Southern, Western & Atlantic and other roads.

On the line of the Nashville, Chattanooga & St. Louis Railway between Nashville and Chattanooga, Nashville has the advantage in rates over Chattanooga. The combinations of the through rates on class 1 goods from New York, for example, to Chattanooga with the local rates from Chattanooga to stations on the Nashville, Chattanooga & St. Louis Railway between Chattanooga and Nashville, exceed to a material extent the combinations of the through rates to Nashville with the local rates from Nashville to those stations, and Chattanooga merchants testify that they cannot sell goods shipped from the east on terms of equality in competition with Nashville merchants in territory west of a point 30 miles from Chattanooga and 121 miles from Nashville on the Nashville, Chattanooga & St. Louis Railway and that they are forced to sell at a much less

profit in that territory, if they sell at all, than Nashville merchants realize.

The Nashville merchants also have a material advantage in rates over Chattanooga merchants in territory west of Chattanooga on the Memphis & Charleston (now Southern) road and at a number of points on the roads south of Chattanooga in Georgia and Alabama much nearer to Chattanooga than to Nashville.

The testimony of a large number of Chattanooga merchants was taken, and it shows that the growth of Chattanooga and her mercantile business, particularly "jobbing business," have been greatly retarded by the materially higher rates from the east to Chattanooga than to Nashville.

At the time when the lower rates from the east to Nashville than to Chattanooga were established, Chattanooga was a small town with only one partially wholesale house, while Nashville had 12 or 13 wholesale houses. Nashville was then recognized as the distributing point for the section of country up to, if not including, Chattanooga. The situation in this respect has changed. It is conceded that Chattanooga is now entitled to recognition and treatment as a distributing center, that her "shipping facilities are superior to those of either Nashville or Knoxville" and that "taking into account the claims of those cities, the *legitimate* trade of Chattanooga covers a strip of territory extending northeast and southwest a distance of about 200 miles in length by about 125 miles in width."

At the same time, we are constrained to find, as a deduction from the foregoing and other facts appearing in the record, that the circumstances and conditions under which this eastern traffic is carried to Nashville are not substantially similar to the circumstances and conditions under which the same traffic is carried to Chattanooga. The lower rates to Nashville *via* the Ohio river gateways are not made or controlled by the lines operating *via* Chattanooga, and the latter are under compulsion to meet those rates or forego participation in the traffic from the eastern seaboard to Nashville.

*Conclusions*

The facts appearing in the present case are not materially different from those disclosed in the former proceeding.<sup>1</sup> While minor changes have taken place since the prior investigation, the salient features of the situation remain practically unaltered. It is clear now as it was then that the lower rates from eastern seaboard cities to Nashville than to Chattanooga give Nashville merchants, on traffic from these cities, an advantage over Chattanooga merchants in territory which may be said to be naturally tributary to Chattanooga; it is equally clear that this disparity in charges has its origin and alleged justification in differences of circumstances and conditions which have existed in substantially the same form for many years. In its practical aspects the problem has not been simplified by lapse of time, while the law from which the Commission derives its authority has meanwhile received repeated and binding construction. The theory upon which our former ruling was based has been declared unsound, and it is obviously our duty to test the facts presented in this case by the law as it has been interpreted for our guidance. If these facts do not show a violation of the regulating statute, as that statute has been construed, we should so decide, whatever appears to be the injustice suffered by Chattanooga, since the making of an order which would not be enforced by the courts would be useless and unwarranted.

In the light of various decisions of the Supreme Court, and as stated in the foregoing findings, we cannot seriously doubt that the traffic in question is carried to Nashville and Chattanooga, respectively, under substantially different circumstances and conditions. This being so, the action of the carriers in maintaining a higher rate for the shorter haul to Chattanooga cannot be regarded as unlawful under the fourth section of the act, or otherwise condemned merely because a lower rate is granted to Nashville. This question is now so well settled as not to be open to discussion.

<sup>1</sup> Cf. footnote, p. 238, *supra*.

We have no authority, even if we had the disposition, to require an advance of the Nashville rates. Those rates are the product of influences which have long been in potent operation. They are rates to which many and important commercial interests are adjusted and on which those interests are largely dependent. The testimony shows that Nashville had lower rates from the east than Chattanooga before the railroads were constructed between Cincinnati and Nashville and between Chattanooga and Nashville, and these lower rates to Nashville have ever since been in force. Their origin and continuance are attributed to the fact that Nashville is much nearer to Trunk Line territory than is Chattanooga, and to the fact of water competition by the Ohio and Cumberland rivers. Before the rail lines were extended to Nashville, traffic from eastern seaboard cities came by the Pennsylvania Railroad to Pittsburg and thence by the Ohio and Cumberland rivers to Nashville. When the Nashville, Chattanooga & St. Louis road was opened between Chattanooga and Nashville, which was prior to the completion of the Louisville & Nashville road from Cincinnati and Evansville to Nashville, the competition it met on traffic from the east to Nashville was that *via* the Cumberland and Ohio rivers; and when the Louisville & Nashville road was subsequently constructed from Cincinnati to Nashville, the evidence shows that the competition of the Cumberland and Ohio rivers was "transferred" to that road, and that the Nashville, Chattanooga & St. Louis road had then to meet the rates of the Louisville & Nashville road thus influenced by Cumberland and Ohio river competition.

It is virtually undisputed that Nashville rates from the east are the result of this competition, coupled with the interest of the Louisville & Nashville road to maintain the commercial importance of Nashville. The competition at Chattanooga, whether of carriers or commercial forces, has not been equally effective, as is evidenced by the fact that it has not reduced Chattanooga rates to the level of Nashville rates. In deciding the former case the Supreme Court said (*East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516) :

Competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions prescribed by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive point, and *this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point and the greater rate to the noncompetitive point may apparently engender a discrimination against it.*

The principle or rule here laid down would apply, and was evidently intended to apply, to a case where both points are competitive, but where competition has resulted in lower rates to the longer- than to the shorter-distance point.

It is further shown that Nashville competes with Cincinnati, Louisville, Evansville, Cairo and other Ohio river points in territory north and west of Nashville; that rates from the east to those Ohio river points are lower than to Nashville; that the present Nashville rates are necessary to enable Nashville to engage in this competition and were fixed, partly at least, with reference to that fact; that even under these rates Nashville is at a disadvantage in the greater part of that territory; and that, therefore, an increase of Nashville rates would place Nashville at quite as great a disadvantage in comparison with Ohio river points as Chattanooga is now under in comparison with Nashville. In a word, we regard it impracticable to relieve Chattanooga by advancing the Nashville rates.

The whole case, therefore, comes to the question of the reasonableness of the Chattanooga rates. While there is more or less evidence of a persuasive character, standing by itself, that these rates are unreasonably high, such as the fact that they are greater per ton mile than the average of roads in Southern territory and throughout the United States, and are the same as rates for longer hauls through Chattanooga to Sheffield, Tusculumbia, Florence and a few other points in the same territory, with other facts of similar import, the force of this evidence is materially modified, if not overcome, by the kindred fact that Chattanooga rates are no higher than rates to Atlanta, Rome, and a large number of other places with which Chattanooga is grouped.

It is frequently asserted, and with apparent reason, that Atlanta is the most strongly competitive point in the south, and it is situated somewhat nearer the eastern seaboard than Chattanooga. The rates to the Atlanta group are the basis upon which numerous rates are adjusted throughout an extensive area, and these rates are applied to a large volume of traffic. The Atlanta rates are the outgrowth of competition between a number of independent lines, and there is no proof that these rates are unreasonable, except such proof as appears in this case respecting the reasonableness of the same rates to Chattanooga. The fact that rates for the shorter haul to Chattanooga are higher than for the longer haul through Chattanooga to Nashville, or for the longer haul to Evansville, does not warrant the conclusion, under the decisions referred to, that the Chattanooga rates are unreasonable, because the rates to Nashville and Evansville are controlled by competitive forces which do not operate with like effect on rates to Chattanooga.

As above indicated, Chattanooga is "grouped," or classed for rate-making purposes, with Atlanta and some 23 other points in Georgia, Alabama and Mississippi, all of which take the same rates from the east. It is claimed by the defendant carriers, and there is no evidence to the contrary, that a reduction of the rates to Chattanooga would require a reduction in the rates to Atlanta and all other points taking the same rates; that this in turn would require a corresponding reduction in rates to other localities outside the Atlanta and Chattanooga group; and that, in short, the ultimate and necessary result would be a reduction in rates throughout the entire Southern territory, with a consequent loss of revenue which the roads serving that territory are unable to bear.

Whatever may be said of this contention, and we doubt whether it is well founded to the extent claimed, it seems clear that a reduction of the Chattanooga rates, without a like reduction in rates to Atlanta and the other points with which Chattanooga is grouped, would give Chattanooga an advantage to which that town is not shown to be entitled. In that case Atlanta and other distributing points would be in much the same

position with reference to Chattanooga that Chattanooga is now with reference to Nashville. Moreover, so far as we can see, the facts in this case which are claimed to establish the unreasonableness of Chattanooga rates would apply with equal force to rates to Atlanta and other destinations. Nor is it otherwise suggested by complainant. Apparently, therefore, a ruling that Chattanooga rates are unreasonable, and so in violation of the first section of the act, would inferentially and in effect condemn as unlawful the rates to Atlanta and many other points of importance which have long had the same rates as Chattanooga.

Upon the facts now appearing we are not satisfied that such a ruling is warranted. There is much to induce belief that the Chattanooga rates are excessive, though to what extent it would be difficult to determine. It is quite apparent that these rates, to a considerable degree at least, operate to restrict the commercial activities of Chattanooga, particularly in its competition with Nashville; and there is little reason to doubt that the charges now imposed on this eastern traffic to Chattanooga should be materially reduced, if that can be done without injustice to the carriers and localities affected by a readjustment. While this is undoubtedly true, it does not follow that these rates are shown to be unreasonable within the meaning of the first section of the act; and this, it should be remembered, is the only question we have authority to decide.

It appears clear to us that the Chattanooga rates cannot be independently considered, even as respects their reasonableness. They are embraced in and connected with a system of equalized rates which have been applied for many years throughout an extensive region, and are closely related to rates in a still larger area comprising the greater part of what is known as Southern territory. To deal intelligently with a rate question of such magnitude and complexity seems to require a wider survey than this record permits. Impressed with this view, we feel justified in deferring a final judgment until the situation can be investigated in its larger relations and a more confident basis found than now appears for declaring that this comprehensive system of rates is unlawfully maintained. We do not find or decide that

these rates are reasonable; we only say that they are not shown to be otherwise. Upon the facts now presented, and the law as it has been interpreted, we are constrained to hold that no violation of the act has been established.

It follows that the complaint will be dismissed without prejudice to any future investigation.

CLEMENTS, *Commissioner*, dissenting:

I do not agree with the conclusion of the Commission dismissing the complaint in this case because I believe, First, that the rates to Chattanooga are shown to be unreasonable; and, Second, because I believe the adjustment and relation of rates to Chattanooga and Nashville, respectively, are shown to be unduly preferential to Nashville and prejudicial to Chattanooga. The general tenor of the report seems to this effect although relief to Chattanooga is denied, for the reasons therein stated.

It is said in the conclusions of the Commission that "there is much to induce belief that the Chattanooga rates are excessive, though to what extent it would be difficult to determine. It is quite apparent that these rates, to a considerable degree at least, operate to restrict the commercial activities of Chattanooga, particularly in its competition with Nashville; and there is little reason to doubt that the charges now imposed on this eastern traffic to Chattanooga should be materially reduced, if that can be done without injustice to the carriers and localities affected by a readjustment."

The original complaint of Chattanooga was presented to the Commission in April, 1890. In December, 1892, the Commission, after hearing the case, partially disposed of the same according to its interpretation at that time of the long and short haul clause, requiring the carriers to cease and desist from charging more to Chattanooga than to Nashville, unless upon application, as provided by law, and upon hearing by the Commission, it should be shown that a greater charge for the shorter distance was justified. In the report of the Commission at that time it was said: "We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in

the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided."

Suit was begun by the Commission to enforce the order made at that time, which, having passed through the various stages of the several courts, was finally determined by the Supreme Court of the United States in 1901 adversely to the ruling of the Commission, which was as stated under the so-called long and short haul provision of the statute, subject to the right of the Commission to further investigate the matter and determine the questions involved according to law.

The present complaint is substantially a continuation of the former one, but was made and has been heard in the light of the interpretation of the law by the Supreme Court in respect to the so-called long and short haul rule, leaving for the determination of the Commission the questions: First, the alleged unreasonableness of the rates to Chattanooga, and, Second, the alleged undue and unreasonable discrimination in the adjustment of the rates to Chattanooga and Nashville, respectively. The ground upon which the Supreme Court overturned the order of the Commission in the former case was that it did not consider competition between rail carriers to Nashville and competition of markets affecting the rates to that place.

There are three material and important facts shown in this case which were not shown before the Commission in the former case; to wit, First, that transportation by water is quite as effective to Chattanooga now as to Nashville; Second, that all of the rates in question are the product of the concurrent or joint action of the carriers alleged to be in competition, though in fact not competing, as to the rates; but, on the contrary, establishing the same and maintaining them by a common understanding and coöperation in restraint of competition; Third, that the Louisville & Nashville Railroad Company controls the Nashville, Chattanooga & St. Louis Railway Company and its

lines by the ownership of a majority of the stock of the latter company.

It is true that some of these facts were brought out in the case before the Court for the enforcement of the order of the Commission ; but the Supreme Court appears to have held that they could not be considered by the Court in upholding a decision by the Commission not based upon these facts but upon an erroneous interpretation of the long and short haul clause whereby material testimony had been excluded from its consideration.

In a pamphlet published jointly by the defendants, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway and the Southern Railway, entitled "Tennessee," there appears the following :

Chattanooga is the terminus of more leading railway lines and is reached by a larger number of competing systems than any other point in the South. Extending north to Cincinnati, a distance of 338 miles, is the Cincinnati Southern Railway, a part of the Cincinnati, New Orleans & Texas Pacific (Queen & Crescent) System, making connection at Burgen, Ky., for Louisville and the Northwest. Washington, New York, and the New England cities are reached by the Southern Railway, *via* Knoxville, Asheville, and Salisbury. Atlanta and the Southeastern Atlantic Coast and Gulf cities are reached from Chattanooga by two competing lines, the Western & Atlantic Railroad and the Georgia Division of the Southern Railway. Due south extends the Chattanooga, Rome & Southern Railroad, a distance of 140 miles to Carrolton, Ga. The Chattanooga Southern, another line extending southward from Chattanooga, has been completed to Gadsden, Ala., a distance of 91 miles with fair prospects of being extended farther south at an early date. To the southwest the Alabama Great Southern (Queen & Crescent) reaches Birmingham, Ala., and Meridian, Miss., the latter city being distant 295 miles from Chattanooga, and continuing from Meridian over the same system to New Orleans and Texas points. Due west extends the Memphis & Charleston Railroad to Memphis, 310 miles, and northwest, the Nashville, Chattanooga & St. Louis Railway reaches Nashville and cities of the Northwest and Southwest.

\* \* \* Geographically, Chattanooga is so situated as to eventually become a jobbing market of more than ordinary importance. The numerous lines of railway radiating from Chattanooga like the spokes of a wheel and reaching every section of Tennessee and adjoining states, warrants this statement. Her rivals for the jobbing trade are Nashville, 151 miles to the northwest ; Knoxville, 112 miles northeast ; and Atlanta, 138 miles south. *Her shipping facilities, however, are superior to those of either of these cities, notably so in the cases of Nashville and Knoxville.* Taking into account the

claims of these cities, what might be termed the "legitimate" trade of Chattanooga covers a strip of territory extending northeast and southwest, a distance of about 200 miles in length by 125 miles in width.

These statements do not in my judgment exaggerate the advantageous natural position of Chattanooga. The confederated action of these carriers and others has greatly impaired the vigor of Chattanooga in this field.

The Commission finds that "the Chattanooga rates from eastern seaboard cities yield rates per ton per mile much greater than—in most instances more than double—the average receipts per ton per mile of the principal defendants, of roads throughout southern territory and of roads throughout the United States." "The rates in question from New York and other eastern seaboard cities to Chattanooga were established by the roads as members of the Southern Railway & Steamship Association, and are still with immaterial exceptions maintained as originally fixed."

The rates per ton per mile on the six numbered classes for the haul of 848 miles (short line distance) from New York to Chattanooga are as follows :

1	2	3	4	5	6
2.68 cents	2.31 cents	2.02 cents	1.72 cents	1.41 cents	1.15 cents

The average of the above rates per ton per mile to Chattanooga being 1.88 cents.

The revenue per ton per mile of the principal defendants named below, taken from their annual reports for the years ending June 30, 1900, and 1901, is shown in the following table :

	1900	1901
Southern Railway Company . . . . .	.916 cents	.936 cents
Louisville & Nashville Railroad Company . .	.752 "	.772 "
Nashville, Chattanooga & St. L. Ry. Company	.887 "	.883 "
Cincinnati, N. O. & T. P. Ry. Company . .	.730 "	.745 "
Chesapeake & Ohio Railway Company . .	.343 "	.388 "
Georgia Railroad . . . . .	1.135 "	1.097 "
Central of Georgia Railroad Company . . .	1.096 "	1.064 "
Norfolk & Western Railway Company . . .	.430 "	.461 "

## RATES PER TON PER MILE FOR THE YEAR ENDING JUNE 30, 1900

Of roads in West Virginia, Virginia, North Carolina and South Carolina . . . . .	.595 cents
Of roads in Kentucky, Tennessee, Mississippi, Alabama, Georgia and Florida . . . . .	.808 "
Of roads throughout United States . . . . .	.729 "

Illustrative of the discrimination of the present adjustment of rates against Chattanooga and in favor of Nashville the following table is inserted, showing combination of class 1 through rates from Boston and New York to Chattanooga and Nashville with local class 1 rates from Chattanooga and Nashville to intermediate stations on the Nashville, Chattanooga & St. Louis Railway, and distances from Chattanooga and Nashville to those stations :

To	DISTANCES FROM NASHVILLE	DISTANCES FROM CHATTANOOGA	NASHVILLE COMBINATION RATES	CHATTANOOGA COMBINATION RATES
Bolivar . . .	118 miles	33 miles	91 + 50 = 141	114 + 28 = 142
Bass . . .	107 "	44 "	91 + 49 = 140	114 + 31 = 145
Sherwood . .	97 "	54 "	91 + 45 = 136	114 + 34 = 148
Cowan . . .	87 "	64 "	91 + 43 = 134	114 + 36 = 150
Estill Spring .	77 "	74 "	91 + 40 = 131	114 + 40 = 154
Normandy . .	62 "	89 "	91 + 35 = 126	114 + 43 = 157
Wartrace . .	55 "	96 "	91 + 34 = 125	114 + 46 = 160
Fosterville . .	46 "	105 "	91 + 31 = 122	114 + 50 = 164
Winsted . . .	37 "	114 "	91 + 30 = 121	114 + 50 = 164
Florence . . .	26 "	125 "	91 + 22 = 113	114 + 50 = 164
Smyrna . . .	20 "	131 "	91 + 20 = 111	114 + 50 = 164
Kimbro . . .	13 "	137 "	91 + 15 = 106	114 + 50 = 164
Glencliffe . .	5 "	146 "	91 + 12 = 103	114 + 50 = 164

On all the other classes as well as class 1, the combinations are in favor of Nashville.

The following table gives the combination of class 1 rates from New York to Nashville and Chattanooga with the local rates from those points to certain stations in Tennessee, Mississippi and North Alabama; also distances from Chattanooga and Nashville to those stations :

To	DISTANCES FROM NASHVILLE	DISTANCES FROM CHATTANOOGA	NASHVILLE COMBINATION RATES	CHATTANOOGA COMBINATION RATES
Winchester, Tenn.	85 miles	72 miles	\$1.33	\$1.53
Stevenson, Ala. . .	113 "	38 "	1.41	1.44
Hollywood, Ala. . .	126 "	51 "	1.46	1.55
Cowan, Tenn. . . .	87 "	64 "	1.34	1.50
Gadsden, Ala. . . .	210 "	92 "	1.63	1.71
Anniston, Ala. . . .	271 "	137 "	1.63	1.71
Huntsville, Ala. . .	146 "	97 "	1.35	1.54
Meridian, Miss. . .	360 "	296 "	1.74	1.91
Decatur, Ala. . . .	121 "	122 "	1.35	1.54
Tuscumbia, Ala. . .	134 "	165 "	1.35	1.64

Nashville, it will be perceived, has the advantage in rates over Chattanooga at all these stations, many of which are beyond Chattanooga from Nashville. For example, at Gadsen, Alabama, 210 miles from Nashville and 92 miles south from Chattanooga, the Chattanooga combination rate exceeds the Nashville combination rate by 8 cents.

The following table gives the excesses of what are termed the Nashville *combination distances* over the Chattanooga *combination distances* to the stations named in the preceding table and also the excesses of the Chattanooga combination rates over the Nashville combination rates in cents per hundred pounds and on car loads of 40,000 pounds. By combination distances is meant the distances from the point of shipment, New York in this instance, to Chattanooga and Nashville, respectively, added to the distances from those points to the stations named:

	EXCESSES OF NASHVILLE COMBINA- TION DISTANCES OVER CHATTANOOGA COMBINATION DISTANCES	EXCESSES OF CHATTANOOGA COMBINATION RATES OVER NASHVILLE COMBINATION RATES	
		In Cents per 100 Pounds	On Car Loads of 40,000 Pounds
Winchester . . . .	164 miles	20 cents	\$80.00
Stevenson . . . .	226 "	3 "	12.00
Hollywood . . . .	226 "	9 "	36.00
Cowan . . . . .	174 "	16 "	64.00
Gadsden . . . . .	269 "	8 "	32.00
Anniston . . . . .	285 "	8 "	32.00
Huntsville . . . .	200 "	22 "	88.00
Meridian . . . . .	215 "	17 "	68.00
Decatur . . . . .	150 "	19 "	76.00
Tuscumbia . . . .	120 "	29 "	116.00

The shortest all rail line from New York to Chattanooga is *via* Alexandria, 846 miles ; that to Nashville is *via* Alexandria and through Chattanooga, 997 miles. It is shown that the greater part of the freight moving from the east to both Nashville and Chattanooga moves *via* Norfolk, sea and rail. Chattanooga, therefore, is materially nearer both the markets of production and shipment, and Norfolk, the point where for the most part the sea carriage ends and the rail haul begins. Nothing else appearing, it would seem clear upon this situation that Chattanooga should have even lower rates than Nashville. The reverse, however, is the fact, and this is, in large part, the cause of complaint. Upon what theory is this reverse order of rates — lower for the long haul to the more distant point — justified? The justification is put mainly upon the ground of Nashville's closer proximity to the territory north of the Ohio river where a lower scale of rates has been fixed by the associated carriers of that territory than by the associated carriers in Southern territory by practically the same methods and upon the ground that Nashville desires to meet in competition the cities on the Ohio river, and St. Louis in the region between these cities and Nashville.

The same theory that justifies and requires rates to Nashville which accomplish this purpose would seem from equal necessity to require a like adjustment of rates to Chattanooga to give her a fair chance in competition with Nashville in territory between that city and Chattanooga. But this has been utterly ignored in the framework of this adjustment of rates by the singleness of action of the associated carriers south of the Ohio river. Chattanooga is not only met in substantially all the regions between the two cities by Nashville with an overwhelming advantage to the latter, but is overreached by the advantages of the latter in rates to many important points south of Chattanooga. Not only is this true, as will be seen by the combination of rates on eastern traffic which as to Nashville passes through Chattanooga on through rates from the East and then out from Nashville in distribution by Nashville jobbers back through and around Chattanooga, but Chattanooga is, by the methods of rate making in vogue in this territory, grouped with a large number of other

places far to the south and west of her taking the same rates under this so-called "equalized system," so that these places have their natural disadvantages of location overcome by more favorable rates to the detriment of Chattanooga, which is not only nearer the points of production and shipment than most of the places in this group but is also much nearer to the Virginia cities, Ohio river points, and Nashville, all of which enjoy the lower scale of official or Trunk Line rates and classifications.

\* \* \* \* \*

In the argument of the case in court for the enforcement of the previous order of the Commission counsel for the carriers said: "The Louisville & Nashville Railroad is vitally interested in maintaining the commercial importance of Nashville," and urged there as in this case that rates to Nashville not higher than at present are necessary "to enable Nashville to compete with Cincinnati, Louisville and Evansville in the territory between Nashville and the Mississippi river." I repeat that like reasoning would, upon the undisputed facts of this case, entitle Chattanooga to such rates as would give her a fair chance in competition with Nashville in the territory between the two cities, and certainly in that south of Chattanooga. Nor can the Louisville & Nashville Railroad, in the light of the testimony in this case, disclaim responsibility in common with the other carriers for the rates and adjustments in question. What concessions one to another these carriers have made from time to time during the 18 or 20 years they have maintained these rates and adjustments, and what compromises of the views and purposes of individual carriers in respect thereof, in disregard of that equality of treatment to all which the law enjoins, have been made in their conferences in order to avoid competition in rates and secure the greatest net revenue to themselves, we do not know. This can probably never be shown, for these things are "done in a corner." But it is not probable that this adjustment and scale of rates could have remained intact, as shown, for so long a period except by the substantial agreement of the carriers in restraint of competition.

Chattanooga has been complaining of and protesting against these rates continuously for more than fourteen years. The foregoing facts and other testimony in the case indicate the extent and hurtfulness of the discrimination against that city; also the excessiveness of the rates to Chattanooga. The facts seem to me to be convincing that the complaint is well founded and that the rates should be condemned by an order to that effect.

## XI

### THE LONG AND SHORT HAUL CLAUSE<sup>1</sup>

#### THE ST. CLOUD, MINN., CASE

(*Vide map, p. 270*)

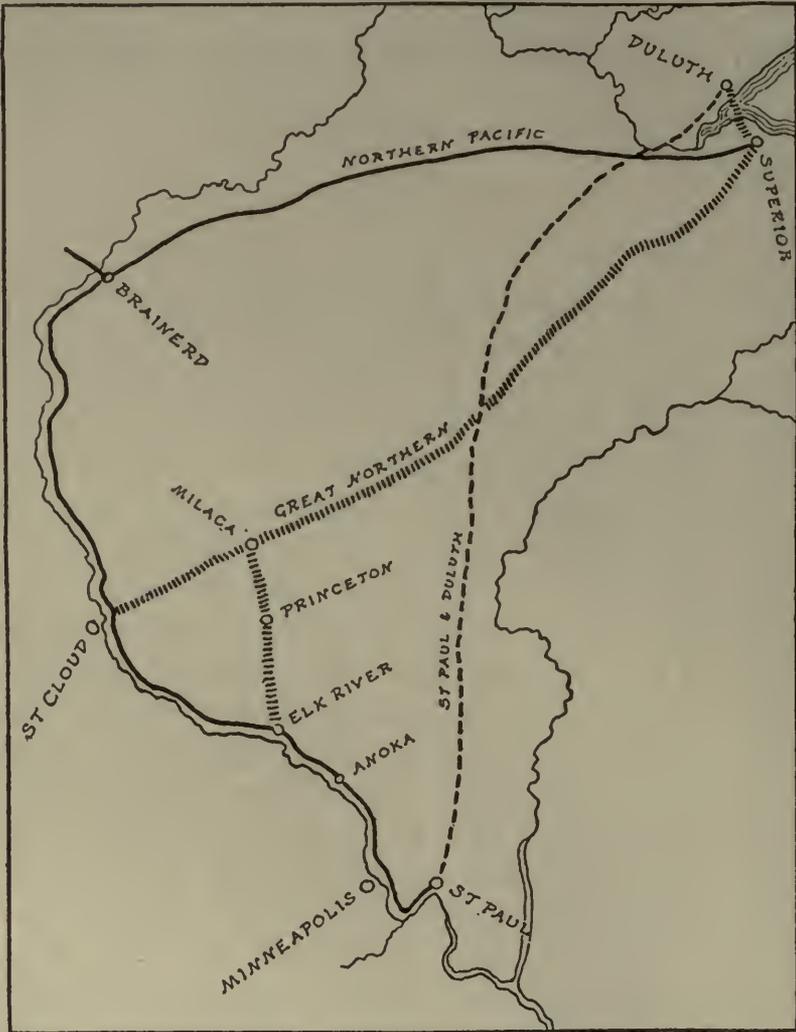
PROUTY, *Commissioner* : \* \* \* \* \*

The railroad of the defendant extends from Minneapolis and St. Paul in a northwesterly and northerly direction to Brainerd, Minn., thence easterly to Duluth, Minn., and Superior, Wis., the distance from St. Paul to Duluth being 241 miles. St. Cloud is upon the line of the defendant, 76 miles north of St. Paul. The defendant engages in the transportation of freight both ways between Duluth and St. Paul, through St. Cloud. Its rates from St. Paul to Duluth are less than those from St. Cloud to Duluth. In the opposite direction its rates from Duluth to St. Paul are less than those from Duluth to St. Cloud.

The two rates specifically referred to in the testimony are those upon flour from St. Paul and Minneapolis east, and those upon coal from Duluth and Superior west. The through rate on flour from St. Paul to New York *via* the defendant's line to Duluth, and thence by water and rail to New York, was, at the time of the hearing, 21½ cents per hundred pounds. The defendant apparently published no through rate from St. Cloud to New York, but applied to such shipments its local rates from St. Cloud to Duluth or Superior, in combination with the through rate from those cities to New York. The local rate from St. Cloud was 12 cents, and the through rate from Duluth 16½ cents, making the rate from St. Cloud to New York 28½ cents. Flour from St. Paul to New York by the defendant's line

<sup>1</sup> Decided November 29, 1899. Interstate Commerce Reports, Vol. VIII, pp. 346-363.

passes through St. Cloud. It was conceded by the defendant that its division of the through flour rate from St. Paul yielded it about 5.375 cents per hundred pounds, as against 12 cents per hundred pounds when the transportation was from St. Cloud.



The rates on coal from Duluth to St. Cloud are, soft coal \$1.60 per ton, hard coal \$2.00 per ton; to St. Paul \$1.25 per ton for hard coal and 75 cents for soft coal. The transportation in the latter case is through St. Cloud.

There are three lines of railroad, besides that of the defendant, connecting St. Paul and Minneapolis with Duluth and

Superior, — namely: the Chicago, St. Paul, Minneapolis & Omaha, distance 179 miles; the St. Paul & Duluth, 160 miles; the Great Northern, over the Eastern Minnesota, 169 miles. It was also said that the Great Northern had in process of construction a line by which the distance would be somewhat reduced. Large quantities of freight move between these points, and these three lines are active competitors for this traffic. The rail lines from St. Paul to Duluth in connection with water lines upon the Great Lakes furnish a means of communication between St. Paul and the northwest and the Atlantic seaboard and the east. Lines of railway leading south from St. Paul through Chicago and other points reach, by their connections, the eastern section of the country as well, and there is fierce competition between the lines leading south and the lines leading to Duluth and Superior, for business between the northwest and the seaboard.

In the making of their rates the three lines above mentioned between St. Paul and Duluth observe at the present time the rule of the fourth section; that is, they make no higher rate from or to the intermediate point than is made from or to the more distant point. Anoka, Elk River, Princeton and Milaca are situated upon the line of the Great Northern, and take the same rate as do St. Paul and Minneapolis. The line of the defendant runs through Anoka and Elk River, the former being 29 and the latter 41 miles from St. Paul, and the rates to and from these points by the defendant's line are the same as those to and from Minneapolis and St. Paul.

It has for some fifteen years been physically possible to transport freight between Duluth and St. Paul by the defendant's line in question; but in point of fact until April, 1889, the defendant did not publish a tariff by that route, owing apparently to the fact that it was much more circuitous than the others in use. During certain seasons of the year the defendant is compelled to haul in the transaction of its business empty cars from Duluth to St. Paul, and during other times of the year to haul empty cars from St. Paul to Duluth. Its traffic manager testified that his attention was called to this fact by the management, and that he was asked to provide, if possible, some freight for these

empties, and that for this purpose, in the hope that some traffic might be obtained, especially flour from Minneapolis to the east and coal from Duluth to St. Paul, the rates in question were published. In the publication of these tariffs the defendant simply met those rates which were already in force by other lines. It appears that the other lines publish, either by some arrangement among themselves, or through some more comprehensive association, common tariffs; for some reason they declined to publish the rates of the defendant upon these tariffs, and the defendant was compelled to and did print its own rate sheets. Rates to and from St. Cloud were, previous to the publication of this tariff, the same that they were afterwards; nor were the rates at any of the points mentioned in any way changed by the putting in of the defendant's schedule. Whether rates between St. Paul and Duluth, and at other points taking those rates, have been influenced or affected since the publication of this schedule by the fact that the defendant has entered the field as a competitor, we cannot determine. The St. Paul rates are at the present time higher, and the discrimination against St. Cloud therefore less, than when the complaint was filed.

There are situated at or near St. Cloud three flouring mills besides that of the complaining company. That of the complainant has a capacity of 1000 barrels per day. The others are considerably smaller. The wheat which is ground at these mills is partly drawn from local territory, and is partly brought in from more distant points. The milling-in-transit privilege is available there upon the payment of an additional 2 cents per hundred pounds.

About one half of the flour ground at the mill of the complainant company is exported. It was said that the profit upon this flour was often not more than from 1 to 3 cents per barrel. It follows, therefore, that this mill cannot compete with Minneapolis and other points enjoying the same rate, if its flour costs the same price at the mill. It does not, for the reason that the mills at St. Cloud pay less for their wheat than do those at Minneapolis. It was said in testimony that the price at St. Cloud was usually about 6 cents per bushel below the Minneapolis

price. A change in the rate on flour to the Atlantic seaboard works a corresponding change in the price which mills at St. Cloud can pay for local wheat. Princeton is situated some 25 miles east of St. Cloud. The Princeton miller enjoys the same rate as does Minneapolis, and he can and does pay the farmer for his wheat some 6 cents a bushel more than the miller at St. Cloud, with the result that intermediate territory between St. Cloud and Princeton delivers most of its wheat at Princeton rather than at St. Cloud.

Considerable testimony was introduced in behalf of the city of St. Cloud, tending to show that these freight rates were much to the disadvantage of that city as compared with Princeton, Elk River, and points in the vicinity taking the Minneapolis rate. This is of necessity true. All commodities coming by rail cost the retail merchant more at St. Cloud than at Princeton or Elk River. The expense of living is somewhat greater in that city. The difference in the freight rate upon heavy articles into which the rate enters as an important factor is sufficient to divert the business to Princeton and Elk River as against St. Cloud. We find, as a fact from the testimony, that business is so diverted, and that St. Cloud, owing to the circumstance that it pays the higher rate, is put to a disadvantage as compared with Milaca, Princeton, Anoka and Elk River. These findings refer to conditions existing at the time of the hearing.

The mill of the complaining company is situated upon the Great Northern Railroad, and can only be reached by the road of the defendant by the payment of a switching charge of \$5.00 per car. The flour traffic of the complainant company, which is very large, seems to have been sent entirely over the Great Northern. Only two cars have ever been tendered the defendant for shipment by the company complainant, and these were tendered for the purpose of enabling it to establish its case in this proceeding. One of them was accepted and shipped to its eastern destination. The other was declined. The freight depots of the two roads are about equally accessible to the business portion of St. Cloud, although that of the defendant is situated across the river, in what is sometimes known as East St. Cloud.

No claim was made that the rates to and from St. Cloud were unreasonable of themselves, unless made so by comparison with the lower rates to and from the more distant points.

It did not definitely appear what amount of through traffic between St. Paul and Duluth had been carried by the defendant under its present tariff. The traffic manager of that company testified that in the month of July 7223 car loads of flour left Minneapolis for the east, that of this number his road carried but 73, and that in no month between the putting in of these rates and the date of the hearing in August had his line carried 2 per cent of the total out of Minneapolis. No statement was made as to traffic in the opposite direction, but it fairly appeared, from all that was said, that up to the date of the hearing the amount of through business done by the defendant had been insignificant.

The statute of Minnesota provides that no greater charge shall be made for the short than for the long haul, in the same direction, the less being included within the greater, without the permission of the Railroad Commission of that State. St. Paul and Duluth are both situated in the State of Minnesota, and the transportation between those points is therefore intrastate. When the defendant first determined to meet the rates of its competitors it did so by the publication of a tariff between St. Paul and Duluth, in which the rate between those points was made lower than the rate from local intermediate points. Either before the putting in of this tariff or after it had been published the defendant applied to the Railroad and Warehouse Commission of Minnesota for leave to make the lower rate between the more distant points, and this application was denied by that board. Thereupon the defendant published the through rates in question, claiming that these, being interstate, were beyond the jurisdiction of the State Commission.

### *Conclusions*

Is the action of the defendant in charging more to and from St. Cloud, an intermediate point, than is charged to and from St. Paul, a more distant point, in violation of the fourth section?

The defendant affirms that it is not, for the reason that the transportation is not conducted "under substantially similar circumstances and conditions."

The only fact relied upon by the defendant to make out a dissimilarity of circumstances and conditions is competition between the four lines of railway connecting Duluth and St. Paul, of which the defendant is one. Water competition is not to be considered, for the reason that, while such competition is an important factor in determining the through rate between New York and St. Paul, of which the rate in question is a part, the rail lines from Duluth to St. Paul are links in the lake and rail route, and cannot, therefore, be heard to set up water competition in excuse of the rate which they themselves make in furtherance of that competition.

In its earliest decisions this Commission said that competition between carriers subject to the Act could only make out substantially dissimilar circumstances and conditions in rare and peculiar instances, and, afterwards, that such competition could not be shown in any instance for that purpose. This rule was applied by the Commission in many cases, and finally came before the Supreme Court of the United States for consideration in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45. That court declined to accept the construction of the Commission in this respect, and held that competition between railways subject to the Act should be considered in determining whether the circumstances and conditions were similar. The present case must, of course, be disposed of in accordance with that interpretation of the Act, and not in accordance with the views previously entertained and applied by this Commission.

It has been claimed by some, in reliance upon the above decision, and is perhaps the contention of the defendant in this case, that if actual bona fide railway competition is shown, that of itself creates the dissimilar circumstances and conditions necessary to except the defendant from the operation of the rule of the fourth section. That such was not the understanding of the Supreme Court is plainly asserted in the language

of the opinion. On page 167, L. ed. 423, Sup. Ct. Rep. 49, it is said :

In order further 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 its character or 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." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

It is apparent from the above quotation that what the court held was, not that competition between railways in and of itself created dissimilar circumstances and conditions, but that it was one factor which might be, and perhaps ought to be, taken into account in determining that question. The question is still largely one of fact, and is in each particular instance whether, in view of all the facts surrounding that individual instance, the circumstances and conditions are so dissimilar as to justify the greater charge for the shorter distance. In answering this question we are to consider the interests of all parties, the carrier as well as the public.

That in the case under consideration there is a discrimination, and a most grievous discrimination, owing to this disparity in rates, cannot be denied. The rate on flour from St. Cloud to market is 7 cents per hundred pounds more than from Minneapolis, Princeton or Elk River. This difference in the rate is often two or three times the profit which the miller makes in the grinding of his flour. A considerable part of the wheat which is ground at the mill of the complainant and at the other mills at or near the city of St. Cloud is local wheat. As a result of this difference in rate this wheat is worth some 6 cents a bushel less at St. Cloud than at Minneapolis or at Princeton or Elk River. This must mean a difference of fully \$1 per acre in the net product of land in the vicinity of St. Cloud, as compared

with similar land in the vicinity of Princeton or Elk River; and this difference in the productive value of the soil must produce a substantial difference in the value of the land itself, and in the prosperity of the owners of that land, if long continued.

The same thing is true in a less degree with reference to whatever St. Cloud consumes. Its anthracite coal must cost 75 cents per ton, and its bituminous coal 85 cents per ton, more than at St. Paul. The testimony shows that the difference in freight rate is so great that in articles of hardware of the coarser kinds the merchants of St. Cloud cannot compete with those of Princeton and Elk River. Whatever goes to the maintenance of life in that community, where the freight rate enters into the price, costs the consumer more than in these near-by communities. It is sometimes difficult to point out the direct and individual hardship of these freight-rate discriminations, although this could be done in the case under consideration, but their effect is none the less real; they are a perpetual tax upon the vitality of the community discriminated against, and sooner or later must produce a visible result.

The defendant earnestly insists, however, that while this discrimination may exist, it is in no sense responsible for it; that the discrimination was equally great before its rates between Duluth and St. Paul were put in, and that the putting in of those rates in no way aggravated that discrimination. It urges, therefore, that inasmuch as these rates do not in any respect injure the complaining company or the community of St. Cloud, while they do to some extent benefit the defendant, they ought not to be declared unlawful.

There is great force in this contention of the defendant. Having reference only to the moment when these rates were first published, its claim that the complainants were in no way prejudiced is probably a valid one. The rates from Minneapolis, Anoka, Elk River and Princeton were the same before as after. The local rates from St. Cloud to Duluth were the same. The mere act of the defendant in publishing its lower rates between the more distant points did not, therefore, produce or aggravate the discrimination with which the complainant is

finding fault. But this question cannot be disposed of as of the instant when these rates were inaugurated. The condition which we are examining is a continuing one. By the putting in of those rates the defendant became a competitor for this traffic between Duluth and St. Paul, and from that moment became a factor in the determination of that through rate. Just what effect the defendant may have produced in the past upon those rates, to just what extent it may in the future influence those rates, is a thing which can never be exactly determined.

The defendant has the long line, and suggests that this fact creates a dissimilarity in circumstances and conditions which justifies it in disregarding the rule of the fourth section, while the short lines are bound by that rule. To this we cannot assent. Without deciding that cases may not arise in which difference in distance may justify the higher intermediate rate, we are of the opinion that such effect cannot be given to that circumstance in the present case. To permit this defendant to meet competition at the more distant point without the sacrifice of its intermediate rates, while its competitors were obliged in all cases to reduce their intermediate rates, would place those competitors at the mercy of this defendant. It carries but little of this through traffic. A reduction in the through rate has small effect upon its revenues, while it may bankrupt its rivals. If, however, a reduction of the through rate by the defendant carried with it a corresponding reduction of the intermediate rate the result to the defendant would be too serious to permit of unreasonable action.

The defendant urges that it does not ask to reduce the through rate; it simply asks to meet the rate already in effect. Since mere difference in the length of the defendant's line does not create substantial dissimilarity, we may assume, for the present discussion, that its line is no longer than that of its competitors. The case stands as it would if this defendant had on the first day of April completed and opened for business for the first time the shortest line between St. Paul and Duluth. It finds these rates in effect. It has had no voice in the making of them. It

insists that they are unreasonably low, and it asks to be allowed to simply meet those rates without reference to its intermediate territory. In what essential respect would that case differ from the position of the defendant which is now under consideration? We repeat what has been already affirmed; this question cannot be determined as of any particular moment, but must be considered as a continuing condition. When this defendant comes into this field of competition, whether it be as the long line or as the short line, it comes subject to the same limitation as every other competitor.

Counsel for the defendant in his argument puts the two propositions together, namely the length of line and the mere meeting of the rate, as though the long line might simply meet the rate of its competitor while the short line could not do so. This involves a further suggestion that the long line has not the same voice in the determination of the rate as the short line. Such is not our observation as applied to circumstances like the present. Upon the contrary, the long line is much more likely to become a disturbing factor in rate situations than the short line. It is the circuitous route, in its struggle for business, which is most apt to reduce the published rate or to secretly depart from the open rate, thereby forcing reductions by the short line in its open tariffs. This defendant has been carrying 73 car loads of flour between these points, as against more than 1000 per month by each of its competitors. It will hardly rest permanently satisfied with that division of traffic. If its present traffic manager is disposed to do so, he is quite likely to be succeeded by some one who will not. It is not intended to suggest that the defendant will violate the law to obtain more of this freight, but all experience shows that in this competitive contest the presence and active participation of the long line exercises as potent an influence over the rate, in one way and another, as does the short line.

It has been said that each case depends upon its own circumstances. Why, it may be inquired, if this is so, should it not be determined in each case, as a controlling circumstance, which carrier is responsible for the low rate, those carriers which are

not being permitted to meet such rate without reference to their intermediate territory. Why should not the defendant in this case be allowed to meet the rate of its competitors untrammelled by the fourth section until it is found as a fact that the defendant has done something more than merely meet these rates?

The practical answer to this would be that no such basis is a workable one. It cannot be satisfactorily determined, in the great majority of instances, which one of several competitors is responsible for a given reduction or a given advance in rates. The causes which lead to rate fluctuations are so intangible, often resting upon a suspicion more or less well founded, that any attempt to say in an individual case what those causes were would ordinarily be futile. We have often had occasion to examine this question, but in no one instance within our present recollection has it ever satisfactorily appeared which carrier actually determined the competitive rate.

It is equally clear that the statute never contemplated any such basis. To enforce such a rule would effectually stifle that competition which the Act to Regulate Commerce took pains to secure. If a carrier could only reduce its rates to a competitive point at the expense of its intermediate territory, while the competitors of that carrier might meet the reduction without corresponding reductions at intermediate points, no carrier would ever openly reduce such rates.

There would be more reason in the claim that flagrant or outrageous conduct of a competitor might create the necessary disparity, and possibly under the rule laid down by the Supreme Court instances of that nature might arise. This Commission held in *Re Chicago, St. P. & K. C. R. Co.*, 2 I. C. C. Rep. 231, 2 Inters. Com. Rep. 137, that the mere unreasonable reduction of a competitive rate at the more distant point would not have this effect. However this may be, it is enough to say that in the case under consideration there is no element of that sort. These four lines are all fairly competing for this traffic. No one has been guilty of any improper conduct in the establishment of the rate or in its methods of obtaining business.

It should be carefully noted that there are no special circumstances or conditions involved in this case. St. Cloud is no farther from Duluth by the line of the defendant than is St. Paul by the more direct lines. The traffic from St. Cloud and St. Paul is of the same character. There is nothing peculiar in the movement of that traffic. The attitude of the different competitors of the defendant, or of all those competitors taken together, is, so far as appears, perfectly fair. No reason can be assigned for permitting this defendant to disregard the fourth section in the handling of this competitive traffic which is not equally applicable to each of its competitors. If the fourth section may be disregarded in case of this railway competition, it is difficult to imagine a competitive condition in which it might not be equally disregarded.

The defendant suggests that, if the other competing lines between St. Paul and Duluth were to imitate its course by making the higher rate to and from the intermediate point, the discrimination against St. Cloud would thereby be removed, for the reason that Princeton, Anoka and Elk River, which now enjoy lower rates, would then be given substantially the same rate which St. Cloud now has. That might in point of fact remove the discriminations as to St. Cloud considered in reference to these three stations, but would it not create a discrimination against those stations in favor of more favored localities? Such a reduction of rates would reduce the price of wheat at Princeton 6 cents a bushel, and would correspondingly reduce the value of land tributary to Princeton. The same would be true of all intermediate territory between Minneapolis and Duluth. Wheat lands in the vicinity of Minneapolis, or even farther west than that city, would be worth more than those through which the products of these lands must pass upon their way to market.

The fact that whatever rule is applied to this defendant must be applied to its competitors has undoubtedly influenced us largely in the determination of this question. The three shorter lines now observe the rule of the fourth section, but they cannot be required or expected to do so if this defendant is permitted to disregard it. To allow all these lines to adopt the course now

pursued by this defendant would be to create discrimination not now existing against all intermediate territory between St. Paul and Duluth. It would be to remove the main protection against exorbitant and discriminating interstate rates which that territory now has.

This defendant carries an insignificant amount of through business, and must derive therefrom an insignificant benefit. In order to obtain this benefit it introduces a practice which may demoralize the rate situation in that whole territory. We do not think, having due regard to its interest, as well as the interest of the public, that this ought to be permitted.

The other competing lines, aside from this defendant, observe the rule of the fourth section. When, therefore, the through rate is reduced, this operates to reduce the rate at points like Princeton, Anoka and Elk River, which are in competition with St. Cloud. To the extent, therefore, that this defendant is directly or indirectly responsible for the through rate, it is responsible for the discrimination against St. Cloud. The defendant by becoming a competitor for this through traffic has put itself in a position where it may control, and must, under ordinary circumstances, be held to control, the through rate equally with other competing lines. This being so, it must observe, in the carrying of this competitive traffic, the rule of the fourth section with reference to its intermediate stations, as do its rivals.

\* \* \* \* \*

In both those cases (Dallas and Savannah Freight Bureau)<sup>1</sup> no prejudice against the intermediate point was shown. In this case such prejudice does not appear. Upon a view of the whole situation, it is our conclusion that the defendant carries this business from and to St. Paul, Minneapolis, Anoka and Elk River "under substantially similar circumstances and conditions" as exist in case of business to and from St. Cloud, and that the higher rates to St. Cloud are in violation of the fourth section.

It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection

<sup>1</sup> Cf. p. 286, *infra*.

with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high, which most often gives occasion for complaint, and which is the ground of complaint here. A rate of 12 cents per hundred pounds on flour from St. Cloud to Duluth may be reasonable when compared with a similar rate from Minneapolis. When compared with a rate of  $5\frac{1}{2}$  cents from the latter place, it is certainly *prima facie* grossly unreasonable. Minneapolis and St. Cloud are competitors in the milling business, and when this defendant charges the St. Cloud miller 12 cents per hundred pounds for transporting his flour from St. Cloud to Duluth, while it charges the Minneapolis miller but  $5\frac{1}{2}$  cents for identically the same service plus an additional haul of 60 miles, it is guilty of a discrimination against the St. Cloud shipper, which is not justified by the circumstances of this case.

It should be noticed, moreover, that there is nothing in the record to show that the rate of  $21\frac{1}{2}$  cents on flour from St. Paul to New York is an unreasonably low one, or that a similar rate applied to St. Cloud would be unreasonably low. It is certainly astonishing that so great a service can be rendered for so small a sum, but, in comparison with similar rates at the same time prevailing in other parts of the country, this one can hardly be classed as extraordinary. The defendant compares its rates from St. Cloud to Duluth and Superior with the distance tariffs of various States and of various railroad companies, and asserts from this comparison that they are unduly low; but this is hardly the proper standard by which to estimate the rates of the defendant in question. The distance tariffs referred to are strictly local tariffs. This rate under consideration is in effect a division of the through rate from St. Cloud to New York, for this defendant cannot treat traffic from St. Paul to New York as through, and that from St. Cloud to New York as local. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. While 12 cents may be an extravagantly low *local* rate as applied

to the distance and traffic in question, it is, when considered as a charge for a haul of 160 miles out of a total through haul of 1500 miles, an extravagantly high rate. We do not express, however, any opinion upon the reasonableness of the through rate or the propriety of the division which the defendant receives, since the latter question especially must depend upon conditions of which no information is afforded by the testimony.

It has been urged that the consequence of the conclusion at which we have arrived must be to compel the Northern Pacific Company to withdraw from this through business, and that as a result that company will lose the profit which might accrue from that traffic, without any benefit whatever to St. Cloud. Should the defendant elect to comply with our order by canceling its through tariffs it cannot be affirmed that the community of St. Cloud has derived no advantage from such action. The injury to that community lies in the discrimination between it and other localities. That discrimination is intensified in proportion as the St. Paul rate is forced down below the St. Cloud rate. As already remarked, it is impossible to say what effect the competition of the Northern Pacific Company might produce upon this through rate, and therefore impossible to say to what extent St. Cloud is or is not benefited by its withdrawing from that competition.

If the Northern Pacific withdraws from this business it will certainly lose a certain amount of traffic. That traffic is insignificant, however, and it is handled under such conditions that the profit arising from it must be more insignificant still. Moreover, this traffic goes to a shorter line which can handle it at less expense. Wasteful competition by circuitous routes is to the disadvantage of railways as a whole, certainly of the country as a whole, for ultimately there must be some relation between rates and the actual cost of transportation. What the Northern Pacific loses here by the application of the long and short haul rule it probably gains somewhere else through the general observance of that same rule by other carriers.

Even if it were true that the defendant did lose without corresponding advantage at other points, that would be no controlling

reason against our conclusion. The application of a beneficent general rule often works a certain hardship in individual cases. At the present time the rule of the fourth section is observed except in certain southern territory and in the making of trans-continental rates. The application of that section for which the defendant contends would permit throughout the whole country the making of higher rates to intermediate points, thereby disarranging business conditions and producing endless discriminations which do not now exist. We cannot feel that any such application was intended by the Act, nor that it should be permitted in due consideration of the interests of all parties concerned.

\* \* \* \* \*

## XII

### RELATIVE RATES<sup>1</sup>

#### THE SAVANNAH FERTILIZER CASE

PROUTY, *Commissioner* :

The Savannah Bureau of Freight and Transportation is an organization of the business men of Savannah, Ga., having in charge the transportation interests of that city. Certain fertilizer companies located at Savannah join with it in this complaint.

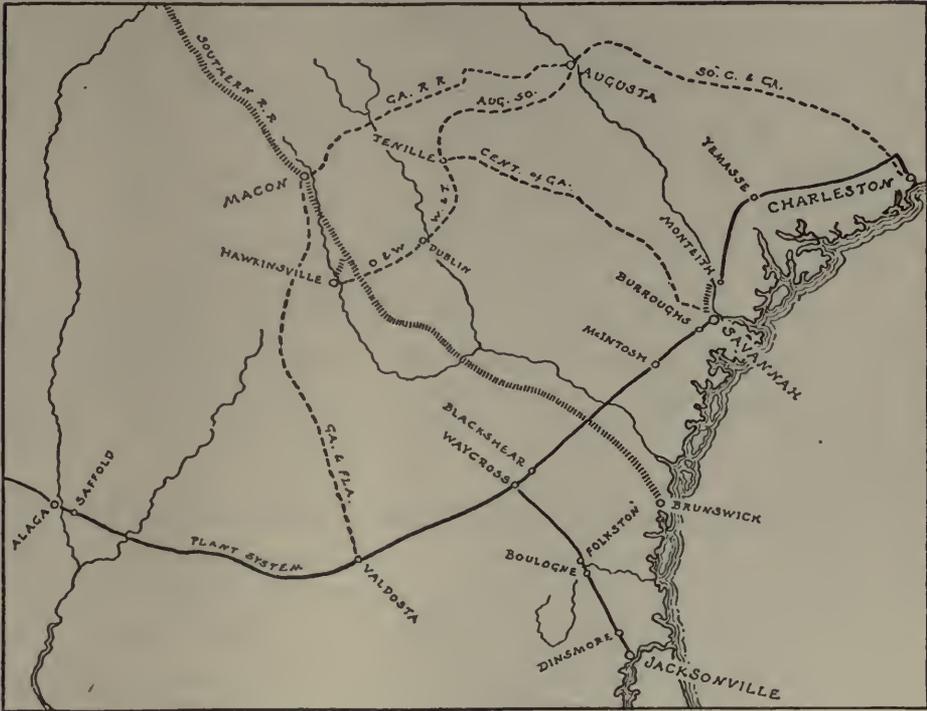
Savannah, Ga., Charleston, S.C., and Wilmington, N.C., are important centers for the distribution of commercial fertilizers. This complaint refers to the rates upon such commodities from these three cities to points in North Carolina, South Carolina, Georgia, Florida, and Alabama, and is in substance that the system by which these rates are made is vicious in principle, and that the rates, as made under that system, discriminate against Savannah in favor of Charleston and Wilmington, and are in violation of the fourth section. The facts are not for the most part in dispute, since they arise mainly upon the published tariffs of the defendants.

While it will be unnecessary to refer to all the instances cited in the pleadings and proofs, two or three cases will best state the nature of the complainants' contention. The rates given are, unless otherwise specified, those in force at the time the complaint and answers were filed.

The Charleston & Savannah Railway extends from Charleston to Savannah. At Savannah, it connects with the Savannah, Florida & Western Railway, which runs southerly to Jacksonville, Fla., and westerly across the southern portion of Georgia,

<sup>1</sup> Decided December 31, 1897. Interstate Commerce Reports, Vol. VII, pp. 458-489.

to the Alabama State line, where it connects with the Alabama Midland Railway extending to Montgomery. These three lines of railway are operated under a common management by what



is known as the Plant System, and constitute in practical operation but one line of railroad.

The distance between Charleston and Savannah by this line is 115 miles. Monteith, Ga., is a station upon the Charleston & Savannah Railway, 101 miles from Charleston. Burroughs, McIntosh, Blackshear and Sparks are all stations in the State of Georgia upon the Savannah, Florida & Western Railway. The rate per ton of 2000 pounds and distance from Savannah to these stations is as follows :

To	RATE	DISTANCE
Burroughs . . . . .	\$0.88	12 miles
McIntosh . . . . .	1.10	31 "
Blackshear . . . . .	1.71	87 "
Waycross . . . . .	1.82	97 "

The rate and distance from Charleston to these various points is as follows:

To	RATE	DISTANCE
Monteith . . . . .	\$1.74	101 miles
Savannah . . . . .	.80	115 "
Burroughs . . . . .	1.38	127 "
McIntosh . . . . .	1.60	146 "
Blackshear . . . . .	1.71	202 "
Waycross . . . . .	1.82	212 "

The complainants urge that a comparison of the rates and distances from Charleston and Savannah to those various points shows that the rates are made without any reference to distance or cost of transportation, and that they discriminate against Savannah.

The defendants insist, upon the other hand, that the rate from Charleston to Savannah is fixed by water competition, that the rates from Savannah to all points upon the Plant System in Georgia are made by the Georgia Railroad Commission, that the rates from Charleston to these same points are made by adding 50 cents to the Georgia Commission rate, and that this difference, in view of the low rate between Charleston and Savannah, is a reasonable one.

The rates between all points in the State of Georgia are fixed by the Railway Commission of that State. The facts as to water competition between Charleston and Savannah are stated upon another branch of this case.

As already stated, the Savannah, Florida & Western Railway extends from Savannah, Ga., to Jacksonville, Fla. The difference in rate between Charleston and Savannah to all points upon the line of that railway in the State of Georgia, not common points, is 50 cents in favor of Savannah. Folkston, Ga., is the last station in that State and is distant 245 miles from Charleston and 130 miles from Savannah, and the rate is \$2.20 from Savannah and \$2.70 from Charleston. Boulogne, Fla., is the next station beyond and 5 miles distant from Folkston. At Boulogne the

difference in rate is but 24 cents per ton in favor of Savannah, while at Dinsmore, Fla., 30 miles south of Folkston, the rate is the same from both Charleston and Savannah, *viz.*, \$2.30 per ton.

Complainants say that if Savannah is entitled to an advantage of 50 cents in Georgia it is certainly entitled to the same advantage in Florida, and that the shrinkage in all instances, and the entire disappearance in many instances of any difference, is an unjust discrimination against Savannah in favor of its competitor Charleston. The defendant excuses this by saying that Jacksonville is an important ocean port, between which and Charleston and Savannah the rate is practically the same, and that in going south upon the Savannah, Florida & Western Railway it is necessary to lower the rate and diminish the difference as Jacksonville is approached. Since the water rate is the same from both Charleston and Savannah to Jacksonville the rail rate must also be the same, or substantially the same, to points which can be reached from Jacksonville.

We find that there is actual water competition between Charleston and Savannah and Jacksonville, and that the rates by water from Charleston and Savannah to Jacksonville upon commercial fertilizers are substantially the same. It did not appear how far from Jacksonville into the interior freight could be transported upon the ocean and rail rate as against all rail competition from Savannah. The rates to Florida points have been changed since the filing of the complaint, so that this alleged discrimination is to some extent removed.

The Savannah, Florida & Western Railway crosses the Chattahoochee river at Saffold, Ga., where it connects with the Alabama Midland Railway. Saffold is the last station in the State of Georgia. Alaga, 1 mile beyond, is the first station in the State of Alabama. The rate from Charleston *via* Savannah to Saffold, distant 384 miles, is \$3.64; from Savannah to Saffold, distant 269 miles, \$3.14, while the rate to Alaga from both Charleston and Savannah is the same, \$3.25. This is true of all the stations upon the Alabama Midland Railway, the rate being the same from both Charleston and Savannah. These rates seem to have

been changed also since the filing of the complaint, so that there is now a differential of 20 cents in favor of Savannah to points on the Alabama Midland in Alabama.

The complainants insist that this equalizing of the rate between Charleston and Savannah to points in Alabama, while the difference in distance remains the same, is an unjust discrimination against Savannah. The defendants reply that all stations upon the Alabama Midland Railway between Alaga and Montgomery are grouped, and that the rate is made by competition with other railway lines and other lines partly rail and partly water, operating through Montgomery; the rate from Pensacola, Fla., and Mobile, Ala., to Montgomery being \$1.80, and from New Orleans, La., to Montgomery \$3.00. These rates are correctly stated, but nothing appears as to the cost of fertilizers at Pensacola, Mobile or New Orleans; nor did it appear whether or not fertilizers were actually brought from these points to Montgomery.

The foregoing illustrations sufficiently indicate the manner in which it is alleged that the Plant System discriminates by these rates against the city of Savannah in favor of Charleston; but the complaint goes much further than this and attacks, not merely the rate of individual lines, but the entire scheme of rate making which, it is alleged, abolishes distance in favor of Charleston and Wilmington as against Savannah. The nature of this alleged discrimination appears from the following examples:

Valdosta, Ga., is situated upon the Savannah, Florida & Western Railway 158 miles from Savannah and 273 miles from Charleston, and this is the direct rail line between Charleston and Valdosta. Valdosta can, however, be reached from Charleston by another line made up of the South Carolina & Georgia Railway to Augusta, the Georgia Railroad from Augusta to Macon, and the Georgia Southern & Florida Railway from Macon to Valdosta. The distance by this route is 413 miles as against 273 miles by the direct route. It has already been said that to most points in the State of Georgia upon the Plant System there exists a difference in rate of 50 cents between Charleston and Savannah in favor of Savannah, but in the case of Valdosta the rate is the same, \$2.48, and this is for the reason that the

circuitous line from Charleston demands and obtains the right to make the same rate from Charleston to Valdosta as is made from Savannah to Valdosta.

Hawkinsville, Ga., is upon the Southern Railway between Brunswick, Ga., and Macon. It is also connected by lines of railway with both Charleston and Savannah. The route from Charleston is over the South Carolina & Georgia to Augusta, the Augusta Southern to Tennille, the Wrightsville & Tennille to Dublin, and the Oconee & Western from Dublin to Hawkinsville, a distance of 297 miles. The line between Savannah and Hawkinsville is by the Central of Georgia Railway to Tennille, the Wrightsville & Tennille to Dublin, and the Oconee & Western from Dublin to Hawkinsville, being the same route from Tennille. The rate from all three points is the same, although the distances are from Brunswick 160 miles, Savannah 211 miles, and Charleston 297 miles.

The complainants have referred to several instances as showing this kind of discrimination in favor especially of Charleston and Wilmington as appears from the following tables. By "one line" is meant one continuous line operated by one company, and by "two or more lines," that the line between the points named is made up of two or more independent roads.

## TO TENNILLE, GA.

FROM	DISTANCE	LINES
Savannah . . . . .	134 miles	1
Charleston . . . . .	221 "	2
Wilmington . . . . .	354 "	3

Rate \$2.31 per ton.

## TO DENMARK, S.C.

Savannah . . . . .	90 miles	1
Charleston . . . . .	81 "	1
Wilmington . . . . .	213 "	1

Rate \$2.60 per ton.

To COLUMBUS, GA.<sup>1</sup>

FROM	DISTANCE	LINES
Savannah . . . . .	291 miles	1
Charleston . . . . .	389 "	4
Wilmington . . . . .	553 "	2

Rate \$3.14 per ton.

To TROY, ALA.<sup>1</sup>

Savannah . . . . .	360 miles	1
Charleston . . . . .	475 "	1
Wilmington . . . . .	687 "	2

Rate \$3.50 per ton.

To MONTGOMERY, ALA.<sup>1</sup>

Savannah . . . . .	340 miles	1
Charleston . . . . .	527 "	1
Wilmington . . . . .	611 "	2

Rate \$3.00 per ton.

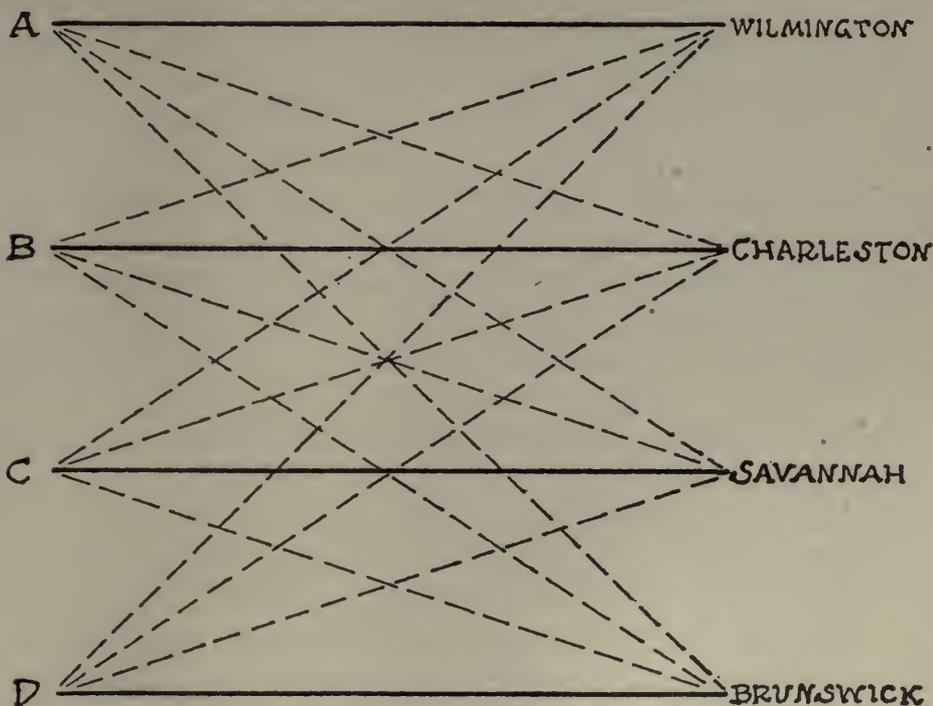
The complainants say that these tables show that the rates complained of are made without any consistency, without any reference to distance, and that they uniformly discriminate against Savannah by admitting Charleston and Wilmington upon equal terms into that territory which is naturally tributary to Savannah.

The defendants do not deny that the rates are made upon the principle complained of, but they say that the principle is just, advantageous to the various localities which thereby enjoy the benefit of the competition, and that, whatever objection there may be to it, it is the only system which is possible under the peculiar circumstances which exist in this southern territory.

<sup>1</sup> Cf. map, p. 146, *supra*.

Exactly what this system is, and exactly the points of difference between the claims of the complainants and the defendants is well indicated by a graphic illustration produced upon the trial by counsel for the defendants, which was made an exhibit and is reproduced here.

Referring to the above outline, Wilmington, Charleston, Savannah and Brunswick are four points upon the seacoast. A, B, C, and D are four interior points. The heavy lines represent



lines of railway connecting each one of these ocean ports with the corresponding interior point, and designate the shortest line of railway between such points. The dotted lines represent lines of railway between the several ocean ports and the interior points. Now, the complainants insist that the lowest rate should in all cases be made upon the shortest line; that is, Wilmington should have the lowest rate to A, Charleston to B, Savannah to C, and Brunswick to D. The defendants insist that when the rate has been made over the short line, as from Savannah to C., then Wilmington, Charleston and Brunswick are all entitled

to the same rate to C, although the lines of communication are much longer.

To state the proposition with reference to some of the points actually in evidence in this case. Valdosta is 158 miles from Savannah by the Savannah, Florida & Western Railway. The rate upon fertilizers from Savannah to Valdosta is fixed by the Georgia Railway Commission. Now, the defendants say that when this rate is once fixed, if Charleston can reach the same point by a longer line, it is entitled to do so at the same rate, although that line is 413 miles in length and composed of three independent railroads as against 158 miles over one railroad.

So in the case of Hawkinsville. This station is situated upon the Southern Railway between Brunswick and Macon. The rate from Brunswick is fixed by the Georgia Commission. Now, when that rate has been determined, Charleston and Savannah, or rather the lines leading from Charleston, Savannah and Wilmington, insist that they are entitled to the same rate, although the distance from Brunswick to Hawkinsville is but 161 miles over one line as against 211 miles from Savannah over two lines, 297 miles from Charleston over four lines, and 430 miles from Wilmington over five lines.

It appears from the testimony that there are in the States of Kentucky, Virginia, Tennessee, Mississippi, Alabama, Georgia, Louisiana, North Carolina, South Carolina and Florida, 148 of these points to which the rates on fertilizers from Charleston, Savannah, Brunswick and Jacksonville are the same. The illustrations given in these findings of fact all show that Savannah loses the benefit of the less distance. There must be many of these common points to which the distance from Savannah is greater than from Charleston and in respect of which Savannah has the advantage over Charleston. No attempt has been made, however, upon the part of the defendants to show what these points are, nor whether, on the whole, Savannah is at an advantage or disadvantage under this system of rate making. Upon the other hand, the defendants claim that this is entirely immaterial, that these points have the right to the common rate provided that the primary, or determinative rate, which is usually the

short-distance rate, is properly made ; and provided further that the long line can carry without loss at that rate.

We are unable to find that the short-distance rate in any case called to our attention discriminates against Savannah. In most cases that rate is the one made by the Railroad Commission of either Georgia or South Carolina. Neither can we find from the testimony that the long line in any case carries at a loss. Although the rate per ton per mile in some instances is low, the testimony of the defendants tends to prove that it is a remunerative rate, and there is nothing to show the contrary.

It does not appear that the Southern Railway & Steamship Association originated this system of "common points," but that it found the same already in existence and adopted it. For a long time Brunswick, Savannah, Port Royal and Charleston have entered upon equal terms this common-point territory. Wilmington did not formerly, but the lines leading from that city strenuously insisted upon their right to participate in the same rates, and in many instances exacted that right. Finally that question was submitted to the Board<sup>1</sup> of Arbitration of the Southern Railway & Steamship Association, and that Board published its award April 29, 1895, by which it was decided that the rates should be the same from Wilmington as from other South Atlantic ports to all points in this territory, excepting those upon and south of the Savannah & Western extension of the Central Railroad of Georgia from Savannah to Lyons and the Georgia & Alabama Railway in the State of Georgia. This award was accepted by the various lines interested and has since been acquiesced in.

The complainants put in evidence upon the trial certain tables of rates and distances which they claim show a discrimination against Savannah and in favor of Charleston. The first of these consists of two sets of tables, each made up of 33 stations. In the first set the stations selected are in the States of Georgia and Florida, and the tables show the distance, the rate per ton, and the rate per ton per mile from both Savannah and Charleston.

<sup>1</sup> *Vide*, p. 114, *supra*.

These averages are :

FROM	DISTANCE	RATE PER TON	RATE PER TON PER MILE
Savannah . . . .	190 miles	\$2.47	\$.013
Charleston . . . .	284 "	2.79	.0098

The second set is made up of 33 stations in the States of North Carolina and South Carolina. The facts shown are the same and the averages are :

FROM	DISTANCE	RATE PER TON	RATE PER TON PER MILE
Savannah . . . .	176 miles	\$2.87	\$.0163
Charleston . . . .	116 "	2.21	.0191

The complainants introduced another table made up of 74 stations, no one of which appears in the tables last referred to. These stations are situated in the States of Georgia, Alabama, Florida, and South Carolina. The average distance, rate per ton, and rate per ton per mile from Savannah and Charleston are as follows :

FROM	DISTANCE	RATE PER TON	RATE PER TON PER MILE
Savannah . . . .	156 miles	\$2.25	\$.02079
Charleston . . . .	252 "	2.50	.01244

It may be observed in this connection that according to the testimony of the defendants only 10 per cent of the fertilizer and fertilizer rock carried to Valdosta during the year 1896 went by the Plant System. Assuming that the Plant System carried nothing from Charleston, this would mean that nine tenths of the fertilizer used in Valdosta was transported 413 miles instead of 158 miles.

The complaint incidentally charges that in the application of this system the carriers charge less for the longer haul to the competitive point than they charge to intermediate points upon the same line. There seems to be a difference between a "common point," which is a point reached by two or more lines, and a "base point," which is a point at which competition has forced down the rates below those upon either side of it. The defendants admit that the rate is in many cases lower to the basing point than to intermediate points, and the complainants have called our attention specifically to the following instances in which the greater charge is made to the nearer point, when the transportation is over the same line, in the same direction at the same time.

1. The Charleston & Savannah Railway connects Charleston and Savannah. Going south from Charleston the rate to Monteith, Ga., is \$1.74 and the distance 101 miles, while the rate to Savannah, 14 miles further, is \$.80 per ton. So going from Savannah north towards Charleston the rates and distances to intermediate points are (cf. map, p. 287, *supra*):

To	RATE	DISTANCE
Hardeeville . . . . .	\$1.20	24 miles
Yemassee . . . . .	1.50	54 "
Jacksonboro . . . . .	1.70	78 "
Drayton . . . . .	2.00	103 "
Charleston . . . . .	.80	115 "

The respondent Charleston & Savannah Railway Company alleges that these rates are justified by water competition between Charleston and Savannah. We find that there is such water competition which is of controlling force, and that the respondent could not, as against this competition, charge more than \$.80 per ton, while the rates to intermediate points are substantially those fixed by the Railroad Commissions of Georgia and South Carolina. That the rates are not exactly the same going north as going south for the same distance is accounted for by the fact that the South Carolina Commission allows a higher rate upon fertilizers than the Georgia Commission.

2. The Charleston & Savannah Railway is the direct line between those two cities, but there is another somewhat longer line made up of the South Carolina & Georgia Railroad from Charleston to Denmark, and the Florida Central & Peninsular Railroad from Denmark to Savannah. These two defendants make a joint rate between Charleston and Savannah of \$.80, the distance being 171 miles. Rincon, Meinhard and Wheat Hill are all stations upon the Florida Central & Peninsular Railroad in the State of Georgia, distant from Charleston respectively 153 miles, 161 miles and 167 miles, and the rate is in each case \$2.30 per ton.

We have already found that water competition between Charleston and Savannah necessitates the rate of \$.80. The rate of \$2.30 to the intermediate points above referred to does not exceed that allowed by the State Commissions of Georgia and South Carolina.

\* \* \* \* \*

4. As already stated, the long line between Charleston and Valdosta is composed of the South Carolina & Georgia Railroad from Charleston to Augusta, the Georgia Railroad from Augusta to Macon and the Georgia Southern & Florida Railway from Macon to Valdosta. These lines make a joint rate from Charleston to Valdosta of \$2.48.

Thomson, Mayfield and Haddocks are stations upon the Georgia Railroad between Augusta and Macon. The South Carolina & Georgia Railroad and the Georgia Railroad make the following joint rates for the following distances to those points :

To	RATE	DISTANCE
Thomson . . . . .	\$2.64	175 miles
Mayfield . . . . .	2.64	198 "
Haddocks . . . . .	2.64	244 "
Macon . . . . .	2.64	263 "

Kathleen, Sycamore, Tifton and Sparks are stations upon the Georgia Southern & Florida Railway between Macon and

Valdosta. The South Carolina & Georgia Railroad, the Georgia Railroad and the Georgia Southern & Florida Railway make joint rates from Charleston to these stations as follows:

To	RATE	DISTANCE
Kathleen . . . . .	\$3.32	288 miles
Sycamore . . . . .	2.83	349 "
Tifton . . . . .	2.53	367 "
Sparks . . . . .	2.87	388 "
Valdosta . . . . .	2.48	413 "

Of the above stations, Thomson, Mayfield, Haddocks, Kathleen, Sycamore and Sparks are noncompetitive stations, while Macon, Tifton and Valdosta are competitive points.

The defendants allege that the low rates at these competitive points are forced by railway competition, and that the rates to intermediate points are reasonable in and of themselves. We find that there is railway competition at the above-named competitive points, which undoubtedly *occasions* the low rates. That competition does not necessitate the low rates, except that it induces a number of carriers, all of whom are subject to the Act to Regulate Commerce, to fix them by voluntary agreement. The rates to intermediate points are not greater than those allowed by the State Railroad Commissions of Georgia and South Carolina, and in this sense they are reasonable "in and of themselves." The making of the lower rate to the more distant competitive point introduces, we think, a new element, and we are not prepared to find affirmatively that the higher intermediate rates in comparison with the lower competitive rates are reasonable either as matter of law or as matter of fact.

5. The line from Charleston to Hawkinsville is made up of the South Carolina & Georgia Railway to Augusta, the Augusta Southern from Augusta to Tennille, the Wrightsville & Tennille from Tennille to Dublin and the Oconee & Western from Dublin to Hawkinsville. The line from Savannah to Hawkinsville is composed of the Central of Georgia Railway from Savannah to Tennille, the Wrightsville & Tennille from Tennille to Dublin

and the Oconee & Western from Dublin to Hawkinsville, being the same line from Savannah to Hawkinsville and from Charleston to Hawkinsville both make a joint rate from those two cities to Hawkinsville of \$2.53.

Hephzibah, Matthews and Warthen are upon the line of the Augusta Southern. The Augusta Southern and the South Carolina & Georgia maintain the following rates from Charleston to these stations:

To	RATE	DISTANCE
Hephzibah . . . . .	\$2.94	153 miles
Matthews . . . . .	3.10	169 "
Warthen . . . . .	2.87	208 "

Wrightsville is upon the Wrightsville & Tennille Railroad between Tennille and Dublin. The South Carolina & Georgia Railroad, the Augusta Southern Railroad and the Wrightsville & Tennille Railroad make the following joint rates from Charleston:

To	RATE	DISTANCE
Wrightsville . . . . .	\$2.92	238 miles
Dublin . . . . .	3.12	257 "

Dexter is upon the Oconee & Western Railway between Dublin and Hawkinsville. The South Carolina & Georgia Railroad, the Augusta Southern Railroad, the Wrightsville & Tennille Railroad and the Oconee & Western Railway maintain the following joint rates from Charleston:

To	RATE	DISTANCE
Dexter . . . . .	\$3.10	270 miles
Hawkinsville . . . . .	2.53	297 "

The rate from Savannah to Tennille over the Central of Georgia Railway is \$2.31 and the distance 134 miles. Between

Tennille and Hawkinsville and to Hawkinsville the Central of Georgia Railway, the Wrightsville & Tennille Railway and the Oconee & Western Railway maintain the same rates as above stated.

The defendants named in this paragraph offer the same justification as stated in the preceding paragraph, *viz.*, that Hawkinsville is a competitive point and that the rates to the intermediate stations named are reasonable.

We find that Hawkinsville is a competitive point, and that the rate from Brunswick to Hawkinsville is fixed by the Georgia Commission. Our finding as to the rates to the intermediate stations is the same as that in paragraph four.

\* \* \* \* \*

Upon these findings to what relief, if any, are the complainants entitled?

The underlying cause of complaint is the system upon which these rates are made, and the most important question is whether that system is in violation of the Interstate Commerce Act in the respect complained of, and if so, whether the Commission has power to correct such violation.

The position of the complainants seems to be that certain territory is tributary to the city of Savannah and that Charleston must not be allowed to enter this territory upon equal terms as to freight rates. This really amounts to saying that the rate should be determined by the distance. It has often been said that distance is an important element in the making of rates, and it has been held that a carrier would not be *compelled* to disregard distance in order to place two localities upon commercial equality. *Commercial Club of Omaha v. Chicago, R. I. & P. R. Co.*, 6 I. C. C. Rep. 647; *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.*, 7 I. C. C. Rep. 180.

Upon the other hand, it often happens that distance is altogether disregarded, and it has been held that this may be proper within certain limits and under certain conditions. *Imperial Coal Co. v. Pittsburg & L. E. R. Co.*, 2 I. C. C. Rep. 618, 2 Inters. Com. Rep. 436. The proposition of the defendant is, however, that in this whole territory distance should be entirely obliterated. The

mere fact that a town is situated at the junction of two railroads entitles that town to the same freight rate from Charleston and Savannah, no matter what the relative distance may be.

To put the question in a concrete form. Valdosta is 158 miles from Savannah and 413 miles from Charleston, yet the defendants claim that the rate from Savannah and Charleston should be the same. It is found that only 10 per cent of the fertilizer used in Valdosta during the year 1896 came from Savannah, the balance of it being brought from Charleston. Assuming that the cost of that article was the same at Savannah and Charleston, this would mean that nine tenths of all the fertilizer consumed in that vicinity was transported 413 miles while it might have been obtained by transporting it 158 miles. Now, the complainants say that this is wrong; that manifestly it costs much more to transport fertilizer from Charleston than from Savannah, and that somebody in the end must pay for that species of foolishness, if it be allowed to continue. Upon the other hand, the defendants urge that this system gives Valdosta the benefit of competition in the markets of both Charleston and Savannah, and that so long as railroad companies are operated as private enterprises they may of right engage in any legitimate business which yields a profit.

Probably the true solution of this controversy is to be found in a mesne between the contentions of the two parties. It can hardly be said that a particular locality is entitled to describe about itself a circle and exclude its competitors from this area. Neither can it well be claimed that distance ought not to be a factor in the making of rates, and that a city is entitled to no benefit by reason of its advantageous position. The defendants themselves concede that there are limits beyond which this disregard of distance ought not to extend. Formerly Wilmington was not allowed to come into this common-point territory for the very reason that the distance was against that city. Finally that question was submitted to arbitration and the arbitrators determined that Wilmington might come into certain territory, but a line was established below which it could not go, and that city is to-day excluded from points south of this line solely on

account of distance. However, we do not feel called upon to decide in this case whether the principle itself is right, nor whether the application of that principle is too extensive, for the reason that, if we determine that there is a wrong, we clearly have no power to correct that wrong.

Valdosta is reached by one line of railroad from Savannah and by an independent line of railroads from Charleston. The rate from Savannah to Valdosta is fixed by the Railroad Commission of Georgia. If the railroads constituting the line from Charleston to Valdosta see fit to make the same rate from Charleston as is made from Savannah we have no power to order them not to do so, for it has always been understood that the Commission had no authority to fix a minimum rate. *Re Chicago, St. P. & K. C. R. Co.*, 2 I. C. C. Rep. 231, 2 Inters. Com. Rep. 137.

If some point is taken to which both rates are interstate, like Montgomery, the result is still the same. Each line is an independent line and may fix its own rate wherever it pleases, and we have no power whatever over that rate when established. It is manifest that a wrong like that complained of in this case could not be corrected without authority to establish both the maximum and the minimum rate. And we can establish neither. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. ed. 243.

But if the Commission has no power to correct a discrimination of this sort where the rate from Savannah is made by one line and the rate from Charleston is made by another line, has it not power to correct it where the same line makes both rates, and ought it not to do so? The Plant System extends from Charleston through Savannah to Valdosta. The rate by that system from both Charleston and Savannah to Valdosta is the same, although the distance from Charleston is almost twice as great. Should not this apparent wrong to Savannah be righted?

If this rate stood alone and were voluntarily made by the Plant System, it would probably be a discrimination against Savannah which ought to be corrected. But under the circumstances it is difficult to see how it can be called an unjust discrimination or

how it works to the injury of Savannah. The rate from Charleston to Valdosta is fixed by an independent line. The distance through Savannah is but 275 miles as against 413 miles by that line. Unless the Plant System makes the same rate as is made by the circuitous line it can do no business whatever. Under these circumstances we think it may properly meet the rate from Charleston which is made by the longer line, and that it does not, in making and maintaining this rate, unjustly discriminate against the city of Savannah. If the rate from Charleston to Valdosta were in any way subject to control, our judgment might be otherwise.

The complainants insist that even though the common-point system of rate making is consistent, nevertheless the defendants discriminate unduly against Savannah in the application of that system. They introduce certain tables which apparently show that Charleston has the benefit of a better rate into the territory of Savannah than Savannah has into the territory of Charleston. It is not clear that these tables fully sustain the contention of the complainants, since the average distances are not the same and the rate per ton per mile should not be the same for short as for long distances ; but assuming that they do show that Charleston has such an advantage, that may well follow from the system and not from its unfair application. If the common points to which Savannah and Charleston take the same rate are so located that upon the whole the distance is less from Savannah than from Charleston, then manifestly the result must be the one which the complainants say their tables demonstrate. In other words, the vice, if one is established, is that of the system, and not of its application ; and we have already said that we cannot correct that fault.

But the complainants say that there are instances in which there is a manifest discrimination against Savannah in the making of these rates. For instance, Charleston is 115 miles distant from Savannah. To all stations in Georgia, not common points, a difference in rate of 50 cents per ton in favor of Savannah is made by the Plant System. It is urged that this difference is too little in view of the difference in distance.

To this we cannot assent. It is found that water competition between Charleston and Savannah compels the making of a rate of 80 cents per ton between those two cities. If 80 cents is a proper local rate, 50 cents cannot be said to be an unfair difference in the through rate from Charleston *via* Savannah to Georgia points. Looking merely to the cost of service, the Plant System would probably make more money in transporting fertilizer from Charleston to Burroughs upon the through rate of \$1.38 than in transporting the same article from Charleston to Savannah upon a local rate of 80 cents and from Savannah to Burroughs upon another local rate of 88 cents. The Charleston-Savannah rate is fixed by water competition; the Savannah-Burroughs rate is fixed by law. These two rates being established, the through rate from Charleston to Burroughs is not an unreasonable one.

The difference in rate between Charleston and Savannah is maintained to all points, not common points, in the State of Georgia upon the Plant System, but when that line of railway crosses the southern boundary of Georgia and enters the State of Florida this difference begins to diminish and finally disappears altogether.

If not in some way accounted for this would be a manifest discrimination against Savannah; but it is accounted for by the fact that the water rate on fertilizers from both Charleston and Savannah to Jacksonville, Fla., is the same, and must accordingly be the same at all intermediate points to which fertilizer can be brought *via* Jacksonville by ocean and rail as against the all rail line. Circumstances over which the Plant System has no control determine that the rate from Charleston and Savannah to these points shall be the same by other lines. This being so, we have already indicated that the Plant System may meet that rate.

Something of the same sort occurs upon the Plant System in the State of Alabama. That system is operated as a continuous line from Savannah to Montgomery, the portion of it which is in the State of Alabama and which extends from Alaga to Montgomery being known as the Alabama Midland Railway in

Alabama. Upon all stations on the Plant System in the State of Georgia, not common points, a difference of 50 cents per ton is made in favor of Savannah, but as soon as the Alabama State line is crossed this difference disappears, and at all stations between Alaga and Montgomery the rate from Charleston and Savannah is the same. This was the case when the answer of the Plant System was filed, but at the date of the hearing the rates had been revised and a differential of 20 cents per ton in favor of Savannah established. Nothing in this case appears to justify a different differential to most points upon the Plant System in Alabama from what it is in Georgia. There are common points upon that system in both Georgia and Alabama.

We are inclined to think that there are stations upon the Plant System in Florida, and also upon the line of the Florida Central & Peninsular Railroad in Florida to which a sufficient difference is not made in the rate from Charleston and Savannah, and that the same thing is probably true of stations upon the Alabama Midland Railway in Alabama; but we do not feel that our information is sufficiently definite to enable us to make any order in this respect.

We are satisfied that water competition through Jacksonville justifies the same rate from Charleston and Savannah to certain points in Florida, but we do not know to what points. We know that competition through Montgomery, and perhaps at other points upon the Alabama Midland, justifies a diminution in the difference in rate between Charleston and Savannah, but we do not know just how far. It appears that changes have been made in these rates since the filing of the complaint, which in some cases remove the ground for complaint. We think best, therefore, not to attempt to make any order in this particular, but to rely upon the defendants to adjust these rates in accordance with our suggestions, giving the complainants leave to apply for an order if this is not done.

The complaint incidentally charges the defendants with certain violations of the fourth section and the findings of fact state the instances which were called to our attention by the pleadings and proofs.

The charging by the Charleston & Savannah Railway of higher rates to intermediate points between Charleston and Savannah than the rate over the entire distance between those cities is justified by the existence of water competition; and this is also true of the line between the same cities composed of the South Carolina & Georgia and the Florida Central & Peninsular Railway Companies.

In all other instances the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held up to the present time that this species of competition does not create the necessary dissimilarity of circumstances and conditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however, the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission v. Alabama M. R. Co.* decided November 8, 1897, 168 U.S. 144, 42 L. ed.,<sup>1</sup> has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under "substantially similar circumstances and conditions." If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section.

<sup>1</sup> Cf. p. 354, *infra*.

Recurring now to the findings of fact, we see that in every case the rate by the longer line to the more distant point is not only controlled but absolutely fixed by competitive conditions. If the lines from Charleston to Valdosta have a right to compete at that point for traffic in commercial fertilizer, the rate which they make is determined by competition alone, and that rate is not in fact made under the same circumstances and conditions as are the rates to intermediate points, if such railway competition is to be taken into account. It is our opinion, therefore, that the higher intermediate rates involved in this case are not in violation of the fourth section.

