

THE MARASMUS OF THE ICC: THE COMMISSION, THE RAILROADS, AND THE PUBLIC INTEREST

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AMONG the myriad federal agencies concerned with transportation, the Interstate Commerce Commission has long been preeminent.¹ It is the oldest transportation regulatory commission, and with the exception of the Corps of Engineers it is the oldest federal agency of any type with major transportation responsibilities. It is the only federal agency immediately concerned with more than one type of carrier: its activities directly affect four of the five

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1. The principal federal agencies with major transportation responsibilities may be classified as follows: (1) Agencies primarily engaged in the construction and maintenance of transportation facilities: Bureau of Public Roads and Civil Aeronautics Administration (Department of Commerce), Corps of Engineers and Panama Canal (Department of the Army), Alaska Roads Commission (Department of the Interior); (2) Agencies primarily engaged in the regulation of carriers: ICC (independent), Federal Maritime Board (Department of Commerce), Civil Aeronautics Board (Department of Commerce for housekeeping purposes only); (3) Agencies primarily engaged in the aid and operation of carriers: Inland Waterways Corporation and Maritime Administration (Department of Commerce), Alaska Railroad (Department of the Interior), Panama Railroad (Department of the Army); (4) Agencies primarily engaged in transportation research: National Advisory Committee for Aeronautics (independent); (5) Agencies primarily engaged in supervision and coordination: Office of the Undersecretary for Transportation (Department of Commerce), Air Coordinating Committee (interdepartmental); (6) Agencies concerned with the defense aspects of transportation: Defense Transport Administration (affiliated with ICC), Defense Air Transportation Administration and National Shipping Authority (Department of Commerce); (7) Agencies primarily concerned with labor relations and employee matters: National Mediation Board (independent), Railroad Retirement Board (independent). In addition, other federal agencies with different primary concerns which perform functions significant to transportation are: (1) Military Air Transportation Service, Military Sea Transportation Service, private carriage for the armed forces; (2) Weather Bureau and Coast and Geodetic Survey (Department of Commerce), Coast Guard (Treasury), which perform valuable transportation service functions; (3) Federal Power Commission, regulation of interstate pipe line transportation of natural gas; (4) Tennessee Valley Authority, various transportation functions in its area; (5) General Services Administration, Post Office, and Department of Defense, which are the principal federal purchasers of transportation; (6) Department of State, international transportation activities.

major forms of commercial transportation.² It is one of the few significant transportation bodies which have not been absorbed by the Department of Commerce, and it is the only important transportation agency completely independent of the executive branch. It is the sole administrative agency to which Congress has delegated the responsibility for enforcing the National Transportation Policy.³ During its sixty-five years of existence the Commission developed an enviable reputation for honesty, impartiality, and expertness.⁴ Its

2. The Act to Regulate Commerce, 24 STAT. 379 (1887) created the ICC and gave it various regulatory powers, subsequently greatly added to and strengthened, over railroads. Its jurisdiction was later extended to express companies, sleeping car companies, and pipelines (except water and gas), Hepburn Act, 34 STAT. 584 (1906); coastwise, intercoastal, and inland water carriers, Panama Canal Act, 37 STAT. 566 (1912), Transportation Act of 1940, 54 STAT. 929 (1940); motor carriers, Motor Carrier Act of 1935, 49 STAT. 543 (1935); and freight forwarders, Part IV, Interstate Commerce Act, 56 STAT. 284 (1942). While the extent of the Commission's powers over these various forms of transportation varies widely, only air carriage is completely outside its purview.

3. "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce, of the United States, of the Postal Service, and of the national defense. All the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Preamble to the Interstate Commerce Act, 54 STAT. 899 (1940).

4. See COMMISSION ON ORGANIZATION, TASK FORCE REPORT ON REGULATORY COMMISSIONS 82 (1948). "Creation of the Interstate Commerce Commission as an independent agency of the Federal Government has proved a highly successful experiment. In its half a century of existence it has become established as a permanent and essential national institution." McIntire, *Dedication*, 5 GEO. WASH. L. REV. 287 (1937). "The accomplishments of the Interstate Commerce Commission is [sic] the greatest triumph of modern times in scientific government. No one who has watched at close range our progress in securing control over the railroads will doubt our capacity for progressive government in that direction." Samuel Untermyer, quoted in Miller, *The Interstate Commerce Commission—Past and Present*, 13 ICC PRACTITIONER'S J. 800 (1946). Also see Miller, *The Lives of the Interstate Commerce Commissioners and the Commission's Secretaries*, 13 ICC PRACTITIONER'S J. § 2, 2-4 (1946); *Hearings before House Committee on Expenditures in Executive Departments on Reorganization Plan No. 7 of 1950*, 81st Cong., 2d Sess. 51 (1950). For sarcastic comment upon the prestige position of the ICC, see BECK, *OUR WONDERLAND OF BUREAUCRACY* 160 (1932): "The Commission has become the sacred white elephant of our governmental system. Members of the Bar and even litigants may exercise their constitutional right, when the Supreme Court decides against them, to swear at the Court, but it seems to be a species of treason for any one to question the beneficence of the Interstate Commerce Commission."

age, prestige, and scope combined to make it the premier federal agency in the transportation field.

Despite this impressive past, however, there are many indications that the ICC is now losing its position of leadership. New developments threaten to bring about the end of the agency or to reduce it to a secondary position. The level of its appropriations and the number of its employees have been either stationary or declining.⁵ Its decisions are more frequently reversed in the courts than previously.⁶ Its leadership and staff have manifestly deteriorated in quality.⁷ The general praise which it once received has been replaced by sharp criticism.⁸ And, most importantly, it is now challenged by the rise of a new agency, the Office of the Undersecretary of Commerce for Transportation, which appears to be assuming federal transportation leadership.⁹ It is the purpose of this Article to analyze the causes of the

5. ICC Appropriations and estimated average employment: fiscal 1947, \$10,522,700, 2,279.5 employees; fiscal 1948 \$10,743,000, 2,268.2 employees; fiscal 1949, \$11,300,317, 2,252.8 employees; fiscal 1950, \$11,416,700, 2,160 employees. Appropriation figures are from the annual reports of the Commission and employment figures are found in *Hearings before Subcommittee of the Senate Appropriations Committee on the Independent Offices Appropriation Bill for 1951*, 81st Cong., 2d Sess. 788-9 (1950). See also COMMISSION ON ORGANIZATION, STAFF REPORT ON THE INTERSTATE COMMERCE COMMISSION: I-20 (1948).

