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# DISCRIMINATION BY RAILROADS AND OTHER PUBLIC UTILITIES—PREFERENCES TO PATRONS IN A GIVEN LOCALITY

I. BEVERLY LAKE\*

## INTRODUCTORY

Strictly speaking, there is no such thing as discrimination between localities in railroad or other utility rates. It is a convenient expression, but one should remember that preferences are given to patrons, not localities. By focusing attention on White and Brown instead of their cities, states or regions it is easier to confine the discussion of their rates to economic causes and results and to avoid muddying the waters with civic or regional pride and jealousy. White is usually damaged less by a preference to Brown who lives in another community than one to Green in the next block. It is true that when a preference is given because of location the indirect results, both beneficial and injurious, are more likely to extend to persons other than the patrons directly concerned. These indirect results are exceedingly difficult to measure and are apt to play a disproportionately important part in the condemnation or approval of the rate differential.

Section Three of the Interstate Commerce Act<sup>1</sup> makes it unlawful for any carrier to give any undue or unreasonable preference to any "particular person, locality, port, port district, gateway, transit point, region, district, territory," or to subject any of these to any undue or unreasonable prejudice. None of the quoted words after "locality" appeared in the original Act. In *Texas and Pacific Railway v. United States*<sup>2</sup> the Supreme Court held New Orleans and Galveston were "localities" so far as shipments of goods for consumption therein were concerned but were not "localities" with reference to shipments to them for export, so Section Three did not apply to the latter. Since no other section applied, the decision set the railroads free to discriminate, even unreasonably, between Brown shipping to England through Galveston and White shipping to England through New Orleans. Congress immediately amended Section Three to extend it to ports and gateways. Had Section Three stopped with a prohibition of any unreasonable preference or prejudice to any person the confusion over what is a locality and the

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<sup>1</sup> 49 F. C. A. §3(1).

<sup>2</sup> 289 U. S. 627, 638-646 (1933).

invitation to unreasonable discrimination would have been avoided. Nothing of great value would have been lost by the omission. The only thing which it seems possible to say has been accomplished by inserting "locality, gateway," etc., is to give a state or municipality the right to institute proceedings, but this could be accomplished by an express provision to that effect.

In the early days of railroad regulation, when economic conditions as well as laws were simpler, there was a legislative trend toward requiring equal rates over all parts of the carrier's line for freight as well as passengers, rates being measured only by distance and the nature of the commodity.<sup>3</sup> As railroads lengthened so as to serve a variety of regions, and began to intersect and to compete, so simple a solution was no longer practicable. The states abandoned these statutes and followed the lead of Congress. In Section Two of the Interstate Commerce Act<sup>4</sup> there is a remnant of this "passion for equality."<sup>5</sup> Section Two forbids charging any person more or less than is charged another for a like and contemporaneous service in transportation of a like kind of traffic under substantially similar circumstances and conditions, which last phrase the Supreme Court has confined to circumstances and conditions relating directly to the transportation.<sup>6</sup> Section Three applies when the transportations are between different termini. It does not require absolute equality but forbids only unreasonable preferences or prejudices. Even so there seems to be a carry-over of the older faith in a uniform rate per ton per mile, so that a difference in the termini of the two hauls is merely a fact to be considered in determining whether to allow a differential.

If we stop thinking of localities as injured or favored parties and think of locality only as a proposed reason for a preference, we are brought to the same sort of questions as when rates on different commodities are compared. What caused the railroad to make a higher charge to Brown shipping a carload of overalls from Atlanta to Chicago than to White shipping from Philadelphia to Chicago, the distance being about the same?<sup>7</sup> Does it cost more to haul a car from Atlanta to

<sup>3</sup> See: *Parker v. Great Western Ry.*, 7 Man. & G. 253, 135 Eng. Reprint 107 (1844); *Chi. & A. R. R. v. People*, 67 Ill. 11 (1873); *McGrew v. Mo. Pac. Ry.*, 230 Mo. 496, 132 S. W. 1076 (1910); *Chi. B. & Q. Ry. v. Anderson*, 72 Neb. 856, 101 N. W. 1019 (1904); *Hines v. Wilmington & W. R. R.*, 95 N. C. 434 (1886). For a discussion of early attempts by Continental European countries to solve the problem by such statutes see Gerrit L. Lansing, *Discrimination in Railroad Rates* (1886) 28 *POP. SC. MONTHLY* 494.

<sup>4</sup> 49 F. C. A. §2.

<sup>5</sup> See, *Holmes, J.*, in *Postal Telegraph Cable Co. v. Tonopah & Tidewater R. R.*, 248 U. S. 471, 475 (1919).

<sup>6</sup> *I. C. C. v. B. & O. R. R.*, 225 U. S. 326, 342 (1912).

<sup>7</sup> "The rate on work clothing in carload lots from Macon, Georgia, to Chicago, a distance of 817 miles, is \$15.60 per thousand pounds as compared with a rate of only \$11.20 from Philadelphia to Chicago, a haul of 814 miles. From Omaha,

Chicago? Is there a smaller volume of traffic between these cities so that each carload must earn a greater portion of the overhead cost of the railroad? Is there carrier competition at Philadelphia and none at Atlanta so that the railroad must give a lower rate to White or lose his business? Is the railroad trying to build up an industry in one locality at the expense of another, and, if so, is it doing this to attract more traffic to its line, or is it acting from motives not related to railroad income? What is the effect of the discrimination? Would Brown's rate be less if White's were raised? Does White use the preference to undersell Brown and monopolize the market? Does the differential tend to concentrate an industry in a small part of the country, and, if so, is this bad? Does it make for lower wages in Brown's factory so as to overcome the lower rate to White? Similar inquiries into cause and effect are appropriate in the case of a non-carrier utility. That is, what we should do in all cases is weigh the utility's explanation for the discrimination. We begin with the simple slogan, All persons should be served alike and at like rates. Then the utility points out differences in the patrons—big and small volume, nature of the use of the service, kind of business engaged in, weak and strong industries, influential or unimportant people, costly or less costly service, distance, locality, race, etc. The question is, Which of these differences in patrons justifies a difference in rates and how much difference?

Assuming the two patrons ship the same kind of goods in carloads, whether a case is governed by the absolute equality rule of Section Two of the Interstate Commerce Act or by the unreasonable preference rule of Section Three depends upon the meaning given "like service" in Section Two and "locality" in Section Three. In *Wight v. United States*,<sup>8</sup> the railroad hauled beer from Cincinnati to Pittsburgh for two dealers, one of whom had a warehouse on the siding of a rival road while the warehouse of the other was on neither. The first dealer was given free cartage from the station to his warehouse, thus, in effect, getting a lower rate. The court held this was governed by and a violation of Section

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Nebraska, to Columbus, Ohio, a distance of 748 miles, the comparable rate is \$18.70 per thousand pounds while the rate is \$15.20 from Fitchburg, Massachusetts, to Columbus, a distance of 743 miles. From Denver, Colorado, to Evansville, Indiana, a distance of 1,083 miles, the freight rate is \$29.40 per thousand pounds as compared with a rate of \$18.40 from New London, Connecticut, to Evansville, a distance of 1,088 miles." WENDELL BERGE, *ECONOMIC FREEDOM FOR THE WEST* (1946) p. 108.

For other illustrations of wide discrepancies in rates on the same commodity moving to a common market from Atlanta and practically equidistant points of origin in the East, see *Class Rate Investigation*, 1939, 262 I. C. C. 447, 567 (1945); and the plaintiff's trial brief in *Georgia v. Pennsylvania R. R., et als.*, in the Supreme Court of the United States, October term, 1945. Of course, many of these illustrations involve a comparison of rates of different railroads.

<sup>8</sup> 167 U. S. 512 (1897). See also, *Public Serv. Comm. v. N. Pac. Ry.*, 77 Wash. 635, 138 Pac. 270 (1914); and *S. A. L. Ry. v. United States*, 254 U. S. 57 (1920).

Two. Thus, the test is not the location of the two shippers' factories, but whether the services rendered by the railroad in return for the rate (the line haul) began and ended at the same places.

Even when the termini are different the services may be treated as if they were the same. Equality of rates where there is unequal service is as truly discrimination as unequal rates for equal services. In an early English case<sup>9</sup> it was said:

"The effect of such a scale of charges is to diminish the natural advantages which the position of the dealers at Ipswich, by reason of its greater proximity, gives them over the dealers at Peterborough in respect of traffic at Thurston, etc., by annihilating, in point of expense of carriage, a certain portion of the distance between Peterborough and those places; and just in proportion by which that natural advantage is diminished, an undue disadvantage is brought upon the complainants and other Ipswich dealers."

However it is not feasible to vary rates in accordance with each minute variation in the service or its cost. Even if it were possible to calculate the cost per mile of haul accurately and if all miles were uniform in cost, a strict distance tariff would be unworkable. The best illustration is perhaps in the case of street car fares. The person riding five miles pays the same as one riding five blocks. Again, it is customary to charge the same for water, electricity or gas throughout the city, though it is somewhat more expensive to serve the inhabitants of the outer edges. Switch districts are established by railroads at the large terminals, and cars are moved anywhere within such district for a flat rate.<sup>10</sup> Railroads frequently establish blanket areas, charging the same line haul rate between the distant outside point and any point within the area.<sup>11</sup>

In all these cases what we are really doing is weighing the convenience to the utility of having a flat rate instead of a myriad of individual rates against the consequences to the person getting the smaller service. The injury being slight in comparison with the reason we say the patrons receive the same service; that is, there is no difference in locality.<sup>12</sup> When the consequence to one just outside the flat rate district overbalances the benefit to the utility from the higher rate to him, we say the area limits must be extended,<sup>13</sup> but when the consequences to

<sup>9</sup> *Ransome v. East Counties Ry.*, 4 C. B. (N. S.) 135, 140 Eng. Rep. 1034 (1858).

<sup>10</sup> See, for example: *Alton R. R. v. Ill. Commerce Comm.*, 382 Ill. 478, 48 N. E. (2d) 381 (1943); *State ex rel. Burr v. A. C. L. R. R.*, 96 Fla. 646, 119 So. 110 (1928).

<sup>11</sup> See, for example: *United States v. Ill. Cent. R. R.*, 263 U. S. 515 (1924); *Zenith Sand Co. v. P. S. Comm.*, 108 W. Va. 413, 151 S. E. 433 (1930).

<sup>12</sup> *City of Milwaukee v. R. R. Comm.*, 206 Wis. 339, 240 N. W. 165 (1932).

<sup>13</sup> *United States v. Ill. Cent. R. R.*, 263 U. S. 515 (1924); *State ex rel. Burr v. A. C. L. R. R.*, 96 Fla. 646, 119 So. 110 (1928); *City of Montgomery v. Green*, 180 Ala. 322, 60 So. 900 (1913); *Ill. Commerce Comm. v. Chi. & E. I. Ry.*, 332 Ill. 243, 163 N. E. 664 (1928).

him are not serious we say the services are not the same; that is, the localities are different.<sup>14</sup>

It does not matter whether we say Section Two requires the same rate because the patrons are in the same locality and receive the same service, or say they are in different localities but Section Three forbids a different rate because unreasonable since the cost of serving is the same and a different rate would be a hardship. Indeed, it may be doubted that under Section Two any desirable result is reached which could not be reached under Section Three's prohibition of undue and unreasonable preferences.

#### SUBURBAN COMMUTERS

It has become customary for railroads to offer to passengers traveling between a city and its suburbs multiple-trip tickets at less than the single trip rate. Section Twenty-two of the Interstate Commerce Act<sup>15</sup> provides that nothing in the Act shall be construed to forbid the issue of commutation tickets, but this merely saves them from the prohibition of Section Two and leaves them subject to attack under Section Three.<sup>16</sup> The Missouri court, reversing an injunction against commutation rates because unreasonably discriminatory, said:

"The suburban or commutation ticket service is a special service rendered by roads entering large cities, and differs in many respects from other passenger traffic. It is a service devoted primarily to those who have their homes in communities adjacent to large cities, but work or carry on their business in the city, and who *regularly and daily* use that service and are wholesale purchasers of transportation. It is related, also, to the fact that such communities often are built up as a result of and in reliance upon such service at mileage rates less than those exacted for ordinary passenger service."<sup>17</sup>

The Georgia court held unreasonableness of a railroad's refusal to establish a commutation rate to one suburb was not shown by proof that it had such rates to another.<sup>18</sup> On the other hand the Oregon court has said that "like service" need not be between the same termini so a carrier may be required to extend commutation rates to another suburb nearer the city than the first, the higher rate having injured real estate values in the unfavored suburb.<sup>19</sup> In Washington a railroad, having

<sup>14</sup> See: *Durant v. City of Beverly Hills*, 39 Cal. App. (2d) 133, 102 Pac. (2d) 759 (1940); *Village of Fox Point v. Pub. Serv. Comm.*, 242 Wis. 97, 7 N. W. (2d) 571 (1943); *Youngman v. Comrs. of Waterworks*, 267 Pa. 490, 110 Atl. 174 (1920).