### XIII

#### THE TRUNK LINE RATE SYSTEM: A DISTANCE TARIFF<sup>1</sup>

THE trunk line freight rate system effectively demonstrates certain principles in railway economics which are of importance at the present time in connection with the problem of Federal regulation. The danger of arbitrary administrative interference without a full understanding of the intricacies of rate making, and at the same time the essential soundness of American railway practice in seeking independently to solve these complex problems by equitable means, are amply illustrated. On the other hand the fallacy of certain objections to governmental control is revealed with corresponding clearness. Three principles in particular deserve mention in this connection. These are: (1) that the element of distance should be a prime factor in the final adjustment of rates as between competing localities; (2) that coöperation and agreement between competing carriers are essential to any comprehensively fair system; and (3) that permanency and stability of rates are of equal importance with elasticity. That all three of these results have been voluntarily worked out in practice by the trunk lines is a tribute at once to the ability and fairness of their traffic officials. Standards are thus established toward which the carriers in the West and South should strive, as soon as their local traffic conditions will permit, in an endeavor to promote good relations with the shipping and consuming public.

That distance tariffs, modified in part to suit commercial conditions, are not only theoretically sound, but entirely practicable, this study aims to prove. The bogey of German rate schedules vanishes into thin air when it appears that the greatest railway

<sup>1</sup> From the *Quarterly Journal of Economics*, Vol. XX, 1906, pp. 183-210.

companies in the United States have for years adopted the same principles in working out their tariffs. The long and short haul rule is here enforced, not alone as between various points on the *same* line, but also as between points equally distant from a common destination on *different* roads. Thirty years ago the trunk lines conceded the principle, for the recognition of which the shippers of the West and South are now so vociferously clamoring before Congress and the Federal courts.

This desirable end could never have been attained if the several competing companies had not been able to act in coöperation. The erroneous popular opinion that railway competition must be preserved in the public interest, had it been legally enforced in this territory a generation ago, would have prevented absolutely any comprehensive solution of the problem. Until Congress abandons this theory, and treats railways as essentially monopolistic, thereafter to be protected and maintained as *beneficent* monopolies through adequate governmental supervision, the lesson of trunk line experience will not have been learned. And, finally, the interesting fact that for almost thirty years it has not been necessary to change either the main system or, in many instances, the actual rates charged thereunder, is an offset to the contention that success in railway operation is to be judged by the instability of rates, seeking to follow constantly the ups and downs of commercial conditions. Certain modifications, especially in export and import traffic, or wherever water rates have to be made or met, are, of course, inevitable. But it is absurd to reason from this that railway tariffs in the main need to be continually jostled about at the behest of the shipping public. Of course, if one railway changes its rates, all the rest must follow. That is the principal reason why many of our rate schedules have been as uncertain as the weather. But there is no reason why, if all parties in competition keep good faith and observe their tariffs, a schedule of class rates for domestic shipments should not remain practically constant.

Take the rates on raw cotton from Mississippi river points like Memphis to New England cities, for example. Was any

staple product ever subject to greater fluctuations in price than raw cotton, varying as it has in the last few years, from five to fifteen cents a pound? Yet through it all, good years and bad, whether for the planter or the manufacturer, the freight rate has stood unchanged at 55 cents per hundredweight. In the same way, within the limits hereafter to be described, the trunk line rate system has endured for a generation. Founded upon sound and, consequently, defensible principles, it has promoted good feeling between railway and shipper. And, if the changes of classification since 1900 had not been made, one may reasonably doubt whether the demand for Federal legislation would have been any more insistent throughout the Eastern Central States than it now is in New England.

The causes leading to the adoption of a systematic rate scheme by the trunk lines acting jointly<sup>1</sup> can be understood only in the

<sup>1</sup> The literature on the subject is scanty. Much of the material has necessarily been gathered in the field by conference with traffic officials and others. My hearty thanks are due primarily to Paul P. Rainer, Esq., chief of the Joint Rate Inspection Bureau at Chicago, for his willingness to impart such explanation of this complicated matter as the delicate responsibilities of his important post permit. The map published herewith, while in part prepared from the actual percentage tables, with his permission and that of several important trunk line officials concerned, has been checked and corrected by his official copyrighted map of January 1, 1899. While the scheme of graphic representation is entirely different, the facts represented are the same. I am also especially indebted to H. C. Barlow, Esq., formerly president of the Terre Haute & Evansville Railroad and now director of the Chicago Commercial Association, and to J. W. Midgley, Esq., for many years one of the Trunk Line Commissioners, for assistance in many ways.

The principal references consulted are included in the following list:

1874. Windom Committee Report, officially known as Report of the Select Committee on Transportation Routes to the Seaboard, Forty-third Congress, first session, Senate Report No. 307, Vol. I, pp. 24-30; Vol. II, pp. 7, 80, 283.
1879. Hepburn Committee Report, New York State, Special Committee on Railroads, 8 vols., pp. 3001-3006, 3102-3111.
1886. Cullom Committee Report, Forty-ninth Congress, first session, Senate Report No. 46, Vol. II, p. 101.
1887. Typewritten Record, Opinion, etc., of the Interstate Commerce Commission in *Detroit Board of Trade v. Grand Trunk, etc., Railways*. Also the Toledo case (1889) and that of Pratt Lumber Company (1905), I. C. C. Reports, Vol. II, p. 315; Vol. V, p. 166; and Vol. X, p. 29.
1890. Senate Report on the Transportation Interests of the United States and Canada, Fifty-first Congress, first session, Senate Report No. 847, pp. 497, 611-636.

light of the conditions existing about 1875. The Baltimore & Ohio Railroad had entered Chicago in 1874, after which time the most furious rate wars between the four trunk lines had been in progress. The main dependence of all these lines was still upon the grain traffic, and all of this was moving in one direction toward the seaboard. As late as 1882, 73 per cent of the trunk line tonnage east-bound consisted of such commodities.<sup>1</sup> Moreover, — and this is a point of especial importance, — the bulk of this grain originated in the territory east of the Mississippi and south of Chicago. Over four fifths of the east-bound traffic came from the States of Illinois, Indiana, Ohio, Michigan, and Pennsylvania. The great northwest and trans-Mississippi territory was not yet opened up. Wisconsin and Iowa contributed only about 10 per cent of the east-bound tonnage, while over two thirds of the west-bound business did not pass beyond Illinois.<sup>2</sup> Nor was the traffic concentrated as yet in the larger cities. Mr. Fink makes it clear that most of the business was gathered up by the trunk lines and their connections from small towns along the way. The modern problem of the great city in competition with the small towns was as yet unknown. The trunk lines had few feeders. Only the main stems to Chicago had been built. Consequently these Central States were served by a host of little cross lines, built as local enterprises, many of them radiating from Chicago, Cincinnati, Toledo, or Cleveland at right angles with the trunk lines, and, for the main part, engaged in an endeavor to open up their

1892. Cincinnati Freight Bureau Case. Copy of Record before the Interstate Commerce Commission, etc., United States Circuit Court for Southern District of Ohio, In Equity No. 4748, Vol. I, pp. 42-53. (Reprint.)

1900. Report of United States Industrial Commission, Vol. IV, pp. 556-562.

1905. Elkins Committee, officially known as Hearings before the Committee on Interstate Commerce, United States Senate, 5 vols., Vol. II, p. 1569, and Vol. III, p. 2271.

1905. Record of Proceedings before the Illinois Railroad and Warehouse Commission in the Matter of Revision of the Schedule of Reasonable Maximum Rates, etc., Springfield, especially pp. 31 *et seq.* (Reprint.)

1876-1905. Proceedings and Circulars, Joint Executive Committee and Joint Rate Committee of the Trunk Line, etc., Associations.

<sup>1</sup> Fink, Adjustment of Railroad Transportation Rates, etc., p. 16.

<sup>2</sup> *Ibid.*, pp. 19 and 52.

territories to water communication with the East by way of the lakes and the Erie Canal. Rail rates, nominally at least, were still high, the rate first-class Chicago to New York, for example, being about double its present figure; and the conditions of railway operation were such that water competition was a matter for grave concern. Every change in the lake situation was at once reflected in the rail rates, violent dislocations at the opening and closing of navigation in the spring and fall being of especial importance.

Among these confusing elements in the problem of trunk line rate adjustment five distinct phases were prominent. In the first place the four trunk lines were a unit in opposition to the diversion of traffic to the Great Lakes and the Erie Canal. However much they might bicker with one another afterwards, — apportionment of the rail business being a distinct feature of the problem, — their interests at the outset were identical respecting the necessity of holding the business on land. Water competition by way of the lakes or the Ohio river was a danger common to them all. The intensity of this pressure may be understood from the statement that the trunk lines were not even consulted in making the Chicago-New York rate on which the western lines prorated. They had no voice in it, merely accepting the figure offered them by their connections into Chicago.<sup>1</sup> The second feature of the problem, namely the division of the all rail traffic among the competing carriers is immaterial to the main question before us. Thirdly, it was essential to the trunk lines to restrict and control the activities of the subsidiary cross lines and feeders, most of which, as has been said, were independent. Many of these, aside from having a direct interest in their longest haul to a terminus on the lakes or the Ohio river, had been built by local capital, and were administered in the interests of the lake cities or Cincinnati and Louisville. There was no unity whatever in their policies, and the most ridiculous wastes of transportation resulted. Grain was literally meandering toward the East instead of moving by

<sup>1</sup> Windom Committee Report, Vol. II, p. 7.

a direct route.<sup>1</sup> Joint through rates would be made by the most extraordinary chain of connecting links leading to the seaboard by very circuitous ways.<sup>2</sup>

A fourth evil, akin to this, consisted of the difficulty of maintaining through rates, not as among the trunk lines who might be made parties to a pool, but by reason of cutthroat competition between their western connections.<sup>3</sup> The agents of these western lines would indiscriminately cut rates to or from points on their lines, and then expect their trunk line connections to accept a proportionate shrinkage of the joint through rate for their part of the haul. The weaker companies would, of course, be susceptible to such temptations in order to secure the business. No stable apportionment of this western traffic among the eastern lines would be possible until they could agree upon a fair rate for the trunk line haul, and rigidly adhere to it. And, finally, water competition, causing constant fluctuations in the lake and Ohio river rates, while directly potent only at water-way points, was continually putting the through rates from these points out of line with the local rates from noncompetitive inland centers. Or, perhaps, the Ohio river and lake rates would be out of joint with one another. The Chicago basis, if applied to Paducah, would make a rate on tobacco that would send it *via* New Orleans.<sup>4</sup> Products would go down the Mississippi after the lakes had been closed by ice. A considerable amount of corn was certainly moved to New York by that route.<sup>5</sup> Some device for coördination of the through and local rates — or, as one might put it, for the distribution of the localized shock of water-rate changes — was imperatively necessary.

An ingenious rate clerk named McGraham, in the offices of the Pennsylvania Railroad, proposed in 1876 a comprehensive scheme for meeting these difficulties. The Chicago-New York rate was to constitute a basis, upon which all other rates were to be made in percentages, according to their relative distance

<sup>1</sup> Waste of transportation as an economic problem is discussed in Chapter XX, p. 484, *infra*. — ED.

<sup>2</sup> This persisted even in 1890. Consult Fifty-first Congress, first session, Senate Report No. 847, p. 616.   <sup>3</sup> Hepburn Committee Report, pp. 3006-3010.

<sup>4</sup> *Ibid.*, p. 318.

<sup>5</sup> Windom Committee Report, Vol. II, p. 287.

from New York.<sup>1</sup> Thus, assuming Chicago to be 900 odd miles from New York, the rate from a point 600 miles inland would be about  $66\frac{2}{3}$  per cent of the Chicago rate, whatever that might be. Whenever the lake rate at Chicago changed, every other rate throughout trunk line territory would vary in due proportion. Relativity of charges would thus be preserved. Moreover, the shortest route, "worked or workable," was to be used in calculating the rates, the basic distance being about 920 miles by the Lake Shore from Chicago to Dunkirk, Ohio, and thence by the Erie to New York. This would give compelling effect to distance as a factor, and would tend to penalize the round-about carriage of goods. More than this, however, it would render the inland territory directly tributary to New York. From a point, for example, 50 or 100 miles south of Chicago, Toledo, or Cleveland, the local rate into those towns plus the through rate east to New York would always exceed the rate by a direct route east. For the hypotenuse of a triangle is clearly always shorter than the sum of the other sides. All shipping points equidistant from New York would enjoy equal rates, those rates at any time being determined by the state of water competition. This was a manifest advantage to the small inland centers, while the rate on the lake front was not affected. The trunk lines lost something, perhaps, through lower rates at intermediate points; but the gain through division of traffic from the lake to the rail lines more than compensated. For conditions were such in the summer of 1875 that the lake boats were prepared to carry grain for almost nothing. The railroads were helpless in such cases.<sup>2</sup> The only real sufferers were the short, independent cross lines and the lake and river cities. Of these, the former were reduced to a status of mere feeders or branches of the trunk lines. They were compelled to accede to the plan, however, by threatened refusal of the trunk lines to turn over business to them west-bound, unless they reciprocated with their grain shipments east-bound.<sup>3</sup> Many of these lines

<sup>1</sup> This was adopted officially by the trunk lines April 13, 1876.

<sup>2</sup> Hepburn Committee Report, p. 3112.

<sup>3</sup> Record Proceedings Railroad Commission of Illinois in Revision of Maximum Freight Rates, 1905, pp. 32 and 88.

became bankrupt later, and were absorbed by the larger companies.<sup>1</sup> And, as for the cities unfavorably affected, the scheme based upon distance was so obviously fair that their protests were of no avail.<sup>2</sup>

The great contest between the trunk lines over the granting of differentials to Philadelphia and Baltimore, as against New York and Boston, played a not unimportant part in the diplomacy leading to the acceptance of the McGraham system. The New York Central, the Lake Shore, and the Boston & Albany roads, of course, eagerly accepted it, because it promised aid in meeting the lake competition to which they were peculiarly exposed. The Pennsylvania and the Erie, lying considerably further from Lake Erie, would also be benefited, operating as they did in a territory naturally tributary to them, but exposed to drainage to the lakes by lateral lines. But the Baltimore & Ohio, ever since its entry into Chicago in 1874, had been a thorn in the flesh of the others. The territory along its line was so far from the lakes that it had little to fear from water competition at intermediate points between Chicago and the seaboard. Would it accept a plan primarily intended to meet a danger which, while injuring its powerful rivals, was of less consequence to itself? Fortunately for the scheme, it was based upon the solid principle that distance was of preponderating influence in the adjustment of rates. The entire contention of the Baltimore & Ohio and the Pennsylvania for a differential rate to Baltimore and Philadelphia below New York rested upon this same principle. The distance from Chicago to the southern ports was less. Consequently, they insisted, they were entitled to offer a lower rate. The McGraham scale and the port differentials were thus logically connected. They stood or fell together. The McGraham plan materially aided the Baltimore & Ohio

<sup>1</sup> Fifty-fifth Congress, first session, Senate Document No. 39, p. 33. The Hepburn Committee Report (p. 3111) describes the local jealousies which prevailed.

<sup>2</sup> Chicago has never become reconciled to it, however, alleging that it injures her commercially. Compare Windom Committee Report, 1874, Vol. I, p. 24; Fifty-first Congress, first session, Senate Report No. 847, 1890, pp. 611 *et seq.*; Elkins Committee, 1905, pp. 1433, 2538 *et seq.*; and Record Proceedings Illinois Railroad Commission on Revision of Maximum Rates, 1905.

in making good its demands.<sup>1</sup> It was acceptable, therefore, by reason of this collateral advantage.

Another factor in the situation appealed to the Pennsylvania and the Baltimore & Ohio. Their lines to tide water were about 75 and 100 miles shorter, respectively, than the shortest line to New York.<sup>2</sup> In the division of the joint through rate between a chain of connecting railway lines this was of great advantage. It always aids the shorter line, if prorating is based upon mileage. A feeder 100 miles long prorating with a trunk line 1000 miles in length would be entitled to only one eleventh of the total rate. Were the trunk line only 800 miles long, the neutral road might claim one ninth. This seemingly slight difference might mean several hundred thousand dollars more earnings to the neutral road, or feeder, if it turned over its business to the short line.<sup>3</sup> Any emphasis upon distance as a general principle strengthened the Baltimore & Ohio in securing patronage from other roads by this means. The other trunk lines, through acceptance of the McGraham scale, conceded the distance principle, and with it, coincidentally, the prorating practice.

After three years' experience the McGraham scale was re-adjusted to conform more closely to the cost-of-service principle. The plan, as thus revised, is the one still in force.<sup>4</sup> It recognizes that railway charges should be proportioned to the length of haul, so far as actual costs of haulage are concerned; but it first eliminates those constant elements in cost which do not vary with distance. The original McGraham scale made no such distinctions. The expenses at terminals, such as loading and unloading, are, of course, entirely independent of the distance covered by the shipment. These, being determined roughly by experimentation, are first deducted from an assumed Chicago rate. From the remainder the rate per mile by the shortest route to New York (920 miles) is then calculated by simple

<sup>1</sup> Hepburn Committee Report, p. 3104.

<sup>2</sup> Distances are given in the Thurman-Washburne-Cooley Advisory Commission on Differentials, etc., of 1882.

<sup>3</sup> Hepburn Committee Report, pp. 3188, 3195.

<sup>4</sup> The revised table of percentages is reprinted in full in Hepburn Committee Report, pp. 3107 *et seq.*

division. This rate per mile is then applied to the distance to any intermediate point, and the terminal charge is again added. Thus a rate is found which is reduced to a percentage of the original Chicago base rate.

FOR ILLUSTRATION <sup>1</sup>	Cents per 100 lbs.
Chicago to New York . . . . .	25
Less fixed charges on both ends of the line . . . . .	<u>6</u>
The basis of rate for computation being the remainder, or . . . . .	19
Using short line mileage 920 miles, Chicago to New York, would yield a rate per mile . . . . .	00.0206
Short line mileage Indianapolis to New York, 833 miles, yields a rate of . . . . .	17.2
Plus six cents fixed charges, as above, makes . . . . .	23.2
The percentage of New York rate being . . . . .	93 per cent
Which is the present percentage basis Indianapolis to New York.	
Short line mileage Frankfort, Indiana, to New York is 881 miles, which would yield at the rate of 00.0206 cents per mile . . . . .	18
Plus terminal charges . . . . .	<u>6</u>
Which is 96 per cent of 25 cents . . . . .	24

<sup>1</sup> The official rule from Proceedings of the Joint Executive Committee, June 12 and 13, 1879, is as follows :

“First. — That from all points being less distant from New York than Chicago new percentages be adopted for making up rates on east-bound freight upon the following basis : the percentages from points of the same, or no greater distance than Chicago, to continue as heretofore.

“Second. — That six cents per 100 pounds be first deducted from an assumed rate of 25 cents per 100 pounds, Chicago to New York, said deduction to represent the fixed charges at both ends of long or short hauls.

“Third. — That, after such deduction, the rate per mile, which the remainder, or 19 cents per 100 pounds, produces from Chicago to New York, shall be charged per mile from all common points named in the first section, according to the percentages of distance shown by the table adopted at Chicago, April 31, 1876, to which result so computed the 6 cents per 100 pounds of fixed charges first above deducted shall be again added, and the percentage of the Chicago rate of 25 cents, produced by such additions, shall thereafter constitute the percentage of the Chicago rate, which shall be subsequently charged from the points named in first section.

FOR ILLUSTRATION

Chicago to New York, per 100 lbs. . . . .	25c.
Less fixed charges, per 100 lbs. . . . .	<u>6</u>
Basis of rate for computation . . . . .	19c.
Columbus, Ohio, as at present 70 per cent of Chicago net rate, will be . . . . .	13.3c.
To which add the fixed charges . . . . .	<u>6</u>
	19.3c.

And the new percentage from Columbus will hereafter be  $77\frac{2}{10}$  per cent of Chicago, in lieu of 70 per cent, as at present.”





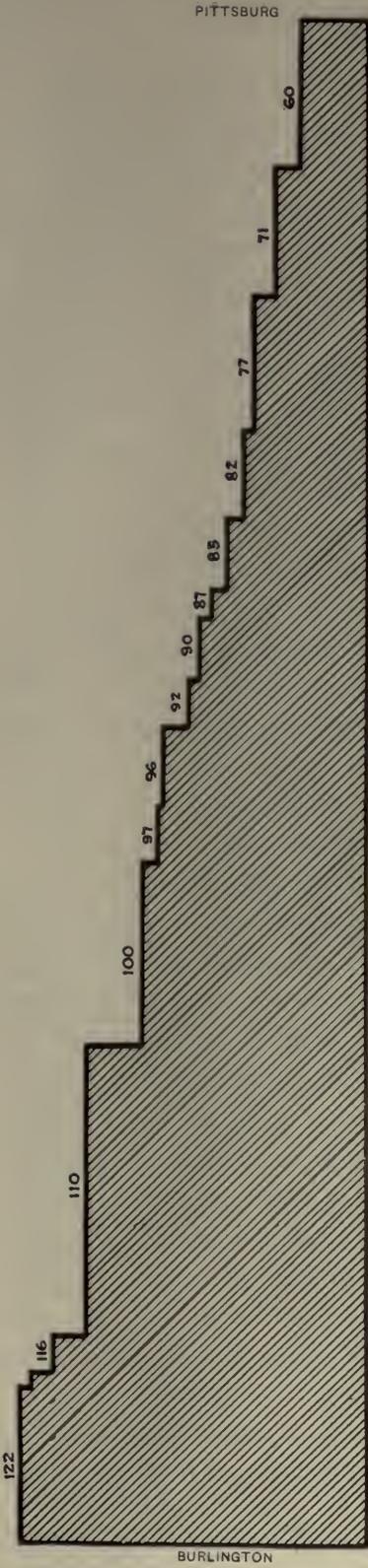
The revised system provides in theory for an absolutely constant rate per ton per mile. It is a rigid mileage tariff in every respect. The original McGraham scale had been so in theory, but not in practice. As amended in conformity with a sound economic principle, it had, moreover, one important practical advantage over the original scale. It yielded more revenue at all the intermediate points.<sup>1</sup> Local rates would be higher as thus calculated than they were originally. It would be unjust to ascribe undue importance to this motive on the part of the roads in the adoption of the new system. That the plan yielded additional revenue, while obviously more just in theory, was naturally no objection to its acceptance.

The fruits of all this process of adjustment are depicted upon the accompanying diagram. Viewing it in a large way, and reserving details for later consideration, we may compare it to a topographical contour map. The several rate zones are thus analogous to a series of levels or steps rising from east to west. Our cross section of these (on p. 321) along a line from Pittsburg to Burlington, Iowa, makes this relation plain. Another cross section at right angles to the first from Louisville, Kentucky, to Lansing, Michigan and beyond, shows how these levels are arranged in a plane from north to south. These steps form a sort of irregular amphitheater opening toward the east, with its main axis lying in a direction slightly south of west toward St. Louis. Or, more correctly, these rate zones, pursuing our analogy to a topographical contour map, indicate a broad valley opening toward the east. Along the bottom of this freight-rate valley lie the great direct trunk lines converging from Chicago and St. Louis. Throughout the State of Illinois the valley opens up on to a plateau, somewhat grooved in the middle at Peoria, where the direct lines from the west cross a neutral field tributary neither to Chicago nor St. Louis exclusively.

<sup>1</sup> Hepburn Committee, p. 3104. A hypothetical instance will serve as illustration. Suppose a point with an 80 per cent rate on the old schedule. When Chicago paid 25 cents, the rate to this point would be 20 cents. Under the new scheme the intermediate rate would be 80 per cent of 19 cents, or 15.2 cents, plus 6 cents terminal charge, making a total of 21.2 cents. This is 84.8 per cent of the Chicago rate instead of 80 per cent as before. Compare table, p. 326, *infra*.

This general description harmonizes with the apt figure used by that master mind in railway economics, Albert Fink. Speaking of this situation, he says, "The trunk lines are nothing but great arteries of commerce, like rivers, only with this difference: the rivers never run across each other, the territory from which they draw their supplies is distinct and well defined." Since his time, by reason of coöperative action for a generation, the confusing maze of railway lines has now been reduced to a single comprehensive system. Cross currents of trade hither and thither have been united or articulated in such a way as, speaking in terms of freight charges, to cause the great internal commerce of the country to flow downhill toward the seaboard in an orderly and reasonable way. The inequalities incident to commercial competition have been modified, or, to revert to our original figure, eroded; so that one may literally speak of the products of the country as flowing, like rivers, in more or less natural channels over the railway lines from the great interior basin towards the Atlantic seaboard.

The mathematical precision of the method of computation heretofore described, while theoretically applicable to a series of parallel roads in a flat country, free from either water competition, the competition of cross railway lines, or the competition of towns and cities of unequal size and importance, obviously requires modification to suit the actual traffic conditions in this densely populated trunk line territory. The process of adjustment has been gradual and necessarily tentative. Every influence brought to bear has been subversive of systematic arrangement, tending, that is to say, to amend the scheme out of all semblance to mathematical order. After reading volumes of the Proceedings of the Joint Rate Committee, filled with petitions of railways, towns, and individuals for exception to the general rules, one is surprised to find that, after all, the scheme is so well ordered as it is. It has been held true only by rigid adherence to the rule that by the shortest "workable and worked route" no intermediate place shall be charged more than is charged to any point beyond. In other words, the long and short haul principle is consistently observed. Space does not



CROSS-SECTION FROM BURLINGTON TO PITTSBURG



CROSS-SECTION THROUGH LOUISVILLE AND LANSING

permit a discussion of all of the factors which have tended to modify the original simple scheme. Three alone may be considered as illustrative of the rest. These are: (1) the effect of railway competition at the important junction points, (2) the influence of the independent cross lines of railway; and (3) commercial competition between producing or distributing centers.

The effect of railway competition at junction points is revealed at once, upon inspection of the map, by the general law that the boundary line of zones lies immediately west of the large cities. Notice the location of Cleveland, Warren, Pennsylvania; Newark, Ohio; Dayton, Fort Wayne, Detroit, Port Huron, Cincinnati, Indianapolis, Louisville, Lansing, Logansport, Terre Haute, Peoria, and Decatur. Columbus, Toledo, and Evansville, Indiana, are about the only exceptions. In nearly every case the theoretical zone boundary has been shifted in such a way that the rate rises just west of the important competitive point. The reason is obvious. Rates being held down at these points, and no greater rate being possible at any other point further east, conditions must be equalized *upwards*, immediately the depressing influence of competition is removed. Each zone level is of necessity an average of a theoretic constantly rising scale from east to west. Places immediately west of an important junction point are raised somewhat above their theoretical grade as a compensation for those places on the westerly side of each zone whose rate is held down below their theoretical level by the exigency of competition at the next large town. Or, to be specific, Indianapolis may hold down the rate to 93 per cent of the Chicago rate farther west than otherwise would be the case. In fact, by reason of its paramount importance as a railway center, it has held down the rate so far west that for purposes of equalization the rate west of it immediately jumps to 100 per cent. For, as will be observed, on inspection of the map, the 96-97 per cent zone is interrupted at this point; the 92-95 per cent zone being extended unduly far west and the 100 per cent zone being extended inordinately far east, until the two meet just west of Indianapolis. Detailed study of the schedules and maps will reveal many similar instances.

The converse of the proposition that important junction points lie near the western-zone boundaries is found in the fact that, where competition is absent, the zones sweep much farther east than mathematically would be prescribed. In other words, wherever competition is less keen, the percentage rates remain high. Were competition entirely uniform in its geographical distribution, the several zones would be parallel, sweeping evenly clear across the map. Illustration of this circumstance will be found in the extension of the 87 per cent zone far to the east, along the Ohio river, in fact nearly to Parkersburg, West Virginia. Or, again, in the 110 per cent territory which extends nearly to Louisville. This latter rate has been recently amended, as will be shown later; but for many years continued, as here represented, abnormally far to the east. In both these instances the railway facilities along the river are monopolized by the Baltimore & Ohio as a trunk line. The only competition is due to the Cincinnati, Hamilton & Dayton and Norfolk & Western, both of which work their traffic from New York north. The population and traffic density being at the same time low, a relatively high level of rates has resulted. Sometimes, also, it may happen that in these outlying regions the shortest line "workable and worked" to the seaboard may not be due east, but may proceed north until a junction with a trunk line can be effected.<sup>1</sup>

The influence of independent transverse lines of railway has been of great importance in shifting the zone boundaries from their theoretical location to conform to practical requirements. Study of the map permits a second important generalization. Not only does the boundary of the zones usually lie just west of large cities, the course of the boundary at the same time frequently follows the location of important independent transverse railways. The zone boundary, in other words, lies just west of the cross railway line. For example, the western boundary

<sup>1</sup> Thus from Ironton, in the 87 per cent zone south of Columbus, Ohio, the distance to Columbus is 127 miles, added to 638 miles from Columbus to New York makes a total of 765 miles. Multiplying this by 00.0206 makes it 87 per cent of the Chicago rate.

of the 100 per cent Chicago zone, after leaving a point on the Illinois Central, is defined from north to south by the course of the Chicago & Eastern Illinois Railroad, and below Terre Haute by the line of the Terre Haute & Evansville. Similarly, practical exigencies determined the odd shape of the 110 per cent zone, formed like a great distorted boot leg. The western boundary of this 110 per cent zone from Peoria south closely follows the Peoria, Decatur & Evansville road nearly to the Ohio river. Similarly conditioned by railway lines are the boundaries north and south of Indianapolis, and especially north and south of Fort Wayne, Indiana. In other cases where the transverse lines do not cross nearly at right angles with the trunk line, the zone boundary will follow one railway for some distance, and then skip across to another railway whose general direction is more nearly perpendicular to the trunk lines. Thus, from Toledo to Lima, Ohio, the western boundary of the 76-80 per cent zone follows the Cincinnati, Hamilton & Dayton, cutting the Baltimore & Ohio and Pennsylvania trunk lines at right angles; and then it jumps across to the east until it strikes the sweep of the Toledo & Ohio Central, which carries it down almost to Columbus. Similarly, the western boundary of the 66½ per cent zone follows the line of the Pittsburg & Western north from Warren, in order that that line may participate in New York business by working its line north *via* Painesville on the Lake Shore.

Why is it apparently necessary that these zone boundaries should follow along just west of the cross railway lines? The reason may be made clear by a concrete instance. Originally and until about 1891, Louisville, Kentucky, instead of having the 100 per cent Chicago rate, as at present, enjoyed, on the base of its distance from New York, about 96 or 97 per cent of the Chicago rate. In other words, the 96-97 per cent zone shown on our map as interrupted at Indianapolis, partly for reasons already mentioned, originally swept across the map all the way from Grand Rapids to the Ohio river. This territory from Chicago south is served by the Monon Railway (Chicago, Indianapolis & Louisville), whose line, not fully indicated on

the map, thus lay partly in 100 per cent, partly in 96 per cent, and partly in 97 per cent territory. An important part of the traffic of the Monon, as well as of the other independent north and south lines, consists of business coming in from the East at the north and worked south, or coming in from the East at the south and worked north. Or, in other words, this line subsisted in part upon indirectly routed tonnage from New York, let us say, destined for Louisville, but reaching it by way of Chicago junction points. Freight thus hauled around two sides of a triangle, instead of by a direct line, constitutes one of the important sources of waste of transportation energy described in Chapter XX.<sup>1</sup> The Monon by such tactics is able to participate in, and to profit by, a much larger volume through business. That is to say, its proportion of the entire haul is much greater than it would be if the business moved by the shortest line. Moreover, when indirectly routed, the Monon, often securing for its trunk-line connections tonnage for the East which would naturally go to other competitive trunk lines, is able to exact a higher prorating than even its extended lateral haul would justify on a strictly distance basis. Such circumstances always greatly enhance the profitableness of lateral hauls to minor connecting roads. It is obvious that much of this transverse haulage would be impossible wherever the lateral railway lines traverse different zones of rates. It might haul traffic from its 100 per cent end, to connect at its 96 per cent end with a trunk line for the East, but not in the opposite direction. The Monon, always in a position to disturb the rate situation, through connection with all the competing trunk lines, insisted upon equality of rates all along its line. To do this, the 100 per cent zone had to be extended east to Indianapolis. Thereafter the Monon could profitably "work its line in both directions." This illustration will serve to show why ordinarily the zone boundaries conform as closely as possible to the course of the lateral roads. The confusion which would be engendered, were the Peoria, Decatur & Evansville to be partly in the 110 per cent and partly in higher percentage territory, while still insisting upon its right to work its line both ways,

<sup>1</sup> P. 484, *infra*.

can readily be imagined. To avoid such difficulties, the present modification of strictly distance percentages had to be adopted.

The third dominant influence, above mentioned, in modifying the mathematical precision of percentages based alone upon the distance from New York, has been the commercial competition of traders and cities one with another. The aim of all rate adjustment should be, and in fact, so far as possible in American railway practice, is to equalize conditions, so that the widest possible market shall result. Producers or traders in each city demand access on even terms to all territory naturally tributary to them by reason of their geographical location. Each particular railroad sees to it that its own patrons and cities are "held" in all parts of these markets, as against the efforts of competing railways to promote the welfare of their own constituencies. Consequently, the Proceedings of the Joint Rate Committee are filled with discussions as to the advisability of amending general rules here and there to suit local conditions. Minor changes are continually being effected. Grand Rapids, Michigan, once in 100 per cent territory, asked for a 90 per cent rate, and in 1891 secured a reduction to 96 per cent.<sup>1</sup> Louisville, once in 97 per cent territory, is now a 100 per cent point. Shifts in both directions have frequently occurred, as the following table of percentage shows:<sup>2</sup>—

BASIS	DETROIT	TOLEDO	SANDUSKY	CLEVELAND
April 13, 1876 . .	85	78	71	65
June 23, 1879 <sup>3</sup> . .	81.5	81.5	78	73.5
April 14, 1880 . .	75.5 <sup>4</sup>	75.5	75.5	70
Present (1900) . .	78	78	78	71

A number of changes were made in 1887 in order to conform to the long and short haul clause. Flint, Michigan, for example, was reduced from 95 to 92 per cent; Ashtabula, Ohio, from 71

<sup>1</sup> Cf. Industrial Commission, Vol. IV, p. 556.

<sup>2</sup> Record, Detroit Board of Trade case.

<sup>3</sup> Consult p. 318, *supra*.

<sup>4</sup> Computed apparently by regular rules, but on the basis of only four cents terminal charges instead of the usual six.

to 67; while Springfield, Ohio, was raised from 82 to 83 per cent.<sup>1</sup> Detroit has been most active in prosecuting its claims for a reduced percentage.<sup>2</sup> But the Interstate Commerce Commission in 1888 upheld the present status. A recent minor change is indicative of the forces which must be dealt with. Evansville, Indiana, on the Ohio river, according to our map, is a 110 per cent point. Vincennes, Indiana, lies just north of it in the 108 per cent triangular zone. Since this plate was made, Evansville has been reduced to 105 and Vincennes to 103 per cent, respectively. This is substantially, I am told, on mileage basis. The reason for the amendment is that certain important industries are located at these points. Either to favor them specially or to remove a preëxisting disability in competition with other towns, this change was insisted upon by the railways interested in their prosperity. By tentative processes of adjustment like this the present general relations have been established. They have been kept constant only by the steady resistance of the majority of carriers to action which is in the interest of a few. Judged by results, it would appear that the broad view has, in the main, prevailed.

The actual situation resulting from the above-named causes, it should be observed, is not quite as simple as our map makes it appear. Most of the zones are in fact subdivided into minor gradations. Thus the closely dotted zone designated "86-90 incl." is constituted of an 87 per cent area up as far as the railway from Dayton to Indianapolis; while the rest of it is broken up into little 88, 89, 90 per cent areas, respectively. The same thing occurs elsewhere. Our map generalizes the results, in an effort to bring out the zone relationships as fully as is technically possible in a single diagram. Certain of the zones, however, such as the 60, 66½, 100, and 110 per cent territories, are bounded exactly as here represented.

As for direction, the original scale was intended only for east-bound traffic. West-bound rates were lower and more irregular.

<sup>1</sup> Joint Rate Circular, No. 815.

<sup>2</sup> Demanding a 70 per cent rate on a strict mileage basis, and also because the prorating basis with Western lines is at that figure.

But the system worked so well that it was soon extended to cover the west-bound business. Owing to difficulties of routing, in order to transport by the shortest line into Chicago, these west-bound percentages were often quite different from those in the opposite direction.<sup>1</sup> Detroit, for instance, for some time prior to 1886 enjoyed a 70 per cent rate west-bound, while its percentage in the opposite direction was 78.<sup>2</sup> But, after the passage of the Act to Regulate Commerce in 1887, efforts were made to harmonize the differences.<sup>3</sup> At the present time the rates east and west are in most cases the same.

At this point it is essential to understand the limitations within which this percentage system is confined. It does not necessarily determine the exact rate to be applied in practice from every little station in trunk line territory. For, in the first place, it concerns only the so-called common points; that is to say, points where competition of two or more carriers is effective. Purely local stations are charged an "arbitrary" into the nearest common point. But, inasmuch as throughout this much be-railroaded country most shippers are less than twenty miles from the next line,<sup>4</sup> and since, moreover, the arbitrary can never raise the local rate above the rate to the common point beyond,<sup>5</sup> the scale is practically effective everywhere. A more important consideration is the fact that this scale, even for common points, does not positively fix the rate. It merely provides a minimum below which rates shall not be reduced, except by

<sup>1</sup> Trunk Line Association Circular No. 523, issued July 26, 1883, gives tables of these percentages in each direction. Present west-bound percentages are given in *Ibid.*, No. 751, issued April 3, 1899.

<sup>2</sup> Typewritten record, Detroit Board of Trade case, 1887-1888, Interstate Commerce Commission Office, pp. 244-251.

<sup>3</sup> Under a committee headed by the late J. T. R. McKay, of Cleveland. The Official Classification and the 75 cent New York-Chicago rate, first class, were then adopted for good.

<sup>4</sup> I am told that rivers intervening to cut off cartage by wagon to competing lines have sometimes effectively influenced the charges.

<sup>5</sup> The long and short haul principle has always been given great weight here. All exceptions to it were removed in good faith by the carriers when the act of 1887 was passed. Cf. Windom Committee, Vol. I, p. 26; Vol. III, pp. 42, 134, and 283.

authority of the roads acting jointly. It is a minimum, not a maximum, schedule in every sense. Its provisions are never promulgated in the form of tariffs as such. They are rarely known to shippers, but serve only as a guide to traffic officials. The Interstate Commerce Commission, in sanctioning the system, has expressly recognized this fact.<sup>1</sup> Moreover, these percentage rates apply to "classified" tonnage, and not to the great bulk of commodity or special rates which are independently made. This exception is more important than either of the others, inasmuch as probably three fourths at least, of the trunk line tonnage measured by weight, is moved under such commodity rates. Financially, of course, the relative proportion of commodity freight is vastly less than this figure. For the classified tonnage is made up exclusively of high-grade goods, transported at most remunerative rates, while the commodity traffic, while bulky, often yields a very low revenue per ton mile.

Other exceptions to the applicability of this percentage system deserve mention, although they are of relative unimportance. Principal among these is the confusion engendered in Illinois territory through the entry of the western lines into Chicago. Throughout their constituencies, by reason of the sparse population, freedom from competition, inequality of east- and west-bound tonnage, and low-grade freight, western railroad rates per ton mile are very much higher than on the trunk lines. Moreover, they are naturally desirous of as long a haul as possible, namely into Chicago. To turn over their local Illinois traffic to the trunk line feeders exposes them financially to the same losses as those above mentioned in the case of lateral independent lines further east. But these western lines, being stronger, have insisted upon recognition of their claims to a proportion of the through rate which would at least "pay for their axle grease."<sup>2</sup> The result is that throughout Illinois, especially in the north and toward the Mississippi, the distance principle is considerably distorted, as our map clearly shows. --

<sup>1</sup> *G. C. Pratt Lumber Co. v. Chicago, Ind. & Louisville Ry. Co.*, decided January 27, 1904.

<sup>2</sup> United States Industrial Commission, Vol. IV, p. 562.

The percentage system practically excludes freight "From Beyond," the rates on that being determined by other rules.

East of the Central Traffic Association territory shown on our map the same percentage system is extended to points in New York and Pennsylvania.<sup>1</sup> Suppose, for example, the rate were desired from Columbus, Ohio, to Albany, New York, or any other point between Buffalo and New York City. The rate from Columbus to New York City would first be determined as a percentage of the Chicago-New York rate, under the system already described. Then from Columbus to Albany the rate would be prescribed as a new percentage of this percentage. The initial western points, however, are not determined individually, but are comprehended in large groups. Thus the rate from all points in the 72-78 per cent territory, shown on our map, to Albany, New York, is 96 per cent of what the rate would be from those points to New York City. Syracuse has 76 and Utica 87 per cent, respectively, of the rate from any point in this 72-78 per cent territory. From points beyond Chicago taking, that is to say, more than 100 per cent of the New York-Chicago rate, the percentages of the rate to New York City applying to Albany, Syracuse, and Utica are correspondingly modified to 96, 84, and 91, respectively. Other complications, such as the addition of arbitraries to Boston and New England points or the subtraction of differentials to Baltimore and Philadelphia, follow. But, in the main, conforming always to the long and short haul principle,<sup>2</sup> rates to all local stations are prescribed within narrow limits by means of a small number of these fixed points. The system is the same, although details may vary. Everything interlocks and is harmoniously related on the distance basis.

Rates from one point to another within the Central Traffic Association territory shown on our map now alone remain for consideration. These cannot, of course, be adjusted on a percentage basis, inasmuch as such traffic may not be east- or west-bound at all, but may consist of shipments in any direction. There

<sup>1</sup> Cf. Joint Committee Information No. 298 of January 13, 1900, giving all these rules in detail.

<sup>2</sup> Cf. Windom Committee, Vol. II, pp. 42 and 134.

is no logical reason why they should interlock with east- or west-bound through rates when the traffic is, perhaps, moving locally north and south. Nevertheless, the long and short haul principle is observed with the same fidelity. A rigid distance tariff for short hauls, the limits of which are prescribed by the rates for long hauls under the McGraham schedule, prevails.<sup>1</sup> For distances up to 75 miles this conforms closely to the rates originally prescribed by the Ohio legislature. For greater distances it is much lower than the Ohio tariff.<sup>2</sup> Thus the Ohio rate for 350 miles is 87.5 cents, while the C. F. A. (Central Freight Association) scale is only 42 cents. The Ohio scale for 200 miles is 50 cents, the C. F. A. rate for the same distance is only 33 cents. Thus it appears that this C. F. A. tariff, applicable to interstate business and beyond control of any State legislature, has, in reality, been voluntarily adopted by the interested railroads. The tariff is only a minimum scale, below which the roads agree not to reduce rates, and above which the actual rates often rise.<sup>3</sup> Nevertheless, the fact remains that these rates, according to distance, are so much lower than the Illinois Railroad Commission's tariff that Chicago and other distributing centers throughout the State of Illinois claim that it works great hardship to them. The situation in Illinois is geographically peculiar. Its great commercial center is in the extreme north-eastern corner, while, at the same time, the greatest extension of the State is north and south. These circumstances, coupled with an interstate (C. F. A.) tariff lower than the Illinois official tariff under which Chicago merchants must ship out their goods, enable Detroit, Indianapolis, and Cincinnati to undersell Chicago in its own State. Chicago can be equalized there only by special or secret rates.<sup>4</sup> Other local centers, like Quincy, Illinois, joined

<sup>1</sup> Known as the C. F. A. scale. Full text is printed in Illinois Railroad Commission Proceedings in Maximum Freight Rate case, Record, etc., 1905, p. 43. See also p. 97.

<sup>2</sup> Detailed comparison is made in *Ibid.*, p. 45. See also p. 172.

<sup>3</sup> Illinois Railroad Commission Proceedings in Maximum Freight Rate case, Record, etc., 1905, p. 152.

<sup>4</sup> Exhibit A 15, *Ibid.*, shows this by means of a map. See also Elkins Committee, Vol. III, p. 2271.

with Chicago in this complaint to the Illinois Railroad Commission that their rates were too high.<sup>1</sup> Think of it! Shippers complaining that a government rate was too high, and requesting that the railway tariff (C. F. A. schedule) be adopted in its place! Is that not evidence that reasonable treatment of its shippers by railway companies is appreciated by the public? Without undue extension further details of this interesting controversy cannot be given. It will suffice to state that in December, 1905, the Illinois Railroad Commission ordered a reduction of its official schedule by 20 per cent, in an attempt to reduce its rates to conform more nearly to the C. F. A. railway tariff.

The evils incident upon two conflicting governmental authorities, State and Federal, each attempting to regulate rates independently, are clearly indicated in the preceding paragraph. The Interstate Commerce Commission has been brought flatly up against them in one of its recent Texas cases. Local and interstate rates must inevitably be adjusted with reference to one another, so complex are the conditions of commercial competition. So long as the plain people remain unsatisfied that any real Federal regulative power exists, is it not possible that the number of arbitrary State tariffs, like those of Illinois and, more recently, of Missouri will tend to increase? If State legislative attention could be diverted from similar activities, and such control as circumstances seem to warrant were to proceed from an efficient, centralized Federal source, the business of railway transportation might be more easily conducted than under present chaotic conditions. Regulation at best is a most difficult and delicate matter. It should never be attempted lightly. The main activities of any governmental commission should be directed towards settlements out of court, with as little exercise of mandatory power as possible. The chances seem to me to be more than even that a broad-gauge Federal commission would accomplish its ends in this manner, and thus tend to discourage State legislative interference in future.

WILLIAM Z. RIPLEY

<sup>1</sup> The double disability of these smaller places is stated in *Ibid.*, p. 7.

## XIV

### THE SOUTHERN BASING POINT SYSTEM

#### THE ALABAMA MIDLAND CASE<sup>1</sup>

##### *Long and Short Haul*

CLEMENTS, *Commissioner* :

\* \* \* \* \*

Troy is situated at the intersection of the roads of the Alabama Midland and the Georgia Central companies. Montgomery is at the terminus of the Alabama Midland, fifty-two miles northwest from Troy, and shipments to Montgomery over that road from New York, Baltimore and northeastern cities, and from the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, and from Port Royal, S. C., and Gainesville, Ocala and Tampa, Fla., pass through Troy.

The Savannah, Florida & Western Railway and the Ocean Steamship Company, and the Savannah, Florida & Western Railway and Merchants & Miners Transportation Company, form with the Alabama Midland Railway two through lines, the former from New York and the latter from Baltimore, over which traffic is carried on through rates and through bills of lading to Troy and through Troy to Montgomery. The Georgia Central forms through lines in connection with the Ocean Steamship Company and Merchants & Miners Transportation Company to Troy and Montgomery from New York and Baltimore. The class rates in cents per hundred pounds, except class F, which is per bbl., over the above lines (sea and rail) from New York and Baltimore to Troy and Montgomery, respectively, are, as follows :

<sup>1</sup> Decided August 15, 1893. Interstate Commerce Reports, Vol. VI, pp. 3-35. Overruled by the Supreme Court, *vide*, p. 354, *infra*.



SEA AND RAIL

CLASS	FROM NEW YORK		FROM BALTIMORE	
	To Montgomery	To Troy	To Montgomery	To Troy
1 . . . . .	114	136	106	129
2 . . . . .	98	117	90	111
3 . . . . .	86	103	83	98
4 . . . . .	73	89	70	84
5 . . . . .	60	74	57	70
6 . . . . .	49	61	46	58
A . . . . .	36	—	33	—
B . . . . .	48	—	45	—
C . . . . .	40	—	37	—
D . . . . .	39	—	36	—
E . . . . .	58	—	55	—
H . . . . .	68	—	72	—
F (per bbl.) .	78	—	65	—

There are also published "all rail" rates *via* the "Great Southern Despatch" line, from New York and Baltimore to Troy and Montgomery. On this line traffic is carried from New York to Harrisburg over the Pennsylvania road, from Harrisburg to Hagerstown over the Cumberland Valley road, from Hagerstown to Bristol over the Norfolk & Western, and from Bristol to Chattanooga over the East Tennessee, Virginia & Georgia road. . . .<sup>1</sup>

The class rates in cents per hundred pounds (except class F, which is per bbl.) over the above-described "all rail" lines to Troy and Montgomery from New York and Baltimore, are as follows :

## ALL RAIL

CLASS	FROM NEW YORK		FROM BALTIMORE	
	To Montgomery	To Troy	To Montgomery	To Troy
1 . . . . .	114	144	106	136
2 . . . . .	98	123	90	115
3 . . . . .	86	108	83	105
4 . . . . .	73	93	70	90
5 . . . . .	60	77	57	74
6 . . . . .	49	63	46	60
A . . . . .	36	—	33	—
B . . . . .	48	—	45	—
C . . . . .	40	—	37	—
D . . . . .	39	—	36	—
E . . . . .	58	—	55	—
H . . . . .	68	—	65	—
F (per bbl.) .	78	—	72	—

It appears that shipments of phosphate rock are made *via* the Alabama Midland, as the terminal road, to Troy and through Troy to Montgomery from Charleston and Port Royal, South Carolina, and from Gainesville and other points in Florida. The roads which connect, and constitute through lines, with the

<sup>1</sup> These routes are mapped in the able and elaborate argument of Judge (Ed.) Baxter before the Supreme Court. U. S. Sup. Court, October term, 1896, No. 563, pp. 39 *et seq.* — Ed.

Alabama Midland, from those cities to Troy and Montgomery, are the following: . . .

The rates in cents per ton on phosphate rock from Port Royal, Charleston and Gainesville, to Troy and Montgomery, respectively, are as follows:

To	FROM PORT ROYAL	FROM CHARLESTON	FROM GAINESVILLE
Troy . . . .	322	322	322
Montgomery . .	300	300	300

The following roads constitute through routes or lines in connection with Alabama Midland to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk; to wit, \* \* \* \* \*

The rates in cents per hundred pounds on cotton from Troy and Montgomery respectively, to these ports are:

FROM	To BRUNSWICK	To SAVANNAH	To CHARLESTON	To WEST POINT	To NORFOLK
Troy . . . .	47	47	52	—	—
Montgomery	45	45	45	51	51

When the complaint was filed the cotton rate from Montgomery to Brunswick, Savannah and Charleston was 40 cts. per hundred pounds. It has since, as appears above, been raised to 45 cts. and the rate from Troy to Charleston has been raised to 52 cts. \* \* \* \* \*

None of the traffic involved in this case is carried by the Georgia Central either through Troy to Montgomery or through Montgomery to Troy. . . .

But as to the Alabama Midland and its connections constituting through lines, the case is different. Interstate traffic is carried over that road to Troy and through Troy on to Montgomery, and in the opposite direction, from Troy, and from Montgomery through Troy, the haul to and from Montgomery

being 52 miles greater; and in respect to this traffic the proof shows departures from the rule of the Statute, (1) as to class goods shipped from New York, Baltimore and the East; (2) as to phosphate rock, shipped from Port Royal and Charleston, S. C., and Gainesville and other points of origin of such shipments in Florida; and (3) as to cotton shipped from Troy and from Montgomery to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk. As will be seen from the tables given above, the "sea and rail" rates on class goods from Baltimore to Troy range from 12 cts. per hundred pounds on class 6 to 23 cts. on class 1 higher than those on such goods shipped through Troy to Montgomery, and from New York to Troy, from 12 cts. to 22 cts., and the "all rail" rates from Baltimore and New York to Troy, from 14 cts. to 30 cts. These class rates are applied to sugar and coffee, which are the heavy goods mostly shipped to Troy from the East, and also to dry goods, notions, and many other commodities. The rate on phosphate rock from Port Royal, Charleston, and Gainesville to Troy is 22 cts. per ton higher than that on such rock shipped through Troy to Montgomery, and on cotton the rate from Troy to the seaports, Brunswick and Savannah, is 2 cts. per hundred pounds and to Charleston 7 cts. per hundred higher than that from Montgomery *via* Troy.

Where substantial dissimilarity of circumstances and conditions is set up by defendant carriers in justification of departures from the "long and short haul" rule of the Statute, the burden is upon them to establish such dissimilarity. *Re Louisville & N. R. Co.*, 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 31; *Spartanburg Board of Trade v. Richmond & D. R. Co.*, 2 Inters. Com. Rep. 193, 2 I. C. C. Rep. 304. Water competition at Montgomery *via* the Alabama river, is adduced as a justification in the answer of the Alabama Midland and by some of the other defendants. In the case of *Re Louisville & N. R. Co.*, *supra*, it was held that "actual" water competition "of controlling force in respect to traffic important in amount" may constitute the dissimilar circumstances and conditions authorizing a departure from the general rule of the Statute. In the

case of *Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 236, the complaint alleged unjust discrimination against Opelika and in favor of Montgomery and Columbus. Water competition at Montgomery *via* the Alabama river was (as in the present case) set up by way of justification. This defense was not sustained and the Commission in overruling it said, "the mere fact that a point is situated upon a navigable stream does not of itself justify the lesser charge for the longer haul to such point," and that, in order to justify such lesser charge, the water competition must "*control the carriage of the traffic on which the discrimination is made.*" In that case it is further said, "The Commission is aware that an independent and active line of steamers connects Montgomery with the Atlantic seaboard at Mobile," but that the fact "without more," that the "railroads have water competition and are compelled to meet it," is not held to be "sufficient to justify the lesser charge for the longer distance." Conceding that there is a line of boats running between Montgomery and Mobile (of which fact, however, there is no proof, in this case) that alone would not be sufficient to justify the greater charge to Troy than to Montgomery. . . . In the affidavit filed by counsel for the defendants is a statement that "*the business on the Alabama river, according to the report of the United States Engineer, for the year, 1891, was 52,349 bales of cotton carried by boat and 44,500 tons of other freight.*" This statement . . . purports to give the entire cotton and other business on the river for the year named without stating the point or points at which it originated, or the direction in which it was moved. How much of it went from Montgomery or points above or below Montgomery *down* the river towards Mobile, or from Mobile and points above that city *up* the river to Montgomery does not appear. As showing water competition of controlling force at Montgomery on traffic to that city from New York, Baltimore and other northeastern cities, or from the South Carolina and Florida phosphate beds, or from Montgomery to the Atlantic seaports, Brunswick, Charleston and Savannah, the statement is valueless. (This is true, also, as to the traffic from St. Louis and from Louisville,

Cincinnati and other Ohio river points, hereinafter to be considered.) There are regular lines of ocean steamers from those ports to New York, Baltimore and other cities on the northeast coast, but there does not appear to be such line from Mobile, either to those cities or to any foreign port. The only witness questioned by counsel for the defendants as to the effect of water competition at Montgomery on shipments of cotton to the Atlantic ports testified that "the river competition plays no great part." An attempt was made to show that some shipments of phosphate rock had been made from the Florida points, Ocala and Tampa (the latter on the Gulf coast) *via* Mobile and the Alabama river to Montgomery, but the witness testified that he had never known such shipments to be made, that he himself had "tried to get a rate by that line to Montgomery and had been unable to get it," and that he thought it impracticable as "the goods would have to be transferred at Mobile to get to Montgomery and then would have to be hauled to the works." No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. *Re Louisville & N. R. Co.*, 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 31.

Our conclusion is that no justification has been shown for the departures, complained of and established by the proof, from the general rule of the 4th section of the Act to Regulate Commerce.

\* \* \* \* \*

The main cause of complaint on the part of Troy, however, in connection with this system of making export rates, as disclosed by the evidence, is, that while its benefits are given by the roads composing the Southern Railway & Steamship Association to Montgomery and other favored localities on their lines, they are denied to Troy, and it is contended that this is an unjust discrimination against Troy. This contention is apart

from and independent of the question, whether the system is itself lawful and justified as applied to Montgomery and other points. If it be lawful in itself, it cannot lawfully be so applied as to unduly favor one locality, to the prejudice of another. Both the Alabama Midland and the Georgia Central are members of the Southern Railway & Steamship Association, and Troy as well as Montgomery is located on those roads. The haul from Montgomery over the Georgia Central to the Atlantic ports named is about 10 miles longer than from Troy over that road, and the haul from Montgomery to those ports over the Alabama Midland is 52 miles longer than from Troy, and is also through Troy. The charge of the lesser rate from Montgomery than from Troy over the Georgia Central would seem to be a discrimination against Troy and over the Alabama Midland, also, a departure from the "long and short haul rule" of the Statute. The principal article of export shipped from Troy and Montgomery over these roads to the Atlantic is cotton. The cotton business of Troy is large, amounting in 1892 to 38,500 bales, aggregating in value \$1,500,000, nearly a third of its total business of all kinds. No excuse is offered, and we are unable to conjecture any valid reason, why Troy is excluded from the benefit of the export system of rate making applied to Montgomery. The fluctuations in ocean rates at the southern ports and other matters set up by the southern carriers as rendering necessary or justifying this system, would seem to apply to shipments from Troy as well as from Montgomery.

It appears, as alleged in the complaint, that on shipments of cotton from Troy *via* Montgomery to New Orleans, the shipper is charged the full local rate to Montgomery both by the Alabama Midland and the Georgia Central. The local from Troy to Montgomery is 23 cts. per hundred pounds and the rate from Montgomery on is 45 cts., making a total through rate from Troy to New Orleans of 68 cts. The testimony is that under this rate Troy is debarred from shipping cotton *via* New Orleans for Europe and is left only the outlet *via* Savannah and other Atlantic ports, and that this is a disadvantage to Troy inasmuch as cotton shipped *via* New Orleans is classed "New Orleans

cotton," which is valued at from  $\frac{3}{16}$  to  $\frac{1}{4}$  of a cent per pound higher than other cotton.

The haul from Troy to Montgomery may be made either over the Alabama Midland or *via* Union Springs over the lines of the Georgia Central and from Montgomery to New Orleans it is made over the Louisville & Nashville road.

In the case of *Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 236, cited in his brief by counsel for complainant, it was charged that through rates and through bills of lading were unjustly denied to Opelika on shipments of cotton *via* Montgomery to New Orleans, and the Commission held that such through rates and bills, being important facilities in the transportation of cotton and being given on other commodities and to other points similarly situated, should be given Opelika and that the refusal of the same in the absence of a valid excuse for such refusal was an unjust discrimination against Opelika. In the present case, however, it is neither alleged nor proven that through rates and billing are denied Troy on shipments of cotton *via* Montgomery to New Orleans, but that on the haul from Troy to Montgomery over either the Alabama Midland or the Georgia Central, the local rate between those points is charged and collected as a part of the through rate to New Orleans. The charge is in legal effect that the aggregate through rate thus arrived at is unjustly discriminatory against Troy. "While," as was said in the case of the *Railroad Com. of Florida v. Savannah, F. & W. R. Co.*, 3 Inters. Com. Rep. 688, 5 I. C. C. Rep. 13, "the complainant has no interest in the division the defendants may make between themselves of a through rate and that division does not determine what the charge to the public should be, yet 'it is not without significance in determining what are reasonable rates for the whole distance on the lines in question.'" See *Brady v. Pennsylvania R. Co.*, 2 Inters. Com. Rep. 78, 2 I. C. C. Rep. 131. The distance from Troy to Montgomery over the Alabama Midland (the short line) is 52 miles and from Montgomery to New Orleans over the Louisville & Nashville road, 320 miles. The rate of 23 cts. per hundred pounds from Troy to Montgomery

is 4.42 mills per mile; the rate of 45 cts. from Montgomery to New Orleans is 1.40 mills per mile; the rate of 47 cts. from Troy to Savannah (359 miles) is 1.30 mills per mile; and the rate of 45 cts. from Montgomery to Savannah (411) miles is 1.09 mills per mile. There is, also, a through rate on cotton from Columbus, Ga., to New Orleans of 50 cts. per hundred pounds. The distance from Columbus to New Orleans over the Georgia Central *via* Union Springs to Montgomery and thence over the Louisville & Nashville road is 414 miles, and this rate of 50 cts. is 1.20 mills per mile. It thus appears that the rate of 23 cts. from Troy to Montgomery is, on a mileage basis, four times as large as that from Montgomery to Savannah and more than three times as large as the rates from Montgomery and from Columbus to New Orleans, and from Troy to Savannah. The aggregate through rate from Troy to New Orleans of 68 cts. yields 1.80 mills per mile.

Through rates, it is true, are not required to be made on a strictly mileage basis, but mileage is as a general rule an element of importance and "due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges." *McMorran v. Grand Trunk R. Co. of Canada*, 2 Inters. Com. Rep. 604, 3 I. C. C. Rep. 252. The cost of the services in railway transportation is the expense of the two terminals and the intermediate haul. The terminal expenses remain the same without reference to the length of the haul. A local rate covers the expenses of *both* terminals, but a division of a through rate allotted to either of the terminal carriers of the through line can only embrace the expense of one terminal, and because of this difference in expense among other reasons, local rates are made as a general rule much higher in proportion to the length of haul than through rates or any division thereof. A local rate, which presumably is adopted as covering both the initial and final expenses of the haul, is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers. The rate of 23 cts. from Troy to Montgomery is admitted to be the local between those points, which is charged on a haul originating at

the former and ending at the latter and hence covers the expense to the carrier (either the Alabama Midland or the Georgia Central) at both terminals.

\* \* \* \* \*

On the hauls from Montgomery to New Orleans, from Montgomery to Savannah, from Troy to Savannah and from Columbus to New Orleans, there are the expenses of both terminals as well as the haul from Troy to New Orleans. It cannot be assumed that on a haul from Troy to New Orleans the initial expenses at Troy are greater than at Montgomery on haul from that point to New Orleans or to Savannah, or at Columbus on haul from that point to New Orleans, or at Troy itself on a haul in the opposite direction to Savannah. No reason has been shown, and we can conceive of none, why a higher proportionate rate should be charged on cotton from Troy to New Orleans than from Montgomery, or from these other points on the several hauls mentioned. The disproportion, as we have seen, is attributable to the charge, as a part of the through rate to New Orleans, of the local from Troy to Montgomery, and the truth appears to be that this exaction of the local rate is an incident and in pursuance of what is termed the "trade center," or "basing," or "distributing point" system, which the Commission has more than once condemned as unjust discrimination and in violation of law, and which we will be called on to refer to more at length in connection with the class rates from Louisville, Cincinnati and St. Louis to Montgomery, Columbus and Troy, hereafter to be considered.

A rate from Troy to New Orleans based on the present mileage rate from Montgomery to that city would amount to 52.21 cts. As a general rule, however, while the aggregate through rate steadily increases as the distance increases, the rate per ton or hundredweight per mile decreases. Under this rule, the distance from Troy being 52 miles greater than from Montgomery, the rate per hundred pounds per mile from Troy, in the absence of exceptional conditions, should be slightly less than that from Montgomery. In view of this rule, and of the rate of 50 cts. from Columbus, a longer distance point by 42

miles than Troy, our conclusion is that the through rate on cotton from Troy *via* Montgomery to New Orleans should not exceed 50 cts. per hundred pounds.

The class rates in cents per hundred pounds (except class F, which is per bbl.) to Troy, Montgomery and Columbus from Louisville, Cincinnati and St. Louis, are given in the following table:

	CLASSES													
	1	2	3	4	5	6	A	B	C	D	E	H	F	
<i>From Louisville, Ky., to</i>														per
Troy, Ala. . . . .	140	130	113	95	75½	62	45	50	37	32	69	59	66	bbl.
Montgomery, Ala. . . . .	98	92	78	63	52	41	28	31	24	20	48	33	40	
Columbus, Ga. . . . .	107	92	81	68	56	46	28	36	29	25	50	55	50	
<i>From Cincinnati, O., to</i>														
Troy, Ala. . . . .	150	140	123	103	82½	68	49	52	39	34	73	63	70	
Montgomery, Ala. . . . .	108	102	88	71	59	47	32	33	26	22	52	77	44	
Columbus, Ga. . . . .	117	102	91	76	63	52	32	38	31	23	54	59	54	
<i>From St. Louis, Mo., to</i>														
Troy, Ala. . . . .	168	153	133	109	87½	72	52	58	44	37	77	69	80	
Montgomery, Ala. . . . .	126	115	98	77	64	51	35	39	31	25	56	43	54	
Columbus, Ga. . . . .	135	115	101	82	68	56	35	44	36	30	58	65	64	

The local class rates in cents per hundred pounds (except class F, which is per bbl.) from Montgomery and Columbus, respectively, to Troy, are as follows:

	CLASSES													
	1	2	3	4	5	6	A	B	C	D	E	H	F	
From Montgomery to Troy	49	46	40	33	27	21	19	21	16	15	27	33	32	per
From Columbus to Troy	58	55	48	39	31	24	22	24	19	17	31	39	38	bbl.

It was testified at the hearing by Mr. Bashinsky, a witness for the complainant, that on goods shipped on through bills of lading from Louisville and the West to Troy, the Troy merchant

is charged the full local rate from Montgomery to Troy, and the counsel for the Alabama Midland states in his brief, that "the through rate from Troy to any western market is made up by adding the local rate from Troy to Montgomery to the through rate from Montgomery to the West." From a comparison of the above local rates with the difference between the rates from Louisville and the other cities named to Montgomery and Troy, respectively, it will be found that this is true only as to rates on goods of class 6. The difference between the class 6 rate to Montgomery and that to Troy from all these points is 21 cts., which is the local rate on that class from Montgomery to Troy. On the other classes the local rate from Montgomery to Troy exceeds the proportion of the through rate between those points as follows:

	CLASSES													
	1	2	3	4	5	6	A	B	C	D	E	H	F	
Excess of local rate over through . . . . .	7	8	5	1	3½	—	2	2	3	3	6	7	6	

The distance from Louisville to Montgomery over the Louisville & Nashville road is 490 miles and from Montgomery to Troy over the Alabama Midland, 52 miles. The following table shows the mileage rate on the different classes in mills per hundred pounds yielded by the through rate from Louisville to Montgomery and by the additional charge on through shipments from Louisville to Troy for the haul from Montgomery to Troy:

	CLASSES													
	1	2	3	4	5	6	A	B	C	D	E	H	F	
Louisville to Montgomery	2	1.8	1.6	1.3	1.06	.83	.57	.63	.49	.40	.98	.67	.40	
Montgomery to Troy . .	8	7.1	6.7	5.9	3.8	4	2.6	3.6	2.5	2.3	4	5	2.5	

The testimony is that the Troy merchant gets the most of his heavy goods from the West. The class 6 (on which the through rate from Louisville, St. Louis & Cincinnati to Troy is made by the addition of the local from Montgomery to Troy) embraces sugar, coffee, flour, buckwheat, animal food, cement, axle and car grease, green hides, iron architecture, agricultural implements, nails, spikes, and many other heavy as well as light articles in constant demand, too numerous to be set forth here. Classes 4 and B on which the difference between the local rate and proportion of through rate from Montgomery to Troy as shown above is only 1 and 2 cents, are applied, the former, among numerous other articles, to machinery of all kinds, agricultural implements, earthenware, moldings, engines, castings, axes, cotton-seed-oil mills, dry hides, window glass, ale, beer, porter, canned beef and pork, canned fruit and potatoes; and the latter, among many other articles, to salted beef, pork and bacon. It seems probable, that the statement above referred to, made by the witness and counsel, that the through rate from Louisville and the west *via* Montgomery to Troy is made up of the rate to Montgomery plus the local on to Troy, is substantially true as to the goods constituting the bulk of the traffic from those points to Troy. When the mileage rate from Louisville (which point is taken as an illustration) to Montgomery, is compared with that from Montgomery on to Troy, it seems clear that the rate to Troy on all the classes is made from Montgomery as a "basing point." This comparison, it will appear from the table given above, shows that the proportion of the rate from Montgomery to Troy is from four to seven times as large per mile as that from Louisville to Montgomery.

The following table shows the sum of the rates on class goods from Louisville to Montgomery and Troy, respectively, plus the rates from those points on reshipment to Brundidge, Ozark, and Dothan:

IN CENTS PER 100 POUNDS, EXCEPT CLASS F, WHICH IS PER BARREL

FROM LOUISVILLE, KY., TO	CLASSES											
	1	2	3	4	5	6	A	B	C	D	E	F
Brundidge, Ala., reshipped from Montgomery, Ala. . . . .	146	136	117	98	81	65	52	52	38	33	72	68
Brundidge, Ala., reshipped from Troy, Ala. . . . .	168	154	135	115	93½	76	59	62	46	40	83	84
Ozark, Ala., reshipped from Montgomery . . . . .	156	144	122	103	84	67	54	54	40	35	74	72
Ozark, Ala., reshipped from Troy, Ala. . . . .	176	161½	143	122	95½	80	59½	66	49	43	87	90
Dothan, Ala., reshipped from Montgomery . . . . .	162	147	125	106	88	71	57	57	40	35	78	72
Dothan, Ala., reshipped from Troy, Ala. . . . .	188	174	152	130	104½	86	69	71	51	45	93	94

Brundidge, Ozark and Dothan are towns and stations on the Alabama Midland Railway, all east of Troy and shipments to them over that road from Montgomery pass through Troy. Brundidge is 17 miles from Troy and 69 from Montgomery; Ozark, 40 miles from Troy and 92 from Montgomery; and Dothan, 68 miles from Troy and 120 from Montgomery.

The sum of the rates from Louisville to Columbus and Troy, respectively, plus the rates on reshipments from those cities to Brantley, in cents per 100 lbs., except class F, which is per bbl., is as follows :

FROM LOUISVILLE TO	CLASSES											
	1	2	3	4	5	6	A	B	C	D	E	F
Brantley, Ala., reshipped from Columbus . . . . .	1.73	1.53	1.32	1.10	90	73	52	63	50	44	84	92
Brantley, Ala., reshipped from Troy . . . . .	1.76	1.64	1.43	1.19	95½	78	60	66	50	44	89	92

Brantley is on the Georgia Central road 26 miles south of Troy and 111 miles from Columbus, and goods shipped from Columbus to Brantley over that road pass through Troy. A

like disparity in rates on reshipments prevails as to points west of Troy on the Alabama Midland and north of Troy on the Georgia Central, the distances of which from Troy are much less than from either Montgomery or Columbus; and the situation in this respect is the same, when the shipments originate at Cincinnati, and other Ohio river points, and at St. Louis, as when they come from Louisville.

The fact that the sum of the rates from points of origin to points of destination, as shown in the above tables, on reshipment from Montgomery, Columbus and Troy, are greater in cases of such reshipments from Troy than from Montgomery and Columbus, is attributed by the complainant to alleged relatively unjust through rates to Troy as compared with those to Montgomery and Columbus. There is no allegation and no proof that the rates to Montgomery and Columbus are unreasonable in themselves. The through rate to Troy is, therefore, the object of attack.

The differences in rates as against Troy, it will be noted, are much smaller on reshipments from Columbus than on reshipments from Montgomery, and the local rates from Columbus to Troy are much greater than the difference between the through rates to Columbus and those to Troy. It is not shown that there are through rates from Louisville, St. Louis and Ohio river points *via* Columbus to Troy based on the Columbus rate, and the natural course of the traffic from those points to Troy appears to be *via* Montgomery. As before stated, the through rates to Troy are based on the Montgomery rates and in making them Montgomery is treated as a "trade center" or "basing" point and Troy as a local. This is conceded on the part of the defendants. The vice in the through rate to Troy, if any, arises from this fact and from the consequently greatly disproportionate charge for the haul from Montgomery to Troy, when compared with that from Louisville and the west to Montgomery.

The "trade center" or "basing point" system has been in many cases pronounced unlawful by this Commission. . . . In the Louisville & Nashville case, it is said in this connection, that the Act to Regulate Commerce "aims at equality of right and

privilege, not less between towns than between individuals, and will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them;” and in the Martin case, the Statute is declared to be one “enacted in the interest of equality as between large and small interests,” under which “there can be no unjust discrimination in giving to large and small towns relatively equal rates.” It is further said in the latter case, that “a fatal difficulty with the theory that a trade center as such is entitled to specially favorable rates is found in the fact, that it is in conflict with the spirit and purpose of the Act to Regulate Commerce — one of the reasons for the passage of which was, that by means of rebates and other contrivances, large towns and heavy dealers secured advantages which gave them a practical monopoly of markets and shut out the small towns and small dealers.” In a recent decision by the Supreme Court of the United States in a case brought up from the U. S. Circuit Court, for the District of Colorado (*Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896) Mr. Justice Brown, in speaking of the purpose of the Colorado act under consideration as being the same as to intrastate commerce as that of the Act to Regulate Commerce as to interstate commerce, says very forcibly, that it was designed “to cut up by the roots the entire system of rebates and discriminations in favor of *particular localities*, special enterprises, or favored corporations,” and pertinently refers to the fact, that carriers being dependent upon the will of the people for their corporate existence, are “bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all their patrons *upon an absolute equality*.” . . . The fact, therefore, insisted upon by counsel for the roads as a matter of defense, that Montgomery is a much larger city with more extensive business interests than Troy, and is and has been treated by the roads in making rates to Troy and other surrounding towns as a “trade center” or “basing point,” is no justification for discriminations in those rates in favor of Montgomery.

Water and rail competition at Montgomery are also set up as justifying the disproportion in the rates in question as between

Troy and Montgomery. Here, as we have shown in connection with the violations of the long and short haul rule of the Statute, these defenses are not sustained by the proof. Water competition *via* the Alabama river, in order to control rates from St. Louis and Louisville, Cincinnati and other Ohio river points, on traffic from those cities stopping at Montgomery, must, it is obvious, grow out of transportation of such traffic *via* Mobile up the river to Montgomery. The carriage of goods by river from or *via* Montgomery to Mobile would be limited in its effect to rates to the latter city. Water transportation may be possible from localities on the Ohio and Mississippi rivers *via* those rivers to the gulf at New Orleans, on the gulf to the Alabama river at Mobile, and up that river to Montgomery, and the Mobile & Ohio Railroad carries freight from St. Louis to Mobile, which might be transported thence up the Alabama river to Montgomery. No competition by either of these routes is shown in this case on traffic from St. Louis or Ohio river points to Montgomery, and it does not seem probable that such competition of controlling force is likely to arise. That it does not now exist would appear to be indicated by the lower rates from St. Louis, Cincinnati and Louisville to Mobile than to Montgomery at present prevailing as shown in the following table:

RATES IN CENTS PER 100 POUNDS, EXCEPT CLASS F, WHICH IS PER BARREL

DISTANCES	FROM	CLASSES												
		1	2	3	4	5	6	A	B	C	D	E	H	F
644 miles <i>via</i> M. & O. } 805 miles <i>via</i> L. & N. }	St. Louis to Mobile . . .	90	75	65	50	40	35	25	25	25	20	28	25	45
625 miles <i>via</i> L. & N.	St. Louis to Montgomery .	126	115	98	77	64	51	35	39	31	25	56	43	54
669 miles <i>via</i> L. & N.	Louisville to Mobile . . .	90	75	65	50	40	35	25	25	25	20	28	25	45
490 miles <i>via</i> L. & N.	Louisville to Montgomery	98	92	78	63	52	41	28	31	24	20	48	33	40
779 miles <i>via</i> L. & N.	Cincinnati to Mobile . . .	98	83	73	54	44	39	28	27	27	22	31	28	49
600 miles <i>via</i> L. & N.	Cincinnati to Montgomery	108	102	88	71	59	47	32	33	26	22	52	37	44

Although over the lines of the Louisville & Nashville Company the distances from all three of the above cities to Mobile is 180 miles greater than to Montgomery, and the haul to Mobile is through Montgomery, the rates to the latter are materially higher

than to the former. The higher rates to Montgomery than to Mobile shown in the above table seem inconsistent with the claim that the rates to Montgomery are controlled by water competition *via* Mobile up the Alabama river to Montgomery.

\* \* \* \* \*

Our conclusion on this branch of the case is, that the through class rates from Louisville, St. Louis, Cincinnati and the West to Troy are relatively unjust to that city, when compared with those to Montgomery, and that this injustice arises from the practice of basing the Troy rates on the rates to Montgomery as a "trade center."

The question remains to be determined, what the rates to Troy shall be. In arriving at a conclusion on this point, no light is furnished by proof of cost of service or other matters proper to be considered in determining what rates are just and reasonable from the standpoint both of the carrier and shipper. If there is an expense incident to the continuation of the through haul to Troy, which calls for and justifies exceptional rates, the burden, as we have seen, is upon the carrier to show it. The roads, however, do not claim that there is anything in the nature of the service of transportation to Troy which justifies the disproportionate rates charged to that city, but base their defense of those rates on another and distinct ground (which we hold not to be established) namely, dissimilarity of circumstances and conditions resulting from water and rail competition at Montgomery. In the absence of proof of exceptional conditions, the transportation from Montgomery to Troy, including terminal expenses, will be presumed to be not more costly to the carrier than for like distances in the same or like territory. On examination we find, that the class rates from Louisville, Cincinnati and St. Louis and Ohio river points generally, are the same to Columbus, Eufaula and Opelika. The distances from Louisville and St. Louis to Columbus by the shortest available route (that *via* Birmingham and Opelika over the Columbus & Western road) are 9 miles greater and by the routes *via* Montgomery are about 42 miles greater than to Troy. The distance from Cincinnati to Columbus by the shortest route appears

to be about 14 miles less than to Troy. The distances to Eufaula are greater than to Troy, and to Opelika they are somewhat less. The distances from the cities named to Columbus and Eufaula being on the average greater than to Troy and other things being equal, the rate to Troy should, if anything, be slightly less than to those cities. No substantial dissimilarity of circumstances and conditions justifying a higher rate to Troy, has been attempted to be shown. The class rates in cents per hundred pounds (except class F, which is per bbl.) to Columbus, Eufaula and Opelika, and to Troy, from Louisville, and the excess of the Troy rates over those to Columbus, Eufaula and Opelika are given in the following table:

	CLASSES												
	1	2	3	4	5	6	A	B	C	D	E	H	F
From Louisville to Columbus, Eufaula, and Opelika . . .	107	92	81	68	56	46	28	36	29	25	50	55	50
From Louisville to Troy . . .	140	130	113	95	75½	62	45	50	37	32	69	59	66
Excess of Troy rates . . .	33	38	32	27	19½	16	17	14	8	7	19	4	16

The excess of the Troy rate is the same under the rates from Cincinnati and St. Louis.

\* \* \* \* \*

Columbus and Eufaula are located in or are contiguous to the territory in which Troy is situated, and the former, at least, is in active competition with Troy for business in the country immediately around Troy. We are of the opinion that the class rates to Troy from Louisville, Cincinnati and St. Louis should be at least as low as those above given to Columbus and Eufaula.

It is claimed on the part of the roads, that the establishment of lower rates to Troy will disarrange and call for a readjustment of the rates to the localities around Troy in order to prevent unjust discrimination in favor of Troy and against such localities. It appears from the tariffs on file with the Commission, that the through rates to these points around Troy are made on the basis of the rates to Montgomery plus the local

rates from Montgomery on — in other words, that Montgomery is given the undue advantage of a “trade center” as against these points. This being the case, these rates now call for readjustment with a view of remedying the unjust discrimination thus appearing. The adjustment of the rates to these points so as to make them conform to the reduced rates which we have ordered for Troy, will tend to bring them in line with the law and do away with the unjust discrimination in favor of Montgomery already existing under them. It certainly cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction as to other localities. Unjust discrimination as between localities or individuals cannot be essential to the business prosperity of the roads; on the contrary, we believe that in the end, if not immediately, their financial welfare would be promoted by the application in the matter of rate making of the principle of absolute fairness as between all interests, large and small, enjoined by the Statute. Rates should in the first instance be fixed upon a fairly remunerative basis and then so applied as to result in no undue advantage or disadvantage to any interest. It will devolve upon the roads to make whatever changes in rates to surrounding towns may be incidental to, and a necessary consequence of, compliance in good faith with our order in reference to the rates to Troy.

In pursuance of the conclusions arrived at in this case, it is ordered, that the roads participating in the traffic involved cease and desist, (1), from charging and collecting on class goods shipped from Louisville, St. Louis and Cincinnati to Troy a higher rate than is now charged and collected on such shipments to Columbus and Eufaula; (2), from charging and collecting on cotton shipped from Troy *via* Montgomery to New Orleans a higher through rate than 50 cts. per hundred pounds; (3), from charging and collecting on shipments of cotton from Troy for export *via* the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a higher rate to those ports than is charged and collected on such shipments from Montgomery; (4), from charging and collecting on cotton shipped from Troy

to Brunswick, Savannah and Charleston, a higher rate than is charged and collected on such shipments from Montgomery through Troy to those ports ; (5), from charging and collecting on class goods, shipped from New York, Baltimore, and the northeast, to Troy, a higher rate than is charged and collected on such shipments to Montgomery ; and (6), from charging and collecting on phosphate rock shipped from the South Carolina and Florida fields to Troy a higher rate than is charged and collected on such shipments through Troy to Montgomery.

INTERSTATE COMMERCE COMMISSION

v.

ALABAMA MIDLAND RAILWAY CO., ET AL.<sup>1</sup>

*Long and Short Haul*

\* \* \* \* \*

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission, under the proviso to the fourth section of the act, are questions of construction of the Statute, and are to be determined before we reach the question of fact in this case.

It is contended in the briefs filed on behalf of the Interstate Commission that the existence of rival lines of transportation, and consequently of competition for the traffic, are not facts to be considered by the Commission or by the courts when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

<sup>1</sup> Known as the "Alabama Midland" case, stated in the preceding chapter. Decided by the Supreme Court of the United States, November 8, 1897. 168 U. S. 144.

Such, evidently, was not the construction put upon this provision of the Statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy, respectively, and that among the errors assigned is one complaining that the court erred in not holding that the rates prescribed by the Commission in its order made due allowance for such dissimilarity.

So, too, in case *In re Louisville & N. R. Co.*, 1 Inters. Commerce Com. R. 77, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House Bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was, beyond doubt, especially in view."

It is no doubt true that in a later case (*Railroad Commission of Georgia v. Clyde S. S. Co.*, 5 Inters. Commerce Com. R. 326) the Commission somewhat modified their holding in the *Louisville & Nashville Railroad Company Case*, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, and competition with railroad lines wholly in a single state; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such

must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the circuit courts. \* \* \* \* \*

In order further 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 its character or 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." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

It is further contended on behalf of the appellant that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the Act to Regulate Commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this: That when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the Commission.

The language of the proviso is as follows:

That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, 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 of this act.

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of

the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the Commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of *In re Louisville & N. R. Co. v. Interstate Commerce Commission*, 1 Inters. Commerce Com. R. 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words, "under substantially similar circumstances and conditions," and of the meaning of the proviso :

That which the Act does not declare unlawful must remain lawful, if it was so before ; and that which it fails to forbid the carrier is left at liberty to do, without permission of any one. \* \* \* The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions ; and therefore if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the Statute is not violated. \* \* \* Beyond question, the carrier must judge for itself what are the "substantially similar circumstances and conditions" which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of

the consequences, but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions.

. . . We are unable to suppose that Congress intended, by the fourth section and the 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 so to do. Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceeding applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

\* \* \* \* \*

The Circuit Court, after a consideration of the evidence, expressed its conclusion thus:

In any aspect of the case, it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the Interstate Commerce Act. The conditions are not substantially the same, and the circumstances are dissimilar, so that the case is not within the Statute. The case made here is not the case as it was made before the Commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered. 69 Fed. 227.

The Circuit Court of Appeals, in affirming the decree of the Circuit Court, used the following language:

Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The Commission finds that no departure from the long and short haul rule of the fourth section of the Statute, as against Troy, as the shorter distance point, and in favor of Montgomery, as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question, when separately considered, are not unreasonable or unjust. As a matter of business necessity, they are the same by each of the railroads that reach Troy. The Commission concludes that as related to the rates to Montgomery, Columbus, and Bufaula, the rates to and from Troy unjustly discriminate against Troy, and, in the case of the Alabama Midland, violate the long and short haul rule.

The volume of population and of business at Montgomery is many times larger than it is at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated, by the traffic association, in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy, that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river

remains navigable to its present capacity. And this water line affects, to a degree less or more, all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its board of trade. We do not discuss the third and fourth contentions of the counsel for the appellant, further than to say that within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to traffic or persons similarly circumstanced, the Act to Regulate Commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business. 21 C. C. A. 51, 74 Fed. 715.

The last sentence in this extract is objected to by the Commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of 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; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the

various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. 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 in unjust discriminations and preferences.

\* \* \* \* \*

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade, and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from competition; and it was contended on behalf of the commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly affirmed.

Mr. Justice HARLAN, dissenting:

I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the

Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body, for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

XV

THE SOUTHERN BASING POINT SYSTEM

THE DAWSON, GA., CASE<sup>1</sup>

PROUTY, *Commissioner* :

The complainant in this case is a mercantile organization representing the commercial interests of the city of Dawson, Ga. No question is made about its competency to prosecute this proceeding. The complaint is that freight rates now in force from New York and northeastern cities, from Cincinnati, Ohio, Nashville, Tenn., Chattanooga, Tenn., and New Orleans, La., to Eufaula, Ala., and Georgetown, Americus and Albany, Ga., as compared with those to Dawson, Ga., are in violation of the third section of the Act to Regulate Commerce, in that they work an undue preference against Dawson. . . .

The class rates from the points aboved named are as follows: [Abridged. — ED.]

RATES IN CENTS PER 100 POUNDS, EXCEPT CLASS F, WHICH IS PER BARREL

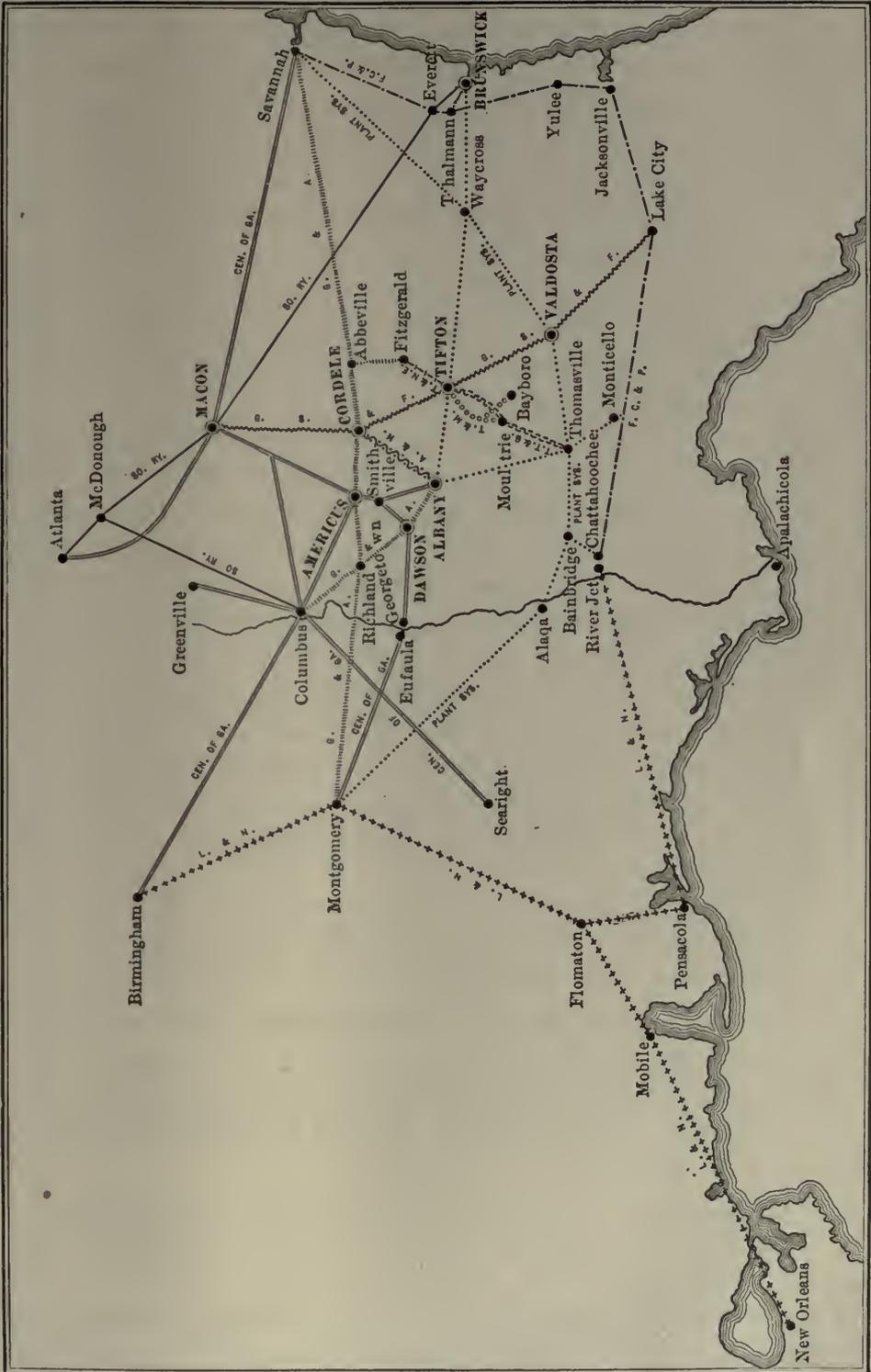
	CLASSES												
	1	2	3	4	5	6	A	B	C	D	E	H	F
<i>From New York, N.Y., to Dawson, Ga.,</i>													
<i>via sea and rail . . . .</i>	131	111	98	83	69	56	46	55	42	40	67	78	81
<i>" all rail . . . .</i>	143	121	107	91	75	61	51	—	—	—	—	—	—

<sup>1</sup> Decided March 27, 1899. Interstate Commerce Reports, Vol. VIII, pp. 142-157. Other similar cases have been recently decided for Cordele, Ga. (*Ibid.*, Vol. VI, 343); Griffin, Ga. (*Ibid.*, Vol. VII, 225); Hampton, Fla. (*Ibid.*, Vol. VIII, 503); Wilmington, S.C. (*Ibid.*, Vol. IX, 118); and Tifton, Ga. (*Ibid.*, Vol. IX, 160).