6. During the five years 1936-1940 the Supreme Court sustained the Commission in approximately 93% of the cases decided which involved the Commission or Commission action. During the next five years the Commission's average declined to 82%, and from 1946 through 1950 it was 74%. See ICC ANNUAL REPORTS for these years. For illustrative cases, see *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *City of Yonkers v. United States*, 320 U.S. 685 (1944); *Eastern Central Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944); *North Carolina v. United States*, 325 U.S. 507 (1945); *ICC v. Mechling*, 330 U.S. 567 (1947). See also PRITCHETT, *THE ROOSEVELT COURT 177-80* (1948), and for an ICC complaint against the reduction of its funds, see *N.Y. Times*, Feb. 7, 1952, p. 43, col. 4.

7. COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at II-49-50, III-35; Curry, *The Future Place of the Hearing Examiner in the Interstate Commerce Commission*, 17 ICC PRACTITIONER'S J. 313-15 (1950); Williams, *The ICC and the Regulation of Intercarrier Competition*, 63 HARV. L. REV. 1366-7 (1950).

8. *E.g.* ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 178-80 (1941); BOARD OF INVESTIGATION AND RESEARCH, PRACTICES AND PROCEDURES OF GOVERNMENTAL CONTROL 168-79 (1944); *Transport Topics*, April 4, 1949; *Hearings before the Senate Committee on Interstate and Foreign Commerce on the Reappointment of J. Monroe Johnson to be a Member of the Interstate Commerce Commission*, 81st Cong., 1st Sess. 10 (1949); LaRoe, *Administrative Side of the Interstate Commerce Commission*, 18 ICC PRACTITIONER'S J. 113-16 (1950).

9. This office was created by Reorganization Plan No. 21 of 1950 effective May 24, 1950. 15 FED. REG. 3178-80 (1950). The Secretary of Commerce has defined the functions of the Undersecretary for Transportation as follows: "[He] serves as the Secretary's principal assistant on transportation policy within the Department and helps to establish and maintain the Department's position with respect to the establishment of an integrated transportation program for the Department and the development of overall transportation

decline of the ICC and the probable and desirable future position of this agency.

Successful adaptation to changing environmental circumstances is the secret of health and longevity for administrative as well as biological organisms. Every government agency must reflect to some degree the "felt needs" of its time. In the realm of government, felt needs are expressed through political demands and political pressures. These demands and pressures may come from the president, other administrative agencies and officials, congressmen, political interest groups, and the general public. If an agency is to be viable it must adapt itself to the pressures from these sources so as to maintain a net preponderance of political support over political opposition.¹⁰ It must have sufficient support to maintain and, if necessary, expand its statutory authority, to protect it against attempts to abolish it or subordinate it to other agencies, and to secure for it necessary appropriations. Consequently, to remain viable over a period of time, an agency must adjust its sources of support so as to correspond with changes in the strength of their political pressures. If the agency fails to make this adjustment, its political support decreases relative to its political opposition, and it may be said to suffer from administrative marasmus.¹¹ The decline of the ICC may be attributed to its susceptibility to this malady.

I. HISTORICAL BACKGROUND

The history of the ICC in terms of its political support divides naturally into two fairly distinct periods. The Commission was created in 1887 after the Supreme Court invalidated state attempts to regulate the railroads' abuse of their monopoly power.¹² The driving force behind these early state regulatory laws and commissions were the farmers, who had suffered severely from exorbitant rates and discriminatory practices. This group plus equally dissatisfied commercial shippers were the political force responsible for the Act

policy within the Executive Branch of Government. He supervises the activities of the Office of Transportation which has been established to assist him in the performance of his duties." The Undersecretary is authorized to (1) exercise general policy guidance over all transportation activities in the Department, (2) assure program consistency among the transportation agencies in the Department, (3) carry out the powers delegated to the Secretary to coordinate the transportation policies and program of the government especially as related to mobilization, (4) initiate action and appear before regulatory commissions when matters affecting overall transportation policies are under consideration. 16 FED. REG. 8189-90 (1951).

10. For thorough discussion of agency support theory, see SIMON, SMITHBURG, & THOMPSON, *PUBLIC ADMINISTRATION* cc. 18, 19 (1950); Long, *Power and Administration*, 9 *PUB. ADMIN. REV.* 257-64 (1949); TRUMAN, *THE GOVERNMENTAL PROCESS* 395-478 (1951).

11. "ma-ras'-mus . . . *n. Pathol.* A gradual and continuous wasting away of the bulk of the body from some morbid cause. [*Gr. marasmos, maraino, waste.*]" FUNK & WAGNALLS, *NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE* (1935).

12. *Wabash, St. L. & P.R. v. Illinois*, 118 U.S. 557 (1886).

to Regulate Commerce.¹³ In addition, general public indignation and disgust at railroad financial and business practices provided a favorable climate of opinion for the creation of the Commission. President Cleveland endorsed the legislation and enhanced the Commission's reputation by appointing Judge Cooley and other prominent figures as its first members.¹⁴

From 1887 down to the First World War the support of the Commission came primarily from the groups responsible for its creation. Opposition came principally from the railroads and the courts. In its first two decades the Commission was severely hampered by the combined action of these two groups.¹⁵ Subsequently farmer and shipper interests with the vigorous support of President Roosevelt secured the passage of the Hepburn Act of 1906. This enlarged the Commission, extended its jurisdiction, gave it the power to prescribe future maximum rates, and prohibited railroads from owning the products they transported. The decade which followed the passage of this Act was the peak of the Commission's power and prestige while still dependent upon consumer, public and presidential support.¹⁶

The end of the First World War marked a definite change in the nature of the transportation problem and in the attitudes of the various interests towards railroad regulation. The vigorous actions of the ICC in the period immediately prior to the war had eliminated the worst discriminatory practices and had convinced the railroads that the path of wisdom was to accept regulation and to learn to live with the Commission.¹⁷ This domestication

13. FAINSOD & GORDON, *GOVERNMENT AND THE AMERICAN ECONOMY* 245 (1941).

14. See MIDDLETON, *RAILWAYS AND PUBLIC OPINION: ELEVEN DECADES 72-91* (1941).

15. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *C., N.O. and Texas-Pacific Ry. v. ICC*, 162 U.S. 184 (1896); *Texas Pac. Ry. Co. v. ICC*, 162 U.S. 197 (1896); *Maximum Rate Case*, 167 U.S. 479 (1897); *ICC v. Ala. Midland Ry. Co.*, 168 U.S. 144 (1897).