<sup>15</sup> 49 F. C. A. §22(1).

<sup>16</sup> See: *N. C. & St. L. Ry. v. Tennessee*, 262 U. S. 318, 323 (1923).

<sup>17</sup> *State v. Pub. Serv. Comm.*, 321 Mo. 297, 10 S. W. (2d) 946, 951 (1928). Italics added.

<sup>18</sup> *Ga. Pub. Serv. Comm. v. A. & W. P. R. R.*, 164 Ga. 822, 139 S. E. 725 (1927).

<sup>19</sup> *Portland R., P. & L. Co. v. R. R. Comm. of Ore.*, 56 Ore. 468, 105 Pac. 709 (1909), *aff'd on rehearing*, 56 Ore. 468, 109 Pac. 273 (1910), and *no error found*, 229 U. S. 397 (1913).

established such rates and finding them not remunerative, undertook to raise them so much that suburbanites began to move back into the city. The order of the Commission allowing the increase to the more distant points but not to points within ten miles of the city was upheld against the contention that it required the very sort of unjust discrimination prohibited by the state constitution, the court saying:

"It is an adaptation of rates to meet certain economic and industrial conditions in certain localities, but which has a like effect upon all who are similarly situated. In order to constitute an unjust discrimination the railway company would have to receive a greater or less rate from one person than another to whom it furnishes a like service under like conditions. . . ." <sup>20</sup>

While recognizing that some reduction in rates to commuters to nearby suburbs may be justified, a New York court refused to sustain an order requiring the railroad to continue such rates if not remunerative, saying, "It is difficult to see why a passenger traveling from New Haven to Boston should pay more than the service is worth because the commuters from Mount Vernon to New York are carried by the company at an actual loss." <sup>21</sup>

The United States Supreme Court in sustaining a state revision downward of commutation rates voluntarily established said the service is "quite different" from the regular passenger service in that the commuter purchases tickets for several rides at one time. <sup>22</sup> It is difficult to see wherein the service to a commuter differs from that rendered the single trip passenger riding between the same towns and occupying the adjoining seat. The money saved in printing and selling the tickets is probably insignificant. The real explanation for the preference to the commuter is, as the Missouri court said, that the commuters "regularly and daily use that service and are wholesale purchasers of transportation" and they will not use it at a higher rate. Unless the carrier has enticed people to settle in a suburb and then has undertaken to take away the low rate, the cases seem to allow it to fix the limit of the commutation zone at the point where a further extension would not be likely to attract regular business. Commuting rates do not cause long distance travelers to pay more unless they yield less than the out-of-pocket cost of service or unless enough of the commuter traffic could be retained at a higher rate to yield a greater total revenue than does the present rate. From the commuter cases it would appear, then, that the test of a preference because of locality is not whether the unfavored

<sup>20</sup> Puget Sound El. Ry. v. R. R. Comm. of Wash., 65 Wash. 75, 117 Pac. 739 (1911).

<sup>21</sup> People v. Pub. Serv. Comm., 159 App. Div. 531, 145 N. Y. S. 503, 509 (1914), *aff'd*, 215 N. Y. 689, 109 N. E. 1089.

<sup>22</sup> Pa. R. R. v. Towers, 245 U. S. 6, 11 (1917).

patron would be in a better position if he were charged the lower rate, but is two-fold: First, did the carrier have a sound business reason for giving the preference? Second, is the unfavored patron in a worse position than he would have been in had the preference not been granted? He is not if the preference was no more than necessary to meet competition for the preferred patron's business.

CARRIER-MADE PREFERENCES DESIGNED TO DEVELOP INDUSTRIES  
IN THE CARRIER'S TERRITORY

In *Union Pacific Railway v. Goodridge*<sup>23</sup> the United States Supreme Court said of a Colorado statute like Section Two of the Interstate Commerce Act: "The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new businesses." In that case it would have been sufficient to say: Regardless of the carrier's interest in developing new businesses the statute forbids it to do so by rates different from those charged other people shipping like goods between the same termini. Such a statute does not apply when the patrons ship between different places. In that event Section Three governs. It does not forbid a reasonable differential; that is, one for which the carrier can give a good reason. Nothing else appearing, it would seem that anything is a part of the "proper business" of a carrier, and a good reason for a differential, which is likely to increase the carrier's own revenues. New businesses springing up along its right of way are quite likely to have that effect. Whether this is a sufficient reason for a preferential rate depends upon the consequences to shippers between other termini.

The problem is presented in two Missouri cases in which the court quoted this statement in the *Goodridge* case.<sup>24</sup> In the first case the complainant's customers were going to neighboring towns to buy because the stores there were able to undersell the complainant, by reason of more favorable rates from St. Louis, the common source of supply. The injury to the complainant might well be sufficient to make the differential unreasonable and to justify an order requiring the extension of the low rate to him. In the second case the railroad to induce the plaintiff to build his proposed new mill on its line, contracted to give him a rebate on machinery shipped interstate at published rates. The contract was properly held unenforceable because Section Six of the Interstate Commerce Act<sup>25</sup> forbids any departure from the published tariff. Had the railroad, instead of undertaking to give a secret rebate, published a preferential rate to the new town, such rate might have

<sup>23</sup> 149 U. S. 680, 690 (1893).

<sup>24</sup> *Cohn v. St. L., I. M., and S. Ry.*, 181 Mo. 30, 79 S. W. 961 (1904); *Foster Lumber Co. v. A., T., & S. F. Ry.*, 270 Mo. 629, 194 S. W. 281 (1917).

<sup>25</sup> 49 F. C. A. §6.



caused no injury to any other patron of the road. If so, it would seem not unreasonable.

The Interstate Commerce Commission has said recently<sup>26</sup> that a complainant is unduly prejudiced by a lower rate to his rival on raw materials enabling the rival to get a monopoly on the foreign market so as to counterbalance the complainant's advantage in being much nearer the domestic market. According to the Commission the complainant's advantage in outbound rates is no more justification for a higher inbound rate than his lower manufacturing costs due to good management in his plant would be. That is, while the carrier has a legitimate interest in keeping the favored factory in business so that it will continue to handle its shipments of raw materials, it cannot accomplish this by a rate which excludes another patron from a market he could otherwise reach.

When a carrier sets a low rate on the product of certain mines in one district in order to enable them to compete with mines in another, it must give that rate to all mines in the first district even though some, by reason of the superior quality of their product, do not need it in order to compete in the common market.<sup>27</sup> This is not because it is no part of the railroad's "proper business" to set rates so freight can move from the poorly located district, but because Section Two requires equal rates, without regard to reasonableness, whenever the two patrons ship like goods between the same places. Having attended to its "proper business" by establishing a rate enabling it to get the maximum volume of traffic from the mines along its track, the railroad must, because of Section Two, give that rate to all who ship the same ore from that point, the entire district being regarded as one locality.

In a Kansas case<sup>28</sup> the court said a lower rate per mile on coal to towns in the salt producing district than to a town slightly beyond it was an unreasonable discrimination, traffic conditions being similar. The reason for the lower rate to the salt towns was that the salt produced, 95 per cent of the cost of producing which was the cost of coal, would be shipped out over the railroad. If this low rate was necessary to keep the salt industry at work, no harm was done the consignees of coal in the other town for they did not compete with the salt towns and their rates were not made higher than they would have been without the concession. The court seems to have proceeded on the theory that the salt town rate shows what is reasonable, for the railroad would not charge a non-compensatory rate voluntarily. While comparison of a rate with other rates to determine its reasonableness *per se* is sound as a basic principle, it is not an infallible test. The railroad might well be willing

<sup>26</sup> *Ecusta Paper Corp. v. Alton R. R.*, 262 I. C. C. 330 (1945).

<sup>27</sup> *Phila. & Read. Ry. v. I. C. C.*, 174 Fed. 687 (E. D. Pa. 1909).

<sup>28</sup> *Union Pac. Ry. v. Pub. Util. Comm.*, 95 Kan. 604, 148 Pac. 667 (1915).

to sacrifice part of its normal profit on hauling coal in order to make a larger profit on longer hauls of salt, especially when to charge the normal rate on coal would shut down the salt industry, for the normal rate on coal yields no profit at all if the consumer abandons his business and ships neither coal nor salt.

An illustration, both of the right of the carrier to set rates so as to enable mines along its road to compete and of the complex problems which can arise from a seemingly simple rate adjustment, is found in litigation over rates from Indiana coal mines to Chicago. Mines in Pennsylvania, West Virginia, Kentucky, Indiana and Illinois compete for this market. Freight rates on coal are high in proportion to value, so they play a large part in a mine's ability to compete. The Illinois mines applied for a reduction in their rates, contending the existing rates discriminated in favor of mines in the other states. The evidence showed the existing rates handicapped the Illinois mines and that business and social conditions in the Illinois mining district were deplorable. The state commission lowered the rates, its action was sustained by the Illinois court, the new rate being somewhat remunerative.<sup>29</sup> The Interstate Commerce Commission found no discrimination against interstate commerce and refused to order the old rate restored,<sup>30</sup> but thereafter it lowered the rate from the Kentucky mines so as to restore them to their former competitive position with the Illinois mines. Under these rates in two years Illinois mines increased their shipments to Chicago to 245 per cent of their previous volume while the shipments from the Indiana mines to the Chicago area were only 39 per cent of what they had been. The Milwaukee road carried about 95 per cent of the coal going from the Indiana mines to Chicago. To recover some of the business it had lost it reduced its rate to a point below the maximum limit of reasonableness but above the minimum limit; that is, the new rate would yield the railroad some profit. Because of greater distance it was still a bit higher in the aggregate than the joint rate from the Illinois mines, in which joint rate the Milwaukee had been required to join. The Interstate Commerce Commission suspended the proposed tariff, but enforcement of its order was enjoined.<sup>31</sup> The district court held the railroad has the right, within reason, to set rates to obtain or retain desired traffic.<sup>32</sup> On appeal the Supreme Court said that the fact that the change would disrupt the existing situation is not conclusive for all changes do that, nor was the possibility of a rate war between the railroads ground

<sup>29</sup> A., T., & S. F. Ry. v. Ill. Commerce Comm., 335 Ill. 70, 166 N. E. 466 (1929).

<sup>30</sup> I. C. C. Docket Number 23130.

<sup>31</sup> Chi., M., St. P. & Pac. R. R. v. United States, 8 F. Supp. 970 (N. D. Ill. 1934), *aff'd*, 294 U. S. 499 (1935).

<sup>32</sup> See also: State v. P. S. Comm., 112 Wash. 520, 192 Pac. 1075 (1920); Laurel Cotton Mills v. Gulf & S. I. R. R., 84 Miss. 339, 37 So. 134 (1904).

to suspend this rate, which in itself was not unreasonable, for the Commission could prevent a rate war's getting out of control.

In the previously mentioned *Texas and Pacific* case<sup>33</sup> the question was whether the railroad which reached New Orleans direct, and served Galveston in conjunction with other roads, could maintain export-import rates from New Orleans as low as the rates it and the connecting road maintained to Galveston, Galveston being considerably nearer to the Texas points from which the export shipments originated and to which the imports were destined. Galveston contended it was being deprived of the natural advantage of its location by equal rates for unequal service—as true discrimination as is unequal rates for equal service.<sup>34</sup> After remarking that long before the Act the railroads habitually so equalized rates between near and distant ports when necessary to compete with other routes available to the shipper, Justice Roberts said:<sup>35</sup>

“The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination. While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel.”

The strong dissent of Justice Stone was not directed against this general proposition.<sup>36</sup> It is by no means clear how a carrier can have the purpose of attracting to itself, and the ports served by it, traffic which otherwise would go to other ports and carriers, without at the same time having the purpose to divert such traffic from such other ports and roads with the necessary injury to them. Possibly the statement means that if the carrier's motive is malicious injury or is otherwise not connected with increasing the carrier's revenues the differential is an unreasonable discrimination. Unquestionably this would be true. Probably Justice Roberts would have found an improper discrimination if a differential actually resulted in stagnation of business at the unfavored, previously prosperous community, but this is, in reality, abandoning the carrier's motive and substituting the effects of its action as the test of reasonableness—a desirable substitution.

It should be noted that the New Orleans rate did no injury to the

<sup>33</sup> *Tex. & Pac. Ry. v. United States*, 289 U. S. 627 (1933).