RATES IN CENTS, ETC. (continued)

	CLASSES												
	1	2	3	4	5	6	A	B	C	D	E	H	F
<i>From New York, N. Y., to</i>													
Albany, Ga.,													
<i>via sea and rail . . . . .</i>	109	96	83	70	59	48	34	47	35	34	52	60	68
<i>" all rail . . . . .</i>	121	106	92	78	65	53	39	52	40	39	58	68	78
Americus, Ga.,													
<i>via sea and rail . . . . .</i>	114	98	86	73	60	49	36	48	40	39	58	68	78
<i>" all rail . . . . .</i>	126	108	95	81	66	54	41	53	45	44	64	76	88
Eufaula, Ala.,													
<i>via sea and rail . . . . .</i>	114	98	86	73	60	49	36	48	40	39	58	68	78
<i>" all rail . . . . .</i>	126	108	95	81	66	54	41	53	45	44	64	76	88
Georgetown, Ga.,													
<i>via sea and rail . . . . .</i>	114	98	86	73	60	49	36	48	40	39	58	68	78
<i>" all rail . . . . .</i>	126	108	95	81	66	54	41	53	45	44	64	76	88
<i>From Cincinnati, Ohio, to</i>													
Dawson, Ga. . . . .	139	121	107	91	75	60	42	51	37	33	69	73	66
Albany, Ga. . . . .	127	109	96	81	67	55	37	41	32	28	60	65	56
Americus, Ga. . . . .													
Eufaula, Ala. . . . .	117	102	91	76	63	52	31	39	32	28	54	59	56
Georgetown, Ga. . . . .	122	106	94	78	65	54	36	44	24½	29½	59	65	61
(Based on Eufaula.)													
<i>From Nashville, Tenn., to</i>													
Dawson, Ga. . . . .	104	91	82	69	57	47	34	43	30	26	54	60	52
Albany, Ga. . . . .	92	79	71	59	49	42	29	33	25	21	45	47	42
Americus, Ga. . . . .													
Eufaula, Ala. . . . .	72	62	56	46	38	33	20	29	23	19	35	37	38
Georgetown, Ga. . . . .	87	76	69	56	47	41	28	36	27½	22½	44	47	47
(Based on Eufaula.)													
<i>From New Orleans, La., to</i>													
Dawson, Ga. . . . .	135	117	103	87	71	56	38	47	34½	30	65	69	61½
Albany, Ga. . . . .	123	105	92	77	63	51	33	37	28	24	56	61	48
Americus, Ga. . . . .													
Eufaula, Ala. . . . .	103	88	77	64	52	42	24	33	26	22	46	51	44
Georgetown, Ga. . . . .	118	102	90	74	61	50	32	40	30½	25½	55	61	53
(Based on Eufaula.)													

The commodity rate on sugar from New Orleans is, per hundred pounds, to Eufaula, Americus and Albany 18 cents, to Dawson 31 cents.      \*      \*      \*      \*      \*      \*



An examination of this map shows that the lines of the defendant Central of Georgia Railway Company reach Americus, Albany, Eufaula and Dawson, its outlying termini being, so to speak, Savannah upon the coast and Atlanta, Birmingham and Montgomery in the interior. The line of the defendant Georgia & Alabama Railway Company reaches Americus, Albany and Dawson, its termini being Savannah upon the coast and Montgomery in the interior. It also has a line extending from Columbus to Albany through Dawson, crossing the main line at Richland. The Plant System connects Albany with Brunswick upon the Atlantic seaboard.

Traffic from New York and other Atlantic cities may reach these different points, either all rail or by rail and ocean. The rate in the two cases is somewhat different, but one is supposed to be fairly the equivalent of the other. Traffic coming by ocean and rail would reach Savannah by water, from whence it might pass by either of the defendant lines to any one of the points in question, except Eufaula, which is only reached by the Central of Georgia Railway. Traffic coming all rail from the North would also ordinarily pass through Savannah, although it might reach these points through lines farther inland. The rate is the same by all routes. The distance from Savannah to these several points by the Central of Georgia Railway is —

To Americus . . . . .	262 miles
To Dawson . . . . .	289 “
To Eufaula . . . . .	335 “
To Albany . . . . .	298 “

Traffic passing over this line from Savannah would naturally, although not necessarily, pass through Americus and Dawson in reaching Eufaula, and through Americus in reaching Albany.

The distance from Savannah by the Georgia & Alabama Railway is as follows :

To Americus . . . . .	199 miles
To Dawson . . . . .	253 “
To Albany . . . . .	276 “

Traffic from Savannah to Albany by this line would pass through Dawson. The distance from Brunswick to Albany *via*

the Plant System is 171 miles, and from Albany to Dawson by the Georgia & Alabama line 23 miles.

The short line all rail distance from New York is —

To Americus . . . . .	1036 miles
To Dawson . . . . .	1063 “
To Eufaula . . . . .	1109 “
To Albany . . . . .	1072 “

For the purposes of this inquiry Cincinnati, Nashville and Chattanooga may be treated as one group. Traffic from these points reaches the points in question through either Atlanta, Birmingham or Montgomery. The rate by all those gateways is the same and the difference in distance is not considerable. Traffic for all these points *via* the Central of Georgia Railway might come to that line at Atlanta, Birmingham or Montgomery. The Georgia & Alabama would ordinarily receive traffic for Americus, Dawson or Albany at Montgomery. The distance by that line from Montgomery is —

To Americus . . . . .	141 miles
To Dawson . . . . .	126 “
To Albany . . . . .	162 “

Traffic from these points *via* Montgomery over this line would pass through Dawson in reaching Albany. \* \* \*

New Orleans freight reaches the points in question over the defendant lines ordinarily through Montgomery, although it might come through points north of Montgomery, but in that event the distance would be considerably increased. The short line distance from New Orleans is —

To Eufaula . . . . .	401 miles
To Dawson . . . . .	447 “
To Americus . . . . .	462 “
To Albany . . . . .	483 “

The rates from all the points in question to Americus, Albany and Eufaula are arbitrarily made; that is, these points are regarded as base points. The rate to Dawson is said to be the lowest combination, which is understood to mean the lowest through rate which can be made by adding the local rate from

some base point to Dawson. It was further said in testimony that the lowest combination at the present time in most cases was that upon Eufaula.

Dawson is a town of from 2500 to 3000 inhabitants. It has one wholesale and some fifty-four retail establishments. Several important industries are located at that point.

Americus, Albany and Eufaula are all towns of from 5500 to 8000 inhabitants. They have from four to eight wholesale houses each, with industries of various kinds, two or three times as extensive as Dawson. The only two lines of railway at Americus are those of the defendants, and the same is true of Dawson. Albany has, in addition to the lines of the defendants, the Plant System from Brunswick upon the seacoast in. The only line at Eufaula and Georgetown is the defendant Central of Georgia Railway. \* \* \* \* \*

We find nothing in the commercial conditions existing at Eufaula, Americus and Albany which requires the defendants to give those towns better freight rates than Dawson or justifies them in so doing. Albany has in the Plant System an additional line of railway which is an aggressive competitor for business from New York and other Atlantic ports, and which might perhaps reasonably justify a somewhat better rate from such points.

Eufaula is situated upon the Chattahoochee river. The distance from Columbus to Eufaula is about 105 miles, from Eufaula to Alaga about 125 miles, and from Alaga to River Junction 50 miles. Some five or six different railways connect at Columbus. The Plant System, running from Brunswick through Alaga to Montgomery, crosses the river at Alaga, while the Louisville & Nashville touches it at River Junction, upon the west bank, and the Florida Central & Peninsular at Chattahoochee, upon the east bank. Counsel for the defendants stated upon the argument that he did not claim that traffic reached the points in question from points like New York or New Orleans by way of the ocean and the Chattahoochee river, but that he did claim that this river was navigable, and that there were in fact lines of steamboats upon it which brought into easy connection different towns upon the river itself.

It did not appear what the rate of freight was between Columbus and Eufaula, nor whether freight from the points in question was ever actually transported to Eufaula by way of Columbus and the river. Neither did it appear what the rate or the movement of freight was between Alaga, River Junction and Eufaula. The rates from New York, Cincinnati, and the other points in question are the same to Columbus and Eufaula, while to Alaga they are materially higher, being ordinarily somewhat higher than to Dawson. At River Junction and Chattahoochee, where rail competition again becomes possible, they are about the same as at Eufaula. No reason was given to account for the fact that river competition between Columbus and Eufaula could reduce the Eufaula rate to a level with the Columbus rate, while the same competition between Columbus, Eufaula, Alaga, and River Junction left the rates at Alaga materially above those at Eufaula, reducing them again at River Junction to the same level.

We find that there is no movement of freight, and no probability that any freight will be moved, from New York, Cincinnati, Nashville and New Orleans by water to Eufaula or any other point upon the Chattahoochee river, and that the lower rates to Eufaula are not justified by any such possible competition. There is communication for about ten months each year by steamboat between different points upon that river which affords actual means for the transportation of freight between such points.

The testimony shows this service to be about triweekly during the season of navigation. We find that this competition existing between Columbus and Eufaula does not necessitate the maintenance of the same rate at Eufaula as at Columbus. Just what relation between the Columbus and Eufaula rates that competition might establish, we have no means of determining. In our opinion it does not enter into the fixing of the present Eufaula rates.

Eufaula is situated upon the west bank of the Chattahoochee river. Georgetown is a small village just opposite Eufaula upon the east bank, and the rate to Georgetown is of necessity substantially the same as the Eufaula rate.       \*       \*       \*

Formerly rates in the State of Georgia from Atlanta to Albany were lower than rates from Atlanta to Dawson. Upon complaint of the Dawson Board of Trade, the Railroad Commission of Georgia, on September 1, 1897, ordered an adjustment of these rates so that all rates from Atlanta and all rates which based upon Atlanta were made the same to Dawson and Albany. In accordance with this order the intrastate rates are now the same from Atlanta to these two points, but the interstate rates, which are made through Atlanta or which base upon Atlanta, as all these rates both from the East and from the West in effect do, still favor Albany as hereinbefore set forth.

### *Conclusions*

It is plain that the rates under consideration create a preference against Dawson in favor of Albany, Americus and Eufaula. Americus is to the northeast, Albany to the southeast, and Eufaula to the west, of Dawson, thus surrounding it upon all sides. And yet, no matter from what point the traffic comes, whether from the North, the East, the South or the West, the rate to all these points is lower than to Dawson.

It is equally clear that this preference works to the disadvantage of Dawson as compared with Eufaula, Americus and Albany. This follows both from necessary inference and from actual testimony. The Dawson merchant, whether wholesale or retail, pays just so much more for his goods than his brother merchant in these surrounding towns, and this amount is in many cases a very considerable one. If he sells his goods to the consumer at the same price as does the merchant in Americus, Albany or Eufaula, he loses exactly so much, and is therefore prejudiced to exactly that extent. If, upon the other hand, he recoups himself for this difference in the freight rate by an increased price to his customer at or in the vicinity of Dawson, then that customer is injured to exactly the same extent.

It is found as a fact from the testimony in the case that it is impossible to do a wholesale business from Dawson in competition with any one of these three towns in territory which

legitimately belongs to Dawson, and it is also found that in the development of that center these increased freight rates are a serious drawback.

The question then remains, Is this preference an undue one? Even if it does work to the disadvantage of Dawson, is it not justifiable?

The defendants insisted in their answers that so far as Eufaula was concerned these rates were justified by water competition upon the Chattahoochee river. The answers alleged, and some attempt was made to show by the testimony of witnesses, that commodities consumed at Eufaula were actually brought from New York, Cincinnati and New Orleans by ocean or river and ocean to the mouth of the Chattahoochee, and thence carried up that river to Eufaula and other points upon it. This claim was not, however, supported by the testimony, and was formally abandoned by counsel for defense upon the argument, who stated that he did not claim upon the evidence that freight was brought by ocean to the mouth of the Chattahoochee, and from thence carried up the river to these different points like Eufaula, but he did claim that the Chattahoochee river connected different lines of railway touching it at different points, and thereby brought these lines of railway into competition with each other. The Chattahoochee river is navigable during a portion of the year, and is at the present time navigated by several small steamboats, which afford communication between the various points upon that river from Columbus to Apalachicola. That river is crossed by several railroads at Columbus, by the Central of Georgia Railway at Eufaula, by the Plant System at Alaga, and is touched by the Louisville & Nashville at River Junction, and the Florida Central & Peninsular at Chattahoochee.

The only line of railroad reaching Eufaula is that of the defendant Central of Georgia Railway Company. There are, however, several lines at Columbus which create active competition at that point, and the contention of the defendants, as stated by counsel in his argument and in his printed brief, is, that inasmuch as these two points are connected by the river, higher rates cannot be maintained at Eufaula than are maintained at Columbus.

This contention has been examined and rejected in the findings of fact. Eufaula is 105 miles from Columbus. Its water connection with Columbus is by small steamers which pass it on their way to Apalachicola three times a week for ten months in the year. No through rate *via* Columbus and the river is maintained, nor does the case show that a pound of freight ever passed from New York, Chattanooga or New Orleans through Columbus and down the river to Eufaula. There is nothing in this situation which leads to the conviction that the rates at Eufaula are appreciably affected by this river competition, — especially when this same competition, operating in exactly the same way, produces no effect at Alaga or River Junction.

Very probably the Central of Georgia Company believes it good policy to make the low rate to Eufaula, thereby developing that town and stimulating the movement of freight to and from it; but might not the same policy result in an increased movement to Dawson, and at all events has not Dawson the right, under the Act to Regulate Commerce, to insist upon equal treatment?

The remaining alleged justification for this discrimination against Dawson is railway competition or the competition of markets acting through the railways. As already said, the Central of Georgia Railway is the only line reaching Eufaula and traffic whether from the East, the West or the North must enter that town over that line. Traffic from New Orleans to Dawson would pass by the short line through Eufaula, and this might justify a lower rate to Eufaula than to Dawson. The short line distance from Nashville and Cincinnati is through Chattanooga, and is less to Dawson than to Eufaula. It is difficult to see, therefore, how the higher rate to Dawson than to Eufaula from these points can be justified, and we hold that it is not.

In case of New York and corresponding eastern cities the discrimination is even more manifest. Traffic from these points, whether by rail or by ocean, ordinarily reaches Eufaula through Savannah. In passing from Savannah to Eufaula it would naturally pass through Dawson, and, by whatever route it went, the distance to Eufaula would be greater than to Dawson. The competition at Eufaula we have already referred to. At Dawson

the Georgia & Alabama Railway is a direct competitor. We can see no possible reason why rates to Eufaula from New York and other eastern points should be lower than to Dawson, and we think that the maintenance of such rates is without justification, and is in violation of the third section.

Comparing, now, Americus and Albany with Dawson, we find that traffic from New York and eastern points reaches Americus and Dawson by the lines of both defendants through Savannah. The distance from Savannah to Americus is considerably less than to Dawson. While the distance to Albany by the lines of the defendants is as great as that to Dawson, the Plant System brings Albany nearer to the seacoast at Brunswick, and gives it an additional means of connection with New York, which would entitle it to as low a rate as Americus. We do not think, therefore, that it can be affirmed that under no circumstances should Americus and Albany receive a better rate from New York and the East than Dawson.

Traffic from Nashville, Cincinnati and Chattanooga might reach these three points over the lines of the defendants in various ways. The short line in all cases is through Chattanooga and Atlanta, and is somewhat less to Americus and somewhat greater to Albany than to Dawson. While as a transportation proposition this difference in distance is insignificant, we are not prepared to affirm that under no rate adjustment might the rates to Americus be less than those to Dawson, but we do hold that under no circumstances should the rate to Albany be lower than the rate to Dawson. In this we determine with reference to interstate rates what the Commission of Georgia has already established in respect to rates within the State.

Traffic from New Orleans for either of these three points passes by the short line through Birmingham, the distance to Americus and Albany being substantially the same, and that to Dawson somewhat less. We hold that there is no justification for a lower rate from New Orleans to either Americus or Albany than to Dawson.

It is urged that these rates have been made under stress of competition between eastern and western markets. It is said both

the East and the West demand a rate which will entitle either section to sell in this territory.

But, first, is there any reason why the market of production should demand an equality which is not also accorded to the market of consumption? If New York and Chicago demand the same right to sell in both Eufaula and Americus, may not Dawson demand the same right to purchase in either market that Eufaula or Americus has?

Then, again, what eastern and western markets ask for is equal rights. They do not demand a higher rate to Dawson than to Americus. These defendants absolutely control the situation both at Dawson and at Americus. Now, if it be true that the rate must be the same to Americus from both the East and from the West, why, nevertheless, cannot that rate be somewhat raised from all directions and the Dawson rate correspondingly lowered? The discrimination of which Dawson complains would thereby be removed and the adjustment between eastern and western markets equally preserved.

The situation complained of in this case grows out of the system of basing points, which prevails in Southern territory. For the purpose of making rates into this territory certain points are selected to which an arbitrary rate is made, the rate to surrounding points being determined by adding to these arbitrary base rates the local rates. Americus, Albany and Eufaula are basing points, and by virtue of that circumstance enjoy the low rates in question. Dawson is not a basing point. Now, granting that the carrier may make lower rates to competitive points than are made to intermediate noncompetitive points, we think it clear that the carrier is not at liberty in the selection of these basing points to determine that this town shall have the benefit of the low rate and that town shall not, when the means of competition and the conditions surrounding that competition do not materially differ. Take as an illustration Americus and Dawson. The only two railroads serving these towns are the lines of the defendants. No water competition is involved. The distances from the markets in question to these two cities are substantially the same. Now, what reason is there for giving Americus a rate of 18 cents per

hundred pounds on sugar from New Orleans, while Dawson pays a rate of 31 cents upon the same commodity?

It should be carefully noticed that the rate to Americus is an arbitrary rate. If that rate were fixed by adding to the competitive ocean rate between New York and Savannah the rate of the Georgia Railroad Commission, it might be said that the Americus rate was fixed by competition beyond the control of either of the defendants. Such is not, however, the case. The rate to Americus is less than the rate to points like Huntington, Leslie and De Soto upon the line of the Georgia & Alabama east of Americus. Why, then, is it that the rate to Americus is made lower than the surrounding rates and lower than the Dawson rate?

Counsel for the defendants stated upon the argument that it was owing to competition between the Central of Georgia and the Georgia & Alabama, and that the same competition did not operate at Dawson, although the same means of competition existed. He said that the rate to Americus was made by one line, and that the other line must accept that rate or refuse the business.

The city of Dawson, in its distress, asks of the Traffic Manager of the Central of Georgia Railway, "Why do you make the low rate to Americus and maintain the high rate to Dawson?" and the answer is, "I make the low rate to Americus because my competitor, the Georgia & Alabama Railway, over which I have no control, makes that rate, and I must either meet it or go out of the business. I do not make a corresponding rate to Dawson because my competitor, the Georgia & Alabama Railway, does not make such a rate." Thereupon the city of Dawson turns to the Traffic Manager of the Georgia & Alabama Railway, and inquires, "Why is it that you make the low rate to Americus while maintaining the high rate to Dawson?" and again the answer is, "I make the low rate to Americus because my competitor, the Central of Georgia Railway, over which I have no control, makes that rate, and I must meet it or refuse the business. I do not make the same rate to Dawson because my competitor, the Central of Georgia Railway, does not." This is

worse than Hindoo Mythology, according to which the earth was supported upon the back of a tortoise, which in turn rested on the back of an elephant. In that case the turtle at least had something to stand upon.

Now, it is pretty apparent unless the traffic managers of these lines can give some intelligent reason for making the low rate at Americus and not at Dawson, the Act to Regulate Commerce, which forbids an undue preference, is violated.

Counsel for the defendants, being pressed with this observation, said that in the present instance the justification for the lower rate at Americus was found in the fact that Americus was a larger trade center than Dawson, and therefore entitled to a better rate.

By the Census of 1890 the population was:

Of Macon . . . . .	22,746
Of Columbus . . . . .	17,303
Of Montgomery . . . . .	21,883
Of Americus . . . . .	6,398
Of Albany . . . . .	4,008
Of Eufaula . . . . .	4,394
Of Dawson . . . . .	2,284

Macon had six, Columbus three, Montgomery six, Albany three, Americus two, Eufaula one, and Dawson two railroads.

Americus with 6000 inhabitants and two railways had the same rate as Columbus with 17,000 inhabitants and three railways; Albany with 4000 inhabitants and three railways obtained the same rates as Macon with 22,000 inhabitants and six railways; Eufaula with 4000 inhabitants and one railway obtained the same rates as Montgomery with 21,000 inhabitants and six railways. Still, these defendants who make and participate in the aforesaid rate adjustments, insist that Dawson with 2000 inhabitants and two railways is not entitled to the same rate as Americus with 6000 inhabitants and the same two railways. It should be observed that this discrimination is one which fortifies itself from year to year, since the more favorable freight rate increases every day the difference in population between Americus and Dawson. It was said upon the argument, and not denied, that when the Georgia & Alabama Railway was

first completed between Americus and Savannah, Americus and Dawson did not differ materially in size.

It has been found as a matter of fact that there are no commercial or competitive conditions at Americus which entitle that city to a better rate than Dawson. Under some different adjustment of freight rates Americus might be entitled in some instances to a better rate than Dawson. So long as the present system of rate making is continued, we hold that Dawson should be given the same rate as Americus. We do not approve that system, but if the defendants put and continue it in force they cannot be heard to say that Dawson should not receive the same treatment as Americus.

In accordance with the foregoing views an order will be made directing :

First : That the Central of Georgia Railway Company cease and desist from maintaining higher rates from New York and other eastern points to Dawson than are maintained to Eufaula ;

Second : That both the defendants cease and desist from maintaining higher rates from Nashville, Cincinnati and Chattanooga to Dawson than to Albany ;

Third : That both the defendants cease and desist from maintaining higher rates from New Orleans to Dawson than to Americus or Albany ;

Fourth : That so long as the present system of rate making is adhered to, the defendants cease and desist from maintaining higher rates from any of the points in question to Dawson than are maintained to Americus.

## XVI

### RATES TO COMPETING LOCALITIES

#### THE DANVILLE, VA., CASE<sup>1</sup>

PROUTY, *Commissioner* :

\*       \*       \*       \*       \*       \*       \*

The rates complained of are divided in the complaint into four groups. First, those to Danville from northern and eastern cities; second, rates on sugar, molasses, rice, and coffee from New Orleans to Danville; third, rates from certain western points to Danville; fourth, the rate on tobacco from Danville to western points.

1. Freight from northern and eastern cities may come to Danville either all rail or by rail and water. This case does not show to what extent all rail competition exists, but it fairly appears from the testimony that the great bulk of such traffic is brought by water to Norfolk, or to some point in that vicinity which may be conveniently designated as Norfolk, and is from thence carried by rail to its destination. Taking New York as a type of these cities, the class rates to Lynchburg and Danville are as follows :

RATES IN CENTS PER 100 POUNDS, EXCEPT CLASS F, WHICH IS PER BARREL

FROM NEW YORK TO	CLASSES												
	1	2	3	4	5	6	A	B	C	D	E	H	F
Lynchburg, Va., water and rail . . . . .	54	47	38	25	22	18	18	22	18	18	22	25	36
Danville, Va., water and rail . . . . .	66	58	47	33	29	24	24	27	24	22	29	33	46

<sup>1</sup>Decided February 17, 1900. Interstate Commerce Reports, Vol. VIII, pp. 409-442. Resumed in *Ibid*, Vol. VIII, pp. 571-583. It is now on appeal before the Supreme Court.

The map on the following page gives a general idea of the location of the points in question and the lines of transportation involved.

This traffic comes by boat to Norfolk. From Norfolk the Southern Railway leads directly to Danville, distance 205 miles. The short line from Norfolk to Lynchburg is by the Norfolk & Western 204 miles. The distance by the Chesapeake & Ohio is 231 miles. Lynchburg is upon the Southern road, 66 miles north of Danville, and a third route from Norfolk to Lynchburg is by the Southern to Danville 205 miles and from Danville to Lynchburg 66 miles, making 271 miles in all. Lynchburg is upon the main line of both the Chesapeake & Ohio and the Norfolk & Western.

There are three lines of railway leading north and east from Danville, which were formerly independent, but are now all controlled by the Southern. These are the Atlantic & Danville to Norfolk, the Richmond & Danville to Richmond, and the Lynchburg & Danville to Lynchburg.

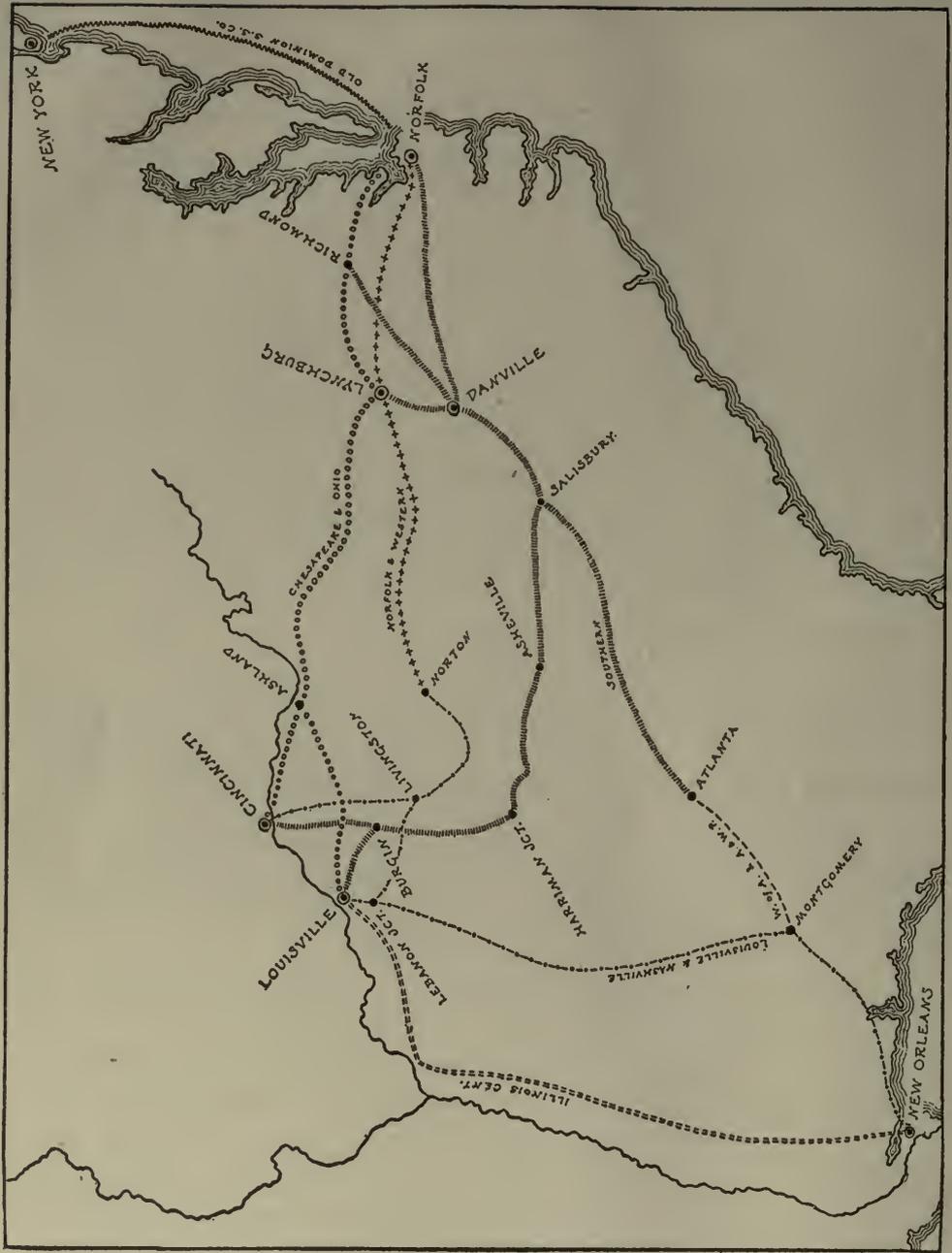
\* \* \* \* \*

Rates from eastern cities to Richmond are much lower than to Lynchburg, due probably to the fact that Richmond has by the James river direct water communication with the Atlantic seaboard. All other rates appear to be uniformly the same to Norfolk, Richmond and Lynchburg, certainly to Richmond and Lynchburg. For the purpose of avoiding unnecessary repetition, only the rate to Lynchburg will be given.

2. The rates on sugar, molasses, rice, and coffee from New Orleans to Lynchburg and Danville are as follows :

FROM NEW ORLEANS TO	SUGAR	MOLASSES	COFFEE	RICE
Lynchburg . . . . .	32	26	40	32
Danville . . . . .	43	37	51	43

The Southern alone carries this traffic into Danville, but it may bring it either from the North *via* Lynchburg or from the South. The Chesapeake & Ohio, Norfolk & Western,



and Southern all compete for this same traffic to Lynchburg, Richmond, and Norfolk. Such traffic may leave New Orleans by various routes. It may reach the Southern road over either the Louisville & Nashville, the Queen & Crescent, or the Illinois Central, and it may also reach the Chesapeake & Ohio and Norfolk & Western over either of those lines. In going by the Southern to either Lynchburg or Richmond it passes through Danville, by whatever route it starts.

\* \* \* \* \*

3. Rates from Cincinnati and Louisville are the same to Lynchburg and also to Danville. Those rates, together with the rates from Chicago and East St. Louis, are given below :

RATES IN CENTS PER 100 POUNDS, EXCEPT CLASS F, WHICH IS PER BARREL

	CLASSES															
	1	2	3	4	5	6	A	B	C	D	E	H	F	Grain	Flour	Packing-House Products
<i>From Louisville, Ky., and Cincinnati, O., to</i>																
Lynchburg, Va. . . . .	62	53½	40½	27½	23	18½	—	—	—	—	—	—	—	16	16	23
Danville, Va. . . . .	68	56	45	33	28	21	19	22	22	21	30	30	—	21	22	22
<i>From Chicago, Ill., to</i>																
Lynchburg, Va. . . . .	72	62	47	32	27	22	—	—	—	—	—	—	—	19	19	27
Danville, Va. . . . .	108	90	70	50	43	33	31	39	34	31	43	45	68	31	34	39
<i>From East St. Louis, Ill., to</i>																
Lynchburg, Va. . . . .	84	72½	55	37½	32	26	—	—	—	—	—	—	—	22½	22½	32
Danville, Va. . . . .	106	89	70	50	43	33	28	39	34	29	43	45	68	29	34	39

The Southern Railway reaches in effect with its own iron Louisville and Cincinnati from Lynchburg and Danville. Traffic from either of these cities to Lynchburg by that route would necessarily pass through Danville. The Chesapeake & Ohio also reaches both Louisville and Cincinnati. The Norfolk & Western by its connections takes traffic from these two cities. The distances by the several routes are as follows :

From Cincinnati

To Lynchburg

*via* the Chesapeake & Ohio 474 miles ;

*via* the Norfolk & Western 510 miles ;

*via* the Southern 742 miles.

To Danville

*via* the Southern 676 miles.

From Louisville

To Lynchburg

*via* the Chesapeake & Ohio 537 miles ;

*via* the Norfolk & Western 551 miles ;

*via* the Southern 722 miles

To Danville

*via* the Southern 656 miles.

\* \* \* \* \*

Traffic from Chicago, St. Louis and other parts of the West and Southwest passes through Cincinnati and Louisville, reaching those points by various lines. It might be expected that the same difference in rate would prevail between Lynchburg and Danville in case of traffic originating beyond and passing through Cincinnati and Louisville as in case of traffic originating at those cities, but an inspection of the rates above given shows that the discrimination against Danville is very decidedly greater with freight starting at St. Louis or Chicago than it is with the same freight when it originates at Louisville or Cincinnati. The reason for this will be stated later.

4. The rate on leaf tobacco from Danville to Louisville is 40 cents per hundred pounds, while the rate from Lynchburg and Richmond to the same point is 24 cents per hundred pounds. The Southern road makes this rate and carries this traffic from Richmond, Lynchburg and Danville, that from Richmond or Lynchburg passing through Danville *en route* for Louisville. Tobacco rates from Danville to other western destinations are correspondingly higher than those from Richmond and Lynchburg.

All the rates above referred to are made and participated in by the Southern Railway. In case of all those rates, no matter from what direction the traffic comes, it is carried through Danville to Lynchburg or Richmond. The complainants insist that

by thus making the lower charge to the more distant point the defendant violates the 4th section and is also guilty of an unjust discrimination under the 3d section.

The defendant justifies the difference in rates between Danville upon the one hand and Richmond and Lynchburg on the other by showing the existence of competitive conditions at the two last-named points. The claim, briefly stated, seems to be this:

Baltimore is an important commercial center, and is so situated and has such railroad connections that it competes both in domestic business and as a port of export and import with other commercial centers upon the Atlantic seaboard, like New York, Philadelphia, etc. The lines of railway connecting these centers with the West are strong trunk lines, and are so situated that competition between them has been unusually active. The Erie Canal to New York has been and is an important factor in fixing the Baltimore rate, especially the export rate, which has generally been the same as the domestic rate. From all these causes it had resulted, previous to the construction of the Chesapeake & Ohio Railway, that the Baltimore rate from almost all directions was an extremely low one.

When the Chesapeake & Ohio Railway was completed from Cincinnati through to Richmond and Norfolk, these points were put into communication with the West in the same manner that Baltimore was by its lines of railway, and that company at once adopted the policy of making its rates from the West to Richmond and Norfolk the same as the Baltimore rate. This was probably done for two reasons: First, to enable Richmond and Norfolk to compete with Baltimore for the wholesale trade in intermediate territory; second, that the Chesapeake & Ohio might conduct through the port of Norfolk an export and import business.

After the passage of the Act to Regulate Commerce, the Chesapeake & Ohio, under its interpretation of the 4th section of that Act, applied no higher rate to intermediate points than was applied to Norfolk upon business moving east, and, in most cases, to Cincinnati upon business moving west; and this had

the effect of giving intermediate points as low a rate as Norfolk or Cincinnati. The original line of the Chesapeake & Ohio did not pass through Lynchburg, but about 1886 it acquired a line of railway leading from Clifton Forge through Lynchburg to Richmond, and the effect of this was to give Lynchburg the Richmond rate.

Still later, when the Norfolk & Western Railway was completed through Lynchburg to Norfolk, that company was obliged to adopt those rates of the Chesapeake & Ohio to Richmond, Lynchburg and Norfolk which were then in effect. It also placed the same construction upon the 4th section which the Chesapeake & Ohio, together with most northern roads, had, and charged no more to the intermediate than to the distant point in either direction. This gave all stations upon the main line of the Norfolk & Western the same rate as Norfolk. The Southern came into this field of competition last of all. When that company determined to compete for this traffic it simply met the rates of the Chesapeake & Ohio and the Norfolk & Western which were already in effect, and this is all it has ever done. It has not reduced the Richmond or Lynchburg or Norfolk rate. It has not raised the Danville rate. It has in no way intensified the discrimination against Danville, but has simply left the situation where it found it. By entering this competitive field it did not injure Danville; to withdraw from it would not benefit Danville. The business is a source of some profit to the Southern Company; therefore that company should be allowed to continue in it.

The above is the claim of the Southern Railway Company defendant, as we understand it. The facts stated in that claim are for the most part correct. The Baltimore rate, owing to various competitive influences, was, previous to the construction of the Chesapeake & Ohio Railway, an extremely low rate. We find from the testimony in this case that the Chesapeake & Ohio determined to place Richmond and Norfolk upon an equality with Baltimore in the matter of rates, and that subsequently, upon the passage of the Interstate Commerce Act, it so interpreted the 4th section of that Act as to give to all intermediate

points as low a rate as the more distant point. When the Norfolk & Western entered Richmond, Lynchburg and Norfolk it found this relation in rates in effect, and that relation has ever since been maintained. The Southern was the last competitor to enter this territory, and we find upon the testimony of Mr. Culp, its Traffic Manager, that the policy of that line has been to meet at Richmond, Lynchburg and Norfolk the rates made by other lines.

We do not find, as claimed by the Southern Railway, that the Baltimore rate has fixed the Richmond and Norfolk rate. Upon the other hand, these two rates have mutually interacted the one upon the other, and while the Baltimore rate has been subject to reductions by influences from the north as well as from the south, we think that the Norfolk rate may have operated to reduce the Baltimore rate quite as frequently as the reverse. Neither do we find, as claimed by this same defendant, that the Chesapeake & Ohio has been responsible all along for the Richmond, Lynchburg and Norfolk rates, and that the Norfolk & Western upon entering the field, and subsequently the Southern, have simply met those rates. These three lines of railway are in competition for this business, and there is no evidence which satisfies us that any one of them has been in the past, or will be in the future, entirely responsible for fluctuations in the competitive rates. \* \* \* \* \*

The Southern Railway Company was organized in July, 1894, for the purpose of effecting the consolidation of certain railway properties. As a result of that consolidation that company almost or quite from the first owned a through line from the Ohio river to Norfolk, as well as to Richmond and Lynchburg. Previous to this time the roads composing the Southern had not competed for western business to these three points, but the Southern decided at once to become such competitor, and has been since.

The lines of railway composing the Southern had, previous to the consolidation, formed a through route for the transportation of merchandise from New Orleans to Richmond, Lynchburg and Norfolk. It does not very clearly appear to what extent

such lines north of Danville had engaged in traffic between northern cities and Lynchburg.

What has been said sufficiently states the competitive conditions existing at Richmond and Lynchburg as compared with Danville. There is, however, still another phase of this situation which should be especially referred to.

It has been already seen that the Chesapeake & Ohio, the Norfolk & Western, and Southern all compete for business from Louisville and Cincinnati to the three cities in question. It has been further noticed that the difference in rates on traffic originating north of the Ohio river is much greater than in case of traffic originating at Cincinnati & Louisville, although the competition between these rival lines is through Cincinnati & Louisville. The reason seems to be this:

In the making of rates between the West and the Atlantic seaboard the New York-Chicago rate is taken as a base.<sup>1</sup> The rate from Chicago to Baltimore is a certain differential below that from Chicago to New York. Rates from various sections in the West to New York are a percentage of the Chicago rate. Thus, Louisville is a 100 per cent point, and the rate from there to New York or Baltimore is the same as Chicago. Cincinnati is an 87 per cent point, and the rate from Cincinnati would be 87 per cent of the rate from Chicago to Baltimore. Now, Richmond and Lynchburg take the Baltimore rate, and upon the rule above stated the rate from Cincinnati to Richmond and Lynchburg ought to be less than the rate from Louisville. It seems, however, that at some time in the past the lines leading from Louisville insisted upon making the same rate from that city as from Cincinnati. It further appears that the same lines, working probably through Southern territory, insisted that the Danville rate should approach quite nearly the Lynchburg rate on Louisville and Cincinnati business.

The rate from Chicago to Danville is made by adding to the Louisville and Cincinnati rate the local rate from Chicago to those cities; that is, traffic which has come from Chicago to Louisville pays exactly the same rate from Louisville to Danville

<sup>1</sup> Cf. p. 314, *supra*.

as does traffic which originates at Louisville. The local first-class rate from Chicago to Louisville is 40 cents, which, added to the first-class rate from Louisville to Danville, makes a through rate of \$1.08; but the rate from Chicago to Baltimore, first class, is 72 cents, and since Lynchburg takes the Baltimore rate the rate from Chicago to Lynchburg is also 72 cents. This rate of 72 cents is divided, from Chicago to the north bank of the Ohio river 23 cents, and from the river to Lynchburg 49 cents.

The testimony was that Danville merchants bought largely in the markets of Chicago and St. Louis, and but little in those of Cincinnati and Louisville, so that the Chicago and St. Louis rates are the ones which especially concern that city.

It will be seen from an examination of the foregoing facts that through rates to and from all directions, whether north, east, south, or west, are higher to Danville than to Richmond and Lynchburg. The complainants insist that this discrimination in favor of the two cities last named is most detrimental to the material interests of Danville. \* \* \*

It appears from the testimony that it has been possible to ship tobacco from Danville to Richmond, store it for a time at Richmond, and send it along to market upon the same rate that it could have been shipped from Danville itself in the first instance, although the first carriage from Danville to Richmond was by the Southern, and the final shipment from Richmond may have passed back through Danville over the same line.

The complainants insist that not only does this discrimination in freight rates cripple the business industries already located at Danville, but that it prevents the establishment of new industries at that point. . . .

The complainants further insist that, in addition to the specific injuries previously pointed out, the general effect is most baleful. This, as we have often remarked in previous cases, must also be true. The cost in Danville of everything into which the freight rate enters is more than in the favored localities, and unless there are some compensating circumstances the effect of this must be to decrease the value of property and to depress all kinds of business in that city.

Twenty years ago Danville was a town of some 3000 inhabitants. To-day it is a place of nearly 20,000. Most of this growth had taken place previous to the last ten years. In the whole period it has developed more than Lynchburg, but it is not at the present time as thriving as its rival. It will be remembered that Lynchburg only received the Richmond rate when the Chesapeake & Ohio obtained possession of the Richmond & Allegheny Railroad, about 1886. \* \* \*

The Southern Railway was organized in 1894 for the purpose of consolidating certain railroad properties, and it has since its organization, from time to time, taken on additional properties. The lines which it now controls into Danville were originally built and operated by independent companies. . . . In 1886 or thereabouts the Richmond & Danville Company leased the Virginia Midland, which it continued to operate from then on until absorbed by the Southern. The complainants insist that previous to the lease of the Virginia Midland and while these roads were in competition for business, Danville enjoyed substantial equality in freight rates with Lynchburg and Richmond.

The Traffic Manager of the Southern Railway testified that he had been familiar with the rate situation in this vicinity since 1875, and that during that time rates had been uniformly higher to Danville than to either Richmond or Lynchburg. . . . Generally speaking the difference was greater than now exists in amount and perhaps equally great in percentage. Since 1887 the published rates to Danville have been higher by about the present degree than to Richmond and Lynchburg.

While this is true of the established rate, the testimony of numerous witnesses introduced by the complainants leaves as little doubt, and we find, that previous to 1886 the actual rate paid by Danville was not materially higher than that of its competitors, Lynchburg and Richmond. It is well understood that published rates previous to 1887 were not observed. Special rates, rebates, and all kinds of concessions to shippers were in those days the rule, not the exception; and we are satisfied that merchants at Danville then obtained much better rates in comparison with their competitors at Richmond and Lynchburg

than they do to-day. It is not probable that these rates were in all cases equal. The average was probably higher, but the effect of any difference against Danville was not felt as it now is, for the reason that business is now transacted upon smaller margins than it then was. From about 1886, when there ceased to be effective competition, the rates were better maintained, and since then the business interests of Danville have suffered more from the effect of these discriminations.

The defendant Southern Railway insisted that, if compelled to reduce its rates at Danville, it must make corresponding reductions throughout its intermediate territory, and that the effect of this would be to seriously cripple its revenues. An examination of rates from the points in question to other points upon the lines of the Southern Railway reveals the fact that those rates are usually higher at the present time than the Danville rate. Rates from northern and eastern cities are considerably higher to Greensboro and Raleigh than to Danville, being first class from New York to Danville 66 cents, Raleigh 84 cents, and Greensboro 84 cents. The same is true of rates from New Orleans and from the West. Thus, the rate on molasses is 37 cents to Danville against 47 cents to Raleigh and 44 cents to Greensboro. The first-class rate from Chicago is \$1.08 to Danville, and \$1.33 to Raleigh and Greensboro. Flour from Chicago takes a rate of 19 cents to Lynchburg, 34 cents to Danville, and 43 cents to Raleigh and Greensboro. This is true with respect to rates from all directions in Southern Railway territory south and southwest of Danville. Traffic for Raleigh and Greensboro would not pass through Danville ordinarily, and need not in any event, but these towns are in the vicinity of Danville, and are in competition with that city in much the same way that Danville competes with Lynchburg; and there are many instances in which traffic from New Orleans and from the West bears a higher rate to points which are strictly intermediate than to Danville.

The rates of the Southern Railway are apparently adjusted largely upon the "basing point" system, which so generally prevails in territory south of the Ohio and east of the Mississippi

rivers. This system has been often referred to and commented upon by the Commission, and need not be gone into here. As is well understood, the central idea of that system is the higher intermediate rate. There is nothing in this case to show what the effect upon the revenues of the Southern road would be if the rule contended for by the complainants were applied to all this intermediate territory, and those rates reduced to the level of Lynchburg and Richmond. It is certain, however, that such an application of the 4th section would result in a most sweeping reduction of rates, and would very seriously impair the income of the Southern Railway unless the volume of traffic was very materially increased; it might even go to the length stated by the Traffic Manager of that company, of entirely eliminating the profits accruing from the transaction of business in that territory.

\* \* \* \* \*

### *Conclusions*

\* \* \* \* \*

As stated in the *St. Cloud Case*,<sup>1</sup> the question for this Commission is one of fact arising upon the whole situation. We are to consider the interest of the producing market, the consuming market and the carriers, and upon the whole to determine whether there is such a dissimilarity of circumstances and conditions as justifies the rates in question. In the case before us we have nothing to do with the market of production, for, so far as the testimony shows, there is no question as to what market should supply Lynchburg, Danville and the surrounding localities, nor what market should receive the products of these localities. It is simply a question of the avenues by which supplies shall be transported to and products carried from this territory, or, in other words, of competition between carriers serving the same markets.

We have held in complaints under the 4th section, that a case for the complainant was made out by the mere showing of the higher rate to the intermediate point, and that the defendant was thereupon required to justify these rates. In the present

<sup>1</sup> *Vide*, p. 269, *supra*.

instance the complainant has gone further, and has shown in the first instance the injurious effects which these discriminations inflict upon Danville. We may follow the same order, and inquire first whether Danville is actually injured, and to what extent, by the adjustment of rates which is complained of.

The testimony establishes as a matter of fact that the burden thereby imposed upon the complainants is a most serious one. The facts in this connection have been already stated and need not be repeated here. . . . The case appeals to us more strongly, perhaps, for the reason that Danville is a larger community than usually prefers complaints of this sort. It cannot be said to be a little village which has no right to expect to do business, for it is a city which in the past has done business and whose people desire to continue it. The complainants have clearly established the injurious effects which result to them from the obnoxious rates.

It does not follow from this alone that the rates in question are unjustifiable. Deserted warehouses and depreciated values are always sad objects to contemplate, but they often occur in the development of society; and if the avenues of commerce have so changed as to dry up the prosperity of this particular locality, the Interstate Commerce Law cannot grant relief, for that law, as has been often said, was not intended to hamper, but to promote, trade and commerce. We turn, therefore, to the justification of the defendant, for the purpose of ascertaining whether the hardship which is inflicted upon these complainants is, under all the circumstances, a reasonable one. As stated by the defendant that justification is this: Owing to competitive conditions the Baltimore rate from almost all directions is an extremely low one. When the Chesapeake & Ohio Railway was completed from Cincinnati to Norfolk the management of that property determined to put Richmond and Norfolk upon an equality with Baltimore. Subsequently, by the acquisition of the Richmond & Allegheny Railroad, Lynchburg came to be on the main line, and was given the benefit of the same rate. When the Norfolk & Western Railway was constructed to Lynchburg and Norfolk it found in effect and adopted this

system of rate making. The Southern came last of all into the field of competition. It simply accepted the rates which it already found in effect at Lynchburg, Richmond and Norfolk. Its rate to Danville is a reasonable one. The rate to Lynchburg is unreasonably low, but yields to the Southern Company something above the actual cost of movement. By handling this traffic through Danville the rate to Danville is not changed. Danville is not therefore injured, and the Southern Railway is to an extent benefited.

The facts have been already stated in our findings of fact. The Baltimore rate is an extremely low one. The Chesapeake & Ohio did determine to put Richmond, Lynchburg and Norfolk upon the same basis with Baltimore. The Norfolk & Western did adopt the same policy. The Southern Railway did enter this competitive field last, and did at the outset meet the rates which it found in effect by the Chesapeake & Ohio and the Norfolk & Western. It is not true that the Baltimore rate has during all the time since the completion of the Chesapeake & Ohio determined the Richmond rate. Upon the contrary, the Baltimore and the Norfolk rate have mutually affected each other. Competition has at times forced down the Norfolk rate below that of Baltimore, and at times *vice versa*. The resulting rate has always been a low one as compared with other rates. It cannot be found as a fact that the Southern Railway has simply accepted the rates named by its competitors.

The argument urged by the defendant is not new. It is the theory upon which every traffic manager justifies in every case the making of the lower rate to the more distant point. If proof of the facts upon which that deduction rests were a sufficient justification, there are few, if any, violations of the 4th section which could not be justified.

That argument omits, however, one most important factor, namely, the interest of the public. This, as well as the interest of the carrier, must be considered. The Southern road insists in this case that Danville would not be benefited if it should withdraw from Richmond, Lynchburg and Norfolk business. But this cannot be affirmed. The desire to transact business at

the more distant point is a continual inducement to the Southern road to obtain an equitable adjustment of rates between the intermediate and the more distant point. If the Southern can only do business at Lynchburg by procuring a just relation of rates between Lynchburg and Danville, it becomes for the interest of the Southern road to secure that adjustment of rates, and it will use all its enormous power to that end. To-day the Southern Railway constructs its Danville tariffs with reference to its own interest alone. An order requiring a proper relation of rates between Danville and Lynchburg as the condition of transacting business at Lynchburg compels that company to consider the interest of Danville as well as its own. \* \*

In considering this case it may be well to refer separately to the rates from each direction involved, and first the rates from New York.

The transportation from New York to Norfolk is the same whether traffic is destined to Lynchburg or Danville. The distance from Norfolk to Danville is 205 miles by the Atlantic & Danville Railway, which is the direct line. For the year ending June 30, 1899, that road was operated by an independent company, and during that year its gross receipts were \$2083.97 per mile, and its operating expenses 71.11 per cent of its gross earnings. . . .

As a part of the Southern system that line will undoubtedly carry much more traffic from Norfolk to Danville than it did as an independent line. Still, it can hardly be said that the above divisions afford an excessive return for the service rendered. Whether the entire rate from New York be considered, or the rail division from Norfolk to Danville, the present rate can hardly be said to be extravagantly high; neither is it extravagantly low.

There are three lines of railway by which this traffic can reach the city of Danville: The Atlantic & Danville, from Norfolk, the Richmond & Danville from Richmond, and the Lynchburg & Danville from Lynchburg. Previous to the acquisition of the Atlantic & Danville by the Southern, that company, as we understand the testimony, carried traffic from Norfolk to Danville by a fourth route, which was from Norfolk to Greensboro,

270 miles, and from Greensboro to Danville, 48 miles. If these routes were all independent lines, and all competing bona fide without agreement among themselves, as to the Danville rate, we think the effect must be, and ought to be, to give Danville a rate not much above that of Lynchburg.

As we have already seen, the direct line from Norfolk to Lynchburg is by the Norfolk & Western, and the distance, 204 miles, is almost identical with the short line distance to Danville. Lynchburg is upon the main line of both the Norfolk & Western and the Chesapeake & Ohio, whose location is such, and the volume of whose traffic is such, that they can perhaps afford to carry freight at a lower price than the Danville lines. On the whole we are impressed that legitimate competitive conditions would entitle Lynchburg to a somewhat lower rate than Danville on traffic from the North.

We turn now to rates from New Orleans. It has been seen that the Norfolk & Western, the Chesapeake & Ohio, and the Southern all carry this traffic into Lynchburg. Such traffic generally leaves New Orleans by either the Illinois Central, the Queen & Crescent, or the Louisville & Nashville. There are, however, numerous intermediate routes over which such traffic may pass. All traffic delivered by the Southern necessarily passes through Danville and 66 miles beyond to Lynchburg. The shortest line from New Orleans to Lynchburg is *via* the Louisville & Nashville to Montgomery, the Atlanta & West Point to Atlanta and the Southern to Lynchburg, distance 971 miles. The distance by this line to Danville is 905 miles. The shortest line by the Norfolk & Western, of which the Southern is not a part, is from New Orleans to Norton, Va., *via* the Louisville & Nashville, and from Norton to Lynchburg *via* the Norfolk & Western, the distance here being 1265 miles. The shortest route by the Chesapeake & Ohio is 1326 miles, being from New Orleans over the Illinois Central to Louisville, and from there by the Chesapeake & Ohio. As will be seen by referring to the findings of fact there are several routes by which the distance is less than 1265 miles, in all of which the Southern is an important link.

Taking now, for the purposes of comparison, the short line *via* the Southern, the short line *via* the Norfolk & Western, and the short line *via* the Chesapeake & Ohio, we find that sugar in car loads is carried from New Orleans to Lynchburg at the following rates per ton per mile :

*via* the Southern 6.59 mills ;  
*via* the Norfolk & Western 4.91 mills ;  
*via* the Chesapeake & Ohio 4.82 mills.

Upon the same traffic to Danville the Southern receives 9.49 mills.

Ordinarily the initial carrier makes the rate. In this case the Louisville & Nashville, Queen & Crescent, and Illinois Central, being the initial carriers, are without doubt largely responsible for the rate to Lynchburg, while the Southern, being the only carrier which enters Danville, can control the rate to that point. In fixing the rate the initial carrier would consult its own interest by obtaining as long a haul as possible. By the Norfolk & Western route, above referred to, the Louisville & Nashville obtains a haul of 1003 miles from New Orleans to Norton, while the Norfolk & Western has a haul of only 262 miles. Other things being equal, the Louisville & Nashville would carry New Orleans traffic for Lynchburg by this route. These competitive conditions, this bidding for business *via* the different lines entering Lynchburg, have undoubtedly tended to force down the Lynchburg rate.

While we are hardly prepared to say upon the testimony in this case that the rate from New Orleans to Danville upon sugar, molasses, coffee and rice is unreasonable when considered in and of itself, we are strongly of impression that it may be. We certainly do not find that it is reasonable, and in view of the rates in which the Southern road participates by various routes, and the rates which its competitors make upon this same traffic by other lines, those rates must be grossly unreasonable.

So far as the testimony shows, and so far as we have any understanding of the matter, here is no competition of contending markets. With respect to this traffic from New Orleans,

Lynchburg is upon no great thoroughfare which in its struggle for competitive business beyond gives to it an unduly low rate. There is nothing except the mere competition between several different lines of railway, and yet that competition has brought it about that merchandise is carried for the inhabitants and merchants of Lynchburg at an average rate per ton per mile of just about one half what the Southern receives for the same service when rendered for the inhabitants and merchants of Danville, but 66 miles distant, and that, too, although the Southern carries this traffic through Danville under exactly the same physical conditions for Lynchburg as when it is destined for Danville itself. We very much question whether in serving these two competitive localities competition between carriers should be allowed to have any such unreasonable and unjust effect as this.

Rates from the West to Danville and Lynchburg exhibit some peculiar features. It will be remembered that, treating the Cincinnati, New Orleans & Texas Pacific as a part of the Southern system, both the Chesapeake & Ohio and the Southern reach Louisville and Nashville over their own lines. The Norfolk & Western reaches both these points by its connections. These three lines, therefore, are competitors for traffic between Cincinnati and Louisville on the west, and Lynchburg and Danville on the east. By the Southern route traffic passes through Danville to Lynchburg; by the two other routes it passes through Lynchburg to Danville.

By referring to the findings of fact it will be seen that the distance by the Southern to Danville is considerably greater than by either the Norfolk & Western, or the Chesapeake & Ohio to Lynchburg. It will also be remembered that both the Norfolk & Western and the Chesapeake & Ohio transact a large through business both for export and domestic consumption *via* Lynchburg, and that Lynchburg takes the same rate which is granted to all this competitive business. An examination of the rates themselves in effect from Cincinnati and Louisville to Danville and Lynchburg, respectively, shows that there is no very extravagant difference in favor of Lynchburg upon class rates. The

widest difference seems to be made upon grain and flour. We hardly think it can be said that the rates from these points to Danville are in the main unreasonably high when considered of themselves, if it is possible to measure a rate by any such standard.

Traffic from Chicago, St. Louis and other points similarly situated comes, or may come, to these three lines at either Cincinnati or Louisville, and the rate through either one of those points must determine the rate through all other points. The distance from points beyond Louisville and Cincinnati by these competitive lines is the same respectively as from those two cities, and the cost of movement is substantially the same whether the traffic originates at Louisville or Cincinnati, or whether it comes to these lines at those points. We might naturally expect, therefore, that the same difference in rate to Lynchburg and Danville would obtain in the case of traffic from beyond as in case of traffic which originates at Louisville or Cincinnati. Such is not, however, the fact. Traffic originating at Chicago, St. Louis, and all corresponding territory takes a much lower rate proportionately to Lynchburg than does Cincinnati and Louisville traffic. Thus, the first-class rate from Cincinnati is to Lynchburg 62 cents, to Danville 68 cents, a difference of but 6 cents per hundred pounds. From St. Louis the same class rate is to Lynchburg 84 cents, to Danville \$1.06, a difference of 22 cents per hundred pounds. From Chicago the first-class rate to Lynchburg is 72 cents, while the corresponding rate to Danville is \$1.08, a difference of 36 cents against Danville. In case of those commodities which are most consumed the difference is even more marked. Thus, the flour rate from Cincinnati to Lynchburg is 16 cents, and to Danville 22 cents per hundred, a difference of 6 cents; while from Chicago it is 19 cents to Lynchburg, and 34 cents to Danville, a difference of 15 cents. Since Danville desires to purchase largely in the markets of St. Louis, Chicago, and corresponding territory, it follows that these rates are the ones in which that community is particularly interested.

The reason for this discrimination has been fully stated in the findings of fact. It arises out of the rule that Lynchburg

shall take the Baltimore rate. The Danville rate is in all cases made by adding the local rate from Chicago to the Ohio river to the Cincinnati or Louisville rate from the Ohio river, while the Lynchburg rate is determined by the Baltimore rate from the locality in question. On traffic from Chicago to Lynchburg the carrier from Chicago to the Ohio river receives 23 cents, and the carrier from the Ohio river to Lynchburg 49 cents. On the same traffic destined to Danville the carrier north of the Ohio river receives 40 cents, while the carrier from that river to Danville receives 68 cents. If the traffic, whether originating at Cincinnati or Louisville, reaches Danville *via* Lynchburg, the Southern exacts its full local rate of 36 cents. The divisions above stated are those of the first-class rate, but other rates are divided upon the same basis. Broadly stated, carriers from Chicago and St. Louis prorate upon business to all points on the Norfolk & Western Railroad. To all points in territory south of the Norfolk & Western Railroad there is no prorating, but each carrier receives the sum of its locals to and from the Ohio river. \* \* \* \* \*

This system of rate making into Southern territory by adding together the sums of the locals to and from the Ohio river is not before us as a general scheme in this case. We are only considering it with reference to the city of Danville, and with reference to that city we hold it to be utterly unreasonable. Danville is situated but 66 miles south of Lynchburg. It is in competition with Lynchburg. Now, these carriers have no right to put in effect a system of rates which prohibits the city of Danville from transacting business in competition with the city of Lynchburg. Whether or not they may make their rates into Southern territory in this manner is something about which we express no opinion, but if they desire to do that they must so adjust their rates in passing from Norfolk & Western to Southern territory as not to annihilate the city of Danville. They have no right to put that locality between the upper and nether millstone of these two schemes of rate making. Rates to Danville must be adjusted with relation to rates to competitive localities like Lynchburg, and the carriers from the point of

origin to destination should prorate in these rates if they participate in either Lynchburg or Danville business.

Lynchburg is situated but 66 miles from Danville. Danville rates from most western territory and from New Orleans base upon Lynchburg; that is, they are made by adding to the Lynchburg rate the Southern local rate from Lynchburg to Danville. We do not think that the rate to Danville upon this through business from New Orleans or from the West ought to be constructed upon that basis. Whatever competitive conditions may be at Lynchburg, Danville to some extent should enjoy the benefit of those competitive conditions by reason of its proximity, for by reason of that same proximity it is thrown into competition with Lynchburg.

This traffic is in no sense local traffic, but is in every sense through traffic. There is no loading at Lynchburg, no billing at Lynchburg, no soliciting of traffic at Lynchburg. It is in fact a through shipment, and to some extent Danville should enjoy the benefit of that fact. We do not mean that the Southern Railway may not exact from the Norfolk & Western or the Chesapeake & Ohio a division upon this business when it moves by way of Lynchburg, which is equal to its full local rate. Perhaps it may do that in the protection of its own line. About that we are called upon to express, and we do express, no opinion. What we say is that in determining the Danville rate, the Southern Railway, which dominates that situation, must recognize the fact that this business is through business upon which Lynchburg, a competitor of Danville, enjoys a low through rate, and upon which Danville itself is entitled to a through rate.

If the various railroad properties leading from Danville north to the line of the Norfolk & Western and Chesapeake & Ohio were operated to-day by their original builders there would be three independent avenues by which these northern roads could obtain access to the city of Danville. These lines, however, have all been absorbed by one corporation. That corporation controls every line leading to the city of Danville, with the unimportant exception of the Danville & Western, and by virtue of that fact it is able to exact, as it does, its full local rate from Lynchburg to Danville.

As already remarked, the Southern Railway is the consolidation of numerous independent railroad properties. It has become through this process of growth a great railroad system embracing to-day a mileage of more than 6000 miles. In this operation properties which were worthless have been put together to form a valuable whole. The physical condition of those properties has been enormously improved. The facilities afforded to their patrons have been increased. The whole territory involved must be benefited by this amalgamation, so far as its physical service is concerned.

This enterprise is a perfectly legitimate one. The men who have conceived and executed it are entitled to a fair return upon the money which has been actually invested in it. They are entitled, in addition, to a reasonable profit upon the ability to conceive and execute a project of this sort. They have no right to exact a return upon an extravagant capitalization, but whatever has honestly and in good faith and reasonably gone into this enterprise should be protected.

On the other hand, the people in this territory are entitled to protection. The Southern Railway, by virtue of the fact that it has obtained possession of and now controls the avenues of communication by rail between the city of Danville and the outside world, has no right to deprive that community of the competitive advantages which the enterprise of its citizens in one way or another had secured, and upon the strength of which business conditions have grown up. It must recognize the geographical position and the commercial importance of the city of Danville.

We fully realize the serious consequences to the Southern Railway of any reduction in its Danville rate, or in corresponding rates to other points. Such reduction means a deduction from its net revenues. As applied to the volume of business handled at Danville alone, such reduction must be very considerable, — it cannot from the testimony in this case be determined just how considerable.

Upon the other hand we think that as an offset to this the Southern would obtain some additional revenue by virtue of the increased amount of business at Danville. The ability to do

business at that point depends largely upon the freight rate. The amount of traffic handled in and out of Danville is determined by the volume of business transacted there, — by the prosperity of the community. Whether the Southern Railway shall reduce its rates to the city of Danville with the hope of thereby stimulating an additional flow of traffic is purely a question of policy with which this Commission has ordinarily nothing to do ; but when we are commanded to consider the interests of all parties, we must consider what the probable effect of our order will be upon the carrier interested. In this view we are bound to inquire what effect it will have upon the volume of traffic, and the consequent increase or decrease of revenue. Any development at Lynchburg is necessarily shared by the Southern with the Norfolk & Western and the Chesapeake & Ohio, whereas any corresponding development at Danville belongs to the Southern Railway Company alone. We feel that a reduction in the Danville rate might ultimately be for the advantage of this defendant.

Under our original interpretation of the 4th section the duty of this Commission in determining whether that section had been violated was a comparatively simple one. We were confined to inquiring whether competition between carriers not subject to the Act to Regulate Commerce influenced or controlled the rate at the more distant point. If it did, that created the dissimilar circumstances and conditions. Now, however, we are bidden to examine the whole situation, and to determine whether, taking all things into account, the conditions which surround that situation justify the charging of the higher rate at the intermediate point. It is impossible to apply to the solution of that question any definite rule. Each case has to be considered upon its own peculiar facts. It is difficult in every case to determine what ought to be done in justice to the public and to the carrier, and it is even more difficult to state the reasons for that determination. We have given this question the best attention we could. It is an extremely perplexing one, but it must be decided, and, without attempting to state the reasons more fully than has been already done, our conclusion is this :

We think that under all the circumstances and conditions the rate to Lynchburg may properly be somewhat lower than the rate to Danville. We do not think that the present difference in rates is justifiable; or, in other words, we do not think that the circumstances and conditions justify the rates now in force. It is our opinion that rates from northern and eastern cities to Danville and rates from New Orleans upon the commodities mentioned in the complaint to Danville should not exceed those to Lynchburg by more than 10 per cent, and that rates between Danville and the West should not exceed those between Lynchburg and the West by more than 15 per cent. This also applies to the rate on tobacco from Danville to Louisville. It may well be called outrageous to impose upon the chief industry of Danville a rate from Danville to Louisville 15 cents above the rate from Lynchburg to Louisville, when the difference in rates upon that class of merchandise in the reverse direction is only  $2\frac{1}{2}$  cents.       \*       \*       \*       \*       \*       \*       \*

[No order was issued by the Commission at its first hearing; but ten months later, in November, 1900, after a rehearing of the case, a new opinion was rendered, concluding as follows. — ED.]

The Southern Railway shows that in the year 1899 it earned nothing upon its \$120,000,000 of common stock, and urges that any order of this Commission which depletes the revenues of that company deprives the owners of this stock of their property without due process of law.

This common stock was issued as a part of a reorganization scheme under which the Southern Railway Company came into existence. It does not appear that the persons to whom this stock was originally issued ever paid one dollar in actual value for it. It simply appears that the stock is outstanding. This is not enough. Something more is needed when a claim of this kind is set up than the mere fact of the existence and amount of capitalization. It does not rest in the whim of a reorganization committee in Wall Street to impose a perpetual tax upon that whole southern country. In the year 1899 the Southern Railway earned net about 4 per cent on \$40,000 a mile of the mileage

of its entire system. That system extends, as a rule, through sparsely populated territories; no difficult and expensive engineering feats were involved in its construction, nor has it in proportion to its extent many expensive terminals. It will hardly be claimed that the cost of reproducing that property in its present state would equal \$40,000 a mile.

The Southern Railway is of great benefit to the territory which it serves, and the money invested in that enterprise is entitled to the most careful protection; but the property of the citizens of Danville is just as sacred as are the securities of that company. No order should be made by this Commission which will deprive it of a dollar in revenue to which it is justly entitled, but we find nothing in its financial condition, as shown by the testimony, to prohibit a change of rates which will reduce to a limited extent its receipts.

This is not a question of revenue altogether. It is a question, to an extent, of right and wrong. The beggar upon the street has no right to steal merely because he is hungry; nor has the Southern Railway a right to do an unlawful act simply because it needs revenue. The state of its revenues has a bearing upon the lawfulness of the act, but is not conclusive.

Railway managers are prone to assume that, in the adjustment of their rates, only the interest of their own properties must be considered. Mr. Culp was asked what weight he gave to the interest of the city of Danville, to its proximity to Lynchburg, to the fact that it was a competitor of Lynchburg, and his reply in effect was, none. This is neither just nor lawful. Railways are public servants and subject to public control. In the exercise of that control the public has enacted that they shall not unduly discriminate in favor of one locality against another, and that they shall not charge more for the short than for the long haul under similar circumstances and conditions. The Supreme Court has declared that in determining what are similar circumstances and conditions, and what is undue discrimination, reference must be had to the interest of all parties, not merely the railway. After considering all the circumstances and conditions in the present case we have sustained the complaint

of the city of Danville, and have indicated in a general way those changes in rates which should be made. If upon an actual trial, in good faith, the effect of those changes upon the revenue of the Southern Railway should prove to be more serious than anticipated, we might modify the opinion already expressed, but there is nothing in the testimony presented upon this motion for rehearing which leads us to do so now, and the motion is denied.

No order will be made until December 31, 1900. If the Southern Railway signifies by that time its disposition to endeavor to make this readjustment, such further time will be allowed as may be reasonably necessary. Otherwise an order will then issue in the premises.

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## XVII

### TRANSCONTINENTAL FREIGHT RATES

#### THE ST. LOUIS BUSINESS MEN'S LEAGUE CASE<sup>1</sup>

PROUTY, *Commissioner* :

The Business Men's League of St. Louis, the complainant in this proceeding, is an incorporated body whose membership represents some two thousand persons, firms and corporations engaged in business in St. Louis and that vicinity. The complaint is that the defendant carriers unjustly discriminate by their tariff rates against St. Louis and other jobbing houses of the middle west, and it is alleged that this discrimination is effected in the following ways :

1. By making a lower rate to Pacific Coast terminals than to points upon the coast which are farther east, and through which traffic must pass in reaching the terminal points.

2. By making a blanket rate from all territory east of the Missouri river to Pacific Coast destinations.

3. By undue and unreasonable differences between car-load and less than car-load rates, by an unjust system of varied commodity rates, and by unreasonably refusing to permit shipment of mixed car loads.       \*       \*       \*       \*       \*

The complaint puts in issue the system of rate making between the territory east of the Missouri river and Pacific Coast points ; and in order to understand the questions raised it is necessary to state briefly what that system is. Only west-bound rates are involved.

Certain points upon the Pacific Coast, of which Los Angeles, San Francisco and Portland may be taken as illustrative

<sup>1</sup> Decided November 17, 1902. Interstate Commerce Reports, Vol. IX, pp. 318-372. In editing, the issues concerning mixed car loads as well as details of cost of less than car-load service have been omitted for simplification.

examples, are designated as "Pacific Coast terminals," and rates to these points are known as "terminal rates." There are "terminal class rates," the western classification being used. There are also "terminal commodity rates," and the great bulk of the traffic moves under such latter rates, over two thousand articles being named. Both class and commodity terminal rates are the same from a given eastern point to all Pacific Coast terminals.

Stations upon the direct line by which traffic from the east reaches a terminal are called "intermediate" points. Rates to such points are made by adding to the terminal rate the local rate from the terminal back to such intermediate point, whether the rate in question be class or commodity. Thus, Reno, Nevada, is upon the main line of the Central Pacific, 155 miles east of Sacramento, California, a terminal. The terminal rate on zinc slab from Chicago to Sacramento is, C. L. (Car Load) \$.80 ; L. C. L. (Less than Car Load) \$1.10. The local rate from Sacramento to Reno is C. L. \$.78, L. C. L. \$.87, making the rate from Chicago to Reno, C. L. \$1.58, L. C. L. \$1.98.

Class rates are named to intermediate points which serve as maxima to those points; *i.e.*, when the intermediate rate is less than the terminal plus the local back, the lower rate prevails. As an illustration of this we may take the rate on sheet zinc from Chicago to Reno. The terminal rate is higher than on zinc slab, being C. L. \$1.25 and L. C. L. \$1.75. Adding the local back from Sacramento we have a rate of C. L. \$2.03 ; L. C. L. \$2.62. But sheet zinc in less than car loads under the western classification is 4th class, and in car loads 5th class ; the intermediate class rates from Chicago to Reno are 4th class, \$2.10 and 5th class \$1.85. These rates apply as maxima, and therefore the rate on sheet zinc from Chicago to Reno is C. L. \$1.85 and L. C. L. \$2.10. The rate on zinc slab, which takes the same classification as sheet zinc, but a lower terminal rate, is made by the combination, while that on sheet zinc is limited by the intermediate class rate. There are also a few intermediate commodity rates which apply as maxima, and have the same effect in establishing the point to which the combination of the terminal and local back will apply.

It will be seen that under this system of rate making the rate upon the Pacific Coast increases as we proceed farther east, or as the distance decreases, until limited by the intermediate class or commodity rate. Rates are uniformly higher at the nearer intermediate point through which the traffic passes than at the more distant terminal. . . .

The complaint also attacked the method of rate making from territory east of the Missouri river to the Pacific Coast, and this point was earnestly pressed by the complainants. At the present time these rates are made upon what is known as the blanket system; that is, rates from all that territory are the same. The first-class rate for instance from St. Louis to San Francisco is \$3 per hundred pounds and the same rate obtains from New York. . . . Commodity rates follow the same rule, and in general it may be stated that . . . all common points east of the Missouri river take the same rate to Pacific Coast terminals, and to those points which base upon Pacific Coast terminals. This so-called blanket system of rate making is vigorously attacked by the complainants, who insist that what are termed "graded" rates should obtain; that is, that the rate should increase toward the Atlantic seaboard; and as one reason for this, it is asserted that such graded rates were until recently in effect.

There is no means of determining exactly what these rates were previous to 1887, when carriers were first required by law to publish and file their tariffs. An examination of the first transcontinental tariff filed with the Commission shows that graded rates were then in effect. By that tariff the first-class rate was, from the Missouri river \$4, from the Mississippi \$4.50, from Chicago points \$4.70; while east of Chicago rates were apparently made by combination upon Chicago. This tariff seems to have been in the nature of an experiment, and very frequent changes were made between that date and January 1, 1889, when a tariff was put into effect which continued substantially the same, so far at least as these gradations were concerned, down to 1894. By this tariff the following differentials or grades were made: from the Missouri to the Mississippi 20 cents; from the Mississippi to Chicago 20 cents; from

Chicago to Cincinnati 5 cents; from Cincinnati to Pittsburg 5 cents; and from Pittsburg to New York 20 cents. Under West-bound Tariff No. T 1, effective April 11, 1893, which continued in effect until the rate war of 1894, the first-class rate was as follows: from the Missouri River \$3; from the Mississippi \$3.20; from Chicago \$3.40; from Cincinnati \$3.45; from Pittsburg \$3.50, and from New York \$3.70. The same principle was applied to commodity rates. . . . Previous to 1894 the principle of graded rates was uniformly recognized in transcontinental tariffs.

In the beginning of that year, owing to conditions which will be hereafter detailed,<sup>1</sup> a transcontinental rate war occurred which lasted actively for two years, and the effects of which continued for some time afterwards. One of the first results of this disturbance was to abolish the graded rate; first as far east as Chicago, and later all the way to the Atlantic coast. Under the tariff of June 25, 1898, which is said to have restored transcontinental rates to a normal condition, this blanket system was retained.

The contention of the complainants in this respect is in favor of the middle west as against the Atlantic seaboard. Since St. Louis is more than one thousand miles nearer San Francisco than New York its business interests insist that it ought to be given the advantage of that difference in distance. The defendants justify the present tariff upon the ground of water competition, and the facts bearing upon that issue will be stated later. No particular industry is complaining. The testimony tended to show and we find that since 1894, when graded rates were first abolished and the blanket system put in effect, the middle west has been steadily gaining in its sales upon the Pacific Coast in comparison with the Atlantic seaboard. Pacific Coast jobbers now buy much more extensively in the middle west than they did five or ten years ago. Middle west jobbers sell more upon the Pacific Coast than they did formerly. It was said that at least 60 per cent of the goods consumed upon the Pacific Coast, which originate in the east, came from points

<sup>1</sup> P. 419, *infra*.

west of Buffalo and Pittsburg. This gain of the middle west in Pacific Coast business seems to be due mainly to the increase of manufacturing in that section, and in a measure to the fact that middle west jobbers and manufacturers have worked Pacific Coast territory with more vigor and persistence than their eastern competitors. It will be observed, moreover, in the subsequent statement of the case, that freight rates from 1894 to 1898 were such as to stimulate business from the middle west; and it should be still further noted that while the terminal rate is blanketed from the Missouri river, the "intermediate" class rates in all cases, and intermediate commodity rates in many instances, are still graded. The first-class intermediate rate to California points under the present tariff is: from the Missouri river \$3.50, from the Mississippi \$3.70, from Chicago \$3.90; while from points east of Chicago the rate seems to be made by a combination upon Chicago. The effect of this is to give the Missouri river an advantage over the Mississippi and Chicago in all territory covered by the intermediate rate, and to virtually prohibit business from points east of Chicago in that territory.

The most serious complaint is addressed to the alleged discrimination against eastern jobbers in favor of Pacific Coast jobbers. By eastern jobbers are now meant all those located east of the Missouri river, although it does not appear that any considerable business is transacted by jobbing houses east of Chicago. The tariff complained of is that of June 25, 1898, and the above discrimination is alleged to be effected by making too wide a difference between car loads and less than car loads, and by applying a scheme of varied commodity rates which prevents the shipping of different articles of a similar character in the same package, and the combining of similar articles in car loads.

It is very difficult to state in a comprehensive way the extent of the difference in rates applicable to car-load and less than car-load shipments. The western classification places many articles in the 4th class when shipped in less than car loads, and in the 5th class when shipped in car loads. The difference between 4th and 5th class rates is 30 cents from the Missouri river and 25

cents from the Mississippi river and points east. It has already been stated that the great bulk of transcontinental traffic moves upon commodity rates. An examination of the west-bound commodity tariff shows that 2219 articles so move, of which 922 have both car-load and less than car-load rates; 835 take the same rate both car-load and less than car-load, while 462 are provided with car-load rates only. Of the 922 articles taking both car-load and less than car-load rates, the differential is in very many instances 50 cents per 100 pounds. There are 152 instances in which that difference is less and 29 in which it is greater than 50 cents. In case of the 462 articles which take only a car-load commodity rate, any less than car-load movement is under the class rate, and this produces a differential which is very much greater, being in some instances more than \$3.00, in almost no instance less than \$1.00 per 100 pounds, and making a less than car-load rate, which is in almost every instance more than double the car-load rate. It was said by several witnesses for the complainants that the differential would average 50 cents per 100 pounds. This was probably intended to refer to the traffic in which the witness was interested, and it seems probable that, as applied to the transportation involved in this proceeding, that may be a fair average. . . .

It is much more important to understand the manner in which these differentials discriminate against the eastern wholesaler, and the extent of that discrimination.

The great bulk of manufactured articles consumed upon the Pacific Coast is produced in the east. Whether these commodities are wholesaled by the Pacific Coast jobber or by the middle west jobber the shipment is ordinarily in car loads from the factory to the warehouse of the jobber and in less than car loads from thence to the retailer. Of rail shipments from eastern factories by Pacific Coast jobbers at least 90 per cent goes in car-load lots and a considerable portion of the balance are emergency orders which require quick delivery. Upon the other hand, testimony showed that the eastern jobber could distribute to the retailer in car loads only to a very limited extent. When it is remembered that the warehouse of the Pacific Coast jobber

is located at a terminal point, and that the rate from the east to the intermediate point is made by adding the local from this terminal point back to the intermediate point, it will be seen that the wholesaler upon the Pacific Coast has the advantage of the wholesaler in the east by the difference between the car-load and less than car-load rate. This advantage is important just in proportion as the value of the goods per hundred pounds, or more properly the margin of profit per hundred pounds, is greater or less.

A concrete illustration will make this clear, and for that purpose we may take bar iron. The rate on this commodity from the east to Pacific Coast terminals is C. L. 75 cents, L. C. L. \$1.25. Assume now some intermediate point to which the local rate from the terminal is 50 cents L. C. L. The Pacific Coast jobber pays in freight upon a hundred pounds of iron delivered to the retailer at that point 75 cents to his warehouse and 50 cents local, in all, \$1.25 ; while his eastern competitor pays on the L. C. L. shipment from his warehouse \$1.75. This gives the Pacific Coast jobber a clear advantage of 50 cents in the freight rate at all points which base upon the terminal point. The testimony of the complainants tended to show, nor was it denied by the defendants, that the profit to the jobber in the handling of bar iron is less than 50 cents per hundred pounds. Unless, therefore, there be some compensating advantage to the eastern jobber he is by this differential prohibited from wholesaling this commodity to retailers upon the Pacific Coast when his shipment from the east is in less than car loads. \* \*

What is true of bar iron is also true of most classes of heavy hardware, so called, which include most kinds of manufactured iron in its simpler forms, as sheet iron, corrugated iron, nails, pipe, horseshoes and in general any form of hardware where the cost of manufacture has not added very materially to the price of the raw material. It also appeared that the same thing was true of some of the more bulky articles among drugs and medicines, paints and oils, stationary supplies, wagon material, plumbers' supplies and some other lines, with respect to which the differential often exceeded and generally approximated the

profit per hundred pounds to the wholesaler. The testimony of retailers upon the Pacific Coast was to the effect that after the putting in of the tariff of June 25, 1898, they were unable to buy many of the heavier articles from eastern jobbers. We think it appears, and we find, that with respect to many of the more bulky articles above named the differential is prohibitive against the eastern wholesaler.

While, however, this is true of many heavier articles, it is not true of the greater number of commodities in which the eastern wholesaler deals. In case of the higher priced commodities the profit per hundred pounds is much greater than the differential. When the tariff complained of took effect the Simmons Hardware Company determined to equalize the disadvantage which its customers incurred by making a freight allowance of 50 cents per hundred pounds. At first this allowance was paid upon all articles, but it soon became evident that there were certain articles which, including the freight allowance, were handled at actual loss, and that company very soon ceased to pay freight allowances upon these commodities. The vice president testified that these commodities were the fifteen following: Shot, bar lead, grindstones, nails, wire, rope, anvils, sheet zinc, sheet steel, horseshoes, sheet iron, staples, wire staples, small chains. Except so far as these articles can be shipped in car loads, either straight or combined, they cannot be wholesaled from the east upon the Pacific Coast. It was claimed that these heavier articles were usually staple commodities, and that the inability to handle them was a serious handicap upon the eastern jobber, since the retailer preferred to patronize that concern which could supply all his wants. \* \* \* \* \*

The jobbing business of the Pacific Coast is transacted under peculiar conditions. As already said, the supplies of the jobber are almost entirely drawn from the east and middle west. Jobbing houses are situated mainly upon the coast, and these supplies are therefore taken to the coast and from thence sent back into the interior. Owing to the method by which rates are made, it necessarily follows that the territory to which the coast jobber can distribute is limited. It has been seen that the

“intermediate” rate limits the territory within which the rate to intermediate points is made by building up upon the terminal rate, and it is evident that as soon as this limit is passed going towards the east the Pacific Coast jobber is at a disadvantage in the freight rate. This limit is not the same with respect to all commodities. In case of sheet zinc, as we have already seen, it is but 155 miles, while in some few instances the combination extends back from the coast a thousand miles, possibly farther. Nor does the line of demarcation so fixed exactly correspond with the actual business limit, since the jobber can only operate in territory accessible to most of the articles in which he deals. The distance towards the east which is open to the jobber upon the Pacific Coast varies somewhat in different lines of merchandise, but generally speaking it is about the 115th meridian, some three or four hundred miles from the coast. It was claimed by the defendants, and not seriously denied by the complainants, that east of this line the territory was exclusively occupied by the eastern wholesaler, except in case of some few articles originating upon the Pacific Coast.

This scheme of rate making also limits the territory of the individual jobber upon the Pacific Coast north and south as well as east. Rates from eastern originating points are the same to all terminals. Rates to interior points are made by adding the local rate to the nearest terminal. It follows therefore that the jobber located at some terminal point like San Francisco, as he goes north or south, very soon enters the territory of some other terminal point, like Portland or Los Angeles, in which his local rate is greater than that of his competitor located at such terminal. The effect is to draw a series of circles with each terminal point as a center within the circumference of which the jobber located at the terminal point has the advantage of all others.

Not only does this confine the territory within which a particular Pacific Coast jobber can compete upon even terms with some other Pacific Coast jobber, but it also limits the territory north and south within which the Pacific Coast jobber has the advantage of his eastern competitor. Less than car-load rates

from the east are the same to interior points no matter upon what terminal a particular point may base, and it soon happens, therefore, that the less than car-load rate to such point is lower than the rate arrived at by combining the car-load rate to the terminal point and the local rate from that point. Take San Francisco as an example. Nominally, rates to San Francisco are the same as to other Pacific Coast terminals. Owing to its superior shipping facilities as a seaport it probably enjoys some actual advantage in the matter of the rate. When, however, the jobber attempts to distribute from San Francisco, he finds all around him terminal points through which he must operate, Marysville distant upon the north 142 miles, Sacramento upon the east 90 miles, Stockton to the southeast 103 miles and San José to the south 50 miles. Now, the rate to almost any interior point outside this cordon of terminals is made by adding the local from these points, while the San Francisco jobber must pay the local from San Francisco itself. This operates to materially decrease the advantage which the San Francisco wholesaler would otherwise possess. But still further, if he attempts to go farther north he very soon reaches territory where the rate bases upon Portland and where his combined car-load and less than car-load is higher than the less than car-load rate from St. Louis. So if he attempts to proceed south he speedily comes to a point where the rate bases upon Los Angeles and where the combined rate is in favor of the middle west jobber. Canned goods were frequently referred to in the testimony. Taking this commodity as an illustration, we find that the car-load rate to San Francisco plus the local rate to Ashland, Ore., a distance of 431 miles, is \$2.08, while the direct L. C. L. rate from the Missouri river, basing on Portland, is \$2.00. At Mojave, California, 382 miles southeast, the combined car-load and less than car-load rate of the San Francisco jobber is \$1.81, as against a direct L. C. L. rate from the Missouri river of \$1.99.

These illustrations serve to show how, while this scheme of rate making favors the Pacific Coast jobber as a class, it limits the territory of the individual Pacific Coast jobber both as against his competitor upon the coast and as against his competitor

in the east. While it appears that San Francisco jobbers do business over the whole Pacific Coast, it is done at a serious disadvantage beyond the limits of a comparatively narrow sphere; indeed, one witness in behalf of the complainants expressed the opinion that the territory of the wholesaler upon the coast was so narrow that there was really no excuse for his existence.

The territory of jobbers east of the Missouri is of course limited against one another. It is not material here to discuss the extent of that limitation, since we are considering the competition between eastern jobbers as a whole and those upon the Pacific Coast. The fact that the rate from the warehouse of every wholesaler in the middle west to the store of each retailer upon the coast is the same, gives him an advantage over the individual Pacific Coast jobber outside the immediate "sphere" of the latter, which in a measure offsets the decided advantage of the Pacific Coast jobber within that sphere.

The effect of thus circumscribing the territory of the Pacific Coast jobber is to render the volume of his business comparatively small. That of all the houses with which he competes in the east is much more extensive. The two concerns most prominent in the prosecution of this proceeding were the Simmons Hardware Company of St. Louis and Hibbard, Spencer, Bartlett & Co. of Chicago; of which the former does business in all portions of the United States except New England, while the representative of the latter testified that the operation of his house was only limited by the confines of the earth. Jobbers upon the Pacific Coast earnestly insisted that these great establishments were not dependent upon that territory for any considerable part of their business, and that they used it as surplus territory in which they could afford to operate at a very small margin of profit. It also appeared that owing to the distance at which these houses upon the Pacific Coast were located from their base of supply, the amount of stock carried was very large in proportion to the volume of business done; and that the expense of transacting that business was greater than in the east.

Certain articles are produced upon the Pacific Coast, and certain others are imported from Europe and from eastern Asia, while still others manufactured in the eastern portion of the United States are sold at a delivered price. With respect to all these the Pacific Coast jobber has the advantage of his eastern rival. But it did not at all definitely appear what the extent of that advantage might be. We are inclined to think that if the Pacific Coast jobber had no advantage in the freight rate at which he could bring his merchandise from points of production and distribute it to points of consumption, he would find it extremely difficult to hold his own.

The principal contention of the Pacific Coast jobbers is that their location entitles them to such an advantage. The controlling factor in that location is the possibility of bringing in goods from the Atlantic seaboard and foreign countries by water. The effect of water competition is also the defense largely relied upon by the carriers in justification of their tariffs, and the facts in reference to it as applicable to each may be stated together.

Several of the jobbing houses whose representatives testified in this proceeding were established at Sacramento and San Francisco a half century ago. At that time the only means available for the transportation of merchandise from the Atlantic seaboard to their warehouses was by sailing vessel around Cape Horn, or through the Straits of Magellan. In 1854 the Panama railroad was constructed. By this route freight passes from New York to Colon by ship, from Colon to Panama, a distance of fifty miles, by rail, and from Panama to San Francisco by water. Upon this route steamers have been used instead of sailing vessels, the distance is much shorter, the time much quicker, the certainty of arrival much greater, and generally the advantages offered are much superior to those by sail around South America. It has from the first transacted a considerable amount of business between the two coasts.

The first transcontinental line of railroad was the Central Pacific in connection with the Union Pacific, and was opened for business in 1869. This line at once began to compete for

transcontinental freight, with no great amount of success at first. It succeeded in carrying a portion of the higher class merchandise, but the great bulk of all commodities continued to move by water or by the Panama route. It was estimated that as late as 1878 not over 25 per cent of the total tonnage moved into California by rail. In that year, for the purpose of obtaining a larger share of this traffic, the rail line inaugurated what was known as the special contract system involving a contract between the railway and each individual shipper, by which the merchant agreed to patronize the railway exclusively, in consideration whereof the railway made certain special rates of freight. . . . This system was not popular at the outset, but before long every important jobbing house in San Francisco, with one exception, had made a contract of this kind. The effect was to very much increase the rail tonnage. It seems probable . . . that in 1884 when this plan finally went out of vogue, the percentage of rail tonnage had risen from 25 per cent to between 60 and 75 per cent.