16. See *e.g.*, Miller, *supra* note 4, at 800 (1946); SEN. REP. No. 597, 63d Cong., 2d Sess. 6, 10 (1914); H.R. REP. No. 553, 63d Cong., 2d Sess. 8 (1914). According to MANSFIELD, *THE LAKE CARGO COAL RATE CONTROVERSY* 141 (1932), the ICC had by this time "gained a place near the Supreme Court in public estimation. . . ." The increase in the Commission's viability was marked by a steady stream of legislation increasing its powers, Hepburn Act, 34 STAT. 584 (1906), Mann-Elkins Act, 36 STAT. 539 (1910), Locomotive Boiler Inspection Act, 36 STAT. 913 (1911), Panama Canal Act, 37 STAT. 560 (1912), Valuation Act, 37 STAT. 701 (1913), Clayton Antitrust Act, 38 STAT. 730 (1914), and by a more respectful attitude from the Courts. See, *e.g.*, *ICC v. Ill. Cent. R.*, 215 U.S. 452 (1910); *Balt. & Ohio R. v. Pitcairn Coal Co.*, 215 U.S. 481 (1910); *ICC v. Chi., R.I. and Pac. Ry.*, 218 U.S. 88 (1910); *ICC v. Del., L. & W.R.*, 220 U.S. 235 (1911); *ICC v. Goodrich Transit Co.*, 224 U.S. 194 (1912); *ICC v. Louisville & Nashville R.*, 235 U.S. 314 (1914); *Houston & Texas Ry. v. United States*, 234 U.S. 342 (1914); *Manufacturers R. Co. v. United States*, 246 U.S. 457 (1918).

17. This policy had been advocated sometime earlier in the 1890's by a far-sighted industrial statesman, Richard Olney, who predicted that the ICC would become "a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests." Quoted in JOSEPHSON, *THE POLITICOS* 526 (1938).

of the carriers consequently reduced the interest and political activity of shipper groups. And increased urbanization reduced the power of farm groups which had been such a significant source of support to the Commission. Finally, "normalcy" had supplanted progressivism and Harding and Coolidge were significantly different from T. Roosevelt and Wilson. Consequently there was little likelihood that restrictive regulation would find much support from either the public or the White House.

All these factors dictated not only the shift in public policy which was made in the Transportation Act of 1920 but also a shift by the Commission in the sources to which it looked for support.¹⁸ Continued reliance upon the old sources of support would have resulted in decreasing viability. Therefore the Commission turned more and more to the railroad industry itself, particularly the railroad management group. This development was aided by the expansion of the Commission's activities and the resulting increased dependence of the Commission upon the cooperation of regulated groups for the successful administration of its program.¹⁹ The support which the Commission received from the railroads sustained it down to World War II and enabled it both to expand its authority over other carrier groups and to defend itself against attempts to subject it to executive control.

The present marasmus of the ICC is due to continued dependence upon railroad support. The transportation industry is not only large, it is also dynamic. Technological changes and economic development are basically altering the nation's transportation pattern. The tremendous expansion of air and motor transport, the resulting increase in competition, the economic development of the South and West, the rise of private carriage, and the increased significance of defense considerations all make today's transportation system fundamentally different from that of twenty-five years ago. These technological and economic developments have given rise to new political demands and pressures, and have drastically altered the old balance of political forces in the transportation arena. A quarter of a century ago commercial transportation was railroad transportation. Today, railroads are a declining, although still major, segment of the transportation industry. Their economic decline has been matched by a decrease in political influence. The ICC, however, remains primarily a "railroad" agency. It has not responded to the demands of the new forces in transportation. It has not duplicated the successful adjustment of its sources of political support that it carried out after

18. The Transportation Act of 1920 required the Commission to fix rates so that the railroad industry as a whole would earn a "fair return upon the aggregate value" of its invested capital. Other provisions (1) extended the power of the Commission over the issuance of railroad securities, new construction and abandonments, car service, and minimum rates, (2) permitted poolings subject to Commission approval, (3) directed the Commission to draw up a plan for the consolidation of the railroads into a limited number of systems, and (4) provided for the recapture of excess railroad profits and their use for the benefit of the weaker roads.

19. See HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 183-93 (1936).

World War I. Consequently, it is losing its leadership to those agencies which are more responsive to the needs and demands of the times.

II. RAILROAD SUPPORT OF THE ICC

Railroad Praise of the ICC

The attitude of the railroads towards the Commission since 1935 can only be described as one of satisfaction, approbation, and confidence. At times the railroads have been almost effusive in their praise of the Commission. The ICC, one sub-committee of the Association of American Railroads has declared, "is eminently qualified by nearly sixty years of experience to handle transportation matters with a maximum of satisfaction to management, labor and the public."²⁰ Another representative of the same association has similarly stated that "[w]hat is needed for the solution of the tremendously important problems of transport regulation is the impartiality, deliberation, expertness, and continuity of policy that have marked the history of the Interstate Commerce Commission."²¹ Railroad officials and lawyers have commended the Commission as a "conspicuous success," a "constructive force," and as a "veteran and generally respected tribunal."²² The American Short Line Railroad Association has commented upon the "fair, intelligent treatment" its members have been accorded by the Commission, and the Pennsylvania Railroad has been lavish in its praise of the latter's policies.²³ The ICC is probably the only regulatory body in the federal government which can boast that a book has been written about it by counsel for a regulated interest in order to demonstrate "how well" the Commission has "performed its duty."²⁴

20. ASS'N OF AMERICAN RAILROADS, RAILROAD COMMITTEE FOR THE STUDY OF TRANSPORTATION, REPORT ON COORDINATION 26.

The staff study of the ICC for the Hoover Commission spoke of the attitude of the railroads as "one of respect and general satisfaction with the Commission and its procedures, though carriers may be highly critical of and dissatisfied with particular decisions." COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at III-34.