<sup>34</sup> See dissenting opinion of Justice Stone at page 656.

<sup>35</sup> Pages 636-7 of the official report.

<sup>36</sup> Page 662 of the official report.

shipper or the consumer, but, on the contrary, gave them a choice between two ports at the same price. We may also take notice of the fact that the port of Galveston was not put out of business,<sup>37</sup> though Justice Stone, dissenting, infers gross injury was done to it.<sup>38</sup> The existing rate relation enabled export-import traffic from and to interior Texas to move either through Galveston or through New Orleans. The rate relation sought by Galveston would have caused practically all of this traffic to move through its port. The complainant whose quarrel with the existing situation is that it deprives him of a monopoly is not in a very strong position. The Minnesota court has held that the operator of a gravel pit near a highway construction project was not injured by a rate to a distant pit actually higher than his own rate but lower in proportion to distance.<sup>39</sup> The English courts came to the opposite conclusion in the early days of railroading.<sup>40</sup> There is clearly an injury to the shipper who is deprived of the natural advantage of his location, but if the only injury is the loss of a monopoly the public welfare swings over into the carrier's side of the scales and together with the carrier's interest in building up its own revenues, may outweigh the injury done the near-by shipper. Just the reverse should be the result when shipper White in Town *A* is given a rate enabling him to compete with Black in Town *B* for the markets near *B*, but Black is given no corresponding differential enabling him to compete for markets near *A*. That is the situation which the shippers of manufactured goods from southern and western states say confronts them today. They cannot compete for the eastern markets but eastern manufacturers can compete for markets in the South and West.

Justice Roberts' statement in the Galveston-New Orleans case that "obviously, what the carrier may not lawfully do, the Commission may not compel" may or may not be sound, but certainly it was inapplicable to the issue in that case. The Commission asserted that Section Three gave it authority to make the order. What Section Three makes it unlawful for the carrier to do is to discriminate without reason. What the Commission was doing was not discrimination at all but the removal of a discrimination by restoring to Galveston the advantage of its location.<sup>41</sup> Even if circumstances exist which would make discrimination

<sup>37</sup> In *I. C. C. v. L. & N. R. R.*, 118 Fed. 613 (S. D. Ga. 1902), a differential giving one port a monopoly was held unreasonable.

<sup>38</sup> Page 657 of the official report.

<sup>39</sup> *Hallet Constr. Co. v. Foley Bros.*, 191 Minn. 335, 254 N. W. 435 (1934). See also, Parker, Cir. J., in *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 471 (S. D. W. Va. 1928).

<sup>40</sup> *Ransome v. East Counties Ry.*, 4 C. B. (N. S.) 135, 140 Eng. Rep. 1034 (1838).

<sup>41</sup> Since the court found the defendant railroad had no control over the Galveston rate this was not in reality a case of discrimination by the defendant railroad.

by the carrier reasonable, the Commission in forbidding such discrimination is not itself discriminating in violation of Section Three.<sup>42</sup> The attack on its action must rest on some other ground such as (1) the Act in forbidding discrimination without a good reason impliedly authorizes discrimination with a good reason and what the statute permits the Commission cannot forbid, or (2) an interference with a reasonable discrimination is an infringement of the carrier's liberty in violation of the Due Process Clause. Perhaps, in the final analysis, these two possible lines of attack converge, since the test of reasonableness of a carrier-made differential calls for a balancing of the carrier's interest in increasing its revenues and the benefits to the preferred patrons against injuries done to other patrons, and, through them, to the public.

There are instances in which the regulatory commission sets rates which are preferential to shippers to or from a given locality, so we are required to consider the correctness of Justice Roberts' statement. The Interstate Commerce Commission is given authority to set rates in certain situations by Section Fifteen of the Interstate Commerce Act.<sup>42a</sup> This provides:

"Whenever, after full hearing, the commission shall be of opinion that any individual or joint rate is or will be unjust or unreasonable or unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate to be thereafter observed in such case."

Thus, the power of the Commission under this section is conditioned upon a finding that existing rates are unreasonable, unjustly discriminatory, or otherwise in violation of the Act. Unless there is a fair basis for such a finding it has no statutory authority to set the rate at any figure,<sup>43</sup> but since the finding of the Commission will be accepted if there is substantial evidence to support it, and in absence of an error of law,<sup>44</sup> and there can usually be collected and introduced considerable evidence of injurious consequences flowing from any given rate adjustment between competitors in different localities, this condition is not

<sup>42</sup> "If [the existing system of rates is] old, interests will probably become attached to them, and, it may be, will be disturbed or disordered if they be changed. Such circumstances is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem." McKenna, J., in *I. C. C. v. Chi., R. I., and P. Ry.*, 218 U. S. 88, 108 (1910).

<sup>42a</sup> 49 F. C. A. §15(1).

<sup>43</sup> *I. C. C. v. Stickney*, 215 U. S. 98, 105 (1909).

<sup>44</sup> *United States v. L. & N. R. R.*, 235 U. S. 314, 320 (1914); *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352 (1940); *United States v. Illinois Central R. R.*, 263 U. S. 515, 526 (1924); *Manufacturers' Ry. v. United States*, 246 U. S. 457, 481 (1918); *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, 547 (1912); *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 471 (S. D. W. Va. 1928).

very difficult to overcome if the Commission is reasonably careful in writing its opinion. Then, having established the Commission's authority to set the just and reasonable rate, the question becomes whether it has done so. Again the presumption offers support to the Commission's conclusion.<sup>45</sup> The Commission in exercising its power under Section Fifteen must consider the effect of the rate so fixed upon the carrier for which it is prescribed and the public interest in adequate transportation at low cost.<sup>46</sup>

In the previously mentioned Illinois decision sustaining the reduction of the rate from Illinois mines to Chicago the court said the economic conditions in the mining district were to be considered though the Commission could not base a rate reduction order solely on the need of the Illinois mines.<sup>47</sup> Texas, however, has sustained an order requiring preferential rates to shipments of livestock feed into a drought stricken area solely because of the need of the cattle raisers and the public interest in maintaining the industry in the area,<sup>48</sup> and when the Interstate Commerce Commission found it necessary to raise rates on salt from the Detroit area in order to produce needed revenue for the railroad serving those mines, it was held that it could raise rates on shipments from the Louisiana mines to the Chicago area in order to prevent the Detroit producers from being driven from the market.<sup>49</sup> Similarly, Washington required the continuance of commutation rates to suburbs because of the need for such rates even though they did not yield a fair return and were said to discriminate against inhabitants of more distant suburbs.<sup>50</sup> Again, over the objection of Justice McKenna that the order was discriminatory in that it did away with natural advantages, the Supreme Court sustained the Interstate Commerce Commission in limiting, in a time of car shortage, a mine located on two railroads to the number of cars it would have gotten had it been on one only.<sup>51</sup>

The *Lake Cargo Coal* case<sup>52</sup> is the leading decision on the power of the Interstate Commerce Commission to set rate differentials for the purpose of equalizing competitive conditions. "Lake cargo" coal is coal

<sup>45</sup> *I. C. C. v. Chi., R. I. & P. Ry.*, 218 U. S. 88 (1910).

<sup>46</sup> INTERSTATE COMMERCE ACT §15A, 49 F. C. A. §15A, as amended in 1940 by 54 STAT. §912.

<sup>47</sup> *A., T., & S. F. Ry. v. Ill. Commerce Comm.*, 335 Ill. 70, 166 N. E. 466 (1929).

<sup>48</sup> *Abilene & So. Ry. v. Terrell*, 131 S. W. (2d) 37 (Tex. Civ. App. 1939).

<sup>49</sup> *Jefferson Island Salt Min. Co. v. United States*, 6 F. (2d) 315 (N. D. Ohio 1925).

<sup>50</sup> *Puget Sound El. Ry. v. R. R. Comm. of Wash.*, 65 Wash. 75, 117 Pac. 739 (1911).

<sup>51</sup> *United States v. New River Co.*, 265 U. S. 533 (1924).

<sup>52</sup> *Anchor Coal Co. v. United States*, 25 F. (2d) 462 (S. D. W. Va. 1928), reversed, 279 U. S. 812 (1929) solely on the ground that pending the appeal subsequent developments had made the case moot and no longer a proper subject for judicial action, and cited with approval by Justice Roberts in *Tex. & Pac. Ry. v. United States*, 289 U. S. 627, 638 (1933).

shipped from the mines to the Great Lakes for further shipment across the lakes to various ports in Canada and the United States. Since the movement occurs during the summer, a normally slack season at the mines, this market is highly competitive and a few cents per ton difference in freight rates will throw the trade to the favored mines. Prior to any action by the Commission the railroads set the differential at 9 cents in favor of the Pennsylvania-Ohio mines as against the more distant West Virginia-Kentucky-Tennessee district. A rate approaching anything like a distance scale would completely exclude the latter from the market. The Commission over the years conducted a series of investigations and hearings,<sup>53</sup> first increasing the differential to 25 cents. Finding that notwithstanding the 25 cents differential the southern mines had increased their proportion of the total lake shipments from 39.6 per cent to 82 per cent, they being able to do this because of their considerably lower cost of production, the Commission allowed a 20 cents reduction in the rate from the northern mines; that is, it increased the differential in favor of the northern mines to 45 cents. The railroads serving the southern mines then filed a new rate schedule lowering their rates by 20 cents, which would have the effect of restoring the old 25 cents differential. Although the proposed rate was not below the minimum limit of reasonableness and so did not have the effect of throwing an added burden upon other patrons of the railroads proposing it, the Commission, on the protests of the northern mine operators, suspended the new tariff, and, after hearing, cancelled it. Thereupon, the Anchor Coal Company, a southern mine operator, sued to enjoin the enforcement of the Commission's order. The three-judge district court granted the injunction on the ground that the Commission had no authority to set rates for the purpose of overcoming the production advantages of one district so as to allow the handicapped district's mines to compete, and also on the ground that there had been errors as to the burden of proof.

The following excerpts from the lengthy opinion of Circuit Judge Parker seem to summarize the court's views:<sup>54</sup>

"It must be manifest that increasing the differential to meet such a situation is not regulation of rates, but regulation of industrial conditions under the guise of regulating rates. It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to the other even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the differential in rates and thereby equalizing the advantage which it has in a low cost of production. It matters not what this may

<sup>53</sup> For the series of hearings and orders by the commission see: 22 I. C. C. 604; 22 I. C. C. 640; 24 I. C. C. 280; 101 I. C. C. 513; 126 I. C. C. 344.

<sup>54</sup> Anchor Coal Co. v. United States, cited *supra* note 52, at 470-474.

be called, it is in essence a regulation of industrial conditions through manipulation of rates."

"How could a competitor who is complaining be injured by a rate higher than his rate? The question answers itself. He could not be injured by the higher rate."

"The Commission does not have the right . . . to regulate industrial conditions under the guise of regulating rates. . . . The Commission is given power to determine and prescribe 'what will be the just and reasonable rate . . . to be thereafter observed . . . or the maximum or minimum, or maximum and minimum to be charged.' . . . But nowhere is it provided that in doing so the Commission may prefer one section of the country over another, or that it may fix rates, or may prevent the fixing of rates by the carriers, with a view of placing competing producers upon an equality or of compensating for disadvantages under which competing communities may labor. Manifestly such a power is not conferred by the statutes referred to<sup>55</sup> for rates fixed with such an end in view are not 'reasonable,' but are unreasonable and constitute an unprecedented interference with the industrial conditions of the country."<sup>56</sup>

"If the Commission has the right in a rate adjustment to consider the shift in traffic to a community already paying a higher rate, and act upon it as one of the factors in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift in cotton manufacturing, in fruit growing, in furniture manufacturing, in short in every branch of industry, will become a matter for consideration by the Commission; for all depend upon freight rates, all have rates in which the differential between long and short hauls is narrow, and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. We feel perfectly certain that Congress did not intend to vest such power in the Commission."

<sup>55</sup> Sections 1, 3, and 15 of the INTERSTATE COMMERCE ACT, 49 F. C. A. §§1, 3, and 15.

<sup>56</sup> Judge Parker here quotes the following authorities in support of his position: Commissioner Franklin K. Lane, in *Ashland Fire Brick Case*, 22 I. C. C. 115, 121: "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as a part of one great whole." Justice Holmes, in *I. C. C. v. Diffenbaugh*, 222 U. S. 42, 46 (1911): The Interstate Commerce Act "does not attempt to equalize fortune, opportunities or abilities." Justice Brandeis, in *United States v. Ill. Cent. R. R.*, 263 U. S. 515, 524 (1924): "The law does not attempt to equalize opportunities among localities."