In 1881 the Atchison, Topeka & Santa Fé Railway was built to a connection with the Southern Pacific at Deming, and in 1882 the Texas & Pacific connected with the same line at El Paso. In 1883 the Southern Pacific route from New Orleans was opened, and the same year saw the completion of the Rio Grande Western and the extension of the Santa Fé to Mojave. In the northwest the Northern Pacific was opened for traffic that year, and the completion of the Oregon Short Line the following year gave the Union Pacific an entrance into Portland. The multiplication of these transcontinental routes produced a corresponding diversity of interest, . . . the contract system was abandoned because the various lines could not agree among themselves upon the division of business and the maintenance of rates. To obviate this embarrassment the Transcontinental Association was organized, having for its purpose a pooling distribution of transcontinental traffic, or earnings, and the fixing and maintaining of transcontinental tariffs. \* \*

When the Central Pacific and Union Pacific began business as the first transcontinental railway line they found in the

Panama route their most troublesome competitor. For the purpose of controlling this competition these two lines and their connections in 1871 entered into a contract with the Pacific Mail Steamship Company, which then did the ocean carrying by the Panama route both from New York to Colon and from Panama to San Francisco, by which the railways leased and paid for the entire space in the steamships of the Pacific Mail Company which was devoted to California business. Under this contract the steamship company disposed of this space according to the direction of the railways, naming such rates, making such regulations and generally so conducting with respect to traffic as they directed. The policy of the railways was to offset the Panama route against the clipper ships. This contract was taken over by the Transcontinental Association when it was formed, and it continued in effect with some slight interruptions from 1871 until December 31, 1892. . . .

Previous to this time there had been in force a contract between the Pacific Mail Steamship Company and the Panama Railroad Company under which the steamship company acquired the exclusive use of the Panama railway for business moving between the Atlantic and Pacific Coasts. That contract expired about this same time, and the Pacific Mail declined to renew it upon the original terms in view of the expiration of its own contract with the transcontinental railways. In consequence the Panama Railroad Company put on a line of steamers of its own between New York and Colon known as the Columbia Steamship Company. Meantime the merchants of San Francisco had become dissatisfied with the treatment which they were receiving from the railways. They knew of the existence of contracts between the transcontinental lines and the Panama route, and regarded the whole arrangement in the light of a monopoly which extorted unreasonable rates and imposed unreasonable conditions. Learning that the contract between the Panama Railroad and the Pacific Mail was about to expire they proposed to put on a line of steamships between San Francisco and Panama, thus making, in connection with the Panama Railroad and its own steamships, an independent line from New York to San Francisco. In the

execution of this plan the North American Navigation Company was organized by the merchants of San Francisco.

This route began operations in the year 1893, and attempted from the first to maintain a differential upon traffic moving between the Atlantic and Pacific Coasts which would deprive the railroads of a considerable share of the business previously handled by them. The result was a most bitter and reckless rate war during which there was an utter demoralization of rates and rate conditions. The San Francisco jobbers were upon the side of the ocean, and not only were rates abnormally reduced, but differentials were abolished, the right to ship in mixed car loads was extended, every inducement was held out to the jobber of the middle west to invade the territory of the Pacific Coast. The North American Navigation Company only operated about one year, but its vessels were taken over by the Panama Company and the competition itself continued in full force until the end of the year 1895.

This episode had been an expensive one for all parties concerned. It is in testimony that the merchants had put into the North American Navigation Company \$350,000, which was entirely lost; and their indirect loss must have been greater still. They had seen their territory diminish, their profits grow less, their business decrease under the competition which had been fostered by rail rates from the east. The situation was not more satisfactory to the railways for they had sacrificed millions of dollars in revenue and were still receiving what they regarded as abnormally low rates. Both parties were therefore anxious for some sort of an accommodation. Representatives of the transcontinental lines upon the coast were instructed to mollify as far as possible Pacific Coast shippers and the shippers in their turn seem to have been anxious to meet this advance. In 1897 a communication was addressed to the railways by the jobbing interests upon the Pacific Coast stating in substance that rates ought to be readjusted in the interest of the coast jobber; that more rigid inspection rules should be enforced preventing their competitors in the middle west from obtaining fraudulent rates; and intimating that if this was done they would not object to

an advance in rates and would find it for their interest largely to place shipments with railroads. . . . The result of this conference was the tariff of June 25, 1898, which is attacked in this proceeding.

The jobbers of the middle west vehemently insisted that in this tariff they had not received proper consideration, and a subsequent meeting was held at St. Paul in May, 1899, at which the matter was again gone into by the parties in interest, with the result that the Great Northern and the Northern Pacific companies modified in certain essential respects the tariff of the previous June by a supplement taking effect May 1, 1899, and known in this case as the St. Paul Supplement. This supplement reduced in some instances the differentials between car loads and less than car loads, and modified the varied commodity rates in the hardware schedule, and perhaps in some others.

The complainants insist that the tariff of June 25, 1898, was the result of an agreement between the railways and the jobbers of the Pacific Coast that tariffs should be adjusted in their favor, and that they in consideration would patronize the rail instead of the water; and that the effect of that agreement has been to largely destroy effective competition by water.

From 1871 until January 1, 1893, the Panama route was absolutely controlled with respect to Pacific Coast business in the United States by transcontinental lines, and there was during that period no competition with that line. For some years afterwards that competition was extremely active. It appears that finally the Pacific Mail became the steamer part of the line from Panama to San Francisco, while the Columbia Steamship Company continued to form the link between New York and Colon. To-day the agent of the Panama Company in New York makes the west-bound rates while the agent of the Pacific Mail at San Francisco controls the east-bound shipments. The tariffs west-bound are based upon the corresponding tariffs of the rail lines, being 20 per cent less on car loads and 30 per cent less on less than car loads. This apparently gives that route substantially the full capacity of its steamers in traffic. . . . While the testimony in this case fails to show any contract or understanding

through which competition by the Panama route is limited it can hardly be said that at the present time that line affords much actual competition between the coasts.

With respect to competition by the all ocean route the matter has all along stood entirely otherwise. At first this was the only means of transportation for merchandise. As late as 1878 probably 75 per cent of the entire tonnage came in by sail. In 1884 this percentage had very much fallen, but still equaled 25 per cent. Since then there has been a further decline, the testimony showing that for the last ten years not more than 10 to 15 per cent has arrived in this way. But there is nothing in the case to show that any agreement has ever subsisted between rail lines and the route around South America as to any division of traffic, or any establishment of rates.

The principal witness as to the present state of water competition by all ocean routes was Mr. Jackson, representative of Flint, Dearborn & Co., of New York, managers of the principal line of clipper ships between the Atlantic and Pacific Coasts. . . . From his testimony it appeared that during the year 1898 there were shipped from New York to California, mainly San Francisco, by sailing vessels about 34,000 tons, and from Philadelphia about 6000 tons. Substantially the same tonnage had been forwarded the previous year, 1897. It also appeared that some other vessels were engaged in the same business between Philadelphia and San Francisco, and perhaps between New York and Pacific Coast points. Formerly the tonnage carried by these lines had been much greater than it was in those years. For some years previous to 1890 it had varied from 50,000 to 100,000 tons per annum. The rate war which broke out in 1894 diverted the tonnage from sail to rail, and the effect of this was continued after the close of those rate disturbances by the Spanish war, which rendered rates of insurance high and ships scarce. The outlook for the future was, however, said to be more promising.

Mr. Jackson . . . was also the treasurer of the American-Hawaiian Steamship Company, a corporation organized for the purpose of owning and operating a line of steamers between New York, San Francisco and Hawaii *via* the Straits of Magellan. He

first testified in November, 1899, and at that time this company had placed orders for four steamers of 8500 tons each to be used in this service. It was said that these steamships would carry, beside the necessary coal, 7500 tons of freight, and would make the run from New York to San Francisco in about 60 days. It was expected that each steamer would make two trips per year, thus affording a capacity of 60,000 tons west-bound which it was believed could easily be obtained.

Subsequently, in December, 1900, Mr. Jackson again testified, and then stated that two of the steamers above referred to had already been delivered and put into service; that the two others referred to in his former testimony would soon be ready for delivery, and that his company had within the year contracted for three larger steamers for this same service with a capacity of 15,000 tons each. He stated that this would give a total carrying capacity west-bound of about 126,000 tons per annum. . . .

Almost every article which moves from the east to the Pacific Coast has been at times actually carried by ocean. A list of the articles transported during the year 1898 was introduced and it embraced nearly every article of merchandise. The territory from which this route draws its freight is mostly that in the immediate vicinity of New York. Shipments have been taken from as far west as Chicago, and even St. Louis, but this is of rare occurrence. The great bulk of its traffic is from points east of Buffalo and Pittsburg.

In the making of rates by ocean no distinction as such is observed between car-load and less than car-load lots. Mr. Jackson testified that about three fourths of the tonnage forwarded by him was in lots exceeding 30,000 pounds and one fourth in lots less than that figure; the range of the smaller lots being from 1000 to 20,000 pounds. While there is no less than car-load rate as such the amount charged per hundred pounds for smaller quantities is greater than that charged for larger quantities, the difference being from 10 to 30 cents per hundred pounds. Everything depends, however, upon the quantity offered for shipment and the state of the ship's contracts for the freight. Large quantities are often taken at very low figures. We are inclined

to think that the ordinary difference made by water between car loads and less than car loads, while not a fixed sum, is considerably less than the difference prescribed by the tariff of June 25, 1898, upon rail shipments.

The witness objected to stating the exact rates at which merchandise had been carried by his line, but did give some illustrative examples; among others the following, in connection with which the rail rate is also given:

	WATER RATE	RAIL RATE	
		L. C. L.	C. L.
Bar iron . . . . .	30 to 35¢	\$1.25	\$ .75
Grindstones . . . . .	32½¢	1.90	.75
Soil pipe . . . . .	35 to 40¢	1.90	.75
Radiators . . . . .	40 to 45¢	2.20	1.30
Hardwood lumber . . . . .	40 to 42¢	1.25	.75

It must be remembered that a water rate of a certain number of cents per hundred pounds is by no means equivalent in value to the shipper to a rail rate of the same amount. Several things must be taken into account in determining the relative desirability of the two rates. The item of marine insurance is important, and Mr. Jackson stated that this was by his sailing vessels about 1½ per cent of the value of the commodity; the time occupied in transit and the consequent loss upon the investment is an item of consequence, the ordinary run from San Francisco being in the vicinity of 135 days. In addition to this is the liability to damage by salt water in case of many articles as well as the delay and uncertainty incident upon that means of transportation. No witness was prepared to state what rate by ocean was equivalent to a rate of \$1 by rail; indeed the witnesses seemed to agree that it would be impossible to answer that question definitely since its answer must depend upon the commodity transported. One witness said that after everything had been taken into account he would still pay the railways on most commodities a rate 5 per cent higher than that by water.

A portion of the disadvantages attending transportation by water will be largely obviated through the use of steamers in place of sailing vessels. As just stated the ordinary time by sail from New York to San Francisco is estimated at 135 days, but the time actually consumed often greatly exceeds this, sometimes being as much as a whole year. This uncertainty as to date of arrival has been a serious objection to that method of carriage. The steamer is expected to make the run around South America in 60 days, and its arrival can probably be counted upon with more exactness than arrivals by rail. The item of insurance will also be much less with steamers than with sailing vessels as will the loss on the investment during the period of transit. It was said that with a canal across the Isthmus of Panama the trip from New York by the steamers now ordered could be made in about 20 days, and that doubtless if such a canal were constructed faster steamers would be put on which would make the trip in from 15 to 16 days. \* \* \*

The carrier must meet this water competition mainly with the car-load rate. Ninety per cent of the merchandise brought from the east to the Pacific Coast by Pacific Coast jobbers comes in car-load lots. The less than car-load shipments are often in the nature of emergency orders requiring quick delivery and not therefore susceptible of ocean carriage. \* \* \*

### *Conclusions*

The complaint in this case attacks the system of rate making in vogue upon the Pacific Coast. What that system is appears in the findings of fact, and is well understood by all persons having an elementary knowledge of the situation. The rate from an eastern point like St. Louis is lowest to the so-called "terminal" upon the coast. Going east from the terminal point the rate increases until limited by the so-called "intermediate" rate. This produces a higher rate at the intermediate point through which the traffic passes to the terminal point and compels the St. Louis merchant, although nearer in distance, to pay more for the transportation of his merchandise. He insists that

his rate to the nearer station ought to be no higher than to the more distant point. \* \* \* \* \*

The complaint also attacks the scheme of transcontinental rate making in force east of the Missouri river as applied to west-bound rates. That system differs radically from the method followed upon the Pacific Coast. While upon the Pacific Coast the rate is lowest to the terminal at the ocean and increases toward the interior, in the east the rate from the seaboard does not increase as we proceed inland, but remains the same. This produces what is known as the blanket system of rates. The first-class rate from New York to San Francisco is \$3 and the same rate applies from St. Louis. Commodity rates follow the same rule so that generally speaking rates both class and commodity to Pacific Coast terminals and points basing upon such terminals are the same from all points east of the Missouri river. This St. Louis declares to be unjust; being one thousand miles nearer San Francisco than New York it insists that it should be given the benefit of that advantage in distance.

The higher rate to the interior point in California is justified by the carriers upon the ground of water competition, the theory being this: Water competition between New York and San Francisco establishes a cheaper rate than could reasonably be exacted from the rail carrier. Merchandise at New York can be taken by water to San Francisco at the low water rate and thence carried by rail to an interior point for the water rate from New York to San Francisco plus the local rate from San Francisco to the interior point. If the rail carrier engages in this business it must meet the rate thus established by water at San Francisco, and by water and rail at the interior point. It is claimed that the carrier may at his election meet this competition and make its rates accordingly. It may therefore charge to the interior point a rate higher than the terminal rate by the local back, until a point is reached at which the rate so formed is more than a reasonable rate. This right upon the part of the carrier may perhaps be subject to certain qualifications and limitations, but generally speaking this is the theory upon which certain rates upon the Pacific Coast, which have

been declared not in violation of the Act to Regulate Commerce, are constructed.

Now in theory the converse of this proposition would be true when applied to the point of origin in the east. Water transportation fixes the rate from New York to San Francisco. Pittsburg is four hundred miles west of New York. A commodity can move from Pittsburg to San Francisco in two ways; it may go directly by rail, or it may go by rail from Pittsburg to New York and from thence to San Francisco by ship. If it goes by rail and ocean manifestly the rate should be higher from Pittsburg than from New York, although Pittsburg is nearer San Francisco, since carriage by that route involves the rail haul from Pittsburg to New York. Applying this principle of water competition in the east exactly as it has been applied upon the Pacific Coast, rates to terminal points from the east would be lowest from the Atlantic seaboard and would gradually increase toward the interior until some point was reached at which the rate so constructed equaled a reasonable rate by the direct rail route. If that theory of rate making which has been sanctioned by the Courts and by the Commission in some cases were applied to this territory east of the Missouri river the rate from St. Louis to San Francisco would be, not lower than that from New York, as the complainants insist, but higher, unless the direct rail rate from St. Louis to San Francisco ought reasonably to be less than the rate established from New York by water competition.

That the same system is not in force in both the east and the west is due to differing conditions in those sections. Upon the Pacific Coast the great cities and the strong commercial interests are located at the seaboard. There are no interior towns of sufficient strength to insist upon a change of this policy, and apparently there never can be so long as the present system continues in force. In the east this is otherwise. Formerly manufacturing was mainly done upon the Atlantic seaboard, but to-day great cities have grown up and great commercial enterprises have developed in the middle west, and these demand an entrance to the markets of the Pacific Coast in tones which cannot be disregarded.

Still more important is the situation of the carriers themselves. Those lines which distribute upon the Pacific Coast control the adjustment of rates into that section, and their interests are united to maintain the present system. Indeed it is declared that to reduce intermediate rates to a level with terminal rates would bankrupt these lines, and it certainly would have a most serious effect upon their revenues. In the east we find many important systems beginning at the Missouri river or in the middle west. It is for the interest of these systems that traffic should originate at the eastern termini of their respective lines. Not only do they obtain more for the transportation of traffic so originating than they obtain from their division upon traffic originating farther east, but they also build up the industries of that locality and therefore remove these from the sphere of water competition. Moreover the traffic which the eastern connections of the transcontinental lines carry farther east is insignificant in amount and in revenue returned in comparison with the whole amount of their traffic. From these various causes it has transpired that the low rate which water competition establishes from New York has been extended to all points east of the Missouri river.

The Commission in a very recent case has examined and passed upon this same question. *Kindel et al. v. Atchison, Topeka & Santa Fé Railway Co. et al.*, 8 I. C. C. Rep. 608.

In that case the city of Denver alleged that by virtue of its location it was entitled to a lower rate to Pacific Coast terminals than the rate from points on the Missouri river and east. When the complaint was brought most rates were higher from Denver than from the Missouri river. The only fact upon which Denver based that claim was its location; being one thousand miles nearer San Francisco than Chicago, and nearly two thousand miles nearer San Francisco than New York, it insisted that it was entitled to a better rate. The Commission held that this did not necessarily follow; that while Denver was nearer in geographical miles it was not of necessity nearer in transportation units. The actual cost of transporting merchandise from New York to San Francisco by water was probably

materially less than the cost of carrying it by rail from Denver to San Francisco. We said that if these carriers extended the low water rate of New York west to the Missouri river they must carry it still farther to Denver, but that we could not affirm upon the mere score of distance that the rate from Denver should be lower. We are satisfied with the disposition of that question in that case, and it must control the case before us.

To avoid any misapprehension it should be said that we . . . do not decide in this case that circumstances and conditions might not be such as to require a lower rate from the nearer point. If in this case the industries of St. Louis and the middle west showed that they were, by this adjustment of tariffs, excluded from the markets of the Pacific Coast their complaint might merit different consideration. But such is not the fact; on the contrary it appears that in recent years under the influence of this rate the industries, both manufacturing and jobbing, of the middle west have made steady gains upon the Pacific Coast. To-day, of all commodities transported into that territory which originate east of the Missouri it is estimated that more than 60 per cent is from points west of Buffalo and Pittsburgh. The only grounds upon which the complainants rest in support of this contention are the greater proximity of the middle west, and the fact that these graded rates were formerly in effect; neither of which entitle them to the relief asked for.

It should also be observed that nothing in this decision would in any way interfere with the right of the transcontinental lines to put in effect, if they saw fit, such a system of graded rates as the complainants ask for. Carriers may or may not at their option meet the low water rate from New York. It is for the manifest interest of those lines beginning at Chicago and points west to maintain lower rates from there than from the seaboard, and if in the future such rates are established they will not be in violation of the Act to Regulate Commerce.

That branch of the complaint most discussed both in testimony and upon the argument was the alleged discrimination by the tariff of June 25, 1898, against the jobber of the middle west in favor of the jobber upon the Pacific Coast. This

discrimination is accomplished, according to the complainants, by too wide a differential between car loads and less than car loads, by the application of improper varied commodity rates and by the refusal to permit shipment in mixed car loads. Of these three things the differential was by far the most prominent.

The statement of facts shows that most traffic from the east to the Pacific Coast moves upon commodity rates. Of these rates nearly one half name for the same commodity a car-load and less than car-load rate; about one third apply in any quantity, making no distinction between car loads and less than car loads, while the remaining one sixth apply to car loads only, leaving the less than car-load shipments to move under the class rate. The differential between car loads and less than car loads is all the way from nothing to \$1.50 per hundred pounds, perhaps in instances even greater. Many of the differentials are exactly 50 cents; the complaint alleges that this is the average differential and the case finds that this is approximately true. Are these differentials in violation of the Act to Regulate Commerce?

In determining this the first inquiry is, by what standard shall the propriety of a differential between car loads and less than car loads be estimated? The complainants urged that the differential was justified largely by difference in expense of handling traffic at terminals, and that this difference when ascertained ought to constitute the difference between car loads and less than car loads; that the differentials thus arrived at would be approximately a fixed quantity, not varying materially with the rate or with the distance. This proposition can hardly be assented to. It really assumes that the proper differential is determined by the difference in the cost of handling the two kinds of traffic. But it appears from the statement of fact that this difference in expense is not confined to terminal points. It costs appreciably more to haul less than car-load business than car-load. If, therefore, the reason for the standard suggested by the complainants is a valid one, the differential ought to increase with the distance, and therefore ordinarily with the rate.

\* \* \* \* \*

In order to understand the claim of the defendants it is necessary to have clearly in mind the entire situation. Traffic transported from the east to the Pacific Coast at the present time is controlled either by jobbers in the middle west or by jobbers upon the Pacific Coast. The middle west jobbers send their merchandise almost entirely in less than car-load lots. In the very nature of the case that freight is not subject to ocean competition, and the carrier may safely disregard such competition in the making of these less than car-load rates which apply to that transportation.

The Pacific Coast jobber upon the other hand brings his supplies from the east to his warehouse almost entirely in large lots. It is found that 90 per cent of his entire rail traffic moves in car loads. Of the remaining 10 per cent a considerable part is in the nature of emergency orders, which require quick delivery and which could not therefore be transported by water. In order to obtain the business of the Pacific Coast jobber it is necessary that the rail carrier make an attractive car-load rate, the less than car-load being of comparatively little importance. There is a certain amount of less than car-load traffic which can and does move by water, as the statement of actual movements by clipper ship and the tariffs of the Panama route show; but broadly speaking the less than car-load business is, from its point of origin, not subject to water competition; the car-load freight is that for which the rail carrier mainly contends with the ocean; hence water competition tends to produce a wide difference between the car-load and less than car-load.

There is still another reason. The fact that business originating in the middle west almost of necessity moves by rail, immediately suggests the thought that it would be for the ultimate interest of those lines which begin in the middle west to make such rates as would enable all business to be done by that section. Up to the present time two causes have prevented this. First, it has been in the interest of certain lines, notably the Southern Pacific, that traffic should move from the Atlantic seaboard, and second, the Pacific Coast jobber has objected to being extinguished. His warehouse is by the sea, and if the rail

line makes a rate which will not permit him to bring traffic by rail and do business against his eastern competitor he must and he will turn to the ocean for relief. This may be disastrous to him; it proved to be so when tried; but it is even more disastrous to the railway. For the purpose therefore of maintaining peace, and at the same time obtaining a large part of the business of the Pacific Coast jobber, the railroad aims to maintain a differential which will enable that jobber to do business.

We have next to consider the interest of the wholesaler upon the coast and in the middle west, and it is really the conflicting claims of these parties which lie at the bottom of this controversy. The jobber upon the Pacific Coast insists that he rests under certain disadvantages in comparison with his eastern rival which render it extremely difficult for him to maintain himself without some advantage in the freight rate, and that his natural advantage of location entitles him to this preference. The alleged disadvantages have been fully stated in the findings of fact. They mainly spring from the limited territory to which his operations are necessarily confined. Owing to the adjustment of freight rates he cannot operate in any event more than about three hundred miles to the east, and the same distance north or south brings him to a point where both his eastern rival and his local competitor have an advantage in the rate. The field which is open to him is narrow, estimated in square miles, and even narrower when estimated by the population which he can reach. From this it results that the volume of his sales is small and the expense of transacting business large in proportion; still further his location and the manner in which he obtains his supplies force him to carry a disproportionately large stock. The Pacific Coast jobber finds it extremely difficult to maintain himself against his eastern rival without some advantage in the transportation charge, and we have seen that his location upon the seaboard by opening two avenues of communication gives him a certain advantage in this respect.

Most of the limitations under which the jobber upon the Pacific Coast works do not attach to the jobber in the middle west who is competing upon the Pacific Coast. His territory

is extensive and the volume of his sales large. He goes east to New England, south to the Gulf of Mexico, north to the Dominion line, west 1700 miles, and whether he does or does not cover this narrow strip west of the 115th meridian in no way affects his general prosperity or his continued existence. This is true not of every jobber in the middle west but of those great houses in whose interest this complaint is prosecuted.

The controversy has been conducted by the railways and the two sets of wholesalers already referred to, but it must not be decided with reference to their necessities or desires alone. There is another interest seldom represented upon these hearings, but always to be considered by this Commission, and that is the consumer. No adjustment of rates made in the interest of carriers or of wholesalers should be permitted if it antagonizes unduly the public welfare. Considering the question before us as an economic problem two things should be secured. First, these commodities should be brought to the consumer at the least possible expense. Second, in both transportation and distribution unfettered competition should be maintained, thereby securing to the consumer the benefits to which he is entitled.

The greater part of the supplies consumed upon the Pacific Coast originate twenty-five hundred miles from the point of consumption, and these supplies should be transported that twenty-five hundred miles in the cheapest manner. Waste is always expensive; if the railways are required to carry this merchandise in an extravagant manner that extravagance is finally borne by the public. We have seen that the actual cost of handling this traffic in less than car loads is 50 per cent greater than the cost of handling car loads. It seems probable, therefore, that the cheapest way in which these supplies can be taken across the continent and distributed to the consumer is by transporting them in solid car loads from the factory to the warehouse upon the Pacific Coast and thence distributing to the retailer in less than car loads, although the effect of this may be somewhat diminished by the back haul from the wholesaler to the interior point which is not performed to the same extent where goods are sent across the continent in less than car-load shipments

directly to the store of the retailer. It would in our opinion be unfortunate from an economic standpoint to establish a condition which would require distribution entirely or mainly in less than car-load lots from the middle west.

It is urged however that this tariff in effect stifles competition, thereby increasing the price to the consumer. It is alleged that this is done in two ways, first, by discouraging water competition and thereby permitting the maintenance of too high a rate, second, by restricting the market in which the retailer can buy, thus increasing the price to him and his customer.

The rate war of 1894 originated in the desire of the merchants of San Francisco to obtain a lower freight rate. The means which they employed was ocean transportation, and in that contest the jobber of the Pacific Coast was upon the side of the ocean. As a matter of retaliation rail lines gave to the eastern jobber every facility for entering Pacific Coast territory. Not only was the general level of rates reduced but differentials were abolished and the privilege of mixing shipments increased.

The result as has been noted in the statement of facts was disastrous to both parties. The San Francisco jobber lost in territory and in profits; the railways suffered severely in the diminution of revenues. At the expiration of three years both parties were anxious for relief and were seeking some ground of compromise. This was the genesis of the meetings at Del Monte and Milwaukee, and it was to effectuate this purpose that the tariff of June 25, 1898, was promulgated. The railway desired to retain its business at higher rates; the jobber upon the coast desired to retain his territory and increase his profits. There can be no doubt that the railways understood that the jobbers would patronize their lines at the higher rate, and that the jobbers had given them so to understand. There was no definite agreement of this sort, nothing like that involved in the old special contract system. It was rather a result growing out of the mutual interest of both parties.

The practical interpretation of this understanding has been to enable the railways to retain just about the same proportion

of traffic at materially better rates. The tonnage brought from the Atlantic to the Pacific Coast since June 25, 1898, has not differed greatly from that of two or three years before. It ought perhaps to have increased, for the Spanish war had dealt this traffic a severe blow both by increasing the rates of insurance and by decreasing the supply of ships, and with the close of that war this traffic might be expected to recover. Clearly it is likely to do so in the future. The tonnage moving during the present year will probably greatly surpass that of the last six or seven years and within two years to come will be greater than at any time since 1880. We find a disposition upon the part of the coast jobbers to patronize the ocean whenever a rate is offered which is decidedly advantageous. It must be remembered that the effect of the rate war of 1894 was to depress ocean as well as rail rates.

Rail lines could not probably increase their car-load rates, and if we were to order a reduction of these differentials that would result in a reduction of the less than car-load rate. Another result would be to compel the coast jobber to seek cheaper means of transportation which might finally lead to a further reduction of the car-load rate and to the same disturbances which have previously occurred. We have already said that the reasonableness of the less than car-load rates considered by themselves is not questioned. Ought we then to order this reduction? If the effect of the present tariff, owing to any understanding between the rail lines and the coast jobbers, was to extinguish or seriously cripple ocean competition it would be our plain duty to interfere; but in fact this competition seems to be in a prosperous state. If the effect were to maintain a scale of rates unreasonably high, our duty would be equally plain; but there is no suggestion that this is true of the present terminal rates. We are not unmindful of the fact that a reduction in the terminal rate works a corresponding reduction at all points which base upon that rate; nor do we overlook the fact, although there is no mention of it in this case, that the earnings of transcontinental lines indicate that some reduction in their rates might properly be made; but we are of the opinion that if any such

reduction is to take place it should be in the high and discriminating intermediate rate rather than in the already extremely low terminal charge. Competition is not healthy when it becomes destructive to the competing parties. It was said upon the argument that this present adjustment provided a state of "equilibrium" under which both the rail and the water, the east and the west could fairly compete. So far as the testimony shows we are inclined to think that this is true of competition by water.

It is said that this tariff is unlawful because it excludes the jobber of the middle west from this territory, gives to the wholesaler upon the Pacific Coast a monopoly, restricts the market in which the retailer can buy and thereby enhances the price to the consumer. The territory of the Pacific Coast jobber is extremely limited, and he is inclined to insist that he should be left in the peaceable possession of that territory; that the jobber of the middle west whose territory extends a thousand miles to the east and seventeen hundred miles to the west ought not to covet the narrow strip which lies beyond the 115th meridian. We do not accede altogether to this view. The adjustment of rates upon the Pacific Coast is such that it confines the local jobber to certain spheres making them almost omnipotent within those spheres; and for this reason competition from the east, which under this same adjustment of rates, tends to diffuse itself over the whole coast, is important. If there be no controlling reason to the contrary, rates should be so adjusted as to permit the operation of the wholesaler from the middle west throughout all this territory. \* \* \* \*

Viewing the case in this broad sense we find that these differentials are not abnormal when compared with others in different parts of this country at the present time; that they are not greater than those in effect under the west-bound transcontinental tariff of 1893, and not greatly disproportionate to the actual difference in cost of service. Considering them with respect to their bearing upon the parties immediately interested, namely, the carriers and the two classes of jobbers, we find that they conserve the interests of the carrier, that they give to the

jobber upon the Pacific Coast a measure of advantage to which he is perhaps entitled by his location, and which he must probably have if he is to continue to exist, while they permit the jobber of the middle west to transact a considerable amount of business in this territory at a reasonable profit. Viewed as an economic problem, the tariff fosters that method of distribution which is probably the cheapest upon the coast, and at the same time permits reasonable competition and thereby secures to the customer the full benefits of such competition. This situation is in some sense the outgrowth of past experience. It is satisfactory to most interests upon the Pacific Coast, and we are not disposed to find fault with the adjustment of rates as a whole.

While, however, we cannot condemn this tariff as a whole upon the grounds put forward by the complainants, we are of the opinion that many of its details are in violation of law. Over four hundred commodity rates apply to car loads only, leaving the movement of these commodities in less than car loads to be governed by the class rate. This produces a differential which even under the peculiar circumstances of this traffic is in many cases excessive, provided there be any commercial reason for a corresponding less than car-load rate. In some instances there is none. Coal, for example, moves usually in car loads and takes a low commodity rate. What little movement occurs in less than car-load lots is not competitive with car-load shipments, and may well be governed by the class rate, although the difference between the two would otherwise be undue. Many similar instances will readily occur, but we are impressed from an inspection of these schedules that there are still many other instances in which the difference is altogether too great.

It is impossible to fix any standard by which these differentials shall be determined, for the reason that circumstances often render the application of a greater differential proper in one case than in another. This record finds that many of the commodity rates show a differential of 50 cents per 100 pounds, and it is said that this may be termed the average differential; it further finds that the cost of handling this less than car-load traffic

exceeds the cost of handling car-load traffic by about 50 per cent. We are inclined to think that a differential which is at once more than 50 cents per 100 pounds and more than 50 per cent of the car-load rate is *prima facie* excessive. We do not mean that every differential may lawfully equal this, nor yet that every differential which exceeds this is unlawful, but that a differential exceeding this requires special justification.

\* \* \* \* \*

FIFER, *Commissioner*, dissenting :

I concur in the opinion to the extent of deeming it inadvisable to attempt, without further investigation, a settlement of the great questions involved in this continental situation.

The undisputed facts involve three propositions : the postage stamp or blanket rate for the whole eastern territory from the Atlantic Coast to the Missouri river ; the wide difference between the car-load and less than car-load rate on west-bound traffic, and, the system common to all, the western mountain territory of making the rates from the east to any intermediate point by adding to the through rate to any Pacific Coast terminal the local rate back to the intermediate point.

Concerning the first, while it may be conceded that the so-called blanket rate is too firmly established, and has proved in too many instances of a great utility and profit to both the road and its patrons to warrant me in denouncing it, yet I am firmly of opinion that, carried to the extent of above a thousand miles, as in this instance, on practically all the schedules, is such an exaggeration of the system as to work serious injustice to the jobbers of the middle west by robbing them of the natural advantages of geographical location to which they are as much entitled as are points located upon the Atlantic Coast, which for that very reason are favored by rates that are denied to those situated farther west.

For this reason it seems to me the only solution of the problem which will be fair to all parties is the graded rate, perhaps not in the proportions formerly in force ; but that, at least, recognizes the advantage of proximity to the western market which

Pittsburg enjoys over New York, Chicago over Pittsburg, and the Missouri river over Chicago.

There seems to me to be just ground for protest against the differentials between car-load and less than car-load rates. These differences have been within a comparatively late period so much increased as to lead to the inference, inevitable to me, that they have been established with deliberate intention to discourage less than car-load shipments. To what extent these differentials should be modified, if at all, must depend upon a wider inquiry and deeper investigation than we have been able to accomplish at this stage of the present case.

The system of rate making which establishes rates for intermediate points by a combination of the through rate to the coast terminal point and the local rate back to destination has much in its favor, as water competition is held to justify even unreasonably low through rates, and as the freight thus favored is secured by the railroads by a rate which is to prevent its carriage by water — all freight, in theory, is treated as if it reached the coast by water and takes its place thereafter as local freight east — instead of through freight west.

But there comes a situation and a locality when this theory of rate making must break down of its own weight, and with a blanket rate from the east reaching to the Missouri river, the short middle west haul, say from the Missouri river to Ogden, is out of all proportion to the haul from the Missouri river to New York, from New York to San Francisco by water and back by rail to Ogden. Upon its face such a condition carries suspicion, and it requires some explanation to justify a situation where a haul practically a thousand miles shorter at each end is higher than the through rate. Just how far the combination through rate with the local back may extend under these circumstances will depend upon where it meets a reasonable rate from the east, and on that question in this case the evidence is incomplete; we having developed only enough to bring me to fear that the schedules in force are discriminating and unjust.

The opinion finds that the Pacific Coast jobber carries his business not farther east than the 115th meridian, or about 300

miles from the coast, and I am inclined to believe that the evidence fairly sustains that finding. But an examination of the tariffs on file in the office of the Commission shows that the zone of their operations may be much wider, the combination rate basing on Pacific Coast terminals extending as far east as 800 or more miles in numerous instances.

For many articles of hardware, such as axes and other edged tools, picks and mattocks, bar, rod and sheet iron and steel, billets, blooms, ingots and scrap iron, the combination rate extends east on the Southern Pacific Railroad (Ogden line) to various points from Millis, Wyo., 828 miles east of Sacramento, to Cheyenne, Wyo., 1239 miles east of Sacramento, except on picks and mattocks, on which the combination rate equals the intermediate rate at Rye Patch, Nev., 273 miles east of Sacramento. On the Southern Pacific (El Paso line) the combination rate extends east to various points from Strauss, N.M., 797 miles east of Los Angeles, to San Elizario, Tex., 833 miles east of Los Angeles, except on picks and mattocks on which the combination rate equals the intermediate rate at Montezuma, Ariz., 400 miles east of Los Angeles. On the Great Northern line the combination rate extends east to various points from Troy, Mont., 579 miles east of Portland, on picks and mattocks, to Wagner, Mont., 1042 miles east of Portland, on billets, blooms, etc. On the Northern Pacific the combination rate tends east to various points from Noxon, Mont., 662 miles east of Portland, on picks and mattocks, to Central Park, Mont., 1009 miles east of Portland, on billets, blooms, etc. On the Santa Fé System the combination rate extends east to various points from Amboy, Cal., 226 miles east of Los Angeles, on picks and mattocks, to Albuquerque, N.M., 889 miles east of Los Angeles, on billets, blooms, etc.

Thus it will be seen that while the business of the coast jobber may, through his own volition or methods of transacting business, be confined to territory lying west of the 115th meridian, there is nothing in existing tariffs that would in any way so limit his field of operations. So far as these rates are concerned, he can apparently do business as profitably as far east as the points

named as he can in the territory lying between the 115th meridian and the Pacific Coast. It should be noted that the differences between the car-load and less than car-load rates complained of in this case serve, under this method of making rates to the intermediate point, to greatly enlarge the Pacific Coast jobber's sphere of operations, and that he will sooner or later take full advantage of the opportunity thus afforded is to be expected.

It seems to me necessary that in the further investigation to which the opinion in this case tends, the feature of reasonable rates for the whole so-called western mountain territory should be made a main issue that the inquiry may develop whether or not the zone of combination rates should not be narrowed to points nearer the coast, and thus remove not only a burden on our commerce but an apparent discrimination that invites criticism, even if justifiable.

## XVIII

### EXPORT AND DOMESTIC GRAIN RATES

#### ATLANTIC AND GULF COMPETITION<sup>1</sup>

PROUTY, *Commissioner* :

The purpose of this proceeding was the investigation of export rates upon grain and grain products. . . . The matters embraced were :

*First.* Relative domestic and export rates.

*Second.* Relative rates on grain and grain products for export.

*Third.* Publication of export tariffs upon grain and grain products.<sup>2</sup>

#### I

A domestic rate applies to traffic which is being transported for use in this country ; an export rate to traffic which is on its way to some foreign country.           \*           \*           \*           \*

An examination of the tariffs filed with the Commission since 1887 shows that until recently the published rates upon domestic and export traffic have ordinarily been the same. Taking Chicago as an example, no export rate appears until October 1, 1896. Upon that date, the domestic rate on corn being 20 cents to New York, an export rate of 15 cents was made which expired October 31, 1896. January 20, 1897, the domestic rate still being 20 cents, a 15-cent export rate was again put in and remained effective until September 6, 1897. No other export rate appears until February 1, 1899, when an export rate of 18½ cents upon wheat and 16 cents upon corn was published, the domestic rates being 20 cents and 17½ cents, respectively. April 17th this rate was reduced to 12 cents upon both wheat

<sup>1</sup> Decided August 7, 1899. Interstate Commerce Reports, Vol. VIII, pp. 214-276. The English practice is suggestively described at p. 611, *infra*.

<sup>2</sup> This part of the case is omitted. — Ed.

and corn, a domestic rate of 17 cents upon each commodity being made effective the following day.

From Minneapolis to the Atlantic seaboard the published rates upon all kinds of grain and the products of grain have been uniformly the same, that is, wheat, corn, and flour have always taken an identical rate. December 28, 1889, the domestic rate being  $32\frac{1}{2}$  cents, an export rate of  $30\frac{1}{2}$  cents was published which expired February 4, 1890. In one or two other instances export rates were in effect for short periods, but it was not until the present year that this became the rule. January 2, 1899, an export rate of 25 cents was made effective upon flour, the domestic rate upon grain and flour being  $27\frac{1}{2}$  cents. This same export rate was, January 4, 1899, extended to grain and other grain products as well as flour. February 7th this rate was raised 1 cent to 26 cents. April 18th the domestic rate was reduced to  $24\frac{1}{2}$  cents, and the export rate to 23 cents.

From the Mississippi river to New York no export rate is found until October 1, 1896, when a rate of 17 cents on corn was put in against a domestic rate of 25 cents. This export rate expired October 31, 1896. January 20, 1897, the domestic rate still being 23 cents, an export rate of 15 cents was applied to corn which remained in effect until September 6, 1897. February 1, 1899, a rate of  $13\frac{1}{2}$  cents upon corn was made effective, the domestic rate being  $20\frac{1}{2}$  cents. April 15th an export rate of 12 cents was made upon both wheat and corn, the domestic rate upon grain and grain products being established April 18th at  $19\frac{1}{2}$  cents. Both domestic and export rates to other Atlantic cities are a certain differential above or below the New York rate, so that the history of the export rate to New York indicates its history to the entire Atlantic seaboard.

It would appear that export rates have been in effect to the Gulf ports for a longer time than to the North Atlantic ports. April 28, 1890, an export rate of 28 cents on corn from Kansas City to Galveston was established, the domestic rate being 48 cents, and this rate continued in effect until December 28, 1895. The domestic rate during that period fluctuated from 48 to 27 cents. December 28, 1895, an export rate of 27 cents was made

upon corn against a domestic rate of 36 cents. July 21, 1896, this was reduced to 16 cents, and July 31 to 13 cents, the domestic rate being 35 cents. An export rate of 28 cents upon oats was made between these points July 20, 1891. The first export rate upon wheat was made February 16, 1896, and was 31 cents. From this time on the export wheat rate fluctuated, the lowest being 12 cents August 17, 1896. At the time of the hearing the rate on all kinds of grain for export was 10 cents. The domestic rate since June 5, 1896, has been 37 cents on wheat and 35 cents on corn. \* \* \* \*

It will be seen that lower rates upon export than upon domestic grain have for a considerable time prevailed through the Gulf ports, but that until quite recently no substantial difference has been made through North Atlantic ports, except in the case of Boston and Portland, which have taken the New York export rate, and of Montreal, which takes an export rate 1 cent below New York. The question now before us is whether these lower export rates are an unjust discrimination against consumers at points bearing the higher domestic rate, and so in violation of the 3d section of the Act to Regulate Commerce. This must depend upon the conditions under which export and domestic grain moves, and those conditions arise both at home and abroad.

Directing our attention first to wheat, and considering the world as a whole, we find that certain countries produce more wheat than they consume, while certain other countries consume more than they produce. The principal nations in the former class are the United States, the Dominion of Canada, Argentina, Russia, India, and Uruguay. \* \* \* \*

The United States always produces more wheat than it uses for domestic consumption, but the amount of this surplus differs greatly from year to year. The following table gives the amount of wheat exported from the different wheat-exporting countries averaged in periods of five years for the time indicated :

COUNTRIES	1881-1885	1886-1890	1891-1895
United States . . . .	122,157,043	115,788,774	171,731,480
Other countries . . . .	115,690,816	134,484,937	179,646,922

The above table shows the exports from the United States of both wheat and flour reduced to bushels, and also from other countries, although the amount of flour exported from the United States is relatively much larger than it is from any other wheat-exporting nation. The exact statistics are not at hand to show exportations from other countries since 1895, but it sufficiently appears from the above statement what the relative position of the United States is as a wheat-exporting nation.

It is not material to state the wheat-consuming countries nor the amounts consumed by each. The United Kingdom and the European continent are the principal ones. It is sufficient to observe that all these principal grain markets are in direct communication with all wheat-producing countries. In Liverpool or Antwerp, American wheat comes into direct competition with foreign wheat from all these sources, and must be sold in competition with such wheat. It was said in testimony that the quality of American wheat was superior to that produced anywhere else, except in the Canadian Northwest, that this wheat was largely used by foreign millers to mix with inferior foreign grades, and that this sometimes created a demand for this particular quality of wheat which made the price higher than that of different grades of foreign wheat; but on the whole it must be true that the price of our American product is determined in these markets under the law of supply and demand in competition with all other wheat-producing nations. American wheat does not make the price abroad, although it may be the greatest single factor in the making of that price. To just what extent it does so operate must manifestly depend upon the amount available from different sources.

If the price of wheat in the foreign market is fixed by conditions outside the United States, that price of necessity determines the sum which can be realized in the foreign market for our American product. The cost of laying this wheat down in the foreign market is made up of two factors: the price paid the farmer who raises it, and the cost of transporting the grain from the grain fields to the foreign market. If the cost of transportation remains at all times the same, the price paid the farmer must

vary with the price abroad, and a reduction in the cost of transportation would benefit the farmer by exactly the amount of the reduction. It was said by those familiar with the business that the price at which our surplus can be sold determines the market price of the entire product. It seems plain that this must be true to a large extent. We are inclined to think, therefore, that there might be, and at times probably are, market conditions abroad which require the making of a low export rate for the purpose of disposing of our surplus product, and that without such rate the surplus product could not be moved, resulting in a demoralization in price to the wheat producer. In that event the consumer would get the benefit of the low price which the producer is compelled to take, but it will hardly be claimed that, taking the people as a whole, such fluctuations in price are desirable.

Market conditions in case of corn are somewhat different than with wheat. In the sale of its corn in foreign markets the United States has no serious competitor. Argentina exports corn in limited quantities, and considerable appears to come from southeastern Europe, but, taken altogether, the amount is insignificant in comparison with that furnished by the United States. The corn market of Chicago fixes the price throughout the world. In an indirect fashion corn comes into competition with wheat both abroad and in the United States. Wheat and corn are both capable of sustaining life, and the comparative expense at which either article can be procured tends in a degree to determine the amount of its consumption. The same is true of other grains. It requires, however, a considerable difference in expense to overcome individual prejudices and habits in favor of a particular article of food. The opinion of exporters examined upon the hearing was that it would require a very substantial advance or reduction in the freight rate to materially influence the export of corn. We very much doubt whether market conditions abroad require a low export corn rate, or whether such low rates produce a material effect in the movement of our surplus corn crop. It is undoubtedly true that exporters in the United States are often enabled to make sales by some concession in the freight rate which they could not otherwise make, but in the making of those

sales they are probably competing with some other dealer in the United States who is exporting his corn by some different route. The lower rate is required, not to meet competition from other countries, but competition between transportation companies in this country.

While, however, we are of the opinion that low export rates, especially upon wheat, might be justified and required by market conditions abroad, we are not of the opinion that the particular rates under consideration are due directly or indirectly to such conditions. Many grain exporters were examined in the course of this investigation, many railroad men were asked to state the reasons for the wide difference between the export and domestic rate, and no one of them suggested that this had been brought about by conditions abroad. It was the universal opinion of grain dealers and the unanimous admission of railroad representatives that these rates were entirely due to competition between railroads in America.

Grain which is grown east of the Rocky Mountains can ordinarily be exported either through the Atlantic ports or through the Gulf ports. The principal North Atlantic ports are Montreal, Portland, Boston, New York, Philadelphia, Baltimore, Norfolk, and Newport News, and the principal Gulf ports, Galveston and New Orleans. Grain grown to the west of the Rocky Mountains passes out through the Pacific ports. \* \* \*

The Pacific ports are not included in this investigation. Most of the grain exported through other ports is raised between a line drawn north and south through Chicago and the Rocky Mountains: All this territory is nearer in miles to the Gulf ports than the Atlantic ports. Owing to the geographical lines upon which our railway systems have been developed, export grain, until within a comparatively few years, has moved almost entirely through the Atlantic ports. These grain fields were first reached by roads from the East. Those roads have been strong and well equipped and have been able to control the greater part of this business. Within recent years, however, the lines leading to the South have become potential competitors for this traffic. Their physical condition has been greatly improved, expensive terminals

have been constructed at New Orleans, and are being constructed at Galveston. Great sums have been expended by the government in improving the water approaches of these ports, until they now admit vessels of the largest tonnage. These railways, being in position to handle the traffic, and having a most important advantage in point of distance, now insist that a portion of the business belongs to them. The Illinois Central Railroad with its easy grades and unexcelled terminal facilities contends that the grain grown upon its own line, at least, should be exported by it. Lines leading south from Kansas City strenuously claim that grain should pass by their routes to the seaboard rather than go twice the distance to the Atlantic ports. Kansas City is distant from Galveston about 800 miles and from New York about 1400 miles. The whole country tributary to Kansas City, in which enormous quantities of wheat and corn are raised, is therefore much nearer the Gulf ports than the Atlantic ports. Testimony in this case showed that the grain exported through Galveston during the last two or three years had been hauled an average distance of from 700 to 1000 miles, while had it passed out by the Atlantic ports it must have been carried from 1400 to 1600 miles.

Plainly, this grain will pass out through that port by which it can reach its foreign destination most cheaply. The margin of profit in handling grain has been and is extremely small, and a slight difference in the freight rate, not more than one eighth to one fourth cent per bushel, determines the route which it will take. The ocean rate varies greatly from the same port, often fluctuating from day to day. It also varies between the different ports. The Gulf ports insist that they are under a very substantial and permanent disadvantage as compared with all the Atlantic ports, and especially Boston and New York, in that there are no regular lines of steamships from Galveston to foreign ports, and comparatively few from New Orleans. The volume of imports through these ports is extremely small, so that vessels coming there for cargoes must come mainly in ballast. From this and many other circumstances it results that the average of ocean rates from the Gulf ports to foreign markets is higher than from

the North Atlantic ports. Upon this proposition the evidence in this case, and the evidence taken before the Commission in previous cases, leaves no question ; but when the attempt is made to go a step further, and to determine what in cents per bushel, or per hundred pounds, represents the disadvantage attaching to the exportation of grain through these ports as compared with North Atlantic ports the problem is an exceedingly difficult one, and indeed one to which an exact answer is impossible. What is true of the Gulf ports as compared with the North Atlantic ports is true in a less degree of the North Atlantic ports in comparison with each other. Now the total rate must be the same by all the ports, and therefore the inland rate to the Gulf ports must be less than the corresponding inland rate to the North Atlantic ports, but just how much it is exceedingly difficult to say. From all this we conclude that competition between railways for a considerable portion of this export grain is most severe, both by reason of the number of competitors and the peculiar conditions under which the competition proceeds.

The first low export rates from the Mississippi river and Chicago were, by the admission of all parties, made to divert traffic from the Gulf ports to the eastern lines. It will be remembered that export rates were in effect from Kansas City to Galveston and New Orleans previous to this much lower than the ordinary domestic rates.

While Gulf competition was the cause of the low export rates from the Mississippi river to the Atlantic seaboard beginning October 1, 1896, that competition is not answerable for the extremely low rates which prevail at the present time, these being due to competition between carriers to different North Atlantic ports.

For many years previous to February 1, 1899, certain agreed differentials had existed in the rates from interior western points to the North Atlantic ports of export. On export traffic Boston and New York have taken the same rate, Philadelphia a rate 2 cents, and Baltimore, Norfolk and Newport News 3 cents per hundred pounds below New York. The lines leading to New York have long insisted that these differentials were too high as

against that port, and in the month of January, 1899, an agreement was made by which they were to be reduced one half, leaving the rate to Philadelphia 1 cent and to Baltimore, Norfolk and Newport News  $1\frac{1}{2}$  cents per hundred pounds lower than to New York. Rates from St. Louis and Mississippi river crossings as far north as East Dubuque are the same. There was either in effect or in contemplation at the time of the making of the above agreement an export rate on corn from the Mississippi river of 15 cents to New York, 13 cents to Philadelphia and 12 cents to Baltimore, Norfolk and Newport News. The lines leading from St. Louis to Baltimore, Norfolk and Newport News insisted that the rate of 12 cents to these latter ports could not be advanced by reason of competition with the Gulf lines. It was therefore determined that the new differentials should be adjusted by reducing the rate to New York and Philadelphia. Accordingly, beginning February 1st, the rates were from the Mississippi river to New York  $13\frac{1}{2}$  cents, to Philadelphia  $12\frac{1}{2}$  cents, and to Baltimore, Norfolk and Newport News 12 cents.

Lines leading to the three latter points had always insisted that the original differentials did not unduly prefer those ports, and that under the modified differentials those ports would not obtain a fair share of the traffic. Some of these lines claimed that it was a part of the original arrangement by which the differentials were modified, that if an actual trial of the new differentials showed that lines leading to these ports did not obtain a fair share of the business the old differentials should be restored. These lines further insisted that the actual showing for the months of February and March demonstrated the correctness of their contention, and they accordingly published from St. Louis to these ports a rate of  $10\frac{1}{2}$  cents, being 3 cents below the New York rate. Thereupon lines leading to New York immediately met this by an export rate of 12 cents, thereby leaving the differential against that city at  $1\frac{1}{2}$  cents. In answer to this one line leading from St. Louis to Newport News published a rate of 9 cents upon corn, thus reestablishing the 3-cent differential. Here the matter rested at the time of the hearing, this rate not having been met by either the Baltimore or New York lines.

Since the hearing other rates have been put in effect which will be stated hereafter.

It will be seen, therefore, that the first export rate from the Mississippi river was made to meet Gulf competition, and that subsequent reductions have been brought about entirely by competition between rail carriers leading to the North Atlantic ports. The recent low export rates to the Gulf have been made to meet these low rates east.

There seems to be certain territory from which it is conceded that grain ought to be exported by way of the Atlantic seaboard, and no attempt is made to divert it to the south. There may also be some regions from which eastern lines are willing to admit that grain ought to be exported through the Gulf, although if such regions do in fact exist their location was not very clearly developed upon this hearing. It is not our province to divide up this traffic nor apportion this territory; nor, if it were, is there evidence in this case which would enable us to do so. It is evident, and we find, that there is a large area from which this export business may properly be said to be competitive as between different ports, and that such competition does actually exist in a most intense degree; first, between the Gulf and the North Atlantic seaboard; secondly, as between different North Atlantic ports. This competition has produced the present export rates.

While, however, competition between rail carriers was responsible in the first instance for the present lower export rates, there is another factor which must have a most important bearing upon the maintenance of these rates. We refer to water competition.

Chicago is the most important grain market of the United States. The price of grain in that market probably controls the price throughout this country at least. Of all the corn which is sent from the West to the Atlantic seaboard the greater part passes through Chicago, or a Chicago junction. Of wheat the greater bulk seems to center at Duluth rather than Chicago, although Chicago handles large quantities.

Now it is possible to transport grain from Chicago to either Montreal or New York entirely by water. The same steamer which loads at a Chicago elevator can pass by way of the Great

Lakes, the St. Lawrence river and the Canadian canals to the side of the ocean steamship at Montreal. Grain carried by lake from Chicago to Buffalo can there be loaded into a canal boat and taken through the Erie canal and the Hudson river to the ship side in New York harbor. It did not appear very definitely what the rate per hundred pounds by water from Chicago to Montreal was, but the testimony leaves the impression that it is between 8 and 9 cents per hundred pounds. Neither did it appear exactly what the all water rate was from Chicago to New York. . . .

We have already seen that export corn, being at Chicago, and export wheat, being at Duluth, will reach the foreign port by the cheapest route. Unless, therefore, the rail carrier makes substantially the same route on this grain to New York as is made by water lines the traffic will of necessity move by water, and not by rail. Otherwise stated, no grain can be exported from Chicago through New York by rail unless the rail rate is practically the same as the water rate. There may be circumstances under which the rail carrier can obtain a slightly higher rate, but the testimony shows, and the necessary conclusion from the undisputed facts is, that no considerable difference can be made in favor of rail transportation.

There was no testimony to show what the ocean rate from Montreal to the foreign destination was, but it did appear in this case, and has appeared in several previous cases, that the ocean rate from New York is lower than from any other port except Boston. It must follow, therefore, that all grain at Chicago, or which can be brought to Chicago, will be exported through the port of New York unless carriers leading from Chicago to the other ports make a rate as low or indeed lower than is made to New York. The same remark applies to interior points. Peoria, St. Louis and the lines leading from these cities claim the right to participate in this export grain traffic, but this they cannot do unless the rates from such interior points to the port of export bear a certain relation to the Chicago rate, for the grain can reach either Chicago or these points. A reduction in the Chicago export rate necessarily forces a reduction in the

export rate from these interior points to the Atlantic seaboard; but we have already seen that the rate to the Atlantic seaboard and the rate to the Gulf must correspond if any business is to move through the Gulf. Hence the inevitable conclusion that the water rate from Chicago to New York and from Chicago to Montreal determines the export rate through all the ports of the United States to a large extent while that rate is available. Whatever has been said in reference to Chicago applies equally to Duluth, the lake rate from there being but a trifle higher than from Chicago.

Not only is water competition a controlling factor in theory, but in volume as well. The testimony upon this hearing was that nearly all the wheat which reached Duluth went from there by water. It appeared that in the year 1898, 127,000,000 bushels of corn passed through Chicago, and of this amount 97,000,000 bushels left that port by water. It was in evidence that one exporter during the year 1898 had sent 14,000,000 bushels of grain all water through the port of Montreal. Competition which actually carries such enormous quantities of traffic must be controlling in its effect.

It should be observed that these lake rates only apply during the period of navigation, which is ordinarily from the middle of April to the middle of December. During some five months in the year grain cannot be transported from Chicago by lake, but the effect of this water competition is not entirely confined to the period of navigation. Considerable quantities are accumulated during the closed season at different ports of export, as well as at Buffalo and other lake ports, to be sent forward after navigation closes. Upon the contrary, the elevators at Chicago, which are estimated to contain about 50,000,000 bushels, are emptied during the season of navigation, but as soon as navigation closes they begin to fill up with grain which is stored there in anticipation of the opening of the next season. Considerable quantities are also stored in vessels lying at Chicago and Duluth during the winter months. While, therefore, there is during nearly half the year no actual lake transportation, the water route in a degree controls even then the rail rate; it limits to

an extent at all times the amount which the rail carrier can obtain from this traffic.

Water rates from Chicago to Montreal and New York apply to both export and domestic traffic, and no distinction appears to be made between the two kinds of traffic in case of the lake and rail rate.

A pertinent inquiry in all investigations of this sort is, Who is injured? In the present case, Whom does this difference between export and domestic rates harm? There are four different classes involved: the producer, the carrier, the domestic consumer and the foreign consumer. Many witnesses expressed the opinion that the producer had the benefit of the low rate. These statements were, however, merely expressions of opinion. No witness was able to say that the putting in of these rates had produced any actual effect upon the general market price of wheat and corn, and for the obvious reason that the elements which determine the market price of these commodities are so complex and so various and the prices themselves so fluctuate that it would be impossible to observe the connection if it existed. Whatever fact is found in reference to this must probably be by inference from other facts.

It appears plain that if the price of grain were absolutely fixed by the foreign market the American farmer would receive the entire benefit of the low rate. If grain cannot be sold for more than a certain price, and if that price is less than the market price in this country plus the established rate, then either the rate or the price in this country must be shrunk or the grain cannot find a foreign market. Upon the other hand, if the price of grain in the foreign market is determined by the American market, then the foreigner has the benefit of the low rate. The price which the American farmer receives is fixed by his home market, and the exporter can sell in the foreign country for that price plus the rate. When the rate is reduced, the price in the foreign market is correspondingly reduced. As an actual fact it is doubtless true that the price of grain, certainly wheat, abroad is fixed neither by the foreign nor by the American supply alone, but by the one acting upon the other.

Undoubtedly the American market has more to do with the price abroad at some times than at others, but it must always have something to do with that price, and the state of the foreign market must always act to some extent upon the American market. It is probable, therefore, that the producer and the foreign consumer obtain in varying degrees the benefit of the low export rate upon wheat. In view of the almost unanimous testimony that market conditions abroad have not required the recent low export rate, and that the volume of exports has not been stimulated by those rates, we are inclined to think that from these particular reductions in rate the American producer has derived no special benefit. The carrier has lost and the foreign consumer has gained.

There was no claim in this case that the present domestic rates were too high. If the American consumer suffers from the low export rate it must be from the necessary consequences which result from such an adjustment of rates. We cannot find specifically from the testimony in this case that the American consumer in the East is injured.

Whatever injurious effect is capable of being perceived is much more likely to result between different sections in the West, and arises, not from the principle of the lower export rate, but from the application of that rate.

Nearly all these low export rates are what are termed proportional rates. They do not apply to traffic originating at the point from which they are made effective, but only to traffic which has already paid the local rate up to that point. The 12-cent rate from the Mississippi river to New York cannot be used for the transportation of grain grown upon the east bank of that river, but only applies to grain grown to the west, and which has already been transported from some point farther west up to that river. It is evident that the application of this rate to the Mississippi, without the putting in of corresponding rates at points east, must have affected the price of grain grown west of that river as compared with the price of that grown east. The export rate from Chicago and from the Mississippi river is nominally the same. If it were actually the same, wheat

would be worth exactly as much at the Mississippi as it is at Chicago for export. The testimony tended to show that the putting in of this low proportional rate did actually increase the price of grain at the Mississippi river in comparison with the Chicago price. \* \* \* \* \*

It may happen and in many cases does happen, that, by the application of these so-called proportional rates, grain from the more distant point obtains transportation to Chicago or to the Gulf at a less rate than grain from the intermediate fields through which the transportation passes. We held in the investigation as to these export rates last April that this created, as against such intermediate points, an undue preference. *In the Matter of Export Rates from Points East and West of the Mississippi River*, 8 I. C. C. Rep. 185. We now repeat that finding.

\* \* \* \* \*

The carriers insist that while now, for the first time, a systematic difference is made in the published tariff between export and domestic rates, there has in fact always been such a difference in the actual rate. It is undoubtedly true that as to competitive traffic the published rate has been largely departed from in the past. This export traffic is highly competitive. It moves in large lots and is handled by comparatively few individuals. The idea has been more or less prevalent that the provisions of the Act to Regulate Commerce did not refer to export traffic. For these and other reasons export business has been peculiarly open to the manipulation of rates.

The testimony of representatives of carriers familiar with rates actually paid was to the effect that there had been in the past as wide a difference between the published rate and the actual rate upon export business as exists to-day in the published tariffs. We have no doubt that there has been in the past a difference between the published and actual rates. This difference has existed in the case of both export and domestic traffic. It has probably been greater in the case of export business, but how great we cannot definitely find.

Carriers also claim that they are justified in making a lower rate on export than on domestic business by the fact that the

cost of service is less to them. This export business moves in large lots, often in train loads, from a single point of origin to a single destination. Large cars can be used and these cars can be loaded to their full capacity. For these and other reasons they urge that the cost of handling this traffic is less than in case of domestic. We are inclined to think that there may be some difference in the cost of service, but we cannot from any testimony in this case express an opinion as to the amount of such difference. \* \* \* \* \*

## II

The second branch of this case refers to the relative rates upon grain and the products of grain. While the order instituting the investigation includes the products of both corn and wheat, the manufacturers of corn products did not appear and were not heard, nor were any complaints received from that class until after the close of this hearing. The only product of grain which was fully represented upon the hearing was flour. It seems, moreover, that flour is the only grain product which is exported in very large quantities, and that is the only subject accordingly to which this discussion will be directed.

From the time the Act to Regulate Commerce took effect until February 1, 1899, railway carriers have, with the exception of a short period in 1891, published the same rate upon export wheat and flour. Different rates upon these commodities have been made in certain parts of the United States, but those rates have never been applied to export traffic. February 1, 1899, carriers leading to the Atlantic seaboard published an export rate upon wheat from Chicago to New York of  $18\frac{1}{2}$  cents. The domestic rate was then 20 cents and the rate upon flour was the same. These rates were not changed, and the rate upon export flour was thus  $1\frac{1}{2}$  cents per hundred pounds higher than the rate upon export wheat. Subsequently the rate upon wheat was further reduced to 12 cents, the domestic rate upon wheat and the rate upon flour being established at 17 cents. Generally speaking the rate upon both domestic and export flour is the same as the rate upon domestic wheat, so that the difference

between export wheat and export flour is represented by the difference between domestic wheat and export wheat. These rates have already been given, and need not be repeated here.

The statement that no distinction is made between domestic and export flour is subject to one most important exception. Flour from Minneapolis, the largest milling center in the United States, when for export takes a rate  $1\frac{1}{2}$  cents per hundred pounds below the corresponding domestic rate by both rail and lake and rail routes, and this same difference obtains in the case of certain other milling points in the Northwest whose rates are governed by the Minneapolis tariff. This distinction does not apply in the case of Milwaukee, nor at any point south of a line drawn through Milwaukee east and west. \* \* \*

The milling interests of Minneapolis and other points which now enjoy an export rate did not appear upon this hearing, but practically all other sections of the country in which flour is ground for export were represented before us, protesting against the difference in rates upon export wheat and flour. These milling interests may be properly divided into the seaboard and the interior millers, and while the difference in rate, when actually paid, apparently affects both these classes in substantially the same way, their claims may be stated separately.

American millers compete in foreign markets with one another, but the testimony shows that their most serious competitor is the foreign miller. Most wheat purchased by wheat-consuming countries is exported before being ground. Russia and Canada grind a small amount of their surplus wheat, but the United States is the only nation which exports any very considerable amount of flour.

Considering the seaboard miller as compared with the English miller who grinds American wheat, both must derive their supply of the raw material from the same source. The American miller at New York pays the domestic rate, which is from the Mississippi river  $19\frac{1}{2}$  cents per hundred pounds, while the English miller transports his wheat from the same point to New York at the rate of 12 cents per hundred pounds. Clearly, therefore, the Englishman has an advantage by reason of this difference in freight rate over the American of  $7\frac{1}{2}$  cents per hundred.

It also costs the American miller more to transport his product across the ocean than it does the English miller to transport his wheat; but this is a matter with which we are not concerned. Plainly the American miller at New York pays, if he pays the published domestic rate,  $7\frac{1}{2}$  cents per hundred pounds more than the Englishman in bringing his wheat to the seaboard, and is therefore placed at a disadvantage to just that amount.

While this must be so if the seaboard miller actually pays the published rail rate, it is not plain to us that at the present time he does pay that rate. During the period of navigation, practically all wheat moves to the east by lake and rail, and upon this traffic the rate is the same whether for export or domestic consumption. Apparently it costs the New York miller to-day exactly the same to get his wheat to New York that it costs the English miller. This would not be so during the period of closed navigation, since it seems that almost one half the grain actually received by the New York Central during the months of March and April last was billed and carried upon the domestic rate.

While the representatives of the seaboard millers stated that these rates seriously discriminated against them, their testimony did not show any considerable diminution in exports from these mills. The profit was said to be less both upon export and domestic flour than it had formerly been, but the relative amount which was exported continued to be about the same.

Chicago may be taken as a type of the interior milling situation, and to illustrate this situation we may select one Chicago mill. This mill had a capacity of about 1500 barrels a day. The wheat which it ground was entirely spring wheat and came from beyond the Mississippi river. In its export business it was in competition with the English miller who obtained his wheat from the same fields. The rate paid by the Chicago mill from the Mississippi river to Chicago was 5 cents per hundred pounds. That paid by the English miller upon the same wheat from the Mississippi river to Chicago was 1.8 cents per hundred pounds. From Chicago to New York the Chicago miller paid upon his manufactured product 17 cents while the English miller paid

upon his raw product 10.2 cents, making a total difference in cost at New York against the Chicago miller of 10 cents per hundred pounds.

The Chicago miller could obtain the benefit of the through rate from the Mississippi river to New York under the milling-in-transit privilege by the payment of an added  $1\frac{1}{2}$  cents per hundred pounds, but he could not apply this to the export rate. The domestic rate from the Mississippi river to New York was  $19\frac{1}{2}$  cents per hundred pounds, which, with the added  $1\frac{1}{2}$  cents for the milling-in-transit privilege, makes a total through rate of 21 cents compared with a rate of 12 cents to the English miller. It is probable that the discrimination would be rather less against the American who was grinding winter wheat, but not materially less. A statement filed by the representatives of the Milwaukee millers shows by many illustrations drawn from actual rates a discrimination of from 4 to 11 cents per hundred pounds.

Considerable testimony was given as to the margin of profit in the manufacture of flour. This must of course vary at different times and under different conditions, but the testimony fairly showed that from 1 to 2 cents per hundred pounds was at the present time a fair profit, and as great a profit as had been realized recently upon export flour. The testimony upon the whole tended to show that the profit on flour sold abroad was rather less than that upon flour consumed at home. The primary object of the flouring mill is usually to grind for home consumption, the foreign market being resorted to as a means of disposing of that portion of the product which cannot be marketed at home.

Minneapolis and the northwest generally, where the lower export rate upon flour prevails, did not complain. The seaboard miller insisted that his margin of profit had been reduced by this discrimination, but the volume of business was apparently about the same. Upon the other hand, Milwaukee, Chicago, St. Louis and corresponding territory not only showed a diminution in profits, but a very marked decrease in the volume of export business. It was said by these millers that January 1st they were largely oversold for export, and that for this reason they sent abroad during the early months of the current year considerable

quantities of flour, but that they were unable to sell at the present prices and were largely out of the export trade. It is our conclusion and finding that the adjustment of rates is largely responsible for this. The northwestern miller enjoys a relatively better export rate. The seaboard miller can buy his grain during a large portion of the year upon the same terms as the foreign miller. Against the interior miller all these causes combine with the effect that he must be largely or entirely driven from the export trade.

The carriers justify the difference in rates in part at least upon the ground of difference in the cost of service. It was urged by them that for several reasons the transportation of export wheat is more profitable at the same rate than the transportation of flour for export, and that there ought to be a difference, although some thought that the present difference was too wide. They urge that it is a universal rule that the manufactured product pays a higher rate than the raw material; that flour is much more valuable than wheat; that it is more liable to damage than wheat; that wheat moves in larger volume, so that not merely car loads, but whole train loads are embraced in one shipment; that the cars can be, and in fact are, loaded more heavily with wheat than with flour. It is also said that the rate includes a delivery over the ship side in case of flour, and at the ship side in case of wheat.

The millers deny most of the above allegations, and say that if the movement of wheat is in larger volume at times, that of flour is much steadier, and that it is for the interest of the carrier to build up industries which bring other traffic in turn.

It is undoubtedly true that the raw material commonly takes a lower rate than the manufactured product, and for this there is usually a substantial reason in the character of the two commodities; but this is not by any means a universal rule, and the uniform practice of carriers for years has been to make the same rate upon export wheat and flour.

Export flour is probably on the whole somewhat more valuable than wheat, although when it is remembered that the cheaper grades of flour are usually exported it is questionable whether the difference in value is material. \* \* \* \*

From all this we conclude that the actual cost of handling export flour somewhat exceeds that of handling wheat, but just how much cannot be determined with certainty. We do not think that the excess would be more than from 1 to 2 cents per hundred pounds.

The carriers also justify their rates upon the ground of water competition. It has already been seen that this species of competition between Chicago and the seaboard forces down the grain rate to a point much below the ordinary rail tariff. The same thing is true, although not to the same extent, of the transportation of flour. It is not only possible to carry flour from Chicago and Duluth to the Atlantic seaboard by all water routes, as well as by lake and rail routes, but considerable quantities of it are so transported. In 1898 nearly one fourth of all the flour leaving Chicago for the entire year went from that port by water. This for the most part is carried to some lake port like Buffalo, and from thence to the seaboard by rail, but it may be taken all water to Montreal or New York as in case of grain, and the possible rail route determines what the rail portion of the haul can exact in the case of flour, as it does in the case of grain.

When, however, the effect of this competition upon the rate is examined, we find that the lake or the lake and rail rate is not as low as the corresponding rate upon wheat. The reason seems to be that equal facilities do not exist for the carrying of flour by lake as for the carrying of grain. Boats which engage in this traffic upon the Great Lakes are either line boats or wild boats. Line boats ply between certain stated points like Buffalo and Chicago at frequent intervals, and are in all cases under the control of some railroad company in connection with which they are operated. Wild boats, on the other hand, ply between different points, sometimes starting from one port and sometimes from another. Line boats are equipped for the carriage of flour and other package freight, while wild boats as a rule are not. Flour is never carried by these wild boats, — at least such was the testimony, — but always goes by the regular lines. In consequence the rate upon flour can be better maintained than that upon wheat. The ruling rate by lake upon flour from Chicago to New

York in recent years has been from 11 to 15 cents as against a rate of from 8 to 10 cents upon wheat. The present lake and rail rate on flour is 14 cents per hundred pounds, and it was said that this rate was maintained. The present domestic rail rate is 17 cents, and under these rates the carriage of flour from Chicago for export was said to be pretty evenly divided between all rail and lake and rail. From this it would appear that the difference between all rail and lake and rail which can be secured in case of flour is somewhat greater than in case of wheat. The differential in favor of the lake lines in former years has usually been 5 cents per hundred pounds, instead of the present differential of 3 cents, and this was one ground of complaint by the millers. In the past the demoralization has been so general that the published rate has offered very little criterion of the actual rate. If the present differential were 5 cents in favor of lake lines the rate on lake and rail flour would be 12 cents, and the millers claim that the railroads take advantage of the fact that they control these regular lines to unduly raise the lake and rail rate on flour. There is probably something to this, since it appears that these regular lines which carry flour are all under the influence of railways leading from the lake ports to the Atlantic seaboard; but we think and find that lake competition fairly fixes the rate on flour at from 2 to 4 cents per hundred pounds above the wheat rate. Subject to this difference the effect of water competition upon export flour is exactly the same as upon export wheat, and that effect need not be restated here. \* \* \* \*

### Conclusions

1. The first question presented for determination is, Does the Interstate Commerce Act, as a matter of law, prohibit the charging of an export and a domestic rate upon the same traffic to the same point? This question has recently been decided by the Commission in the negative in the case, *Kemble v. Boston & Albany R. Co.*, 8 I. C. C. Rep. 110. Since, however, the reasons upon which that decision rested have a certain bearing upon the questions of fact involved in this matter they may be briefly restated here. \* \* \* \*

January 29, 1891, a decision was announced in the case, *New York Bd. of Trade & Transportation v. Pennsylvania R. Co.*, 4 I. C. C. Rep. 447, 3 Inters. Com. Rep. 417, in which the matter of import rates was considered. The complaint was that carriers leading from New York to Chicago and the West were transporting freight which arrived from foreign destinations from New York to interior points at a less rate than was charged for the transportation of similar freight to the same interior points when such freight originated at New York. Many companies were made parties to this proceeding, and the case, in its original form, was intended to embrace practically all ports of entry upon the eastern seaboard and the Gulf. The conclusion reached was that the rate charged by the rail carrier from the port of entry to the inland destination must in all cases be the same upon merchandise originating at such port of entry as upon merchandise coming to that port from a foreign country. The Commission made this decision, however, not as question of fact, but as matter of law. Its holding was that the effect of the Act to Regulate Commerce extended no further than the boundaries of the United States; that the Commission had no power to consider conditions existing without the United States; that when traffic arrived at a port within the United States from a foreign country it was not proper to inquire from whence it came, but it must be treated in all respects as though it was domestic traffic originating at the port of entry.

The *Import Rate Case, Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, was an attempt upon the part of the Commission to enforce its order in this last-named proceeding. The Texas & Pacific Railway Company, with its connections, was engaged in the transportation of merchandise from Liverpool, England, to San Francisco, Cal. This merchandise was taken upon a through rate, came by water from Liverpool to New Orleans, and by rail from New Orleans to San Francisco. This entire through rate was often much less than the rate on corresponding articles from New Orleans to San Francisco, and the division of the rail carrier was of course very much less than its domestic rate for a

corresponding service. For example, one of the articles so transported was dry goods; the rate on dry goods by this line from Liverpool to San Francisco was 107 cents per hundred pounds, while the rate from New Orleans to San Francisco over the same rail line was 374 cents per hundred pounds. The defendants justified the rate from Liverpool upon the ground that water competition by various routes between Liverpool and San Francisco compelled them to charge this rate if they obtained any portion of the business.

The rule laid down by the Commission, and which was contended for by the Commission, in that case would have compelled the carrier to charge the same rate from New Orleans to San Francisco upon import as upon domestic merchandise, and would have excluded all consideration of conditions existing abroad. The Supreme Court refused to concur in this construction of the Interstate Commerce Act, holding that in case of imported traffic as well as of traffic originating within the United States the Commission should have reference to all conditions, whether at home or abroad, which bore upon the reasonableness of the rate adjustment. It held that the Act to Regulate Commerce did not prescribe a hard and fast rule which required that imported merchandise should be taken from the port of entry at the same rate which was applied to domestic merchandise originating at that point. The exact point decided was that carriers were not, as a matter of law, prohibited from participating in a through rate from a foreign destination to an interior point, of which the division received by the inland carrier was less than its rate for a similar service in the transportation of domestic merchandise between the same points. This decision must apply equally to export traffic, and upon its authority we are constrained to hold that, as matter of law, the Interstate Commerce Act does not prohibit a rail carrier from making a through rate from a point within the United States to a foreign destination, of which its division shall be less than the amount charged for the corresponding transportation of domestic merchandise to the port of export. \* \*

Carriers in some quarters seem to assume that the *Import Rate Case* above referred to in effect withdrew import and export

traffic from the purview of this Commission. Such is not at all the result of that decision. It rather enlarged the power of this body over that species of traffic, for while it was held that there was no rule like that contended for by the Commission it was also held that conditions abroad as well as at home should be considered, and that the interests of all classes, and not of a single class, should be taken into account. It is still a question of fact whether rates upon export or import traffic, as well as those upon domestic traffic, are in contravention of the provisions of the Act to Regulate Commerce.

The question for our consideration is therefore one of fact, and seems to be, upon this branch of the case, whether the present adjustment of export and domestic rates discriminates against the domestic consumer and in favor of the foreign consumer. What reason is there why the foreigner who eats our wheat should have it transported from the Mississippi river to New York for 12 cents a hundred pounds, while the American is obliged to pay  $19\frac{1}{2}$  cents for the same service?

The Supreme Court in the *Import Rate Case* has laid down the rule which should guide this Commission in the determination of that question. It is not every discrimination which is forbidden by the Act to Regulate Commerce, but only unjustifiable discriminations; and the court holds that in determining whether a discrimination is in fact unjustifiable the interests of all parties involved must be considered. The parties involved in this case are the producer of the grain, the domestic consumer and the inland carrier; we are not concerned with the foreign consumer. Now, taking all these classes together, is the discrimination against the seaboard consumer an unjust one?

The railways insist that it is a matter of no consequence to the eastern consumer what rate is charged the foreigner, provided the domestic rate is a reasonable one, and there is no pretense in this case that domestic rates are not sufficiently low. To this proposition we cannot fully assent. In the first place the foreigner is to an extent in competition with the American. Both are engaged in the production of articles sold in the same market, either abroad or in the United States. If the Englishman can

procure the necessities of life cheaper than his American competitor, that gives him the advantage. A few cents per hundred pounds in the price of his flour would not be, of itself, a matter of great consequence, but the same sort of a preference applied to all articles which enter into his daily support, as well as to the product of his labor, may determine whether he or the American can manufacture for our own market even.

Again, railway rates are in amount interdependent the one upon the other. The railway is entitled to earn a fair return upon its investment. If the proposition is made to reduce the rate, one important factor in the determination of that question is the total amount of earnings. If the rate is too low upon one article, in the end other articles pay too high a rate. Unless there is some good reason for the distinction, the rate to the American ought not to be higher than to the foreigner. If our carriers, in the absence of any constraining reason, can transport corn from the Mississippi river to New York for 12 cents per hundred pounds for export, that of itself shows that a rate of  $19\frac{1}{2}$  cents to the domestic consumer is unreasonable. Conditions may justify the existence of a lower rate for export than for domestic use, but in the absence of such conditions we cannot concur in the idea that any permanent system of rates which renders a service for the foreigner at a less price than is paid by the American can be just to the American; nor would we permit the continuance of such a system if we had the power to prevent it. From the standpoint of the eastern consumer the difference in rate of itself creates a discrimination which is undue, unless justifiable in the interest of the producer or the carrier.

How stands the interest of the producer; in other words, to what extent is the western farmer benefited by these low export rates?

The United States produces every year a certain quantity of wheat. Of that quantity the greater part is consumed by our own people, but a very large surplus still remains which must be disposed of abroad. This surplus is sold to foreign countries in competition with wheat from other parts of the world, and it must be sold at the price obtainable in the foreign market. While

at times that price may be practically fixed by the United States, and while at all times it is influenced by the price here, still it must be admitted that ordinarily the foreign market is not entirely determined by our own market.

It has already been said, in the findings of fact, that our wheat must be delivered abroad at the market price there. If the foreign price is less than our market price plus the ordinary cost of transportation, either the price here or the price of transportation must be reduced. Witnesses of experience in this respect gave it as their opinion that market conditions abroad frequently require a low rate in order to dispose of our surplus product; that the price of our surplus wheat establishes the market price in this country, and that, therefore, at times a low rate was of distinct benefit to the farmer, and indeed was necessary to prevent the demoralization of prices.

Conditions with reference to corn are apparently somewhat different. The corn market of the United States controls that of the world. The price at which our corn can be sold abroad has something to do with the amount which will be taken by foreign countries, but so does a lower price upon the eastern seaboard stimulate the consumption of corn. It is probable, and this was the testimony of exporters, that the difference in rate has little influence upon the volume of corn exportation.

Our conclusion is that a low export rate is sometimes necessary to dispose of our surplus wheat, and that in a much less degree it may promote the movement abroad of our surplus corn; that to the extent that it does operate to move our surplus grain it is of distinct benefit to the producer, and that his interest would outweigh that of the American consumer, and would justify a moderate difference in the rate. The price of the surplus within certain limits, seems to fix the price of the whole, and in the disorganization of prices from a glut in the market the producer loses more than the consumer gains. The ability to dispose of an actual surplus is a sort of safety valve which steadies the whole situation. It must be observed, too, that in applying this low rate to our surplus product the railway does precisely what the miller does and what every other manufacturer is likely to

do. The foreigner can buy American flour and almost every article of American manufacture cheaper than the American can at the mill or the factory. It is equally apparent that whether market conditions abroad do justify the lower export rate is a very delicate question to deal with, and one which had better be left to the law of supply and demand so far as it can.

An examination of this question from the point of view of the eastern consumer and the western producer leads to the conclusion that the low export rate is an unjust discrimination against the former unless it is required to move our surplus grain, in which event it is within some limits proper; that this Commission ought not to interfere unless it clearly appears that the difference is unduly great, or that no conditions abroad require it.

In the present case those facts did clearly appear. It appeared beyond all question that the low export rate in force at the time of the hearing had not resulted from any market conditions abroad. The witnesses were almost unanimous in the opinion that these rates had not been required by such conditions, and that they did not stimulate the export of our grain. It was practically conceded by the carriers that the rates were abnormally low, and that they had resulted entirely from competition between rail carriers themselves. If this is true, then it seems plain that the American producer has derived no substantial benefit from these rates; that the American carrier has lost enormously by them, and that the foreigner alone has had the benefit of them. The discrimination against the eastern consumer is not justified unless there is something in the interests of the carrier which excuses it.

\* \* \* \* \*

The cause of these low export rates has been fully stated in the findings of fact. The carriers themselves with one voice affirm that they were entirely the result of competition between American railways, first between the eastern lines and the Gulf lines, afterward between the different eastern lines. Since January 1st export rates on grain have been reduced in many cases almost one half; at these reduced rates enormous quantities of traffic have moved; no market conditions abroad required these reductions, and the American producer has not been

materially benefited by them; our railways have sacrificed millions of dollars without producing any real effect upon the flow of traffic, for the relative rate has remained about the same and the low rate has not increased the total volume. This depletion in revenue has been a donation to the foreigner.

It is impossible more strongly to emphasize the folly of this whole proceeding than by the mere statement of it; and yet in just what way does it violate the Act to Regulate Commerce? The purpose of that Act was to foster railway competition. The highest judicial authority has declared that competition between railways may be a reason for making a lower charge to the more distant point. We have found that this traffic is not only the legitimate subject of competition, but that the competition for it must be conducted under such circumstances as to render it peculiarly active and difficult to control. To agree upon these differentials to the different ports might be a criminal act. Apparently there is no method by which these questions can be settled except by a resort to such measures.

The real question is whether, in this warfare, domestic as well as export rates ought not to be reduced; whether the American as well as the foreigner ought not to have the benefit of this competition. We should be inclined to take this view of the matter, and to make some order which would at least limit the extent to which export might be lower than domestic rates, were it not for two circumstances.

*First:* Assuming that the basis of export and domestic rates ought to be the same, we think there may be cases where a difference may properly exist. Of this Boston is a good illustration.

The through rate from Chicago to Liverpool must be the same by all the ports. The ocean rate from Boston to Liverpool is the same as from New York; therefore, unless the inland rate from Chicago to Boston is the same as that from Chicago to New York export traffic will move through New York, not through Boston. These circumstances have induced the railways serving these two ports to agree for the last thirty years that the export rate to Boston and New York from the West might be the same. It is difficult to see how this agreement

can, in its operation, be treated as unjust or as in violation of the Act to Regulate Commerce. This Commission has twice decided that the Boston domestic rate may properly be higher than the New York domestic rate. We must assume, therefore, that the domestic rates to these two sections are properly adjusted, and that no discrimination is made against New England by charging the higher rate. The rate to the foreigner is fixed by that through New York, and therefore the making of the same rate *via* Boston does not discriminate in his favor as against the New England consumer. The commercial interests of Boston do not complain of the export rate. Under these circumstances, why should not New England carriers be permitted to engage in this export traffic?

It may be that if these carriers could be compelled, by an order of this Commission, to make the same domestic and export rates they would as a consequence reduce the domestic rate rather than surrender the export traffic, and that consequently Boston and perhaps some other New England territory would obtain the benefit of a lower domestic rate. They might, upon the other hand, prefer to surrender the export business rather than reduce the domestic rate; but the question before us is not what the carriers could be compelled to do, but what should they in fairness be required to do.

What is true of the rate to Boston is equally true of the export rate to Portland and Montreal; it is perhaps even more true of export rates to the Gulf ports. Taking effect July 1, 1899, the local export rate on wheat from Kansas City to Galveston is 19 cents, the proportional export rate 15 cents, and the local domestic rate 37 cents. Through rates *via* Kansas City undoubtedly make the ordinary domestic rate from Kansas City somewhat less than 37 cents, but the relation is probably pretty well indicated by the local export rate compared with the local domestic rate. We have here a domestic rate almost twice as great as the export rate. Without expressing any opinion as to the propriety of as wide a difference, or as to the reasonableness of the domestic rate, it seems evident, or extremely probable, that these lines may with propriety in competition for this export business make a lower charge upon export than upon domestic traffic.

Now if an order were to be made that domestic and export rates should under all circumstances be the same, it might result, and probably would result, in either driving out of business those lines where two rates may with propriety exist, or at all events in unjustly depleting the revenues of those lines. It would give to those lines in whose tariffs the difference is least an undue advantage over other lines in this competitive struggle. Before making any order which would not work injustice in the premises, it would be necessary to determine in each case by how much the domestic rate might properly exceed the export rate, if at all, and compel the observance of this relation. To do this would require us to determine what the differentials between these ports should be, and what reasonable domestic rates to these ports should be, and we certainly cannot undertake to do this upon the testimony before us.

The second circumstance which deters us from attempting to interfere is the existence of water competition. These rates were made before the opening of navigation, and were not probably influenced by that element; but we must dispose of the case with some reference to conditions as they now exist, and water competition is at the present time a factor which cannot be ignored.

By referring to the findings of fact it will be seen that Chicago and Duluth are the two points through which the greatest quantity of wheat and corn passes on its way to the seaboard. From both these points communication with the seaboard can be had by water. The greater part of the grain which leaves these cities for the east moves by water, and it cannot be questioned that the water rate to New York determines the rail or the water and rail rate to that same point. This Commission has always held that water competition, if it in fact exists, is an important circumstance in determining what rates may be justly charged by the rail carrier. The reasons for that have often been stated, and need not be repeated here. The water carrier is not subject to the provisions of the Act to Regulate Commerce; it publishes no rates; it may change its rates from day to day or from hour to hour; it can carry certain commodities at a lower rate probably than can be profitably made by rail. We have therefore been inclined to hold that competition

of this kind might be met by the rail carrier without in all cases a corresponding reduction at points not affected by such competition. There is no invariable rule of this sort, nor can it be said that interior and intermediate points ought not to receive any benefit from water competition, but neither can it be affirmed that the carrier should in no case be allowed to meet such competition except at the expense of its interior and intermediate territory. Such a requirement would often be unjust to the carrier and of no benefit to interior points.

In this case the export rate to New York is absolutely fixed by water competition, although, as we have seen, the low export rates were first fixed without reference to such competition. The export rate to New York of necessity fixes that rate through every other port. This being true we are not inclined to say, so far as the export rate is actually controlled by water competition, and while it is so controlled, that carriers must at all points reduce correspondingly their domestic rates. The rate from Chicago to New York is a base rate. Thousands of other rates are a percentage of, or a differential above or below, that rate. A change in that rate automatically works a change in all these other rates. If the carriers prefer to leave the New York domestic rate higher than the export rate by reason of these many dependent rates, we should hardly be justified in interfering unless some specific injustice in some particular case was called to our attention.

Of course no business actually moves during the period of navigation between Chicago and New York upon the domestic rail rate so long as that rate is materially higher than the water rate. Grain to New York can move by water at the same rate both for export and domestic consumption, and the two rates must be practically the same to that point. Furthermore, the New York domestic rate of necessity to an important degree influences other domestic rates upon the seaboard. The Philadelphia miller cannot pay 5 cents per hundred pounds above the New York miller. Carriers apparently meet this condition by lake and rail rates which are much lower than the domestic rail rate, and which apply to both domestic and export traffic as a

rule. Under the operation of these tariffs most of the eastern seaboard has the benefit of the low export rate, but we assume that there is some substantial reason why carriers do not reduce all rail domestic rates accordingly.

An examination of the tariffs in effect at the time of the hearing, as well as those at present in effect, shows that the difference between export and domestic rates is the least through the ports of New York, Philadelphia, Baltimore, Norfolk and Newport News. The published rates both at present and in the past show that the relation between the domestic and export rate through these ports is about the same; if there were but one rate at New York there would probably be no occasion for but one through all these ports.

