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Railroads -- Abandonments and Partial Discontinuances of Passenger Service -- Jurisdiction -- Factors in Determining

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tiff must show circumstances pointing to both the physical and the responsible human cause of the accident.[17]

In the final analysis the principal case neither changes the duty of the proprietor,[18] nor does it lessen the elements to be proved by the plaintiff.[19] However, the case does express a willingness on the part of our court to allow a plaintiff to have either of these necessary elements inferred from convincing circumstancial evidence. There will undoubtedly be many instances where a plaintiff will be unable to obtain direct proof of either of these elements of actionable negligence. He may then offer circumstantial evidence from which one of the elements may be inferred. That is as far as the court has gone in this case. The case does not, as the dissent suggests, support the proposition that a plaintiff may establish a prima facie case merely by proving that there was some slippery substance on the floor where she fell. Each case must be decided on the facts peculiar to it, and there is no question that as past cases of this type are distinguishable on their facts, so is the principal case distinguishable from all others.[20]

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Railroads—Abandonments and Partial Discontinuances of Passenger Service—Jurisdiction—Factors in Determining

Since 1916, when railroad mileage in the United States reached its peak,[1] there has been a steady reduction of trackage and service.[2]

[17] For an excellent distinction between circumstantial evidence and *res ipsa loquitur*, see Harris v. Mangum, 183 N. C. 235, 237, 111 S. E. 177, 178 (1922) (quoted in Howard v. Texas Co., 205 N. C. 20, 23, 169 S. E. 832, 834 (1933).

[18] The proprietor is not an insurer, but owes to customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition, and to give warning of unsafe conditions in so far as can be ascertained by reasonable inspection. For a collection of cases so holding see Fanelty v. Rogers Jewelers, Inc., 230 N. C. 694, 699, 55 S. E. 2d 493, 497 (1949).

[19] See note 1 *supra*.

[20] The facts of past cases of this class did not warrant their submission to the jury in the absence of direct evidence; with the possible exception of King v. Thackers, Inc., 207 N. C. 869, 178 S. E. 95 (1935).

[1] In that year there were 435,745 miles of track in operation. See ASSOCIATION OF AMERICAN RAILROADS, RAILROAD TRANSPORTATION, A STATISTICAL RECORD (1951). Miles of track in North Carolina reached a peak of 5,522 in 1920. See ICC, STATISTICS OF RAILROADS IN U. S. (1951).

[2] Statistics on abandonments are available only from 1920, when the ICC was given juristiction over abandonments under the Transportation Act of that year. By 1945 there had been 33,513 abandoned miles of trackage in the United States, 613 of them being in North Carolina. See CHERINGTON, THE REGULATION OF RAILROAD ABANDONMENT 105 (1948). There were five additional abandonments in North Carolina between 1945 and 1948 inclusive, cutting the railroad trackage in the state to 4,554 miles. The figures were derived from individual abandonments in REPORT OF THE NORTH CAROLINA UTILITIES COMMISSION (1945-46, 1947-48). No statistics are available indicating the reduction of trains nationally, although between 1945 and 1948 inclusive, 14 daily passenger trains were discontinued in North Carolina.

Among the causes of reduction in passenger service,[3] and the one of greatest present-day importance, is competition from other forms of transportation; namely, the bus, airplane and private automobile.[4] Therefore, until the railroads can better their competitive position or until they come merely to serve a certain limited segment of the traveling public, the Interstate Commerce Commission and our state commissions will be called on to continue to grant abandonments and discontinuances.

Reductions in service are of two types: (1) complete abandonments of certain lines or branches, and (2) partial discontinuances of service.