To these might be added: Justice McKenna, in *I. C. C. v. Chi., R. I. & P. Ry.*, 218 U. S. 88, 102 (1910): "The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either." And see similar statements in: *A. C. L. R. R. v. Trammell*, 287 Fed. 741 (N. D. Ga. 1923); *Sou. Ry. v. Atlanta Stove Wks.*, 128 Ga. 207, 57 S. E. 429 (1907); *A., T., & S. F. Ry. v. Ill. Commerce Comm.*, 335 Ill. 70, 166 N. E. 466 (1929); *Ind. Harbor Belt R. R. v. Illinois Commerce Comm.*, 340 Ill. 304, 172 N. E. 708 (1930); *Vicksburg, S. & P. Ry. v. R. R. Comm. of La.*, 137 La. 747, 69 So. 161 (1915); *Cincinnati Nor. R. R. v. P. U. Comm. of Oh.*, 116 Oh. St. 397, 156 N. E. 506 (1927); *Pa. R. R. v. Pa. P. U. Comm.*, 135 Pa. Super. Ct. 5, 4 Atl. (2d) 622 (1939); *State v. P. S. Comm.*, 112 Wash. 520, 192 Pac. 1075 (1920).

In many of these cases the courts sustained the action of the commission because not designed to control competition.



The failure of Congress to amend the Act in the eighteen years which have intervened indicates that Judge Parker was correct in his view that Congress did not intend for the Commission to fix rates solely to counteract natural advantages in the competitive race. However, since the injunction was promptly reversed by the Supreme Court<sup>57</sup> on the ground that pending the appeal the matter had become moot, there was not the pressure upon Congress for an amendment that might have developed had the injunction remained in effect, and the silence of Congress is less impressive than it otherwise would be.

The trouble with Judge Parker's decision is that the net result was not the free and equal competition he seems to have desired, with the prize going to the producer of the best goods at the cheapest cost. On the contrary it resulted in a fixed race with the prize going to the southern mines many miles farther from the market. Despite his assertion that the northern mines could not be injured by a southern rate 25 cents higher than their own, the contrary is true. The normal rate would be a rate measured by distance. There is little doubt that the southern mines' rate would have been higher had there been no northern mines. It was set low to enable the southern mines to overcome the distance advantage of those in the north. The shift of the "lake cargo" coal traffic from 39 per cent from the southern mines to 82 per cent from the southern mines shows the differential went too far and practically enabled the southern mines to drive the nearer mines from the market. If, as is true, the southern mines were entitled to the advantage of their lower production costs and a rate differential cannot be set to deprive them of it, it would seem that the northern mines are entitled to the advantage of their location. Had the rates been set on anything approaching a distance basis the southern mines would have retained their advantage of low production costs but would have been completely shut out of the market nevertheless. Therefore, the higher rate to the southern mines injured the northern mines in that it was not high enough to preserve the northern mines' geographical advantage. The decision does not substitute a free economy for a planned economy. It substitutes a railroad-and-court planned economy for a Commission-planned economy. It may well be that the railroad-court plan is a better plan—at least it allowed the consumers to buy from two groups of mines—but it is well to recognize that it is a plan. It is possible to believe that the Commission is a better informed and more public-minded planner than the railroad, though that is by no means a certainty.

It might be argued that in dealing with the Commission's power to set differentials the Act does not mean the same thing as when limiting the power of the carrier; that although the Commission's power under

<sup>57</sup> 279 U. S. 812 (1929).

Section Fifteen is to set a "reasonable" rate and the railroad is forbidden to fix an "unreasonable" differential, the reasonableness of the carrier's and the Commission's action may be measured by different standards.<sup>58</sup> However, this would be straining the words of the Act. Notwithstanding the swing toward a governmentally planned economy which has taken place since the *Lake Cargo* case it would be a radical departure from American tradition to empower a commission, however competent, to control the location of factories by fixing rates to markets, or otherwise. Such a departure from tradition is not to be implied from language in a statute susceptible of a different meaning. Nevertheless, giving the Commission power to consider industrial needs in handicapped sections in determining reasonableness of rate differentials would not, as Judge Parker thought, give the Commission "practically unlimited" control over the economic development of the country, since it would not do away with the limiting effect of "reasonable." It would merely permit the Commission to say it is doing what it very likely does now without saying so. Whether the Commission initiates a rate differential or approves or disallows one initiated by the carrier, it definitely is affecting the economic life of the communities. Since it is doing so in any event it might be wise to consider this effect deliberately and try to weigh it along with the other arguments for or against the differential.

While Judge Parker was probably correct in his interpretation of the Act, he seems to have gone too far in saying, "We do not think Congress could give such power to the Commission."<sup>59</sup> As authority he cites only *Hammer v. Dagenhart*,<sup>60</sup> since overruled by *United States v. Darby*.<sup>61</sup> There is no insurmountable difficulty so far as delegation of legislative power is concerned. The remaining objections would have to do with the Due Process Clause of the Fifth Amendment. Though that amendment contains no Equal Protection Clause, it may be that the Due Process Clause of the Fifth Amendment would forbid a classification by Congress which would be beyond a state's power under the Equal Protection Clause of the Fourteenth. If so, a rate differential set by Congress or its Commission would be open to constitutional attack by a shipper discriminated against. If the entire rate schedule enables the railroad to earn a fair return on its entire investment neither the entire schedule nor any single rate therein confiscates the railroad's property. The railroad's constitutional attack on a differential must be that the rate order is an arbitrary interference with its freedom of man-

<sup>58</sup> The phrase "similar circumstances and conditions" was held to have one meaning in Section Two and another in Section Four. *I. C. C. v. Ala. Midland Ry.*, 168 U. S. 144 (1897).

<sup>59</sup> *Anchor Coal Co. v. United States*, 25 F. (2d) 462, 472 (S. D. W. Va. 1928).

<sup>60</sup> 247 U. S. 251 (1918).

<sup>61</sup> 312 U. S. 100 (1941).

agement, which it is not if there was a good reason for the classification of the patrons. That is, the railroad's attack would be of the same nature as the attack by the disfavored shipper—the differential is an arbitrary classification. But, whether a classification is arbitrary depends upon a weighing of all conflicting interests. If the public has an interest in scattering the plants of a given industry all over the country, or in concentrating them in a small area, surely such an interest may outweigh those of operators of existing plants sufficiently to justify a rate differential making such a scattering or concentration possible. For example, it might be thought that national safety against sudden air attack demands a decentralization of the steel industry. One way to bring this about would be by a direct subsidy to plants in less favorable areas. Another would be by an indirect subsidy in the form of rate differentials. Whether Congress could use the second method would seem to be not susceptible of a flat yes or no answer but to require a balancing of interests in each case.

The City of Galveston has had a long struggle with its neighbor, Houston. Originally Galveston had the advantage since it was a deep water port and Houston was not. To enable Houston to overcome its inland location the Texas Commission gave Houston more favorable rates on shipments to and from points in Texas approximately the same distance from the two cities. The Court of Civil Appeals held this beyond the power of the Commission, the Texas statute being similar to the Interstate Commerce Act.<sup>62</sup> Three years later the same question arose and again the Court of Civil Appeals held the Commission was not authorized to overcome the natural advantages of Galveston with favorable rates to Houston, the purpose of the statute being to end unreasonable discrimination of that sort by the railroads.<sup>63</sup> This time the Supreme Court of Texas reversed saying that access to the sea belongs to all people of the state so rates could be set to make it possible for them to reach it.<sup>64</sup> Then Houston was made accessible to deep-water ships, and being further inland it had the geographical advantage. Again the Commission sought to equalize the two ports, this time giving Galveston a preferential rate. Once more the Court of Civil Appeals said the Commission had no power under the statute to overcome economic disadvantages with rate differentials, each locality being entitled

<sup>62</sup> *R. R. Comm. v. Galveston Chamber of Commerce*, 51 Tex. Civ. App. 476, 115 S. W. 94 (1908).

<sup>63</sup> *Galveston Chamber of Commerce v. R. R. Comm.*, 137 S. W. 737 (Tex. Civ. App. 1911).

<sup>64</sup> *R. R. Comm. v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573 (1912).

to the natural advantages of its location.<sup>65</sup> This time the Supreme Court of Texas agreed.<sup>66</sup>

The *Galveston-New Orleans* case,<sup>67</sup> the *Lake Cargo Coal* case and these *Galveston-Houston* cases seem to lead to the conclusion that under a statute like the Interstate Commerce Act while the regulatory commission cannot, in the public interest, set rate differentials to overcome disadvantages in location or production costs, the railroads, in the interest of obtaining traffic, and so increasing their own revenues, may do so within the zone of reasonableness, but not "with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality." That is, all differentials, by whomsoever established, must be based on transportation conditions—a difference in cost of service, or carrier competition.

#### DIFFERENTIALS BASED ON DIFFERENCE IN COST OF SERVICE

Under the statutes of all states and Section One of the Interstate Commerce Act<sup>68</sup> rates must be reasonable *per se*. The same requirement was imposed by the common law. A rate is no more than reasonable *per se* if it pays the cost of service including a fair profit to the carrier and no more. Because the services rendered by our modern railroads, and other utilities, involve the joint use of property and employees by many patrons for varied purposes, it is impossible to calculate the exact cost of serving a single patron or group. Consequently, we try to fix the rate schedule as a whole so as to yield the carrier, or other utility, from all of its business, a fair return on its entire investment, and to distribute this burden among the many groups of patrons as equitably as is practicable. The division is, at best, a rough estimate. In the case of the railroad if traffic moves in a considerable volume under a particular rate and pays something more than its out-of-pocket cost the rate is very likely to be found reasonable *per se* as compared with rates on other commodities. It is more difficult to sustain a difference between patrons shipping the same kind of article over the same railroad between different places.

If a difference exists the complainant may possibly base his attack under Section One on the theory that he is charged too much, in which case the lower rate to another is mere evidence of the wrong done him, or he may attack under Section Three, in which case the difference in the rates is the wrong irrespective of the relation between the complainant's rate and the cost of serving him. So, a comparison of rates enters

<sup>65</sup> *Houston Chamber of Commerce v. R. R. Comm.*, 19 S. W. (2d) 583 (Tex. Civ. App. 1929).

<sup>66</sup> *R. R. Comm. v. Houston Chamber of Commerce*, 124 Tex. 375, 78 S. W. (2d) 591 (1935).

<sup>67</sup> *Tex. & Pac. Ry. v. United States*, 289 U. S. 627 (1930).

<sup>68</sup> 49 F. C. A. §1(5).

into a discussion under either Section One or Section Three. Though the nature of the injury, and so the damages recoverable, under these sections is not the same, there seems to be no difference so far as the evidential value of the comparative rates is concerned.

Since the starting point is the assumption that each patron will be charged the total cost of serving him, and no more, obviously, a difference in cost of service justifies a higher rate to the more expensive patron. If other conditions are equal it costs more, in the aggregate, to haul a longer distance than a shorter so in the absence of evidence of a difference in other conditions it is not unreasonable to charge a greater total rate between the more distant points.<sup>69</sup>

So far as the United States Constitution is concerned a state may require a railroad to charge no more for a shorter than for a longer haul over a different portion of its track or in a different direction so long as the railroad does not show facts indicating material differences in transportation conditions.<sup>70</sup> The not infrequent statutes of this type in the early days of rate regulation<sup>71</sup> were enacted on the theory that the railroad would not voluntarily establish a rate anywhere which would not give it a fair return for its service, so a higher rate anywhere else necessarily gave it more than a fair return. Of course, this is not sound for the rate at the other points may have been set low because, due to competition by other carriers, the traffic there would not move over this railroad at all at a higher rate.<sup>72</sup> A rate set on the theory that half a loaf is better than no bread should not be taken as conclusive proof that half a loaf is enough.

In the absence of such a statute it is generally agreed that a mere showing of what rates are between other points is not conclusive.<sup>73</sup> Nevertheless, proof that the same railroad, or other utility, charges lower rates elsewhere is generally accepted as evidence on the issue of reasonableness, and will probably control unless the services are rendered under

<sup>69</sup> Ga. Pub. Serv. Comm. v. A. & W. P. R. R., 164 Ga. 822, 139 S. E. 725 (1927); Ill. Cent. R. R. v. Ill. Commerce Comm., 342 Ill. 11, 173 N. E. 804 (1930); St. L., A. & T. H. R. R. v. Hill, 14 Ill. App. 579 (1884); State *ex rel.* Pugh v. Pub. Serv. Comm., 321 Mo. 297, 10 S. W. (2d) 946 (1928); Oregon-Washington R. R. & Nav. Co. v. Dept. of Pub. Wks., 151 Wash. 142, 275 Pac. 87 (1929).