Our conclusion upon this branch of the case is that market conditions sometimes in case of wheat, seldom in case of corn, justify an export rate lower than the domestic through the port of New York; and that water competition may have the same effect. Ordinarily, during the period of closed navigation the export and domestic rate should be the same through that port, and the Atlantic ports above mentioned. Lower export rates may perhaps with propriety be made through other ports, thereby enabling lines leading to them to compete for this export business. Such an adjustment of rates would be to the advantage of the carrier, just to the American consumer, and equally so to the producer. With the opening of navigation water competition introduces a new element which may necessitate, in the fair interest of the carriers, two rates at New York and consequently at all other ports. The problem is primarily one for the carriers rather than this Commission, and we do not think at the present time any interference on our part would contribute to its solution. \* \* \* \* \*

### III

The element of direct injury which was absent in the first branch of this case is abundantly present in the second branch. The complaint is that discrimination in the freight rate exists

against the milling industry in certain sections of the United States, and the miller makes oath that these freight rates have destroyed or are fast destroying his export business. We have found that this is in a measure true of Milwaukee, Chicago, St. Louis and corresponding territory in the middle west; in all this territory millers are being excluded from the export trade; and we have further found that this apparently results from the improper adjustment of freight rates. In part this improper adjustment consists in giving to certain sections better rates on flour in comparison with the complaining territory than have been previously enjoyed, and in part in creating an unreasonable difference in the rate upon wheat and flour. This being so, to what relief, if any, are the millers entitled? \* \*

The main complaint of the millers is directed to the difference in rates between export wheat and flour. The findings of fact fully state the case, and from them it clearly appears that a discrimination, and a most grievous one, does exist. It needs no argument to show that, when the entire margin of profit to the American miller in the grinding of export flour does not exceed from 1 to 3 cents per hundred pounds, a difference in the freight rate in favor of the English miller amounting to from 4 to 11 cents per hundred pounds is, other things being equal, prohibitive. The serious question is whether that discrimination is justifiable. \* \* \* \* \*

The carriers insist that the difference in rate is justified first, by water competition, and secondly by additional cost of service.

Water competition certainly limits during the period of navigation, and to a degree before the opening and after the close of navigation, the rates upon wheat and flour. Both the published and actual water rate on wheat has been lower than upon flour; we have found from 2 to 4 cents lower.

This water competition for seven months of the year is not only possible but actual. Of all the traffic leaving Chicago by regular line boats during the period of navigation, 30 per cent is said to be flour and the balance grain and other commodities. It has already been said that water competition may to an extent be properly met by the rail rate. The water line does actually

fix these relative rates on wheat and flour, and we think the carriers are justified by that competition in making, to a degree at least, the same difference which is thereby created. The millers urge with force that the rail carriers, by virtue of their control over the line boats by which alone flour is transported, unduly exaggerate the difference in rate between wheat and flour; but the fact still remains that water competition does create a substantial difference in those rates.

We have also found that to a limited extent the cost of service is greater in the transportation of export flour than in that of export wheat, and for this reason under the circumstances of this case we think that a slightly higher rate on flour than on wheat for export is justifiable. This is especially true in view of the fact that the flour rate includes the delivery on shipboard while the wheat rate does not. The rate from Chicago to New York upon flour puts the flour on board the vessel, whereas to put export wheat on shipboard an additional charge of about  $1\frac{1}{8}$  cents per bushel is made. \* \* \* \* \*

It should perhaps be noticed that, although the rate upon flour has been confessedly higher than upon wheat for many years, the exportation of flour has steadily increased, being 3,947,333 barrels in 1878 and 15,349,943 barrels in 1898. The increase for the last six years has not, however, been marked, and exportations since 1894 have actually declined, having been in that year 16,859,533 barrels.

This Commission is of the opinion that public policy and good railway policy alike require the same rate upon export wheat and flour. Such rates tend to develop both the industries of the United States and the traffic of the railways. We are not, however, here settling national or railroad policy. We are simply administering the Act to Regulate Commerce; and in view of all conditions as we find them, we do not feel that charging a somewhat higher rate on flour than on wheat for export is in violation of that statute. We do think that the published difference is too wide, and that the rate upon flour for export ought not to exceed that upon wheat by more than 2 cents per hundred pounds. \* \* \* \* \*

## XIX

### FREIGHT CLASSIFICATION

#### THE HATTERS' FURS CASE<sup>1</sup>

PROUTY, *Commissioner*:

The complainant is engaged in the manufacture of hats under the title of the Pioneer Hat Works at Wabash, Indiana, and his complaint is that "hatters' furs" and "fur scraps and cuttings" are wrongly classified, the present classification of both these commodities being double first class, while he insists that hatters' furs should be classified as first class and fur scraps and cuttings as second class. . . .

Hatters' furs is a trade name applicable to the various kinds of fur used in the manufacture of hats. These furs, as sold to the manufacturer and presented for transportation, are sheared from the skin, and packed in paper bags containing three or five pounds each, which are then assembled in wooden cases, 100 bags to the case. The case thus weighs from three to five hundred pounds and is in size about 36" x 36" x 40", containing some 30 cu. ft.       \*       \*       \*       \*       \*       \*

The complainant testified that rabbit fur was the sort mostly used by him in the manufacture of hats, although he used to some extent nutria, and that the value of the furs which he used was from \$.40 to \$2.50 per pound. The complainant makes a medium grade of fur hats. More of the higher priced furs would probably enter into the manufacture of hats of a higher grade. These furs, nutria and beaver, average in price as high as \$6 per pound, and the price list show that the best grade of beaver has at times listed at \$15 per pound; but it is fairly

<sup>1</sup> Decided November 21, 1901. Interstate Commerce Reports, Vol. IX, pp. 79-86.

inferable from the testimony that rabbit fur is the kind mainly used in the manufacture of fur hats of all grades, the more expensive sorts of fur being used only in comparatively small quantities. The testimony is not sufficiently definite to justify an exact finding, but we think it fairly appears, and find, that the average value of hatters' furs would be from \$1 to \$2 per pound, the great bulk of that commodity presented for transportation being within these limits.

The term fur scraps and cuttings seems to include the waste produced in working up fur pelts for various purposes. It embraces not only the waste from the preparation of hatters' furs but also the pieces which are left in the manufacture of fur garments. These fur scraps are purchased by fur brokers, by whom they are assorted into different grades and sold to different persons for various uses at widely different prices. The complainant testified that the fur scraps and cuttings used in the manufacture of hats were worth from  $2\frac{1}{2}$  to 40 cents per pound. The pieces of fur which would also be embraced under the same title are often worth much more than this, sometimes as high as \$1.50 per pound.

It is extremely difficult to fix any fair average value, but we are inclined to think that the great bulk of fur scraps and cuttings offered for transportation could not exceed in value 50 cents per pound, and that the average would not equal this. Fur scraps and cuttings are transported in cases, bags or bales weighing from 450 to 500 pounds. The proportion between bulk and weight is about the same as with hatters' furs.

Manufactured hats are classified first class and the complainant insisted that this was a discrimination against the raw material.

Upon this point testimony was given by both parties as to comparative value and desirability from a traffic standpoint of the raw material and the finished product.

Hatters' furs are put through three processes in preparation for use in the manufacture of hats and shrink about two ounces in the pound. Fur scraps and cuttings pass through from twelve to eighteen processes and only from 10 to  $33\frac{1}{3}$  per cent in weight

of usable fur is obtained. In the manufacture of the hat itself the average is still further shrunk.

Hats are shipped in cases weighing about sixty pounds to the case and are from two to three times more bulky than hatters' furs or fur scraps and cuttings. The complainant also insisted that they were much more valuable by the pound. This was denied by the defendants who claimed that the average value of all hats was less by the pound than the average value of hatters' furs.

Hats other than straw are sometimes made of other material besides fur, but the complainant testified that the proportion of fur hats to other hats would be fifty to one. Caps are made of cloth. The average value of fur hats per pound must greatly exceed the average value of the hatters' furs which enter into their construction, and without doubt this is true of all hats other than straw. It would be unprofitable to hazard a guess as to whether this might or might not be the case if straw hats were included.

The complainant further insisted that hatters' furs and fur scraps and cuttings were a more desirable kind of traffic than hats and caps for the reason that they were less liable to loss or damage in transit. From the very nature of the articles it is almost impossible that hatters' furs or fur scraps and cuttings should be stolen. They are not combustible and not easily injured by water or by jamming; and any injury from these causes would be confined to what was actually injured. Upon the contrary a hat is ready to wear and this is an inducement to abstract one from a case. Injury to a small part of a hat spoils the entire article. The complainant testified that in the whole course of his business he had never made a claim for damage to hatters' furs or fur scraps in transit while he had frequently had occasion to do so in case of hats.

The complainant is the only manufacturer of hats located in the West. All his competitors are upon the Atlantic seaboard in near proximity to New York. Most of these hatters' furs are imported and are distributed from the port of New York. The complainant claims that by reason of the higher rate upon raw material than upon the manufactured product he is placed at a disadvantage in comparison with the eastern manufacturer.

The market of the complainant is the whole United States west of Pittsburg and in all that territory he competes with the eastern manufacturer. The exact points in the East at which these competitors are located did not appear, and it is not therefore possible to make any exact comparison of rates; but generally speaking the rate from these eastern points is that of Boston or New York. There is considerable territory, like the Pacific Coast, to which rates upon hats are the same from the Atlantic seaboard as from Wabash, and in nearly all territory the sum of the rates, upon the same class, from New York to Wabash and from Wabash to the point of consumption is considerably greater than the rate from New York to the last-named destination.

Some question was raised as to the amount of complainant's shipments per year. Mr. Gill, Chairman of the Official Classification Committee, stated that a compilation of these shipments had been made and that they aggregated about 150,000 pounds per year. The rate from New York to Wabash is 72 cents, first class, and \$1.44 double first class. If, therefore, the complainant is right in his contention as to what the correct classification should be he is damaged to the extent of something more than \$1000 annually upon the statement of the defendants.

The complainant also urged that the classification in question created undue prejudice against his commodities as compared with dry goods, boots and shoes and many other articles classified as first class.

About 250 articles are classified as double first class by the Official Classification. Generally speaking, such articles offer some special reason for the classification, like unusual bulk, extraordinary risk, or something of that nature. An examination of the entire list fails to disclose a single commodity which affords as desirable traffic as the one under consideration, and in only three or four instances is there any approach to this. Something like 1500 articles are classified as first class. We have examined this list and our conclusion is that but very few of them are as desirable freight as hatters' furs and fur scraps and cuttings, and that none of them are more so.

No special reasons were shown why these two commodities should pay a higher rate than other similar commodities.

### *Conclusions*

Upon these facts the complainant contends that the present classification of hatters' furs and fur scraps and cuttings is in violation of the Act to Regulate Commerce. His position is that in the forming of a classification a proper relation between different articles should be preserved and that when these articles under consideration are compared with others analogous from a transportation standpoint it appears that this present classification is too high.

To this the defendant replies that one commodity should not be compared with another unless the two are competitive; hatters' furs cannot therefore be tested by dry goods or boots and shoes. Mr. Gill, Chairman of the Official Classification Committee, speaking both as a witness and as counsel for the defendants, asserts that the main element in the determination of a classification is "value of service" or "what the traffic will bear."

There is undoubtedly much, we do not find it necessary to now inquire how much, truth in this contention of Mr. Gill; but it cannot be admitted that those are the only considerations to be observed. It has been repeatedly claimed by carriers and repeatedly held by the Commission that in the forming of a classification bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily be placed in the same class. *Warner v. New York C. & H. R. R. Co.*, 4 I. C. C. Rep. 32, 3 Inters. Com. Rep. 74; *Harvard Co. v. Pennsylvania Co.*, 4 I. C. C. Rep. 212, 3 Inters. Com. Rep. 257; *Page v. Delaware, L. & W. R. Co.*, 6 I. C. C. Rep. 548. Manifestly in determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which utterly fails to give due weight to such considerations is unjust and unreasonable.

The present case falls within this rule. Here are two commodities, not bulky, offered for transportation in packages of convenient size, of not great value, and with practically no liability to loss or damage in transit. It has been found that hardly an article among all those in first class is so desirable traffic as they are, and still these commodities are classified as double first class. In our opinion this is unlawful. They should not be classified higher than first class. We should be inclined to say that fur scraps and cuttings must not be rated higher than second class were it not for the claim of the defendants that this would lead to fraud in the billing of furs as fur scraps.

There is another ground upon which the same conclusion must be reached. Mr. Gill himself admits that when two articles are competitive no preference should be shown in the freight rate. Hatters' fur, the raw material, does compete in a way with hats, the finished product, and we do not think that, under the circumstances of this case, the rate upon the raw material ought to be greater than that upon the finished product.

The complainant is located at Wabash, Ind., and is the only manufacturer of hats west of the Atlantic seaboard. Most of his competitors are in the immediate vicinity of New York from whence supplies of hatters' furs and fur scraps and cuttings are almost entirely drawn. For the purpose of noting the effect upon the complainant, let us assume that his competitor is located in New York itself.

The complainant pays upon his raw material double first class, and that raw material shrinks about one half in process of manufacture. His competitor pays upon the finished product first class or just one half the rate paid by the complainant upon the raw material. The item of freight, therefore, costs the complainant at his factory three or four times what it costs his competitor in laying down the same hat at that point.

The complainant sells exclusively in territory west of Pittsburg and the defendants urge that he has an advantage over his competitors in freights by reason of closer proximity to the market. But a moment's consideration will show that at points other than Wabash the discrimination is even greater than at the

complainant's factory. In some at least of this competitive territory rates from the Atlantic seaboard and Wabash are the same, so that the complainant pays freight upon the raw material in addition to the same rate as the eastern manufacturer upon the finished hat. In none of this competitive territory probably is the rate from the east as great as the rate to Wabash plus the rate from Wabash to the point of consumption.

In determining the relative amounts paid upon the raw material and the finished product we have disregarded the weight of the cases. This is somewhat more in the case of hats than hatters' furs, but there is no definite testimony upon this point.

The defendants say that the complainant is the only person who is finding fault with this classification. Were this true, and without apparent reason, it would be no ground for denying him the relief to which he is entitled; but here the reason is sufficiently obvious since the discrimination is to the advantage of every other manufacturer as against the complainant.

Neither is this a case, as the defendants intimate, where the matter is of so slight consequence that it should not be inquired into nor redressed. The law has a maxim that it will not concern itself with trifles and this perhaps ought to be all the more true of traffic conditions where there can be no exact rule; but in the case before us the excess paid by the complainants according to the statement of the defendants amounts to \$1000 a year, which can hardly be called a trifle to the complainant, however it might be with the defendants. We think the present adjustment between the raw material and the finished product is unjust and unduly prejudicial to the complainant and that this should be corrected. \* \* \* \* \*

The fixing of a classification determines the relation of rates, not the rate itself. If we transfer these two commodities from double first class to first class, we do not thereby determine the rate under which they shall move in the future. The revenues of the defendants are not necessarily diminished since they may advance rates applicable to these classes. In *Danville v. Southern R. Co.*, 8 I. C. C. Rep. 409, the right of determining the relation in rates which should exist between two localities was

exercised and the same principle must apply to the relation between two commodities. In that case it was said that the authority was not clear, but having exercised it then, and believing that a plain distinction exists between fixing a rate and determining a relation in rates, we shall continue to do so until the Supreme Court of the United States has held otherwise.

\* \* \* \* \*

## XX

### ECONOMIC WASTE IN TRANSPORTATION<sup>1</sup>

THE vast extent of the United States, the necessity of transporting commodities great distances at low cost and the progressiveness of railway managers have led to an extraordinary development of one phase of rate making. This is the principle of the flat rate, based upon the theory that distance is a quite subordinate if not indeed entirely negligible element in the construction of freight tariffs under circumstances of competition. Albert Fink fully accepted this principle in his classic *Report upon the Adjustment of Railroad Transportation Rates to the Seaboard* almost twenty-five years ago.<sup>2</sup> Mr. J. C. Stubbs, traffic manager of the Harriman lines, speaking of transcontinental business in 1898, clearly expressed it as "the traditional policy of the American lines as between themselves to recognize and to practice equality of rates as the only reasonable and just rule . . . regardless of the characteristics of their respective lines, whether equal in length or widely different. . . ." <sup>3</sup> Professor H. R. Meyer, formerly of the University of Chicago, both in his testimony before the Elkins Committee<sup>4</sup> and in his *Government Regulation of Railway Rates*, is the most prominent academic exponent of this principle. It is the theory upon which the Southern basing-point system is founded; and it is the common practice in making rates into and out of New England — being in fact vital to the continued prosperity of this out-of-the-way territory. President Tuttle of the Boston & Maine Railroad has most ably supported this principle of equality of rates irrespective of distance. "It is a duty of transportation companies,"

<sup>1</sup> From the *Political Science Quarterly*, Vol. XXI, 1906, pp. 381-417.

<sup>2</sup> P. 41.

<sup>3</sup> Question of Canadian-Pacific Freight Differentials, Hearings, etc., October 12, 1898, p. 118. Cf. quotation on p. 494, *infra*. <sup>4</sup> Vol. II, pp. 1552 *et seq.*

he says, "to so adjust their freight tariffs that, regardless of distance, producers and consumers in every part of this country shall, to the fullest extent possible, have equal access to the markets of all parts of this country and of the world, a result wholly impossible of attainment if freight rates must be constructed upon the scientific principle of tons and miles . . ." <sup>1</sup> This is the principle of the blanket rate attacked in the famous Milk Producers' Protective Association case in 1897, and it is the practice which has been so fully discussed of late, and generally applied to lumber rates from the various forest regions of the United States into the treeless tract of the Middle West. <sup>2</sup> The principle, while applied thus generally in the construction of tariffs, is of far greater applicability in the making of special or commodity rates. Under such rates probably three fourths of the tonnage of American railways is at present moved. The essential principle of such special rates, constituting exceptions to the classified tariffs, is that of the flat rate; namely, a rate fixed in accordance with what the traffic will bear, without regard to the element of distance.

Such general acceptance, both in practice and theory, of the principle that distance is a relatively unimportant element in rate making is significant at this time, in connection with the recent amendment of the Act to Regulate Commerce. It is important also because of the marked tendency toward the adoption by various state legislatures of the extreme opposite principle of a rigid distance tariff. The old problem of effecting a compromise between these two extreme theories by some form of long-and-short-haul clause — the original section 4 of the act of 1887 having been emasculated by judicial interpretation — is again brought to the front. For these reasons it may be worth while to consider certain results which inevitably follow the widespread acceptance of this principle of the blanket rate. Its benefits are indeed certain; namely, an enlargement of the field of competition, and an equalization of prices over large areas,

<sup>1</sup> Interstate Commerce Commission, *In re Rates on Import and Domestic Traffic*, February 28, 1903, p. 7.

<sup>2</sup> Elkins Committee, Vol. III, pp. 2189-2191.

and that too at the level of the lowest or most efficient production. But these advantages entail certain consequences — of minor importance, perhaps, but none the less deserving of notice.

## I

The subordination of distance to other factors in rate making is a logical derivation from the theory of joint cost. This theory justifies the classification of freight; namely, a wide range of rates nicely adjusted to what the traffic in each particular commodity will bear, while always allowing each to contribute something toward fixed and joint expenses. In the same way it explains a close correlation of the distance charge to what each commodity will bear. It assumes that any rate, however low, which will yield a surplus over expenses directly incidental to the increment of traffic and which thus contributes something toward indivisible joint costs, serves not only the carrier by increasing his gross revenue, but at the same time lightens the burden of fixed expenses upon the balance of the traffic. This principle of joint cost, so clearly set forth by Professor Taussig,<sup>1</sup> is fundamental and comprehensive. It pervades every detail of rate making. But it rests upon two basic assumptions which, while generally valid, are not universally so. In the first place each increment of traffic must be *new* business, not tonnage wrested from another carrier and offset by a loss of other business to that competitor. And secondly, each increment of traffic must be *economically suitable* to the particular carriage in contemplation.

The first of these assumptions fails wherever two carriers mutually invade each other's fields or traffic. Each is accepting business at a virtual loss, all costs including fixed charges on capital being taken into account, in order to secure the increment of business. Each gain is offset by a corresponding loss. It is the familiar case of the rate war. A less familiar aspect of the matter is presented when traffic is disadvantageously carried by two competing roads, each diverting business from its natural

<sup>1</sup> *Quarterly Journal of Economics*, Vol. V, p. 438.

course over the other's line. The sum total of traffic is not increased. Each carries only as much as before but transports its quota at an abnormal cost to itself. This may, perhaps, swell gross revenues; but by no process of legerdemain can the two losses in operating cost produce a gain of net revenue to both. And each increase of *unnatural* tonnage, where offset by a loss of natural business, instead of serving to lighten the common fixed charges, becomes a dead weight upon all the remaining traffic. The commonest exemplification of this is found in the circuitous transportation of goods, instances of which will be given later.

The second case in which the principle of joint cost fails to justify charges fixed according to what the traffic will bear may arise in the invasion of two remote markets by one another; or, as it might be more aptly phrased, in the overlapping of two distant markets. A railroad is simultaneously transporting goods of like quality in opposite directions. Chicago is selling standard hardware in New York, while New York is doing the same thing in Chicago. Prices are the same in both markets. Of course if the two grades of hardware are of unequal quality, or if they are like goods produced at different cost, an entirely distinct phase of territorial competition is created. But we are assuming that these are standard goods and that there are no such differences either in quality or efficiency of production. What is the result? Is each increment of business to the railroad a gain to it and to the community? The goods being produced at equal cost in both places, the transportation charge must be deducted from profits. For it is obvious that the selling price cannot be much enhanced. The level of what the traffic will bear is determined not, as usual, by the value of the goods but by other considerations. The traffic will bear relatively little, no matter how high its grade.

The result is that the carrier, in order to secure the tonnage, must accept it at a very low rate, despite the length of the haul. This is the familiar case of the special or commodity rate granted to build up business in a distant market. Special rates confessedly form three fourths of the tonnage of American railways,

as has already been said. The assumption is usually made that such traffic is a gain to the railways, justified on the principle of joint cost as already explained. But does it really hold good in our hypothetical case? There is a gain of traffic in both directions, to be sure. But must it not be accepted at so low a rate that it falls perilously near the actual operating cost? It is possible that even here it may add something to the carriers' revenue, and thereby lighten the joint costs in other directions. But how about the community and the shipping producers? Are any more goods sold? Perhaps the widened market may stimulate competition, unless that is already keen enough among local producers in each district by itself. The net result would seem to be merely that the railroads' gain is the shippers' loss. There is no addition to, but merely an exchange of, place values. Both producers are doing business at an abnormal distance under mutually disadvantageous circumstances. It may be said, perhaps, that the situation will soon correct itself. If the freight rates reduce profits, each group of producers will tend to draw back from the distant field. This undoubtedly happens in many cases. But the influence of the railway is antagonistic to such withdrawal. It is the railway's business to widen, not to restrict, the area of markets. "The more they scatter the better it is for the railroads." "Keep every one in business everywhere." And if necessary to give a fillip to languishing competition, do so by a concession in rates. Is there not danger that with a host of eager freight solicitors in the field, and equally ambitious traffic managers in command, a good thing may be overdone, to the disadvantage of the railway, the shippers and the consuming public?

An objection to this chain of reasoning arises at this point. Why need the public or other shippers be concerned about the railways' policy in this regard? Is not each railway the best judge for itself of the profitableness of long-distance traffic? Will it not roughly assign limits to its own activities in extending business, refusing to make rates lower than the actual incidental cost of operation? And are not all low long-distance rates, in so far as they contribute something toward joint cost,

an aid to the short-haul traffic? The answer will in a measure depend upon our choice between two main lines of policy: the one seeking to lower *average* rates, even at the expense of increasing divergence between the intermediate and the long-distance points; the other policy seeking, *not so much lower rates as less discriminatory rates* between near and distant points. In the constant pressure for reduced rates in order to widen markets it is not unnatural that the intermediate points, less competitive probably, should be made to contribute an undue share to the fixed sum of joint costs. The common complaint to-day is not of high rates but of relative inequalities as between places. It is a truism to assert that it matters less to a shipping point what rate it pays than that its rate, however high, should be the same for all competing places. This immediately forces us to consider the consumer. What is the effect upon the general level of prices of the American policy of making an extended market the touchstone of success, irrespective of the danger of wastes arising from overlapping markets? That the result may be a general tax upon production is a conclusion with which we shall have later to do. Such a tax, if it exists, would go far to offset the profit which unduly low freight rates in general have produced. In short, the problem is to consider the possible net cost to the American people of our highly evolved and most efficient transportation system. Our markets are so wide, and our distances so vast, that the problem is a peculiarly American one.

## II

Having stated the theory of these economic wastes, we may now proceed to consider them as they arise in practice. Concrete illustration of the effect of disregard of distance naturally falls into two distinct groups. Of these the first concerns the circuitous carriage of goods; the second, their transportation for excessive distances. Both alike involve economic wastes, in some degree perhaps inevitable, but none the less deserving of evaluation. And both practices, even if defensible at times,

are exposed to constant danger of excess. It will be convenient also to differentiate sharply the all rail carriage from the combined rail and water transportation. For as between railroads and water ways the difference in cost of service is so uncertain and fluctuating that comparisons on the basis of mere distance have little value.

Recent instances of wasteful and circuitous all rail transportation are abundant. A few typical ones will suffice to show how common the evil is. President Ramsay of the Wabash has testified as to the roundabout competition with the Pennsylvania Railroad between Philadelphia and Pittsburg by which sometimes as much as 57 per cent of traffic between those two points may be diverted from the direct route. "They haul freight 700 miles around sometimes to meet a point in competition 200 miles away."<sup>1</sup> Chicago and New Orleans are 912 miles apart, and about equally distant — 2500 miles — from San Francisco. The traffic manager of the Illinois Central states that that company "engages in San Francisco business directly *via* New Orleans from the Chicago territory, and there is a large amount of that business, and we engage in it right along."<sup>2</sup> This case therefore represents a superfluous lateral haul of nearly a thousand miles between two points 2500 miles apart. The Canadian Pacific used to take business for San Francisco, all rail, from points as far south as Tennessee and Arkansas, diverting it from the direct way *via* Kansas City.<sup>3</sup>

Goods moving in the opposite direction from San Francisco have been hauled to Omaha by way of Winnipeg, journeying around three sides of a rectangle by so doing, in order to save five or six cents per hundred pounds.<sup>4</sup> Between New York and New Orleans nearly one hundred all rail lines may compete for business. The direct route being 1340 miles, goods may be

<sup>1</sup> Senate (Elkins) Committee Report, 1905, Vol. III, pp. 2152-2153. The transverse Buffalo, Rochester & Pittsburg seems to be the feeder for the New York Central and the Reading.

<sup>2</sup> *Ibid.*, Vol. IV, p. 2849.

<sup>3</sup> Question of Canadian Pacific Differentials, Hearings, etc., October 12, 1898, p. 115. Privately printed. Cf. also the Sunset Route, *Ibid.*, p. 116.

<sup>4</sup> Fifty-first Congress, first session, Senate Report No. 847, p. 176.

carried 2051 miles *via* Buffalo, New Haven (Ind.), St. Louis and Texarkana.<sup>1</sup> A generation ago conditions were even worse, the various distances by competitive routes between St. Louis and Atlanta ranging from 526 to 1855 miles.<sup>2</sup> New York business for the West was often carried by boat to the mouth of the Connecticut river, and thence by rail over the Central Vermont to a connection with the Grand Trunk for Chicago. To be moved at the outset due north 200 miles from New York on a journey to a point — Montgomery, Ala. — south of southwest seems wasteful; yet the New York Central is in the field for that business.<sup>3</sup> It is nearly as uneconomical as in the old days when freight was carried from Cincinnati to Atlanta *via* the Chesapeake & Ohio, thence down by rail to Augusta and back to destination.<sup>4</sup> Even right in the heart of eastern trunk-line territory, such things occur in recent times. The Cincinnati, Hamilton & Dayton prior to its consolidation with the Père Marquette divided its east-bound tonnage from the rich territory about Cincinnati among the trunk lines naturally tributary. But no sooner was it consolidated with the Michigan road than its east-bound freight was diverted to the north — first hauled to Toledo, Detroit and even up to Port Huron, thence moving east and around Lake Erie to Buffalo.<sup>5</sup> In the Chicago field similar practices occur. Formerly the Northwestern road was charged with making shipments from Chicago to Sioux City *via* St. Paul. This required a carriage of 670 miles between points only 536 miles apart; and the complaint arose that the round-about rate was cheaper than the rate by the direct routes.<sup>6</sup> I am privately informed that the Wisconsin Central at present makes rates between these same points in conjunction with the Great Northern, the excess distance over the direct route being 283 miles. Complaints before the Elkins Committee<sup>7</sup> are not

<sup>1</sup> *Pubs. Amer. Stat. Ass.*, June, 1896, p. 73.

<sup>2</sup> Reports Internal Commerce, 1876, pp. 54-59.

<sup>3</sup> Map in Brief of Ed. Baxter, United States Supreme Court in the Alabama Midland case.

<sup>4</sup> Windom Committee, Vol. II, p. 795.

<sup>5</sup> New York *Evening Post*, September 30, 1905.

<sup>6</sup> Fifty-first Congress, first session, Senate Report No. 847, p. 637.

<sup>7</sup> Elkins Committee, Vol. III, p. 1831.

widely different in character. Thus it appears that traffic is hauled from Chicago to Des Moines by way of Fort Dodge at lower rates than it is carried direct by the Rock Island road, despite the fact that Fort Dodge is 80 miles north and a little west of Des Moines. The Illinois Central, having no line to Des Moines, prorates with the Minneapolis & St. Louis, the two forming two sides of a triangular haul. An interesting suggestion of the volume of this indirect routing is afforded by the statistics of merchandise shipped between American points which passes through Canada in bond.<sup>1</sup> The evidence of economic waste is conclusive.

A common form of wastefulness in transportation arises when freight from a point intermediate between two termini is hauled to either one by way of the other. Such cases are scattered throughout our railroad history. One of the delegates to the Illinois Constitutional Convention of 1870 cites, as an instance of local discrimination, the fact that lumber from Chicago to Springfield, Ill., could be shipped more cheaply by way of St. Louis than by the direct route.<sup>2</sup> And now a generation later, it appears that grain from Cannon Falls, 49 miles south of St. Paul on the direct line to Chicago, destined for Louisville, Ky., can

<sup>1</sup> Only once compiled in detail. United States Treasury Department, Circular No. 37, 1898. The volume of traffic by tons between points in designated states by way of Canada was as follows:

From Illinois to California . . . . .	11,800
From Illinois to New Jersey . . . . .	80,000
From Illinois to Pennsylvania . . . . .	123,000
From Kentucky to Pennsylvania . . . . .	1,005
From Kentucky to New York . . . . .	5,516
From Missouri to Pennsylvania . . . . .	5,000
From Pennsylvania to Missouri . . . . .	13,824
From New York to Kentucky . . . . .	3,357
From New York to Missouri . . . . .	12,869
From New York to Tennessee . . . . .	609
From Ohio to Pennsylvania . . . . .	26,801
From Pennsylvania to Ohio . . . . .	5,251
From Ohio to New York . . . . .	211,657
From New York to Ohio . . . . .	55,243

<sup>2</sup> Debates, Vol. II, p. 1646, cited in University of Illinois Studies, March, 1904, p. 21.

be hauled up to St. Paul on local rates and thence on a through billing to destination, back over the same rails, considerably cheaper than by sending it as it should properly go.<sup>1</sup> The Hepburn Committee reveals shipments from Rochester, N.Y., to St. Louis, Minneapolis or California, all rail, on a combination of local rates to New York and thence to destination.<sup>2</sup> Presumably the freight was hauled 300 miles due east and then retraced the same distance; as New York freight for southern California is to-day hauled to San Francisco by the Southern Pacific and then perhaps 300 miles back over the same rails. Even if the rate must be based on a combination of low through rates and higher local rates, it seems a waste of energy to continue the five or six hundred miles extra haul. Yet the practice is common in the entire Western territory. From New York to Salt Lake City by way of San Francisco is another instance in point.<sup>3</sup> Of course a short haul to a terminal to enable through trains to be made up presents an entirely different problem of cost from the abnormal instances above mentioned.<sup>4</sup>

Carriage by water is so much cheaper and as compared with land transportation is subject to such different rate-governing principles, that it deserves separate consideration. Mere distance, as has already been said, being really only one element in the determination of cost, a circuitous water route may in reality be more economical than direct carriage overland. Yet beyond a certain point, regard being paid to the relative cost per mile of the two modes of transport, water-borne traffic may entail economic wastes not incomparable to those arising in land transportation. In international trade, entirely confined to vessel carriage, a few examples will suffice for illustration. Machinery for a stamp mill, it was found, could be shipped from Chicago to San Francisco by way of Shanghai, China, for fifteen cents

<sup>1</sup> Elkins Committee, Vol. I, pp. 32-34. Cf. also Cannon Falls Elevator Company case, decided by the Interstate Commerce Commission, March 25, 1905. The Hampton, Florida, case shows the same thing. Interstate Commerce Reports, Vol. VIII, p. 503.

<sup>2</sup> P. 2031.

<sup>3</sup> Elkins Committee, 1905, Vol. II, p. 921.

<sup>4</sup> Cullom Committee, Vol. II, p. 101.

per hundred weight less than by way of the economically proper route. Were the goods ever really sent by so indirect a route?<sup>1</sup> It would appear so when wheat may profitably be carried from San Francisco to Watertown, Mass., after having been taken to Liverpool, stored there, reshipped to Boston, thereafter even paying the charges of a local haul of nearly ten miles;<sup>2</sup> or when shipments from Liverpool to New York may be made *via* Montreal to Chicago, and thence back to destination.<sup>3</sup> I am credibly informed that shipments of the American Tobacco Co. from Louisville, Ky., to Japan used commonly to go *via* Boston. Denver testimony is to the effect that machinery, made in Colorado, shipped to Sydney, Australia, can be transported *via* Chicago for one half the rate for the direct shipment; and that on similar goods even Kansas City could ship by the car load considerably cheaper by the same roundabout route. Conversely straw matting from Yokohama to Denver direct must pay \$2.87 per hundred pounds; while if shipped to the Missouri river, 500 miles east of Denver, and then back, the rate is only \$2.05.<sup>4</sup>

As a domestic problem, water carriage confined to our own territory has greater significance in the present inquiry. Purely coastwise traffic conditions are peculiar and in the United States, as a rule, concern either the South Atlantic seaports or trans-continental business. As to the first-named class, the volume and importance of the traffic are immense. Its character may be indicated by a quotation from a railroad man.

Now a great deal has been said, chiefly on the outside, about the Canadian Pacific Railway seeking by its long, circuitous and broken route to share in a tonnage as against more direct and shorter lines all rail, and I propose to show to you gentlemen that not only have we a precedent on which to claim differentials, many of them, and that we also have numerous precedents to show that there are numerous broken, circuitous water and rail lines operating all over the country that are longer and more circuitous

<sup>1</sup> Interstate Commerce Commission Report, *In re* Publication and Filing of Tariffs on Export and Import Traffic, decided February 5, 1904, p. 81.

<sup>2</sup> Elkins Committee, Vol. II, p. 919.

<sup>3</sup> *Ibid.*, p. 1624.

<sup>4</sup> Interstate Commerce Commission case, No. 723, *Kindel v. B. & A. R. R.*, etc., p. 508.

than ours, and still they do operate with more or less success. . . . In saying this I do not wish to be understood as criticising the right of any road to go anywhere, even with a broken and circuitous line, to seek for business, so long as they are satisfied that taking all the circumstances into account such business will afford them some small measure of profit. . . .

The distance by the Chesapeake & Ohio road, Boston to Newport News, is 544 miles by water; Newport News to Chicago, 1071 miles, total 1615 miles from Boston to Chicago, against 1020 miles by the shortest all rail line from Boston, showing the line *via* Newport News, 58 per cent longer. The distance by the Chesapeake & Ohio from New York to Newport News is 305 miles, to which add 1071 miles, Newport News to Chicago, total 1376 miles, against the shortest all rail line of 912 miles, 50.87 per cent longer. Again the distance between Boston and Duluth by all rail is 1382 miles, against 2195 miles *via* Newport News and Chicago, 58.82 per cent longer by the broken route.

The Southern Pacific Co., or System rather, in connection with the Morgan line steamers carries business, *via* New York, New Orleans and Fort Worth, to Utah points at a differential rate. The distance from New York to Denver *via* water to New Orleans thence rail to Fort Worth is 3155 miles, against 1940 miles by the direct all rail line, showing it to be longer *via* New Orleans 62.61 per cent.<sup>1</sup>

Allowing a constructive mileage of one third for the last-named water haul,<sup>2</sup> many of these even up fairly well with the all rail carriage; although a route from New York to Kansas City by way of Savannah, Georgia, would appear to be an extreme case, owing to the relatively long haul by rail.<sup>3</sup> The increasing importance of Galveston and the necessity of a back haul to compensate for export business make it possible for that city to engage in business between New York and Kansas City, although the roundabout route is two and one-half times as long as the direct one.<sup>4</sup> As compared with these examples, it is no wonder that the competition for New York-Nashville or New England-Chattanooga business by way of Savannah, Mobile or Brunswick, Georgia, is so bitter. The roundabout

<sup>1</sup> Question of Canadian Pacific Freight Differentials, Hearings, etc., October 12, 1898, p. 17. Privately printed. See also pp. 72 and 116 on the same point.

<sup>2</sup> Record Cincinnati Freight Bureau case, Vol. II, p. 306.

<sup>3</sup> Question of Canadian Pacific Freight Differentials Hearings, October 12, 1898, p. 55.

<sup>4</sup> United States Industrial Commission, Vol. IV, p. 134.

traffic thus reaches around by the southern ports and nearly up again to the Ohio river.<sup>1</sup>

The second great class of broken rail and water shipments consists of transcontinental business. Goods from New York to San Francisco commonly go by way of New Orleans or Galveston,<sup>2</sup> as well as by Canadian ports and routes.<sup>3</sup> In the opposite direction, goods are carried about 1000 miles by water to Seattle or Vancouver before commencing the journey east. But more important, as illustrating this point, is the traffic from the Central West which reaches the Pacific coast by way of Atlantic seaports. As far west as the Missouri, the actual competition of the trunk lines on California business has since 1894<sup>4</sup> brought about the condition of the "blanket" or "postage-stamp" rate. The same competitive conditions which open up Denver or Kansas City to New York shippers by way of New Orleans or Galveston enable the Southern Pacific Railroad or Cape Horn routes to solicit California shipments in western territory to be hauled back to New York, and thence by water all or part of the way to destination. How important this potential competition is — that is to say, what proportion of the traffic is interchanged by this route — cannot readily be determined.

Transportation over undue distances — the carriage of coals to Newcastle in exchange for cotton piece goods hauled to Lancashire — as a product of keen commercial competition may involve both a waste of energy and an enhancement of prices in a manner seldom appreciated. The transportation of goods great distances at low rates, while economically justifiable in opening up new channels of business, becomes wasteful the

<sup>1</sup> Fifty-fifth Congress, first session, Sen. Doc., No. 39, p. 88.

<sup>2</sup> By water from New York, 1800 miles to New Orleans, with 2489 miles by rail. Or to Galveston 2300 miles, with 2666 miles by rail, a total of 4966 miles. The direct line, all rail, is about 3300 miles. Allowing constructive mileage of 3 to 1 for water carriage, they are far from equal.

<sup>3</sup> Texas cotton bound for Yokohama by way of Seattle.

<sup>4</sup> On these matters the Record of the Business Men's League of St. Louis case before the Interstate Commerce Commission and the Hearings on Canadian Pacific Differentials are illuminating.

moment such carriage, instead of creating new business, merely brings about an exchange between widely separated markets, or an invasion of fields naturally tributary to other centers. The wider the market, the greater is the chance of the most efficient production at the lowest cost. The analogy at this point to the problem of protective tariff legislation is obvious. For a country to dispose of its surplus products abroad by cutting prices may not involve economic loss; but for two countries to be simultaneously engaged in "dumping" their products into each other's markets is quite a different matter. In transportation such cases arise whenever a community, producing a surplus of a given commodity, supplies itself, nevertheless, with that same commodity from a distant market. It may not be a just grievance that Iowa, a great cattle-raising state, should be forced to procure her dressed meats in Chicago or Omaha;<sup>1</sup> for in this case some degree of manufacture has ensued in these highly specialized centers. But the practice is less defensible where the identical product is redistributed after long carriage to and from a distant point. Arkansas is a great fruit-raising region; yet so cheap is transportation that dried fruits, perhaps of its own growing, are distributed by wholesale grocers in Chicago throughout its territory. The privilege of selling rice in the rice-growing states from Chicago is, however, denied by the Southern Railway Association.<sup>2</sup> An illuminating example of similar character occurs in the southern cotton manufacture, as described by a Chicago jobber.

Right in North Carolina there is one mill shipping 60 car loads of goods to Chicago in a season, and a great many of these same goods are brought right back to this very section. . . . I might add that when many of these heavy cotton goods made in this southeastern section are shipped both to New York and Chicago and then sold and reshipped South, they pay 15 cents to 20 cents per hundred less each way to New York and back than *via* Chicago. This doubles up the handicap against which Chicago is obliged to contend and renders the unfairness still more burdensome.<sup>3</sup>

<sup>1</sup> Elkins Committee, Vol. III, p. 1830.

<sup>2</sup> Record before the Interstate Commerce Commission, Cincinnati Freight Bureau case, Vol. I, p. 166.

<sup>3</sup> Elkins Committee, Vol. III, pp. 2540-2541.

Not essentially different is a case recently brought before the Interstate Commerce Commission, outlined to me by the chairman, Hon. Martin A. Knapp. A sash and blind manufacturer in Detroit was seeking to extend his market in New England. At the same time it appeared that other manufacturers of the same goods located in Vermont were marketing their product in Michigan. The burden of the complaint of the Detroit producer was not directed to this invasion of his home territory; but rather to the fact that the freight rate from Boston to Detroit, probably due to back loading, was only about one half the rate imposed upon goods in the opposite direction, from Detroit to the seaboard. Is not this an anomalous situation? Two producers presumably of equal efficiency in production are each invading the territory naturally tributary to the other and are enabled to do so by reason of the railway policy of "keeping every one in business" everywhere, regardless of distance. President Tuttle of the Boston & Maine Railroad is perhaps the most outspoken exponent of this policy, it being in a sense a necessity imposed upon New England by reason of its remoteness to stimulate the long-haul business.

Generally the roads have never refused to help in the stimulation of industries everywhere. They all participate. I have even known it to happen between New York and Boston that a freight train would have a car load of bananas going in one direction and would pass a train having a car load of bananas going in the opposite direction, so that a car load of bananas are landed in New York and in the Boston market on the same day. I do not know how it is done, but it is done. . . . I should be just as much interested in the stimulating of Chicago manufacturers, in sending their products into New England to sell, as I would be in sending those from New England into Chicago to sell. It is the business of the railroad centering in Chicago to send the products from Chicago in every direction. It is our particular business in New England to send the New England products all over the country. The more they scatter the better it is for the railroads. The railroad does not discriminate against shipments because they are east-bound or west-bound. We are glad to see the same things come from Chicago into New England that are manufactured and sent from New England into Chicago.<sup>1</sup>

This is of course what naturally results. The overweening desire of the large centers to enter every market is well

<sup>1</sup> Elkins Committee, Vol. II, p. 981.

exemplified in the Elkins Committee Hearings by testimony of the Chicago jobbers.

A few years later, when the railroads established the relative rates of freight between New York and Philadelphia and the Southeast, and St. Louis, Cincinnati and Chicago and the Southeast, giving the former the sales of merchandise and the latter the furnishing of food products, the hardware consumed in this country was manufactured in England. At that time we, in Chicago, felt that we were going beyond the confines of our legitimate territory when we confidently asked the merchants in western Indiana to buy their goods in our market. To-day, a very considerable percentage of the hardware used in the United States is manufactured in the Middle West, and we are profitably selling general hardware through a corps of traveling salesmen in New York, Pennsylvania and West Virginia, and special lines in New England.

What we claim is that we should not have our territory stopped at the Ohio river by any act of yours. It is not stopped, gentlemen, by any other river in America. It is not stopped by the greatest river, the Mississippi. It is not stopped by the far greater river, the Missouri. It is not stopped by the Arkansas; it is not stopped by the Rio Grande. It is not stopped even by the Columbia; and, even in the grocery business, it is not stopped by the Hudson. There are Chicago houses that are selling goods in New York city, groceries that they manufacture themselves. Mr. Sprague's own house sells goods in New York city, and Chicago is selling groceries in New England. As I say, even the Hudson river doesn't stop them.<sup>1</sup>

All this record implies progressiveness, energy and ambition, on the part of both business men and traffic officers. Nothing is more remarkable in American commerce than its freedom from restraints. Elasticity and quick adaptation to the exigencies of business are peculiarities of American railroad operation. This is due to the progressiveness of our railway managers in seeking constantly to develop new territory and build up business. The strongest contrast between Europe and the United States lies in this fact. European railroads take business as they find it. Our railroads make it. Far be it from me to minimize the service rendered in American progress. And yet there are reasonable limits to all good things. We ought to reckon the price which must be paid for this freedom of trade.

<sup>1</sup> Elkins Committee, Vol. III, pp. 2538 and 2550.

## III

The causes of economic waste in transportation are various. Not less than six may be distinguished. These are: (1) congestion of the direct route; (2) rate cutting by the weak circuitous line; (3) prorating practices in division of joint through rates; (4) desire for back loading of empty cars; (5) strategic considerations concerning interchange of traffic with connections; and (6) attempts to secure or hold shippers in contested markets. These merit consideration separately in some detail.

Congestion of traffic upon the direct line is a rare condition in our American experience. Few of our railways are overcrowded with business. Their equipment may be overtaxed, but their rails are seldom worked to the utmost. Yet the phenomenal development of trunk-line business since 1897 sometimes makes delivery so slow and uncertain that shippers prefer to patronize railways less advantageously located, even at the same rates. The congestion on the main stem of the Pennsylvania railway between Pittsburg and Philadelphia is a case in point.

Special rates or rebates often divert traffic. The weak lines (in that particular business) are persistently in the field and can secure tonnage only by means of concessions from what may be called the standard or normal rate. The differential rate is an outgrowth of this condition. The present controversy over the right of the initial line in transcontinental business to route the freight at will involves such practices. The carriers insist that they can stop the evil only by the exercise of choice in their connections. An interesting recent example is found in the Elkins Committee testimony. It appears that lumber from points in Mississippi destined for Cleveland instead of going by the proper Ohio river gateways was diverted to East St. Louis. The operation was concealed by billing it to obscure points — Jewett, Ill., near East St. Louis, and Rochester, Ohio, — and there issuing a new bill of lading to destination.

*Senator Dolliver.* And these people carry it up to this little station near St. Louis and then transfer it to another station near Cleveland?

*Mr. Robinson.* Oh, no; to any point on the Central Traffic Association territory. In other words, it may go to Cleveland.

*Senator Dolliver.* Why do they bill it to Rochester?

*Mr. Robinson.* In order to get the benefit of keeping it in transit fifteen days without any extra cost, first.

*Senator Dolliver.* I do not see how that would affect the question of billing it to Rochester.

*Mr. Robinson.* Because that enables the wholesaler to have fifteen days extra time in which to sell the lumber.

*The Chairman.* Why haul it all around the country and then reduce the rate on that long haul?

*Mr. Robinson.* In order that roads that are not entitled naturally to this traffic may by this process get the traffic.

*Senator Dolliver.* What roads from Mississippi to East St. Louis?

*Mr. Robinson.* Any of the trunk lines — the Illinois Central, the Louisville or the Southern Railway lines. The roads in Mississippi south of the river are not parties to this arrangement, you understand. In fact, as fast as they find it out they break it up, or try to. They do not want their traffic diverted.

*Senator Kean.* Does it not come down to this, that some road is trying to cheat another on the use of its cars?

*Mr. Robinson.* Not only that, but it is trying to get traffic that does not belong to it.<sup>1</sup>

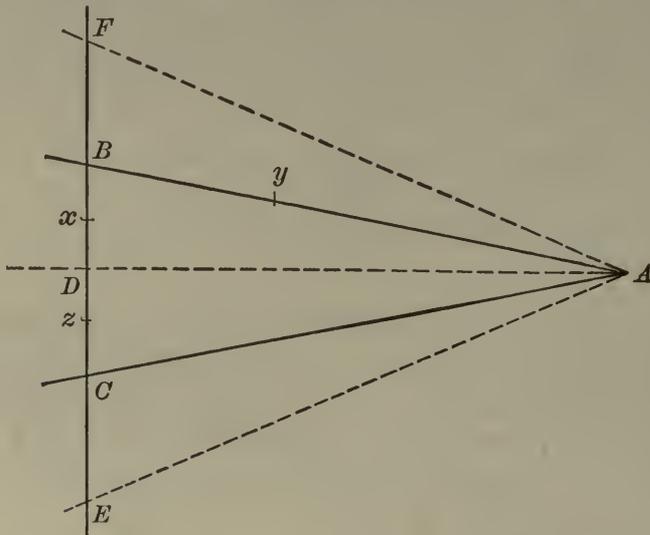
Wherever a large volume of traffic is moving by an unnatural route, the first explanation which arises therefore is that rebates or rate cutting are taking place. The devious routing of the Standard Oil traffic from Chicago to Grand Junction, Tenn., over a chain of connecting roads, in order to cover up the rebate is a good illustration.<sup>2</sup>

A third cause of diversion of traffic is akin to the second; and concerns the practices in prorating. Much circuitous transportation is due to the existence of independent transverse lines of railway which may participate in the traffic only on condition that it move by an indirect route. This situation is best described by reference to the following diagram. Let us suppose traffic to be moving by two routes passing through points

<sup>1</sup> Testimony, Vol. III, pp. 2495 *et seq.*

<sup>2</sup> Report of the United States Commissioner of Corporations on the Transportation of Petroleum, 1906, p. 255. *Vide*, also, pp. 5, 7, 14, and the map at p. 256.

$B$  and  $C$ , and converging on  $A$ , which last-named point might be Chicago, St. Louis, New York or any other railroad center. Cutting these two converging lines of railway, we will suppose a transverse line passing through  $B$  and  $C$ . Obviously the proper function of this railway is as a feeder for the through lines, each being entitled to traffic up to the halfway point,  $D$ . But over and above serving as a mere branch, this road, desirous of extending its business, has a powerful incentive to extend operations. The longer the transverse haul, the greater becomes its prorating division of the through rate with the main line. Traffic from  $C$  is of no profit to the transverse road so long as it is hauled directly to  $A$ . But if hauled from  $C$  to the same



destination by way of  $B$ , the profit may be enhanced in two ways. In the first place the prorating distance is greater; and secondly, such traffic from  $C$  not being *naturally* tributary to the main line  $BA$ , but merely a surplus freight to be added to that already in hand, the main line  $AB$  is open to temptation to shrink its usual proportion of the through rate in order to secure the extra business. This same motive may on proper solicitation induce the other main line  $CA$  to accept traffic from  $B$  and its vicinity. The result is a greatly enhanced profit to the cross line and circuitous carriage of the goods in both directions around two sides of a triangle. Only recently in

a case in Texas the Interstate Commerce Commission found that two roads thus converging on a common point were each losing to the other traffic which rightfully was tributary to its own line. Our illustrative example is not a fanciful one in any degree.

This roundabout carriage becomes of course increasingly wasteful in proportion to the width of angle between the main lines converging on the common point. And several cases indicate that in extreme instances the two main lines may converge on a common point from exactly opposite directions, while the transverse or secondary road or series of roads forms a wide and roundabout detour. The well-known Pittsburg-Youngstown case, cited in the original Louisville & Nashville decision in 1887, serves as illustration. The Pennsylvania was competing from Pittsburg directly east-bound to New York with certain feeders of the New York Central lines which took out traffic bound for the same destination but leaving Pittsburg *west-bound*.<sup>1</sup> Other instances of the same phenomenon occur at Chattanooga, where freight for New York may leave either northward or southward, at Kansas City and in fact at almost any important inland center.

Another extreme form may even arise in the competition between two parallel trunk lines cut transversely by two independent cross roads. One of these latter may induce traffic to desert the direct route, to cut across to the other trunk line, to move over that same distance and then to be hauled back again to a point on the first main line where it may find a "cut" rate to destination. Grain sometimes used literally to meander to the seaboard in the days of active competition between the trunk lines. Wheat from Iowa and northern Illinois finally reached Portland, Me., by way of Cincinnati in this manner, with a superfluous carriage of from 250 to 350 miles.

Starting within 90 miles of Chicago, though billed due northeast to Portland, wheat has traveled first 97 miles due southwest to avail of the connection of the Baltimore & Ohio Railroad for Cincinnati, and thence north

<sup>1</sup> Interstate Commerce Commission Report, Vol. I, p. 32; and Industrial Commission, Vol. XIX, p. 442.

to Detroit Junction, a total of 716 miles to reach the latter point and save 5 cents in freight. The direct haul through Chicago would have been 340 miles less, or a total of 376 miles only.<sup>1</sup>

Another witness describes the route as follows:

Property billed for Portland, Me., started 90 miles below Chicago, although Chicago is on a direct line, and took a southeasterly course, then to Springfield, from Springfield to Flora, then to Cincinnati, and then over the Hamilton & Dayton system to Detroit, there to take the Grand Trunk road to Portland. This was owing to the billing system adhered to here with great tenacity. Property ran around three sides of a square, and I lost money on some of that property.<sup>2</sup>

This ruinous diversion of freight seems to have been dependent upon the existence of active competition at Detroit and ceased when the Grand Trunk came to an agreement with the American lines. But there can be no doubt that wherever these cross lines exist there is a strong tendency toward diversion. In the recent hearings of the Senate Committee on Interstate Commerce on railway rate regulation, a railroad witness again describes the operation:

*Mr. Vining.* Well, for instance, take the time when I was on the Grand Rapids & Indiana Railroad. Its connection at the south was at Fort Wayne, with the Pittsburg, Fort Wayne & Chicago road. We took lumber out of Michigan and wanted to send it east. We had to compete with lines that went by way of Detroit, that went perhaps through Canada and that in some cases were shorter. Of course, if we wanted to send lumber from Grand Rapids to New York we had to make at least as low a rate as was made by other lines leading from Grand Rapids to New York. That rate might be just the same from Fort Wayne as from Grand Rapids, so that we could not get any more than the low rate from Fort Wayne. We had to go in that case to the Pittsburg, Fort Wayne & Chicago Railway and say: "Here are so many car loads of lumber, or so much lumber, at Grand Rapids, a part of which could be shipped to New York if we had through rates that would enable us to move it. These other lines are carrying it for 25 cents a hundred pounds to New York. You join us in a through rate of 25 cents and we can give you some of that business." . . . But if I were with a short line and wanted to negotiate with a long one, I should try

<sup>1</sup> Statements taken before the Commission on Interstate Commerce of the United States Senate with respect to the Transportation Interests of the United States and Canada. Washington, 1890, p. 616.

<sup>2</sup> *Ibid.*, p. 631.

to put my case just as strongly as possible before the long line. I should say to them: "We cannot take 5 per cent of a rate of 25 cents. It would not pay us. You know that; you can see that;" and they, as business men, would admit it. "Well," I would say, "give us 5 cents a hundred pounds and we will bring the business to you, and if you do not, we cannot afford to do it."

*Senator Cullom.* I think in some instances they have stated before us that they gave 25 per cent.

*Mr. Vining.* They might.<sup>1</sup>

Whenever the cross road was financially embarrassed, the tendency to diversion was increased. For then, of course, having repudiated fixed charges, the cross line could accept almost any rate as better than the loss of the traffic. And that this was in the past almost a chronic condition in western trunk-line territory appears from the fact that eighteen out of the twenty-two roads cutting the Illinois Central between Chicago and Cairo have been in the hands of receivers since 1874.<sup>2</sup>

It not infrequently happens that the initial railroad may entirely control a roundabout route, whereas shipments by the most direct line necessitate a division of the joint rate with other companies. In such a case the initial line will naturally favor the indirect route, at the risk of economic loss to the community and even to its own shippers. An interesting illustration is afforded by a complaint of wheat growers at Ritzville in the state of Washington concerning rates to Portland, Oregon.<sup>3</sup> By direct line with low grades along the Columbia river the distance was 311 miles. This was composed of several independent but connecting links. The Northern Pacific on the other hand had a line of its own, 480 miles long, which moreover crossed two mountain ranges with heavy grades. It based its charges upon the cost of service by this roundabout and expensive line; and insisted upon its right to the traffic despite the wishes of the shippers. The Commission upheld the shippers' contention for the right to have their products

<sup>1</sup> Elkins Committee, Vol. II, p. 1706.

<sup>2</sup> Quoted from Acworth, Fifty-fifth Congress, first session, Sen. Doc., No. 39, p. 33.

<sup>3</sup> *Newland v. Nor. Pac. R. R. Co.*, International Commerce Commission Report, Vol. VI, p. 131.

carried to market in the most efficient manner.<sup>1</sup> Another instance on the Illinois Central is suggestive, concerning shipments from Panola, Illinois, to Peoria, a distance of about forty miles by the shortest line of connecting roads. Yet the Illinois Central having a line of its own *via* Clinton and Lincoln transported goods round three sides of a rectangle, a distance of 109 miles, presumably in order to avoid a prorating division of the through rate.<sup>2</sup> Of course elements of operating cost enter sometimes, as in the case of back loading;<sup>3</sup> but in the main the prorating consideration rules.

Rebates may or may not be given in connection with circuitous routing. Sometimes the same result may be obtained when one carrier merely shrinks its proportion of a joint through rate, leaving the total charge to the shipper unaffected. Of course it goes without saying that an implication of improper manipulation of rates does not always follow the diversion of freight from a direct line. The rate may be the same by several competitive routes, shipments going as a reward for energy, persistency or personality of the agent. A recent case, concerning rates on lumber from Sheridan, Ind., to New York illustrates this point.<sup>4</sup> Sheridan is 28 miles north of Indianapolis on the Monon road. Quoting from the decision:

In the division of joint through rates on percentages based on mileage, the defendant line naturally prefers arrangements with connections giving it the longest haul and largest percentages. Therefore it carries this freight at rates based on a carriage through Indianapolis by a direct line eastward, while in fact it carries it in an opposite direction north and west by a longer route, the reduced ton mileage being accepted to secure the traffic.

The Iowa Central, cutting across the four main lines between Chicago and Omaha, derives a large revenue from such diversion. Coal from Peoria west, instead of moving by the shortest

<sup>1</sup> Cf. the case of the C. H. & D. R. R. on p. 491, *supra*.

<sup>2</sup> Record, Illinois Railroad Commission, concerning Reasonable Maximum Rates, 1905, p. 165.

<sup>3</sup> Cf. p. 507, *infra*.

<sup>4</sup> *Pratt Lumber Co. v. Chicago, Indianapolis & Louisville R. R.*, decided January 27, 1904.

line to Omaha, is hauled across the first three to a connection with the devious Great Western line.<sup>1</sup> The motive is obvious.

A fourth cause of diversion of traffic has to do rather with the operating than the traffic department. An inequality of tonnage in opposite directions may make it expedient to solicit business for the sake of a back load. The Canadian Pacific may engage in San Francisco-Omaha business by way of Winnipeg, because of the scarcity of tonnage east-bound. The traffic to and from the southeastern states is quite uneven in volume. The preponderance of bulky freight is north-bound to the New England centers of cotton and other manufacture; while from the western cities, the greater volume of traffic is south-bound, consisting of agricultural staples and food stuffs. To equalize this traffic it may often be desirable to secure the most roundabout business. A disturbing element of this sort in the southern field has always to be reckoned with. A good illustration elsewhere occurs in the well-known St. Cloud case.<sup>2</sup> The Northern Pacific accepted tonnage for a most circuitous haul to Duluth, but seems to have done so largely in order to provide lading for a preponderance of "empties." In this case it did not lower the normal rate but accepted it for a much longer haul.

Not unlike the preceding cause, also, is a fifth, the desire to be in position to interchange traffic on terms of equality with powerful connections. Mr. Bowes, traffic manager of the Illinois Central, justifying the participation of this road in Chicago-San Francisco business by way of New Orleans, well stated it as follows:<sup>3</sup>

Of course the Southern Pacific Railroad, as you gentlemen know, originate and control a very large traffic, which they can deliver at various junctions; at New Orleans, where they have their long haul to the Missouri river, and we naturally want some of that business, a long-haul traffic to New Orleans, and in giving it to them we place them under obligations to reciprocate and give us some traffic. That is one of the things that occurs to a railroad man as to increasing the volume and value of his traffic for the benefit of his company.

<sup>1</sup> Boston *Transcript*, October 14, 1905.

<sup>2</sup> *Tileston Milling Co. v. Nor. Pac.*, decided November 29, 1899.

<sup>3</sup> Elkins Committee, Vol. IV, p. 2850.

A sixth and final reason for diversion of traffic from the direct line may be partly sentimental, but none the less significant. It concerns the question of competition at abnormal distances. We may cite two railroad witnesses, who aptly describe the situation. "We can haul traffic in competition, and we frequently do, as I stated, at less than cost, or nearly so, in order to hold the traffic and our patrons in certain territory — Kansas City for instance — but we do not like to do it."<sup>1</sup> Or again "The Charleston freight is not legitimately ours. . . . We make on these through rates from Chicago to Charleston for instance scarcely anything. But it is an outpost. We must maintain that or have our territory further invaded."<sup>2</sup>

In other words the circuitous or over-long-distance haul is a natural though regrettable outcome of railroad competition.

#### IV

What are the effects of this American practice of unduly disregarding distance as a factor in transportation? Not less than five deserve separate consideration in some detail. It inordinately swells the volume of ton mileage; it dilutes the ton-mile revenue; it produces rigidity of industrial conditions; it stimulates centralization both of population and of industry, and it is a tax upon American production.

One cannot fail to be impressed with the phenomenal growth of transportation in the United States, especially in recent years. It appears almost as if its volume increased more nearly as the square of population than in direct proportion to it. Our population from 1889 to 1903 increased slightly less than one third. The railroad mileage grew in about the same proportion. Yet the freight service of American railroads surpassed this rate of growth almost five times over. While population and mileage increased one third, the railroads in 1903 hauled the equivalent of two and one-half times the total volume of freight traffic handled in 1889. In other words, the ton mileage — representing

<sup>1</sup> President Ramsey of the Wabash, Elkins Committee, Vol. III, p. 1971.

<sup>2</sup> Windom Committee, Vol. II, p. 796.

the number of tons of freight hauled one mile — increased from 68,700,000,000 to 173,200,000,000. Do these figures represent all that they purport to show? Every ton of freight which moves from Chicago to San Francisco over a line one thousand miles too long adds 1000 ton miles to swell a fictitious total. Every car load of cotton goods hauled up to Chicago to be redistributed thence in the original territory and every ton of groceries or agricultural machinery exchanged between two regions with adequate facilities for production of like standard goods contribute to the same end. How large a proportion of this marvelous growth of ton mileage these economic wastes contribute can never be determined with certainty. That their aggregate is considerable cannot be questioned.

These practices must considerably dilute the returns per mile for service rendered by American carriers — in even greater degree than they enhance the apparent volume of transportation. Long-distance rates must always represent a low revenue per ton mile, owing to the fixed maximum for all distances determined by what the traffic will bear. Furniture made in North Carolina for California consumption<sup>1</sup> cannot be sold there in competition above a certain price. The greater the distance into which the possible margin of profit is divided, the less per mile must be the revenue left for the carrier. Yet this is not all. Such would be true of simply over-long-distance carriage. But to this we must add the fact that some of this long-haul tonnage reaches its remote destination over a roundabout line, which increases the already over-long carriage by from 25 to 75 per cent. It is apparent at once that a still greater dilution of the average returns must follow as a result. From 1873 down to 1900 the long and almost uninterrupted decline of rates is an established fact. Has the volume of this economic waste increased or diminished in proportion to the total traffic throughout this period? If it is relatively less to-day, at a time when ton-mile rates are actually rising, it would be of interest to know how far such economies offset the real increases of rates which have been made. Rates might conceivably rise a little, or at

<sup>1</sup> Elkins Committee, Vol. III, p. 2008.

all events remain constant, coincidentally with a fall in ton-mile revenue produced through savings of this sort.

The third result of undue disregard of distance is a certain inelasticity of industrial conditions. This may occur in either of two ways. The rise of new industries may be hindered, or a well-merited relative decline of old ones under a process of natural selection may be postponed or averted. The first of these is well set forth in the Elkins Committee hearings.<sup>1</sup>

It is always considered desirable to have a long haul, and the rates on a long haul should be much less, in proportion to distance, than on a short haul. This is a principle of rate making which has grown up as one of the factors in the evolution of the railroad business in this country, and it has greatly stimulated the movement of freight for long distances, has brought the great manufacturing centers in closer touch with the consumer at a distance and the producer in closer touch with centers of trade. It has been of undoubted benefit to both, though it may oftentimes retard the growth of new industries by a system of rates so preferential as to enable the manufacturer a long distance from the field of production of raw material to ship the raw material to his mills, manufacture it and return the manufactured goods cheaper than the local manufacturer could afford to make it, and thus, while building up the centers of manufacture, have retarded the growth of manufacturing in the centers where the raw material is produced.

The other aspect of industrial rigidity is manifested through the perpetuation of an industry in a district, regardless of the physical disabilities under which it is conducted. Another quotation describes it well.<sup>2</sup>

*Senator Carmack.* Is it the policy of the roads, wherever they find an industry established, to keep it going by advantages in the way of rates regardless of changes in economic conditions?

*Mr. Tuttle.* I think in so far as it is possible for them to do so. It has not been possible in all cases. We could not keep iron furnaces running in New England; they are all gone.

One cannot for a moment doubt the advantages of such a policy as a safeguard against violent dislocating shocks to industry. It may render the transition to new and better conditions more gradual and easier to bear. It has been of inestimable value to New England, as exposed to the competition of

<sup>1</sup> Vol. IV, p. 3115.

<sup>2</sup> Elkins Committee, Vol. II, p. 976.

newer manufactures in the Central West. But on the other hand, it is equally true that in the long run the whole country will fare best when each industry is prosecuted in the most favoured location — all conditions of marketing as well as of mere production being considered. If Pittsburg is the natural center for iron and steel production, it may not be an unmixed advantage to the country at large, however great its value to New England, to have the carriers perpetuate the barbed wire manufacture at Worcester.<sup>1</sup> Each particular case would have to be decided on its merits. My purpose at present is not to pass judgment on any of them but merely to call attention to the effect of such practices upon the process of industrial selection.

Centralization, or concentration of population, industry and wealth is characteristic of all progressive peoples at the present time. Great economic advantages, through division of labor and cheapened production have resulted; but on the other hand, manifold evils have followed in its train. The results are too well known to need mention in this place. From the preceding paragraph it would appear that American railroad practices operate in some ways to retard this tendency. But much may be adduced in favor of the opposite view. Many staple industries utilizing the raw material at their doors might supply the needs of their several local constituencies were it not that their rise is prevented by low long-distance rates from remote but larger centers of production. Denver, in striving to establish paper mills to utilize its own Colorado wood pulp, is threatened by the low rates from Wisconsin centers. Each locality ambitious to become self-supporting is hindered by the persistency of competition from far-away cities. This is particularly true of distributive business. The overweening ambition of the great cities to monopolize the jobbing trade, regardless of distance, has already been discussed.<sup>2</sup> And it follows of course that the larger the city, the more forcibly may it press its demands upon the carriers for low rates to the most remote hamlets. The files of the Interstate Commerce Commission are stocked with

<sup>1</sup> Specifically described in Elkins Committee, Vol. II, p. 923.

<sup>2</sup> See p. 498, *supra*.

examples of this kind. The plea of the smaller cities and the agricultural states — Iowa for example — for a right to a share in the distributive trade naturally tributary to them by reason of their location formed no inconsiderable element in the recent popular demand for legislation by the Federal government.

In the fifth place, every waste in transportation service is in the long run a tax upon the productivity of the country. More men may be employed, more wages paid, more capital kept in circulation; but it still remains true that the coal consumed, the extra wages paid and the rolling stock used up in the carriage of goods either unduly far or by unreasonably roundabout routes constitute an economic loss to the community. In many cases of course it may be an inevitable offset for other advantages. In the Savannah Freight Bureau case<sup>1</sup> the facts showed Valdosta, Ga., to be 158 miles from Savannah, while it was 275 and 413 miles by the shortest and longest lines respectively from Charleston. Valdosta's main resource for fertilizer supplies, other things being equal, would naturally be Savannah, the nearer city. Yet in the year in question it appeared that nine tenths of the supply was actually drawn from Charleston; and much of it was hauled 413 instead of a possible 158 miles. No wonder the complainants alleged "that somebody in the end must pay for that species of foolishness." Whenever the Colorado Fuel and Iron Co. succeeds in selling goods of no better grade or cheaper price in territory naturally tributary to Pittsburg, a tax is laid upon the public to that degree.<sup>2</sup> When Chicago and New York jobbers each strive to invade the other's field, the extra revenue to the carriers may be considerable; but it is the people who ultimately pay the freight. The analogy to the bargain counter is obvious. The public are buying something not necessary for less than cost; while the carriers are selling it for more than it is worth. Economies would redound to the advantage of all parties concerned.

<sup>1</sup> Decided December 31, 1897. International Commerce Report.

<sup>2</sup> Practically it may be declared that the public, considered as distinct from railway owners, must pay for all the transportation which it receives. . . . — H. T. Newcomb in *Pubs. Am. Stat. Ass.*, n.s., No. 34, p. 71.

## V

What remedy is possible for these economic wastes? Both the carriers and the public have an interest in their abatement. The more efficient industrial combinations have taken the matter in hand, either by strategic location of plants or, as in the case of the United States Steel Corporation, by the utilization of a Pittsburg base-price scheme, with freight rates added.<sup>1</sup> But probably the larger proportion of tonnage is still shipped by independent and competing producers. To this traffic the railways must apply their own remedies. Either one of two plans might be of service. The right to make valid agreements for a division either of traffic or territory, if conceded to the carriers by law under proper governmental supervision, would be an effective safeguard. This would mean the repeal of the present prohibition of pooling. Or a reënactment of the Long and Short Haul clause, now emasculated by judicial interpretation, would do much toward accomplishing the same result.

Agreements between carriers previous to 1887 were often employed to obviate unnecessary waste in transportation. The division of territory between the eastern and western lines into the southern states is a case in point. Thirty years ago competition for trade throughout the South was very keen between the great cities in the East and in the Middle West. Direct lines to the Northwest from Atlanta and Nashville opened up a new avenue of communication with ambitious cities like Chicago, St. Louis and Cincinnati. The state of Georgia constructed the Western & Atlantic Railroad in 1851 for the express purpose of developing this trade. As western manufactures developed, a keen rivalry between the routes respectively east and west of the Allegheny Mountains into the South was engendered. A profitable trade in food products by a natural, direct route from the Ohio gateways was, however, jeopardized by ruinous rates made by the warring trunk lines to the northern seaboard. Corn, oats, wheat and pork came down the coast and into the South

<sup>1</sup> Agreements for a scale of cross freights by wholesalers' or jobbers' associations as in Ohio, for groceries or hardware are equally effective.

through the back door, so to speak, by way of Savannah and other seaports. On the other hand the eastern lines into the South were injuriously affected by the retaliatory rates on manufactured goods made by the western lines for shipments from New York and New England. Freight from each direction was being hauled round three sides of a rectangle. Finally in 1878 a reasonable remedy was found in a division of the field and an agreement to stop all absurdly circuitous long hauls into one another's natural territory. A line was drawn through the northern states from Buffalo to Pittsburg and Wheeling; through the South from Chattanooga by Montgomery, Ala., to Pensacola. Eastern lines were to accept goods for shipment only from their side of this line to points of destination in the South also on the eastern side of the boundary. Western competitors were to do the same. The result was the recognition of natural rights of each to its territory. This agreement has now formed the basis of railway tariffs into the southern states for almost a generation. Similar agreements, on a less extensive scale, are commonly used to great advantage. Thus in the "common point" territory formerly tributary to Wilmington, Savannah and Charleston, the first-named city insisted upon its right to an equal rate with the other two, no matter how great the disparity of distance. The Southern Railway & Steamship Association arbitrated the matter, fixing a line beyond which Wilmington was to be excluded.<sup>1</sup> Obviously such agreements have no force in law at the present time. The only way to give effect to them is for connecting carriers to refuse to make a joint through rate. This effectually bars the traffic. Moreover entire unanimity of action is essential. Every road must be a party to the compact. Otherwise the traffic will reach its destination by shrunken rates and a more circuitous carriage even than before.

One cannot fail to be impressed in Austria and Germany with the economic advantages of an entirely unified system of operation. No devious routing is permitted. Certain lines are designated for the heavy through traffic, and concentration on them is effected to the exclusion of all others. Between Berlin and Bremen, for example, practically all through traffic is routed by

<sup>1</sup> Savannah Freight Bureau case, decided December 31, 1897, pp. 10 and 18.

three direct lines. No roundabout circuits occur because of the complete absence of railway competition. No independent lines have to be placated. The sole problem is to cause the tonnage to be most directly and economically transported. And this end is constantly considered in all pooling or through-traffic arrangements with the railway systems independently operated. The Prussian pooling agreements with the Bavarian railways are typical. Each party to the contract originally bound itself not to route freight over any line exceeding the shortest direct one in distance by more than twenty per cent. Compare this with some of our American examples of surplus haulage of fifty or sixty per cent! And within the last year, the renewal of these interstate governmental railway pools in Germany has provided for a reduction of excessive haulage to ten per cent. The problem of economical operation in Austria-Hungary with its mixed governmental and private railways is more difficult. But no arrangements are permitted which result in such wastes as we have instanced under circumstances of unlimited competition in the United States.

A more consistent enforcement of the long-and-short-haul principle might provide a remedy almost as effective as pooling.<sup>1</sup> The Alabama Midland decision nullified a salutary provision of the law of 1887 by holding that railway competition at the more distant point might create such dissimilarity of circumstances as to justify a higher rate to intermediate stations. The English practice is suggestive upon this point.<sup>2</sup> Turn to our diagram on page 502 and observe the effect. Traffic around two sides of a triangle from *A* to *C* by way of *B* is carried at a rate equal to the charge for the direct haul from *A* to *C*; or it may be even at a lower differential rate. Complaint arises from the intermediate points *y* and *x* of relatively unreasonable charges. The roundabout route replies with the usual argument about a small contribution toward fixed charges from the long-haul tonnage, which lessens the burden upon the intermediate rate. This is cogent enough up to a certain point. It might justify a lower rate to *D*, on the natural division line of territory. It might be defensible on principle to accord *D* a lower rate than *x* or

<sup>1</sup> *Vide*, Introduction, p. xii.

<sup>2</sup> *Vide*, p. 611, *infra*.

possibly even than  $y$ . To deny the validity of lower rates to  $z$  or  $C$  would however at once follow from the same premises.

Suppose a long-and-short-haul clause to be reënacted, exemption from its provisions to be granted only by the Interstate Commerce Commission, what would be the result? This body roughly determining the location of  $D$ , a natural division point, would then refuse to permit  $AB$ ,  $BC$  to charge less to either  $z$  or  $C$  than to any intermediate point  $x$ ,  $B$  or  $y$ . Coincidentally it would bar the other road  $AC$ ,  $CB$  from any lower through rate to points beyond  $D$ , such as  $x$ ,  $B$  or  $y$  than to any intermediate station. Two courses would be open to the roads. They must either mutually withdraw from all business beyond  $D$  or reduce their rates to all intermediate points correspondingly. In a sparsely settled region with little local business, they might conceivably choose the latter expedient. The St. Cloud case is an illustration of such choice.<sup>1</sup> But in the vast majority of cases the roads would prefer to withdraw from the unreasonably distant fields.<sup>2</sup> Simultaneously taken by each line such action would put an end to the economic waste. At the same time it would terminate one of the most persistent causes of rebates and personal favoritism. To be sure it would generally operate in favor of the strong, direct lines as against the weak and round-about ones. Great benefit would accrue to the Pennsylvania, the Illinois Central or the Union Pacific railroads. The activities of the parasitic roads and the scope of parasitic operations by the substantial roads would inevitably be curtailed. Much justice would be done and much local irritation and popular discontent would be allayed.

WILLIAM Z. RIPLEY

<sup>1</sup> *Vide*, p. 269, *supra*.

<sup>2</sup> This problem is involved in the Youngstown-Pittsburg case already mentioned. In the original Louisville & Nashville decision the Commission apparently preferred to encourage competition even at the risk of its being roundabout and "illegitimate." But after the railway attorneys expanded the "rare and peculiar" cases to cover all kinds of competition, the Commission apparently regretted its earlier position. Cf. Interstate Commerce Commission Reports, Vol. I, p. 82, and Vol. V, p. 389; and especially the brief of Ed. Baxter, Esq., in the Alabama Midland case, United States Supreme Court, October term, 1896, No. 563, p. 118.

## XXI

### THE NORTHERN SECURITIES COMPANY<sup>1</sup>

THE certificate of incorporation of the Northern Securities Company was signed by the three incorporators and acknowledged in the state of New Jersey on the twelfth of November, 1901. During the three days immediately following, resolutions were adopted by the newly organized company, authorizing the purchase of any shares that might be tendered to the company, under specified conditions and terms. Power to do so was expressly granted in the charter. "The objects for which the corporation is formed are: To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness. . . . To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation. . . . To purchase, hold, etc., shares of capital stock of any other corporation . . . and, while owner of such stock, to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon. . . ." The nature of these powers, with respect to the signs of indebtedness of other corporations, has caused the company to be commonly described as a holding company.

This particular idea of a holding company antedates the Northern Securities Company by seven or eight years; and, in a larger sense, the principle involved in the holding company has found at least partial expression in the organization of railway companies for half a century. The voting trust may also be regarded as an antecedent of the modern holding company,

<sup>1</sup> From "A History of the Northern Securities Case," *Bulletin of the University of Wisconsin*, No. 142, July, 1906, pp. 225-241. Elaborate footnote references are omitted. — ED.

and the causes which have produced the one are analogous to those which have produced the other. The process of metamorphosis between the voting trust and the holding company does not appear to be either long or complex.

Both the remote and the immediate causes of the organization of the Northern Securities Company were partly personal and partly economic. They were personal in so far as the Securities Company was the outgrowth of a desire on the part of certain men to perpetuate a certain policy. They were economic in that the execution of certain large, almost empire-building plans could be promoted, in the estimation of its founders, by the company. The founders of the company, through years of effort, had become accustomed to associate their railway properties with a certain economic policy. And thus the personal and the economic causes of the organization of the company practically become merged into one, namely, the desire to insure uninterrupted progress in the building of a great system of transportation. The existence of other causes, like the desire to suppress competition, to inflate values, has been alleged. An examination of these will be taken up later.

The original idea of the Securities Company was that it should embrace the ownership of about one third of the Great Northern stock. A small number of the Great Northern stockholders, not to exceed eleven out of about 1800, felt that they were getting along in years. One of them was eighty-six, another eighty-two, and several of them past seventy years of age; and they desired to work together as they had done for more than twenty years. Some of these stockholders lived in foreign countries. Their powers and privileges had to be exercised by their legal representative. This might continue to work satisfactorily as long as the old circle of associates remained unbroken; but a number of them felt that a more permanent arrangement would be preferable. A close corporation, embracing six or eight men, was suggested, to which others objected because such an arrangement would violate the principle of equality which had always prevailed among Great Northern stockholders. As soon as the idea of exclusiveness had been abandoned and an inclusive

organization decided upon, "the question came up: Why not put in the Northern Pacific? That is the way it occurred." This, in substance, is the manner in which President J. J. Hill summarizes what has been alluded to above as the "personal" element in the organization of the Securities Company. And to place at the head of the new company the guiding spirit and constructive genius of that group of men at once made the Securities Company doubly a matter of "moral control," of "fortification," and of "strength." In the words of a colleague, who is familiar with the territory through which the Great Northern railway runs, that road is "regarded as a personality. People know that there is some one whom they can see and talk to. If other means fail, they know they can go to see 'Jim' Hill about it, and he will give them a fair hearing." From the threefold point of view of public policy, of personality, and of business, the actual course of the organization represents the best that could have been done.

The desire to secure a permanent basis for the interchange of commodities between great producing sections of the United States and of the Orient may be characterized as the largest economic cause of the organization of the Securities Company. The Great Northern and the Northern Pacific railways had lived in comparative peace with each other for twenty years. Both had maintained joint rates with other roads like the Burlington. The Burlington taps the principal live-stock markets, important cotton, coal and mineral areas of the United States. The unified control and management of these three great systems of railways — Great Northern, Northern Pacific, and Burlington — makes it possible to secure a sufficient variety and quantity of freight to make systematic back loading a certainty. Back loading, together with a steady flow of freight large enough to insure the economical utilization of motive power and car capacity, results in a general economy of operation which makes rates that would bankrupt numerous other roads remunerative to the systems embraced in the Securities Company. Such a flow of freight had been developed on the basis of joint rate agreements with railways and agreements with steamship lines.

The value of the railway properties concerned, as well as the continued prosperity of the commercial and industrial interests served by them, depended largely upon the permanency and security of the arrangements which had begun to crystallize with the turn of the century, and to which the opening of the Orient promised to bring still greater returns. However, joint rates may be withdrawn at any time, and it was thought too hazardous to build up a great business "extending across the continent and even across the ocean on the basis that to-morrow the rate might be changed or the party with whom we were working to reach the different points of production or consumption had some other interest or some greater interest elsewhere. It was necessary in doing this that we should have some reasonable expectation that we could control the permanency of the rate and that we would be able to reach the markets. In other words, if the man producing lumber on the coast, or cattle on the ranches, or ore in the mines, could not find a market for it and if we could not take it to a market that would enable him to sell his stuff for a profit, he would have to stop producing it. That was the line we worked upon, and that was the reason we felt called upon to put ourselves in a position where we could control access to the markets." \* \* \* \* \*

A glance at a railway map of the territory west of the Mississippi reveals the importance and strength of the Burlington system. West of the Missouri river it lies in the very lap of the Union Pacific, while east of that river it forms a great bridge, with its terminal pier in Chicago. The Northwestern, St. Paul and Burlington systems largely complement each other in the great manufacturing, agricultural and mineral regions of the greater northwest. In relation to the Great Northern and Northern Pacific, the Burlington is like the point and mold-board of a plow, the beam and handles of which are constituted by the former systems. The Burlington connects Chicago with St. Louis, Kansas City, Omaha, Denver, St. Paul and Minneapolis, and numerous smaller but important cities, which, taken collectively, represent the manufacture and sale of every staple commodity and the raw materials therefor.

An alliance with a system possessing the tactical and physical advantages of the Burlington could not be otherwise than a source of strength and profit to the party making such an alliance.

For many years the Great Northern and Northern Pacific had been contemplating direct connection with Chicago. The usual alternatives of the construction of a new line or the lease or purchase of an existing one, presented themselves. The former would result in unnecessary duplication and waste; the latter only was deemed expedient. The improved financial condition of the Northern Pacific and the dissolution of the voting trust planned for January 1, 1901, made the year 1900 propitious for the execution of the long-cherished plans for an eastward extension. At least five different lines were within the range of possibility. These were: the Wisconsin Central; Chicago & Northwestern; Chicago, Milwaukee & St. Paul; Chicago, Burlington & Quincy; and the Chicago Great Western. To what extent each of these great lines figured as possibilities in the minds of the Great Northern and Northern Pacific, and the relative degrees of desirability which were attached to each by them, does not appear in the testimony, although the statement may be positively made that more than two of these railways were made the subject of correspondence and probably, also, of tentative solicitation.

The preferences of J. J. Hill and J. P. Morgan, with respect to the particular line to be acquired as an eastward extension, do not appear to have coincided, when an extraneous factor appeared, which probably added the force of circumstances to Hill's preference. It appears that during the "fall of 1900 or early winter of 1901" the Union Pacific interests purchased in the market some \$8,000,000 or \$9,000,000 out of \$108,000,000 or \$109,000,000 of the Burlington stock. Much of the Burlington stock had been held for many years by people who had inherited it, and it was found impossible to secure control of the property through purchases in the open market. This episode in the stock-market hastened the completion of negotiations which probably had been begun before that time. The two northern

transcontinental lines were not inclined to permit a rival interest to wrest from them this much-coveted property without leaving a single stone unturned. The testimony does not show a direct causal connection between the attempt of the Union Pacific interests to purchase the Burlington in the open market and the negotiations of Hill for the same property, although more than mere coincidence probably existed. Negotiations were opened by Hill with the executive committee of the board of directors of the Burlington system about Christmas, 1900, or January 1, 1901. Prior to this date no negotiations had taken place. "The actual negotiations commenced about or after the middle of January, 1901." Early in March, 1901, E. H. Harriman and Jacob H. Schiff, acting for themselves, or for the Union Pacific, or for interests friendly to the Union Pacific, requested to be allowed to join with the Great Northern and Northern Pacific in the purchase of the Burlington. This request was refused. At that time the Union Pacific interests no longer owned the eight or nine millions of Burlington stock which had been purchased during the preceding fall or winter, but they now desired to secure a half interest in the final purchase. A month later the Burlington sale was consummated. The two northern roads had made the offer which the Burlington directors had specified beforehand as satisfactory to Hill, and nearly all the Burlington shareholders accepted it. The Great Northern and Northern Pacific each received one half of the \$108,000,000 of capital stock of the Burlington at \$200 per share, payable in joint collateral four per cent, long-time bonds of the two companies, for the payment of which the acquired 96.79 per cent of the stock of the old Burlington Company was pledged as collateral security. These two companies had now become joint owners of all the Burlington stock, and, as such, they had the right thereafter to exercise all the rights and privileges of shareholders, including the right to elect the board of directors. The purchase of the Burlington stock by the two companies in equal parts, it was thought, would serve each of them as well as if it were the sole owner of such stock, while such a purchase might have been beyond the financial means of

either company by itself. "The evidence is therefore uncontradicted and conclusive that the Great Northern and Northern Pacific companies each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along the lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on the Pacific Ocean, and as the best if not the only means of furnishing an indispensable supply of fuel for their own use and for the inhabitants of the country traversed by their lines. These connections and the interchange of traffic thereby secured were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in its competition with European carriers, for the trade and commerce of the Orient."

During the very days when the Burlington transaction was being perfected, the men who had been refused what they regarded an equitable share in that purchase elaborated plans which were calculated to vanquish their enemies and elevate the Union Pacific interests to a position of supremacy in trans-continental traffic. These stirring events led a cosmopolitan editor to invent a parable of fishes in which the bass had swallowed the minnow, and the pike swallowed the bass. In this instance, however, the bass, armed with retirement fins, compelled the pike to spew him out.

The total outstanding capital stock of the Northern Pacific was \$155,000,000 of which \$80,000,000 was common and \$75,000,000 preferred. During April and early in May, 1901, the Union Pacific interests acquired \$78,000,000 of this stock, — \$41,000,000 preferred and \$37,000,000 common — with the view of controlling the Northern Pacific railway, with its half

interest in the Burlington system. Such a movement appears to have been anticipated. "It was a common story at one time." Individuals representing the Great Northern and Northern Pacific interests, becoming apprehensive, increased their holdings in the Northern Pacific by purchasing about \$15,000,000 of common stock in the market. Short selling of Northern Pacific stock and the scramble to cover, when it was discovered that only a limited supply was to be had, drove the price of Northern Pacific common stock up to about \$1000 per share. This was the climax of a series of events which culminated in the stock-exchange crisis of May 9, 1901. "The markets of the world were convulsed, the equilibrium of the financial world shaken, and many speculative interests in a critical condition." On May 1, 1901, when the so-called "raid" upon Northern Pacific stock became known, J. J. Hill and his associates, who had been in possession of large blocks of Northern Pacific stock from the time of the reorganization of the company, were holding from \$18,000,000 to \$20,000,000, par value, of common stock; and J. P. Morgan & Co. were holding some \$7,000,000 or \$8,000,000. Together, May 1, 1901, these individuals lacked the dramatic \$15,000,000 of common stock, which, when they had acquired it, gave them a majority of some \$3,000,000 par value, of the \$80,000,000 of common stock, when the "show down of hands" occurred after May 9. Although the Union Pacific interests represented by E. H. Harriman and Winslow S. Pearce, as trustees for the Oregon Short Line, held a majority of \$1,000,000 of the total amount of stock, their majority lay in the preferred shares which could be retired on any 1st of January prior to 1917, — that is, before the present owners could get an opportunity of exercising the authority which was assumed to reside in them, and which would give them the coveted control. This is why the pike did not swallow the bass. To the country at large and to Wall Street these events appeared like a duel between giants, but one who appears to have been a leading participant in the duel, on the losing side, asserted that he never was in a contest, nor did he and his associates lose money.