21. *Hearings before Senate Committee on Interstate and Foreign Commerce on Domestic Land and Water Transportation*, 81st Cong., 2d Sess. 495 (1950). For other examples of railroad praise, see *id.* at 483-4; *Hearings before Senate Select Committee on Government Re-Organization on S. 2700*, 75th Cong., 1st Sess. 242-3 (1937); *Hearings before Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 2d Sess. 990 (1943); *Hearings before Senate Committee on Expenditures in Executive Departments on Reorganization Plan No. 21 of 1950*, 81st Cong., 2d Sess. 82 *et seq.* (1950).

22. *Ibid.* 493-4; Wham, *Railroads and The National Transportation Policy*, 7 JOHN MARSHALL L. Q. 168-9 (1941); DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 3 (1946).

23. 1 HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SPECIAL SUBCOMMITTEE ON TRANSPORTATION, NATIONAL TRANSPORTATION INQUIRY 17, 266 (1946). For a recent expression of dissatisfaction with the Commission over one issue by the same railroad, see *Wall Street Journal*, Nov. 7, 1951, p. 18, cols. 1, 2.

24. Walter, Introduction to DRAYTON, *TRANSPORTATION UNDER TWO MASTERS*, xii (1946).

The railroads and the Commission have both praised their harmonious relations. "The railroad industry," it has been said, "in wide contrast to other industry, has learned to live under government regulation."²⁵ The editors of *Railway Age* have similarly spoken highly of the "collaboration" which exists between the Commission and its regulated enterprises and have remarked that this "stands out in strong contrast to the animosity and distrust which now separates many regulatory bodies from the areas of industry which they supervise."²⁶ The Commission itself has noted with pride the lack of criticism which its administration of the Interstate Commerce Act has received from the carriers and has pointed out that while some interests have urged the abandonment of regulation the "railroads have never joined in that suggestion."²⁷

Railroad Defense of Commission Independence

The railroads have vigorously defended the independence of the ICC from control by other governmental units and have opposed all attempts to subordinate it to other agencies or to transfer from the Commission any of its functions. This support for the Commission has taken three principal forms.

Opposition to ICC reorganization. The railroads have successfully opposed all reorganization proposals to subordinate the ICC or transfer any of its functions to the executive branch. In 1937 the President's Committee on Administrative Management recommended that the ICC along with all other regulatory commissions be divided into administrative and judicial sections and be placed in an executive department. The administrative section would be a regular bureau within the department; the judicial section would be in the department for "housekeeping" purposes only.²⁸ These proposals raised a storm of protest from the ICC-railroad bloc and legislation to effect them was defeated in Congress.²⁹ Over a decade later similar opposition was expressed by the railroads to legislation designed to create a Department of Transportation which would absorb the "executive" functions of the ICC.³⁰

25. ASS'N OF AMERICAN RAILROADS, *op. cit. supra* note 20, at 26.

26. 112 RAILWAY AGE 324 (Feb. 7, 1942).

27. 52 ICC ANN. REP. 8 (1938). See also 53 *id.* at 6-7 (1939).

The only railroad spokesman regularly to criticize the Commission is Robert R. Young, who has also been generally estranged from the other railroads and whose dissidence in this matter serves to emphasize the close affiliation between the bulk of the industry and the Commission. See Young, *A National Transportation Policy*, 12 LAW & CONTEMP. PROB. 623 (1947); Young, *A Strange Alliance for Monopoly*, 178 ATL. MONTHLY 43-50 (1947); *Hearings before House Committee on Interstate and Foreign Commerce on National Transportation Policy*, 80th Cong., 2d Sess. 314-48 (1948).

28. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 41 (1937).

29. *Hearings on S. 2700 supra* note 21, at 239-44; 55 Traffic World 155 *et seq.*, 169 (Jan. 23, 1937), 209-10 (Jan. 30, 1937).

30. Transport Topics, March 15, 29, 1948. For the most systematic presentation of the railroad arguments against such a department, see Dickinson, *Proposals to Create a Federal Department of Transportation*, 16 ICC PRACTITIONER'S J. 205-16, 341-52 (1948-49).

The Hoover Commission recommendations that the equipment inspection, safety, and car service functions of the Commission be transferred to the Department of Commerce were likewise opposed by the rail carriers.³¹ In general, the railroads have repeatedly emphasized the desirability of maintaining the independence of the Commission against all forms of executive encroachment.³²

The significance of railroad support for the Commission in this connection was perhaps best demonstrated by the fate of the presidential reorganization plan designed to centralize administrative authority within the Commission in a chairman appointed by the president. This plan was one of six, all submitted by the president at the same time, and devised to effectuate similar reforms in five other commissions as well as the ICC. Resolutions of disapproval of four of these plans were introduced in the Senate and referred to the Committee on Expenditures in Executive Departments.³³ This committee reported three of the resolutions unfavorably; the fourth, that disapproving of the ICC reorganization, was reported favorably. The explanation of this obviously inconsistent action (since all four plans were virtually identical) can, in the words of the minority report, "easily be found by reading the roster of the regulated interests (and their lawyers) which appeared in opposition."³⁴ The hearings on the plans had been largely monopolized by railroad and associated witnesses appearing to defend the "independence" of the ICC.³⁵ In the debate on the floor of the Senate the railroads were given primary credit for the committee's peculiar action, and in the end the ICC resolution was approved by a substantial majority.³⁶ Railroad support saved the ICC from a reorganized fate to which five other commissions succumbed.

31. COMMISSION ON ORGANIZATION, THE INDEPENDENT REGULATORY COMMISSIONS 12 (1949); *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 482-90.

32. *E.g.*, 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 266-7; *Hearings on National Transportation Policy*, *supra* note 27, at 77.

33. ICC: Reorganization Plan No. 7 of 1950, Resolution of disapproval, S. Res. 253; FTC: Plan No. 8, S. Res. 254; FPC: Plan No. 9, S. Res. 255; FCC: Plan No. 11, S. Res. 256; SEC: Plan No. 10, no res.; CAB: Plan No. 13, no res. Plan No. 12 proposed to reorganize the NLRB along similar lines but was complicated by the proposed subordination of the General Counsel to the Board and consequently cannot be used for comparative purposes.

34. SEN. REP. No. 1567 (pt. 2), 81st Cong., 2d Sess. 21 (1950). The committee minority (Senators Humphrey, Leahy, and Benton) also described the preferential treatment given the ICC as a "high tribute to pressure-group tactics."