The authority to abandon all or any segment of an interstate railroad, that is, one extending into two or more states, is within the exclusive jurisdiction of the Interstate Commerce Commission.[5] It has power to authorize a complete abandonment of an interstate line as to both interstate and intrastate commerce because interstate commerce is involved. "Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discriminations which are found to result. . . . "[6]

Where, however, a purely intrastate railroad is involved; *i. e.*, the tracks of a railroad lie wholly within one state and the railroad is being operated independently and not as a branch of any railroad engaged in interstate commerce, the Interstate Commerce Commission's authority is limited to the abandonment of the interstate business, rather than both the interstate and intrastate business.[7] "[The railroad's] continued operation solely in intrastate commerce cannot be of more than local concern. Intrastate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage."[8] The

[3] This article pertains only to reductions in passenger service. Fundamental causes of such reductions may be divided conveniently into five categories: (1) Competition from other forms of transportation; (2) readjustments in railroad operating practices in a given area; (3) exhaustion or depletion of natural resources, or the closing or dismantlement of non-transportation facilities; (4) legal changes in the status of the operating railroad or of the particular segment; and (5) miscellaneous or unknown causes. See CHERINGTON, *op. cit. supra* note 2, at 108.

[4] In North Carolina alone there are 847,331 registered motor vehicles, five commercial airlines serving 13 cities, and 101 motor passenger carriers. See NORTH CAROLINA ALMANAC 1951.

[5] 49 U. S. C. § 1 (18-20) (1948), Colorado v. United States, 271 U. S. 153 (1925); Central N. E. Ry. v. B. & A. R. R., 279 U. S. 415 (1923).

[6] Colorado v. United States, 271 U. S. 153, 163 (1925). This case involved a branch line, wholly within one state, of an interstate carrier, which branch was doing both intrastate and interstate business.

[7] Texas v. Eastern Texas Ry., 258 U. S. 204 (1922).

[8] *Id.* at 216. Rarely, however, will a carrier wish to, or be able to operate

abandonment of the remaining intrastate business is within the jurisdiction of the state. In North Carolina this authority is placed in the Utilities Commission.[9] As every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, Congress provided means for cooperation between the state and the federal government.[10]

Jurisdiction as to a partial discontinuance,[11] as contrasted with a complete abandonment, is with the state; for every state has the exclusive right to regulate passenger service on all railroad lines wholly within its borders. This is true even where these lines are a part of an interstate rail network, or where the train or trains involved run between two or more states transporting interstate passengers.[12] The Interstate Commerce Commission has held that it has no authority to authorize a partial discontinuance as such.[13] Therefore, until Congress grants the Interstate Commerce Commission jurisdiction over partial discontinuances, the states will be free to regulate passenger service within their boundaries even though the trains run without the state and interstate commerce will be affected.

Most states, in regulating public utilities within their respective borders, have given authority to a commission to see that railroads provide reasonably adequate passenger service.[14] A few states, like North Carolina, provide by statute what minimum service shall be

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once it has been authorized to abandon its interstate business; and it may be deprived of its property under the due process clause of the Fourteenth Amendment if it is not then allowed to abandon its intrastate business as well. So, in practical effect, the ICC has exclusive jurisdiction in *all* abandonments. See Bullock v. Railroad Comm'n, 254 U. S. 513 (1920); Brooks-Scanlon Co. v. Railroad Comm'n, 251 U. S. 396 (1919).

[9] N. C. GEN. STAT. §62-96 (1943 Recomp. 1950).

[10] 49 U. S. C. § 13 (3) (1948). For a discussion of cooperation between federal and state regulatory bodies, see Lindahl, *Cooperation Between the Interstate Commerce Commission and The State Commissions in Railroad Regulation,* 33 MICH. L. REV. 338, 357 (1934). State regulatory bodies, having an intimate knowledge of local conditions and being appreciative of local interests and needs, may hold the original hearings pertaining to an abandonment. Recommendations as to the disposition of the cases are forwarded to the ICC. Members of a state regulatory body might also sit with members of the ICC when an abandonment is under determination. Statistics indicate that these provisions are often put into practice.

[11] A discontinuance of one or more, or all, of several passenger trains is a partial discontinuance and not an abandonment.

[12] Alabama Public Service Comm'n v. Southern Ry., 341 U. S. 341 (1951); New York Central R. R., 254 I. C. C. 745, 765 (1944); Kansas City Southern R. R., 94 I. C. C. 691 (1925).

[13] New York Central R. R., 254 I. C. C. 745, 765 (1944); Kansas City Southern R. R., 94 I. C. C. 691 (1925).