<sup>70</sup> Mo. Pac. Ry. v. McGrew Coal Co., 244 U. S. 191 (1917).

<sup>71</sup> See: Chi. & A. R. R. v. People, 67 Ill. 11 (1873), holding such a statute violated the state constitution; McGrew v. Mo. Pac. Ry., 230 Mo. 496, 132 S. W. 1076 (1910); Chi., B. & Q. Ry. v. Anderson, 72 Neb. 856, 101 N. W. 1019 (1904); and Hines v. Wilm. & W. R. R., 95 N. C. 434 (1886).

<sup>72</sup> See: Lawrence, C. J., in Chi. & A. R. R. v. People, 67 Ill. 11 (1873).

<sup>73</sup> Cent. of Ga. Ry. v. W. Va. Pulp & Paper Co., 92 F. (2d) 292 (App. D. C. 1927); Darnell v. Edwards, 209 Fed. 99 (S. D. Miss. 1913); Chi. & E. I. Ry. v. Ill. Commerce Comm., 343 Ill. 117, 175 N. E. 8 (1931); Mo., K. & T. Ry. v. Pub. Util. Comm., 103 Kan. 111, 172 Pac. 1022 (1918); Shaw-Fahrer Grain Co. v. Pub. Util. Comm., 126 Oh. St. 74, 183 N. E. 922 (1932); Hope Nat. Gas Co. v. Pub. Serv. Comm., 112 W. Va. 223, 164 S. E. 248 (1932).

conditions so obviously dissimilar as to require judicial notice of a difference in cost, or the party seeking to preserve the differential proves this or some other justification,<sup>74</sup> though there is authority to the effect that a comparison with other rates is persuasive only after a showing that the other rates are themselves reasonable,<sup>75</sup> and, of course, though the two distances be approximately equal, the carrier can justify a rate differential by proof of grades and curves making one haul more expensive than the other.<sup>76</sup>

A much more difficult problem is presented when the two services are rendered entirely by different railroads, which is the situation in many of the current controversies between extensive regions such as the Southern, Official (Eastern), and Western rate classification territories. In such a case Section Three does not apply. In the *New Orleans-Galveston* case<sup>77</sup> the Supreme Court, first recognizing that Section Three does apply where the defendant carrier is a party to two discriminatory joint rates as well as where it is the only carrier involved in the two rates complained of,<sup>78</sup> held it did not apply where the defendant carrier participated in but did not control one joint rate and the other was its own rate from origin to destination. In the course of the majority opinion Justice Roberts said:<sup>79</sup>

“. . . preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to point *A* and that of another to point *B* while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates if an order for correction of the disparity is to run against it or them. Where an order is made under Section Three an alternative

<sup>74</sup> See: *Ill. Cent. R. R. v. Vest*, 39 F. (2d) 658 (E. D. Ky. 1927); *B. & O. R. R. v. United States*, 12 F. Supp. 261 (D. Del. 1935); *A. C. L. R. R. v. Trammell*, 287 Fed. 741 (N. D. Ga. 1923); *City of New Haven v. New Haven Water Co.*, 118 Conn. 389, 172 Atl. 767 (1934); *Ill. Cent. R. R. v. Ill. Commerce Comm.*, 359 Ill. 563, 195 N. E. 32 (1935); *Mo., K. & T. Ry. v. Pub. Util. Comm.*, 103 Kan. 111, 172 Pac. 1022 (1918); *Hocking Valley Ry. v. Pub. Util. Comm.*, 92 Oh. St. 362, 110 N. E. 952 (1915); *A., T., & S. F. Ry. v. State*, 130 Okla. 263, 267 Pac. 253 (1928); *Bell Tel. Co. of Pa. v. Pa. Pub. Util. Comm.*, 135 Pa. Sup. Ct. 218, 5 Atl. (2d) 410 (1939); *Anchor Coal Co. v. Pub. Serv. Comm.*, 123 W. Va. 439, 15 S. E. (2d) 406 (1942).

<sup>75</sup> *Mountain States Tel. & Tel. Co. v. Pub. Util. Comm.*, 8 F. Supp. 307 (D. Utah 1934); *State ex rel. Puget Sound P. & Lt. Co. v. Dept. of Pub. Wks.*, 181 Wash. 105, 42 P. (2d) 424 (1935).

<sup>76</sup> *A., T., & S. F. Ry. v. Ill. Commerce Comm.*, 335 Ill. 624, 167 N. E. 831 (1929); *Chi. & E. I. Ry. v. Ill. Commerce Comm.*, 343 Ill. 117, 175 N. E. 8 (1931); *N. Y. C. R. R. v. Pub. Util. Comm.*, 116 Oh. St. 120, 155 N. E. 862 (1927).

<sup>77</sup> *Tex. & Pac. Ry. v. United States*, 289 U. S. 627 (1933).

<sup>78</sup> Citing: *St. L.-S. W. Ry. v. United States*, 245 U. S. 136 (1917). See also: *United States v. Ill. Cent. R. R.*, 263 U. S. 515 (1924); *Sou. Ry. v. United States*, 204 Fed. 465 (Commerce Court, 1913).

<sup>79</sup> Page 649 of the official report.

must be afforded.<sup>80</sup> The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. . . . The situation must be such that the carrier or carriers if given an option have an actual alternative."

Justice Stone dissented from the distinction between this case and the one in which both rates were joint ones participated in by the defendant railroad, but he did not take issue with the dictum that Section Three has no application where the two rates are entirely separate rates of different carriers. That this is true was made clear by the 1940 amendment to Section Three adding:<sup>81</sup>

"Provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

It is difficult to see how a shipper would have any standing to attack any rate given by another railroad to his competitor, regardless of how injurious to him the relation between such rates and his own may be. The only procedure open to him would seem to be to attack his own rate an unreasonably high *per se*, using the other railroad's rate for whatever it may be worth as a comparison. Having no data to show cost of serving him, about all a shipper can do is to show that for approximately the same distance another railroad charges a lower rate on like goods, that the roads run through similar terrain, and are in the same general class as to type and volume of business. This would seem to be some indication at least that his rate is too much and to justify the throwing on the defendant railroad the burden of justifying the difference by proof of greater expense or otherwise.<sup>82</sup> It is so provided in Nebraska by statute.<sup>83</sup> The Commission, on the other hand, may inquire on its own motion into the reasonableness *per se*, as well as relatively of any rate.<sup>84</sup>

It was held quite early that the reasonableness or unreasonableness of a particular carrier's rate was not conclusively established by proof of what another carrier charged for a similar service.<sup>85</sup> The reason for

<sup>80</sup> Here the court inserted the following footnote: "This is not true of an order pursuant to Section 15(1), prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section."

<sup>81</sup> 49 F. C. A. §3(1), as amended by Act of Sept. 18, 1940, 54 STAT. 902.

<sup>82</sup> See: *Minneapolis Traffic Assn. v. Chi. & N. W. Ry.*, 245 I. C. C. 11 (1941), saying evidence of widespread absorption of switching charges is "strong evidence" that a refusal to do so at Minneapolis is unreasonable; *Ry. Exp. Agency v. United States*, 6 F. Supp. 249 (S. D. N. Y. 1934).

<sup>83</sup> *Lincoln Commercial Club v. Mo. Pac. Ry.*, 103 Neb. 504, 172 N. W. 687 (1919).

<sup>84</sup> INTERSTATE COMMERCE ACT §15(1), 49 F. C. A. §15(1).

<sup>85</sup> *I. C. C. v. Union Pac. R. R.*, 222 U. S. 541 (1912). For similar decisions under state statutes see: *Darnell v. Edwards*, 209 Fed. 99 (S. D. Miss. 1913); *Morgan's L. & T. R. R. & SS. Co. v. R. R. Comm.*, 127 La. 636, 53 So. 890 (1911); *Shaw-Fahrer Grain Co. v. Pub. Util. Comm.*, 126 Oh. St. 74, 183 N. E. 922 (1932).

this is that the lower limit of reasonableness of a rate *per se* is determined by what the service costs the carrier, including not only the out-of-pocket cost attributable solely to that service but also a portion of the joint costs such as maintenance of the right of way, salaries of officials, and return to investors. Operating costs are not the same on different railroads due to topography and other reasons. The amounts needed to give the two groups of investors fair returns are not the same. Finally, the roads' volumes of business are not the same, which means that one road can divide its joint costs among more people than the other can.

There is no formula which will result in an accurate division of joint costs among patrons of a railroad or other utility. Within limits a regulatory commission can shift some of the joint-cost burden from shippers of one commodity to those of another so as to enable the former to compete with their rivals on another railroad, but in the absence of clear proof of a compelling public need for doing so it cannot cut a rate below the point at which the carrier makes a substantial return for its service in hauling that commodity; that is, each type of traffic must make a substantial contribution to the joint costs.<sup>86</sup> It would seem from the *Lake Cargo Coal* case<sup>87</sup> that a public interest in enabling shippers of a given commodity to compete with their rivals on another road is not such a public need as will justify the commission's shifting the burden of joint costs from them to shippers of another commodity. In addition to the legal barriers there are practical limits to the power of shifting joint costs, for the second group of shippers is likely to have competitors on the other railroad too.

Of course, if the traffic is not moving, or is barely trickling, under the existing rate because the producers of the commodity cannot compete for the market at destination, the present rate does not result in those producers carrying any part of the joint cost of the railroad. A lower rate may increase the volume of the shipments of that article enough so that the railroad's net revenue from it—the difference between gross revenue and out-of-pocket cost—will increase. If that is the case the lower rate will hurt neither the railroad nor its patrons shipping other commodities, but on the contrary is a more reasonable rate since it enables the shippers of this article to carry some of the joint cost. If the lower rate will not produce this result, if the railroad is not now making more than a fair return, and if the present rate does not throw an excessive share of the joint costs upon this commodity, the present rate is not unreasonably high *per se*, and cannot be reduced over the railroad's objection. In such a case, as one court has said of rates

<sup>86</sup> No. Pac. Ry. v. North Dakota, 236 U. S. 585 (1915).

<sup>87</sup> Anchor Coal v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928).



for electricity, if the complainant feels his service is costing him more than it is worth the only thing he can do is find a substitute.<sup>88</sup>

#### DIFFERENTIALS BASED ON CARRIER COMPETITION

In *Texas and Pacific Railway v. Interstate Commerce Commission*<sup>89</sup> the question of carrier competition as an excuse for rate differentials was first presented to the Supreme Court. The Commission ordered the railroad to accept as its share of a joint rate from a foreign port to a point in the United States no less than it charged on a domestic shipment from the port of reception to the point of destination. The railroad continued its arrangement with ocean carriers whereby on through shipments from England to San Francisco by way of New Orleans it received as its share of the joint rate less than its own rate from New Orleans to San Francisco on shipments originating at New York, Philadelphia and other eastern seaboard points. Its share of the rate from England paid more than the out-of-pocket cost, and it defended the differential by showing that if it insisted upon a greater rate from England, or a large share of the present rate, it would lose all of the traffic since, in that event, all the goods would go from England to San Francisco around Cape Horn or across the Isthmus of Panama and then again by water to the destination, rates for which transportation were, of course, beyond the power of the Commission. Apparently it was not feasible to ship by Cape Horn or the Isthmus from New York and the other eastern seaboard ports. The Commission refused to consider this fact on the theory that the Act limited it to a consideration of circumstances pertaining to the traffic after it reached the United States.<sup>90</sup> Its view was accepted by the district court, which said a carrier could justify a differential only by showing it cost less to render one service than the other.<sup>91</sup> The circuit court of appeals said that even if competition from other carriers justified some differential the railroad had made too great a difference and so the order of the Commission was enforceable.<sup>92</sup> The Supreme Court reversed, holding that carrier competition is a fact to be considered in determining whether a differential is an unreasonable discrimination in violation of Section Three, and, since the Commission had not taken it into consideration at all, the case was not before the circuit court of appeals in such a way as to enable it to determine what the amount of the differential should be, so it should have sent the case back to the Commission for a fixing of the rate in the light of competition and other facts. Justice Shiras, for the majority, said:<sup>93</sup>

<sup>88</sup> *Ga. P. & Lt. Co. v. Ga. Pub. Serv. Comm.*, 8 F. Supp. 603 (N. D. Ga. 1934).

<sup>89</sup> 162 U. S. 197 (1896).

<sup>90</sup> 4 I. C. C. 447.

<sup>91</sup> *I. C. C. v. Tex. & Pac. Ry.*, 52 Fed. 187 (S. D. N. Y. 1892).