35. *Hearings before Senate Committee on Expenditures in Executive Departments on Sen. Res. 253, 254, 255, 256*, 81st Cong., 2d Sess. 53-89, 151-61, 171-7 (1950); SEN. REP. No. 1567, 81st Cong., 2d Sess., pt. 2, 21, n.2 (1950). Motor carrier representatives expressed qualified opposition to the proposal. Significantly, the water carriers, the other major carrier group regulated by the Commission, did not appear to oppose the reorganization.

36. 96 CONG. REC. 7160-4, 7173 (1950). The resolution of disapproval of the ICC reorganization plan was passed by a vote of 66 to 13. Five days later two similar resolutions concerning the FTC and FPC were defeated by votes of 34 to 37 and 37 to 36

Opposition to the creation of new agencies which might rival the ICC. Within the last decade the railroads have generally opposed the establishment of new agencies which might in any way infringe upon or limit the powers of the ICC. In 1938 the railroad Committee of Six did recommend the creation of a new transportation authority which would take over the Commission's powers in regard to finance, entry, and abandonment, and the establishment of a special court to handle railroad reorganizations.³⁷ Both recommendations, however, were opposed by numerous rail carriers and officials.³⁸ Typical of the usual railroad attitude was the rejection in 1946 by one Association of American Railroads group of the proposal for a new transportation planning body because apparently this "would provide another agency duplicating the work of the Interstate Commerce Commission, and further complicate a situation now made difficult by the intervening of various government departments."³⁹ Representatives of the AAR also opposed the creation of the new office of Undersecretary of Commerce for Transportation on the grounds that the ICC was the leading federal agency concerned with transportation and that this new official could only duplicate its functions and challenge its authority.⁴⁰ Similarly, railroad opposition to the creation of a Department of Transportation has in large part been based upon the fear that even if this body did not initially absorb the ICC it would eventually encroach upon the Commission's functions.⁴¹ Railroads have frequently urged the creation of a single regulatory commission for all forms of transportation; the implicit or explicit assumption in all such proposals, however, is that this Commission would be an enlarged and reorganized ICC.⁴²

Opposition to the interference of existing agencies with the Commission. Attempts by existing agencies to influence or dictate ICC policy through intervention in proceedings before the Commission, informal pressure upon com-

respectively (forty-nine affirmative votes being necessary to pass a resolution of disapproval). On the same day that the ICC plan was disapproved, however, the Senate also disapproved the reorganization of the FCC by the narrow margin of two votes, 50 to 23, despite the unfavorable report of the resolution of disapproval by the Committee on Executive Expenditures. While the majority of the Senate evidently felt the necessity of being consistent for at least the duration of one afternoon, eleven senators voted against the reorganization of the ICC and for the reorganization of the FCC.

37. Report of Committee Appointed September 20, 1938, by the President of the United States to submit Recommendations upon the General Transportation Situation 4 (1938).

38. *Hearings before the House Committee on Interstate and Foreign Commerce on the Omnibus Transportation Bill*, 76th Cong. 1st Sess. 312, 615-21, 1310, 1314, 1358, 1384-92, 1395-1400 (1939); Wham, *supra* note 22, at 169.

39. ASS'N OF AMERICAN RAILROADS, *op. cit. supra* note 20, at 26.

40. *Hearings on Reorganization Plan No. 7 of 1950, supra* note 4, at 51 *et seq.*; *Hearings on Reorganization Plan No. 21 of 1950, supra* note 21, at 82-5.

41. Transport Topics, March 15, 29, 1948.

42. I NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 22-4; ASS'N OF AMERICAN RAILROADS, *op. cit. supra* note 20, at 19.

missioners, or by other means, have been severely attacked by the railroads. The argument is that the ICC has the responsibility to act in the public interest, and other agencies, if they interfere, must be doing so on behalf of some parochial interest. Appearances of the Secretary of Agriculture before the Commission have frequently been objected to, and the intervention of price control agencies in the general rate cases has likewise been attacked.⁴³ The heaviest criticism along this line has been directed at the Department of Justice for its frequent interventions before the ICC and attempts to influence Commission policy in cases raising antitrust issues.⁴⁴ On a much broader level, the railroads and associated groups have been staunch defenders of the independence of the Commission from presidential and congressional interference.

Railroad Support for the Expansion of ICC Power

In addition to defending the ICC against intrusions upon its powers by other agencies the railroads have fairly consistently in recent decades advocated the expansion of the Commission's authority. There are four principal points in the railroad program as it has developed.

Transfer to the ICC of all existing regulatory functions affecting the railroads. In the words of the Pennsylvania Railroad:

"All regulation of the railroads should be in the Interstate Commerce Commission and not part under that Commission and part under the Securities and Exchange Commission or other Commissions. In other words, the Interstate Commerce Commission should be the only governmental agency regulating the railroads."⁴⁵

Since 1941 the principal activity of the railroads in this area has been the drive to get the enforcement of the antitrust laws as applied to common carriers transferred from the Department of Justice to the ICC. The railroads argued that they were subject to two conflicting types of regulation and that the Antitrust Division was unfamiliar with and unsympathetic to their problems. In the end, the carriers were successful and the Reed-Bulwinkle Act of 1948 gave the ICC power to exempt rate conferences and bureaus from the antitrust laws.⁴⁶

43. 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 267; 103 RAILWAY AGE 23 (Feb. 3, 1940); *Hearings on the Omnibus Transportation Bill*, *supra* note 38 at 1385-9; Transport Topics, Feb. 21, 1949. An attempt by OPACS in 1941 to reduce railroad rates on iron and steel moving to the West Coast was described by Railway Age as "an usurpation by an ambitious and upstart agency of functions lodged in experienced and responsible hands elsewhere." 111 RAILWAY AGE 31 (Aug. 16, 1941).

44. 111 RAILWAY AGE 29 (Dec. 13, 1941); DRAYTON, *op. cit. supra* note 22, *passim*; Dickinson, *Railroad Rates and the Anti-trust laws*, 12 ICC PRACTITIONER'S J. 936-51 (1945).

45. 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 31.