[14] Delaware appears to be the only state without a utilities commission or its equivalent.

furnished,[15] but empower the commission to authorize a "railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public [do] not require such operation."[16] While most state statutes are silent on the explicit authority of a commission to grant discontinuances, such authority is implicit in the agency's supervision over the service of common carriers within the state.[17] Also, it is the general rule that the commission must hold a hearing, either upon its own motion or upon petition of the carrier, before the carrier will be allowed to discontinue any service.[18]

Despite the jurisdictional differences as to abandonments and partial discontinuances, the factors in making a case for either are essentially alike.[19]

[15] FLA. STAT. ANN. § 350.16 (1944); IOWA CODE ANN. § 479.5 (1949); N. C. GEN. STAT. § 62-47 (1943 Recomp. 1950) (At least one passenger train must be run each way daily except Sunday.)

[16] N. C. GEN. STAT. § 62-47 (1950). Other statutes, see note 15 *supra*, contain similar provisions. This authorization to relax the minimum requirements has certain advantages. Since railroad charters or franchises are generally governed by contract rules, and the statutory requirement would therefore become a part of the contract, the cessation of a particular required service would otherwise be prohibited as a breach of contract. See Field, *The Withdrawal From Service of Public Utility Companies*, 35 YALE L. J. 169 (1923); and State v. Enid, O. & W. Ry., 108 Tex. 239, 191 S. W. 560 (1917). However, when a railroad is authorized to abandon, it no longer continues to exercise the privileges conferred by its charter. Texas R. R. Comm'n v. Eastern Texas R. R., 264 U. S. 79 (1923). Hence, without the "relaxing" provision, railroads suffering losses on operations might seek authority to abandon lines rather than discontinue certain losing operations. Texas & N. E. R. R. v. Railroad Comm'n, 145 Tex. 541, 200 S. W. 2d 626 (1947). Some courts do not follow the "contract theory," applying instead an expanded concept of due process which holds that a carrier is deprived of property without due process of law if it is required to furnish service on a particular line which is not required in the public interest or which is losing money. See State of Washington v. Fairchild, 224 U. S. 510 (1912); Pennsylvania-Reading Seashore Lines, 42 P. U. R. (N. S.) 417 (1950).

[17] This is attested by discontinuance hearings in states which do not mention such authority in their statutes. *E. g.*, Public Service Comm'n v. Capital Transit, 80 P. U. R. (N. S.) 513 (Md. 1949); Pennsylvania-Reading Seashore Lines, 42 P. U. R. (N. S.) 417 (N. J. 1942); Union Pacific R. R., 40 P. U. R. (N. S.) 498 (Utah 1941); Colorado & Southern Ry., P. U. R. 1927E 1 (Colo.); Union Pacific R. R., P. U. R. 1926B 541 (Neb.).

[18] ALA. CODE tit. 48 § 106 (1940); MINN. STAT. ANN. § 216.62 (West 1945); N. H. REV. LAWS c. 289, § 26 (1942); NEV. COMP. LAWS ANN. § 504-3 (1929); N. M. STAT. ANN. § 74-401 (1941); N. C. GEN. STAT. § 62-47 (1943 Recomp. 1950); OHIO GEN. CODE ANN. § 504-3 (1946); S. C. CODE ANN. § 8250 (1942); TENN. CODE. ANN. § 5398 (Williams 1934); TEX. STAT. ANN. § 6479 (1951); W. VA. CODE ANN. § 2563 (1949); WIS. STAT. § 196-81 (1951). The requirement of hearing before a discontinuance may be allowed is illustrated by a recent instance in North Carolina. The Norfolk Southern Ry. made public notice of discontinuance and withdrew its trains without a hearing. The Utilities Commission ordered a hearing before there could be discontinuance.

[19] However, an order authorizing a complete abandonment of a line is not conditioned on a finding that operation will prejudice interstate commerce, or that a railroad will be prevented from earning a fair return on its properties as a whole, or that the entire intrastate business in a state involved will not earn a fair return on property used therein. The sole test is whether abandon-

Substantial losses for the particular operation are usually the motivating factor in seeking discontinuance, and there is also no doubt that the financial ability of the carrier to continue operations has constituted one of the main tests of convenience and necessity. A stronger case is presented if the carrier is able to show that the total operating costs exceed the total operating revenues. Although questions sometimes arise over what constitutes revenue or a proper expense,[20] such controversies are greatly diminished by the Uniform System of Accounts, prescribed by the Interstate Commerce Commission,[21] along with periodic interpretations of accounting classifications.[22]