<sup>92</sup> *I. C. C. v. Tex. & Pac. Ry.*, 57 Fed. 948 (C. C. A. 2d, 1893).

<sup>93</sup> Page 220 of the official report.

“. . . we think it evident that those facts and matters which carriers, apart from any given question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable.”

A similar conclusion was reached by the English courts construing the Railway and Canal Traffic Act of 1854,<sup>94</sup> from which Sections Two and Three of the Interstate Commerce Act were taken, Lord Herschell saying:

“It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competitive routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market.”

In *East Tennessee etc. Railway v. Interstate Commerce Commission*<sup>95</sup> railroad competition was recognized as making the circumstances dissimilar. The Commission ordered the railroad to refrain from charging a higher rate to Chattanooga than to Nashville, the latter being a longer haul over the same line. The railroad justified the differential by showing that at Nashville there was competition with other railroads so that if it did not charge the low rate to Nashville it would get no Nashville traffic, and that the existing rate to Nashville paid more than the out-of-pocket cost. On behalf of the Commission it was contended that this violated both the Long and Short Haul Clause of the Section Four<sup>96</sup> and the unreasonable discrimination provision of Section Three. The Supreme Court rejected both contentions. Of that dealing with Section Three it said:<sup>97</sup>

“The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines.”

The court then recognized that the right of the carrier to cut rates to meet competition was not unlimited, using as an illustration the case of

<sup>94</sup> Phipps v. London & N. W. Ry., 2 Q. B. D. (1892) 229.

<sup>95</sup> 181 U. S. 1 (1901).

<sup>96</sup> 49 F. C. A. §4.

<sup>97</sup> Pages 18 and 19 of the official report.

a carrier cutting its rate to the competitive point below cost, by which the court apparently meant out-of-pocket cost. Of such a situation it said:<sup>98</sup>

“Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places.”

An analysis of these two cases shows that carrier competition at city *A* and no competition at city *B* was held to be a fact to be considered by the Commission in determining the reasonableness of a preference to *A* because: (1) If the preference were removed the defendant railroad would lose all the traffic going to *A*; (2) the shippers to and from *B* were in no worse position with respect to their own ability to compete with their rivals in *A* than they would be if the preferential rate were raised; and (3) the rate to *A* paid more than the out-of-pocket cost so that it did not cause rates to *B* and other places to be raised to make up a deficit in carrier revenue. That is, a preference is not unreasonable when it is designed to increase the carrier's revenues from transportation and does not injure other patrons.

In *United States v. Illinois Central Railroad*<sup>99</sup> the railroad established a blanket or group rate on lumber moving to the North from all points in the area from the Mississippi River to Alabama and from Jackson to the Gulf, which points were on its own main or branch lines or on the lines of independent roads if such roads had competitive connections with another trunk line, but not to points within the area on independent lines not so connected with competitors of the Illinois Central. Knoxville, Mississippi, was on the line of an independent road which connected with the Illinois Central but not with any competing road. As a result the lumber plant at Knoxville paid 2 cents per 100 pounds more than mills at points to which the blanket rate was given although Knoxville was in the center of the blanket area. The Commission found the Knoxville rate was not unreasonably high *per se*, and did not find the blanket rate unreasonably low *per se*, but found the differential unreasonable discrimination under Section Three and ordered it discontinued. The court sustained the order, Justice Brandeis saying:<sup>100</sup>

“The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or

<sup>98</sup> Page 20 of the official report.

<sup>99</sup> 263 U. S. 515 (1924).

<sup>100</sup> Pages 523-24 of the official report. Authorities cited by the court have been omitted.

malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. Self interest of the carrier may not override the requirement of equality in rates. It is true that the law does not attempt to equalize opportunities among localities and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. To bring a difference in rates within the prohibition of Section Three, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice."

After observing that the Commission had considered all the facts presented by the railroad and that the weight to be given these was for the Commission, he continued:<sup>101</sup>

"The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before the Transportation Act of 1920. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's design to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need, and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable."

At first glance it seems that this departs from the *Texas and Pacific* and *East Tennessee* cases since to charge points on competitive independent lines the Knoxo rate would cause traffic from those places to be lost to the Illinois Central, discontinuing the preference would not help the plant at Knoxo to compete with those on the competitive independent lines, and the blanket rate was remunerative so that it did not make the Knoxo rate unreasonably high. However, the blanket rate was also given to non-competitive points on the Illinois Central's own line which points were considerably farther from the market than was Knoxo. It was the discrimination between Knoxo and these other non-

<sup>101</sup> Page 525 of the official report. Authorities cited by the court have been omitted.

competitive points which was unreasonable,<sup>102</sup> so the *Illinois Central* case does not change the rule of the older decisions.

In view of the 1940 amendment to Section Three<sup>103</sup> it appears that the possibly conflicting policy of the Transportation Act of 1920 has been abandoned in favor of carrier competition. In the comparatively recent case of *L. T. Barringer and Company v. United States*<sup>104</sup> the Court refused to set aside an order of the Commission approving a charge by a railroad for loading cotton at Oklahoma points for shipment into the Southeast and loading without charge at the same places for shipment to Gulf ports. The reason given by the carriers was that this was necessary to meet truck competition from Oklahoma to the Gulf ports, there being no trucking of cotton to the southeastern destinations. Four justices dissented on the ground that this was an accessorial service, not a part of the line haul, and so was governed by Section Two which requires absolute equality. Chief Justice Stone, for the majority, said:<sup>105</sup>

"It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. It follows that competitive conditions, which would justify and render non-discriminatory a reduction in the line-haul tariff on a particular class of traffic, would likewise justify the reduction and render it non-discriminatory if made in the loading charge instead. Whether made in the one charge or in the other, it enters into the total cost of the line-haul to the shipper, regardless of whether the loading charge be separately stated or included in the line haul tariff. Since the only effect on the shipper is the difference in the line-haul charge he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as non-discriminatory equally justify the other."

This emphasis on the carrier's need to give the preference to protect itself against competition and the absence of injury to the complaining shipper is clearly in line with the reasoning in the *Texas and Pacific* and *East Tennessee* cases. The dictum in the *New Orleans-Galveston* case<sup>106</sup> to the effect that Section Three allows the carrier to set rates to retain

<sup>102</sup> Since the *Illinois Central* controlled the joint rate from Knoxville this case is not governed by Justice Roberts' rule in *Tex. & Pac. Ry. v. United States*, 289 U. S. 627 (1933) to the effect that Section Three does not apply where the differential is between a rate controlled by the defendant and one participated in but not controlled by it.

<sup>103</sup> This reads: "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatsoever description." 54 STAT. 902, 49 F. C. A. §3(1).

<sup>104</sup> 319 U. S. 1 (1943).

<sup>105</sup> Pages 7 and 8 of the official report. Authorities cited by the court have been omitted.

<sup>106</sup> *Tex. & Pac. Ry. v. United States*, 289 U. S. 627, 636 (1933).

traffic but not for the purpose of building up one community or destroying another is also in accord with the original rule since it requires that the preference be given for the purpose of getting traffic which would otherwise be lost to a competitor. A number of state decisions and early decisions in the lower federal courts are likewise in agreement.<sup>107</sup>

Apparently, a difference in the cost of rendering two services gives the railroad a clear right to make a corresponding difference in rates regardless of its motive or the effect upon the patron paying the higher one, whereas carrier competition at the preferred locality is merely a fact to be considered by the Commission when the carrier shows the three conditions of the rule of the *Texas and Pacific* and *East Tennessee* cases have been met. The Commission's decision will not be disturbed on this ground unless it shows that the Commission ignored competition or unless there is no substantial evidence to support the finding.

#### THE LONG AND SHORT HAUL CLAUSE

Not infrequently the rate on a shipment passing through a locality and going on to a more distant place is less than it would have been had the shipment been consigned to the first town. This special form of discrimination between patrons on account of locality is dealt with in Section Four of the Interstate Commerce Act.<sup>108</sup> It provides in substance that without first obtaining the approval of the Commission no carrier shall receive a greater aggregate compensation for transporting passengers or a like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance. After investigation the Commission may authorize a less rate for the longer distance but such a rate must be at least reasonably compensatory. No such authority may be granted on account of merely potential water carrier competition and when a railroad has reduced rates to competitive points because of actual water carrier competition it may not raise such rates again until the Commission, after hearing, finds a change in conditions other than the elimination of water competition. Commission approval of a lower long haul rate is not, however, a grant in perpetuity and the Commission can reopen the question without waiting for a petition from the carrier, as where it finds the low long haul rate is eliminating water carriers from competition.<sup>109</sup>

<sup>107</sup> *I. C. C. v. Nash. C. & St. L. Ry.*, 120 Fed. 934 (C. C. A. 5th, 1903); *I. C. C. v. Cinti. P. & V. R. R.*, 124 Fed. 624 (E. D. N. C. 1903); *N. Y. Central R. R. v. P. U. Comm. of Ohio*, 116 Oh. St. 120, 155 N. E. 862 (1927); *R. R. Comm. v. Hocking Valley Ry.*, 82 Oh. St. 25, 91 N. E. 865 (1910); *Chi. & A. R. R. v. People*, 67 Ill. 11 (1875); *Wedron Silica Co. v. Ill. Commerce Comm.*, 387 Ill. 581, 57 N. E. (2d) 349 (1944). *But see Oregon-Washington R. R. & Nav. Co. v. Dept. Pub. Wks.*, 151 Wash. 142, 275 Pac. 87 (1929).

<sup>108</sup> 49 F. C. A. §4.

<sup>109</sup> *Skinner & Eddy Corp. v. United States*, 249 U. S. 557 (1919).

As originally enacted, this prohibition against a less rate for the long haul did not apply unless the shipments were "under substantially similar circumstances and conditions." The Supreme Court held that in Section Two these words were confined to circumstances and conditions relating to transportation so carrier competition did not justify a difference in rates for like and contemporaneous services in transporting a like kind of traffic.<sup>110</sup> The court said the purpose of Section Four was different from that of Section Two and the words had a broader meaning in the Long and Short Haul Clause, so carrier competition between the long haul points and no competition for the short haul was a dissimilarity in circumstances which the Commission must consider though it did not necessarily relieve the carrier from the prohibition.<sup>111</sup> In the same case the court also held that where there was such dissimilarity in the conditions the railroad could charge less for the longer haul without first obtaining the approval of the Commission.

The Act was amended in 1910<sup>112</sup> and the phrase "under substantially similar circumstances and conditions" was eliminated. In the *Intermountain Rate* case<sup>113</sup> the railroads had applied to the Commission for permission to continue their coast-to-coast rates lower in the aggregate than the rate from a coastal point to an intermediate, inland point, the only reason for the proposed lower long haul rate being competition from water carriers and from Canadian coast-to-coast railroads. The Commission, after a hearing, granted relief but on condition that a proportion be maintained between the two rates, which proportion was to vary with the zones into which it divided the country. The railroads disregarded the order and sued to enjoin enforcement of the statute as amended, contending it was an unconstitutional delegation of legislative power. The Commerce Court granted the injunction saying the order exceeded the Commission's authority, since it did not set the rate but merely a proportion to be maintained between rates.<sup>114</sup> The Supreme Court reversed, saying the Commission had not exceeded its authority

<sup>110</sup> *Wight v. United States*, 167 U. S. 512 (1897).

<sup>111</sup> *I. C. C. v. Ala. Midland Ry.*, 168 U. S. 144 (1897); *Lou. & Nash. R. R. v. Behlmer*, 175 U. S. 648 (1900); *East Tenn. V. & G. Ry. v. I. C. C.*, 181 U. S. 1 (1901); *I. C. C. v. Clyde SS. Co.*, 181 U. S. 29 (1901); *I. C. C. v. L. & N. R. R.*, 190 U. S. 273 (1903). Most of the lower federal courts had reached the same conclusion prior to the *Alabama Midland* case. See: *Ex parte Koehler*, 31 Fed. 315 (D. Ore. 1887); *Mo. Pac. Ry. v. S. T. & P. Ry.*, 31 Fed. 862 (E. D. La. 1887); *I. C. C. v. A. T. & S. F. Ry.*, 50 Fed. 295 (S. D. Cal. 1892); *I. C. C. v. Cin. N. O. & T. P. Ry.*, 56 Fed. 925 (N. D. Ga. 1893). But see: *Junod v. Chi. & N. W. Ry.*, 47 Fed. 290 (S. D. Iowa 1891). At least two state courts had reached the opposite result in interpreting similar state legislation. *Ill. Cent. R. R. v. People*, 121 Ill. 304, 12 N. E. 670 (1887); *L. & N. R. R. v. Commonwealth*, 104 Ky. 226, 46 S. W. 707 (1898).