46. Section 5a, Interstate Commerce Act, 62 STAT. 472 (1948).

Expansion of ICC regulatory authority over unregulated railroad-competitive groups. During the 1930's the railroads consistently urged the extension of ICC authority over unregulated carriers, particularly motor and inland water carriers. Their efforts in regard to the former achieved success in the Motor Carrier Act of 1935, which was the culmination of a determined legislative push by the railroads and the ICC. The latter itself had recognized in 1932 that:

" . . . there is substantially no demand for public regulation of the charges of motor trucks to protect shippers against exorbitant or discriminatory charges. The demand has been chiefly from the railroads, and for the prescription of minimum rather than maximum charges."⁴⁷

Yet the Commission in that year endorsed the regulation of motor carriers, and in succeeding years regularly gave its support to measures designed to achieve that end.⁴⁸ The recommendations of ICC Commissioner Eastman in his capacity as Federal Coordinator of Transportation gave additional impetus to the drive for regulation.⁴⁹ The strongest political support, however, came from the railroads themselves, and representatives of the Association of Railroad Executives actively participated in the drafting of motor carrier legislation.⁵⁰ The great bulk of the motor carriers initially opposed regulation. The approval of the American Trucking Associations was achieved only in the later stages after they had received assurances that enforcement of the new legislation would be placed in a separate ICC bureau completely divorced from the existing railroad-regulating bureaus.⁵¹ Motor

47. 46 ICC ANN. REP. 20 (1932).

48. Coordination of Motor Transportation, 182 I.C.C. 263 (1932); *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 6836*, 73d Cong., 2d Sess. 14 *et seq.* (1934); *Hearings before Senate Committee on Interstate Commerce on S. 1629, S. 1632, S. 1635*, 74th Cong., 1st Sess. 116 *et seq.* (1935); 49 ICC ANN. REP. 19 (1935).

49. FEDERAL COORDINATOR OF TRANSPORTATION, REGULATION OF TRANSPORTATION AGENCIES 14-34, 97, 350-71 (1934); FEDERAL COORDINATOR OF TRANSPORTATION, REPORT ON TRANSPORTATION LEGISLATION 1934 59-61, 105, 201-17 (1935).

50. *Hearings on H.R. 6836*, *supra* note 48, at 210, 238-43, 284 *et seq.*; *Hearings on S. 1629, S. 1632, S. 1635*, *supra* note 48, at 434-9, 442-3, 465-7. The actions of the railroads in support of this legislation were discussed and attacked in Congress, 79 CONG. REC. 12208, 12222 (1935). See also SEN. REP. No. 482, 74th Cong., 1st Sess. 2 (1935).

51. *Hearings on H.R. 6836*, *supra* note 48, at 177-82; *Hearings on S. 1629, S. 1632, S. 1635* *supra* note 48, at 307, 357-8; 79 CONG. REC. 5650, 5656 (1935). Motor carrier regulation had been supported from the start by a group of long-haul common carriers, *Hearings on H.R. 6836*, *supra*, at 85-96, but this was not the position of the industry as a whole. The assurances which the ATA received from the ICC were subsequently gone back on by the Commission, see p. 498 *infra*.

carrier regulation was also strongly opposed by all the principal farm organizations and most of the industrial shipper groups.⁵²

A comparable pattern prevailed in the struggle over the regulation of inland water carriers. The ICC, the Federal Coordinator, and the railroads strongly supported regulation.⁵³ The farm organizations, the shippers, and the bulk of the water carriers themselves were equally strongly opposed.⁵⁴ The strength of this latter combination was sufficient to delay the enactment of regulatory legislation until 1940 when the Transportation Act of that year gave the ICC control over these carriers.⁵⁵

Since the achievement of these two major objectives of basic ICC control over water and motor carriers, the railroads have attempted to fill in the gaps left in the regulatory jurisdiction of the Commission. They have urged that the exemptions given motor carriers of agricultural commodities and water carriers of bulk commodities be removed, and that private carriage and contract carriers likewise be subjected to the authority of the ICC.⁵⁶ The

52. *Hearings on H.R. 6836, supra* note 48, at 112, 140, 245, 252-4, 270-3, 415 *et seq.*; 79 CONG. REC. 12223-4 (1935). The farm organizations consistently opposed regulation, and the National Industrial Traffic League first opposed and then supported it with many qualifications. See also, Nelson, *New Concepts in Transportation Regulation*, in NATIONAL RESOURCES PLANNING BOARD, *TRANSPORTATION AND NATIONAL POLICY* 202, n.25 (1942).

53. 49 ICC ANN. REP. 19 (1935); FEDERAL COORDINATOR OF TRANSPORTATION, *REGULATION OF TRANSPORTATION AGENCIES* 5-12, 41-4, 97, 333-49 (1934); FEDERAL COORDINATOR OF TRANSPORTATION, *REPORT ON TRANSPORTATION LEGISLATION 1934* 56-8, 105, 182-200 (1935). *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48 at 434-9, 1028-60, 1142-3; *Hearings before House Committee on Merchant Marine and Fisheries on H.R. 5379, 74th Cong., 1st Sess.* 32-7, 176 *et seq.*, 396-401 (1935). For description of the activities of the railroads on behalf of their program, see *id.* at 254.

54. *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 1146-9; *Hearings on H.R. 5379, supra* note 53, at 46-50, 113-26, 214 *et seq.*, 253, 471. The government-owned Federal Barge Lines and one or two other large common carriers were the only water carriers to support regulation and then only on the condition that the ICC be thoroughly reorganized. The alleged tendency of the Commission to "give paramount consideration to the needs of the railroads" was strongly attacked by Senator Shipstead. SEN. REP. No. 925, 74th Cong., 1st Sess., pt. 2, 2 (1935); 79 CONG. REC. 10694, 10727, 10749 (1935). Among the organizations listed by Senator Shipstead as opposed to the bill were: American Farm Bureau Federation, National Grange, Northwest Farmers Unions, Farmers National Grain Corporation, American Cotton Cooperative Association, National Industrial Traffic League, Mississippi Valley Association, Upper Mississippi Waterway Association. *Id.* at 5.

55. The positions of the various parties-in-interest were essentially the same in 1940. The water carriers and farm organizations stubbornly opposed the regulation of the former without success. The railroad origins of this legislation were perfectly obvious since it stemmed in large part from the recommendations of the railroad Committee of Six. *Hearings on the Omnibus Transportation Bill, supra* note 38, at 997, 1092; H.R. REP. No. 1217, 76th Cong., 1st Sess. pt. 2 (1939); SEN. REP. No. 433, 76th Cong., 1st Sess., pt. 2, 2, 11 (1939); 84 CONG. REC. 5867-71, 6126, 6152, 9731-3, 9743-5, 9752-5, 9875-9, 9967, 9971, 9988-91, 9995-6 (1939).