However, a mere showing of pecuniary loss from a particular operation is not of itself sufficient to justify a discontinuance. "Unlike a department store or a grocery, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable."[23] A failure to show that the railroad as a whole is operating at a loss, or failing to receive a fair return on its total investment,[24] will tip the scales toward a denial of discontinuance; however, in considering the confiscatory effect of a commission's actions, the railroad's income from sources other than its railroad operations should not be taken into account.[25] " . . . even where a carrier's operations as a whole are reasonably profitable it has been held in various cases that it should not be required to continue the operation of passenger trains that show such disproportionate losses as to indicate that they are not

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ment is consistent with public necessity and convenience. Colorado v. United States, 271 U. S. 153 (1926); SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 331 (1935).

For information on basic data to be furnished in making application to the Interstate Commerce Commission, see ICC, IN THE MATTER OF APPLICATIONS UNDER PARAGRAPHS (18) to (21), INCLUSIVE, SECTION I, OF THE INTERSTATE COMMERCE ACT FOR CERTIFICATES OF CONVENIENCE AND NECESSITY AUTHORIZING THE ABANDONMENT OF LINES OF RAILROAD OR THE OPERATION THEREOF (July 8, 1921).

[20] See Atlantic Coast Line R. R. v. Public Service Comm'n, 77 F. Supp. 675 (E. D. S. C. 1948); Chicago, M. St. P. & P. R. R. v. Public Service Comm'n, 221 Ind. 1, 46 N. E. 2d 230 (1943); New York Central R. R. v. Public Utilities Comm'n, 129 Ohio St. 381, 195 N. E. 566 (1935); Southern Ry. v. Commonwealth, 193 Va. 291, 68 S. E. 2d 552 (1952).

[21] UNIFORM SYSTEM OF ACCOUNTS FOR STEAM RAILROADS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION IN ACCORDANCE WITH SECTION 20 PART I OF THE INTERSTATE COMMERCE ACT (1943).

[22] INTERPRETATIONS OF ACCOUNTING CLASSIFICATIONS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION FOR STEAM RAILROADS IN ACCORDANCE WITH SECTION 20 PART I OF THE INTERSTATE COMMERCE ACT (1943). See WERMOUTH, RAILROAD ACCOUNTS AND STATISTICS (1924).

[23] Mr. Justice Frankfurter in Alabama Public Service Comm'n v. Southern Ry., 341 U. S. 341, 352 (1951) (concurring opinion).

[24] See Alabama Public Service Comm'n v. Southern Ry., 341 U. S. 341 (1951).

[25] Atlantic Coast Line R. R. v. Public Service Comm'n, 77 F. Supp. 675 (E. D. S. C. 1948).

substantially used or needed by the public."[26] The very fact that a line of railroad does not pay the expense of running some of its trains is cogent evidence that public convenience and necessity does not require that they be kept in operation.[27]

Many railroads have numerous short lines which act as feeders to main lines, and which could not be operated independently of the main lines. While many main-line trains make substantial profits, those profits are diluted by the losses on unprofitable branch-line operations.[28] Consequently, in determining the reasonableness of any branch line service, the relation of the branch line to the system as a whole, from the standpoint of costs, volume of business, connections, and through service, must be considered.[29]

The character and population of the territory served are important factors. 66% of North Carolina's population is rural,[30] and even though the percentage of rural population is decreasing,[31] the over-all increase in the state's population[32] keeps the rural population high. Of the remaining 34% of North Carolina's population which is in urban areas,[33] 26% is within cities of 50,000 to 100,000. Rural areas and small urban communities tend to depend more on railroad passenger service; nevertheless, a railroad cannot afford to suffer disproportionate losses in order to serve them.

A case for discontinuance is materially strengthened when alternative services are available, whether over the lines of the applicant car-

[26] *Id.* at 686. See also Mississippi R. R. Comm'n v. Mobile & Ohio R. R., 244 U. S. 388 (1916); North Pacific R. R. v. Montana R. R. Comm'n, 46 F. Supp 340 (D. Mont. 1942); Delaware, L. & W. R. R. v. Van Santwood, 216 Fed. 252 (N. D. N. Y. 1914); Blease v. Charleston & W. C. R. R., 146 S. C. 496, 144 S. E. 233 (1928); REPORT OF NORTH CAROLINA UTILITIES COMMISSION 288 (1947-48).