According to the by-laws of the Northern Pacific Company, the annual election of its board of directors by the stockholders occurs in October, and under the distribution of stock existing after May 9, 1901, the Union Pacific interests could have controlled this election, and thus prevented the retirement of the preferred stock on January 1, 1902, which would legislate them out of control. Both the preferred and the common stock could vote under the conditions existing on May 9, 1901. A postponement of the annual meeting from October till after January 1, 1902, was frequently thought of and advised by counsel. It could have been done. This potential power of retiring the Northern Pacific preferred stock before the same could be voted, residing in the Northern Pacific Board of Directors, appears to have generated a conciliatory attitude on the part of the representatives of Union Pacific interests, and negotiations for the purchase of such shares were successfully carried through by J. P. Morgan & Co. Direct testimony admitting this causal connection does not exist, but the admitted facts make it appear highly probable. To be sure, the retirement of the preferred stock had been thought of long before, and the right to do so on any 1st of January between 1896 and 1917 was expressly reserved; yet up to 1901, when this plan was finally consummated, no plan had been devised for the retirement of that stock. The interested parties agreed not to wait until October, but to act at once, in order to establish permanent peace and "to show that there was no hostility." The detailed movements following the 9th of May do not appear clearly from the evidence, but the results of what took place are indicated in the bulletin published on June 1st. "It is officially announced that an understanding has been reached between the Northern Pacific and the Union Pacific interests, under which the composition of the Northern Pacific board will be left in the hands of J. P. Morgan. Certain names have already been suggested, not now to be made public, which will especially be recognized as representative of the common interests. It is asserted that complete and permanent harmony will result under the plan adopted between all interests involved." This "understanding" had

been incorporated in the Arbitration Agreement of May 31, 1901, which the bulletin just quoted announced to the public, and which gave "every important interest its representative." In it the "vitality and vigor of the peace policy established between the railroads" found definite expression. It showed "that they were acting under what we know as a community of interest principle, and that we were not going to have that battle in Wall Street. There was not going to be people standing up there fighting each other." Had this battle in Wall Street been fought to the last ditch and the Union Pacific interests triumphed, the measure of the injury done to the Great Northern and Northern Pacific would have been destruction, in the judgment of those who are responsible for the administration of these properties, — destruction in the sense that the properties would have been incapacitated from doing what it was intended they should do and what they were quite able to do in building up a great interstate and Oriental traffic, unless they had all gone into a single combination. "With the Northern Pacific as a half owner in the shares of the Burlington and responsibility for one half of the purchase price of these shares, the transfers of the shares of the Northern Pacific or the control of the Northern Pacific to an interest that was adverse or an interest that had greater investments in other directions, the control being in the hands of companies whose interests would be injured by the growth and development of this country would, of course, put the Great Northern in a position where it would be almost helpless, because we would be, as it were, fenced out of the territory south which produces the tonnage we want to take west and which consumes the tonnage we want to bring east, and the Great Northern would be in a position where it would have to make a hard fight — either survive or perish, or else sell out to the other interests. The latter would be the most businesslike proceeding." With the view of preventing the possibility of future "raids" upon the Great Northern and Northern Pacific stock and of fortifying these two roads and their connections in their competitive struggle with "the Suez Canal and the high seas and the entire world," the idea of a

permanent holding company was invented. It has been persistently denied that the desire to restrain competition among the constituent companies had anything to do with the organization of the Northern Securities Company. \* \* \*

The organization of a holding company having been determined, it was necessary to decide upon the form and contents of a charter, or articles of incorporation, and the state in which the incorporation should take place. The general nature of the contents of such a charter had been discussed practically as long as the idea of a holding company had been entertained by the men interested in the matter; namely, for something like seven or eight years. The specific nature of such a charter for this particular company was not made the object of study until after the Arbitration Agreement of May 31, 1901. About this time several men began an examination of the laws of a number of states for the purpose of discovering a suitable charter and of deciding upon the state in which the company should be incorporated. The decision with reference to the place of incorporation was not made until a few days before the company was actually incorporated. The general aim in searching for a charter and a state "was to have beyond any question the power to purchase, own and hold and dispose of corporate securities on a large scale." Between June and October several different sketches of articles of incorporation were made and submitted to seven or eight men. These men were scattered so that no formal meeting for the consideration of the articles was ever held. The sketch referred to left blank the name of the corporation, the name of the state in which it was to be incorporated, and the amount of the capital stock. "There was practically no change in the substance of it from the beginning." Among the earliest efforts was a search for a special charter granted by the territory of Minnesota prior to the adoption of the constitution of 1858. "A large number of special charters that were passed when Minnesota was a territory have been very much sought after and extensively used by railroads that have since been built, by financial institutions of various kinds and business corporations." The old enactments were glanced through with a

view of seeing if there was anything that would meet the desires and purposes of the contemplated organization, because "under our constitution all charters antedating the admission of the state into the union became fixed legislative contracts." Such a special, territorial charter could, however, not be found; nor could a later charter suitable for the occasion be discovered. Hence, recourse was had to the general incorporation laws of Minnesota, New York, New Jersey, and probably also of West Virginia. The Minnesota statutes were regarded as too "new in that class of corporations. There are no large business corporations incorporated under the laws of the state of Minnesota; she never has had any. There has been no occasion to put powers that are given by her general statutes to such organizations under judicial question." Furthermore, her own citizens, it was asserted, go to other states for the incorporation of enterprises of any magnitude. Whether West Virginia was any more than mentioned in this connection does not appear. As between the statutes of New York and New Jersey, the choice fell upon the latter because they had been in force a good many years and were regarded as "thoroughly well settled." Those of New York, on the other hand, while they were quite similar to those of New Jersey, and "had evidently been passed with a view of enlarging her legislation to put it on a parity with New Jersey," were of very recent origin, and had not been construed by the courts. In this connection, reference may be made to a pamphlet entitled "Advantages of the General Corporation Act of New Jersey," published without reference to the Securities Company, in which the author of it points out that since 1846 the policy of New Jersey towards capital has been that of "liberality." The changes introduced in the law since then have made it "simpler, more liberal and less burdensome." Since 1896, when the law was again revised and codified, its salient features have been simplicity of organization and management, freedom from undue publicity in the private affairs of the company, and facility of dissolution.

The charter, which was finally taken out in the state of New Jersey, is in many respects similar to the charters of other great

corporations. It has many points in common with the charters of the United States Steel Corporation, and the Standard Oil Company, except that the Northern Securities charter does not grant the omnibus powers conferred by the others. The Standard Oil Company and the United States Steel Corporation can engage in practically every conceivable kind of enterprise, while the Northern Securities charter limits the company to the acquisition of valuable paper held by domestic and foreign corporations, exercising the rights of property over the same, aiding corporations whose paper is thus held, and acquiring and holding the necessary real and personal property. The amount of the capital stock with which the corporation began business was thirty thousand dollars, while the total authorized capital stock of the corporation is four hundred million dollars. The customary officers and committees are provided for and the usual powers conferred upon them. A board of fifteen directors was elected, six of whom represented Northern Pacific interests; four, the Great Northern, not counting the president; three, the Union Pacific; and two, unclassified. The composition of the board on the community of interest plan was one of the points of attack subsequently pursued by the state and federal authorities. Such an arrangement had numerous precedents, however. Chauncey M. Depew is an officer or director of fifty-six transportation companies; W. K. Vanderbilt of fifty-one; Geo. J. Gould of thirty-five; E. V. Rossiter of thirty-one; E. H. Harriman of twenty-eight; Charles F. Cox of twenty-seven; D. S. Lamont of twenty-four; J. P. Morgan of twenty-three, and so on through a list of more than a hundred names.

Much testimony was elicited with respect to the capitalization and the ratio at which the Northern Pacific and Great Northern shares were exchanged for Northern Securities stock. It seems that the capitalization of \$400,000,000 was fixed at that figure in order to cover approximately the combined capital stock of the Northern Pacific and Great Northern at an agreed price apparently based upon earning capacity. The par value of the outstanding capital stock of the Great Northern was \$123,880,400 and that of the Northern Pacific amounted

to \$155,000,000. The Northern Securities Company purchased about seventy-six per cent of the former and ninety-six per cent of the latter, on the basis of \$115 per share of \$100 of Northern Pacific and \$180 per share of \$100 of the Great Northern. The purchase of the stock of the two railway companies by means of the shares of the Securities Company was effected by and through the stockholders as such. An offer to make the purchase was conveyed to the Great Northern stockholders in a circular letter. This circular called forth numerous inquiries, in response to which President Hill sent out a letter setting forth the purposes of the company and suggesting that "the offer of the Securities Company is one that Great Northern shareholders can accept with profit and advantage to themselves." It was the expressed wish of the leading stockholders of the Great Northern that all of them should be dealt with on a basis of absolute equality, irrespective of the amount of their holdings. This appears to have been done. In case of the Northern Pacific no circular letter appears to have been sent out to stockholders; nor were the same rules of equality applied to them, for the Union Pacific interests received a cash premium of \$8,915,629 in the exchange of their Northern Pacific holdings on the agreed basis for \$82,492,871 par value of the Northern Securities stock. It also seems that the promoters of the Northern Securities Company had an understanding with the holders of at least a majority of the common stock of the Northern Pacific Railway Company that they would exchange that stock for the stock of the Northern Securities Company as soon as organized; and also an agreement that the preferred stock of the Northern Pacific should be retired on the first day of January following.<sup>1</sup>

BALTHASAR H. MEYER

<sup>1</sup> Practically the full text of the decision of the United States Supreme Court, declaring the Northern Securities Company illegal, is reprinted in our *Trusts, Pools, and Corporations*, pp. 322-382. The corporation is now in process of dissolution. — ED.

## XXII

### THE INTERSTATE COMMERCE ACT AS AMENDED IN 1906<sup>1</sup>

**A**NALYSIS and criticism of the Interstate Commerce Act as recently amended, which is the purpose of this article, may properly be introduced by a sketch of its legislative career. Although the reports of the Interstate Commerce Commission have almost from the beginning contained urgent recommendations for amendment and modification of the statute, no significant change has been effected since its enactment, with the exception of the Elkins Act of 1903, which may be regarded as an amendment of the law. Credit for making rate regulation an immediately practical legislative problem is due to President Roosevelt, who in his annual message of 1904 recommended legislation vesting power in the Commission to prescribe rates upon complaint and after full hearing, such rates to be effective until reversed by a court of review.

The House of Representatives proceeded at once to the consideration of the problem, and on February 9, 1905, passed the Esch-Townsend bill by the extraordinary vote of 326 to 17. The railroads, thoroughly alarmed, prevailed upon the Senate to postpone consideration of the subject for a year, in order to give them time to present their case, and in accordance with this request the Senate on February 24 adopted a resolution instructing the Senate Committee on Interstate Commerce to sit during the recess of Congress for the purpose of taking testimony and considering plans for railroad rate regulation. This committee held sessions lasting until May 23, in which railroad representatives, shippers, government officials, and students of the question

<sup>1</sup> From the *Quarterly Journal of Economics*, Vol. XXI, 1906, pp. 22-51.

were given an opportunity to be heard. Their report,<sup>1</sup> with appendices, in five volumes, together with the Digest,<sup>2</sup> prepared by Messrs. Adams and Newcomb, is the most valuable source of material in existence on the present problem of railroad control in the United States. But the railroads did not confine themselves to testimony before this body. They carried on an educational campaign such as has been rarely witnessed in this country, organizing publicity bureaus in charge of expert students of the railroad question, and flooding the country with literature in support of the railroad position. In spite of all their efforts popular sentiment in favor of endowing the Commission with greater powers grew steadily, and was strengthened by the revelations in the summer of 1905 of abuses in connection with private-car lines, by disclosures of discriminations in favor of the Standard Oil Company, and by the publication of the facts in the Santa Fé rebate case,<sup>3</sup> which involved indirectly a member of the President's cabinet.

As was to be expected, the President renewed his recommendations for rate regulation in his message of 1905, but in slightly modified form. On February 8, 1906, the Hepburn bill, which contained many features of the Esch-Townsend bill of the previous session, passed the House by a vote of 346 to 7. A majority of the Senate Committee on Interstate Commerce voted on February 23 to report the bill unamended to the Senate. But the conservatives of the committee, who were opposed to legislation so radical, succeeded, with the purpose of discrediting the measure, in having it put in charge of Senator Tillman, a Democrat and one of the President's bitterest opponents. The bill was, consequently, put into its final shape on the floor of the Senate, and this method of procedure brought forth as brilliant and able a debate as the Senate has known for many years. Party lines were never drawn. The radical Republicans com-

<sup>1</sup> Hearings before the Committee on Interstate Commerce, Senate of the United States, Washington, 1905. Hereafter cited as Senate Committee Report.

<sup>2</sup> Digest of the Hearings before the Committee on Interstate Commerce, Senate of the United States. Compiled by Henry C. Adams and H. T. Newcomb, December 15, 1905. Hereafter cited as Digest.

<sup>3</sup> Interstate Commerce Commission Reports, No. 10, p. 473.

bined with a majority of the Democrats against the great body of conservative Republicans, and every step in the framing of the measure was stubbornly contested. Extensively amended, the bill passed the Senate with but three dissenting votes,<sup>1</sup> on May 18. A week later the House disagreed to all amendments and sent the bill to conference. The report of the conference committee made on June 2 proved unsatisfactory, and was rejected by both bodies. A second conference report met the same fate, and it was not until June 28 that the measure finally emerged in an acceptable form. It was passed and signed the following day, and by joint resolution became effective on August 28. The final controversies, which thus took so long to compose, were concerned largely with pipe lines, passes, sleeping-car and express companies, and the transportation by railroads of products owned by them.

In its final stages the measure was powerfully aided by a somewhat extraordinary series of events, which exerted a very apparent influence upon the Upper House of Congress. These events included an anthracite coal strike, a report by the Commissioner of Corporations on the Transportation of Petroleum,<sup>2</sup> accompanied by a presidential message which called attention to extensive violations of the Interstate Commerce law, and an investigation by the Interstate Commerce Commission of the Pennsylvania Railroad in its relations with the coal companies, which revealed a discreditable and wholly unsuspected condition of affairs, assumed by the public to be merely symptomatic of conditions among all roads similarly situated. All these, added to the revelations of the insurance investigation last fall, and the more recent disclosure of deplorable conditions in the packing industry, created so thorough a suspicion of corporate activity in general as to make the movement for more vigorous control of our transportation agencies irresistible.

A comparison of the measure which became a law with the Hepburn bill as it passed the House reveals the fact that, in the

<sup>1</sup> Senators Foraker, Morgan, and Pettus.

<sup>2</sup> Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906. Washington, Government Printing Office.

face of determined opposition, the country has secured a much more radical statute than the President or his supporters in the House had any reason to expect. This measure it is now our task to analyze briefly.

The new law widens materially the scope of the Commission's authority, and includes agencies of transportation that have heretofore been free from governmental control. The term "common carrier," as used in the act, now includes express companies, sleeping-car companies, and persons or corporations engaged in the transportation by pipe lines of oil or other commodity except water or gas. Express companies have long been held to be common carriers in law,<sup>1</sup> but they have been exempt heretofore from any attempt at control. In the first year of its existence the Commission decided that the law was not sufficiently clear to warrant it in taking jurisdiction of any such companies except those conducted by the railroads as a part of their business. Consequently, it declined to exercise any authority over express companies at all. As a result, express companies have published no rates or traffic statistics and no financial reports. So far has this policy of secrecy been carried that, in the case of one company, it has recently caused a revolt among minority stockholders. These great corporations now become subject to all the provisions of the act, as a result of which their rates will be regulated and published, their financial condition revealed, and, in the discretion of the Commission, their accounting systems prescribed. It remains to be seen, when these facts have been placed before the public, whether the claim by the express companies of a freedom from the practices of discrimination and undue preference will be sustained. Certain it is that complaints of excessive charges, so constantly made, will be presented for adjudication.

Sleeping-car companies insist that they are not common carriers, but merely equipment companies engaged in building and renting cars and in providing a special facility, and that

<sup>1</sup> Compare Dixon, "Publicity for Express Companies," *Atlantic Monthly*, July, 1905.

they should not be held to be common carriers for the purposes of this act. Many courts sustain their legal contention. It is a question of little importance, however, as they will be reached under the definition of "transportation," which will be noted presently.

The monopoly in oil built up by the Standard Oil Company has been greatly aided by its pipe lines, which have given it a dictatorial power over railroad rates. The timely appearance of Commissioner Garfield's report on the transportation of petroleum revealed a wholly unsuspected relationship between this corporation and the railroads, in which rebates and discriminations on an extensive scale were being granted, and led directly to the inclusion of pipe lines as common carriers under the act. This makes possible the publication of rates open to all shippers and their regulation. But the practical situation is in the control of the Standard Oil Company, and it is very doubtful whether independent refiners will gain much advantage from the clause without additional legislation. While many insist that the provision is unconstitutional, the fact that pipe lines have, in some cases, enjoyed the right of eminent domain, would give ground for anticipating a decision of the Supreme Court in support of the statute.

The act extends the meaning of the word "railroad" to include switches, spurs, tracks, and terminal facilities of every kind, and all freight depots, yards, and grounds. "Transportation," which, in its indefinite form under the old law, included "all instrumentalities of shipment or carriage," now includes cars and all other vehicles, and all instrumentalities of shipment or carriage irrespective of ownership or contract, and all services in connection with the receipt, delivery, elevation, transfer, ventilation, refrigeration, storage, and handling of property transported. Every carrier is obliged to provide such facilities upon reasonable request, and to establish reasonable rates applicable thereto.

*Rebates and discriminations.* The Elkins Act of 1903, prohibiting departures from the published rate, has doubtless done away with many of the common forms of rebating. Most of the

witnesses before the Senate Committee were of the opinion that rebates had either wholly ceased or were much less frequent than formerly. This was also, for a time, the opinion of the Commission; but in its last published report, that for 1905, it finds itself compelled to admit that the giving of rebates has been resumed. Whatever may be the situation as to the simple rebate, there is no question that new and elaborate devices have been employed on a large scale for the purpose of evading the statute. Among these the most important are the private car and the industrial railroad. The practical monopolization of refrigerator equipment by one corporation, and the identity of car owner and shipper, are responsible for the evils, and the testimony before the Senate Committee is filled with allegations of exorbitant rates for refrigeration, icing, and special forms of packing, and with the difficulties that shippers encounter in the settlement of damage claims because of the divided responsibility of railroad and car owner. Carriers have refused to publish refrigeration charges, contending in reply to the demands of the Commission that icing and similar services are of a private nature, and are not under its control. Among the remedies suggested in the testimony were the provision of all special equipment by the railroads individually, the separation of car owner and shipper by the formation of an equipment company, controlled by the railroads, that should take over all private cars, and the extension of the jurisdiction of the Commission to include the private-car business. The last suggestion is the one adopted in the new law, which gives the Commission authority over all services performed by private-car lines, and expressly requires the publication separately of all terminal, storage, and icing charges, or those for any other facilities or privileges granted. The complaint of divided responsibility between railroad and car owner has been met by holding the railroad responsible for the provision of such special equipment upon reasonable request.

The terminal railroad, variously known as the "tap line," or industrial railroad, has been, in the judgment of the Commission, one of the most dangerous and effective means of evading the

law. Such a road built by an industry to connect with the main line, instead of securing from the road to which it delivers its freight merely a reasonable switching charge, obtains an undue proportion of a through rate which amounts to a rebate. The new law extends the jurisdiction of the Commission over such connecting lines, and gives it power to determine a proper switching charge or a proper proportion of a through rate. With the purpose of removing still further the danger of discrimination in the manipulation of these spur tracks, a clause has been introduced requiring a railroad, upon application of a branch line or shipper, to construct and operate upon reasonable terms a switch connection, where such connection is reasonably practicable and where business warrants it, and to furnish without discrimination cars for the movement of traffic. The Commission is given authority to make this provision effective by the issuance of an order which is enforceable in the same manner as are its other orders.

Another serious and elusive form of discrimination has been practiced with special success by the coal roads. By virtue of being owners of coal mines and transporters of their own product, as well as that of independent operators, they have been enabled so to manipulate their books that it has been impossible for either the Commission or the courts to decide whether the advantage which they enjoyed over independent shippers should be regarded as a discrimination granted to themselves as carriers or a loss suffered by them as producers. The extraordinary situation revealed in the affairs of the Pennsylvania Railroad by the investigation of the Interstate Commerce Commission while the rate bill was under discussion in the Senate, combined with the sentiment fostered by long-continued troubles in the coal fields, resulted in the incorporation of a radical clause, which provides that after May 1, 1908, no railroad will be allowed to transport in interstate commerce any commodity, other than timber or its manufactured products, produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect, except such as may be necessary and is intended for its use as a common

carrier.<sup>1</sup> Many have vigorously contended that this clause will not bear the test of constitutionality, that a railroad in its function as common carrier may serve itself quite as properly as it may serve the public, and that this deprives the railroad as shipper of due process of law. If the clause is sustained, it will greatly simplify the enforcement of the whole act; for the dual nature of roads as carriers and shippers has made confusion of accounting and discrimination in favor of their own products easy, and violations of law difficult to establish. It will compel coal roads to divest themselves absolutely of all their coal properties, and will not permit them to evade the law by the creation of holding companies with merely nominal transfer of ownership. Moreover, the application of the clause does not cease with the coal roads against which it was specifically directed. Inasmuch as the term "railroad" includes switches, spurs, terminal facilities, and yards, it will compel all owners of terminal elevators and of businesses connected by tap lines to give up one business or the other. A railroad can now be engaged in no other business than that of transportation. Of course, most of the terminal facilities are intrastate in their ownership, but the jurisdiction of the Commission will extend to all their interstate shipments. An exception has been made in favor of lumber, doubtless because of the apparent necessity of the private railroad to the logging camp and because of its temporary character; but it is difficult to discover the justice of the exception, particularly in view of the fact that the Commission is empowered to require the building of spurs by railroads where business warrants them. A determined attempt was made to bring all common carriers under the operation of the clause instead of railroads alone, in order that pipe lines, which had been declared common carriers by the act, might be included; but the argument that it would have resulted in the destruction of the oil industry, and would probably in any case have been found unconstitutional, led to its final elimination. That the financial problem involved in

<sup>1</sup> The decision of the Supreme Court on February 19, 1906, in the case of the Chesapeake & Ohio Railway probably had much influence in the enactment of this clause.

this clause was appreciated is shown by the fact that nearly two years are to elapse before it becomes effective. It is likely to prove one of the most troublesome provisions in the act on both the financial and legal side. In it are involved many close questions of interpretation.

The Act of 1887 contained no express prohibition of the granting of passes. It was held by the Commission and sustained by the courts that the granting of free transportation other than to those specially excepted was contrary to sections 2 and 3, which forbade unjust discrimination and undue preference.<sup>1</sup> The new law leaves no doubt in the minds of any reader as to its intention in this matter. Common carriers are forbidden to give directly or indirectly, and persons are forbidden to use, any interstate free ticket or pass. Two general classes of exceptions are made to the application of the statute. The first class includes railroad employees and their families, officials, railroad surgeons and attorneys, and employees of agencies associated with the railroad business, such as those of the sleeping-car, express, telegraph, post-office, customs, and immigration service, care takers of live stock, and newsboys and baggage men on trains. The second class comprises the poor and unfortunate classes and those engaged in religious and charitable work.

There is some doubt whether the law should, even by implication, impose upon railroads the burden of carrying unfortunate persons free, when the duty is clearly one belonging to the state. As for ministers of religion and charitable workers, there is no justification whatever for any legislation in their favor. It is high time that the national government and the separate states ceased to sanction this gross form of discrimination. The anti-pass clause is to be interpreted in connection with section 22 of the old act, still in force, which provides for the issuance of mileage and excursion tickets and for granting reduced rates to certain excepted classes.

The section would seem to be sufficiently generous in granting all the exceptions that can properly be demanded. The Commission has ruled, since the new law went into effect, that

<sup>1</sup> 7 Interstate Commerce Commission Reports, 92 ; 66 Federal Report, 146.

the prohibition against the departure from the published rate precludes the acceptance of anything but money for the transportation of either passengers or property. This should do away with the abuse of newspaper mileage and all other devices by which the roads are accustomed to favor those whose influence is of importance. If the pass clause is vigorously enforced, it should, in coöperation with the laws enacted in the several states, do away eventually with the pass scandal.

Finally, it is to be noted that the Elkins Act of 1903 has been strengthened by making both giver and receiver of a rebate liable to imprisonment as well as fine, and by compelling the recipient of the favor, in addition to these penalties, to forfeit three times the value of the consideration received. It is perfectly obvious that a vigorous enforcement of the imprisonment penalty would dispose of the rebate question once for all. Whether we have reached the point in our criminal procedure when we have the courage to put our financiers and our railroad presidents behind the bars for an offense of this character is another question. What is more likely to happen is the humiliation of some humble traffic official who becomes the scapegoat for the real culprits. Yet experience has shown that a fine alone was not sufficient to deter a corporation from violation of the law : it became a mere matter of business speculation. It is to be hoped that our executive officials will have the courage to prosecute vigorously under this amended section, and that our judiciary will impose the full penalty provided.

*Rates.* Since the decision in the Maximum Rate case in 1897,<sup>1</sup> which definitely declared that the Commission had no power to prescribe a rate for the future, and that its power in passing upon the reasonableness or unreasonableness of a rate was entirely confined to determining whether that rate had been reasonable or unreasonable in the past, the question of conferring specifically upon the Commission the rate-making power has been the topic about which all discussion concerning the amendment of the Interstate Commerce law has centered. It

<sup>1</sup> Cincinnati Freight Bureau Case, 167 U. S. 479. Reproduced in Chapter VI, *supra*. — ED.

was the main suggestion of President Roosevelt in his presentation of the subject in the messages of 1904 and 1905. It was the topic of greatest interest and most general discussion in the hearings before the Senate Committee. It formed the main theme of the speeches in both Houses of Congress. Such a power is designed to reach the published rates, not secret rates, which are covered by the sections forbidding rebates and discriminations. Excessive rates, those unreasonable in and of themselves, if they exist at all, are of comparatively small importance, but relatively unreasonable rates have been the subject of long-continued and bitter complaint. A shipper is not so much interested in the rate he pays as he is in seeing to it that his competitor pays the same rate. The Supreme Court's decision that the Commission could not prescribe a rate for the future left to the shipper merely the privilege of suing for excessive charges when a rate had been held by the Commission to be unreasonable. This the individual shipper usually failed to do, the amount in controversy in any individual case being usually too small to warrant it. Moreover, the one who paid the freight rate was frequently a middleman, and the individual who actually suffered from the excessive rate, the consumer or the producer, had no standing in court and could not recover. The only adequate relief from such a situation was to clothe the Commission with power to prevent such occurrences in the future.

When it became evident that public opinion would demand the endowment of the Commission with the rate-making power, the proposition began to be vigorously attacked on the ground of unconstitutionality. Witnesses before the Senate Committee argued against the constitutionality of such a plan, and members of the Senate devoted portions of their speeches and hours of debate to proving the contention. Space will not permit an analysis of these arguments.<sup>1</sup> It is sufficient to say here that they denied the right of Congress to delegate its legislative power to a Commission. Those who maintained the constitutionality of such a delegation of power relied, in the first place,

<sup>1</sup> For an excellent summary, see Digest, pp. 84-87.

upon the utterance of the court in the Maximum Rate case as follows:—

Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable.

In the second place the supporters of this view rely upon the principle enunciated in *Field v. Clark*,<sup>1</sup> in which the court sustained the right of Congress to clothe the President with power to suspend under certain conditions the reciprocity provisions of the Tariff Act of 1897. The conclusions of this case may best be presented in the words of Attorney-General Moody, who, at the request of the Senate Committee, submitted an opinion covering this question:<sup>2</sup>—

Although legislative power, properly speaking, cannot be delegated, the lawmaking body, having enacted into law the standard of charges which shall control, may intrust to an administrative body, not exercising in the true sense judicial power, the duty to fix rates in conformity with that standard.

It seems probable that Congress, having established a standard and declared that rates shall be reasonable and just, has violated no constitutional principle in giving the Commission power to prescribe maximum rates, and that the rights of carriers will be fully guarded through the assertion by the courts of their jurisdiction over the question of reasonableness.

Another clause of the Constitution which has been brought into the discussion for the purpose not of demonstrating the impossibility, but rather the undesirability, of taking the rate-making power out of the hands of the railroads, is the so-called preference clause.<sup>3</sup> The argument is that preferences of various kinds are absolutely essential to transportation, and that this

<sup>1</sup> 143 U. S. 692.

<sup>2</sup> Senate Committee Report, Vol. II, p. 1674.

<sup>3</sup> No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another (Constitution of the United States, Article 1, Section 9, § 6).

clause would make such preferences impossible, and would compel either Congress, or a body to which it delegated authority, to adopt the rigid mileage basis in the establishment of railroad rates with resulting disaster to industry. The Interstate Commerce Commission, supported by an opinion of the Attorney-General, has held that the clause has no application to the exercise of the rate-making authority. But, even if it had, the wording of the clause would demand careful definition. What, for example, is meant by a "port"? Does it include all inland ports or merely seaports? What constitutes a preference? The Commission holds that the establishment of differential rates to various ports, far from creating preferences, actually removes them, and that a distance tariff would, in fact, create the very preference which is forbidden by the Constitution.

The rate section of the amended act provides that the Commission shall have power, upon complaint, whenever the rates or charges or any regulations or practices are unjust or unreasonable, to prescribe, after full hearing, the reasonable regulation or the maximum rate, and to make an order that the carrier shall cease from violation of the statute. All orders except those for the payment of money are to go into effect in not less than thirty days, and to remain in effect for not more than two years, unless suspended, modified, or set aside by the Commission or suspended or set aside by a court of competent jurisdiction.

One of the most vigorously and ably contested points in the Senate in connection with the granting of the rate-making power concerned the question whether the rates prescribed by the Commission should remain in effect pending their review as to reasonableness by the courts. The railroads had insisted that, if the new rates remained in effect during the court hearing, and were then held to be unreasonably low, there would be no possible way by which they could recover the losses suffered at the hands of their multitude of shippers. They suggested, as an alternative proposition, that the law should provide for the suspension of the Commission's order pending review by the courts, but that the railroads should be required to give a bond to their shippers, guaranteeing the payment of the difference

between the old and the new rate, if the case should be decided adversely to the railroads. This apparently liberal offer overlooked the fact, already mentioned, that the shipper who would be entitled to the fulfillment of the bond is frequently merely a middleman, and that the actual sufferer from an unjust rate would not be reached.

The question, as it was debated in the Senate, turned upon the power of Congress to take away from the lower Federal courts the right to entertain petitions for temporary injunction. It is clear that, if the right of injunction could be constitutionally denied to Federal courts in relation to orders of the Commission, the effectiveness of the Commission's rulings relative to rates would be immensely increased, and the remedy against abuses enjoyed by shippers would be rendered very much more speedy. One view, ably presented by Senator Bailey,<sup>1</sup> maintained that the power to create all courts other than the Supreme Court rests alone in Congress, and that such courts, being statutory, are necessarily limited in their scope and power by the authority that creates them. The opposition, represented by Senators Spooner<sup>2</sup> and Knox,<sup>3</sup> insisted upon a distinction between judicial power and jurisdiction. They admitted that Congress has the power to define the jurisdiction of all courts below the Supreme Court, but, having created them and defined their jurisdiction, Congress cannot limit those fundamental judicial powers which have for centuries been considered as essential to a court's existence. Among these inherent powers are the equity power and the right to issue injunctions. The contest was bitter and protracted, involving misunderstandings in which the President became involved. The radicals, unable to accomplish their desire to deprive the courts altogether of the right of injunction in rate cases, stood for the proposition that the judicial right of review should be confined to cases in which the order of the Commission was either unconstitutional or beyond its statutory authority. It is unnecessary here to express

<sup>1</sup> Congressional Record, Fifty-ninth Congress, first session, Vol. XL, p. 5301, April 13, 1906.

<sup>2</sup> *Ibid.*, p. 4481, March 28, 1906.

<sup>3</sup> *Ibid.*, p. 4418, March 27, 1906.

an opinion upon the merits of the controversy. The conservatives practically won their contention, and the so-called compromise which was effected conferred express jurisdiction upon the Circuit Courts in suits to enjoin, set aside, or suspend orders of the Commission. It required, however, that no injunction or interlocutory decree, suspending the order of the Commission, should be granted except after not less than five days' notice to the Commission. This question will be further discussed under the head of Procedure.

Under the old law the Commission had no power to compel the making of a joint rate, and the railroads could nullify any order of the Commission which declared any such rate unreasonable by refusing to agree upon divisions of the through rate. In fact, the refusal of roads to prorate led, in many cases, to excessive charges, and, where the refusal applied to all but a favored few of the shippers, to serious discrimination. The Commission is now given power, after hearing, to establish maximum joint rates. It is also empowered to prescribe their division among the carriers concerned, and to establish through routes and the terms and conditions under which they shall be operated whenever the carriers have refused or neglected to do so voluntarily. This provision also applies when one of the connecting carriers is a water line.

Power is given the Commission to determine upon complaint the reasonable maximum charge to be paid by a carrier for service rendered or instrumentality furnished by the owner of property transported. Commissioner Prouty is of the opinion that this clause will not prove effective, and that it probably will be found necessary to forbid the merging of shipper and owner in one person in the same manner as railroads are now forbidden to carry their own commodities.

Publication of rate schedules in form to be easily understood is of the utmost importance to an effective enforcement of any rate law, and its importance has been increased by the enactment of the Elkins Act which makes any departure from a published rate a misdemeanor. The old law in the case of both local and joint rates, required a ten days' notice of any

advance and a three days' notice of any reduction. The Commission, under the authority granted it, prescribed the form of such schedules and the method in which they should be made public. By various devices, the most objectionable of which was the so-called "midnight tariff," which gave favored shippers advance information of a contemplated reduction of rate, and immediately restored the old rate when these shippers had profited by it, the provisions of the section were rendered of little value to the public. The section of the new law relating to the subject has attempted to profit by the Commission's experience. Schedules of both local and joint rates must be filed with the Commission and publicly posted, and, where no joint rates have been established, each carrier must file the rates applied to through transportation. The schedules must also state separately all terminal, storage, and icing charges, and all privileges and regulations which in any way affect the service rendered. Thirty days' notice is required of any change in these rates unless the Commission for good cause modifies the requirement. Since the new law became effective on August 28, many petitions for the suspension of this provision have been filed with the Commission. One such petition has been granted, that permitting a modification of the rate on ice into Boston to avert a threatened famine. An extended hearing has been given the roads exporting cotton, which maintain that the fluctuation of ocean rates makes it impossible to give the required thirty days' notice of that portion of the rate received by the railroads. It is clear that the Commission has here a problem of the greatest delicacy, involving the exercise of a sound judgment and a wise discretion. Too great liberality in the interpretation of the statute at the start will bring down upon it such a flood of petitions, with equally good claims to consideration that the law will soon become nugatory. The clause can be made a powerful stimulus towards securing impartial and stable rates if administered with firmness, and many of the dire consequences looked for by the railroads will fail altogether of realization when once the roads have brought their rate-making methods into conformity with the statute.

It is to be noted that the amended law, like the old law, gives the Commission no direct power over classification. While uniformity of classification may not at present be feasible, the power to prescribe such a classification should reside with the Commission, and its influence should be in the direction of greater uniformity. Moreover, such a provision would give the Commission a more direct authority to put a stop to the practice of raising rates by changes in classification.

The lack of power in the amended law to prescribe a differential will, it is feared, prove to be a serious weakness. While the Commission has power, upon complaint, to lower a rate on one road, it cannot prevent the virtual nullification of its order by a lowered rate on a competing line. The questions of discriminations between long- and short-haul shipments will be considered later.

*Accounting.* The importance of the section of the act relating to annual reports has been little appreciated. Yet it is a safe prediction that, if its provisions are made effective, it will have more influence than any other section of the statute upon the elimination of existing transportation evils. The old law required from the railroads annual reports which should contain, in addition to a complete financial statement, specific answers to questions upon which the Commission might need information. It further authorized the Commission, in its discretion, to prescribe a uniform system of accounting for railroads. Yet, in spite of the efficient labors of the able statistician to the Commission, reports have been faulty and incomplete. Certain railroads have habitually refused to answer some of the questions, and others have answered them in a manner wholly unsatisfactory. With such undesirable results the Commission has been obliged to rest content, for there has been no way to compel compliance with its requests. No penalty was provided in the law for failure to make the full report asked for. The Supreme Court has held that no suit could be maintained to compel the furnishing of the information refused in the annual reports.<sup>1</sup> The Commission has requested the verification of reports under oath, but

<sup>1</sup> *Knapp v. L. S. & M. S. Ry. Co.*, 197 U. S. 536.

the law did not require it, and the request has been disregarded by many railroads.

The new section grants to the Commission all that the most ardent advocate of publicity of accounting could desire. It requires that the annual reports shall be made out under oath, and imposes penalties for failure to file them with the Commission within the prescribed time. It empowers the Commission to call for monthly or special reports. It gives the Commission authority, in its discretion, to prescribe the bookkeeping methods of the carriers, gives it access at all times to the books of the railroads, and authorizes it to employ special examiners for the purpose.<sup>1</sup> Penalties are imposed for failure to conform to the prescribed methods of bookkeeping or for refusal to submit the books to the inspection of the examiners. Fine or imprisonment, or both, are imposed upon persons who wilfully falsify or mutilate records or neglect to make the proper entries, and jurisdiction is given to the United States courts to issue writs of mandamus in the enforcement of the provisions of the section.

The purpose of the section is to make the railroads in reality public-service corporations, and expose every individual transaction to the public eye. Armed with penalties and supported by the courts, upon whom jurisdiction is specifically conferred, the Commission can now, as it could not earlier, draw up a complete system of bookkeeping and secure its adoption. Uniformity of bookkeeping is, of course, absolutely essential to any successful government inspection, for thorough familiarity with the books cannot be obtained or satisfactory comparisons made until the books of all the carriers are drawn up in the same form. Such a system, when once secured, will be a great aid in determining the reasonableness or unreasonableness of rates, and will be a most potent power in the detection and prevention of rebates.

But the clause goes one step further in the effort to enforce absolute publicity and prevent evasions of the statute. It is made unlawful for carriers to keep any other accounts, records,

<sup>1</sup> The old law gave the Commission power to call for the books in a case under investigation, but not to send its examiners into the offices of the roads.

or memoranda than those prescribed or approved by the Commission, attaching to any violation of this provision the penalty of fine and imprisonment. Such a safeguard is obviously necessary, if the section is to be effective. Otherwise, illegal transactions would be out of reach of government inspectors. It is sincerely to be hoped that the constitutionality of this clause, which many question, will be sustained. There is no doubt that it will be liberally interpreted by the Commission, and railroads will be permitted to keep such records peculiar to their own situation as are essential to the development and perfection of their operation. It would be a heavy price to pay for uniformity of accounting, were it to result in the abolition of the experimental statistical laboratory so efficiently conducted by many railroad managers. The purpose is not to prevent such records, but simply to make the Commission cognizant of them in advance.

*Procedure.* Changes have been brought about in methods of procedure for the enforcement of orders of the Commission which promise to strengthen greatly the effectiveness of the Commission as a regulating body. Orders may be issued for many purposes, including those designed to enforce definite requirements of the law and those issued after complaint and hearing to rectify the evils complained of. But all orders except those for the payment of money are enforced in the same manner. The latter have been of little importance in the experience of the Commission. In suits involving more than twenty dollars, and requiring under the seventh amendment to the Constitution a trial by jury, the new law provides, as did the old, for appeal to the Circuit Court sitting as a court of law, and the findings of fact which the Commission is required to prepare in such cases are considered *prima facie* evidence.

It has been observed that the Commission in the suits just referred to prepares a *prima facie* case for the court. This practice, which was formerly required in all investigations, is now confined to damage suits. In the case of every other form of complaint the thorough investigation which included the findings of fact upon which conclusions were based is now eliminated, and the Commission is now required to make a report which

shall state merely its conclusions together with its decision or order. The former procedure necessitated the examination of large numbers of witnesses, and imposed in many cases an unnecessary amount of labor upon the Commission, besides consuming much time and delaying the settlement of cases that called for speedy relief. It will be seen that this change in the law will materially expedite the settlement of complaints by lightening the clerical labors of the Commission. It takes away one of its semi-judicial functions, and makes it more definitely an administrative agent of the legislative authority. Whether it will impose new burdens upon the judiciary depends entirely upon the interpretation which the courts place upon the statute. Under the old law a refusal to obey the Commission's order brought the matter by petition of the person injured before the Circuit Court in equity, which had power to issue writs of injunction, to levy fines, and to issue writs of attachment. In the court hearing the findings of the Commission were accepted as *prima facie* evidence, but the court from the beginning considered it within its power to go beyond the evidence submitted by the Commission and consider the case *de novo*.<sup>1</sup> This acted as an incentive to the carriers to reserve the main portion of their evidence for the court and present a mere outline to the Commission. The Supreme Court has, however, frowned upon this practice,<sup>2</sup> and has declared that it was the intention of the act that the facts involved were to be disclosed before the Commission. It is to be hoped that the new methods of procedure will dispose of this troublesome question. Disobedience of an order of the Commission now, as before, brings the case upon petition of the party injured before the Circuit Court in equity. The application for relief merely states "the substance of the order." The court is required to "prosecute such inquiries and make such investigations through such means as it shall deem needful, in the ascertainment of the facts at issue or which may arise upon the hearing of such petition." The section continues, "If upon such hearing as the court may determine to be necessary,

<sup>1</sup> *Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co.*, 37 Fed. Rep. 567, January 7, 1889.

<sup>2</sup> *Social Circle Case*, 162 U. S. 184.

it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of mandamus or other proper process." Much depends upon the interpretation of the words "regularly made and duly served." If it confines the jurisdiction of the court to determining whether the Commission has followed the correct procedure in making and serving its order, the law virtually declares the order of the Commission unreviewable, and calls upon the court simply to enforce the existing order. If, however, the court holds that its duty to ascertain the facts in the case gives it broader jurisdiction, the situation will remain much as it was under the old law. Appeals from action of the Circuit Court lie direct to the Supreme Court, and have priority over all except criminal cases.

A most salutary change has been brought about in the method of making penalties operative upon the carrier. Formerly penalties for violation of an order of the Commission did not begin to run until sustained by an order of the court. This threw the initiative upon the Commission, and left the carrier free to pursue its disobedient course until the judiciary had concluded its deliberations. The new section makes an order effective within such reasonable time, not less than thirty days, as the Commission shall prescribe, and continues it in operation for a period not to exceed two years. A penalty of \$5000 for each violation of the order, each day being considered a separate offense, begins to run on the day indicated in the Commissioner's order.

Relief from the burden of cumulative penalties, which would quickly amount to an excessive sum, is provided by giving the carrier power to bring suit at any time after the order is issued, to enjoin it or set it aside, and jurisdiction is expressly vested in the Circuit Courts to hear such suits.

The provisions of the Expedition Act of 1903<sup>1</sup> are made applicable to all these suits, including application for temporary

<sup>1</sup> This act, approved February 11, 1903, provides that, in any suit in equity brought in the Circuit Court under the Anti-Trust Act or the Interstate Commerce Act wherein the United States is complainant, the Attorney-General may certify to the court that the case is of general public importance, under which circumstances the case shall be given precedence and heard before three circuit judges, with appeal within sixty days direct to the Supreme Court,

injunctions, but no injunction or interlocutory order may be granted except on hearing after not less than five days' notice to the Commission.

The Commission is given power to grant a rehearing after its order has been made, if sufficient reason appears, but such rehearing does not operate to stay the enforcement of the order without special permission of the Commission. Upon rehearing the Commission may reverse or modify its original order.

One distinct purpose animates all these changes in the section. The fact that an order of the Commission is now effective immediately upon promulgation, and that the carrier must either obey or take steps at once to prevent the accumulation of penalties; that a rehearing before the Commission is provided for; that the duty of the Circuit Court is now to determine the regularity of the order of the Commission; and that no injunction may issue suspending an order without giving the Commission an opportunity to be heard,—all show clearly that Congress has intended to create an efficient administrative board as an arm of the legislative body. It is perfectly clear that the judicial power is expected to interfere only when the order of the Commission is *ultra vires* or unconstitutional. The court will be expected to treat an order of the Commission as it would an act of Congress, with a presumption in favor of its validity until the opposite has been clearly shown, and carriers will be deterred from contesting an order of the Commission unless they have a good case.

Whether the Supreme Court will decide that the intent of the statute is unequivocally expressed in its terms remains to be seen. If upheld, a permanent step has been taken in the solution of the problem of railroad control. Not only will the orders themselves be more effective, but their value will be enormously increased by the expedition with which they will go into effect. The curse of the old law, the weakness which obtained for it its greatest disrepute, was its utter inability to bring about speedy or decisive results.

*Minor changes.* Among the minor changes may be noticed the so-called Carnack amendment, which provides that carriers receiving interstate shipments must issue a through receipt or

bill of lading therefor, and become liable for the shipment, no matter on what road the loss or damage occurs; but the initial carrier is entitled to recover from the carrier on whose line the loss takes place. Conferences have been proceeding for a year or more between shippers and carriers in an effort to arrive at some sort of uniform and satisfactory adjustment of this troublesome question. Whether or not bills of lading have been issued, whether the carriers have limited their common-law liability, whether they have paid claims promptly or at all, has often depended upon the keenness of competition and the desirability of the shipper's patronage. Under the guise of claims, rebates to large shippers have been frequent, and small shippers have waited long and frequently in vain for the adjustment of their losses. So far as joint shipments have been concerned, the fact is that in a large majority of cases where losses have occurred on the line of a connecting carrier no recovery has been possible at all. The clause under discussion adopts the prevailing principle of English law since 1841, and, if it proves to be constitutional, as to which some doubt exists, it should be productive of beneficial results to shippers. It is insisted that it will work a distinct hardship and injustice to the railroads, but it is perfectly apparent to those who are familiar with the claim departments of our railroad systems that the hardship imposed on railroads is a mere trifle when compared with that which has been endured so long by shippers. In most railroad systems of accounting the machinery is now in existence by which such damage claims can be adjusted between the roads. It will, of course, be necessary for the Commission, when compelled to establish through routes upon failure of the railroads to do so voluntarily, to take into consideration the effect of this liability clause, and to safeguard initial carriers against possible failure of connecting lines to settle damage claims. The clause forbids the carrier to limit its liability by contract, but does not make clear that it is full common-law liability which is intended. Interpretation at this point will be required.

The Commission is enlarged from five to seven members, only four of whom shall be of the same political party. Their term

of office is extended from six to seven years, and their salary is increased from \$7500 to \$10,000 per year. These changes mean an increase in the dignity and influence of the Commission.

Having now considered the more important amendments to the act, we are led to inquire what gaps in the system of railroad regulation are still left to be filled. The omission which will be most keenly felt in the enforcement of the new statute concerns the relation of long-and-short-haul rates. Section 4 of the old act,<sup>1</sup> robbed of all its vitality by Supreme Court decision,<sup>2</sup> stands unamended. To quote from the testimony of the chairman of the Commission before the Senate Committee:<sup>3</sup> —

No one, I think, can read the fourth section . . . and be in doubt that Congress intended to provide some actual and potential restraint upon that particular form of discrimination. And, I may say, it remains to-day, much as it was then, not the greatest evil, but the most irritating and obnoxious form of discrimination that has been encountered.

In view of this situation, Congress might reasonably have been expected to reconstruct the clause, not in such radical manner as to prohibit lower rates for the long haul, when circumstances manifestly justified such a practice, but to prevent the present practice in which carriers have been authorized by the court to charge less for the long haul than for the short haul whenever competition of any kind is present, and to act without any previous authorization by the Commission. It is evident that a large breeding place of discrimination and undue preference has been left undisturbed, and that the arbitrary basing-point system of the southern roads may continue its existence unmolested.<sup>4</sup>

In the consideration of remedies for this situation other than a reconstruction of the section itself, we are led to observe two

<sup>1</sup> Section 4 made it unlawful for a carrier to charge any greater compensation in the aggregate for transportation 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 in the longer distance; but the Commission might, after investigation, suspend the operation of the clause.

<sup>2</sup> Alabama Midland Case, 168 U. S. 144, 173. Reprinted herein at pp. 333 and 354. Cf. also Introduction, p. xix. — ED.

<sup>3</sup> Vol. IV, p. 3293.

<sup>4</sup> Compare our cases, reprinted at pp. 238, 286, and 378, *supra*. — ED. The English regulations are described at p. 602, *infra*.

other regrettable omissions in the statute. The one is the failure to bring under the jurisdiction of the Commission carriers engaged in inland transportation by water.<sup>1</sup> Although the evils incident to water transportation have probably been much less than in the case of railroads, and although the force of competition works much more effectively in water carriage, nevertheless the exemption of water transportation from the operation of the law has been a serious hindrance to the regulation of land transportation which comes into competition with it, and, in many instances, water lines have been made to assist railroads in evasion of the act. Publication of water rates and the securing of reasonable stability through the jurisdiction of the Commission would assist in solving the problem of section 4. But of more importance would be the repeal of section 5 which prohibits pooling. Such a result was hardly to be hoped for in the present temper of public opinion, and in view of the fact that rates, for one cause or another, have been advanced since the era of railroad consolidation. But it is the widespread conviction of students of the problem that the pooling of traffic by competitive lines, under close supervision of the Commission, would materially improve the railroad situation by securing uniform and stable rates, and by eliminating a great part of the place discriminations. The theory clung to so tenaciously by the people at large, and given weighty sanction by the decisions of our highest court, that competition can be relied upon to give shippers reasonable rates, is utterly impracticable when applied to the railroad industry. The conversion of the informal and secret agreements between carriers which now prevail, and which in the nature of things must prevail, into open legal contracts sanctioned and regulated by the Commission, must be effected sooner or later if this railroad problem is to be solved by other means than by government ownership.

In view of the extended treatment given to the amendments individually, comment on the act, as a whole, seems superfluous. It is to be remembered that this is not a new statute, but an

<sup>1</sup> This refers to all water lines, water carriage that forms with rail transportation a through route being now under the jurisdiction of the Commission.

amendment of an old one. The fundamental principles set in the act of 1887 have not been disturbed. The experience of nineteen years has but demonstrated the soundness of its basic principles, and the amendments have been incorporated with a view to making these standards apply more definitely and practically to the everyday problems of railroad transportation. Public interest in the progress of the measure has been remarkable, and the result is a striking victory for public opinion. How much has actually been accomplished cannot be foretold. This will depend upon the ability of the act to run the gantlet of the courts, and upon the vigor with which its provisions are enforced by the Commission. At present one can afford to be optimistic. The Commission, without awaiting the presentation of cases to it, is diligently engaged in the interpretation of the statute and in its application to the specific questions that arise daily. The roads have accepted cordially the will of Congress, and seem disposed to obey the law to the letter, and to accord the Commission every facility for investigation. Whether this attitude will continue when traffic falls off and the railroads begin again their struggles for business remains to be seen. They are at least entitled to a presumption in their favor, and cordial coöperation will do much to make railroad regulation a blessing to shipper and carrier alike.

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## XXIII

### REASONABLE RATES<sup>1</sup>

STATES may fix local rates for public service, but decisions of the United States Supreme Court have swept away the power of states to make their rates conclusive.

This result has been reached gradually through a line of decisions under the Fourteenth Amendment.

In the earliest cases of rate regulation under the amendment the court declined to review the reasonableness of rates fixed by states, holding this to be purely a legislative question. Later the court decided to review the extent of rate regulation, but held that rates which permitted some, though only a slight, return on the property devoted to a public service were legal. Finally a position has been reached where rates fixed by states are held invalid unless they permit as large profits as the court thinks the public service ought to yield. In this way the power to determine what are reasonable rates for public service has been transferred from state legislatures to the Supreme Court.

The first case in which the extent of state regulation of rates for public service was brought before the Supreme Court for review, after adoption of the Fourteenth Amendment, was *Munn v. Illinois*,<sup>2</sup> decided in 1876. This case involved the validity of an Illinois statute that fixed a maximum rate for storing grain in elevators at Chicago. Munn, having been convicted and fined in the state courts for violation of the statute, appealed to the United States courts on the ground that enforcement of the rate provided by the statute would take his property

<sup>1</sup> From the *Journal of Political Economy*, December, 1903, pp. 79-97. The same subject is much elaborated in *Publications of the American Economic Association*, 3d series, Vol. VII, 1906, pp. 24-82.

<sup>2</sup> 94 U. S. 113.

without due process of law and violate the Fourteenth Amendment. In the course of an opinion upholding the validity of the statute, Chief Justice Waite said, speaking for the court:

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. . . . The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied.

From these statements it is perfectly clear that the question as to the right of those engaged in a public calling to have a judicial review of rates fixed by a legislature was squarely presented to the court in this case. It is equally clear that in the opinion of the court no such right existed.

Of the nine Supreme Court Justices, two, Field and Strong, dissented from the decision in *Munn v. Illinois*. The dissenting opinion was prepared by Justice Field and concurred in by Justice Strong. This dissent went on the broad ground that the storage of grain is not a public business or one for which a legislature has the power to fix rates. Nowhere in the dissenting opinion is it contended that in a public business where a legislature has the right to fix rates the amount or reasonableness of these rates can be reviewed by the court. On the contrary, Judge Field said in the course of his opinion:

If it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion. . . . The several instances mentioned by counsel in the argument, and by the court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the state over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest

on money, which I shall presently notice, there was some special privilege granted by the state or municipality ; and no one, I suppose, has ever contended that the state had not a right to prescribe the conditions upon which such privilege should be enjoyed.

At the October term of the Supreme Court, in 1876, when the opinion in *Munn v. Illinois* was delivered, cases involving the validity of railway rates fixed by the legislatures of Iowa, Minnesota, and Wisconsin were also decided. Several of these cases involved the power of legislatures to fix conclusively the rates for public service under the Fourteenth Amendment, and in each case the court affirmed this power.

In *Chicago, Burlington & Quincy Railway Co. v. Iowa*,<sup>1</sup> maximum rates fixed for transportation by a statute of that state were contested on the ground, among others, that the rates fixed would take property of the railway without due process of law. Replying to this contention the court in an opinion upholding the statute said through Chief Justice Waite :

In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business.

In other words, the court decided that due process of law was satisfied when rates for public service were fixed by the legislature.

The next case, *Peik v. Chicago & North-Western Railway Co.*,<sup>2</sup> was brought to restrain the enforcement of a law of Wisconsin that fixed maximum rates for passengers and freight. It was contended on the part of the railway security holders that the rates named in the statute would destroy the value of their securities, that the railway was entitled to collect reasonable compensation for its services, and that reasonable compensation was a question for the court and not for the legislature. Chief Justice Waite again delivered the opinion of the court, in which it was said, upholding the statute :

In *Munn v. Illinois*, *supra*, p. 113, and *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, *supra*, p. 155, we decided that the state may limit the

<sup>1</sup> 94 U. S. 155.

<sup>2</sup> 94 U. S. 164.

amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions. . . . As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn v. Illinois*. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.

In *Chicago, Milwaukee & St. Paul Railroad Co. v. Ackley*<sup>1</sup> the court said, speaking through Chief Justice Waite:

The only question presented by this record is whether a railroad company in Wisconsin can recover for the transportation of property more than the maximum fixed by the act of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered. . . . But for goods actually carried, the limit of the recovery is that prescribed by the statute.

Two cases<sup>2</sup> involving railway rates under a statute of Minnesota followed those just considered, and the court in brief opinions stated that they were covered by the rulings already made.

In *Stone v. Wisconsin*,<sup>3</sup> which was decided in favor of a state statute fixing rates, the only question not covered by *Chicago, etc., Railway Co. v. Ackley*, according to the court, related to the construction of a certain charter.

Justices Field and Strong dissented in each of the above railway cases, but gave no opinion until *Stone v. Wisconsin* was reached, when Justice Field prepared an opinion in which Justice Strong concurred. In this opinion the dissent to this entire group of railway cases was put on the ground that the railway charters were contracts with the legislatures, which should protect the companies from state regulation of rates.

Besides Chief Justice Waite, the celebrated group of cases headed by *Munn v. Illinois* was supported by Justices Clifford, Hunt, Bradley, Swayne, Davis, and Miller. The assertion by these judges of the power of states to fix conclusive rates for

<sup>1</sup> 94 U. S. 179.

<sup>2</sup> 94 U. S. 180.

<sup>3</sup> 94 U. S. 181.

public service seems to have been as emphatic as any believer in local self-government could desire.

The doctrine of the Granger Cases, that a state may fix conclusive rates for local public service was reaffirmed in the case of *Ruggles v. Illinois*,<sup>1</sup> where the validity of a law of that state providing a maximum fare per mile on railways was called in question. In the course of its opinion sustaining the law the Supreme Court said:

This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, for in the absence of a statute, or other appropriate indication of the legislative will, the common law forms part of the laws of the state to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that, when a maximum is so established, that fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws.

Seven judges supported the majority opinion in this case, and two judges, Field and Harlan, delivered separate concurring opinions. Judge Harlan held that the charter of the railway in question was a contract that gave it the right to collect reasonable rates, but that the rates fixed by statute were not shown to be unreasonable. Judge Field held that the statutory rates had not been shown unreasonable, but did not state why he thought that they were bound to be reasonable.

By 1885 a fundamental change had taken place in the position of a portion of the court on the question of state power over rates for public service. This change was brought out by the case of *Stone v. Farmers' Loan & Trust Co.*,<sup>2</sup> where an effort was made to enjoin the enforcement of rates under a Mississippi statute. The court through Chief Justice Waite affirmed the power of the state to fix rates and upheld the statute, but added:

From what has been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a

<sup>1</sup> 108 U. S. 526.

<sup>2</sup> 116 U. S. 307.

power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward ; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

Thus was the underlying principle of the Granger Cases as to reasonable rates brought in question. Unlimited power of regulation like that affirmed in those cases may certainly be used to destroy and did in fact destroy much of the value of railway securities under the Granger Acts. It was said of the United States Bank by Chief Justice Marshall in *M' Culloch v. State of Maryland* :<sup>1</sup>

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied.

The tax imposed by Congress on note issues of state banks after the close of the Civil War in the exercise of its power to regulate the currency, and upheld in *Veazie Bank v. Fenno*,<sup>2</sup> certainly destroyed these issues completely. Of course, if the power to regulate is itself regulated by some other and higher power, the former may be held within any desired limits. The above quotation from the opinion in *Stone v. Farmers' Loan & Trust Co.*<sup>3</sup> must mean, therefore, an assertion by the court of its power to review rates fixed by a state. Even the Granger Cases never decided that a railway must continue in business against its will under rates fixed by a state ; it was open to the railway to go out of business. Neither did the Granger Cases decide that the property used in a public service might be taken without due process of law, but rather that state regulation of rates for such service was due process of law. The power asserted by the court in the case under consideration must therefore relate to the review of the reasonableness or justice

<sup>1</sup> 4 Wheaton, 316.

<sup>2</sup> 8 Wall. 533.

<sup>3</sup> 116 U. S. 307.

of rates fixed by a state. This meaning is made clear by the statement that:

What would have this effect we need not now say, because no tariff has yet been fixed by the commission. . . .

The opinion in the case under consideration was delivered by Chief Justice Waite who spoke in the Granger Cases, and was also supported by Justices Bradley, Miller, Woods, Matthews, and Gray, of whom Bradley and Miller took part in the Granger Cases. Justices Harlan and Field dissented, and Blatchford did not sit. The dissent of Harlan, J., went on the ground that the railway charters were contracts that permitted the companies to fix their own rates unless they were shown to be unreasonable.

In *Dow v. Beidelman*<sup>1</sup> a statute of Arkansas that fixed a maximum fare of three cents per mile on railroads in that state was upheld by a unanimous court. It was shown in this case that the rates fixed by statute, on the basis of the existing traffic, would yield a net yearly income of less than 1.5 per cent on the original cost of the road and only a little more than 2 per cent on the bonded debt. The evidence did not show, however, how much the then owners of the railway had paid for it. Justice Gray said in delivering the opinion of the court:

Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable.

The dictum above quoted from *Stone v. Farmers' Loan & Trust Co.*,<sup>2</sup> as to limitations on the power of states to fix conclusive rates, was repeated with approval in the case under consideration.

In neither of these two cases was it open to members of the court who did not assent to this dictum, but who did agree with the decision, to dissent from the opinion, because the principle of the dictum was not acted on in either decision. The later of these two cases was decided by eight judges, Chief Justice Waite having died at Washington, March 23, 1888.

<sup>1</sup> 125 U. S. 680.

<sup>2</sup> 116 U. S. 307.

In *Chicago, Milwaukee & St. Paul Railroad Co. v. Minnesota*,<sup>1</sup> the dicta put forth in previous cases that the reasonableness of rates fixed by a state is subject to review by the courts, was established by the force of a judicial decision. This case arose under a statute of Minnesota which authorized a commission to fix transportation rates. The commission reduced the rate for carrying milk between certain points from 3 cents to 2.5 cents per gallon, and the Minnesota courts refused to admit evidence offered by the railway that the latter rate was unreasonable, holding that under the statute the findings of the commission were conclusive. From this decision the railway appealed to the Federal court on the ground that the denial of a judicial hearing as to the reasonableness of the rates would deprive it of property without due process of law. Mr. Justice Blatchford delivered the opinion of the court, holding the Minnesota statute void because it made the rates fixed by the commission conclusive. In the course of this opinion the court said :

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States ; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

Dissent from some of the judges who decided the Granger Cases was now due. This dissent could not properly have been delivered in the earlier cases where the power of the court to review rates fixed by a state had been asserted, because those assertions were mere dicta and were not involved in the decisions of the cases where they occurred.

In the course of a long dissenting opinion, concurred in by Justices Gray and Lamar, Justice Bradley said :

<sup>1</sup> 134 U. S. 418.

I cannot agree to the decision of the court in this case. It practically overrules *Munn v. Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the state itself. It is chartered as an agent of the state for furnishing public accommodation. The state might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. . . . But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted ; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is preëminently a legislative one, involving considerations of policy as well as of remuneration ; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. . . . Thus, the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable ; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat : when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there ; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary ; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there. It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. . . . It is complained that the decisions

of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for that purpose. . . . It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations, and society. But such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people have always a remedy in their hands; they may at any time restrain them by constitutional limitations.

This strong dissent, in 1889, gives a glimpse of the conflict that had been going on in the Supreme Court since the decision of the Granger Cases, in 1876. As far as can be seen from the line of decisions noted, only two of the seven judges who decided those cases ever receded from the position there taken that the court could not review the reasonableness of rates fixed by a legislature. Of these two judges, Waite indicated his change of view by the dictum above quoted from *Stone v. Farmers' Loan & Trust Co.*, and Miller concurred in the majority decision of the Minnesota case just considered, by a separate opinion.

As new judges came on to the Supreme Bench, the support given by the court to the principles of the Granger Cases grew less. In *Chicago, etc., Railway Co. v. Minnesota*<sup>1</sup> the scales were turned and five justices — Fuller, Field, Harlan, Blatchford, and Brewer — supported the majority opinion. Of the nine judges who sat in the Granger Cases only Justices Field, Miller, and Bradley remained to take part in the case last decided, and of these three Justice Bradley alone adhered to the fundamental doctrine of the earlier decisions.

By *Chicago, etc., Railway Co. v. Minnesota*<sup>2</sup> the Granger Cases were in large measure overruled. Due process of law was no

<sup>1</sup> 134 U. S. 418.

<sup>2</sup> 134 U. S. 418.

longer to be found in rates fixed by states, but in decisions of the court as to what was reasonable. Under this decision the states may exercise as much or as little control over rates as the court sees fit to permit. In *Munn v. Illinois*<sup>1</sup> the court said:

The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied.

With equal force it may be said that assertion by the court of authority to review the reasonableness of rates fixed by legislatures opened the way for a great reduction in state powers. Since 1889, when the paramount authority of the court was established by a judicial decision, suits to invalidate rates fixed by legislatures have multiplied and decisions have borne with increasing severity on state powers.

In *Budd v. New York*, decided in 1892, the validity of a statute of that state was contested on the ground that rates fixed by it for elevating and storing grain were not within the state power to make and were unreasonable. Mr. Justice Blatchford in delivering the opinion of the court, supported the power of the state to regulate the business of storing grain and said :

In the case before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws ; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

It was also said in this opinion, referring to *Chicago, etc., Railway Co. v. Minnesota* :

What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature.

This statement was *obiter dicta*, pure and simple, as the rates in *Budd v. New York* were not shown to be unreasonable, was in direct conflict with the language of the Minnesota case and

<sup>1</sup> 94 U. S. 113.

no support for it can be found in later decisions. Moreover, the three dissenting judges in the Minnesota case certainly understood the decision there to apply to rates fixed directly by a legislature as well as to those fixed by a commission. It is to be noted that the Minnesota statute itself, as construed by the Supreme Court of that state, was declared invalid by the United States Supreme Court, and not merely the rates fixed under the statute. This statute evidently failed because it denied the right of the courts to investigate the reasonableness of rates fixed under it.

As to reasonable rates *Budd v. New York*<sup>1</sup> simply shows that their unreasonableness must be proved before the court will hold them void on that ground. Justices Brewer, Field, and Brown dissented in this case.

*Brass v. North Dakota*<sup>2</sup> involved the validity of a statute of that state that fixed rates for storing grain. The case turned on the power of the legislature to fix rates at all, rather than on the reasonableness of the rates actually fixed. The court upheld the statute, and said in its opinion, delivered by Justice Shiras :

We are limited by this record to the questions whether the legislature of North Dakota in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states.

Justices Brewer, Field, Jackson, and White dissented, leaving only Fuller, C. J., and Justices Harlan, Gray, Brown, and Shiras to decide the case.

In *Chicago & Grand Trunk Railway v. Wellman*,<sup>3</sup> decided a few months earlier than *Budd v. New York*, the court upheld a law of Michigan regulating railway rates, and said :

The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates. . . . Surely before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent stockholders from receiving any

<sup>1</sup> 143 U. S. 517.

<sup>2</sup> 153 U. S. 391.

<sup>3</sup> 143 U. S. 339.

dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends.

The opinion delivered by Justice Brewer in this case clearly upholds the doctrine of *Chicago, etc., Railway Co. v. Minnesota*, that the court has power to review the reasonableness of rates fixed by a legislature.

*Reagan v. Farmers' Loan & Trust Co.*<sup>1</sup> furnished another application of the same doctrine by restraining the railway commission of Texas from enforcing rates fixed under a statute of that state. The statute provided that rates fixed under it were to be deemed reasonable until finally found otherwise in a direct action, but enforcement of the rates fixed was enjoined before their reasonableness was determined by evidence, in spite of the language of the statute. In the opinion of the court, delivered by Justice Brewer, affirming the preliminary injunction and holding the rates unreasonable and void, it was said:

Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employees have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been

<sup>1</sup> 154 U. S. 362.

enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust or unreasonable?

It may be suggested that the decision in this case rested on the provision of the Texas statute that suits might be brought to determine the reasonableness of rates fixed by the commission. This view cannot be maintained, however, because the statute expressly provided that rates so fixed should be deemed reasonable until finally found otherwise in an action brought by the dissatisfied party, and that in such actions "the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations (etc.), complained of are unreasonable and unjust." The case in which the injunction restraining the commission from enforcing the rates in question was granted came up to the Supreme Court on demurrer by the commissioners and the Attorney-General to the complaint of the Trust Company, so that there was no hearing on the merits as the statute required. In deciding the case the court went on the broad ground that it had power to determine whether rates fixed by states were reasonable. This was shown by the statement in the course of the opinion

that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts sitting as courts of equity.

And also that there could be

no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation.

The court modified the force of its decision by the statement that

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. . . . There may be circumstances which would justify such a tariff; there may have

been extravagance and needless expenditure of money ; there may be waste in the management of the road ; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value ; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

Evidently this case decides only that under the circumstances stated a road is entitled to earn interest on its bonds and something for its stockholders, besides paying necessary operating expenses. How much the return to stockholders may be is not decided. As no evidence was taken, it does not appear how the court knew that the failure of the road to earn "some profit" was not due to some of the "matters" named above.

In the case just considered and also in that of *St. Louis & San Francisco Railway v. Gill*,<sup>1</sup> decided during the same year, 1894, there was no dissent, but the entire court concurred in the opinion. These two cases present interesting comparisons, as the railway company in each sought protection from a law for the regulation of rates, and each alleged in its pleadings that the rates fixed for transportation would yield no profit on the invested capital, and each case was decided on demurrer.

The case of *St. Louis & Santa Fé Railway v. Gill* came up under a law of Arkansas, passed in 1887, that fixed a maximum rate of three cents per mile for the transportation of passengers on railroads of that state, and named a penalty of \$300 payable to any passenger from whom an overcharge was exacted. Gill was charged five cents per mile and obtained a verdict in the state courts against the railway for the amount of the penalty. The railway took the case to the Supreme Court on the ground that the rate fixed by statute would result in a taking of its property without due process of law. Proof was offered for the railway that on the branch where Gill was charged five cents per mile the actual cost to the railway was 3.3 cents per mile

<sup>1</sup> 156 U. S. 649.

for each passenger carried ; that this branch line had never earned more than 1 per cent annually above actual operating expenses on the capital stock that had been paid in cash and invested in this line. These offers of proof were not accepted, and the demurrer of Gill to the pleadings of the railway was sustained by the court in an opinion sustaining the validity of the rates fixed by the Arkansas law. The opinion, delivered by Justice Shiras, took occasion to assert the power claimed in previous cases, by saying :

This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws.

The line of railway on which Gill was charged five cents per mile, and to which the offers of proof seemed to refer, extended from the northern boundary of Arkansas to Fayetteville in that state, and had formerly been owned by a separate company. Referring to these circumstances the court said :

In this state of facts we agree with the views of the supreme court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads ; the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided.

Finally came the important statement that

Even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public.

This case seems to represent an effort of the court to stay the tendency of former decisions toward the destruction of state

power in the regulation of rates. It is hard to see why the rates on a distinct line of railway should not be regulated according to the investment and expense of operation on that line, even though the line in question forms only a part of a large consolidated system.

The demurrer by a private litigant as a barrier to judicial annulment of rates fixed by legislatures did not stand the test of the next case on the subject that came before the court, namely, *Covington, etc., Turnpike Co. v. Sandford*.<sup>1</sup> By an act of the Kentucky legislature in 1890 the rate of toll that might be charged on the turnpike owned by the company just named was reduced. Sandford obtained an injunction in the state courts which required the turnpike company to charge no more than the statutory rate of toll. From this injunction the company sought relief in the Supreme Court on the ground that the reduction in rates would take its property without due process of law. In the decision of the Supreme Court, prepared by Justice Harlan, it was said that the answer of the company

alleged that the receipt for the several preceding years had not admitted of dividends greater than 4 per cent on the par value of the company's stock ; that the act of 1890 reduced the tolls 50 per cent below those allowed by the act of 1865 ; and that such reduction would so diminish the income of the company that it could not maintain its road, meet its ordinary expenses, and earn any dividends whatever for stockholders.

These allegations were sufficiently full as to the facts necessary to be pleaded, and fairly raised for judicial determination the question — assuming the facts stated to be true — whether the act of 1890 was in derogation of the company's constitutional rights. It made a *prima facie* case of the invalidity of that statute.

This opinion reversed the action of the Kentucky courts which granted the injunction, though no evidence was before the court that the allegations of the company in its pleadings were true. Sandford acted in this case simply as a private person who wished to use the turnpike, and the admissions of his demurrer to the pleadings of the company were held sufficient ground on which to overturn the statute. The previous decision

<sup>1</sup> 164 U. S. 578.

in the Gill case that a statute cannot be held invalid on the demurrer of a private person was thus overruled. Admitting the statements in the pleadings of the company in this Sandford case to be true, the case simply follows the rule previously laid down that rates cannot be reduced to a point where they allow no return on the investment above operating expenses. This case, decided in 1896, was concurred in by the entire court. Though not required for the decision of the case, it was stated in the course of the opinion that

It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. . . . If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public.

These dicta indicate that there might be instances due to unwise investments, or perhaps to competition, where a corporation would not be protected in a right to earn any return on its investment.

The next case to come before the court involving the reasonableness of rates fixed by state authority was that of *Smyth v. Ames*, decided in 1898.<sup>1</sup> A notable difference between this case and those that had preceded it lay in the fact that the decision of the court was based on evidence taken at the trial as to the investments and earnings of the railways involved, instead of on allegations or admissions of parties to the suit. The case arose under a Nebraska statute of 1893, that prescribed rates for the transportation of freight on railways in that state, by a prayer on the part of persons interested in these railways for an injunction to prevent enforcement of these rates. In a unanimous opinion, delivered by Justice Harlan, the court said:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under

<sup>1</sup> 169 U. S. 466.

legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in such case.

We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the circuit court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution.

The injunction confirmed by the court in this case enjoined the Nebraska Board of Transportation and the Attorney-General of the state from taking any steps to enforce the rates fixed by the act of 1893. It should be noted that the court based its decision on the income that would have been derived from the local freight actually carried by the railways during the fiscal years of 1891, 1892, and 1893, ending June 30, at the rates prescribed by the act which took effect August 1, 1893. This takes no account of the fact that a decrease in rates may be followed by an increase in traffic, especially as to heavy farm produce which it may not pay to move at all if the freight is more than a very moderate figure.

The most important rule laid down by the case is that the basis of calculations as to reasonable rates of a corporation " must

be the fair value of the property being used by it for the convenience of the public."

This statement with others in the opinion, appears to limit "fair value" to that of the physical property and to exclude franchise valuations. Unless the value of the physical property employed in a public service and the actual cost of performing that service are to be taken as the basis of rate calculations, the amount of rates would appear to depend mainly on the arbitrary opinion of the company or legislature making them. Though the majority of the railways in Nebraska could have made nothing on their investments under the rates prescribed by the act of 1893, as the court understood the evidence, yet the opinion states that two companies could have earned "something" above operating expenses. Reference to the evidence on which the court relied, and which was repeated in the opinion, shows that this something amounted to 1.99, 4.06, 6.84 and 10.63 per cent annually on the values of the railways. Unless the court thought that this rate of net earnings was so small as to amount to a taking of property without due process, it does not appear why the Nebraska act was unconstitutional as to the roads making this rate. According to dicta in the Sandford case above cited, an act might be constitutional as to some roads and unconstitutional as to the others.

A still later case in the Supreme Court, that of *Cutting v. Goddard*, decided in 1901, goes farther than any of the foregoing in its limitation of state powers. This case arose under a Kansas statute of 1897 that fixed charges for handling live stock at stock yards where more than a certain amount of business was done, and affected the yards at Kansas City. Petitions were filed asking that the Attorney-General of Kansas be restrained from enforcing the statute as to these yards, and, after hearings in which evidence was taken as to the value of the yards and the annual earnings, the injunction was granted. In the course of the unanimous opinion of the court, delivered by Justice Brewer, it was said:

If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896, the income of the stock-yards company would have been reduced that year \$300,651.77, leaving a

net income of \$289,916.96. This would have yielded a return of 5.3 per cent on the value of the property used for stock-yard purposes, as fixed by the master.

The actual net income of the company during 1896, as found by the master and the court below, was \$590,558.73, and the value of its property in the stock yards was \$5,388,003.25, so that its net income during that year amounted to nearly 11 per cent on its investment. After pointing out the liability of a person engaged in the operation of public stock yards to some legislative regulation, the court proceeded to define the limits of such regulation, and said :

The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.

These reasons for the decision of the court are negative in character. They tell us that it matters not that profits are large if rates are only reasonable. But what are reasonable rates? How are they to be determined if considerations as to investments and profits are put aside? If reasonable rates do not imply reasonable profits, where is the amount of charge to stop short of what the person receiving the service can be induced to pay?

A quarter of a century has transferred the test of reasonable rates from the opinions of state legislatures to the opinion of the Supreme Court. In the Granger Cases the court denied its right to interfere with local rates fixed by legislatures, even when these rates were so low as to destroy all profits. This doctrine, after various adverse dicta, was fully repudiated by the case of *Chicago, etc., Railway Co. v. Minnesota*, decided in 1889, thirteen years after the Granger Cases. From that date to 1896, when *Covington, etc., v. Sandford* was decided, the court went no farther than to hold that legislative rates must afford some income above operating expenses. Another step

was taken the following year, when the court held in *Smyth v. Ames* that rates which permitted a net profit of as much as 10.63 per cent on one road, but nothing on others, could not be enforced as to either.

Finally, in 1901 comes the decision, in *Cutting v. Goddard*, that rates which yield a profit of 10.9 per cent on the investment are not unreasonable, and that rates which would reduce this profit to 5.3 per cent are unconstitutional.

ALTON D. ADAMS

## XXIV

### THE DOCTRINE OF JUDICIAL REVIEW<sup>1</sup>

WE are now to undertake an investigation of the influence which the doctrine of judicial review has exerted on our American system of railroad control, in order to discover whether it has strengthened or weakened the efficiency of that control. In this inquiry we shall consider, first, its effect on the state's power to reduce rates; second, its effect on the state's power to enforce the rates it has established; and third, its effect, as a resultant of the other two, upon the spirit and ideas of railroad commissions.

Before coming to these precise questions, however, we shall do well to reflect for a moment upon the spirit of the law which has shaped the doctrine of judicial review, and which directs its application; for it will serve to illumine our entire discussion of this subject to recall at the outset the general attitude of the law and of the courts in all cases which involve both public and private interests. The attitude of the courts is determined by the fact that they are charged with the duty of interpreting and applying a law in which the individualistic spirit of the age has been firmly crystallized. In our modern régime the *individual* is the central figure. His importance, his dignity, his sanctity, his rights, and his liberties are everywhere recognized. His use of a free ballot is supposed to guard civil rights and to shape aright the course of government; his pursuit of his individual self-interest is supposed to secure industrial justice and welfare; his freedom of conscience, of thought, of will, and of action is not to be lightly infringed. "All men are created free and equal," says our Declaration of Independence, "and are endowed

<sup>1</sup> From "Railroad Rate Control," by Harrison Standish Smalley, Ph.D., *Publications of the American Economic Association*, 3d series, Vol. VII, 1906, pp. 83-110.

by their Creator with certain inalienable rights. . . . *To secure these rights, governments are established among men.*" The only limitation upon them is that they shall not, in their exercise, encroach upon the equal rights of other individuals.

It is true that this is a theory which has been gradually losing its hold both upon the minds and upon the hearts of men. So pernicious have been some of its results, especially in the world of industry, that the inquiry now is whether it has not passed the zenith of its usefulness, and whether it is not now necessary to modify it by an assertion of the social duties and responsibilities of individuals, and accordingly, by the enactment of laws restricting the individual for the general good. In this inquiry different minds have pursued different courses, have gone different lengths, and have, of course, reached different conclusions. Socialists would have us abandon the theory of individualism entirely and substitute therefor a theory of social duty, to be applied by the state. Long since, more conservative minds suggested factory legislation. Some thirty years ago, the consensus of public opinion demanded regulation of railroads for the public good. To-day there is agitation for municipal ownership, trust regulation, and other limitations upon private enterprise. This view is not intended to be complete. Its purpose is merely to recall the fundamental theory upon which our society is based, and some of the modifications of it which have been urged by many from time to time.

But while observing the gradual departure from the theory of individualism in industrial economics we must always remember that the law under which we live grew up with the growth of the individualistic theory and has received its stamp. The history of the English law is a record of the successful struggle of the individual, first for recognition, and then for supremacy. Indeed our law is permeated, saturated, with the theory of individual rights. Two centuries ago English law had been shaped to that theory, while in our country it no less lies at the basis of our law; and its dignity has been recognized in the bills of rights of our state constitutions, and in most of the Amendments to the Federal Constitution. Such limitations as the state may

impose on private rights are regarded as exceptions to the general rule, repugnant to the spirit and genius of the law, and therefore to be confined within strict bounds. Moreover — and this is a point of deep significance — for almost all purposes the law considers those artificial persons, corporations, as individuals entitled to the legal rights and privileges of natural persons.

This is the law which our courts are established to interpret and apply. “The primary duty of the courts,” said Mr. Justice Brewer, in deciding *Railway Co. v. Dey*, “is the protection of the rights of persons and property.”<sup>1</sup> And again, speaking for the Supreme Court in the *Wellman* case, he said, “the protection of vested rights of property is a supreme duty of the courts.”<sup>2</sup> This duty, it must be admitted, has not been neglected. In railroad rate cases its demands have been faithfully obeyed.

Such being the character of the law in which our judges are trained, and such being the acknowledged duty of the courts in its application, it is but natural that the professional sympathies of judges should all be with the railroads. Not that the judges, as *men*, are callous to the abuses which for a third of a century have irritated the general public, sometimes beyond the point of endurance; but nevertheless, as *judges*, they must apply a law which is in thorough sympathy with private persons, their property and rights, and which knows almost nothing of the “public welfare” except as it is to be secured through the assertion and maintenance of individual rights. If it be true, as is sometimes stated, that judges are disposed to subordinate the public weal to individual advantage, it is because they have entered fully into the spirit of a system of law which allows no other course.

In the light of these general observations, let us proceed to inquire the effect of the doctrine of judicial review, as developed and applied under our legal system, and first to notice the manner in which it has affected the power of the states to reduce rates.

Low rates are not, of course, the only ideal of railroad regulation. Doubtless the most important thing is *proportion*, that

<sup>1</sup> 35 Federal Reports, 872.

<sup>2</sup> 143 United States, 346.

is, a proper adjustment of rates as among the various commodities and the various localities. But given this adjustment, the lower rates are, the better. There can be no doubt that the public interest demands that, so long as the due proportion is not disturbed, rates shall be as low as possible. A commission, therefore, being charged with the duty of advancing the public welfare, must require reductions in railroad schedules which are too high to be in accord with the public interest. And the efficiency of a commission must depend in no small measure on its ability to accomplish the reductions which are demanded by considerations of public utility. Now how great is its ability in this regard?

Clearly, if its action in the matter of rates were final and binding upon the companies, its power of lowering rates would be absolute. There would be no obstacle to prevent it from meeting in the most complete manner the requirements of the industrial situation. We have seen, however, that its rates are subject to review by the courts, and the consequence of judicial review has been to seriously impair a commissioner's power to reduce rates. While it is impossible to measure with exactness the extent to which this power is impaired, it is possible to see that the limitation placed upon the commissions' activity in this particular is very great. And in order that this may clearly appear, let us consider at length three reasons why the doctrine of judicial review, as practically applied by the courts, stands in the way of public reduction of rates. These reasons may be stated as follows:

I. The doctrine fixes an improper limit beyond which reduction of rates cannot be carried.

II. The methods employed by the Supreme Court in determining the effect of rates on earnings are such as to make that effect seem more disastrous than is the fact.

III. The principles recognized by the Court in determining reasonableness of income are unduly favorable to the railroads, and afford no adequate protection to the interests of the public.

These propositions we shall take up in order.

I. The first limitation upon the state's power to reduce rates is found in that part of the doctrine of judicial review which

requires that rates shall be high enough to permit the railroad company to secure reasonable earnings. A state cannot lower rates so as to reduce earnings below that point without making adequate compensation to the company for all earnings, below the point of reasonableness, which are so taken. For to take any part of a railroad's "fair returns" is to deprive of property, — an act which, under the Fourteenth Amendment, must be accompanied with proper reimbursement.

This phase of the doctrine of judicial review is certainly subject to criticism, and the criticism touches a point so vital as to call in question the entire doctrine. The vulnerable point is the distinction made between earnings above the point of reasonableness, and earnings below that point. In effect the Court declares that above that point earnings are not property; but below it they are property; for the state may freely appropriate earnings above that point without violating the constitutional provision protecting property, though to take any below that point is declared to be a violation of it. This distinction is ingenious, and in making it the Court has perhaps saved from annihilation the state's right of rate control, but whatever merit may be claimed for it on that account, it may be admitted that it is a distinction which is artificial and which cannot be supported by reason. For, if income from property is itself property at all, surely all income must be property. To divide income into two parts — "property" and "not-property" — giving one part the protection of the constitution, and leaving the other defenseless, is an extraordinary proceeding. No one has ever thought of making a similar division in the case of any other kind of property. If the state were condemning a person's lot, it would not divide the lot into two parts and say: "one of these parts is property, and for it you may have compensation; but the other is not property, and for it, therefore, no payment will be made." Such a proceeding is unheard of, even in the case of property belonging to a quasi-public corporation. It cannot be imagined that the state, in taking any such property, would divide it into two parts and say: "one of these parts is property, and for it compensation will be made, but no payment

will be made for the other because it is not property, since you are a quasi-public corporation and, your property being devoted to a public use, a part of it has ceased to be property"! But the absurdity is more clearly seen when such a distinction is applied, not to real estate or equipment but to the income of railroads. Suppose the state were to seek in the treasury of a railroad company the earnings it had received from the operation of its road, and were to attempt to appropriate those earnings. There is not the least doubt that if the appropriation were permitted at all, the courts would require the state to reimburse the company for every cent of the earnings taken. The wildest stretch of the imagination cannot picture the courts saying to the state: "a part of these earnings are reasonable, and hence are property, and if you take them you must recompense the company; but the rest of the earnings are not property, because not reasonable, and you can have them for nothing." Yet this is just what the Supreme Court has said in regard to depriving a railroad of its income through the agency of low rates. The distinction is clearly without warrant and must be given a place among the pure fictions of the law.

It is evident from the absurdity of this distinction, which the Court has found it necessary to maintain in order to prevent judicial review from practically denying the established legislative power of rate control, that somewhere in the reasoning of the Court there is an error which is fundamental and which vitiates the whole process. That error, it is believed, consists in the actual, though not professed, transfer of rate regulation from the basis of the police power, where it has always been held to rest, to the basis of the eminent domain. While continuing to insist *in words* that rate control is an exercise of the police power, the Court has *in fact* treated it as if it were a phase of the power of eminent domain. The Court has apparently looked upon it as a means whereby the state may take property (in the form of income) for public use, and has consequently subjected it to the ordinary rules of eminent domain, requiring just compensation for property appropriated. It is because of this change of base that the Court has been driven to the dilemma

of holding either that all income is property, which practically denies the ancient legislative right of control, or else that none of it is property, and hence that all of it is beyond constitutional protection, which the judicial mind is unwilling to concede. From this dilemma our jurists have extricated themselves by advancing the extraordinary idea that a part of income is property and a part is not. But they would have saved themselves from getting into the dilemma, and so would have spared themselves the necessity of resorting to this untenable fiction, had they actually continued to regard rate control in the light of their own repeated assertions, as a phase of the police power. For viewed as a part of the police power, rate regulation is, of course, not subject to the rules applying to the condemnation of property. It is the exercise of an entirely different sovereign power, subject to entirely different rules and restraints. If the court should really so regard it, there would be no question of appropriation or compensation to consider, no inquiry as to the effect of rates on earnings would have to be made, and hence no classification of income.

But, it may be objected, though rate regulation is a part of the police power, is it not true that in its exercise the income of the railroad may be decreased, which would amount to a deprivation of property, income being regarded as property? True; — from the control of rates many consequences may flow, and among other results, the income of a company may be reduced. But that is a consequence which also flows from other police regulations which the state may adopt. Railroad rate control is not peculiar in that regard. Yet no one thinks of subjecting other police regulations to the rules of eminent domain. Thus the legislature may pass laws requiring railroads to put in cattle guards at highway crossings, or to equip each passenger car with an ax, saw, and hammer, or with drinking water, or to substitute, within a given time, automatic couplers of a certain type for the couplers in use. Any of these requirements would necessitate an expenditure of money and consequently would reduce the net income of the company by increasing expenses while the improvements were being installed. In effect,

if one wishes to think of it in this way, it amounts to an appropriation of property for a public purpose. A portion of the income, instead of being devoted to paying operating expenses, or interest on bonds, or dividends on stock, must be expended in a manner required for the benefit of the public. Thus income is affected just as truly — though in a somewhat different way — through these measures as through rate control. A railroad company may be deprived of income just as truly through police regulations requiring an expenditure of money for the public welfare as through those requiring a reduction in rates.

Nevertheless a railroad company is not permitted to object to ordinary police regulations on the ground that its "reasonable income" is threatened. A case can be imagined where a railroad could show that its existing income was no more than reasonable, and where the courts would so hold. In such a case to enforce a law requiring the installation of new couplers or other equipment would so increase the expenses of the company that the income would no longer be reasonable. Its existing income being just barely a reasonable one, to require expenditures from it for the public good would be in effect to deprive the company of a part of its reasonable income. But could the company demand compensation for the sum so taken? Of course not. In passing upon police regulations a court does not consider their incidental effect on earnings. It makes no difference whether the road can earn a reasonable income under them or not. A company in the last stages of insolvency is just as subject to them as the most prosperous of roads.<sup>1</sup>

<sup>1</sup> It should be noted that the validity of a police regulation is not a matter which is personal to certain individuals within the class affected, but rather is a quality of the regulation itself. A factory act applying to factories of a certain class is never valid as to some and void as to others. Its validity is determined on its own merits, irrespective of its financial effect on certain factories, and if it is held to be a valid exercise of the police power, it is binding on all the persons coming within its terms. Yet a general schedule of railroad rates may, under the present judicial doctrine, be held void as to one road but binding upon another, perhaps a competing line. This unfortunate consequence is, of course, a result of bringing into rate cases the rules of eminent domain, instead of judging rates on their merits, as a police measure designed to promote the public welfare.