<sup>112</sup> 36 STAT. 547.

<sup>113</sup> *United States v. A., T., & S. F. R. R.*, 234 U. S. 476 (1914).

<sup>114</sup> *A., T., & S. F. R. R. v. United States*, 191 Fed. 856 (Commerce Court, 1911).

and the amendment did not change the previous law in substance, but merely required prior approval by the Commission of the long haul rate even though there was competition at the long haul points. So, competition for the long haul is still a circumstance to be considered by the Commission, which the court said must exercise its discretion in the light of Section Two and Three, for which reason the amended statute was held not an unconstitutional delegation of legislative power.

Since it necessarily costs more to haul a shipment through Town *A* to the more distant Town *B* than to stop it in Town *A*, and since a railroad cannot set rates for the sole purpose of building up one town and destroying another,<sup>115</sup> and, according to the *Lake Cargo Coal* case,<sup>116</sup> even the Commission cannot set rates for the purpose of equalizing competitive abilities of shippers in different cities, it seems that the only possible justification for a lower rate for the longer haul is carrier competition. The test, then, as in other cases of carrier competition, would seem to be: (1) Will the railroad lose the traffic if it raises the long haul rate? (2) If the lower long haul rate be raised will the shipper in the intermediate town be in a better position to compete with his rival at the long haul destination? (3) Will the lower long haul rate cause a financial loss to the railroad which must be passed on to its other patrons in rates higher than they would pay if the long haul rate were raised?

In the *Behlmer* case<sup>117</sup> shipments of grain and hay from Memphis to Charleston passed through Summerville. The Summerville rate was not unreasonable *per se* but was calculated by adding to the Charleston rate the local rate back from Charleston to Summerville. Thus, though the Summerville consignment actually never went to Charleston, the rate was calculated on the basis of its having gone there and returned to Summerville. The justification was that the Charleston rate was fixed to meet water and rail-water carrier competition from Chicago to Charleston; that is, rates fixed by these carriers on hay and grain produced in the Chicago area. The Commission ordered the railroad to cease the discrimination, on the theory that the carrier competition did not originate at the point of origin of these shipments, and in any event, since the other carriers were subject to the Act, competition from them could not be considered. The Supreme Court held this was error,<sup>118</sup> competition for the long haul being an element to be considered regardless of the fact that the competing carrier was subject to the Act and despite the fact that the one carrier hauls western grain and hay from

<sup>115</sup> *Tex. & Pac. Ry. v. United States*, 289 U. S. 627, 636-7 (1930).

<sup>116</sup> *Anchor Coal Co. v. United States*, 25 F. (2d) 462 (S. D. W. Va. 1928).

<sup>117</sup> *Lou. & Nash. R. R. v. Behlmer*, 175 U. S. 648 (1900).

<sup>118</sup> *E. Tenn., V. & G. Ry. v. I. C. C.*, 181 U. S. 1 (1901), also held that it is immaterial whether the competition is by water or rail carriers.



Chicago while the other hauls southern grain and hay from Memphis. Assuming that an increase in the Memphis-Charleston rate would have caused Charleston merchants to buy their grain and hay in Chicago, and assuming that the long haul rate yielded something above out-of-pocket cost, the above test was met, for should the Memphis grain and hay be so shut out of the Charleston market the Charleston merchants would still have received their goods at the same preference over Summerville merchants, regardless of whether the latter bought in Chicago or Memphis. The inability of Summerville merchants to compete was not caused by the defendant railroad but by the natural advantage of Charleston's location, and the defendant could not be forced to reduce its revenue to overcome such an advantage possessed by Charleston.<sup>119</sup> On the contrary, if it did so, it would probably be an unjust discrimination against that city.<sup>120</sup> Whether these assumptions as to the necessity of the present rate to meet competition and the amount of revenue it yields are sound are, of course, questions of fact to be determined by the Commission. On these questions the courts can conduct no original inquiry and are bound by the Commission's order unless an error of law has been committed or there is no substantial evidence to support the Commission's findings.<sup>121</sup>

#### EXTENT, CAUSES AND CONTROL OF DISCRIMINATION BETWEEN PATRONS IN THE EAST, SOUTH AND WEST

The United States is divided for railroad rate purposes into three classification areas, in which there are some subdivisions. Roughly, Official Territory lies east of the Mississippi River and north of the Ohio and the Potomac; Southern Territory lies east of the Mississippi and south of Official Territory; Western Territory includes the area west of the Mississippi. This division apparently was made so as to reduce to the minimum the number of railroads running from one territory into the other.<sup>122</sup> Rates, within and between these territories, are of three types: class, commodity and exception. Class rates apply to high grade manufactured goods of considerable value in proportion to weight. Approximately 4 per cent of all carload freight and a large part of less than carload shipments move under these. Commodity rates apply on most raw materials and heavy manufactured goods, and account for about 85 per cent of all carload traffic. Exception rates are exceptions to class rates which would otherwise apply, as where an article

<sup>119</sup> *Ex parte Koehler*, 25 Fed. 73 (D. Ore. 1885); *I. C. C. v. A., T., & S. F. Ry.*, 50 Fed. 295 (1892).

<sup>120</sup> *Brewer v. Cent. of Ga. Ry.*, 84 Fed. 258 (S. D. Ga. 1898).

<sup>121</sup> *E. Tenn. V. & G. Ry. v. I. C. C.*, 181 U. S. 1 (1901); *I. C. C. v. Clyde SS. Co.*, 181 U. S. 29 (1901); *United States v. A., T., & S. F. R. R.*, 234 U. S. 476 (1914); *United States v. L. & N. R. R.*, 235 U. S. 314 (1914).

<sup>122</sup> See WENDELL BERGE, *ECONOMIC FREEDOM FOR THE WEST* (1946) 104.

is taken out of its regular class and put in another. They are usually lower than the class rate which would otherwise apply and are set by the carriers to meet truck competition, to establish a rate of restricted application, and for administrative convenience. These account for about 10 per cent of carload shipments.<sup>123</sup>

"The importance of class rates lies in the fact that they apply particularly to manufactured goods so that the effect of a differential must inevitably be reflected in the distribution of manufacturing industries."<sup>124</sup> Each kind of article moving under class rates is given a class rating, of which Official Territory has 27, Southern 28 and Western 26.<sup>125</sup> It may be rated differently in each of the three territories. Of a total of more than 20,000 articles rated, at the time of the Commission's investigation, only 12,000 were uniform in all three, most of the differences being in favor of Official Territory.<sup>126</sup> In each territory rates are set for each class, and these were likewise found to differ between the territories with a tremendous preponderance of the differences being in favor of Official Territory, both on less than carload and on carload shipments.<sup>127</sup> Like differences were found in shipments from one territory into the other. According to the Interstate Commerce Commission<sup>128</sup> some "typical rates" on Class One goods were: New York to Chicago (890 miles) \$1.67 per hundredweight; Atlanta to Chicago (728 miles) \$2.10; Pittsburgh to Kansas City (852 miles) \$1.97; Atlanta to Kansas City (879 miles) \$2.40; Detroit to Dallas (1,116 miles) \$2.89; Atlanta to Dallas (822 miles) \$2.61; Atlanta to New Orleans (429 miles) \$1.73. According to Honorable Wendell Berge, Assistant Attorney General of the United States,<sup>129</sup> "On the average, goods subject to class rates, which are primarily important in the marketing of industrial products,

<sup>123</sup> The following table appearing in *Class Rate Investigation, 1939*, 262 I. C. C. 447, 564 (1946), shows the division of carload traffic among these three types of rates in Southern and Official Territories:

Territory	Class Rates	Exception Rates	Commodity Rates
	Per Cent	Per Cent	Per Cent
Within Official .....	5.8	17.6	76.7
Within Southern .....	1.8	6.0	92.2
Official to Southern .....	12.6	36.3	51.1
Southern to Official .....	0.9	4.9	94.2

See Heath, *The Uniform Class Rate Decision and Its Implications for Southern Economic Development* (1946) 22 SOUTHERN ECONOMIC JOURNAL 213.

<sup>124</sup> BERGE, *op. cit. supra* note 122, at 107.

<sup>125</sup> Class Rate Investigation, 262 I. C. C. 447, 467 (1945).

<sup>126</sup> *Id.* at 468 and 471.

<sup>127</sup> For example: Of 2,092 articles put in Class One in Official Territory, on all but 12 the rate was higher by approximately 30 per cent in Southern. Of 2,672 given the next rating in Official Territory, all but 51 paid over 40 per cent higher rates in Southern, and so on through all the classes. The difference was even greater as between Official and Western Territories. *Id.* at 731.

<sup>128</sup> *Id.* at 567.

<sup>129</sup> BERGE, *op. cit. supra* note 122, at 107.

must pay rates 37 per cent higher in the South than for comparable service in the East. In the West these rates are from 46 per cent to 71 per cent higher than in the East."

Turning to commodity rates the Commission said:<sup>130</sup>

"In many instances, commodity rates in the South are lower than commodity rates on like traffic in Official Territory. There is no comprehensive showing as to the general level of commodity rates in the South as compared with that in Official Territory. The record does reveal, however, that in the following instances commodity rates in the South are lower than rates on the same commodity in Official Territory: Brick, building and facing . . . fertilizer and fertilizer materials . . . lime . . . logs . . . lumber . . . pig iron . . . pulpwood . . . sand, gravel, crushed stone and slag . . . iron or steel scrap . . . sulphuric acid . . . iron ore."

Thus the combination of class rates and commodity rates seems to encourage the movement of raw materials and semi-finished goods to Official Territory and to give finished manufactured articles made in Official Territory an advantage over those made elsewhere.

It is a matter of common knowledge that most of the manufacturing plants of the country, most of its population, most of its purchasing power, and its highest average individual income are to be found in Official Territory. Though it covers but 14 per cent of the land area of the country, the Commission found that<sup>131</sup>

"Depending on whether Michigan and Virginia are excluded or included, Official Territory is estimated to contain between 60 and 62 per cent of the manufacturing establishments, between 44 and 46 per cent of the hotel rooms, 59 and 61 per cent of the office, trade and other business structures, 50 and 52 per cent of the dwelling units, 48 and 50 per cent of the motor vehicles, 56 and 58 per cent of the miles of wire in cable, and 64 and 66 per cent of the miles of all wire of telephone companies."

In 1940 the population of Official Territory was approximately 49 per cent of the whole, and from 1900 to 1940 it had 48 per cent of the total increase in the nation's population but 53 per cent of the increase in gainfully employed persons. Although so highly industrialized it is an important agricultural area, its farm products in 1940 amounting to approximately 31 per cent in value of the total for the country.<sup>132</sup>

So many factors are involved in the development of such an economic condition that it is probably impossible to say with any degree of accuracy what part preferential freight rates have played, but it is obvious that a freight rate structure such as the Commission found to exist tends to develop just such a concentration of industry and wealth. As to this the Commission said:<sup>133</sup>

<sup>130</sup> Class Rate Investigation, 262 I. C. C. 447, 593-600 (1945).

<sup>131</sup> *Id.* at 537.

<sup>132</sup> *Id.* at 542.

<sup>133</sup> *Id.* at 619.

"The principal factors which control the location of industries are: Availability of and cost of obtaining and assembling raw materials; availability of markets, including cost of reaching such markets, adequacy and cost of fuel and power, climate, labor, capital, and, sometimes, momentum of an early start, and the personality of the individual founding the industry. In 1939, freight revenue on commodities in the manufactures and miscellaneous group was but 5.3 per cent of the destination value of manufactured goods. From this it would seem that any differences in freight charges resulting from differences in class rate levels is only a small fraction of that figure. Nearness to markets and ability to ship to markets, on a basis fairly and reasonably related to the rates of competitors, are nevertheless potent factors in the location of a manufacturing plant. In fact, rate relations are more important to the manufacturer and shipper than the levels of the rates."

Accepting the Commission's figure that for the entire country freight rates account for only 5.3 per cent of the destination value of class-rate goods, practically all of the class rate shipments being in or from Official Territory, and Southern class rates being on the average 39 per cent higher than Official, it would seem that freight on Southern class-rate articles would amount to approximately 7.5 per cent of the destination value, and the ratio is still greater as to Western Territory goods. On many articles the manufacturer's margin of profit is little if anything more than two or three per cent of the gross value of the article at destination. In any event the difference gives the manufacturers in Official Territory a power to undersell the Southern and Western manufacturers substantially and regularly, so perhaps Mr. Berge does not exaggerate in saying:<sup>134</sup>

"The West and South have long fought against these high and discriminatory freight rates. Until very recently the battle has been waged without victory or effect. To both regions continuous disadvantage in transport cost has meant not only the loss of local industry and the inability of new industry to rise. It has meant a perpetual reduction in purchasing power, a gradual drift of population to more favored regions, and, in some sections, it has meant even the closing of schools and the loss of homes and farms. Bitter experience has taught the people of these regions a basic lesson—that it will avail them little to build factories, to develop power projects, to seek new industries and new capital unless the slow poison of transport handicaps can be eliminated."