56. Transport Topics, Feb. 21, 1949; *Hearings on Domestic Land and Water Transportation, supra* note 21, at 234-45; 106 RAILWAY AGE 685-87 (April 22, 1939), 107 *id.* at 99 (July 15, 1939).

AAR has also urged in recent years that the Commission be given power to charge tolls for the use of the inland waterways.⁵⁷

Transfer of regulatory controls over railroad-competitive groups from other agencies to the ICC. Where the railroads have been unsuccessful in preventing the assignment to other agencies of regulatory functions over competing carriers they have waged prolonged campaigns for the transfer of these functions to the ICC. In the debates over the Transportation Act of 1940 the AAR urged that ICC authority be extended over all forms of transportation subject to federal regulation. In particular, the Association wished to transfer authority over coastwise and intercoastal shipping from the Maritime Commission to the ICC and to have the ICC assume the functions of the Civil Aeronautics Authority. Legislation introduced at the instigation of the railroads contained these provisions.⁵⁸ The railroads were successful in achieving only the first of their objectives. Rail groups have subsequently regularly attacked the independent position of the Civil Aeronautics Board, and urged either its abolition and the transfer of its functions to the ICC or, in more general terms, the centralization of all regulatory activities affecting transportation in one agency.⁵⁹

Concentration of all federal transportation activities in the ICC. The culmination of these various railroad policies towards the expansion of ICC authority was reached in 1950 when the AAR advanced the position that all government activities—regulatory and promotional—affecting all forms of transportation should be placed in the ICC. The representative of the railroads testifying before the Senate Interstate and Foreign Commerce Committee was quite explicit in stating that such agencies as the Bureau of Public Roads should be under the Commission. He left some doubt, however, as to the extent to which this recommendation also included such transportation service agencies as the Coast Guard, Weather Bureau, and Coast and Geodetic Survey.⁶⁰ In addition, the AAR advocated that the authority of the ICC be extended so that all projects for improving the inland waterways proposed by the Chief of Engineers, United States Army, be submitted to the ICC for approval before their transmission to Congress.⁶¹ Insofar as the scope of its authority is concerned, no stronger support could be asked by the ICC than that which the Association of American Railroads has given to the Commission.

Railroad support in all its forms has been the basis of the Interstate Commerce Commission's viability. Other interests have at times supported individual actions of the Commission or defended the Commission against specific

57. *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 212-15.

58. H.R. 4862, 76th Cong., 1st Sess. (1939); RECOMMENDATIONS UPON THE GENERAL TRANSPORTATION SITUATION, *supra* note 37, at 13-14; *Hearings before Senate Committee on Interstate Commerce on the Transportation Act of 1939*, 76th Cong., 1st Sess. 45 (1939).

59. See note 43, *supra*. Transport Topics, Feb. 21, 1949.

60. *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 493-4.

61. *Id.* at 220-30.

attempts to curb its authority. But such action on the part of these interests has always been sporadic and balanced by severe criticism of the Commission and opposition to it in other lines of policy. The railroads are alone among the interests surrounding the Commission in their constant and comprehensive support of that body. By their continuous praise of the Commission, by their defense of its independence and by their efforts to protect and to extend its authority the railroads have made the Commission the beneficiary of what has been their not inconsiderable political power. But in the rough world of competitive politics nothing comes for free. Political support must be purchased, and the price which the ICC has paid for its railroad support may be traced through almost all important phases of its policy and behavior.

III. ICC AID TO THE RAILROADS

An exhaustive analysis of the ramifications of the ICC-railroad affiliation throughout Commission policy is obviously beyond the scope of this Article. Instead it is here proposed to indicate briefly the consequences of this affiliation in four major areas of Commission activity: (1) the level of rates and fares; (2) monopoly and antitrust; (3) rail-motor competition; (4) rail-water competition.

The Level of Rates and Fares

The ease with which the railroads in recent years have obtained advances in rates and fares from the ICC has been the subject of considerable unfavorable comment.⁶² The significance of this Commission acquiescence to railroad demands can only be appreciated by a comparison of ICC policy in this field before and after it became dependent upon railroad support. The Commission received the power to prescribe future maximum rates in the Hepburn Act of 1906.⁶³ The first general request for rate advances came from the carriers in 1911 after the Mann-Elkins Act had broadened the Commission's powers in this area. These requests were denied, with the Commission laying down rigorous criteria for the justification of rate advances.⁶⁴ During the next few years, in a series of general rate cases, the Commission either denied the railroad requests for increases or granted only a minor fraction of their demands.⁶⁵ As a consequence of this policy, freight rates remained stable

62. *Hearings on the Reappointment of J. Monroe Johnson*, *supra* note 8, at 10-11; N.Y. Times, April 15, 1950, p. 21, col. 5; Askwith, *Our Pampered Railroads*, 168 NATION 556-7 (1949).

63. 34 STAT. 584 (1906).

64. 36 STAT. 539 (1910); *Advances in Rates, Eastern Case*, 20 I.C.C. 243 (1911); *Advances in Rates, Western Case*, 20 I.C.C. 307 (1911).

65. *The Five Per Cent Case*, 31 I.C.C. 351 (1914), 32 I.C.C. 325 (1914); 1915 *Western Rate Advance Case*, 35 I.C.C. 497 (1915), 37 I.C.C. 114 (1915); *Western Trunk Line Rate Increases*, 43 I.C.C. 481 (1917); *The Fifteen Per Cent Case*, 45 I.C.C. 303 (1917); *Proposed Increases in New England*, 49 I.C.C. 421 (1918). Significantly, it was

and in general harmony with wholesale prices from 1908 through 1915.⁶⁶ In 1916, however, wholesale prices started to skyrocket, and the railroads renewed their demands for rate advances. But the ICC remained adamant throughout 1917, and it was not until March 1918 that the railroads were able to secure any substantial relief.⁶⁷ ICC policy during this period directly reflects its shipper and farmer sources of political support.⁶⁸

In 1920, as its support from non-railroad sources was beginning to weaken, the Commission approved a major increase in railroad rates.⁶⁹ After prices plummeted in 1921, freight rates were considerably out of line, and the Commission in 1922 ordered a ten per cent decrease.⁷⁰ Despite the pressure of agricultural interests, however, the Commission did not restore the prewar relationship between prices and rates. Instead, the Commission from 1924 through 1929 stabilized freight rates at about 165% of the 1913 level, whereas prices had fallen back to about 140% of that level. It was during this period that the Commission lost its farmer and shipper support and developed close railroad affiliations. The changing attitudes of the former toward the Commission are reflected in the Hoch-Smith resolution of 1925, and the year 1926 marks the last time that the Commission denied in toto a railroad request for a general rate advance.⁷¹

during this period alone in ICC history that the Commission exercised its legal prerogative to be represented by special counsel in general rate proceedings. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, THE INTERSTATE COMMERCE COMMISSION 221, n.129 (Monograph No. 24, 1941).