[27] Public Convenience Certificate to D. & N. M. Ry., 71 I. C. C. 795 (1922).

[28] The average operating ratio (operating costs divided by operating revenues, expressed by a percentage) for passenger service on Class I railroads (those having operating revenues over $1,000,000 annually) was 136.6 in 1949. See ASSOCIATION OF AMERICAN RAILROADS, A REVIEW OF RAILWAY OPERATIONS IN 1950 8 (1951). It is recognized that many main-line trains, especially streamliners, are highly successful. The "Silver Meteor" of the Seaboard Air Line Ry., for example, earned $2,973,930 on a gross of $5,445,699. See *Profits in Streamliners*, FORTUNE May, 1950, p. 78.

[29] Gardner v. Commerce Comm'n, 400 Ill. 123, 79 N. E. 2d 71 (1948); Abandonment of Branch by Pere Marquette, 72 I. C. C. 303 (1922); Abandonment of Branch by Green Bay & W. R. R., 72 I. C. C. 647 (1922).

[30] BUREAU OF THE CENSUS, 1950 UNITED STATES CENSUS OF POPULATION P-A33, 7 (1950).

[31] *Ibid.* The 1940 rural population was 73%.

[32] There has been an increase from 3,571,623 in 1940 to 4,061,929 in 1950, or 13.7%.

[33] Under the urban definition established for use in the 1950 census, the urban population comprises all persons living in (a) incorporated places of 2,500 or more; (b) the densely settled urban fringe, including both incorporated and unincorporated areas, around cities of 50,000 or more; and (c) unincorporated places of 2,500 inhabitants or more outside an urban fringe. There are 107 such areas in North Carolina.

rier or some other railroad,[34] or merely by virtue of the existence of adequate highways or bus service.[35] Of the 34 railroads which operate in North Carolina, only four[36] provide daily passenger service. These four railroads operate a total of 74 daily trains,[37] but 40 of these trains are operated on main north-south lines. There would seem to be less likelihood that one of these main-line trains, as distinguished from a branch-line train, would be discontinued permanently, but even if this occurred, there would be several remaining trains. The remaining 34 trains serve communities on only ten branch lines, and while these communities would be more adversely affected by discontinuances, almost all communities would be served by as frequent bus service if all passenger trains were withdrawn.[38] In addition to the trains are the thousands of automobiles[39] using the 63,600 miles of roads in North Carolina,[40] and the airlines serving the major cities.

The transportation of mail is a minor factor. The postal service is a function of the federal government, and it is the duty of the Post Office Department to provide adequate postal service regardless of the presence of passenger trains.[41] When passenger trains are discontinued, highway post office service is generally provided.[42] Express service also generally presents no problem, for it can usually be given

[34] Mississippi R. R. Comm'n v. Mobile & Ohio R. R., 244 U. S. 388 (1917); Atchison T. & S. F. Ry., 162 I. C. C. 474 (1930); Chicago, M. St. P. & P. R. R., 162 I. C. C. 141 (1930); Abandonment of Line by C. R. I. P. R. R., 90 I. C. C. 645 (1924).

[35] Chicago, B. & Q. R. R. v. Nebraska State Ry. Comm'n, 138 Nebr. 767, 295 N. W. 389 (1940); Abandonment by Oregon E. Ry., 145 I. C. C. 449 (1928); Union Pacific R. R., 40 P. U. R. (N. S.) (1941); Public Service Comm'n v. Delaware & Hudson R. R., 14 P. U. R. (N. S.) 326 (1935).

[36] Atlantic Coast Line R. R., Norfolk & Western Ry., Seaboard Air Line R. R., and Southern Ry.

[37] THE OFFICIAL RAILWAY GUIDE (June, 1952). All the figures on passenger trains in North Carolina are based on the writer's personal count of trains from the timetables, and in no wise indicate a count from any official source. In addition to the trains given, the Clinchfield Railroad operates one train in each direction three times a week.