Similarly, a rather minute difference in commodity rates may divert shipments from one market to another. Perhaps wheat affords the most striking example. For many years and through a series of hearings the Commission has struggled to establish and maintain a fair rate structure for wheat all over the country. It has likened freight rates on wheat to a blanket in that the slightest pull at one part of the country has an

<sup>134</sup> BERGE, *op. cit. supra* note 122, at 109.

effect throughout the whole.<sup>135</sup> Failure to absorb switching charges at Minneapolis while absorbing them at Chicago was found to divert substantial shipments to the latter, though the net saving to the shipper was only a little more than one-eighth cent per bushel.<sup>136</sup>

The injurious consequences probably flowing from long continued, systematic freight rate discrimination between patrons in different localities are far reaching. The shipper paying the higher rate is at a disadvantage in competing for the market with his favored rival, and in normal times most markets and most commodities are highly competitive. Through this injury to him his community loses his purchasing power and, more important, his wage-paying power. It is impossible to calculate this indirect injury accurately and it may easily be exaggerated. It would seem that the purchasers in the market from which he is excluded have been hurt in that they have lost the opportunity to choose between competing sellers, though the Supreme Court has held that there is no undue prejudice against the market city in discriminatory rates to producers for the market.<sup>137</sup> When the discrimination results from a relation of rates of two separate carriers the carrier charging the higher rate may lose so much traffic as to impair its own efficiency. An indirect consequence is, as we have seen, the concentration of industry, a matter of considerable concern in the problem of national defense in these modern times. However, all of these other injuries are indirect results of the injury to the patron who pays the higher rate and do not exist unless there is an injury to him, so it is perhaps best to consider only the injury to him in determining the propriety of rate discriminations on account of locality.

It is perhaps as difficult to ascertain the cause of the systematic discrimination in favor of shippers in and from Official Territory as it is to trace its effect, but here, as there, some general trends appear. We have seen that the two justifications for preferences of this type are a difference in cost of service and carrier competition making it necessary in order to save the traffic for the carrier. Because of the volume of traffic it might be thought that per unit of service it costs the roads in Official Territory less to carry freight, but the Commission has found just the reverse to be true, saying:<sup>138</sup>

"The various comparisons of territorial costs reviewed hereinabove show that there is little significant difference in the cost of furnishing transportation in the South as compared to the East, excluding the Pochontas territory. The figures both for the year 1939 and the period

<sup>135</sup> Rate Structure Investigation, 164 I. C. C. 619, 697 (1930).

<sup>136</sup> Minneapolis Traffic Asso. v. Chi. & N. W. Ry., 245 I. C. C. 11 (1941).

<sup>137</sup> Phila. & Rdg. R. R. v. United States, 240 U. S. 334 (1916).

<sup>138</sup> Class Rate Investigation, 262 I. C. C. 447, 591 (1945). The studies referred to showed both out-of-pocket and total costs for hauling identical loadings of identical goods.

1930-1939 indicate that, taken as a whole, the costs in the South are equal to or a little lower than those in the East. If the period 1937-41 is used the costs in the South are substantially lower than those in the East."

That being so we should expect to find that the difference in rates is caused by carrier competition, but it appears that just the reverse is true here also, and that the differences in rates are due to absence of carrier competition. At least that is the conclusion of the United States Department of Justice and of the state government of Georgia, which has pending in the United States Supreme Court an original suit brought against numerous railroads alleged to have conspired to eliminate carrier competition in rates.<sup>139</sup> The United States has brought suit in the district court in Nebraska, alleging a similar collusion to maintain non-competitive rates in the West.<sup>140</sup>

In its trial brief Georgia contends that the following is the true situation:<sup>141</sup>

For a long time prior to 1934 the railroads maintained a large number of regional associations, the basic function of which was to maintain technical rate experts to assist the railroads with various mechanical aspects of rate modification. In 1934 all of these were merged into a single integrated hierarchy of trade associations culminating in the Association of American Railroads, newly formed, principally at the instigation of certain large and influential institutional and private investors. The object of this combination was to establish private dominion and control over all freight rates by preventing individual carriers from initiating competitive freight rates in accordance with the provisions of the Interstate Commerce Act. This object was achieved by compelling individual carriers as a condition of filing rate proposals with the Interstate Commerce Commission to obtain first the approval of the proposed rates by the rate fixing agencies of the association. Members agreed to abide by the decision of the association's board of directors and failure to do so would necessitate withdrawal from the association. The consequence of withdrawal would be a practical boycott of the offender by the remaining members; that is, it would be excluded from agreements relating to car service, per diem rules, agreements relating to repairs and like cooperative agreements, and joint traffic would be diverted to other roads whenever possible. In other words the association prevents competition by "the fear of the united competition of the association against the particular member." Another pressure can be exerted on rebellious members through the banking connections of the other members of the association. Gradually the financial groups came to regard

<sup>139</sup> The right of the state to sue was established in *Georgia v. Pennsylvania R. R., et als.*, 324 U. S. 439 (1945).

<sup>140</sup> *United States v. Asso. of American Railroads*, Civil Docket No. 246, U. S. Dist. Ct., Nebraska District.

<sup>141</sup> The brief seems to be well supported by exhibits from which it quotes, and in its broad outlines, at least, is in agreement with Mr. Berge's conclusions. See, *BERGE, op. cit. supra* note 122, at 99, 112-120. Findings of fact have not yet been made in this suit nor in that of the United States.

even the association as a mere convenient vehicle for carrying out the recommendations arrived at by them. As a result rates were set not to enable carriers to compete for traffic, but to prevent the forces of competition and the trend to lower prices created by the depression of the early 1930s from resulting in lower freight rates and a diminished market value of railroad securities "*and of industrial securities of businesses enjoying non-competitive advantages under the prevailing rate structure.*"<sup>142</sup>

If the facts be as the state contends it is obvious that the present rate structure<sup>143</sup> is not the result of carrier competition but of a monopolistic collusion between the railroads contrary to the assumptions of the Interstate Commerce Act. The chief counsel for the defendant northern railroads conceding that if the statements of fact by counsel for the state "were in all points correct, a basis would be laid for the judgment of condemnation" which the state seeks said the facts are otherwise.<sup>143a</sup>

Since most of this inequality comes about through relations between rates of different carriers, the inquiry must be directed at the reasonableness of the rates *per se*. While the Interstate Commerce Commission is a valuable and much needed agency in the prevention and removal of unreasonable discriminations due to locality, the problem is so complex and the testimony introduced by the various interests affected is usually so conflicting that it is not possible for the Commission to calculate with

<sup>142</sup> Italics supplied.

<sup>143</sup> The Interstate Commerce Commission in 1945 issued an order equalizing class ratings throughout the country, and providing a uniform class rate east of the Rocky Mountains, but the validity of the order is now being litigated. Class Rate Investigation, 262 I. C. C. 447 (1945); and see, BERGE, *op. cit. supra* note 122, at 122-4.

<sup>143a</sup> See, John Dickinson, Letter to the New York *Herald Tribune*, published in the issue of December 8, 1946. Mr. Dickinson's contentions may be summarized as follows:

The rapid industrialization of the South, and particularly of Georgia, disproves the charge that the existing railroad rate structure prevents the South from becoming industrialized. Many Southern products carry as low a rate, or even lower rates, to Northern markets than the products of the North. The Interstate Commerce Commission has not turned a deaf ear to the South but has for many years been acceding to the requests of the South and ordering steadily decreasing rates on Southern products shipped to Northern markets. The Northern railroads have not insisted on higher rates from Southern than from Northern producing points, but only that the northbound rates from Southern producing points be no lower than southbound rates from Northern producing points to the Southern market, which reciprocity has been opposed by the Southern interests who demand a higher southbound rate to protect their industries against Northern competition. The rate bureaus of which Georgia complains are only clearing houses for exchange of information on rate problems and do not prevent a single railroad from taking any independent action that it desires, either before or after it has fully canvassed the subject. If the arrangements between railroads attacked by Georgia were abolished we might return to conditions prevailing many years ago when a shipper could not consign goods beyond the terminus of a single line, or else we might be forced to government management of the railroads. To support the assertion that existing railroad rates are not hampering the industrial development of the South the following statement is made: "The figures are conclusive. Taking three chief indices of industrial growth, namely: number of workers employed; total wages paid, and value added by manufacture, the percentage increases shown by

arithmetical exactness the "correct" relation between the rates. If this were possible, correction of a discrimination complained of, may only aggravate the condition of a shipper in a third locality who is not a party to the proceeding and has no opportunity to present his case to the Commission. The Commission, itself, has said that in these matters it must proceed through trial and error, setting rates at the presently apparent proper levels and holding new hearings when it appears that the scales have not been tipped far enough or have gone clear over on the other side.<sup>144</sup>

The Interstate Commerce Act was framed on the assumption that carrier competition, not the Commission, would prevent most injustices in rate relations. As Mr. Berge says:<sup>145</sup>

"With respect to rates . . . the function of the Interstate Commerce Commission has generally been misunderstood by the public. The Interstate Commerce Act, as it now stands, makes it the duty of every common carrier to initiate its own rates and to file them with the Commission. The Commission in reviewing the rates thus made by the industry cannot and does not ordinarily go behind the given data to consider whether the rates are arrived at by agreement or compulsion or, in relatively rare instances, open competition. Investigations conducted by the Department of Justice indicate that more than 99 per cent of the rail rates filed with the Commission become the 'lawful rates' without any review by the Commission."

Carrier competition, subject to Commission supervision, is a far more effective means than Commission investigation alone of combating unreasonable preferences to patrons in a given locality through the relation of rates of different railroads. A competing carrier has an interest in getting and keeping traffic which will keep it on the alert to discover and meet lower rates by other carriers. Since the best the Commission can do is trial and error, it seems probable that the trials of a competing road would not produce any more serious errors.<sup>146</sup> Certainly, carrier

Georgia between 1931 and 1939 in each of these items were 32 per cent, 44 per cent and 55 per cent, respectively, as against increases of only 19 per cent, 25 per cent, and 22 per cent, in the Northeastern states; and of 21 per cent, 26½ per cent and 24 per cent in the country as a whole. The figures since 1939 would be even more startling, but we must wait for them until the next census of manufacturers."

It would thus seem that the controversy in the Georgia case has been reduced to an issue of fact, the just determination of which must await presentation of evidence. Among other things to be considered would be the possibility that such industrial development as the South has experienced in recent years may be the result of unreasonably low wages paid to off-set the handicap of unreasonably high freight rates, and the percentages cited by Mr. Dickinson may reflect the rate of recovery from the Great Depression rather than an actual gain in new industries.

<sup>144</sup> Rate Structure Investigation, 164 I. C. C. 619, 697 (1930).

<sup>145</sup> BERGE, *op. cit. supra* note 122, at 111.

<sup>146</sup> "The decision as to what is a sufficient difference to fairly require a discrimination in its favor must be decided by the fallible mind of man. . . . The decision as to the differences, too, must always be decided by man; and the government official in Germany, France, Italy, Spain, and other countries of Europe



competition offers a much speedier method of counteracting preferential rates by other roads than a Commission hearing does. The solution seems to be to restore active carrier competition and limit interference therewith to cut-throat competition found to be such by the Commission—a possible but greatly exaggerated danger—and to rates which are discriminatory in relation to other rates charged by the same carrier and which do not meet the test of the *Texas and Pacific* and *East Tennessee* cases: (1) Are no lower than necessary to get the traffic; (2) do not decrease the competitive abilities of the same carrier's other patrons; and (3) are compensatory so as not to throw an added rate burden on the same carrier's other patrons.

How to bring about this return to the sort of carrier competition anticipated by the framers of the Act and protected by the decisions of the Supreme Court construing the Act is difficult to say especially in view of the financial control of the railroads by banks, insurance companies and private investors whose principal interests are in non-carrier businesses now concentrated in Official Territory. The Georgia suit in the Supreme Court and that brought by the United States in the district court in Nebraska are at least encouraging steps in that direction.

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where there is state ownership of railroads, has caused even more complaint by his rulings than has the manager of the private corporation in the United States." Gerrit L. Lansing, *Discrimination in Railroad Rates* (1886) 28 POP. SCI. MONTHLY 494.