In short the state is permitted through police regulation to appropriate earnings for the public benefit without any obligation, under the Constitution, to provide compensation. But the police power differs from eminent domain in that the appropriation of property is not direct, but is incidental and resultant. The direct and immediate effect of a police regulation is always the establishment of some condition or method or other regulation which the public safety or welfare or comfort demands. And its indirect or consequent effect on income is not regarded as a deprivation of property such as is contemplated in the law of eminent domain. There is no valid reason why an exception to this rule should be made in the case of that form of police regulation called rate control. It is a perfectly legitimate exercise of the police power and should certainly be treated in the same way as other police regulations,—at least it should not be subjected to more stringent restraints.

Two objections to this view of the case might conceivably be raised, neither of which, however, it is believed, is well taken. In the first place it may be said that there is a difference between rate control and other forms of police regulation, in that the latter are of real benefit to the company. The railroad is in possession of equipment which proves of decided advantage to it. For example, its automatic couplers and cattle guards decrease accidents, with their losses of property and subsequent damage suits, while passenger car equipment encourages patronage by the greater security and comfort offered to travelers. But two replies may be made to this objection. One is that public regulation of rates also is of advantage to the company. It does away with lawsuits to recover damages for overcharge, for a company is never guilty of extortion so long as it keeps within the maximum fixed by the state. Moreover, it tends to increase the popular favor in which the roads are held and to encourage traffic. The development of industry resulting from efficient public regulation is in itself of great advantage to the roads. But while this answer to the objection can be made, a better one, and one fully sufficient, is this: that the benefit which a police regulation confers on the road is *not* the reason why the courts do not

subject the regulation to the law of eminent domain. The reason is simply that it is not an exercise of that power. The second possible objection is that a regulation of rates necessarily affects income ; but that in the case of other police laws the company may recoup whatever expense is involved, by raising its rates and so increasing its earnings. The reply to this objection is that a company is not able thus to manipulate its earnings. It is at many points subject to competition, and so is not, commercially speaking, free to raise its rates. And an increase of rates at any point might simply have the effect of decreasing traffic, so that earnings would be but slightly increased, if at all. Moreover, it may be that the state has prescribed rates and they are in force, so that the company is without legal power to raise its rates, and thus without the means wherewith even to try to recoup the expense forced upon it. Even here the attitude of the courts is just the same. A railroad cannot claim exemption from police regulations because it is unable to make up the expense through the manipulation of its rates.

We conclude, therefore, that since rate control is an exercise of the police power and not of the eminent domain, it should not be subjected to the law of eminent domain; that accordingly the test of its validity should not be, as is now held by the courts, its effect on the income of the company.

Does this mean that the legislative power of rate control is absolute and without limit? No. It simply means that the legislature is subject to the same limitations that it is in exercising other forms of the police power. In other words, the validity of rate control is to be determined just as the validity of other police regulations is determined. The same test that is applied to them should be applied to it. The question upon which the validity of a cattle-guard, or automatic-coupler, or drinking-water law hangs — or, for that matter, a factory act, or sanitary legislation, or an inspection law — is whether a sufficient public interest demands the law. Upon that same question should the validity of rate regulation depend. It should be a question of public welfare. And therefore just as a court sometimes sets aside a police law because its enactment is not justified by the

public advantage to be secured through its operation, so rates made by public authority might be set aside on the same grounds. But this is vastly different from saying that their effect on earnings should be the conclusive test in determining their validity.<sup>1</sup>

If the view of the matter here suggested were to command acceptance, judicial review would be transformed. Instead of being what it now is, it would become a judicial investigation designed to apply to rate control the same test which is judicially applied to other police regulations. And beyond a doubt this would result in giving to legislatures and commissions much greater freedom of action in rate matters than they enjoy under the present doctrine. The full measure of their proper authority, of which they have been largely deprived by the courts, would be restored to them. And that it is their proper authority is made more evident by the following consideration. A state may, of course, and frequently does employ the police power to control private persons in matters of private concern. In such cases, as has been said, the regulation stands or falls according to whether the public interest, welfare, safety, health, morals, comfort, or, sometimes, even convenience, demand it. If that is the only limitation placed upon the legislature in its control of private persons in their management of private matters, surely no more stringent limitation should be placed on it in its regulation of the management of public business by quasi-public corporations. Indeed there is evidently much ground on which to contend that legislative authority should be even more extensive over public than over private business. It would certainly seem that the government should have more control over property devoted to public use than over property retained for purely private use. It is not an immoderate suggestion, therefore, that the authority in the first case should be barely equal with that in the second.

<sup>1</sup> Of course it is perfectly conceivable that the effect of rates on earnings might be *one* of the points considered by a court. It might be made a question whether the public interest demanded certain rates, if they reduced income so much that bare operating expenses could not be paid, for in that case the road might have to suspend operation. But even if the effect of rates were so considered, the limitation on legislative action would be decidedly different from what it is at the present time.

That a broader governmental power over rates would render more precarious the earnings from railroad properties is evident, but that, of course, is simply one of the hazards which one must contemplate in going beyond the boundaries of private enterprise, into the uncertain field of public activities. A forcible judicial expression of this idea may be found in the words of Mr. Justice Brewer, uttered *obiter*, in *Cotting v. Kansas City Stock Yards Company*.<sup>1</sup> In entering a public business, said he, a person "expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. . . . Is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public?"

In this connection it is instructive to notice that in other ways persons embarking in a public business must assume the risk of losing much or even all of their investments. Such dangers exist, — have been permitted by the courts to exist even since the adoption of the Fourteenth Amendment. Thus, it has been held that a state may grant a franchise to one railroad to parallel an already existing road. The value of the older property may be impaired by competition with the new road, yet it is held that the owners have no vested rights which can prevent its construction and operation. So also the value of a turnpike may be practically annihilated by the state through a franchise permitting a parallel railroad. Yet it has been held that the Fourteenth Amendment does not command just compensation in any sense which would require the state to compensate the turnpike company for the property so taken.<sup>2</sup> When

<sup>1</sup> 183 U. S. 93.

<sup>2</sup> For further illustrations, see Cooley's Principles of Constitutional Law, 3d ed., p. 370.

the public welfare demands more efficient means of transportation, the owners of existing roads must expect to suffer ; and the courts, aside from declining to relieve them, have not even claimed that any one but the legislature should be the final judge of the public necessity of the new improvement. A power such as this is one which properly belongs to the state to enable it to deal with property devoted to a public use in a manner conducive to the welfare of the community, and one of which the state has been deprived, so far as rate regulation is concerned by the doctrine of judicial review.

We thus conclude the discussion of our first reason why the doctrine of judicial review has seriously impaired the legislative power to reduce rates. It has fixed a limit beyond which reduction cannot be carried, and that limit is an improper one. By basing rate regulation on eminent domain rather than on the police power, it has prevented the legislatures and commissions from exercising the authority that is their right, and has thus subjected them to a serious restraint.

II. But this is not the only reason why the judicial doctrine has impaired the power of the state to reduce rates. The present judicial limit on legislative action is, as we have seen, the point of "reasonable income." But while the Court has repeatedly declared that this is the proper limit, it has, nevertheless, adopted principles and methods in the trial of rate cases which do not permit a state to fix rates so as to reduce income even to the point of reasonableness. In other words, the Court employs principles and methods which unduly favor the railroad and unduly restrict the state ; and thus the legislature cannot exercise even the limited authority which the Court has in general terms allowed it. Rates may be made which will not actually reduce the income below the point of reasonableness, yet the Court may hold that they will — so erroneous is the way in which it determines that point. In the further elucidation of this contention, let us consider the methods by which the Court determines the effect of rates on earnings. We shall see that those methods inevitably make that effect appear more favorable to the railroads than is really the case.

As we have already seen,<sup>1</sup> the Court begins with the rule that the effect of rates upon earnings shall be determined on the basis of *past* business. That is, the judicial estimate of earning capacity of the road under the new rates is arrived at on the assumption that the rates will neither increase nor decrease the traffic, but that the traffic will remain the same that it was for a period of time prior to the establishment of the rates.

Extraordinary as this assumption is, it is one which, as we have seen from our review of the cases, the courts have repeatedly recognized as legitimate. It need hardly be said that in this matter the courts have failed to take into consideration one of the most fundamental characteristics of the railroad business. For it is a matter of general knowledge that, usually, a reduction in rates results in an increase of business. At this stage of the railroad controversy no argument is needed to prove this contention, nothing beyond a mere appeal to those general facts of which all are cognizant. Curiously enough it was even admitted, with innocent frankness, by Mr. Carter, of counsel for the railroads in *Smyth v. Ames*. In arguing that there are sufficient protections against the danger of extortion, he said, "Moderate charges yield more profit by the greatly increased business they draw. A sound policy, perfectly well known to railroad managers, advises them that it is better to tempt and draw out a large traffic by low prices than to try to make a large profit on a small business."<sup>2</sup>

In spite of this universally accepted fact, however, the courts have definitely settled that the effect of lower rates may properly, for judicial purposes, be determined on the assumption that increase of business will not result from the decrease in rates. It must, of course, be admitted that compensating circumstances may occasionally prevent an increase in traffic, but such an occurrence is out of the ordinary. The rule remains that a reduction in rates, other conditions remaining the same, always tends to augment the volume of business. For the courts, then, to proceed upon the assumption which it does, is to unduly favor the railroads. It enables them to make a

<sup>1</sup> P. 58 of original monograph.

<sup>2</sup> 169 U. S. 506.

stronger case than they could were the correct assumption to be made. Upon this principle the judicial view must always be that rates will more seriously affect the earnings of the companies than would be true in nineteen cases out of twenty. As a matter of fact, to put the rates in operation might not reduce either gross or net earnings at all, or might reduce them but slightly. Yet, in contemplation of the courts, earnings would be diminished exactly in proportion to the reduction in the rates.

Of course it may be urged that this is the only definite test which the courts can apply; that to attempt to estimate the probable increase in traffic resulting from a decrease in rates would involve the courts in speculations in which they could never have the guidance of reliable principles.<sup>1</sup> Let this be granted as true; let it be conceded that the courts can find no other test. Nevertheless that fact does not make the test a good one, nor one adequate to the needs of rate cases, nor does it affect the fact that the test gives to the railroads an undue advantage as against the public.

No more favorable is the view which must be taken of the next step in the procedure of the Court. After declaring that the effect of rates upon earnings must be decided on the basis of past business, the Court goes on to hold that that effect must further be determined by applying to past earnings the percentage of reduction in the rates.<sup>2</sup>

If the effect of the new rates upon earnings were to be determined at all on the basis of past business, it would seem that the correct method of arriving at the result would be to apply freight rates to past tonnage, and passenger rates to past passenger traffic. This would give the maximum earnings which could be secured by the railroad under the new rates, on the condition, assumed by the courts, that traffic would continue

<sup>1</sup> It is said that it cannot be determined in advance what the effect of the reduction of rates will be. Oftentimes it increases business, and who can say that it will not in the present cases so increase the volume of business as to make it remunerative, even more than at present? But speculations as to the future are not guides for judicial actions; courts determine rights upon existing facts. — Mr. Justice Brewer in *Chicago, etc., Ry. Co. v. Dey*, 35 Fed. Rep. 881.

<sup>2</sup> P. 58 of original monograph.

unchanged. Instead of this method, however, the courts determine the percentage of reduction made by the new rates in the rates in force, and then assume that future earnings will equal past earnings reduced in the same proportion. For example: Suppose that past earnings were \$1,000,000, and that the new rates are 80 per cent of the old rates. It is assumed by the courts that earning capacity under the new rates will be \$800,000.

Now, here, again, is an assumption which gives the railroads a distinct advantage in suits involving rates. For the basis of the whole process is the reduction made by the new rates in the old schedules. Yet the old schedules, of course, contain only the *nominal* rates established by the railroad. As a matter of fact, in very many cases, the *actual* rates charged are lower than those named in the schedules. Discriminations, rebates, drawbacks, preferential advantages, all awarded, usually, under the veil of secrecy, are not yet, unfortunately, things of the past. The past earnings of the company, therefore, have been derived, not by charging the rates fixed in the schedules, but by charging rates which average considerably less than those scheduled. When the courts, then, compare the new rates with the old *nominal* ones, they discover a percentage of reduction greater than the percentage of reduction made by the new rates in the old *actual* ones. The assumption, therefore, that the earning capacity of the road will be reduced in proportion to the greater percentage, is clearly wrong. It makes the company's criminal practices a source of advantage to it, and of disadvantage to the public, in the trial of rate cases.

For example, let us make the same assumption, made above, that past earnings were \$1,000,000, and that the new rates are 80 per cent of the old nominal rates. In such a case the courts hold that the maximum earning capacity of the road under the new rates will be \$800,000.

Suppose that the nominal rate per mile was \$.01; the new rate is, then, \$.008. Now, it is evident, from the merest knowledge of railroad practices, that the earnings of \$1,000,000 were not secured by charging an average of \$.01 for each of 1,000,000

ton miles. As a matter of fact, the actual average rate charged was less than \$.01. It might have been \$.009, or \$.008, or \$.007, or even less. But in order to deal generously with the railroad, let us assume for the moment that it was as high as \$.009. Then, the earnings of \$1,000,000 were secured by charging \$.009 for each of 111,111,111 ton miles. The actual traffic, therefore, being 111,111,111 ton miles, to put in force a rate of \$.008 would give an earning capacity of \$888,888.88. This, indeed, is less than the former earnings, but, on the other hand, it is over \$88,000 greater than the earning capacity which the Court assumes the railroad would possess under an \$.008 rate.

Now let us alter our last assumption, and suppose that the actual average rate which earned the receipts of \$1,000,000 was low, say \$.007. Then the \$1,000,000 were earned by charging \$.007 for each of 142,857,142 ton miles. But to apply to that tonnage a rate of \$.008 would give an earning capacity of \$1,142,857. This is greater by \$142,857 than the old earnings, and is \$342,857 greater than the earning capacity reached by the processes of the Court.

Thus it appears that the earning capacity determined by the courts is always less than that which the railroad will actually possess under the new rates. Furthermore, it appears that the earning capacity of the road under the new rates, if it will abstain from discrimination, may even exceed the actual amount of earnings received under the old rates.

This practice of the courts, then, is always unfair to the new rates, since it makes out their effect upon earning capacity to be more disastrous than it will be, except in the purely hypothetical case of a road which has not deviated from its nominal rates. As an item in a test of reasonableness, it is, therefore, clearly inadequate, and unduly favorable to the railroads. Under this practice, the more flagrant a company's violations are of the laws against discriminations, the more complete is its immunity from public regulation of its rates. In any event, a railroad is able to make out before the Court a stronger case than it has in fact.

True, in the Reagan cases, it was laid down that a railroad's right to profitable compensation is limited, *inter alia*, when it has

indulged in "unjust discriminations resulting in general loss." <sup>1</sup> Accordingly the way is opened for the state to attempt to prove the unjust discriminations of which the road has been guilty. But satisfactory evidence upon such matters is, of course, almost impossible to get; and even were it secured, it is not certain to what extent and in what way the courts would make use of it. So far as the question of the effect of rates upon earning capacity is concerned, no fair or correct result can be secured by the method now employed by the courts. As said above, if past business is to be the basis of the calculation at all, the correct method would seem to be the application of the new rates to past tonnage, or past passenger traffic. Without discussing this point farther, however, it is sufficient for our present purposes to note that the method now employed by the Court may often result in the suspension of rates which, while looking toward the public welfare, are not really calculated to impair the earning capacity of the railroads, to say nothing of reducing it to the point of "reasonable returns."

III. Beyond this, however, it may be urged that the judicial conception of "reasonable income" is not adequate. At least it may fairly be said that the principles which the Court has laid down as the controlling considerations in determining reasonableness of income have so far proven unduly favorable to the railroads, and have not, as yet, given proper expression to the interests of the public. Let us recall what these principles are. Briefly stated, the Court has held <sup>2</sup> that a railroad's earnings must be sufficient, in general, to pay all expenses including interest on bonds, and yield a reasonable dividend upon stock, but that the reasonableness of the dividend, and, indeed, a railroad's right to any dividend at all, is dependent upon a large number of considerations. These considerations, we have also seen, may be grouped into four classes — one pertaining to the base upon which the rate of profit shall be reckoned, the second to the management of the road, another to the rights of the public, and the fourth to the industrial condition of the community.<sup>3</sup> The enunciation of these limitations upon a railroad's right to

<sup>1</sup> P. 74 of original monograph.

<sup>2</sup> *Ibid.*, p. 70.

<sup>3</sup> *Ibid.*, p. 72.

compensation is a most interesting feature of rate cases. At first blush it might seem that they are admirably calculated to aid in restoring the proper balance between the public and private interests. Yet it cannot escape observation that almost all of them are simply *obiter dicta*, and investigation shows that the Court has often forgotten them, either in determining procedure or in deciding special cases.

A few instances of this kind will serve both to explain and to enforce the point. In the Reagan cases is laid down the doctrine that the failure of rates to yield profitable compensation is not conclusive of reasonableness when, *inter alia*, the railroad has indulged in unjust discriminations resulting in general loss. And yet, as has just been seen, the Court has employed a method of determining the effect of new rates, which enables a railroad to take refuge under the very shelter of its own discriminations, and from that safe retreat, protected by the strong bulwark of the law, to defy legislatures and commissions. Again, the Reagan cases also recognized a limitation when a road was unwisely built, in districts where there is not sufficient business to sustain a road. Yet such was the case with almost all, if not all, of the roads involved *in those very cases*. The International & Great Northern had never been able to pay the interest on its bonds, and had been in a receiver's hands for three years. Of two other roads the Court speaks as follows :

The St. Louis Southwestern Railway Company is called by counsel for defendants, in their brief, "a reorganized bankrupt concern." It would seem to be a railroad *which was unwisely built, and one whose operating expenses have always exceeded its earnings*. Counsel says that "it is familiarly known as a 'teazer,' and, if it ever passes beyond this interesting but unprofitable stage, even its friends will be surprised." We are not advised and we can hardly be expected to take judicial notice of what is meant by the term "teazer," but *it is clearly disclosed by the record* that this was an unprofitable road. . . . The Tyler Southwestern Railway Company has a short road of ninety miles, and also appears to be a "reorganized bankrupt concern," and one whose road has been operated with constant loss.<sup>1</sup>

Here are cases which clearly, by the admission of the Court, come under the general limitation expressed in the body of the

<sup>1</sup> 154 U. S. 403.

opinion. Yet the limitation was entirely ignored. After making the statement quoted above, the Court continued, "it will not do to hold that, because the roads have been operating in the past at a loss to the owners, it is just and reasonable to so reduce the rates as to increase the amount of that loss." Here, then, one who has read, a few pages back in the opinion, the general rule laid down by the Court, finds the hopes aroused by it most rudely dashed.

Further evidence may be found of the Court's tendency to ignore the limitations upon a railroad's right to profitable rates. It is worth while mentioning that the Court in the Reagan cases specifically denied two claims which were allowed in general terms in later cases. The Covington case limits the railroad's right when competition of parallel lines so diminishes business as to make profitable rates exorbitant, and the last Minnesota case further limits that right when the industrial condition of the country is such that profitable rates would be exorbitant. Yet in the Reagan cases the Attorney-General showed that there were four lines in competition with the International & Great Northern, reducing its share of the traffic; alleged that there had recently been a commercial depression; and offered evidence to show that the price of products was so low that rates would have to be lower than those charged by the railroads in order to permit the farmers to market their produce with any profit. All this was not gladly received by the Court, as tending to support the rates which are "presumed to be reasonable." On the other hand it was summarily dismissed, and given no weight whatever in the case. We are accordingly left in grave doubt as to whether the Court meant much if anything by its later dicta in the Covington and the last Minnesota cases. At any rate, it is evident that the play of the Court's sympathy for individual as opposed to public rights, operates to seriously limit the limitations, as it were, which it has recognized upon the rights of the railroads. The view of the railroad industry which has been taken by the Court since the Granger cases requires the limitations to be stated; but the predilections of the judges create a tendency to disregard them. As statesmen, or publicists,

the judges might recognize the full force and importance of those limitations; but as *lawyers or judges*, they almost inevitably forget them.

It is true that as yet the Court has not been put to a severe test, and consequently it is not clear to just what extent it will go. For, up to the present time, counsel for the states have shown comparatively slight disposition to urge upon the Court the limitations it has recognized, or to introduce evidence in such matters. The Court by its repeated declaration and affirmation of its dicta, has offered an opportunity the significance of which has apparently not been fully appreciated by the representatives of the public. But the treatment which those dicta have received in the cases where they have been urged, as we have just seen, forbids any very sanguine hope that they hold much promise of better things for public control.

But it is not only because the Court tends to ignore in special cases the rules it has laid down in general terms, that they are not available for the cause of the public welfare. A further reason is that many of the limitations upon the rights of the railroads are so vague in character, and involve considerations so difficult to establish, that the public can derive little advantage from them. One illustration of this fact is to be found in the limitation which is recognized to exist when the management of the road has not been prudent and honest. But how difficult must it always be for state officers to secure satisfactory evidence upon such a point! The secrecy which enshrouds many railroad operations and the possibility of manipulating accounts make difficult even the discovery of imprudence and dishonesty, to say nothing of securing evidence which will be satisfactory at law.

Again, the courts have, in general terms, given recognition to the rights of the public. In the Gill case the Court was hesitant to declare rates unreasonable when, among other things, the claims of the railroad were admitted in the demurrer of a party who in no adequate sense represented the public. In the Reagan cases it was said that the right of the road to compensation is limited, among other things, by "matters affecting the

rights of the community in which the road is built.”<sup>1</sup> And in the Covington and Smyth cases, it was stated that the rights of the public are not to be ignored, that rates must not be more than the services are worth to the public, that, in short, rates must be just to the public as well as to the railroad.<sup>2</sup> But what are the “rights of the community,” or the “rights of the public,” and how are they to be established? How is it to be determined what a railroad’s services are worth to the public? How, indeed, is it to be discovered what rate is just to the public as well as to the railroad? And, when the interests of the public and of the railroad clash, which is to prevail? It need hardly be stated, in view of the preceding discussion, what the coloring is which must necessarily prevail in the Court’s answers to these questions. The rights of the public are indeed difficult to establish. Generally speaking, the public has rights, which must not be invaded by the railroads. But specifically, what rights? To be exempt from the high rates necessary to compensate a railroad for losses due to its discriminations, or necessary to make profitable a road unwisely built, or necessary to sustain as many competing roads as may chance to divide the traffic? We have seen what answers the Court has given to these questions. The vague “rights” of the public have vanished with the appearance of a practical test.

But there is still another “limitation” upon the right of the railroad to compensation, namely, the industrial condition of the community, which is too vague and general to mean much in practice. Here again, it may be asked, how is the industrial condition of the community to be established at law, and just what “industrial condition” will justify a reduction of a road’s earning capacity? Is it not inevitable that counsel for the state should find it difficult to secure satisfactory evidence in such a matter? The limitation is in general terms. In specific cases how much would it amount to? Probably not much. The only points ever argued by the states have, as we have already seen,<sup>3</sup> been summarily rejected by the Court.

<sup>1</sup> 154 U. S. 402.

<sup>2</sup> 164 U. S. 596-598; 169 U. S. 544-547. And see also 173 U. S. 754-756.

<sup>3</sup> P. 106 of original monograph.

The fact unfortunately seems to be that the euphonious generalities in which the Court has bound up the industrial welfare of the American commonwealths are more beautiful for contemplation than they are efficacious in use. To discover the practical meaning which is embodied in them, and to obtain recognition of it by the courts, is one of the difficult problems which now confronts the commissions, and one in the performance of which the attitude of the judiciary up to the present time gives little encouragement.

In these three ways, then — by placing an improper limitation on the legislative power to reduce earnings through regulation of rates, by employing erroneous methods in determining the effect of rates on earnings, and by setting up inadequate standards of reasonableness in earnings — has the Court practically destroyed the state's power of rate reduction. The doctrine of judicial review is therefore of great importance in the development of the railroad problem. But, more than that, it is of significance as a notable triumph achieved by the principle of individual interest over that of the public welfare. Under whatever constitutional pressure the courts may have been in announcing the doctrine, it is felt that it is a movement against the current of the times, and that it must result, in part, in deepening the conviction already growing in the minds of men, that the proper balance between the public and the private interests in industrial action has been much disturbed, and should be speedily restored.

HARRISON STANDISH SMALLEY

## XXV

### THE ENGLISH RAILWAY AND CANAL COMMISSION OF 1888<sup>1</sup>

WHILE the law providing for the Commission of 1873 passed both Houses of Parliament with comparative ease and received but little opposition from the railway interest, the law of 1888 developed by small degrees, and met much opposition. The report of the Committee of 1881 had stated that a permanent railway tribunal was necessary.<sup>2</sup> Railway Commission legislation was introduced regularly between 1882 and 1886. In 1885 the nine principal railways submitted bills to Parliament embodying a general classification and a rearrangement of their maximum rates. But the protests of the traders led to the withdrawal of these measures. The defeat of the government in 1886 on the Irish Question prevented any further action at that time. In 1887 a regulative measure, which in some respects resembled the legislation of the following year, passed the House of Lords.

So far as the form of the Commission is concerned, the most important changes introduced by the legislation of 1888 were the court organization of the Commission and the limitation of the right of appeal. Under the old organization the Commission was considered to be in the same position as any inferior court, and might be prohibited from proceeding in matters over which it had no jurisdiction.<sup>3</sup> Now, by giving the Commission a definite

<sup>1</sup> From the *Quarterly Journal of Economics*, Vol. XX, 1905, pp. 1-55. The author was the expert employed by the Canadian Government in 1902 to draw up its Report upon Railway Rate Grievances and Regulative Legislation. British Railway Statutes and Regulations are reprinted in full in Hearings before the Senate (Elkins) Committee on Interstate Commerce, 1905, Vol. V, Appendix, pp. 133-264. <sup>2</sup> Report of Select Committee on Railways, 1881, Part I, p. iii.

<sup>3</sup> *Toomer v. L. C. D. Ry. Co. and S. E. Ry. Co.*, 3 Ry. and Canal Traffic Cases, 98.

court organization and by making its decisions final on questions of fact, much strength was added.

The new legislation provided for a Commission of five members, composed of two lay and three *ex-officio* members. The *ex-officio* members are superior court judges, one for England, one for Scotland, one for Ireland. The active Commission at any one time has a membership of three, the two lay commissioners presided over by the designated superior court judge of the country in which the Commission is sitting.<sup>1</sup> While the judges who serve on the Commission are appointed for terms of five years, the lay commissioners hold office on a good-conduct tenure. The old provision whereby one of the lay commissioners was to be "of experience in railway business" was continued; and Mr. Price, the railway member of the former Commission, was reappointed. The qualification of the other lay commissioner was not specified. To this position Sir Frederick Peel, whose training was legal and who had been a member of the Railway Commission in 1873, was appointed. The lay commissioners were admonished of their judicial functions, for in their letters of appointment they were informed, "Doubtless you will feel that the judicial nature of your office is also incompatible with any active engagement in political controversies."

In every possible way the fact was emphasized that the Commission was a court, and therefore not concerned with rate making. The control of matters pertaining to rates was divided. Powers in regard to conciliation of rate difficulties were given to the Board of Trade. When the provision placing the revision of maxima and of classification in the hands of the Board of Trade was under consideration, an amendment to place such revision in the hands of the Commission was negatived.

The Act of 1888, while it repealed portions of the railway regulative acts already in existence, did not codify the portions remaining. Consequently there are still in effect sections of the

<sup>1</sup> The draft legislation of 1887 had provided a cumbrous arrangement whereby the judicial commissioner was to preside when a question of law was involved, while in other matters his attendance was to be invited by the lay commissioners, "if it was expedient for the better performance of the Commission's duties."

Railway Clauses Consolidation Act, 1845, the Railway and Canal Traffic Act, 1854, the Regulation of Railways Act, 1868, and the Regulation of Railways Act, 1873. Since 1888 jurisdiction in regard to actual rates has been given by an Act of 1894 ; while, under a law of 1904, the powers of the Commission in regard to private sidings have been made more definite by an interpretation of the "reasonable facilities" clause of the Act of 1854.<sup>1</sup>

While the jurisdiction given by the Act of 1888 embraces a variety of functions, the most important of which are undue preference, facilities for traffic, traffic on steamboats, through rates, rate books, terminals, legality of rates, provisions relating to private branch sidings, and references under the Board of Trade Arbitrations Act, 1874, the most important matters from the standpoint of the traders are (a) terminals, (b) reasonable facilities, (c) through rates, (d) undue preference, (e) control over actual rates.

#### TERMINALS, REASONABLE FACILITIES AND THROUGH RATES

The history of the terminal question is a long and involved one. When the earlier railways were chartered, the "canal toll" idea prevailed. For a time carriers, already in existence, quoted through rates over the railway lines, making such arrangements as they deemed proper in regard to payments for special services and for station terminals. It was not long, however, before the railways controlled the forwarding business, and complaint soon arose. The railways claimed the right, in addition to the powers given them under their maximum rates, to make charges for additional services and for terminals.<sup>2</sup> The traders contended that the maximum rates covered all that the railways were

<sup>1</sup> For detail concerning the unrepealed sections, see Woodfall, *The New Law and Practice of Railway and Canal Traffic, etc.*, Appendix A.

<sup>2</sup> The question of terminals has come up in the United States. The charter of the Pittsburg & Connellsville Railway gave it the right to charge tolls. It was decided it had the right to charge terminals as well. *National Tube Works v. Baltimore & Ohio R.R.* (Penn.), 28 Am. and Eng. R'd Cases, 13.

legally empowered to collect. It was concerning the station terminals, however, that the keenest contention existed. The Select Committee of 1882 had recommended that terminal charges should be recognized, but that they should be subject to publication by the companies, and that in case of challenge they should be sanctioned by the Railway Commission.<sup>1</sup> A clause to this effect was contained in the regulative measure introduced by Mr. Chamberlain in 1884. In a decision of the Court of Queen's Bench in 1885 the right of the railways to collect terminals was definitely recognized.<sup>2</sup> But the traders did not recognize this decision as final; for, because of a technical condition, it was impossible to carry the case before the higher courts. While the legislation of 1888 was in committee, various attempts were made to place the control of terminals under the Railway Commission, as well as to provide that in every case the maximum rates should include terminals. But the government took the position that terminals were legally established, and so they were given explicit recognition. \*

The Act of 1888 had recognized terminals. The Provisional Orders Acts gave them definite form. The matter was finally passed on by the Commission in 1891 in a decision which upheld that of 1885.<sup>3</sup> Justice Wills, who gave the decision in the former terminal case, was at this time the judicial member of the Commission. On appeal the decision of the Commission was upheld. While the question of the legality of terminals has thus been settled, there still remains the question of the right of the trader to be exempt from the payment of terminals under special conditions. This question is of especial interest

<sup>1</sup> Select Committee on Railways, 1882, pp. v and xvii.

<sup>2</sup> *Hall v. London, Brighton, & South Coast Railway*, 15 Q. B. D. 505. This overruled a decision of the Railway Commission. A discussion of the question from the traders' standpoint will be found in Hunter, *The Railway and Canal Traffic Act, 1888*, pp. 38-50. See also *British Railways and Canals*, by "Hercules," chap. ii (a pro-trader brochure, published in London in 1885). A summary of the railway point of view will be found in the address of Mr. Pope, Q.C., representing the London & Northwestern Railway before the Board of Trade, October 29, 1889, reported in *Railway News*, November 2, 1889, pp. 778-780. See also Grierson, *Railway Rates, English and Foreign*, pp. 93-106.

<sup>3</sup> *Sowerby & Co. v. Great Northern Ry. Co.*, 7 Ry. and Canal Traffic Cases, 156.

in connection with the mining and manufacturing districts, where the establishments furnishing and receiving freight are usually situated on private sidings or on private railways. The importance of these sidings is shown in the fact that, while at the Sheffield freight station the tonnage in 1900 was 580,000, at a near-by siding it was 1,100,000. In 1894 the Commission was given jurisdiction in claims for exemption from payment of terminal charges at sidings when it was alleged that the services had not been performed. Under the provision of the Act of 1888, requiring the railway to distinguish conveyance from terminal charges, it had been held that the responsibility of the railway might be discharged by stating that the whole payment was for a conveyance rate.<sup>1</sup> But the Court of Appeal decided in 1897 that it was incumbent on the railway, in such a case to prove that it did not charge for terminals.<sup>2</sup> The Commission has power to allow a rebate from sidings charges without proof that any definite amount of terminal is included in the rate. A *prima facie* case for such a rebate is made out, if it is shown that, in respect of similar traffic between substantially the same termini, and passing over substantially the same routes, a sidings trader who does not require or use any terminal accommodation or services is charged the same amount as a trader who uses the station.<sup>3</sup> But the latter rate must not be simply a paper rate.<sup>4</sup> In calculating the amount of the rebate, it has, in general, been the practice of the Commission to follow the rule in *Pidcock's case*; i.e., to assume that the service charges are in the same proportion to the rates actually charged as the maximum service charge would be to the sum of the maximum rates, — i.e., the maximum rate and the maximum terminals.<sup>5</sup>

<sup>1</sup> *New Union Mill Co. v. Great Western Ry. Co.*, 9 Ry. and Canal Traffic Cases, 160.

<sup>2</sup> *Salt Union, Ltd. v. North, Staffordshire Ry. and Others*, 10 Ry. and Canal Traffic Cases, 179.

<sup>3</sup> *Vickers, Sons & Maxim, Ltd. v. Midland Ry. and Others*, 11 Ry. and Canal Traffic Cases, 259.

<sup>4</sup> *Cowan & Sons v. North British Ry.*, 11 Ry. and Canal Traffic Cases, 271.

<sup>5</sup> *Pidcock v. Manchester, Sheffield & Lincolnshire Ry.*, 9 Ry. and Canal Traffic Cases, 45.

The through-rate clause of the Act of 1888 provides that through rates, stating the amount, route, and apportionment of the rate, may be proposed by a railway, a canal company, or a trader. In case of dispute regarding the rate or its apportionment the matter is brought before the Commission. In apportioning the through rate, the commissioners are to consider the special circumstances of the cases, and are not to compel any company to accept lower mileage rates than it may for the time legally be charging for like traffic, carried by a like mode of transit on any other line of communication, between the same points, being the points of departure and arrival of the through route.

Reasonable facilities in general must be such as can reasonably be required of the railway company, due allowance having been made for the way in which the service is already performed.<sup>1</sup> Similarly, in a reduced through rate there must always be considered whether there is a commensurate advantage to the railway company.<sup>2</sup> *Prima facie*, it is against public interest to interfere with vested legal rights, unless some compensation or equivalent is given. There must, therefore, be evidence both of public interest and reasonableness in favor of the rate and route sufficient to outweigh the former considerations.<sup>3</sup> The fact that two competing routes will tend to make either company treat the traders more reasonably is a consideration bearing on the question of public interest.<sup>4</sup> At the same time the Commission will not grant a through rate which creates unhealthy competition.<sup>5</sup> If there are grounds for the Commission granting something claimed as a proper facility for using railways, an objection grounded on its inconvenient consequences to railway companies

<sup>1</sup> *Newry Navigation Co. v. Great Northern Ry.* (Ireland), 7 Ry. and Canal Traffic Cases, 176.

<sup>2</sup> *Plymouth Incorporated Chamber of Commerce v. Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 72; 10 *Ibid.* 17.

<sup>3</sup> *Didcot, Newbury & Southampton Ry. v. Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 210.

<sup>4</sup> *Plymouth, Devonport & S. W. Ry. v. Great Western Ry. & L. & S. W. Ry.*, 10 Ry. and Canal Traffic Cases, 68.

<sup>5</sup> *Didcot, Newbury & Southampton Ry. v. L. & S. W. Ry. and Others*, 10 Ry. and Canal Traffic Cases, 17.

by reason of arrangements made by themselves will not be sufficient reason for not granting it.<sup>1</sup> The particular circumstances of the proposed route and rate must be considered. The reasonableness of a rate over a proposed route is not to be measured by an existing rate over an alternative route, even if the rate over the latter route may be reasonable.<sup>2</sup>

Incident to granting a through rate, a through booking (ticketing) arrangement may also be made.<sup>3</sup> While the Commission has not attempted to lay down any general principle on which through rates are to be apportioned, it will consider any special expenses in construction or special charges a company may have been empowered to make.<sup>4</sup> It is not clear that the Commission has power to rescind a through rate once established under the Act of 1888.<sup>5</sup> So far no such action has been taken.

In the claims made by canal and by dock companies to obtain through rates, considerable emphasis has been laid upon the technical interpretation of the word "railway." Thus it was decided in 1897 that the powers the Manchester Ship Canal possessed to construct railways on its quays, although these railways were simply for its own service, constituted it a railway company. In 1901 the action of the Commission in approving a through-rate arrangement for a dock company was overruled on the ground that the railways possessed by the dock company did not constitute a railway within the meaning of the act.<sup>6</sup> In

<sup>1</sup> *Corporation of Birmingham & Sheffield Coal Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry., Midland Ry., & L. & N. W. Ry.*, 10 Ry. and Canal Traffic Cases, 62.

<sup>2</sup> *Didcot, Newbury & Southampton Ry., etc. v. Great Western Ry., etc.*, *ut supra*.

<sup>3</sup> *Didcot, Newbury & Southampton Ry. v. Great Western Ry. & L. & S. W. Ry.*, 10 Ry. and Canal Traffic Cases, 1.

<sup>4</sup> *Forth Bridge & North British Ry. Co. v. Great North of Scotland Ry. & Caledonian Ry.*, 11 Ry. and Canal Traffic Cases, 1. This would cover, for example, "bonus mileage," or an arbitrary, in the case of an expensive bridge.

<sup>5</sup> *Great Northern Central Ry. (Ireland) v. Donegal Ry.*, 11 Ry. and Canal Traffic Cases, 47.

<sup>6</sup> *London and East India Docks Co. v. Great Eastern Ry. & Midland Ry.*, 11 Ry. and Canal Traffic Cases, 57. This was a majority decision, Peel dissenting. The decision of the Court of Appeal was given by Mr. Justice Wright, who was a member of the Commission when the Manchester Canal case was decided. He distinguished the cases.

1903 a further application of the same company, subsequent to its acquisition of a short railway with which it had made connections, was refused on the ground that the difficulties of exchange of traffic did not justify the granting of such an application.

The Commission has looked at each through-rate case by itself. It has refrained from proposing a through rate. It has limited its action to the acceptance or rejection of the proposed through rate as brought before it. The power to propose through rates has been of little value to the traders. Normally, they have not been possessed of the exact knowledge necessary to the making of a through rate, with the result that they have been successful only in one out of five applications. The following summary gives details with reference to the through-rate applications formerly acted upon by the Commission :

YEAR	BY CANAL COMPANY		BY DOCK COMPANY*		BY RAILWAY COMPANY*		BY TRADERS		BY MUNICIPAL CORPORATION AND TRADERS	
	Granted	Refused	Granted	Refused	Granted	Refused	Granted	Refused	Granted	Refused
1895 . .	2	-	-	-	-	-	1	1	-	-
1896 . .	1	-	-	-	1	-	-	-	-	-
1897 . .	1	-	-	-	3	-	-	-	-	1
1898 . .	-	-	-	-	-	-	-	-	-	-
1899 . .	-	-	-	-	2	1	-	-	-	-
1900 . .	-	-	-	-	-	-	-	-	-	-
1901 . .	-	-	-	-	-	-	-	-	-	-
1902 . .	-	-	1	-	-	-	-	-	-	-
1903 . .	-	-	-	2	-	-	-	2	-	-

\* No action prior to 1895.

### UNDUE PREFERENCE

The question of "undue preference" has long engaged attention in England. Complaints were made during the investigations of 1882 that many anomalies existed in domestic rates. Thus London sugar refiners complained that, while Greenock was double the distance from given points, sugar was being carried to

these points at the same rates as were given to London.<sup>1</sup> But it was against low import or *preferential* rates, which intensified the competition to which different industries were subjected, that special attention was directed.<sup>2</sup> The Act of 1873 had left much to the discretion of the Railway Commission in dealing with the question of undue preference. In the parliamentary discussions of 1887 and 1888 there were constant complaints of preferential rates. It was stated that no general measure dealing with railway traffic could be considered satisfactory which did not prevent preferential rates in favor of foreign products.<sup>3</sup> The government held, however, that no difference should be made between English merchandise and foreign merchandise because of origin.<sup>4</sup>

The undue preference section of the Act of 1888 provides that where, for the same or similar services, lower rates are charged to one shipper than are charged to another, or any difference in treatment is made, the burden of proof that such actions do not constitute an undue preference shall be on the railway. In considering whether the action complained of constitutes an undue preference, the commissioners are to consider "whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made. *Provided that no railway company shall make, nor shall the commissioners sanction, any difference in the tolls, rates, or charges made for or any difference in the treatment of home and foreign merchandise in respect of the same or similar services.*"<sup>5</sup> The final clause of the

<sup>1</sup> See evidence of J. H. Balfour Browne before the Select Committee of 1882, explanatory of the factors involved, answers to questions 1297 and 1298.

<sup>2</sup> In addition to the evidence bearing on this point contained in the Select Committee Report of 1882, see also detail in the Report of the Royal Commission on Depression of Trade and Industry, 1886.

<sup>3</sup> Motion of Earl of Jersey, Hansard, 1888, third series, Vol. 322, p. 1796. This was defeated by a vote of 72 to 45.

<sup>4</sup> Lord Salisbury, Hansard, 1888, third series, Vol. 323, p. 1052.

<sup>5</sup> I have italicized this so as to bring out the distinction of treatment between home and foreign traffic. In the bill, introduced in 1887, clause 25 provided that the commissioners were to consider whether the difference in charges or treatment was necessary "for the purpose of securing the traffic in respect of which it was made." The vague phrase, "in the interests of the public," contained in the legislation of 1888, was placed in the Bill of 1887 by amendment.

section prohibits a higher charge for similar services, for the carriage of a like description and quantity of merchandise, for a less than is charged for a greater distance on the same line of railway. The concluding clause of the section is not only wider than the "long and short haul" clauses of the American statute, it is also much wider than the prohibition hitherto existing in English legislation. An attempt was made by the railway interest to have a "long and short haul" clause placed in the legislation. It was argued that where a question of preferential rates came up, the comparison should in fairness to the railway be made with traffic carried over the same portion of the line.<sup>1</sup> It was held, however, that the consideration of this matter could safely be left to the discretion of the Commission.

Complaints concerning undue preferences have occupied a prominent place before the Commission. Broadly speaking, the subject-matter of these falls under the headings of: (a) *differential rates*, concerned with disparities in domestic rates and including as subheads export rates, group rates, and rebates in respect of quantity; (b) *preferential rates*, concerned with disparities between home and import traffic. Before 1888 inequalities of charges for like services were only *prima facie* evidence, and the burden of proof was on the complainant: now it is on the railway. In the earlier decisions no rule is apparent. Each case was considered by itself. A decreased rate to develop a particular traffic in a particular district was an undue preference. The mere fact preference existed was not sufficient: it must be shown to be "undue" and "unreasonable." Differences in rate might be allowed where there were differences in the cost of conveyance.<sup>2</sup>

<sup>1</sup> The proposal was voted down, both in Grand Committee of the House of Commons and in the House itself. The motion will be found in Hansard, 1888, third series, Vol. 329, p. 452. The statement of Mr. Acworth, Hearings before the Committee on Interstate Commerce of the United States Senate, etc., 1905, Vol. III, p. 1851, that there is in the Act of 1888, a "long and short haul" clause—"the short distance included in the long distance"—is evidently attributable to the fact that he had not a copy of the act before him.

<sup>2</sup> For a summary of the law on this point, prior to 1888, see Woodfall, *op. cit.*, pp. 77-82. See also Darlington, *Railway Rates*, chap. iv.

Additional points have been made under the present Commission. A contract to give exclusive use of a given station to a particular colliery is an undue preference, as are also lower tolls given by a navigation company to prevent a large dealer moving his business.<sup>1</sup> Normally, similar charges should be made for similar services.<sup>2</sup> An unreasonable preference is a question of fact, and no general principle will be laid down.<sup>3</sup> Competition is a circumstance to be taken into consideration, and the extent to which it is to be considered is a question of fact, not law.<sup>4</sup> There can be no mathematical equality in regard to the charges or advantages between places which are outside of a group and the different members of a group. Competition and convenience to the neighborhood are to be considered as affecting the justifiability of a group rate.<sup>5</sup>

On the question of differential rates the Commission has reversed itself. As has been indicated, the Commission is empowered to consider whether the rate complained of "is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made." In 1890<sup>6</sup> complaint was made that lower rates on grain and on flour were given from Cardiff to Birmingham than from Liverpool to Birmingham. The distances were respectively 173 and 98½ miles. The railway company contended that this was on account of competition and that the lower rate was necessary (1) in its own interest, (2) in the interests of the public. Direct inland communication

<sup>1</sup> *Rishton Local Board v. Lancashire & Yorkshire Ry.*, 8 Ry. and Canal Traffic Cases, 74; *Fairweather and Others v. Corporation of York*, 11 Ry. and Canal Traffic Cases, 201.

<sup>2</sup> *Timm & Son v. Great Eastern Ry., Lancashire & Yorkshire Ry., and Others*, 11 Ry. and Canal Traffic Cases, 214.

<sup>3</sup> *Per Lord Herschell in Pickering Phipps and Others v. London & N. W. Ry. and Others*, on appeal, 8 Ry. and Canal Traffic Cases, 100, 101; *Inverness Chamber of Commerce v. Highland Railway Co.*, 11 Ry. and Canal Traffic Cases, 218.

<sup>4</sup> *Pickering Phipps*, case cited, p. 87. Group rates are authorized by Section 29 of the Act of 1888. See in this connection the important decision given in *Denaby Main Colliery Co., Ltd. v. M. S. & L. S. Ry.*, 11 App. Cas. 97.

<sup>5</sup> *Pickering Phipps, etc.*, 87-88.

<sup>6</sup> *Liverpool Corn Traders' Association v. London & N. W. Ry.*, 7 Ry. and Canal Traffic Cases, 125.

exists between Bristol and Birmingham by way of the Severn river and canal navigation. There is also a combined sea and rail route.

Justice Wills pertinently said Parliament had dealt with the matter of undue preferences with a "faltering hand." It had left to the Commission the responsibility of deciding many things which would more naturally have been laid down in legislation.<sup>1</sup> The somewhat inchoate nature of the undue-preference clause is, however, more correctly attributed to its compromise origin. While it was intended, in a general way, that the phrase "in the interests of the public" should protect the interests of the consumers, Justice Wills was undoubtedly correct in saying that Parliament had no clear idea of what it meant. He considered that the "public interest" must be something wider than that of one of the two localities concerned, and stated that he could not see that any important "public interest" would be affected if the traffic in grain and flour should have to seek some other route from Cardiff to Birmingham.<sup>2</sup> The action of the railway in engaging in such competition created artificial conditions which interfered with the natural course of trade. Sir Frederick Peel put this point still more strongly: "A traffic which differs only from other traffic in being competitive can have no such a distinction made in its favor, however necessary a lower charge may be to meet the competition, or however much it may be to the benefit of the company to secure the traffic." The attempt of the railway to compete with the "natural advantages" of the traffic which went from the Severn ports<sup>3</sup> by sea and rail, or by inland water navigation, to Birmingham was unjustifiable. His general reasoning rested on the assumption that the low rail rate from Cardiff gave "little or no profit," and that therefore a penalty was being placed on Liverpool in the "highly remunerative rate" it paid.<sup>4</sup>

The unsatisfactory position taken by this decision in regard to the effect of competition, and the extent to which this was

<sup>1</sup> P. 137.

<sup>2</sup> Pp. 136-138.

<sup>3</sup> These are Cardiff, Portishead, Avonmouth, Bristol, and Sharpness.

<sup>4</sup> Pp. 140, 141.

to be taken into consideration, was, however, apparently justified by the decisions on the matter. While the law was confused and contradictory, the leading decision — Budd's case — ruled water competition out of consideration.<sup>1</sup> The effect of water competition on the undue-preference clause was brought up again in 1892.<sup>2</sup> Complaint was made of an undue preference in flour and grain between the Severn ports and Birmingham, on the one hand, and Birkenhead and Birmingham, on the other. While the rate from Birkenhead to Birmingham, a distance of 98 miles, was 11s. 6d., the rate from Bristol to Birmingham, a distance of 141 miles, was 8s. 6d. The railway contended that the apparent anomaly was attributable to water competition. Both a majority and a minority decision were given. In the dissenting opinion, delivered by Sir Frederick Peel, it was held that, while the evidence justified low rates from the Severn ports, at the same time the Birkenhead rate should be reduced so as to give a lower mileage rate. The majority opinion upheld the railway position. The rates complained of were attributable to effective competition, maintained by a competing railway and by water competition. The existing inequality in rates was necessary to give the section of country around Birmingham the advantage of the supplies both from the Severn ports and from Birkenhead. Justice Wills stated that in the former decision he had construed "public interest" too narrowly. The public intended was the public of the locality or district. Any considerable portion of the population in general as opposed to an individual or an association was sufficient.<sup>3</sup>

While it is contended that one principle was applied in the first Corn Traders' case, because the amount of traffic affected

<sup>1</sup> *Budd (P. O.) v. L. & N. W. Ry.*, 4 Ry. and Canal Traffic Cases, 394. The cases bearing on this subject are dealt with by Justice Wills in his decision. See also Lord Herschell in *Pickering Phipps, infra*, 104, 105. See also Butterworth and Ellis, *A Treatise on the Law relating to Rates and Traffic on Railways and Canals, etc.*, pp. 168-170.

<sup>2</sup> *Liverpool Corn Traders' Association v. Great Western Ry.*, 7 Ry. and Canal Traffic Cases, 114.

<sup>3</sup> *Liverpool Corn Traders' Association v. Great Western Ry.*, 7 Ry. and Canal Traffic Cases, 127.

was small, and that a different principle was applied in the second case because the amount of traffic affected was large,<sup>1</sup> it would appear that the change of position was, in reality, attributable to a decision in a case appealed from the Commission in 1891.<sup>2</sup> In this the construction of "public interest" had been involved. It was contended that a difference in rate complained of was not necessary for the purpose of securing the traffic in the public interest, and that the railway in making such a rate was seeking its own interest, not that of the public. This attempt to exclude the railway interest from "public interest" was denied by Lord Herschell. The point which should be considered, he stated, was not only the legitimate desire of the railway to obtain traffic, but also whether it was in the interest of the railway to secure this traffic rather than abandon it. The legislature, he continued, had recognized that there were cases where the traffic could not be obtained if the lower rate was raised, and where at the same time it would be unfair to demand as a condition of obtaining the traffic a reduction of the higher rate.<sup>3</sup> By judicial construction "public interest" has thus come to mean the controlling power of effective competition on particular rates. Undoubtedly there was a desire, when the legislation was under consideration in Parliament, to give the phrase a narrower construction. In 1887 it was stated that the railway, in carrying traffic on a rate competitive with sea-borne traffic, must show that there was a distinct public interest involved. The fact that some additional profit was obtained by engaging in such traffic was not sufficient.<sup>4</sup>

The "long and short haul" question comes before the Commission but seldom. When it does, it is not treated, as in the United States, as a form of preference demanding exceptional

<sup>1</sup> See Boyle and Waghorn, *The Law relating to Railway and Canal Traffic*, Vol. I, p. 4; also evidence of Mr. W. M. Acworth, Committee on Interstate Commerce, etc., 1905, Vol. III, p. 1849.

<sup>2</sup> *Pickering Phipps and Others v. L. & N. W. Ry. and Others*, 8 Ry. and Canal Traffic Cases, 83.

<sup>3</sup> *Pickering Phipps, etc.*, 102 and 103.

<sup>4</sup> See statement of Lord Salisbury, Hansard, 1887, third series, Vol. 314, p. 332.

treatment. The Commission has recognized effective competition as a justification of a lower rate for the longer distance. Where a higher rate is charged for the shorter than for the greater distance, the less being included in the greater, the Commission has held that, in the absence of effective competition at the longer distance point, such an arrangement is not justifiable, and that the shorter distance point should share on a mileage basis in the low rate given to the longer distance point.<sup>1</sup> The effect of competition has also been recognized in the case of export traffic. In 1903, in the *Spillers & Bakers* case, a low "shipment" rate was held necessary to obtain traffic. It was considered impossible to raise this rate, and the dissimilarity of circumstances did not warrant a comparison of the higher domestic rate with the lower export rate.<sup>2</sup> In 1904 a briquette manufacturing firm claimed that it was unduly prejudiced, since it paid the domestic rate on its raw material, while the manufactured product came into competition abroad with coal carried on a low export rate. The Commission upheld the principle of export rates, and further found that the railway was under no obligation to regulate its charges with reference to the ultimate competition complained of.<sup>3</sup>

From an early date English railway law has held that wholesale rates for large shipments do not constitute an undue preference. So early as 1858 in *Nicholson's* case, a leading case, it was decided that carrying at a lower rate in consideration of large quantities and full train loads at regular periods was justifiable, provided the real object was to obtain a greater profit by reduced cost of carriage. In taking this point of view, it was recognized that various shippers would necessarily be excluded from the advantage of the low rate granted on such conditions.<sup>4</sup> In the decisions of the Commission of 1873 it was recognized

<sup>1</sup> *Timm & Sons v. N. E. Ry., Lanc. & York Ry., and Others*, 11 Ry. and Canal Traffic Cases, 214.

<sup>2</sup> *Spillers & Bakers, Ltd. v. Taff Vale Ry.*; 20 The Times L. R. 101.

<sup>3</sup> *Lancashire Patent Fuel Co., Ltd. v. L. & N. W. Ry., Great Central Ry., and Others*. A summary will be found in the *Railway Times*, August 13, 1904.

<sup>4</sup> *Nicholson v. Great Western Ry.*, 5 C. B. (N. S.) 366. The test of the agreement complained of will be found in the footnotes to pp. 382-408. See also *Evershed v. L. & N. W. Ry.* (1877), 2 Q. B. Div. 267.

that lower rates might be given because of train-load shipments or of ability to load a greater weight into trucks.<sup>1</sup> The general justification of such arrangements has been recognized by the present Commission.

An example from a case decided in 1900 will indicate the nature of the arrangement.<sup>2</sup> A rebate of 3*d.* per ton from the established rate was to be made on condition that a minimum shipment of 25,000 tons of coal a year was guaranteed, and that the arrangement should last for five years. The Commission has, in various cases, held such rebates excessive.<sup>3</sup> The ground taken has been that the rebate is justified by a reduction in cost to the company, and that the rebate should not be in excess of the saving to the company. It is obvious that such a practice as this has dangers connected with it. A considerable number of complaints have been directed against the excessive advantages obtained by Messrs. Rickett, Smith & Co. under their rebate arrangement with the Midland Railway. In one case, though the evidence is contradictory, there are the earmarks of a secret rebate.<sup>4</sup> While the decisions of the old Commission recognized bulk of traffic as a justification for reduction of rates, the policy of the present Commission has not been clear cut. In some cases it has recognized quantity as a justification for a rebate.<sup>5</sup> But it has in other cases attempted to confine cost to mere economies of bookkeeping, attributable to more prompt settlements, etc.;<sup>6</sup> and it has expressed the dictum that rebates in respect of quantity would justify a differentiation of charges in so many cases that

<sup>1</sup> E.g. *Ransome v. Eastern Counties Ry.* (No. 2), 1 Ry. and Canal Traffic Cases, 109; *Girardot, Flinn & Co. v. Midland Ry.*, 4 Ry. and Canal Traffic Cases, 291; *Greenop v. S. E. Ry.*, 2 Ry. and Canal Traffic Cases, 319.

<sup>2</sup> *Daldy and Others v. Midland Ry. and Others*, 10 Ry. and Canal Traffic Cases, 305.

<sup>3</sup> E.g. *Charrington, Sells, Dale & Co. v. Midland Ry. Co.*, 11 Ry. and Canal Traffic Cases, 222; *Wallsall Wood Colliery Co. v. Midland Ry.*, *Railway Times*, July 25, 1903.

<sup>4</sup> *Charrington, Sells, Dale & Co.*, *ut supra*, p. 229.

<sup>5</sup> *Daldy and Others*, *ut supra*, p. 310. See also *Hickelton Main Colliery Co. v. Hull & Barnsley Ry.*, *Railway Times*, July 25, 1903. In this case the consideration of the lower rate was a minimum of 38,000 tons per annum.

<sup>6</sup> E.g. *Charrington, Sells, etc.*, *ut supra*, 230.

the rule against preference would be in danger of disappearing, "and the small trader would be in a more helpless position than the position in which he now is."<sup>1</sup>

While the traders recognize the value of export rates, and the effects of competition thereon, the conditions which affect the import rate are often neglected, and the low rail rates given on imported goods are often attributed to the stupidity, if not turpitude, of the railways in preferring home to foreign goods. When the Act of 1888 provided that the Commission should not "sanction any difference . . . in the treatment of home and foreign merchandise in respect of the same or similar services," it was claimed that this absolutely forbade preferential rates, and that the home traffic would therefore be carried at the same as that of foreigners.<sup>2</sup> Notwithstanding this enthusiastic prediction there is at present a reiterated demand for a select committee to investigate the question of preferential rates.

The discussion of preferential rates in England has proceeded along lines familiar to every student of the effects of water competition on railway rates. "Why," asks one, "if they (the railways) can carry at a profit from foreign countries, can they not carry home produce at the same rate?"<sup>3</sup> If the London & North-western carried a train load of meat from Liverpool to London at 25s. because it was American, it should be able to do the same wherever the meat came from.<sup>4</sup> "*Ex hypothesi* they (the railways) already got a profit out of the produce they carried, . . . and what they would have to do was to put the English farmer and producer on the same footing as the foreigner."<sup>5</sup>

The question of preferential rates was brought before the Commission in 1895 in an exceedingly important case, which

<sup>1</sup> E.g. *Charrington, Sells, etc., ut supra*, 231.

<sup>2</sup> Waghorn and Stevens, Report upon the Proceedings of the Inquiry held by the Board of Trade, 1889 and 1890, pp. 12 and 106. This report to the Lancashire and Cheshire, Devon and Cornwall, and Irish Conferences (traders' organizations), was published at Manchester in 1890. It contains a searching but extremely acrid and biased examination of the railway position.

<sup>3</sup> Lord Henniker, Hansard, 1885, third series, Vol. 315, p. 412.

<sup>4</sup> Mr. Mundella, Hansard, 1888, third series, Vol. 329, p. 413.

<sup>5</sup> Mr. Chamberlain, Hansard, 1888, third series, Vol. 339, p. 445.

lasted eight days.<sup>1</sup> Complaint was made that the railway charged lower rates from Southampton docks to London on the following goods of foreign origin — wool, hay, butter, cheese, lard, hops, fresh meat, bacon, hams — than it charged on similar articles of home origin, which were normally carried a shorter distance, and that the services rendered in respect of the foreign traffic were not less than those rendered for the home traffic in the proportion that the rates were lower. A few examples will serve to show the nature of the disparity complained of: —

STATION	DISTANCE TRAVELED	RATES ON FRESH MEAT, HAY, AND HOPS TO LONDON		
		Rate for Meat	Rate for Hay	Rate for Hops
Southampton docks	76 miles	17s. 6d.	5s.	6s.
Southampton town	76 "	26s. 3d.	9s. 8d.	20s. 10d.
Alton . . . . .	45 "	9s. 2d.	7s. 4d.	20s.
Botley . . . . .	76 "	27s. 6d.	9s. 8d.	22s. 7d.

Back of the complaint lay a competition of ports for foreign traffic. The London docks were in competition with the Southampton docks, which were owned by the London & Southwestern Railway.<sup>2</sup> Competition existed between the all water route to London and the water and rail route *via* Southampton.

At first the railway endeavored to justify the apparent anomalies on the grounds that the rates complained of were made on the basis of water competition, and that, besides, they were balances of through rates. But the Commission ruled that such matters could not be considered in evidence under the provisions of the Act. Under these conditions the railway had to fall back on the unsatisfactory standard of cost of service. It was shown that the rates for the home traffic covered a variety of services — e.g., receiving, weighing, loading, covering,

<sup>1</sup> *Mansion House Association on Railway and Canal Traffic for the United Kingdom v. London & Southwestern Railway*, 9 Ry. and Canal Traffic Cases, 20.

<sup>2</sup> When these docks were acquired by the railway in 1892, it was anticipated they would be a formidable competitor of the London docks. For information descriptive of the highly developed facilities for handling traffic at the Southampton docks, see *Railway Age*, July 1, 1904; *Railway News*, January 7, 1905.

superintendence, provision of station accommodation, switching — which were not included in the rate on the foreign goods. The foreign merchandise was less valuable, less liable to damage, more easily and expeditiously handled, could be dealt with at times more convenient to the railway, always in larger quantities, and generally in a much more economical manner. On account of better baling, to cite one example, three tons of foreign hops could be loaded into a truck that would hold only two and a half tons of English hops.

The traders contended that such conditions of traffic as regularity and quantity, while admitted, were not capable of being included in the "similar services" spoken of in the undue preference section. Their contention was in substance that, while there might be differences in the case of home traffic because of dissimilarity of circumstances, in the case of the foreign traffic it was intended that there should not, on any account, be any difference in favor of foreign goods.

Had the contention of the traders been successful, it would have established a principle. But the decision of the Commission, which has been claimed as a victory by both parties, was of a compromise nature, and proceeded on the careful lines already laid down that undue preference is a matter of the facts of the particular case. The articles with which the decision concerned itself were hops, fresh meat, and hay. These were the only articles in which there was any considerable traffic from the stations intermediate between Southampton and London. The rates quoted on the other articles were simply "paper" rates. Sir Frederick Peel, who decided on the facts, held that the differences between the home and the import rates on meat, hops, and hay were not justified.<sup>1</sup> While his colleagues accepted this opinion, it was with hesitation. They both had doubts as to the alleged preference on meat,<sup>2</sup> and justly so. The average consignment of foreign meat from Southampton was 37 tons. In a period of seventeen months 10,638 tons of meat were shipped in 286 consignments. On the other hand, from Salisbury, the leading English meat center concerned, 231

<sup>1</sup> Mansion House case, pp. 38, 39.

<sup>2</sup> *Ibid.*, pp. 32 and 43.

tons in 825 consignments were shipped in the same period. It is apparent that, where the whole series of costs would be so different, the Commission strained the idea of cost of service to the breaking point, and in doing so favored the home producer.

The decision was based on the idea, manifestly correct, that it was the intention of the statute to eliminate competition from the factors to be considered. At the same time the majority of the Commission are satisfied that the real factor controlling the rate situation in this case is water competition. As was said by Justice Collins, there was "no reason or principle in leaving out of account the fact of a rival route by rail or water from the point of departure to the point of arrival in the case of goods from abroad and taking it into account, as it clearly may be taken into account, where the comparison is between home goods only."<sup>1</sup>

This unsatisfactory decision, which cost the traders £2000 in law costs, obtained no general principle for the traders, and at the same time forced the railways to depend upon the artificial justification of cost of service. While the decision is of such a nature that in a case where there is real competition of home and foreign products a different verdict might be given, no further action in regard to preferential rates has been taken before the Commission. In 1899 the question of preferential rates was brought before the Board of Trade under the conciliation clause, but no satisfactory agreement could be obtained.<sup>2</sup>

It was Mr. Chamberlain who introduced into the legislation the clause under discussion. The agitation in regard to preferential rates has been given an added vigor by his preferential trade movement. Back of much of the outcry concerning preferential rates is a hazy protectionism. The support Mr. Chamberlain has obtained, for example, in the iron and steel industry is in considerable part due to preferential rates on iron and

<sup>1</sup> Mansion House case, p. 32. See also the statement of Lord Cobham in *Didcot, Newbury & Southampton Ry. Co. v. Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 210.

<sup>2</sup> Case 16, Seventh Report of the Board of Trade, under Section 31 of the Act of 1888.

steel products, although the matter is complicated by the export rates given by the railways of competing countries.<sup>1</sup>

The control over docks by railway companies, which was objected to at an earlier date as a source of discrimination,<sup>2</sup> has been increasing of recent years. The railways have found it necessary to obtain control not only of docks, but also of steamer lines connecting with the Continent, in order to obtain the through rates which are necessary, if the import and export traffic are to balance, and thus permit a more economical use of rolling stock.<sup>3</sup> Complaint is made that the railways are spending large sums in erecting docks and warehouses at ports in order to encourage foreign trade, thereby still further increasing the number of preferential rates. The provisions of the Act of 1888 with reference to the right of the traders to have through rates from foreign points distinguished into their domestic and foreign portions are somewhat ambiguous. In the Southampton case the traders were unable to ascertain the foreign portion of the rate. As a result of this condition, an attempt was made in 1904 to obtain a provision in a special railway act, requiring that the railway should distinguish on its rate books, in the case of imports on a through rate, the portions attributable to (1) land carriage abroad, (2) dock, harbor, and shipping charges abroad, (3) conveyance by sea, (4) dock, harbor, and shipping charges at the British port, (5) railway charges in the United Kingdom. This was voted down by 103 to 79 on the ground that it was unfair to pick out a particular company in connection with what was a general matter.<sup>4</sup>

<sup>1</sup> See *Report of the Tariff Commission* (Chamberlain), 1904, Vol. I: The Iron and Steel Industry, under heading "Preferential Rates." *Contra*, see "British Railways and Goods Traffic: Is Preference given to Foreign Products?" (A. Dudley Evans, *Economic Journal*, March, 1905).

<sup>2</sup> Section 27 of the draft Report of the Select Committee of 1882, p. xxviii.

<sup>3</sup> The practice of consigning goods on through rates is increasing. At the same time Continental railways — e.g. those of Belgium — refuse to make through rates, except with railway companies. As to the alleged evil effects of such arrangements, see remarks of Mr. Hanbury, president of the Board of Agriculture, Hansard, 1902, fourth series, Vol. 108, p. 1640. See also Boyle and Waghorn, *op. cit.*, Vol. I, p. 304.

<sup>4</sup> Lancashire and Yorkshire Railway Bill. For text of the Instruction, see Hansard, 1904, fourth series, Vol. 131, p. 1473.

The farmers of the United Kingdom are subject to competition from many points. To cite but a few examples: Algerian fruit and vegetables, French hops, Danish butter and eggs, compete with the home products. The hop rates complained of when President Hadley wrote still exist. Not only do the English farmers complain of preferential rates, there is also complaint from Ireland that the existing rate basis discriminates against Irish eggs, butter, and bacon. It should be noted, although such a consideration is ruled out by the Railway Commission, that the low rates complained of are balances of through rates. It costs about £10 for freight charges to place one ton of Algerian fruit or vegetables in London. In fruit shipments the foreigners have had the advantage that a considerable number of the British growers are not giving sufficient attention to grading and packing and, in general, to the requirements of consumers. The following may be taken as examples of the complaints in regard to Danish competition:—

	DISTANCE (mixed route)	RATE PER TON	
		Butter	Eggs
Esbjerg (Denmark) to Birmingham	553 miles	47s. 6d.	58s. 8d.
Armagh (Ireland) “ “	358 “	42s. 6d.	50s.

The apparent disparity of rates on a distance basis disappears when it is remembered that on the Danish products there is a long water haul, and that there is also the difference between a car-lot and a less than car-lot basis. The Danish rates are quoted on minimum consignments of ten tons, while the Irish rates are based on three hundredweight.

The more enlightened English farmers recognize the effects of water competition. They know that it would not benefit them to have the through rate raised, as it would simply mean that the foreign produce would move more cheaply by an all water route. When the London & Southeastern Railway in 1887 placed foreign hops on the same rate basis as domestic hops, the result was that the former moved by water to London.

The English producer was injuriously affected by the increased competition which lowered the price. At present approximately 90 per cent of the Continental produce imported by way of Boulogne and Calais goes by water to London. While the farmers recognize the superior facilities for handling foreign goods, they at the same time consider that the disparity between home and foreign rates is too great.<sup>1</sup>

Some part of the complaint in regard to preferential rates is attributable to misunderstandings in regard to rate conditions as well as to a lack of initiative on the part of the farmers. The Royal Commission on Agriculture stated in 1897 that, while coöperation among farmers was necessary in order to obtain lower rates, this matter could not be helped on by legislation.<sup>2</sup> But little has been done by the farmers to accomplish this.<sup>3</sup> While there is much unorganized complaint in regard to agricultural rates, the farmers are presenting very little evidence before the Departmental Committee, which is at present investigating the matter. The railways have been more willing than the farmers to coöperate. For forty years the London & North-western has been collecting small consignments of agricultural produce along its lines. These it forwards in bulk, delivers them to the London salesmen, pays market dues, collects the proceeds from the salesmen, and forwards the balance to the shippers. The London & Southwestern, which does a large business in package freight, undertook recently to supply the farmers along its lines with copies of Pratt's *The Organization of Agriculture*. All of the railways have been active in giving special rates to encourage agricultural shipments.<sup>4</sup> But, while

<sup>1</sup> E.g. evidence of W. W. Berry, a prominent hop grower of Kent, before the Royal Commission on Agricultural Depression, 1897, answers to questions 49,190, 49,226, 49,258. See also statement of Mr. Sinclair, Hansard, 1904, fourth series, Vol. 136, p. 295.

<sup>2</sup> Final Report, p. 529.

<sup>3</sup> See statement of the president of the Board of Agriculture, Hansard, 1902, fourth series, Vol. 108, p. 1639.

<sup>4</sup> For full detail concerning the special arrangements made by British railways in this regard, see *Railway Rates and Facilities*, copy of correspondence between the Board of Agriculture and Fisheries and the Railway Companies of Great Britain, etc., 1904. A large number of details bearing on the question of

the Danes are shipping produce into England on relatively low rates, which are the result of coöperation, 70 per cent of the domestic agricultural shipments on the Northeastern Railway are below three hundredweight, and 90 per cent fall below one ton.

#### CONTROL OVER ACTUAL RATES

In dealing with the rate policy of the Commission, a distinction must be made between the period prior to 1894 and that subsequent thereto. Though it had been stated in 1872 that legal maximum rates afforded but little real protection to the public,<sup>1</sup> the system was continued by the Act of 1888. While the work of the Board of Trade, as embodied in the Provisional Orders Acts, meant in all cases the systematization and in many cases the reduction of the maxima, the outcome was not satisfactory to the traders, some of whom wanted a general reduction of rates, regardless of the cost to the railways. The change of status in regard to *reasonable* rates introduced by the Act of 1888 was more apparent than real. The former Railway Commission had stated that, in addition to there being a necessity that rates charged should be within the maximum, there was also the added requirement that they must be reasonable.<sup>2</sup> No legal action had been taken, however, in regard to this matter. Two judicial decisions given in 1883 and in 1887 seemed to uphold the position that a maximum rate sanctioned by Parliament was conclusively reasonable.<sup>3</sup> But the statements in these decisions are simply dicta, since the question of reasonableness of rates was not directly involved. The Act of 1888, however, settled that the maximum rate was conclusive of reasonableness.<sup>4</sup>

preferential rates will be found in Pratt's *Railways and Their Rates*. This book has come to hand since the material contained in this section was set up.

<sup>1</sup> Report of the Joint Select Committee on Railway Companies Amalgamation, 1872, p. xxxiv.

<sup>2</sup> Fourth Report of the Railway Commissioners, p. 6, Section 14.

<sup>3</sup> See *Manchester, Sheffield & Lincolnshire Co. v. Brown*, 8 App. Cas. 715, and *Great Western Railway Co. v. McCarthy*, 12 App. Cas. 218. In the latter case Lord Watson took the position, "*Prima facie*, I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate."

<sup>4</sup> See Act of 1888, Section 24, Subsection 6 and Subsection 10. Report of Board of Trade, 1890, on Classification of Merchandise Traffic, etc., p. 17.

At the outset of its work the only way in which the Commission was brought in touch with rates was through the provisions concerned with undue preference and with through rates. The Commission will not state beforehand that a rate is preferential.<sup>1</sup> One of the commissioners, Sir Frederick Peel, has taken the position that certain powers over actual rates were given to the Commission. He has construed the statement in the "undue preference" clause which directs the commissioners to consider "whether the inequality cannot be remedied without unduly reducing the rate charged to the complainant" to give a power of reducing the higher rates.<sup>2</sup> Concerning this interpretation there is some doubt. Justice Wills holds that the words in question do not confer any rate-making power, but simply indicate the circumstances to be considered.<sup>3</sup> In an Irish case in 1897, in which the question of distributive rates was involved, it was held that the rate to a shorter distance point should be 3*d.* per ton less than the rate to the longer distance point; but no attempt was made to determine the longer distance rate.<sup>4</sup> In 1900 a temporary reduction of a canal toll was directed.<sup>5</sup> However, it cannot be said that these decisions have established the power of the Commission to reduce rates under the undue preference clause. Sir Frederick Peel also holds that the Commission may fix a through rate, no matter what the railways concerned may have agreed upon. While this matter has not been passed on, the weight of opinion is against such an interpretation.<sup>6</sup> It would appear, although this also has not been passed upon, that the Commission has no power to test the

<sup>1</sup> *In re Taff Vale Ry. Co.*, 11 Ry. and Canal Traffic Cases, 89.

<sup>2</sup> Note his dissenting opinion in the Liverpool Corn Traders' Association case in 1892.

<sup>3</sup> Select Committee on Railway Rates and Charges, 1893, answer to question 8268.

<sup>4</sup> *Carrickfergus Harbor Commissioners and Others v. Belfast Northern Counties Ry.*, 10 Ry. and Canal Traffic Cases, 74.

<sup>5</sup> *Fairweather & Co. and Others v. Corporation of York*, 11 Ry. and Canal Traffic Cases, 201.

<sup>6</sup> Evidence before Select Committee of 1893, answers to questions 7963, 7964, 7966. See also the extremely guarded statement of Justice Wills before the same committee, answer to question 8264.

reasonableness of an established through rate. While the Commission has power to fix a through rate, if the parties do not agree, it would appear, although this is a moot point, that it has no power to apportion such a rate.<sup>1</sup> The Commission stated explicitly in 1895 that it had no power under the Act of 1888 to inquire into the reasonableness of a particular rate.<sup>2</sup> The various reductions of rate which have been ordered in connection with the workmen's trains applications are given under an entirely different jurisdiction.<sup>3</sup>

In the matter of group rates there has been some conflict between the English and the Irish decisions. The former regard competition and convenience as the most important factors. The latter lay more stress on distance. The appeals from the Commission have settled that competition is as important a factor in connection with rates as geographical position.

The question of the reasonableness of particular rates was suddenly brought before the Commission in 1894. The adjustments necessary in putting into force the rates under the revised maxima were great. The fact that fully one half of the traffic is carried on exceptional rates, which are below the class rates, still further complicated matters.<sup>4</sup> At the same time there was an apparent desire on the part of some of the railways to give the traders an object lesson in regard to the disadvantages of the legislative intervention which had brought some maxima below the actual rates formerly charged. And so the maximum class rates were published as the actual rates effective January 1, 1893. The outcry which followed quickened the work of adjustment, and led to an undertaking on the part of the railways that the rate increase should not be more than 5 per cent. But this

<sup>1</sup> This point was raised in the Forth Bridge case, 11 Ry. and Canal Traffic Cases, 5, but was not passed upon.

<sup>2</sup> *West Ham Corporation v. Great Eastern Ry.*, 9 Ry. and Canal Traffic Cases, 15.

<sup>3</sup> E.g. *In re London Reform Union v. Great Eastern Ry.*, 10 Ry. and Canal Traffic Cases, 280. See Ferguson, *Railway Rights and Duties*, pp. 206, 207.

<sup>4</sup> For detail concerning these rates, see "Report on the Question of Slow Freights (England)," by Henry Smart, *Bulletin of the International Railway Congress*, July, 1904.

did not prevent the enactment of a piece of panic legislation, passed hurriedly and without due consideration.<sup>1</sup> By this act it was provided that, where rates were directly or indirectly increased after December 31, 1892, they were *prima facie* unreasonable. The fact that the rate complained of was within the maximum was not to be a justification of the increase. The Commission was given power to deal with complaints arising under this act, subject to the provision that an application was first to be made to the Board of Trade. Over seventeen hundred complaints were brought before the Board of Trade between the date of the passage of the act and the end of February, 1895.

In the investigations leading up to the Provisional Orders legislation the traders had all along been desirous of having the actual rates serve as maxima.<sup>2</sup> The evident intention of the majority of the members of the Select Committee of 1893 was that the rates in force at the end of 1892 should be the maxima.

In taking up the new functions imposed by the revolutionary Act of 1894, the Commission had a full appreciation of the difficulties of the new jurisdiction. Justice Collins said, "I cannot suppose that Parliament intended to take the management of these great trading companies [the railways] out of the hands of the practical men who work them, and to place it in the hands of the Railway Commissioners." The Commission had no intention to exercise a rate-making power. It was its intention to construe the legislation strictly. In the interpretation of the statute there was, however, a difference of opinion between the commissioners. Lord Cobham held that the Commission was not competent, of its own knowledge, to say whether a rate was reasonable or not. "No tribunal, however expert, would undertake to say that a 6s. 6d. rate for the carriage of coal from Derbyshire to London is reasonable, but that 6s. 9½d.

<sup>1</sup> A mass of detail pro and con will be found in the evidence attached to the Report of the Select Committee of 1893. See also Mavor, "The English Railway Rate Question," *Quarterly Journal of Economics*, April, 1894; Acworth, *The Elements of Railway Economics*, pp. 147-154.

<sup>2</sup> E.g. speech of J. H. Balfour Browne, already cited, p. 171. Evidence of Marshall Stevens before the Select Committee of 1893, answers to questions 2448 and 2518.

is unreasonable." The legislature had, however, given a standard of reasonableness in the rate of 1892, and the rate could not be increased above this unless good reasons were shown.<sup>1</sup> In endeavoring to obtain some definite standard of measurement of reasonableness, the Commission ruled out all reference to competition, or to that more inclusive system, charging what the traffic will bear.<sup>2</sup> The opinion of the traders, that the rates in force at the end of 1892 should be maximum rates, received a partial support from Lord Cobham, who held that the fact that a rate had not been increased prior to 1892 created a strong presumption against the railway because it had not increased the rate when it had the unchallenged right to do so;<sup>3</sup> but Justice Collins held that conditions prior to 1892 could be considered, and that the reasonableness of a rate was to be tested by conditions existing or apprehended before the legislation came into force.<sup>4</sup> Later decisions have taken into consideration conditions subsequent to 1894.<sup>5</sup> There still remained the question of the criterion of reasonableness. Justice Collins held that this should be cost of service. Reasonableness, he held, must be measured by reference to "the service rendered and the benefit received." This, in his opinion, pointed to cost of service as the base, because "the service rendered and the benefit received were unaffected by the prosperity or misfortune of the parties to the contract."<sup>6</sup> This squared with the views of the traders, who held that the true basis of a rate was cost of service.<sup>7</sup> The fact that the legislation provided, in the first

<sup>1</sup> *Derby Silkstone Coal Co., Ltd. v. Midland Ry.*, 9 Ry. and Canal Traffic Cases, 107.

<sup>2</sup> E.g. *Charlaw and Sacriston Collieries Co. v. Northeastern Ry.*, 9 Ry. and Canal Traffic Cases, 140. In *Black & Sons v. Caledonian Ry., etc.*, 11 Ry. and Canal Traffic Cases, 176, the Court of Sessions refused, on appeal, to grant the process which would enable the railway companies to investigate the books of the applicants to see what their profits had been during a given period.

<sup>3</sup> *Derby Silkstone Coal Co.* case, p. 130.

<sup>4</sup> *Ibid.*, p. 111.

<sup>5</sup> E.g. *Black & Sons*, *ut supra*.

<sup>6</sup> *Derby Silkstone* case, p. 113. The decision in this regard is based on *Canada Southern Ry. Co. v. International Bridge Co.*, 8 App. Cas. 731, 732.

<sup>7</sup> E.g., letter of Sir James Whitehead, president of the Mansion House Association, *London Times*, December 22, 1892; also speech of J. H. Balfour Browne, *ut supra*, p. 257.

instance, a rate of an antecedent period as a criterion of reasonableness would seem to show an intention of ruling out in the present rate any consideration of what the traffic would bear; for, if charging what the traffic would bear, in the present, were admitted as a present criterion of reasonableness, it is difficult to see how the past rate could serve as a standard of reasonableness, when, presumably, what the traffic would bear was something essentially different.

The increases in rates complained of, which have for the most part arisen in connection with coal traffic, have in a number of cases been indirect, attributable to decreases in the allowance made for wastage in the coal traffic, etc. The criterion the Commission has found it necessary to adhere to — cost of service — has tied it down to an arbitrary arrangement. To meet this condition, the railways have had recourse to technicalities savoring, in some instances, of subterfuge. In one case it was alleged that the increase complained of was attributable to an increase in the cost of cartage as distinguished from conveyance charges. The former fell under terminal services, over which the jurisdiction of the Commission was limited.<sup>1</sup>

No general principle has been established in the unreasonable-rate cases. The railways had claimed the right in 1893 to increase the rates by 5 per cent as compared with the rates in force in 1892. While the traders never recognized the validity of this claim, the Board of Trade by 1898 had accepted this arrangement as justifiable. The important *Smith & Forrest* case, which came up in 1899, was intended to test this arrangement.<sup>2</sup> Complaint was made by the oil refiners of Liverpool and Manchester that an increase of 5 per cent was unreasonable. The increase was in part direct, in part indirect, attributable to decreases in cartage rebates. The matters involved were pertinent to the whole freight traffic of the United Kingdom, and affected future

<sup>1</sup> *Mansion House Association, etc. v. L. & N. W. Ry.*, 9 Ry. and Canal Traffic Cases, 174. See especially the remarks of Lord Esher in the appeal proceedings, pp. 199, 200.

<sup>2</sup> *Smith & Forrest v. L. & N. W. Ry. and Others*, 11 Ry. and Canal Traffic Cases, 156.

as well as past rates. The railways introduced statistical evidence showing that, because of various increases in cost, particularly in the case of labor, expenses were 5.1 per cent higher in 1892 than in 1888 and 6.3 per cent higher in 1898 than in 1892. The railways desired to carry the comparisons back to 1872, when many of the old rates had been fixed; but the Commission considered 1888 a sufficiently remote date, and comparisons were made with the conditions of 1891. It was found that an increase of 3 per cent would be justified. The Commission has thus shown its intention to look at each case by itself. If a 5 per cent increase should be found justifiable in a particular case, it would not necessarily have any bearing on a later decision.

The desire of the Commission not to engage in any rate-making experiments has kept it from making any statements as to general rates. It has concerned itself with the reasonableness of particular rates. The Commission has painstakingly endeavored to get at the cost involved. The decisions have been compromises. Where decisions have been against the railways, damages have been awarded on the basis of the difference between the increase and what was deemed a justifiable increase; and the railways have been ordered to desist charging the unreasonable rates. In a recent case an attempt was made to obtain an expansion of the unreasonable-rate jurisdiction.<sup>1</sup> It was contended that it was unreasonable to increase a rate, although the increased rate was still below the point to which it had been decreased in 1894. The Commission did not, however, pass upon this question. It is apparent that, if such a contention were accepted, still more rigidity would be introduced into the system. The traders' anticipations as to the effect of the Act of 1894 have been nullified by the willingness of the Commission to consider conditions antecedent to the legislation. The whole position, it must be recognized, is an exceedingly artificial one. While the position taken by the Commission is strained and unsatisfactory, it is difficult to see, when it was specifically referred back to the conditions of

<sup>1</sup> *Millom & Askam Hematite Iron Co. v. Furness Ry. and Others*, reported in *Railway Times*, January 21, 1903.

1892, what other method it could have adopted. By acting as it has, a degree of elasticity has been retained for the process under the legislation which it otherwise would not have possessed.<sup>1</sup>

It was objected at the outset, that the judicial member would dominate the Commission, owing to the difficulty of distinguishing between law and fact. It has happened, however, that in the performance of their duties the lay members determine on questions of fact. At the same time, while the opinion of the *ex-officio* commissioner is final on a point of law, the lay members also form and express their opinions.

The government has throughout considered the requirement that one member of the Commission shall "be experienced in railway business" to mean that he shall have been a railway director or a railway manager.<sup>2</sup> Exception has been taken to this by the traders. To the attempt to obtain a business representative on the Commission, in addition to a railway representative, the railways are not opposed. It is from the government that the objection has come. Mr. Mundella, when president of the Board of Trade, said he would be glad to appoint a "really" business man who should be an impartial authority, fairly representative of the trading class. Mr. Mundella had stated that the Commission as then constituted was generally unsatisfactory.<sup>3</sup> An attempt was made by the traders in 1894 to so amend the legislation that one of the commissioners should be "experienced in trade or commerce." This was not pressed beyond the first reading.<sup>4</sup> Mr. Bryce, who succeeded Mr. Mundella, held, however, that no such restriction as his predecessor had favored

<sup>1</sup> The criticism directed against the Commission by Grinling, in *British Railways as Business Enterprises*, pp. 161-163, contained in Ashley's *British Industries*, is not wholly justified.

<sup>2</sup> Mr. Price, before his appointment to the Commission of 1873, had been chairman of the Midland Railway. Viscount Cobham, who succeeded Mr. Price in 1891, had been deputy chairman of the Great Western. On Viscount Cobham's resignation, early in the present year, he was succeeded by Mr. Gathorne-Hardy, who had been deputy chairman of the Southeastern.

<sup>3</sup> Hansard, 1894, fourth series, Vol. 28, pp. 792, 793.

<sup>4</sup> The text of this bill will be found in the *Railway Times*, June 16, 1894, p. 782. See also Report of the Select Committee of 1893, p. xiii.

should be placed on the choice of the government. The desire to have a commercial representative is still active. Believing that the commissioners should be assessors, possessed of expert knowledge, rather than judges, the traders have urged that the terms of the commissioners should not exceed ten years, so that there might be an opportunity to keep constantly in touch with actual conditions.

Looking at conditions as they are, it is apparent that the presence of a railway representative on the Commission has meant that those appearing before it have been more careful to give essential details. There is no real cause for complaint, from the traders' standpoint, concerning the services which the lay members have performed. The railway representative, for example, in the enforcement of the legislation of 1894 has followed very closely the ideas favored by the traders. Sir Frederick Peel has been willing to give a broad construction to the legislative provisions concerned with control of rates.

The average English trader asks for a process which shall be "short, sharp, and decisive." And to him the process of the Commission has undoubtedly been unsatisfactory. As a minimum, six weeks elapse between the filing of the application and the decision of the case.<sup>1</sup> In a number of cases more than a year has elapsed between the initial hearing and the decision. In some cases the delays are attributable to adjournments in order to permit the obtaining of more evidence.<sup>2</sup> In other cases delays have been caused by an endeavor to get the parties to settle the questions in dispute. When cases are appealed, there are further delays. While one case has been decided on appeal within two months after the decision of the Commission, the usual period is from six months to one year.

Notwithstanding the assumption in 1887, that giving a *locus standi* to governing bodies and to traders' associations would cause much litigation, the number of complaints is not great.

<sup>1</sup> The Rules of Procedure of the Commission allow twenty-one days after the filing of the application for the filing of replies.

<sup>2</sup> E.g. the important case of Spillers & Bakers, etc., was heard first December 9 and 10, 1903. It was then adjourned for further evidence, and was decided in July, 1904.

In the period 1889–1903 there have been, on the average, fifty applications a year; but many of these have been of minor importance. In the same period there have been on the average twenty-three decisions a year. But here there are many cases where one decision covers a group of identical cases.<sup>1</sup> Complaint has been made of the small number of days on which the Commission sits. In the nine years, 1896–1904, the average period the Commission has sat annually as a court is thirty-two days. This, it is true, is exclusive of the days when the Commission has sat to consider applications for sanctioning working agreements between railways, the time taken up in connection with the administrative duties of the Commission, and the days on which the registrar of the Commission has inquired into damages and interlocutory proceedings which would otherwise come before the commissioners acting as a court. Of these no record is kept; but, after making all allowance, it is apparent that the Commission is not overworked. It is apparent, however, as has been recognized by the traders themselves, that the mere enumeration of the number of days on which the Commission has sat is no criterion of its usefulness.<sup>2</sup>

The Commission is criticised on account of its expense. This criticism is, however, directed only to a slight extent against its cost of maintenance.<sup>3</sup> It is the expense of obtaining a decision that the critics have in mind. In recommending a limitation of the right of appeal, the committee of 1882 intended to limit expense. By providing for the intervention of the Board of Trade in various matters, the legislation of 1888 hoped that the expense of proceedings might be kept down. The attempt of the legislation of 1894 to lessen expense, by providing that costs should not be granted by the Commission, except in cases where the claim or the defense is frivolous or vexatious, was intended to obviate the burden of the fees of the railway lawyers falling

<sup>1</sup> See Table I, on p. 650.

<sup>2</sup> In this connection see the statement of Sir B. Samuelson, who was very active, on the traders' side, in the steps leading up to the legislation of 1888. Hansard, 1888, third series, Vol. 278, p. 1887.