[38] According to bus schedules, only a few stations on the Clinchfield R. R. would be wholly without a common carrier. Actually, this is a main-line operation, but because of the shortness of the railroad and the infrequence of the service, it was placed in this category.

[39] See note 4, *supra*.

[40] Statistics were obtained from the North Carolina Highway and Public Works Commission. This figure does not include the Blue Ridge Parkway, military reservation roads, or non-system roads in national parks. Of this mileage, as of Jan. 1, 1949, 16,282 miles were hard surface, while 47,319 miles were non hard-surface. Under the new road building program (1949-52), 12,000 additional miles are to be hard-surfaced, and 35,000 miles of other non hard-surface roads are to be improved or all-weathered.

[41] Union Pacific R. R. v. Public Service Comm'n, 102 Utah 465, 132 P. 2d 128 (1942); Louisiana Public Service Comm'n v. Illinois Central R. R., 84 P. U. R. (N. S.) 508 (1949); Chicago, B. & Q. R. R., 34 P. U. R. (N. S.) 348 (1940).

[42] Highway post office service is certainly a more substantial equivalent to the railroad postal service than star routes, which was the substitution in the past.

as prompt service by an express carrier's own trucks, regular motor freight, passenger carriers, or by other available trains.

Important factors are the extent to which there may have been mismanagement and failure to effectuate economies in the operation of the line.[43] A commission, in its discretion, may deny the application or dismiss it for the time being if it thinks there has been mismanagement or if it thinks economies may be introduced. Actually, there is much room in the railroad industry for cutting costs. There is probably no other industry which has been more backward in modernizing its activities, both in operations and in administration, and despite certain new developments, the railroads have been obstinate in adopting them.[44] Clerical costs in the industry are one-seventh of total payroll.[45] 72% of operating revenues are "eaten up" by labor and material costs alone.[46] Four out of five passenger cars are more than twenty years old,[47] and this may somewhat account for the per car average of only seventeen passengers hauled per run in 1950.[48] A criticism of the railroads would be unduly harsh, however, without noting that "a railroad company has but limited powers of management. It has no power to fix rates and thus has little control over its revenue. Its control over expenses, particularly wages, is also strictly limited—as the spiral of recent wage increases abundantly indicates. It is restricted in its managerial functions by rules arising from contracts with well-integrated and nation-wide labor organizations."[49] Surely a commission will consider this in deciding whether there might be economies.

It is said that the railroads are faced with a serious problem, for while modernization is needed to attract more business, they do not have the money to finance modernization, and have difficulty attracting the capital.[50] The failure to modernize is somewhat reflected in the annual decrease of passenger business,[51] despite the greatest peace-time travel in history. Many, however, consider the problem of the railroad

[43] Colorado & Southern Ry. Abandonment, 166 I. C. C. 470 (1930); Abandonment by Southern Ry., 131 I. C. C. 264 (1927); Abandonment of Line by Southern Ry., 105 I. C. C. 228 (1928); Pennsylvania-Reading Seashore Lines, 42 P. U. R. (N. S.) 417 (1942).

[44] See YOUNG, NEW RAILROADS FOR ALL (1952).

[45] YOUNG, *op. cit. supra* note 44, at 2.

[46] ASSOCIATION OF AMERICAN RAILROADS, A REVIEW OF RAILWAY OPERATIONS 14 (1950). Materials are fuel, power, and supplies.

[47] YOUNG, *op. cit. supra* note 44, at 2.

[48] Figures were obtained from ASSOCIATION OF AMERICAN RAILROADS, A REVIEW OF RAILWAY OPERATIONS 14 (1950).

[49] Atlantic Coast Line Ry. v. Public Service Comm'n of S. C., 77 F. Supp. 675, 687 (E. D. S. C. 1948).

[50] U. S. News and World Report, Feb. 29, 1952, p. 32. Much railroad equipment, however, is financed through the use of equipment trust certificates, which find a ready market.