<sup>3</sup> In 1903 the cost of maintenance of the Commission amounted to £6497.

on the trader, when defeated in a case. The admittedly high expenses are not attributable to the fees of the Commission, which are moderate,<sup>1</sup> but to the development of a technically equipped Railway Commission Bar. It was early seen that the necessary prominence of the lawyers employed would make the process relatively expensive. The same conditions existed in connection with the Commission of 1873. In the body of lawyers found practicing before the Commission are many whose names are prominent in the Parliamentary bar, — a practice whose fees are high. The legal work before the Commission has tended to fall into the hands of a relatively small number of practitioners.<sup>2</sup> Prior to 1894 it was the practice to allow costs for two lawyers, unless when some especially technical matter was involved.<sup>3</sup> Since 1894 there have been, on the average, two lawyers on each side in the traders' cases. Under these conditions the expense, in a case contested before the Commission, runs from £150 to £200 a day. The individual trader is able to lessen his expense where, as in the sidings' rent cases, a group of traders bring action on a common set of facts. Only in one case has a rate matter been presented before the Commission by the complainant himself; and he was unsuccessful. The judicial members of the Commission are opposed to the complainants appearing in person. While it is true that in one case, which was settled before trial, the total court costs to the complainant were £1; and these, with his other expenses, were reimbursed to him by the railway, it is apparent that those who

<sup>1</sup> See Railway and Canal Commission Procedure, Schedule III, Woodfall, *op. cit.* See also Senate Committee on Interstate Commerce, *ut supra*, Vol. V, Appendix B, p. 220. The Commission fees in rate cases, as a maximum, do not exceed £5.

<sup>2</sup> In the 58 traders' cases covered by the reported decisions down to 1902, 68 lawyers took part. Mr. J. H. Balfour Browne, K.C., who is the dean of the traders' legal forces, appeared in 41 cases; Mr. C. A. Cripps, in 36; Mr. E. Moon, in 31. In all there were 32 lawyers who appeared in more than three cases. Eight of these appeared in more than ten cases each. The leaders have not practiced exclusively on one side. For example, Mr. C. A. Cripps, who has appeared in 30 cases for the railways, has appeared in 6 cases on the traders' side.

<sup>3</sup> The registrar is the taxing officer of the Commission. See appeal from his decision in this connection in *Glamorganshire County Council v. Great Western Ry.*, 9 Ry. and Canal Traffic Cases, 1.

are aggrieved in small matters cannot afford to come before the Commission.<sup>1</sup> There have not been the migratory sessions of the Commission which the traders favor. The sessions are held in the capital cities of the countries concerned. It is cheaper to have the cases taken to the technically equipped lawyers in the capital cities than to have these come to the cases in local centers. If the case involves any matter of considerable moment, the contest has to be carried on against the Railway Association. This being so, the complaints have to be fought out by firms, groups of traders, trade associations, Chambers of Commerce, local governing bodies.<sup>2</sup> The cost of a suit before the Commission is, under these conditions, about the same as before any other high court.<sup>3</sup>

In view of the expense attaching to suits before the Commission, it has been urged that the power possessed by the Board of Trade under the Act of 1873 to institute proceedings before the Railway Commission should be utilized. While the railways would not object to the Board of Trade presenting before the Commission matters arising under the conciliation procedure of the Board, where its decisions have not been accepted by the railways, it has been held that this would interfere with the efficiency of the conciliation clause. The government has held that to make a government department public prosecutor in cases before the Railway Commission would savor rather of persecution than of prosecution.<sup>4</sup> One exception has been made to this general rule. In 1899 the Irish Department of Agriculture was empowered in its act of organization to present rate grievances before the Commission at the public expense. So far

<sup>1</sup> See evidence of T. Middleton before the Royal Commission on Agricultural Depression, 1897, answer to question 2361.

<sup>2</sup> One of the most interesting trade associations is the Mansion House Association, founded in 1889. It represented, before the Board of Trade in 1889-1890, 209 public and local authorities, 174 commercial and agricultural organizations, besides a large number of individuals.

<sup>3</sup> While the limitation of appeal reduces the expense, the powers of the Court of Appeal to grant costs in Commission cases is not affected by the legislation of 1894.

<sup>4</sup> Hansard, 1883, third series, Vol. 278, p. 1901, statement of Honorable Joseph Chamberlain.

there has been only one such case, in 1902. In this the Board of Agriculture was successful.

The Associated Chambers of Commerce urged in March, 1904, that, with a view to cheapness and expedition, the local county courts should be used in cases between the railways and the traders. This suggestion is especially intended to cover the case of the small trader. In one form or another it has been under discussion since the early nineties. Cases affecting railways already come before the county courts from time to time.<sup>1</sup> While the county court method of procedure might work fairly well in local matters, it is apparent that this procedure is unfitted for matters of more general interest. There would also be a defect in that the way is open for a lack of expedition. Appeals may be taken on points of law or equity from the decisions of the county court. In the consideration of these appeals the high courts are empowered to draw inferences of facts. Exceedingly small matters are appealed at present. In 1904 one appeal was concerned with an alleged overcharge of  $11\frac{1}{2}d.$  on a railway journey.<sup>2</sup> It has been suggested, however, that the cost of appeals under the proposed jurisdiction should, where the appeal is by a railway, be borne by the railway.<sup>3</sup>

When the Act of 1894 was under discussion, it was claimed that the legislation was defective, in that it had not restored the right possessed prior to 1888 to challenge the reasonableness of all rates. To the proposition to confer rate-making power on the Commission the government was strongly opposed. It considered that "to ask the Railway Commission, or any tribunal, to consider what is a reasonable rate would be to give them no firm ground on which they could stand."<sup>4</sup> Back of all the criticism directed by the trader against the Commission there is in

<sup>1</sup> E.g. cases arising under Section 5 of the Railway Rates and Charges Act of 1891. This section is concerned with special charges that may be made by railways for special services.

<sup>2</sup> *Ashton v. Lanc. & Yorkshire Ry.*, 2 K. B., 1904, 313.

<sup>3</sup> Waghorn and Stevens, *op. cit.*, p. 65.

<sup>4</sup> Statement of Honorable James Bryce, president of the Board of Trade, in an interview with the deputation on railway rates and charges, June 15, 1894, *Railway Times*, June 23, 1894.

reality a desire that the rate-making power should be exercised. But, while the desire exists, there is a lack of unanimity as to the means to use to accomplish this. In this uncertainty some are looking to the Board of Trade.

The Board of Trade was given jurisdiction, under the Act of 1888, to deal with rate grievances through a conciliation process modeled on that contained in the Act to Regulate Commerce. It is also empowered to attempt to settle complaints about unreasonable rates. The operation of the Board of Trade under its conciliation jurisdiction is recognized as having met with a considerable degree of success.<sup>1</sup> Agreements have been obtained in about one third of the cases brought before it. By the explanations it obtains from the railways the board is also able to settle incipient rate grievances. The process is simple and inexpensive. When a complaint is made, the railway is communicated with, so that a statement of its position may be obtained. If the matter cannot be settled by correspondence, an attempt is made to arrange a meeting at the Board of Trade between the complainant and a railway representative. Here the matter is taken up in an informal manner. Isolated cases have dragged on a year without a decision, but normally some settlement is obtained much more promptly. Complaints varying from an overcharge of 2*d.* on a lawn mower to questions concerned with preferential rates come before the board. In 1900 it was able to obtain a reduction in distributive rates affecting five hundred towns in England and in Ireland. Since 1888 over eleven hundred cases have been brought before the board.<sup>2</sup> Approximately one half of these were presented in the period 1899-1903. The table on the following page shows the result of the more important applications.

There were, then, under these headings satisfactory agreements in about one fifth of the applications made.

<sup>1</sup> This is admitted by so strong an advocate of the rate-making power as Mr. W. A. Hunter. See an article of his "Railway Rates and the Common Weal," *New Review*, Vol. VIII, p. 341.

<sup>2</sup> This is exclusive of over 1900 unreasonable-rate complaints dealt with by a special official prior to 1899.

PRINCIPAL APPLICATIONS, 1899-1903	SEVENTH REPORT		EIGHTH REPORT	
	Settled	Unsuccessful	Settled	Unsuccessful
Classification . . . . .	4	9	2	12
Delays in conveyances, facilities, etc.	15	15	4	5
Facilities and tolls on canals . . . .	2	4	—	—
Rates, differential . . . . .	9	18	—	10
Rates, preferential . . . . .	—	2	—	—
Rates, through rates obtained . . . .	2	7	2	4
Rates, through rates, reduction of . .	2	2	—	1
Rates, unreasonable, reduction of . .	37	82	18	29
Rebate, cartage . . . . .	6	3	3	2
Rebate, station terminals . . . . .	1	—	—	—

While the conciliation work of the Board of Trade has met with a fair degree of success in smaller matters, it has failed when larger matters have had to be dealt with. In Pidcock's case, which later came to the Railway Commission, there was involved the right of the complainant to receive rebates in respect of terminal services not performed at his sidings. The matter dragged on for seventeen months, and finally the railways stated they would take the matter to the Commission, although in the opinion of the Board of Trade the "matter was of no such intricacy or difficulty as to make the arbitrament of a more elaborate tribunal essential to a just decision."<sup>1</sup> The railways will not recognize the conciliation procedure in any matter which involves legal right. With a view to simplifying procedure the Act of 1888 provides that, when a trader desires to obtain a through rate, a preliminary hearing before the Board of Trade is necessary. However, since the determination of the board on such a matter has no legal effect, the preliminary hearing has become simply a perfunctory matter. The Board of Trade is unwilling to express an opinion; while the railways are unwilling to take any position that may be used against them before the Commission.

When the rate increases of 1893 were under discussion, the Mansion House Association proposed, on behalf of the traders,

<sup>1</sup> Fourth Report of the Board of Trade of Proceedings under Section 31 of the Railway and Canal Traffic Act, 1888, p. 6.

to accept the decision of the Board of Trade on these rates if the railways would also pledge themselves to accept the decision. But to this the railways would not agree. To the attempt to give the Board of Trade power over rates the railways are strongly opposed. This position is also supported by the Board of Trade itself. It has constantly claimed that the strength of the conciliation procedure of the board is wholly attributable to lack of compelling power. It is averse to any increased jurisdiction over rates being conferred upon it. It also believes that, if a new rate tribunal is organized, it should, while equipped with a commanding personnel, be of the "advisory" type.

Table I<sup>1</sup> indicates that, from the traders' standpoint, the most important matters brought before the Commission are sidings' rent charges, preference, unreasonable rates, charges for services at sidings, and reasonable facilities. Attention has already been directed to the importance of sidings' traffic in British railway working. For many years the small traders engaged in retailing coal had been using the trucks as storage warehouses. The railways objected to their sidings being crowded with loaded trucks. The colliery owners, to whom the rolling stock belonged, also objected. Formerly the railways had charged demurrage charges based on the average time a truck was detained on a siding. In 1895 the railways decided to charge demurrage based on the actual time a truck was detained on a siding over and above the time necessary to unload it. Since 1895 many applications dealing with this arrangement have been brought before the Commission. Some have come up under the heading of legality of rates, others under the heading of unreasonable rates. The complaints in regard to charges for services at sidings are attributable to the fact, already sufficiently explained, that in the English railway system there are various special charges over and above the conveyance rate. As is indicated in Table I, 779 applications have been made to the Commission.

The preventive effect of the Commission is in part measured by the details given in Table II.<sup>2</sup> A special example will make

<sup>1</sup> P. 650; *infra*.

<sup>2</sup> P. 650, *infra*.

the preventive effect clearer. In 1902 some forty-seven cases, which were brought before the Commission alleging that the Midland Railway was unduly preferring a prominent colliery, such favor being to the detriment of the complainants, were settled before trial. In all, 219 cases have been settled or withdrawn. Formal action has been taken in 346 applications,<sup>1</sup> leaving approximately one third of the applications concerning which there is no further record.

There has been only three cases in the history of the Commission in which anything savoring of a secret rebate has been brought before it. The work of the Commission, in so far as rates are concerned, has been almost entirely concerned with freight traffic. The Act of 1888 makes no direct provision for action in regard to passenger rates. It has, however, been settled in decisions arising out of the Commission's action that it has, as an incident of a through-rate arrangement, power to order through booking (ticketing) of passengers. It has also power to deal with passenger facilities under the question of "reasonable facilities." Of the rate cases formerly argued before the Commission the traders have won not far from three fifths. The tendency of the Commission has been to give compromise decisions. Not only have there been compromises as between the contending parties, there have been compromises as between the opinions of the commissioners themselves. In the Rickett, Smith case, in which the point involved was an increase in rates, Justice Collins thought all the increase was justifiable, Lord Cobham thought none of the increase was justifiable, Sir Frederick Peel occupied an intermediate position, and his opinion prevailed. Both in the traders' cases and in the cases between railways the Commission has been attempting to have the parties arrive at satisfactory settlements, without final action on its part. In some cases, when the parties have agreed, the Commission, in accepting the agreement, has incorporated it in its final order.

<sup>1</sup> This includes a large number of group decisions ; i.e. where one decision covers identical facts in a set of cases, consent decisions, cases where a settlement arrived at by the parties is embodied in an order of the Commission, dismissal of applications, etc.

The presence of a judge on the Commission has meant a strict constructionist point of view in regard to the law. In general, powers have not been implied. Early in the history of the Commission Justice Wills said nothing could be more mischievous than to strain legislation to cover facts that had been left out of it. In 1892 the same judge, in speaking of a statute, said, "The legislature had reasons of its own, good, bad, or indifferent, which have nothing to do with me." In one case, however, where a railway had closed a branch railway, and pulled down the railway station, the Commission required, with much hesitation on the part of the judicial member, that the railway should give the reasonable facilities asked for; and this of necessity involved the rebuilding of the railway station. This implication from the law of 1854 was promptly overruled.<sup>1</sup>

Undoubtedly the presence of a judge on the Commission has made the relations with the higher courts more harmonious than was the case with the Commission of 1873. There has not been that tendency, so conspicuous in the relations of the Federal courts to the Interstate Commerce Commission, to regard the Commission as an amorphous interloper. In one case, it is true, the Scotch Court of Sessions claimed that, if a decision as to fact depended upon a conclusion in law, then there could be an appeal. This line of argument, which, if followed, would soon undermine the finality of the Commission's decisions on questions of fact, has not been adopted; and there has been a ready recognition by the courts of the finality of the Commission's decisions on questions of fact. The result of this is seen in the attitude of the courts to the decisions of the Commission. Down to 1904 there have been, as is indicated in Table III, thirty-eight appeals. The Commission has been overruled in four cases, while in two others it has been sustained in part and reversed in part. The decisions of the Commission in the traders' cases have more finality than in the cases between railways. While nine tenths of the applications before the Commission have been concerned with traders' rights, there have been only eighteen appeals in

<sup>1</sup> *Darlaston Local Board v. L. & N. W. Ry.*, 8 Ry. and Canal Traffic Cases, 216.

the traders' cases; while there have been fifteen appeals in cases where railways alone or railways and dock companies have been concerned.

From the standpoint of the trader a question of importance is the willingness of the railway to obey the orders of the Commission without fighting the matter to the last ditch. While, on the whole, the railways have been loyal to the decisions of the Commission, examples may be found on both sides. In 1902 the railway reconsidered its first intention to appeal the Charrington, Sells case. The result was that a large number of cases, in which the same set of facts was involved, were settled out of court. The London & Northwestern, as a result of the decision in the first Corn Traders' case, gave up the attempt to compete for the traffic with which the case was concerned, and readjusted its rates accordingly. On the other hand, it was necessary, in the case which the Mansion House Association won from the same railway in 1896, to have supplementary proceedings before the Commission in 1897 before the cessation of some of the rates complained of was obtained. The involved uncertainties of English railway law have also played their part. The railways have been able, acting within the law, but depending upon legal, not commercial, conditions, to modify the redress given by the Commission. In 1889 a decision, under the undue-preference clause, found that existing rates were interfering with the distributive business of the Irish town of Newry. Two years later complaint was made because one of the rates complained of had been raised. The railway successfully justified this, on the ground that the section of road, on which there was an increase of rate, was expensive to work on account of cost of gradients, etc. In 1900 the firm of Cowan & Sons, paper manufacturers, failed in an application to the Commission for a rebate on sidings' charges. In retaliation for this application the railway company, which for twenty-eight years had delivered coal at the private siding of the firm in question, refused any longer to deliver coal at the siding. While the railway was at the same time delivering coal at the sidings of adjacent competing firms, it delivered the coal for the Cowans at a near-by station, and they had to

haul it *back* to their siding. The decision of the Commission in favor of the Cowans was overruled. It was held that the arrangement between the railway and the trader in this case was a purely voluntary arrangement, creating no prescriptive rights against the railway. It was not till 1904 that legislation, bringing such sidings within the facilities clause of the Act of 1854, and thus supporting the Commission's decision, was passed.

The Commission, whenever there is an identity of facts, — e.g., in many of the sidings' rent cases, — has dealt with cases in groups, giving a decision which covers a set of cases. The unwillingness of the courts to give the decisions of the Commission a more general effect has assisted in tying the decisions down to the facts of a particular case. In October, 1901, the Commission decided that certain coal rates charged by a number of Scotch railways were unreasonable. The rates were discontinued, as regards the complainants, in December of that year. Three other traders, who were subjected to the same rates, but who had not been parties to the suit, later brought action in the courts for damages because the railways had continued to charge them the rates complained of. The court held, however, that the decision of the Commission had no general effect. Although the rates had been found unreasonable, the court would take no cognizance of this unless they were also illegal.<sup>1</sup>

The functions committed to the Commission are extremely diverse. While it has, with evident innuendo, been called the Traders' Court, it has, in addition to dealing with rate matters, an extensive jurisdiction in regard to arbitration of matters referred to it by the Board of Trade; e.g., differences between railways involving such matters as running rights, number of trains under a running arrangement, arrangements in regard to connection in a through train service over a connecting line, division of expenses between the owning and the controlling company, differences between the Postmaster-General and railways in regard to postal payments, questions arising in connection

<sup>1</sup> *Lanarkshire Steel Co., Ltd. v. Caledonian Ry.*, 11 Scots Law Times Reports, 407, 408. A preliminary decision of the court had held that the Commission's decision was of general effect. *Ibid.*, 225.

with the introduction of improved brakes, complaints in regard to the water supply of London. In addition it serves as a court of appeal from the Board of Trade in cases arising out of the rules made by the Board of Trade under the railway labor acts, and has alternative jurisdiction in the workmen's trains applications. In addition to jurisdiction under special acts the Commission exercises functions finding their legal sanction in some nineteen general acts.

Not only are there complaints at present in regard to preferences on imported products, there are also complaints concerning the rates and facilities given home products. Complaint is especially active in the case of Irish agricultural products. Comparisons, unfavorable to domestic rates, are constantly being made with foreign rates. The question of shipments on "owner's risk" rates gives rise to many complaints. The criticism of the Commission on Agriculture of 1897, that the rate regulative legislation has not given clear effect "to the intentions of Parliament,"<sup>1</sup> is general among the traders. That the Commission has not accomplished much that was expected of it is a patent fact. Its procedure has not met the case of the small trader. At the same time the rate regulative procedure that accomplishes all that is expected of it is not absent from England alone. The Commission, it must be remembered, was organized, not to reduce rates or to intervene actively in matters of rate regulation, but as a court to settle differences. As a court, it has performed its functions. While there was, at the outset, some tendency on the part of the judicial members to look at matters from a legal standpoint rather than from the standpoint of facts, the tendency has been, in more recent years, to meet the conditions rather than to bend the conditions to meet preconceived theories. On questions of railway law the Commission has been, on the whole, more in touch with the facts than the ordinary law courts. While the expense attaching to litigation before the Commission is readily apparent, it may be queried in how far there is a justification for expecting either a cheap settlement or a settlement, at the public expense, of important business matters. So far as

<sup>1</sup> Final Report, paragraph 526.

England is concerned, the attempts to obtain cheap settlements, in the face of the existing involved body of railway law, would mean, if successful, results of little worth.

In the United States the Federal courts have recognized the debt of the Act to Regulate Commerce to the English regulative legislation. But, when comparison is made of the constitution and functions of the English Commission with those of the Interstate Commission, differences at once appear.

The English Commission is a court. The American Commission has the functions of a referee or special commissioner. The former has final decision in regard to fact and a limitation on the right of appeal, with the result that appealed cases are normally settled within a year. The latter has no finality of decision in regard to fact, and appeals from its decisions have taken from two to nine years to decide. While the English Commission has been overruled in the period ending 1904, wholly or partly, in six out of thirty-eight appeals, the American Commission has, in approximately the same period, been overruled in twenty-nine out of thirty-eight appeals.<sup>1</sup> While the Interstate Commerce Commission has, practically from the outset, claimed, as a necessary implication from the language of its enabling statute, an amendatory rate-making power, the English Commission, organized as a court, has, almost without exception, kept aloof from making implications extending its jurisdiction, and has denied any intention to exercise a rate-making power. While the members of the American Commission hold on a limited tenure and the Commission is a bipartisan organization, the tenure of the lay commissioners in the English Commission is for good conduct, there is a pension on retirement, no question of bipartisan organization enters in, and the provision is made that one of the commissioners shall have technical knowledge of railway affairs. The judicial members of the English Commission are assigned to it for five years; but during the period they are not engaged in the Commission work they perform their regular duties as judges of the high court.

<sup>1</sup> See Table III. See also Appendix D, Vol. V, p. 331, Hearings of Committee on Interstate Commerce, etc., 1905.

In the details of the regulative policy which has developed under the Commissions, resemblances and differences appear.<sup>1</sup> The English regulative policy is not in harmony with that of the United States in regard to the extent to which competition is to be considered as a justification of rate anomalies. While the English legislation eliminates competition in the case of import rates, the American position, as established in the Import Rate case, states that competition is to be considered as affecting both import rates and domestic rates. In the case of domestic rates the English Commission at first would not recognize competition as the justification of an anomalously low rate basis unless a well-defined "public interest" was thereby served. Later it accepted the same view as was set forth in the United States in the Alabama Midland case; namely, that competition is one of the matters which may lawfully be considered in making rates. The grievance of secret rebates, one of the central evils in the United States, is practically nonexistent in England. There is no provision other than that of the undue preference clause to cover such a grievance. In both countries the principle that undue preference is a question of fact has been accepted. While the United States has singled out a particular form of preference for special treatment under the "long-and-short-haul" clause, England has allowed more elasticity by placing the matter under a general clause. On the question of the justifiability of granting wholesale rates in respect of quantities larger than car-load lots, the American decisions have been contradictory. The lower courts have shown a tendency to accept the decision in Nicholson's case, but in the Party Rate case the Supreme Court established as the law that a discrimination in respect of quantity, even if allowed to all doing the same amount of business, is to be considered from the standpoint of public policy and the effect of such an arrangement upon trade competition.<sup>2</sup> In so deciding

<sup>1</sup> There is no recognition, in the working of the English Commission, of results arrived at in the regulative policy of the United States.

<sup>2</sup> *I. C. C. v. Baltimore & Ohio Rd. Co.*, 145 U. S. 263. This upholds the general position taken at an earlier time by the Interstate Commerce Commission in *Providence Coal Co. v. Providence & Worcester R. Co.*, 1 I. C. C. Decisions, 363. See also Judson, *The Law of Interstate Commerce and its Federal Regulation*, p. 194.

there has been accepted as a principle what is, so far, only a tendency in the English regulative policy.

The dissimilarities of the matters dealt with by the two Commissions will be seen by referring to Table I. The items common to the two Commissions are legality of rates, unreasonable rates, reasonable facilities, and undue preference.<sup>1</sup> In all, about one half of the applications made to the English Commission are concerned with matters of a kind coming before the American Commission.

The English Commission has used two sets of rate principles: competition as an important factor in differential rates, export rates, and in general in the home side of undue preference; cost of service in regard to preferential rates, and unreasonable rates. This has been in great degree attributable to the legislation. The traders have desired free trade in exports, not in imports. Admitting that there has been a certain *judicial* bias in favor of the cost-of-service principle, it is at the same time apparent that legislation, like that of 1894, which makes a past rate the *prima facie* criterion of reasonableness rules out the possibility of considering present competition. The defects of the legislation of 1894 are its own. The Commission has made the legislation less unworkable than could have been expected.

A considerable part of the desire to control and lower actual rates in England pertains to that hysterical belief in England's industrial decadence which has found some favor in recent years. A considerable part of the criticism arises from the endeavor to prove, on the basis of foreign statistics not properly comparable with English statistics, that English rates are unduly high. Some rearrangements in the Commission's machinery would, however, effect improvements. An arrangement whereby, when a question of principle is established in a decision of the Commission as distinct from a mere finding on facts, the enforcement should be placed in the hands of the Board of Trade

<sup>1</sup> I omit sidings' rent (demurrage) charges, because the conditions under which these arise in England differ entirely from those existing in the United States.

instead of leaving it as a question of possible dispute to be fought out in individual cases, would effect an improvement. A closer articulation of the conciliation procedure of the Board of Trade with the process of the Commission, whereby the findings of the former would have a status before the latter, would also be expedient. The Commission is becoming more and more a technical court, whose decisions are modified by an attempt to obtain settlements rather than legal decisions. Notwithstanding the criticism directed against it, it is difficult to see how, considering the peculiar geographical, industrial, and railway conditions it has faced, the Commission could have accomplished more than it has done.

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TABLE I

SUBJECT-MATTER OF APPLICATIONS DEALT WITH BY THE COMMISSION, 1889-1903<sup>1</sup>

	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903
Board of Trade (Prevention of Accidents Act, 1900) . . . . .	-	-	-	-	-	-	-	-	-	-	-	-	-	6	26
Classification . . . . .	-	-	-	-	-	-	-	-	-	-	1	-	-	-	1
Facilities, reasonable . . . . .	3	8	3	3	1	6	-	1	4	2	2	5	4	4	3
Postmaster-General, applications concerning . . . . .	-	-	-	-	-	-	-	-	-	2	2	2	-	1	-
Preference, undue . . . . .	3	4	5	4	5	5	4	6	-	1	6	3	97	10	8
Rates, distinction of . . . . .	2	3	-	-	-	-	-	1	-	-	-	-	-	-	-
Rates, legality of . . . . .	-	2	-	1	-	-	-	2	-	-	-	2	-	-	-
Rates, through . . . . .	-	-	-	-	-	2	13	4	3	3	6	2	1	-	-
Rates unreasonable . . . . .	-	-	-	-	-	1	63	10	2	24	-	-	3	-	1
Sidings, rent (demurrage) . . . . .	-	-	-	-	-	-	-	6	-	-	25	3	-	108	91
Sidings, rebate from sidings' charge . . . . .	-	-	-	-	-	1	6	3	-	4	9	8	6	-	3
Sidings, services on, charges for . . . . .	-	-	-	-	-	1	4	5	1	-	2	-	-	23	24
Terminal charges . . . . .	-	1	-	-	-	1	-	1	-	-	-	-	-	-	-
Trucks, rebates because not supplied . . . . .	-	-	-	-	2	-	-	-	1	-	-	-	-	-	-
Railways, differences under special acts, etc. . . . .	3	10	1	2	4	5	3	7	6	3	3	4	2	1	2
Railways, working agreements approved . . . . .	3	2	5	5	2	-	2	2	2	-	1	2	3	1	-
Workmen's trains applications . . . . .	-	-	-	1	-	-	-	-	-	23	1	3	-	1	-
Water Act, Metropolitan (1897), applications . . . . .	-	-	-	-	-	-	-	-	-	2	-	2	-	-	-
Miscellaneous . . . . .	-	-	1	2	1	2	3	3	1	2	-	1	1	1	1

TABLE II

CASES WITHDRAWN OR SETTLED EITHER IN COURT OR OUTSIDE, 1889-1903<sup>1</sup>

	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903
Facilities, reasonable . . . . .	1	-	-	2	-	1	1	-	2	2	-	4	1	3	2
Postmaster-General, applications concerning . . . . .	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-
Preference, undue . . . . .	-	-	1	-	2	2	2	-	2	2	2	-	-	2	15
Rates, legality of . . . . .	-	1	-	-	-	-	-	2	3	-	-	-	-	-	-
Rates, through . . . . .	-	-	-	-	-	-	1	2	2	-	1	1	-	1	-
Rates, unreasonable . . . . .	-	-	-	-	-	-	2	16	20	19	8	1	4	30	-
Sidings, rent (demurrage) . . . . .	-	-	-	-	-	-	-	2	2	-	-	-	-	1	1
Sidings, rebate from sidings' charge . . . . .	-	-	-	-	-	1	2	1	3	2	3	1	-	-	-
Sidings, services on, charges for . . . . .	-	-	-	-	-	-	-	1	2	-	-	1	-	-	-
Railways, differences under special acts, etc. . . . .	-	-	1	-	1	1	-	2	-	2	-	1	-	-	-
Workmen's trains applications . . . . .	-	-	-	-	-	-	-	-	-	12	1	3	1	-	-
Water Act, Metropolitan (1897), applications . . . . .	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-
Miscellaneous . . . . .	-	-	-	-	-	2	-	2	1	-	-	1	1	-	-

<sup>1</sup> In various cases a number of points are dealt with. In constructing the table, I have selected the most important point in each case.

TABLE III  
CASES APPEALED FROM THE RAILWAY AND CANAL COMMISSION, 1889-1904<sup>1</sup>

YEAR	NAME OF CASE	APPEALED BY	POINT INVOLVED IN APPEAL	RESULT
1890	<i>Taff Vale Ry. Co. v. Barry Docks &amp; Ry. Co.</i>	Defendant	Differences under special act	Com. sustained.
1891	<i>Sowerby &amp; Co. v. Great Western Ry. Co.</i>	Plaintiff	Terminal charges.	"
1891	<i>Rhymney Ry. Co. v. Bute Docks Co.</i>	"	Facilities between parties	"
1892	<i>Pickering, Phipps, et al. v. L. &amp; N. W. Ry. et al.</i>	"	Undue preference	"
1892	<i>Liverpool Corn Traders' Ass'n v. Gt. W. Ry.</i>	"	Undue preference	"
1894	<i>Northeastern Ry. v. Scarborough &amp; Whiby Ry.</i>	"	Construction of working agreement	"
1894	<i>Darlaston Local Board v. L. &amp; N. W. Ry.</i>	Defendant	Reasonable facilities	" overruled.
1895	<i>Mansion House Ass'n v. Gt. W. Ry.</i>	"	Unreasonable rates	" sustained.
1896	<i>Greenwood &amp; Sons v. Lanc. &amp; Yorkshire Ry.</i>	"	Rebate on sidings' charges	"
1896	<i>Watson, Todd &amp; Co. v. Midland Ry. &amp; L. &amp; N. W. Ry.</i>	Plaintiff	Terminal rebates	"
1896	<i>Mansion House Ass'n v. L. &amp; N. W. Ry.</i>	Defendant	Unreasonable rates	"
1897	<i>Dilcot, N. &amp; S. Ry. v. Gt. W. Ry. &amp; L. &amp; S. W. Ry.</i>	"	Through booking of passengers	"
1897	<i>Northeastern Ry. v. North British Ry.</i>	Both parties	Running rights	"
1898	<i>Salt Union v. North Staffordshire Ry.</i>	Defendant	Rebate on sidings' charges	"
1898	<i>Gt. Northern Ry. v. N. E. Ry. &amp; N. B. Ry.</i>	"	Differences under special act	"
1899	<i>Huntingdonshire County Council v. Simpson</i>	"	Reasonable facilities	"
1900	<i>Postmaster-General v. Corp'n of London</i>	"	Telegraph connections	"
1900	<i>Postmaster-General v. Corp'n of Glasgow</i>	"	Telegraph connections	"
1900	<i>Forth Bridge v. N. B. Ry., Gt. N. Ry., et al.</i>	Plaintiff	Through rates	"
1900	<i>L. T. &amp; S. Ry. v. Gt. Eastern Ry.</i>	"	Differences between railways	" overruled.
1901	<i>Cowan &amp; Sons v. North British Ry. (No. 2)</i>	"	Rebate on sidings' charges	" sustained.
1901	<i>Black &amp; Sons v. Cal. Ry., N. B. Ry., &amp; G. &amp; S. W. Ry.</i>	Defendants	Application for details of plaintiffs' profits to use in suit	"
1901	<i>Cowan &amp; Sons v. North British Ry. (No. 3)</i>	Defendant	Reasonable facilities	" { sustained. <sup>2</sup> overruled. <sup>2</sup>
1901	<i>Huntington et al. v. Lanc. &amp; Yorkshire Ry.</i>	Plaintiff	Ownership of a siding	" sustained.
1901	<i>Rhymney Ry. v. Great Western Ry.</i>	"	Differences between parties	"
1901	<i>Gt. Western Ry. v. Metropolitan Ry.</i>	Defendant	Differences between parties	"
1902	<i>Crompton &amp; Co. v. Lanc. &amp; Yorkshire Ry.</i>	"	Rebate on sidings' charge	" { sustained. <sup>2</sup> overruled. <sup>2</sup>
1902	<i>Vickers, Sons &amp; Maxim v. Midland Ry. et al.</i>	"	Rebate on sidings' charge	" { sustained. <sup>2</sup> overruled. <sup>2</sup>
1902	<i>London &amp; India Dock Co. v. Gt. Eastern Ry. &amp; Midland Ry.</i>	Defendants	Power to propose through rate	"
1902	<i>Lanc. Brick &amp; Terra Cotta Co. v. Lanc. &amp; Yorkshire Ry.</i>	"	Connection of siding with railway	"
1902	<i>Gt. Western Ry. v. Metropolitan Ry.</i>	Defendant	Difference between parties	"
1902	<i>Mold &amp; Denbigh J'u Ry. v. L. &amp; N. W. Ry.</i>	Plaintiff	Difference between parties	"
1902	<i>Abram Coal Co. v. Gt. Central Ry.</i>	Defendant	Undue preference	"
1903	<i>London &amp; India Docks v. Midland Ry. &amp; Gt. Eastern Ry.</i>	Plaintiff	Refusal of proposed through rate	"
1903	<i>Great Western Ry. v. Postmaster-General</i>	"	Compensation for mail	"
1903	<i>Ackers, Whitley &amp; Co. v. Gt. Central Ry.</i>	Defendant	Undue preference	"
1904	<i>North British Ry. v. Caledonian Ry.</i>	"	Running rights	"
1904	<i>Lancashire &amp; Yorkshire Ry. v. Wright</i>	Plaintiff	Point of law	" overruled.

<sup>1</sup> The official report of cases for 1904 is not yet available.

<sup>2</sup> In part.

## XXVI

### RAILWAY REGULATION IN FRANCE<sup>1</sup>

THE railway policy of France is based on the view that railways should be exploited, not by the State, but by strong independent companies under strict government control. National purchase has again and again been considered, but has always been rejected. When last it was proposed in the French Parliament that the State should buy out four of the large railway companies, one hundred Chambers of Commerce voted against, and one only for, the proposal. While the companies are encouraged to earn large profits,<sup>2</sup> they are never allowed to compete with one another, or to invade one another's territory, and their arrangements for sharing traffic or earnings constantly receive official sanction. The State has refrained from dictating their tariffs, and confined itself to exercising a veto over those which they propose. Under the Railway Conventions of 1883, as under those of 1859, the government has no power either to fix or to alter rates. The proposal of a rate must emanate from one of the companies, but before taking effect it has to be approved by the Minister of Public Works.

The official machinery by which this control over rates is exercised consists of three parts: a salaried corps of expert officials for gathering information; a large nonsalaried committee made up of high officials, members of the legislature, and representatives of the business community, to give advice

<sup>1</sup> From the *Quarterly Journal of Economics*, Vol. XX, 1906, pp. 279-286. Further details are given in translations from Colson's "Abrégé de la Législation des Chemins de Fer, etc.," in Hearings before the Senate (Elkins) Committee on Interstate Commerce, 1905, Vol. V, Appendix, pp. 265-297.

<sup>2</sup> M. Pelletan, in his report of May 12, 1889, pointed out that French railway shares paid from 10 to 24 per cent of their original cost; since then there have been some increases in dividends.

based on that information; and, lastly, the Minister who acts on that advice.

The permanent officials who investigate and report on all questions concerning rates number 68, and cost the State 400,000 francs a year; that is, 10 francs for each kilometer of railway at present in operation.<sup>1</sup> Of this amount 258,500 francs represent the salaries of the chief experts, 32 in number.<sup>2</sup> At their head, receiving 20,200 francs a year, is the Director of Commercial Supervision (*Directeur du Contrôle Commercial*), who studies the tariffs and commercial workings of all the French companies. Under his orders are the General Supervisors of Commercial Exploitation (*Contrôleurs Généraux de l'Exploitation Commerciale*), each of whom has similar duties in respect to a single railway, receives 11,400 francs a year, and is assisted in his work by one Principal Inspector and several Special Inspectors. To each railway is assigned one Principal Inspector (*Inspecteur Principal*) of Commercial Exploitation, receiving 8000 francs a year, and from three to five Special Inspectors (*Inspecteurs Particuliers*), each of whom receives from 6500 to 5500 francs a year. These inspectors are all under the orders of the General Supervisor in charge of that particular railway.

There is at the Ministry of Public Works a bureau of Railway Direction, one of the divisions of which investigates tariffs and charges, and the head of which is known as the Director of Railways (*Directeur des Chemins de Fer*). This high official acts as counselor to the Minister on all points connected with railway administration.✓

But the Minister's chief adviser is the Consultative Committee of Railways (*Comité Consultatif des Chemins de Fer*) over which he presides, and which examines questions of rates as well as all others affecting the relations between the railway companies and the State. The organization of this Committee has been several times changed. In its present form, which

<sup>1</sup> The 40,000 kilometers "of general interest" are alone to be counted, since tariffs of local lines are, as a rule, passed upon by the prefects of the several departments.

<sup>2</sup> M. Sibille's Report on Budget of 1905 (*Ch. des Députés*, No. 1962), pp. 148, 183.

dates from 1898, it has 100 unpaid members, 10 *ex officio* and 90 appointed for two years by the President of the Republic. The present membership consists of 36 government officials (6 *ex officio*), 34 members of the legislature (4 *ex officio*), and 30 men holding no political office. A combination is thus secured of administrative, legislative, and general opinion.

Among the officials are the Director General of Customs, a brigadier general on the general staff, the Directors of Forests, of Agriculture, of Commerce, and of Labor, the Director of Roads, Navigation and Mines, the Director of Commercial Supervision, the Director of Railways, and five other members of the Council of State. Among these last is M. Picard, well known as the author of the two principal works on French railways, who, as vice chairman, presides over the Committee in the absence of the Minister; while M. Colson, another member, is almost equally well known for his book, *Transports et Tarifs*, and for the articles on Transportation which he contributes to the *Revue Politique et Parlementaire*. Both these officials have heretofore filled the post of Director of Railways.

Among the Deputies MM. Baudin, Barthou, Bourrat, and Sibille, and among the Senators M. Waddington, are specially conversant with railway problems, the first two being ex-Ministers of Public Works, and the three others having written elaborate reports on various railway questions.

In the general group we find twelve presidents or members of Chambers of Commerce (Paris, Lille, Hâvre, Lyons, Bordeaux, and Marseilles being among the cities represented), six presidents or members of national Agricultural Societies, two workmen, the Governor of the Bank of France, seven business men or civil engineers, two of whom represent internal navigation, one judge, and one representative of the International Railway Congress. This last member, M. Griolet, is also vice chairman of the Railway du Nord, and is the only railway official belonging to the Consultative Committee.<sup>1</sup>

<sup>1</sup> For further particulars, see J. de la Ruelle, *Contrôle des Chemins de Fer* (Paris, 1903), p. 218, and for the names of present members, see *Annuaire du Min. des Travaux Publics*, 1905, p. 34.

General meetings of the Committee are seldom held, most of its business being transacted by its "permanent section," a subcommittee of 40 members (4 *ex officio*, 36 annually chosen by the Minister), which meets at least once a week. This "section" comprises twelve Senators and Deputies, six representatives of commerce, industry, and agriculture, three civil engineers, two workmen, and the member of the Railway Congress, besides sixteen of the government officials. Matters of importance may be referred to the whole Consultative Committee by the Minister, or by the Vice President either on his own initiative or upon the request of five members of the "section."

When a company wishes to introduce a new rate or to change an old one, the regular procedure is the following. The text of the proposed rate must be posted up or otherwise advertised in the company's stations, and sent to the Minister of Public Works, to the Director of Commercial Supervision, to the Prefects of departments, and to the Chambers of Commerce of districts affected by the rate. The Chambers of Commerce and the Prefects are expected to forward to the Minister in writing any protests or comments which they may wish to make.

The proposal is then carefully examined by the General Supervisor of Commercial Exploitation in charge of the railway proposing the rate, whose duty it is to report thereon. In this task he is assisted by the Principal Inspector and the several Special Inspectors of the railway in question. These officials are instructed personally to inform themselves as to the needs of trade and the views and wishes of business men. Having done so, they prepare a written report, which must embody "a thorough discussion of the prices proposed, and a comparison between them and other tariffs in force on the French railways at the various shipping points with which this traffic competes."<sup>1</sup> The report is submitted to the Director of Commercial Supervision, who transmits it with or without revision to the Minister of Public Works. As soon as these documents reach the Minister he lays them before the Consultative Committee. If this Committee makes a favorable report, the Minister approves the

<sup>1</sup> Ministerial Circular of July 16, 1880.

rate, and it usually goes into effect within fifteen days from that date. Thus on March 25, 1904, a proposed addition to one of the special tariffs of the Railway de l'Ouest was duly advertised. It was officially approved on the 11th, and took effect on the 26th of April, 1904.<sup>1</sup> No rate can become operative until one month after having been advertised. In order to keep the public fully informed, the text of the proposal and that of the ministerial approval are published in the *Journal Officiel*.

The ministerial sanction given to any rate may be withdrawn at any time, and, in accepting a rate proposed, the Minister may attach to his approval certain conditions to which the company must assent before the rate can take effect. A passenger rate cannot be increased till it has been in force three months, nor a freight rate till it has been in force one year.

The interval between the proposal and the approval of a rate, which is normally one month, is sometimes a great deal longer. Should it, however, be necessary to put a rate into immediate effect, the Minister often grants a provisional "homologation," whereby the rate becomes at once available pending its formal consideration and approval. ✓

The French tariffs that have been thus approved are published in the two large folio volumes of the *Recueil Chaux*, a revised edition of which is issued quarterly. The edition bearing date July, 1905, but not actually issued till last September, has 1712 pages in the volume containing the tariffs for slow freight, and 980 pages in that containing the rates for fast freight and passengers. These manuals would be less bulky if they embodied only the tariffs of the large companies, but they also include the rates of all the light railways, narrow-gauge lines, and tramways throughout France. In the intervals between the editions of this work newly approved rates are published in a special weekly bulletin, as well as in the *Journal Officiel*. Thus the authorized railway tariffs are at all times readily accessible to the French public.

Since the French regard railway tarification from a commercial standpoint, their tariffs, like those of England and the

<sup>1</sup> *Journal Officiel*, April 3 and 25, 1904.

United States, are based on the so-called "value" system, which consists in charging such rates as the traffic will bear. Their system of classification would take too long to explain. Suffice it to say that, in compliance with the demands made by the government in 1879, the classification and description of freight was made uniform on all the French railways by their reformed tariffs approved between August, 1884, and December, 1890. At the same time the number of reduced tariffs and special rates was much cut down, and the *Recueil Châix* considerably simplified. Since those reforms, however, the large family of special rates has continued to multiply, under the pressure of commercial needs, though the Consultative Committee is on principle opposed to them, and seeks, whenever possible, to procure in their stead reduced kilometric scales of rates drawn up on the Belgian differential plan, and applicable in any direction and on any line of the given railway.

In sanctioning a special rate, the Committee almost always insists, as a condition of approval, that intermediate stations shall also be entitled to it, and that a special rate, say from Toulouse to Orleans, shall be enjoyed as far as Orleans by goods shipped from Toulouse to points beyond Orleans.

The Minister of Public Works having no power to fix rates, the principal function of the Consultative Committee is to check unjust, discriminating, or capricious tariffication, and thus by degrees to produce throughout France an equitable system of rates. It often suggests to the companies what changes it deems desirable, and, though it can only suggest, yet the possession of its veto often enables it, when granting one of the companies' requests, to gain its own point as a *quid pro quo*. This influence is all the stronger because the authority vested in the Minister, and through him in the Consultative Committee, covers not only the commercial (i.e., rate-making), but also the technical and financial<sup>1</sup> sides of railway administration.<sup>2</sup>

<sup>1</sup> E.g. no railway company can issue bonds without the assent of the Consultative Committee and of the Minister.

<sup>2</sup> It is clearly to the companies' interest not to offend an authority on which they are in so many ways dependent. A different system of administration, interfering only in commercial matters, would be far from having the same influence (Colson, *Transports et Tarifs*, 1898, p. 350).

The Committee always declines to indorse any special rate favoring of undue preference or discrimination; for instance, a rate in favor of goods produced by a particular factory or of materials ordered by a particular contractor. It also rejects any rate calculated to draw away traffic from any other French railway or to ruin the business of coasting steamers or canal boats. Thus in April, 1899, a special rate of 15 francs on mineral waters shipped to Paris was requested by the P.-L.-M. Company. This rate was approved in April, 1900, but, the canal men of Roanne having pointed out that it was ruining them, the approval was withdrawn on August 24, 1901.

The Committee endeavors to adjust the tariffs enjoyed by competing industrial centers in such a way as to secure to each the natural advantages of its location. If, however, a particular place or industry has long had the benefit of certain special rates, and has thus acquired a quasi-vested right to them, the Committee will not allow them to be abolished without stipulating that they shall be reëstablished, "if within a year their disappearance gives rise to well-founded complaints."

A good illustration of the manner in which the Committee may obtain concessions from the companies is furnished by the negotiations leading up to the approval on October 27, 1900, of the new tariff of Accessory Charges (*Frais Accessoires*). The companies had for twenty-five years been urging that the registration fee for luggage should be raised to 15 centimes, while the Committee still insisted on maintaining it at 10 centimes. The Committee also wished that the companies should guarantee to the consignor of freight using the lines of several companies the route offering the cheapest combination of rates, even when not demanded by him, as they had been doing since 1883 for the consignor of freight using the lines of a single company. The companies, on the other hand, had been anxious to suppress certain special rates affecting about 1350 kinds of freight. The matter was settled by a compromise, in which the companies waived their claim for the 15-centime registration fee, and consented to guarantee the cheapest route in the manner men-

tioned, while the Committee advised the Minister to sanction the suppression of the special rates on the ground that they were practically obsolete.<sup>1</sup>

In Algeria and in the Regency of Tunis the service of commercial supervision has been organized in a manner practically identical with that above described, and proposals of rates are referred either to the Minister of Public Works in Paris or to the Resident-General in Tunis. This latter personage is assisted by a consultative committee of eight or ten members most of whom are officials connected with the administration of the Regency.

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<sup>1</sup> Arrêté du 27 October, 1900, Impr. Nat., 1902.

## XXVII

### RAILROAD OWNERSHIP IN GERMANY<sup>1</sup>

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THE Prussian railway administration was reorganized on April 1, 1895.<sup>2</sup> Previous to that time there had existed two distinct official bodies, or "resorts," immediately below the minister of public works. The latter was then, and is now, the executive head of the railway administration, and the two bodies subordinated to him were known as Eisenbahndirektionen and Eisenbahnbetriebsämter, respectively, the one having direct charge of the operation of the railways and the other performing purely administrative functions. Of the Direktionen there were 11, and of the Betriebsämter 75. The functions of both of these have now been consolidated in the royal State railway directories, of which 20 have been created,<sup>3</sup> with their seats at Altona, Berlin, Breslau, Bromberg, Cassel, Cologne, Danzig, Elberfeld, Erfurt, Essen, Frankfurt a. M., Halle a. S., Hannover, Kattowitz, Königsberg, Magdeburg, Münster, Posen, St. Johann-Saarbrücken, and Stettin. Each directory is composed of a president, appointed by the King, and the requisite number of associates, two of whom, an Ober-Regierungsrath and an Ober-Baurath, may act as substitutes of the president under the direction of the minister. Each directory has complete administrative control over all the railways within its limits, although the subordinate civil administrative organs of the State, such as the Oberpräsident, Regierungspräsident, and Landrath, have certain powers in the granting of concessions, police regulations,

<sup>1</sup> From *Annals of the American Academy of Political Science*, 1897, Vol. X, pp. 399-421.

<sup>2</sup> Only a few minor changes have been introduced since.

<sup>3</sup> Since this was written (1897) the Hessian railways have been associated with the Prussian and the number of directories increased to 21.

etc. The directory decides all cases arising out of the action of special and of subordinate branches of the administration; and, representing the central administration, it may acquire rights and assume responsibilities in its behalf. The directories may be characterized as general administrative organs, one of whose great functions is the proper coördination of all the parts of the railway system.

Below and subordinated to them are special administrative organs, upon whom falls the duty of local adaptation and supervision. There are 6 classes of these local offices, and their names indicate in a general way their functions: operating, machine, traffic, shop, telegraph, and building offices or *Inspektionen*, as they are called. Shortly before the new system went into operation the minister of public works issued special business directions for each class of offices. The contents of each of these ministerial orders may be grouped under 3 heads: (1) the position of the office in the railway service; (2) its jurisdiction in matters of business; (3) general provisions. To give a detailed analysis of the functions of the local offices is out of the question here. It should be added, however, that all phases of the service, whether from the point of view of the railways or of the public, are carefully provided for. Thus one of the foremost duties — “*die vornehmste Aufgabe*” — of the local traffic office is to maintain a “living union” between the railway administration and the public. For this purpose the chief of the office is in duty bound, by means of numerous personal interviews and observations, to inform himself concerning the needs of the service in his district, to investigate and to remedy complaints and evils without delay, and to take such measures as will secure the most efficient service. It is also one of his duties to inform the public concerning the organization and administration of the railways, so as to avoid idle complaints. This single provision in the rules governing one of the local offices illustrates the spirit of them all.

Private railways, which before April 1, 1895, had been supervised by a special railway commission, are now subject to the jurisdiction of the president of a directory and his alternates.

This was another step toward greater unity in the system. The directories upon whom the supervision of the private roads devolves are those at Altona, Berlin, Breslau, Cassel, Cologne, Elberfeld, Erfurt, Essen, Frankfurt a. M., Halle, Hannover, Königsberg, Magdeburg, Münster, St. Johann-Saarbrücken, and Stettin. As there are 20 directories, and only 16 supervise private railroads, it is evident that jurisdictions for private roads are not identical with those of directories. Nor does each directory have an equal number of miles of private or State roads within its jurisdiction. This depends largely upon the geographical distribution of the railways and upon the intensity of the traffic. Thus, the Berlin directory supervises 587 kilometers of State roads, while Halle has 11,884 kilometers. The other directories lie between these two extremes. It may be added that on April 1, 1895, the private roads represented together only 2200 kilometers (not including Anschlussbahnen, and 71 kilometers rented to private parties) against 27,060 kilometers<sup>1</sup> of State roads, of which 10,479 kilometers contained two or more tracks.

All Prussian railways, then, whether State or private, are subject to the jurisdiction of a carefully graded administrative system — local, intermediate, and central — each part of which is connected with every other part in such a manner that, without interfering with the ability to act promptly in cases of emergency, every act not only finds its responsible agent, but the central organ can also make its influence felt in the remotest branch of the system and at the same time not transcend its responsibility to the public.

*Advisory councils and other bodies.* Whether we regard the interests of the railways and of the public as identical or not, there are certainly times when harmony between the two does not exist. This may be due to the failure of each to understand the other, or to some wrongful act which one of them may have committed. Whatever the cause, if such circumstances do arise any organ which can promptly and prudently remove the friction performs an admirable service in the interests of public traffic. Such an agent is found in Prussia in the advisory councils and

<sup>1</sup> Increased to 37,161 kilometers by the close of 1900.

other bodies which coöperate with the legally responsible parts of the railway administration. These councils are created by law, and are required to meet regularly for the purpose of coöperating with the State administration upon all the more important matters pertaining to the railway traffic, especially time-tables and rate schedules. ✓

The first German advisory council was organized in the federal domain of Alsace-Lorraine. Through an impulse given by the chamber of commerce of the city of Mülhausen a conference between the representatives of the chambers of commerce of Alsace-Lorraine and the general imperial railway directory at Strassburg was held at Mülhausen on October 21, 1874. Organization, composition, and functions of the council were agreed upon during the first session. Originally its membership was confined to the chambers of commerce of Alsace-Lorraine, but later representatives of the various agricultural and industrial bodies were also admitted. All matters falling within the domain of at least 2 chambers of commerce could be brought before the council.

The proceedings of this conference made such a favorable impression upon the federal railway commissioner that he attempted, although without immediate success, to induce the other German railways, both State and private, to assist in this movement toward a closer union and a better understanding between the commercial and railway interests by instituting similar councils. The circular letter of the commissioner, addressed to the railways on January 11, 1875, is one of the most significant steps in the development of the councils.

“This arrangement,” says the letter, “primarily strives to establish an intimate connection between the places intrusted with the administration of the railways and the trading classes. It will keep the representatives of the railways better informed as to the changing needs of trade and industry and maintain a continued understanding between them; and, on the other hand, it will impart to commerce, etc., a greater insight into the peculiarities of the railway business and the legitimate demands of the administration, and consequently, by means of earnest and

moderate action, it will react beneficially upon both sides through an exchange of views."

This statement sounds the keynote of the whole movement. For a time the railways were not very ready to respond, and the movement made little progress until the policy of the State to purchase private railways was about to be inaugurated. The Prussian Landtag made its approval of the first bill for the nationalization of railways dependent upon certain wirtschaftliche Garantien (economic guarantees) which it demanded of the Government. A resolution to this effect was adopted by the Landtag in 1879. The ministry of trade and industry had already taken active steps during the previous year. In 1880 a bill embodying the motives of the resolution of the Landtag was introduced, and after having undergone various changes and modifications was approved and published as the law of June 1, 1882.

Prussia was thus the first, and, up to the present time is the only,<sup>1</sup> country in which advisory bodies of this nature were placed upon a legal basis. The law is entitled Gesetz, betreffend die Einsetzung von Bezirkseisenbahnräthe und eines Landeseisenbahnraths für die Staatsbahnverwaltung. As the name indicates, it creates a class of advisory boards or councils known as Bezirkseisenbahnräthe (circuit councils), and one national council, called Landeseisenbahnrath. The national council is the advisory board of the central administration, and the circuit councils of the railway directories. Since the reorganization of the railway administration, April 1, 1895, 8 circuit councils have been in existence, with their seats in Bromberg, Berlin, Magdeburg, Hannover, Frankfurt a. M., Cologne, Erfurt, and Breslau. It will be remembered that there are 20 directories, so that a circuit council serves as an advisory board for more than one directory. The national council is composed of 40 members, holding office for 3 years. Of these, 10 are appointed and 30 are elected by the circuit councils from residents of the province or city, representing agriculture, forestry, manufacture, and

<sup>1</sup> Japan and Switzerland have since then established similar councils on a legal basis.

trade, according to a scheme of representation published in a royal decree. Of the appointed members, 3 are named by the minister of agriculture, domains, and forests; 3 by the minister of trade and industry; 2 by the minister of finance; and 2 by the minister of public works. An equal number of alternates is appointed at the same time. Direct bureaucratic influence is guarded against by the exclusion from appointment of all immediate State officials. The elective members are distributed among provinces, departments, and cities, by the royal order to which reference has just been made, and both members and alternates are elected by the circuit councils. The presiding officer and his alternate or substitute are appointed by the King. In addition, the minister of public works is empowered to call in expert testimony, whenever he may think it necessary. Such specialists, as well as regular members, receive for their services 15 marks (about \$3.60) per day and mileage.

The national council meets at least twice annually, and deliberates on such matters as the proposed budget, normal freight and passenger rates, classification of freight, special and differential rates, proposed changes in regulations governing the operation of railways, and allied questions. It is required by law to submit its opinion on any question brought before it by the minister of public works; or, on the other hand, it may recommend to the minister anything which it considers conducive to the utility and effectiveness of the railway service. Its proceedings are submitted regularly to the Landtag, where they are considered in connection with the budget, thus establishing "an organic connection" between the national council and the parliament. In this way the proceedings are made accessible to every one, and an opportunity is given to approve or disapprove what the council does, through parliamentary representatives. The system is one of reciprocal questioning and answering on part of the minister of public works, the national council, and the parliament.

The circuit councils are equally important and interesting. Since January 1, 1895, 9 of these have been in existence. Their membership, which varies considerably with the different

councils, was fixed by the minister of public works in December, 1894. Any subsequent modifications which may have been made have no bearing on what we are considering here. At that time the council at Magdeburg had only 24, while that at Cologne had 75 members. The nature of their composition can best be illustrated by presenting an analysis of the membership of one such council. The council of Hannover, comprising the railway directories of Hannover and Münster-Westphalen, seems to be a fair type. In that council we find 1 representative from each of the chambers of commerce of Bielefeld, Geestmünde, Hannover, Harburg, Hildesheim, Lüneburg, Minden, Münster, Osnabrück, Ostfriesland and Papenburg, Verden and Wesel; 1 representative from each of the following corporations or societies: Society of German Foundries in Bielefeld, German Iron and Steel Industrials in Ruhrort, Craftsmen's Union of the Province of Hannover, Branch Union of German Millers in Hannover, Union of German Linen Industrialists in Bielefeld, Society for Beet Sugar Industry in Berlin, Society for the Promotion of Common Industrial Interests in the Rhine Country and Westphalen, in Düsseldorf, and the Society of German Distillers in Berlin; 4 representatives from the Royal Agricultural Society in Celle; 3 from the Provincial Agricultural Society for Westphalen, in Münster; 1 from the German Dairy Society in Schladen and Hamburg, the Society of Foresters of the Hartz, the North German Foresters in Hannover, the Union of Forest Owners of Middle Germany in Birnstein, and from the Society for the promotion of Moor Culture in the German Empire; and, lastly, 1 from the Society of German Sea Fishers in Berlin. This one illustration is probably sufficient to show the thoroughly representative character of the circuit councils. If a circuit comprises railways covering territory of other German States, the chambers of commerce, industrial, and agricultural societies of such territory may also be represented in the council. The minister of public works has power to admit other members, and frequently does so when the nature of the questions upon which the council deliberates makes it desirable. Thus, at a meeting in which the rates on coal and coke — to be noted hereafter — from

the Rhenish mining districts to the seashore were to be considered, there were present an Oberpräsident, accompanied by an assessor, a deputy of a Regierungspräsident, a Landrath (these three are civil administrative officers presiding over a province, circuit, and department, respectively), a representative of the Upper Mine Office at Bonn and at Dortmund, of the Royal Mine Directory at Saarbrücken, of the Royal Railroad Directory at Hannover, of the Dortmund and Gronau and Enscheder Railroad Company (private), in addition to the regular representatives and voting members.

The circuit council, as has been indicated above, stands in a relation to the railway directory similar to that of the national council to the minister. The law makes it mandatory upon the directory to consult the circuit council on all important matters concerning the railways in that circuit. This applies especially to time-tables and rate schedules. On the other hand, the council has the right, which it freely exercises, of making recommendations to the directory. In case of emergency the directory may act according to its own judgment independently of the council, but it is required to report all such cases to the standing committee of the council and to the council itself. This provision supplies the elastic element, which enables the railways to meet momentary wants. The standing committee of the council is an important body. It meets regularly some time before the full council holds its sessions, and its proceedings form the basis of the deliberations in the council. The committee receives petitions, memorials, and other communications. The bearers of these are invited to appear before the committee and to advocate their cause. Questions are asked and answered on both sides, and after all the questions have been presented the committee votes upon the petition or request, usually in the form of a resolution adopted by majority vote, recommending the council to accept or reject the demands made in the petitions. The action of the committee is reported on each question by a member designated for that purpose to the full council at its next session. While the decision of the committee is usually accepted by the council, it in no way binds

that body. Before the council meets, each member has an opportunity to examine the arguments presented before the committee, and the facts upon which its decisions are based. If the advocates of the petitions before the council present new evidence, or if the recommendations of the committee are shown to be unsound, the council simply reverses the decision of the committee. Of the nature of these petitions I shall speak later.

These advisory councils have spread into Bavaria, Saxony, Württemberg, Hesse, Oldenburg, Mecklenburg-Schwerin, Austria, Italy, Russia, Denmark, Roumania, and, in a much modified form, into France. An examination of the councils in these countries shows the same principle underlying them all — the representation of all the different economic interests in the conduct of the railways. In composition and organization they are much alike. They owe their existence, however, except in Japan and Switzerland, not to law, but simply to administrative orders.

There are still other bodies which, although not created by law and not confined in their activity to Prussia, have long exerted a powerful influence throughout the Empire. Foremost among these stands the Generalkonferenz (general conference). Under its guidance the modern German system of rates, called Reformtarif, has been systematically developed. The general conference meets annually, and discusses matters relating to tariffs, fees, operating regulations, etc. Thus, at a recent meeting the conference disposed of no less than 53 different items, relating mostly to the classification of goods and the adjustment of rates, all of which, as in case of the circuit councils, had been previously considered in subordinate bodies whose deliberations lie at the basis of the proceedings in the general conference. It is composed of members representing all the German railways, and votes are distributed according to the number of miles of road the members each represent, and the total number of votes, increasing, of course, with the growth of the German system. At the meeting referred to, the total number of votes was 322, of which 51 were not represented. Of these 51, 28 belonged to roads having 1, 10 to those having 2, and 1

to those having 3 votes. The Prussian State railways had 139 votes, the Bavarian State railways 28, those of Saxony 16, the State roads of Alsace-Lorraine 11, the State roads of Baden 10, and so on down, the remainder representing the smaller State and private railways. These figures show the predominating influence of Prussia in the conference.

Bodies subordinate to the general conference have already been alluded to. These are the Tarif-Kommission and the Ausschuss der Verkehrsinteressenten (tariff commission and committee of those interested in transportation). The tariff commission is a standing committee whose members represent Prussian State roads, 2 Swiss roads, and 1 of the railways of Mecklenburg. It meets 3 times a year, and occupies itself with petitions and other communications from shippers. The committee of shippers (Verkehrsinteressenten) is composed of members representing agriculture, trade, and industry; and some of the matters brought before it are previously discussed by a subcommittee. Both of these bodies occupy themselves almost exclusively with freight rates and matters immediately connected with them. Out of 23 items brought before them during a 2 days' session in 1893, 22 were deliberated upon in joint session, although each body voted separately. The discussions in these sessions are so thorough that the recommendations made are, in the great majority of cases, approved by the general conference. Those conclusions of the commission which are adopted in the form of a declaratory statement become binding upon members unless protests are made. Subjects discussed in the conference and commission may, and frequently are, brought before the councils.

Among the various railway traffic and rate unions which might be mentioned none have exerted an influence on rates at all comparable to that which has been exercised by the Society of German Railway Administrations. Founded as a Prussian society in 1846, it became in quick succession a national and an international organization, embracing the railways of Germany, Austria, Hungary, Roumania, Luxemburg, Holland, Belgium, Bosnia, and Russian Poland. Both State and private railways are eligible to membership. A series of 8 standing

committees covers the special branches of the service, and if extraordinary matters arise they are referred to special committees. Questions upon which the society is to act must be published at least 3 months preceding the meeting. The proceedings have long been published in an official paper, and, through custom, exert a powerful influence. The attainment of uniformity in construction and other matters has been one of its great aims. In Europe the necessity for international uniformity is much greater than with us, and in the domain of freight traffic this has been well attained by means of an international treaty, signed at Berne on October 14, 1890, by diplomatic agents from Belgium, France, Germany, Italy, Luxemburg, Holland, Austria, Hungary, Russia, and Switzerland. It is officially known as the "Convention internationale sur le transport de marchandises par chemins de fer."

The history of this international agreement dates back to 1874, the same year that Mülhausen inaugurated the movement which led to the institution of advisory councils. In that year 2 Swiss citizens, residents of Bâle, directed to the governments of the surrounding States inquiries concerning their willingness to enter into an international freight treaty. Drafts of such a treaty were worked out in both Germany and Switzerland and discussed in a congress at Berne in 1878. This congress submitted the draft of a treaty to the different governments for examination. Many objections were raised and improvements made. Further conferences, dealing also with questions of technical uniformity, were held in 1882 and 1886, and on October 14, 1890, the draft approved by the third congress was formally drawn up as a treaty and approved. The original treaty has been modified and supplemented in various ways, partly by agreements among all these countries and partly by agreements among several of them. Every 3 years, or sooner, if one fourth of the treaty-making States demand it, a general congress must be called together to consider improvements in the agreement.

As its name indicates, the Bernese treaty applies only to international freight traffic. Excepting articles the transportation

of which is regularly monopolized by the post offices of the contracting States, the treaty governs all shipments of goods from or through one of the States to another. It provides for uniform through bills of lading, prescribes routes for international traffic, fixes liability in cases of delay and loss, prohibits special contracts, rebates, and reductions, except when publicly announced and available to all, and prescribes certain custom-house regulations. Not the least important feature of the treaty is the creation of a central bureau, organized and supervised by the Swiss Bundesrath, with its seat in Berne. The duties of the bureau are five:

1. To receive communications from any of the contracting States, and to transmit them to the rest of them.

2. To compile and publish information of importance for international traffic, for which purpose it may issue a journal.

3. To act as a board of arbitration on the application of the countries concerned.

4. To perform the business preliminaries connected with proposed changes in the agreement, and, under certain circumstances, to suggest the meeting of a new conference.

5. To facilitate transactions among the railways, especially to look after those which have been derelict in financial matters. After notice has been given by the bureau, the State to which the railway belongs or by whose citizens it is owned can either become responsible for the debts of the road or permit the exclusion of the road from international traffic.

The expenses of the bureau are met by contributions of the contracting States in proportion to mileage.

The original agreement provided that any of the States might withdraw at the end of 3 years, on giving 1 year's notice. No such notice has ever been given. Any violation of the treaty can be punished in the courts, and a judgment having been rendered in one country the courts of the others are bound to assist in its execution, unless the decision conflicts with their own laws. But so far as the question of fact is concerned there is no appeal, and a German court is bound to accept the findings of a court in France. Germany, Austria, Hungary, Russia,

Switzerland, and, to a less extent, France have embodied provisions of the international code in their internal code, thus leading to unification beyond the limits of international traffic. To what extent the Bernese treaty may influence other phases of the national and international laws of the States of central Europe cannot well be foreseen. That States differing widely in forms of government, geographical position, and commercial interests have voluntarily made themselves amenable to a common code of law under these circumstances, again impresses one with the great power and many-sided influence of railways and the healthy development of closer international relations. The code is binding for a domain embracing nearly 3,000,000 square miles and 260,000,000 people. It ranks in importance with the international postal, telegraph, and copyright unions.

*Proceedings of advisory councils.* The leading features of the Prussian railway administration relating to rates have now been presented. It remains to illustrate by means of a few side lights from the proceedings how a part of the machinery acts. To convey a somewhat detailed view of the workings of the administrative organs directly concerned with the operation of the railways would unduly extend this paper; besides, it would be a little technical and not essential from the economic point of view. So we shall content ourselves with a brief account of some of the deliberations of the advisory and other bodies directly occupied with questions about rates. We shall save time by first obtaining a general idea of the German system of rates, for which purpose the general plan of the German reform tariff is here given :

#### GERMAN TARIFF SCHEME

1. Fast freight by the piece (express package freight).
2. Fast freight by the car load.
3. Piece goods (less than car loads).
4. General car-load class A 1, in shipments of at least 5000 kilograms.
5. General car-load class B, in shipments of at least 10,000 kilograms.
6. Special tariff A 2, in shipments of at least 5000 kilograms.
7. Special tariff I, II, III, in shipments of at least 10,000 kilograms.

The rates and what pertains to them are officially published in volumes not unlike our monthly magazines. This tariff scheme was first introduced in 1877, and through the influence mainly of the general conference it has become gradually more unified. It is obvious that the price of transportation of goods becomes less as they fall into a class farther down the list. The general car-load classes include goods of higher value not enumerated in any of the special tariffs, while the special tariffs I, II, and III embrace less valuable goods — their value falling by degrees — so that, generally speaking —

Special tariff I includes manufactured goods.

Special tariff II includes intermediate products.

Special tariff III includes raw materials and bulky goods of small value, such as certain waste products of gas factories, tanneries, paper factories, slaughterhouses, etc.

Special tariff A 2 is for goods belonging to special tariffs I and II in consignments below 10,000 and above 5000 kilograms. Goods belonging to special tariff III, but weighing less than 10,000, though at least 5000 kilograms, are transported at the rates of special tariff II. Then there are special rules and rates for such things as explosives, precious metals, vehicles, timber, fish, bees, meat, carrier doves, etc. Questions as to classification and the transference of goods from one class to another often arise. Here is a typical case:

The Chamber of Commerce of Lennep, a Rhenish city, petitioned the general conference to transfer manufactured horse-shoes — “raw hoof irons,” the Germans say, but which will here be designated simply as “horseshoes” — from special tariff I to special tariff II. A prominent business firm brought the question before one of the railway directories, and from there it was carried before the minister of public works. The minister consulted the permanent tariff commission and the committee of shippers, and finally the question was brought before the advisory councils.

The petitioners asserted that the manufacture of horseshoes was a new industry which, after many costly experiments, had only recently gained a firm foothold; that the trade had been

gradually growing, especially with the East, and that consignments had been sent to Russia, Italy, Austria, and other countries. In domestic trade the use of these horseshoes had been promoted by military authorities and street-car companies, because it lessened cost and relieved the blacksmith of much purely mechanical work. It enabled him to do better work more cheaply and with greater uniformity. The charge that it hindered the education of skillful blacksmiths was untrue.

Extensive statistical tables were introduced to show that the life of the industry depended upon the desired change in rates. Horseshoes were subjected to the same rates as fine iron and steel goods, while they properly belonged to intermediate products in special tariff II. Many of the factories were unfavorably located, and it was one of the highest duties of the State to promote industrial activity in regions which lie away from the great channels of trade, if it could be done without too great a sacrifice on part of the public. The desired concessions on part of the railroads would do this. It was unjust for the representatives of the Saxon State railways to assert, as they had done in the tariff commission, that the change in the classification of horseshoes would benefit the Rhenish industry only. Particularistic designs should not be suspected in a movement which was deeply rooted in economic necessities. The representatives of the Bavarian railways had considered fiscal reasons only, but these alone could not be decisive. It would not be businesslike for the State, in order to gain a temporary advantage, to sacrifice the very source of this gain. The railways would fare worse with high rates and a stagnant industry than with lower rates and a prosperous industry, and it was safe to assert that the desired change would, through an increased output, ultimately yield a greater income to the railways. The established system of rates would not be prejudiced; besides, when the question of system is balanced against that of the welfare of an industry the latter should prevail. The nationalization of railways was undertaken not for fiscal, but for economic reasons.

These were the main features of the petition. The petition, together with the records of previous deliberations on the

question, was brought before the standing committee of one of the circuit councils, by which the arguments were reviewed and new evidence introduced. Can these horseshoes be classed with rod iron? Are they an intermediate product? Could not plowshares and other articles demand a like change? What is the relation of the proposed change to the competition of Swedish iron? Is it true that the manufacture of horseshoes injures the craft of blacksmiths? Will it lead to a wider use of horseshoes and consequently to an improvement of agriculture? Such were the questions which the committee considered, and in response to which evidence of individuals and of societies was presented and subjected to the most rigid examination by specialists of various classes. From the committee the question went, as all questions considered by the committee do, before the full council, by which the report of the committee was reviewed and the horseshoe problem finally disposed of.

In a similar manner both the committee and council deliberated upon a petition of the Agricultural Society of Rhenish Prussia to place street sweepings in the special class with fertilizers and to reduce rates for shorter distances, because sweepings are used only within from 10 to 20 kilometers of the cities. The sweepings, it was asserted, had considerable value for agriculture, but that the difficulty of disposing of them had led some cities, notably Hamburg, to destroy them, thus depriving agriculture of a valuable agent. The composition and value of sweepings were examined and compared with other fertilizers now available, and the probable effect on the use of these considered. At the same session of the committee the change in time-tables for the summer period was regularly considered. Twenty-eight items were presented by the 14 different members, involving the time and frequency of passenger trains. All propositions which received a majority vote in the committee were brought, of course, before the full council.

In speaking of the composition of circuit councils reference was made to the question of rates on coal and coke. One of the railway directories brought before the standing committee of the circuit council a question first submitted in a petition of the

chamber of commerce of Bielefeld and subsequently indorsed, either in part or entire, by other organizations. The petition sought a temporary suspension of rates applicable to coke and coal sent from the Rhenish mining districts to the German seashore and to foreign countries. The suspension was to remain in effect until the prices in the coal market should return to a normal level.

In the consideration of this question the railway directory asked the committee and council to deliver an opinion on each of the following points: (1) Is the level of prices of coke and coal in the Rhenish-Westphalian district an abnormal one? (2) How must the prices of coke and coal be constituted in order that their level may be characterized as normal? (3) Should a permanent or temporary suspension of existing freight rates on coke and coal be recommended in order to effect a reduction of prices within the country? (4) What markets and what rates come into consideration in case of the temporary or permanent suspension of the rates in question? Shall the rates to foreign countries or also the rates to the seashore be changed? (5) What will be the probable effect of the proposed suspension of rates with reference to the sale and the price of coal and coke within the country?

In both the committee and in the council this problem was thoroughly dissected. Naturally there were differences. Abnormal prices were thought to be prices which include an element of profit out of proportion to the other constituents of price. On the one hand, a profit of 40 per cent was shown to exist, which, however, the experts present at once proved to be confined to two specially favored mines. In computations to ascertain the average selling price of coal there was a difference of several marks, which called forth the most rigid examination of the statistics and other evidence upon which the figures were based. The railway authorities showed that in 5 years the outlay for coal for locomotives had risen from  $4\frac{1}{2}$  to 7 per cent of their total expenses, while coal was still rising, and the coal men showed that their cost of production had risen because of advances in wages and expenses connected with insurance. It

was said that the present low rates for the transportation of coal had been introduced at a time when the coal industry had lain prostrate, and that now all other industries were suffering from the high price of coal, and that this advance in freight rates on coal and coke would check exportation and force down prices at home. A decrease in exportation was deplored by representatives of the German marine. In conclusion, among both the advocates and the opponents of the change, the opinion was expressed that there was reason for rejoicing in the thorough airing which this question had received; that it would lead to a better understanding of actual conditions, and that the coal industry would hereafter be more inclined to give due consideration to the condition of other German industries.

We come now to the consideration of a question which, perhaps even more forcibly than what has just been related, illustrates the comprehensiveness and fair-mindedness with which the railway authorities investigate the problems which affect wide economic interests. It is a petition submitted by the minister of public works to the national council for an expression of opinion. The printed evidence sent to the council alone covers about 500 folio pages. The problem submitted by the minister to the national council was this: Giving due consideration to the financial condition and the financial interests of the State, is it conducive to the general economic interests of the country (1) to introduce special reduced rates for all kinds of manures and fertilizers, irrespective of their nature, and, if so, what rates? (2) to introduce special reductions, and to what extent, for the transportation of (*a*) potassium salts — without discrimination or only “raw salts” — and phosphate; and (*b*) lime, in pieces or powdered, used for fertilization?

This was submitted in October, 1893. During March of that year the Herrenhaus had passed a resolution requesting the Government to introduce reduced special rates for fertilizers, a number of which were specified in the resolution. As stated in support of the resolution, the necessity for it lay in a cheapening of elementary utilities in order to maintain and promote agriculture and to increase the receipts of the railway from the

traffic with the interior. The same resolution had previously been adopted by the budget commission of the Landtag.

In response to this resolution the minister of public works sought information from the minister of agriculture, domains, and forests, and all the different agricultural experiment stations as to the occurrence and production of natural and artificial manures in different parts of the country, their price and value in use, and the nature of their application. Various commissions reported on the prices at which different fertilizers could be profitably used on different soils. The agricultural authorities showed where and to what extent these soils existed, and elaborate statistics of the railways and manufacturers told how much had actually been consumed. In this lay the vital issue — the capacity of the land to absorb profitably artificial manures, and the adaptability of the farmer to secure them. The national council said that a simple expression of its appreciation of the great economic significance of the use of both natural and artificial manures was not sufficient, but that an exact and conscientious examination of the effect of existing rates on the widest and most effective use of these was necessary. The deliberations of the committee of shippers, the tariff commission, the general conference, and the evidence submitted through the minister of public works were all thoroughly sifted by the standing committee of the national council before the case went before the full council for its final verdict.

Marbles, slates, and pencils even have been the object of the most serious deliberations of bodies so large and so dignified as the general conference and the national council. A memorial was addressed to one of the railway directories by the marbles, slate, and pencil industry of Thuringia, praying for a detariffization of these articles. The memorial gives a detailed account of the manufacture of marbles, slates, and pencils in Thuringia, and points out the places where it meets competition. It gives the cost of production, output, markets, prices, and the rates of transportation. The conditions of the laboring population are described, and the probable effect of a change in rates on their welfare is analyzed. (One may be pardoned for turning aside

to state that the laborers there engaged in the manufacture of slates, although exposed to the danger of completely undermining their health, receive often no more than 12 cents for a day's work of 18 hours.) The railway directory to which the memorial was sent addressed a letter of inquiry to the manufacturer of slates and pencils in Westphalia, whose business would be affected by the competition of Thuringia, calling for information on various points relating to this industry. This reply, together with the memorial and supplementary material, was submitted, through the minister of public works, to the national council.

One cannot read these documents without being impressed with the sincere desire of the railway authorities to do justice to all competitors and at the same time to make such changes as will better the conditions of people like these laborers in Thuringia. Whether or not the benefits arising from a change in rates would really accrue to these people was most carefully considered. The material submitted for consideration in deciding this question, as in case of the preceding questions, furnished evidence on every point which was raised. The moderation with which the petitions are drafted, the high plane upon which the debates are carried on, the thorough conscientiousness and judicial-mindedness with which the arguments are balanced in reaching a decision, all manifest a tone not unlike that of the decisions of our best courts of justice.

*Summary and remarks.* Prussia began with a general law. In this respect her history is the direct opposite of that of our States. Treating this general law as a nucleus, legislation, royal and ministerial orders and rescripts, and custom have developed two distinct groups of railway administrative organs, each representing distinct sets of interests, yet both working coöperatively. On the one hand we have a group of organs which represents railway interests in particular and which takes the railway point of view. The minister of public works, the railway directories, the general conference and tariff commission, and the Society of German Railways fall into this group, although the two latter stand in a measure on the border line, and none of them are confined exclusively to railway interests. Legal responsibility is

fixed in the first two. On the other hand, we have the national and circuit councils with their standing committees and the committee of shippers. These primarily take the social and economic point of view. They are not legally responsible for the conduct of the railways, but act as advisory bodies. They represent all the different interests of the nation, and through them every citizen has not only an opportunity but a right to make his wants known.

✓The marble and slate industry of Thüringen is relatively insignificant, yet of vital importance to the inhabitants of that section of the country. We have seen how complete an examination the petition of these people received at the hands of the highest authorities of the land. A fair and prompt hearing can be denied to no man, rich or poor. The railways are made real servants. All the administrative, legal, and advisory bodies are organically connected with one another and with the parliament. The lines may be drawn taut from above as well as from below. The elaborate system of local offices makes the system democratic, and the cabinet office and the directories give it the necessary centralization. The system presents that unity which a great business requires, on the one hand; and, on the other, that ramification and elasticity which the diverse and manifold interests of a great nation need for their growth and expansion.

In the formation of the councils the elective and the appointive elements are so well proportioned that it is impossible to "pack" any one of them. In this respect each body is a check on the other. It is easy to reproach the system with "bureaucracy," but to give adequate support to such a stigma would be an impossible task. We need only recall the analysis of the membership of one of the councils. Farmers, dairymen, fishermen, foresters, traders, miners, manufacturers — the long array of human professions have here their representatives. One representative may shape his views according to some particular philosophy of the State. Another will at once restore the balance by presenting the opposite. One member may make extreme statements about some branch of trade or industry. Another will

furnish exact information for its refutation. I doubt whether we can find anywhere in the world deliberative or administrative bodies in which the tone and the many-sidedness of the proceedings, the amount and variety of special knowledge displayed, and the logic of the debates present more points of excellence than in these councils and other bodies.

If from the point of view of the railways nothing should come of these proceedings — a most violent assumption — the information brought together would alone make them invaluable. No investigating committee of Congress or legislature ever had a better array of talent in every field at its disposal and under its control than is found in one of these councils or commissions.

It is not my purpose here to present new schemes, or to suggest ways and means by which existing institutions of our own country might be modified to perform similar functions. But let me ask whether, if our coal and iron industry, or fruit and cattle raising, or any other industry, were to receive an examination like that given to the Rhenish coal and coke industry, many things might not be different from what they now are? Imagine a well-organized assembly whose members could speak for the railways, for wheat and cattle, for fruit and steel, for forests and for mines, and is it not probable that the effects anticipated in the circular letter of 1875 would make themselves felt also in the United States? Both our railways and the public have repeatedly gone to extremes because neither understood the other. A system like the Prussian reveals the railways to the public and the public to the railways. It tends to remove blind prejudice and violent measures on both sides. By reflecting accurately the existing conditions, these conferences lead to tolerance, forbearance, and mutual concessions. The conclusions reached often have as salutary an effect on industrial situations as suspended judgments of our courts on defendants. It would be difficult to find in Prussia to-day, among the representatives of any class or interest, objections to the entire railway system which are not relatively insignificant. Both the public and the railways have gained more and more as the system has developed.

It will doubtless have been noticed that in the discussion of the council proceedings the decisions and their effect were not stated. It was my purpose simply to show the nature of the councils, and either a negative or an affirmative vote would throw no additional light on the problem. Without a full presentation of local details it could mean little to state that the council voted to place sweepings into the special tariff with fertilizers.

BALTHASAR H. MEYER

MADISON, WISCONSIN

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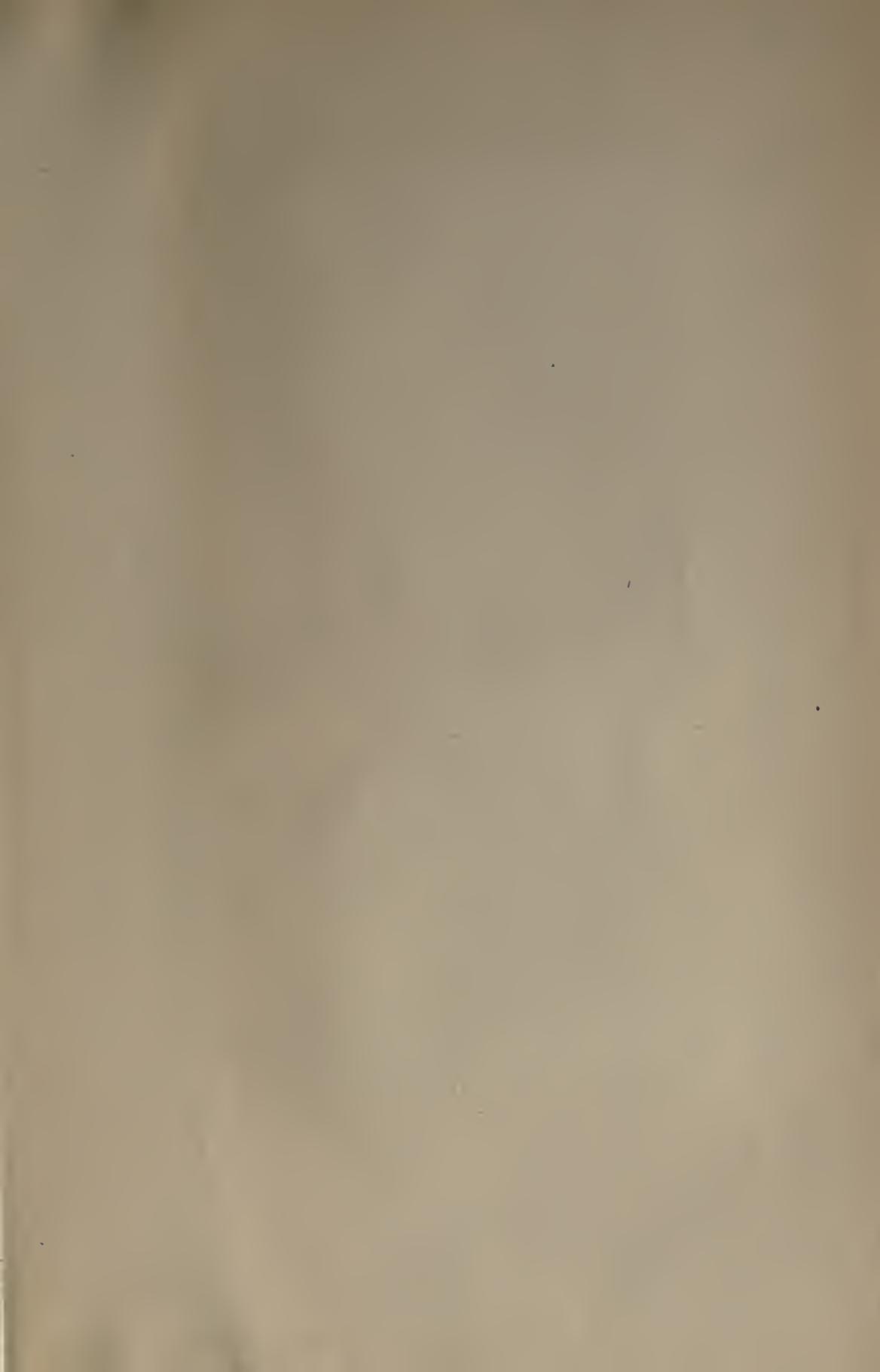
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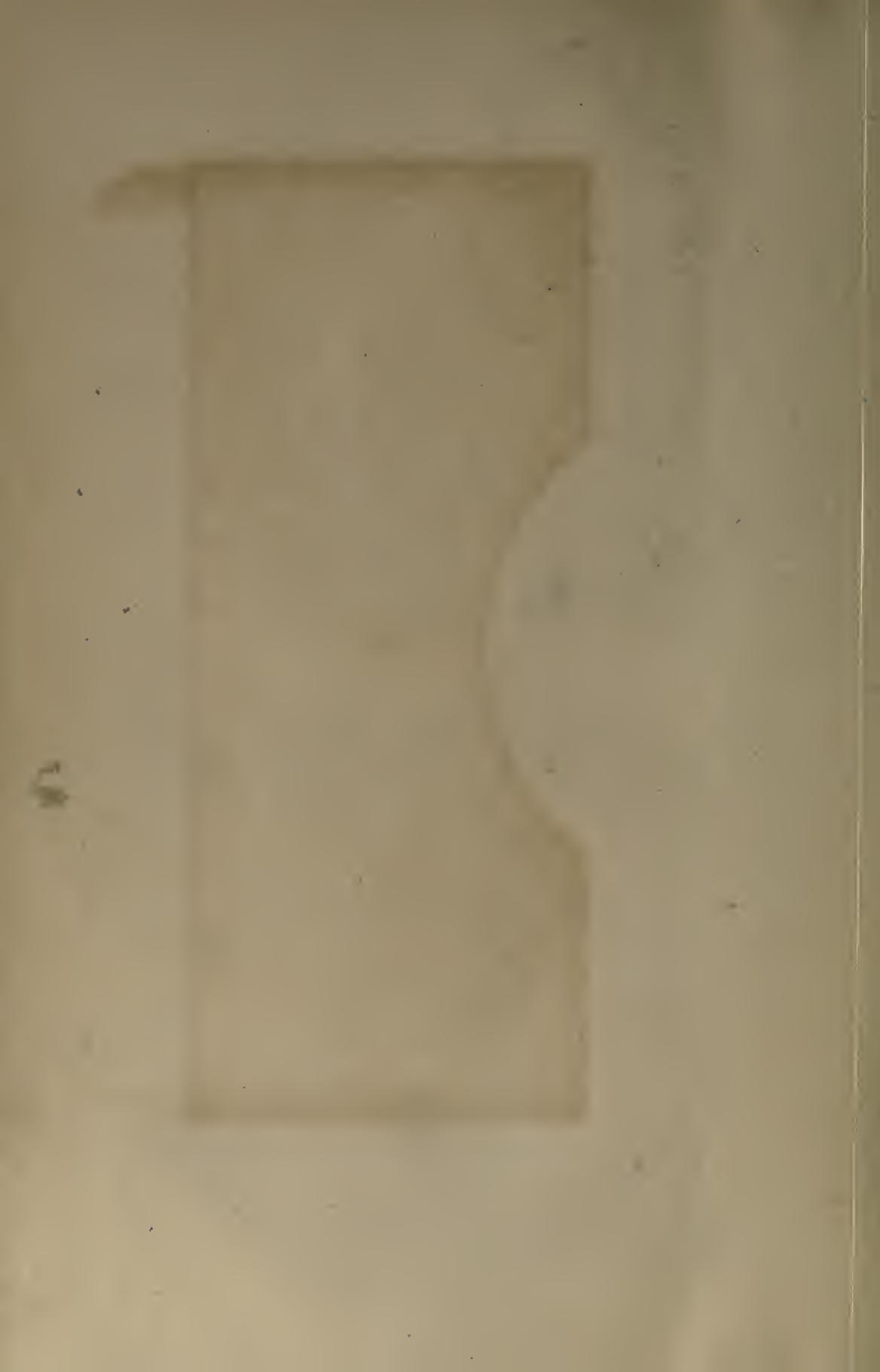
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