[51] ASSOCIATION OF EASTERN RAILROADS, A YEARBOOK OF RAILROAD INFORMATION 32 (1950).

to be solvable and predict a good future for railroad passenger traffic.[52]

When a commission considers a case for abandonment or partial discontinuance, it weighs all of the above factors together. In each case the burden of proving that the proposed abandonment or discontinuance will impose no serious hardship upon the public lies upon the applicant carrier.[53]

In the final analysis, the validity of every order of a state commission depends on a negative answer to both of these questions: (1) Does the order constitute an undue, unreasonable, or unjust discrimination against interstate commerce?[54] (2) Is the order so confiscatory as to amount to a taking of property without due process of law, hence violative of the Fourteenth Amendment?

An atack on an order on the theory of undue discrimination against interstate commerce would raise the issue as to whether or not the denial of a discontinuance might, by obliging the railroad to keep on sustaining a loss, cause a burden to be placed on interstate commerce.[55] The usual result will be that interstate commerce will not be held burdened by a continued operation, but it is conceivable that in some instances an operation would unduly saddle the interstate traffic of a carrier.

[52] See MULHFELD, THE RAILROAD PROBLEM AND ITS SOLUTION (1941); YOUNG, NEW RAILROADS FOR ALL (1952); *Profits in Streamliners*, FORTUNE, May, 1950, p. 78.

[53] Abandonment by Hill City Ry., 150 I. C. C. 159 (1928); Pennsylvania-Reading Seashore Lines, 42 P. U. R. (N. S.) 417 (1942).

[54] The Interstate Commerce Commission has the duty of determining whether or not an order of a state commission results in discrimination. 49 U. S. C. § 13 (4) (Supp. 1951). There must be a hearing before that commission before the question may be presented to the courts. Western & A. R. R. v. Georgia Public Service Comm'n, 267 U. S. 493 (1925).

[55] The question of undue discrimination has heretofore been confined, with few exceptions, to the matter of intrastate rates; and to date the I. C. C. has not had occasion to decide whether a denial of a partial discontinuance might, in some instances, constitute an undue discrimination against interstate commerce. An analogy might be drawn with the rate cases, however, to determine what standards might be applicable. After issuance of the order, is the intrastate traffic still "contributing its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate." Montana v. United States, 106 F. Supp. 778, 780 (D. Mont. 1952) (rates). The standard for determination "in a case of this kind is not whether the intrastate traffic is contributing its fair share of the railroad's total revenue—the question is whether it is contributing its fair share of the revenue required to enable [the carrier] to render adequate and efficient transportation service." Montana v. United States, 106 F. Supp. 778, 784 (D. Mont. 1952) (rates). This determination necessarily involves expert analysis, and unless there is a "high standard of certainty" that the state order constitutes an undue discrimination against interstate commerce, it will not be overridden by the Interstate Commerce Commission. Illinois Central R. R. v. Public Utilities Comm'n, 245 U. S. 493, 510 (1917) (rates).

Rarely are orders pertaining to partial discontinuances attacked on the theory of undue discrimination against interstate commerce.[56] The usual theory of attack is the one presented in question (2), *viz.*, whether the order amounts to a taking of property without due process of law. The due process question normally arises from an order denying a discontinuance or abandonment. In determining whether an order is unreasonable or arbitrary, the court must consider, in addition to the factors already discussed, the investment in the entire system, its earnings as a whole, what effect the losses on the trains sought to be discontinued have on the system as a whole, with specific consideration to the relative need for maintaining this train service in the territory which would be affected by the discontinuance.[57] Since passenger traffic as a whole is rarely profitable, it is clear, therefore, that freight shippers must bear some of the burden of unprofitable passenger service. But, if the public convenience and necessity require that the service be continued, an order requiring continuance is within the scope of due process.[58]

A review of the decisions of the North Carolina Utilities Commission indicates that it has been liberal in allowing discontinuances. There is no doubt that it is the right of carriers to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed nor used by the public to any substantial extent. It is also manifest that carriers are justified in reducing their expenses, where it is practicable to do so with reasonable regard to efficiency and without impairment of their obligations. However, the railroads have been permitted to discontinue trains to the point that only a skeleton of passenger service remains in this state. Since so many unprofitable trains have been taken off, the railroads should

[56] One reason undoubtedly is that the carrier must present this question to the I. C. C. first, while the question of due process may be raised on an appeal from, or on a hearing to seek an injunction against, a commission's order. See notes 54 and 55 *supra.*

[57] Mississippi R. R. Comm'n v. Mobile & Ohio R. R., 244 U. S. 388 (1917). It is the majority view that the earnings of the *entire system* will be taken into consideration in determining the effect of the losses on the trains sought to be discontinued. Alabama Public Service Comm'n v. Southern Ry., 91 F. Supp. 980 (M. D. Ala. 1950) rev'd on other grounds 341 U. S. 341 (1951); Atlantic Coast Line R. R. v. Public Service Comm'n of S. C., 77 F. Supp. 675 (E. D. S. C. 1948). *But see* Alabama Public Service Comm'n v. Southern Ry., 341 U. S. 341, 352 (1951) (concurring opinion) ("No showing whatever was made that by the loss incurred in running these trains the Southern was deprived of that protection for its investment in Alabama which alone can be made the basis of a claim under the Due Process Clause of the Fourteenth Amendment.") A state would often seem to be an economically illogical unit in determining the effect of losses.

[58] "A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. . . . This is true even where the system as a whole fails to earn a fair return upon the value of the property." Fort Smith Light & Traction Co. v. Bourland, 267 U. S. 330, 332 (1925).

now be in a better position to furnish improved service, at lower operating costs, on the remaining lines. Perhaps the railroads can make the next step in meeting competition.[59]

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Torts—Assault and Battery—Provocative Words as Defense

In a recent Louisiana case,[1] plaintiff sued defendant for assault and battery. Defendant asserted the defense of justification because of plaintiff's use of opprobrious language directed toward him. The court held that provocative words may be justification for an assault, provided the person uttering the words understood or should have understood that physical retaliation would be attempted. The words must be "fighting" words.[2]

The court based its decision, as well as previous ones to the same effect,[3] on a section of the Louisiana Civil Code,[4] which, as interpreted by the court prevents one who provokes the difficulty from recovering damages for the resulting assault.[5] The rule was first extended to

[59] Perhaps the greatest advancement that has been made in commuter and branch-line equipment to meet the short-haul competition is the Budd RDC-1 (Rail Diesel Car). Each car is capable of carrying ninety passengers and several cars can be coupled together to make a train. Operating costs are 55¢ a mile with a two-man crew and 64¢ a mile with a three-man crew, compared with $1.80 a mile for a steam locomotive with two cars. The initial cost of a car is $128,750. The price of three cars with a total seating capacity of 270 would be $90,000 cheaper than a small diesel locomotive and three standard passenger cars seating only 162. See Business World, Oct. 22, 1949, p. 22; Popular Science, Dec. 1949, p. 114.

A problem which is closely related to abandonments of lines and discontinuance of service is that pertaining to the abandonment of railroad stations. See Utilities Comm'n v. Atlantic Coast Line R. R., 235 N. C. 273, 69 S. E. 2d 502 (1952); Public Service Comm'n v. Atlantic Coast Line R. R., 72 S. E. 2d 438 (S. C. 1952).

[1] Smith v. Parker, 59 So. 2d 718 (La. App. 1952).

[2] " . . . insulting or 'fighting' words . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. State of New Hampshire, 315 U. S. 568, 572 (1942).

"The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Such words, as ordinary men know are likely to cause a fight." Chaplinsky v. State of New Hampshire, *supra* at 573 (1942).

[3] Oakes v. H. Weil Baking Co., 174 La. 770, 141 So. 456 (1932); Gross v. Great A. & P. Tea Co., 25 So. 2d 837 (La. App. 1946) and cases cited therein.

[4] LA. STAT. ANN. § 2315 (1945) "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."

[5] Notes, 14 FORD. L. REV. 95 (1945); 5 LA. L. REV. 617 (1944). The defense is apparently not an extension of self-defense, but based on the theory that the plaintiff by opprobrious language, puts himself under a legal disability to recover. See Gross v. Great A. & P. Tea Co., 25 So. 2d 837, 840 (La. App. 1945) ("The reason is that one who uses words or actions which it may be expected will bring about an attempt at retaliation has only himself to blame, if as a result of the attempt at retaliation, he, himself, is injured.") . *But see* McCurdy v. City Cab Co., 32 So. 2d 720, 723 (La. App. 1947); Ponthieu v. Coco, 18 So. 2d 351, 355 (La. App. 1944). In these cases the court referred to the plaintiffs as the