66. The source for this and subsequent figures on the level of freight rates and wholesale prices is Exhibit 54, p. 3, Testimony of C. E. Childe, *Ex Parte* No. 168, Increased Freight Rates 1948, 276 I.C.C. 9 (1949). For both the rate and price indexes 1913 equals 100. Mr. Childe compiled these indexes from data furnished by the Commission and the Bureau of Labor Statistics. Index figures for 1948 through 1950 have been supplied directly to the author by Mr. Childe.

67. 3B SHARFMAN, INTERSTATE COMMERCE COMMISSION 83-98 (1936); General Order No. 28, United States Railroad Administration, dated May 25, 1918, amended June 12, 1918, effective June 25, 1918.

68. "The Commission's active concern with the protection of the interests of shippers and users of transportation service was demonstrated in a series of important rate decisions between 1910 and 1917, in which the Commission in the main denied permission for the rate advances proposed by the railroads. These decisions were rendered in the face of tremendous pressure upon the Commission to grant the increases and in spite of marked increases in operating expenses, particularly towards the end of the period." FAINSON & GORDON, GOVERNMENT AND THE AMERICAN ECONOMY 255 (1941).

Recent writers sympathetic to the railroad position have criticized the Commission for its actions during this period. See *e.g.* 3B SHARFMAN, INTERSTATE COMMERCE COMMISSION 71-102 (1936); FAIR & WILLIAMS, ECONOMICS OF TRANSPORTATION 595 (1950).

69. Increased Rates, 1920, 58 I.C.C. 220 (1920); Authority to Increase Rates, 58 I.C.C. 302 (1920).

70. Reduced Rates, 1922, 68 I.C.C. 676 (1922).

71. 43 STAT. 801 (1925); Revenues in Western District, 113 I.C.C. 3 (1926). See also notes 72, 73, *infra*. In following the mandate of the resolution the Commission in one case, *Calif. Growers' and Shippers' Protective League v. So. Pac. Co.*, 129 I.C.C.

By the advent of the thirties the ICC was exercising a benevolent paternalism in regard to the rate level. Whereas in 1932 the wholesale price index had fallen off over 30% from its 1929 level, the Commission by granting "emergency" increases had actually slightly increased the level of freight rates. Throughout the depression the Commission maintained the rate level by approval of additional "emergency" increases and surcharges, by the rejection in 1933 of a shipper petition for rate reduction, and by the approval in 1938 of a general ten per cent rise.⁷² The result was that freight rates never dropped more than eleven per cent from their 1929 level. When wholesale prices increased in the early forties, freight rates went up also: the price index for 1945 was 151.6 and the freight rate index 173.8. Thus from 1924 through 1945 the Commission was able to maintain the rate level well above the price level. The significant gap between wholesale prices and freight rates during this period is graphic measure of the price of railroad support. (See graph on page 484.)

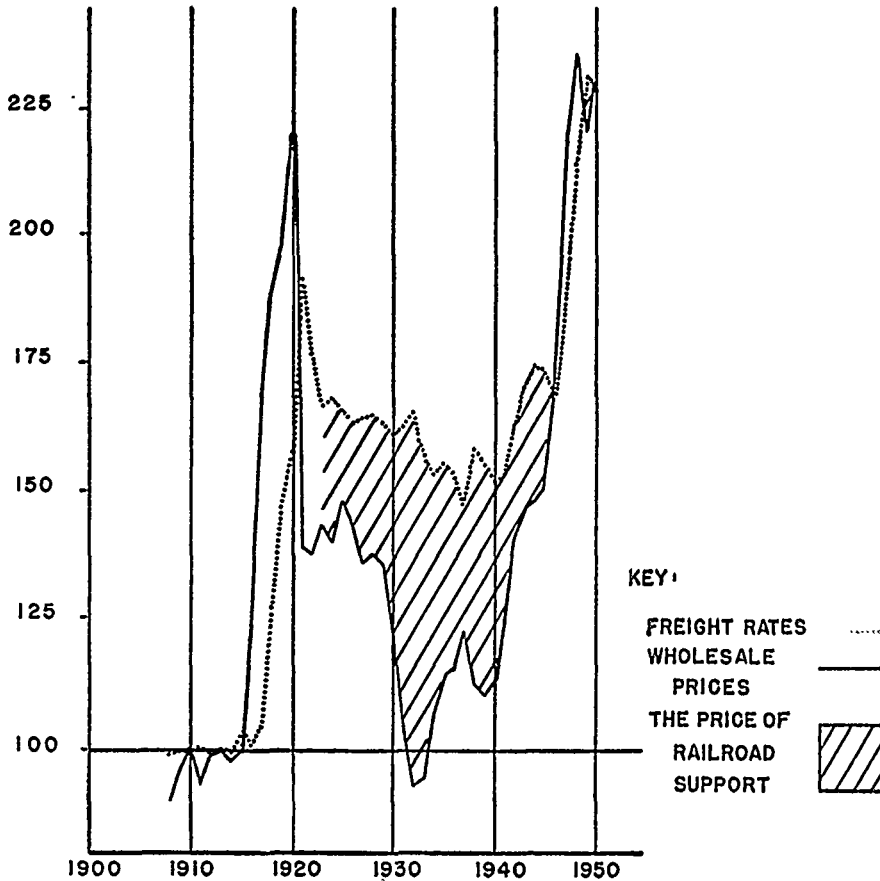
The removal of price controls in 1946 sent wholesale prices shooting upward. In three years the wholesale index had risen to 236.4. The ICC made valiant efforts to keep up with these skyrocketing prices. In June 1946 the Commission approved the first of a series of ten general rate increases embodied in four major proceedings.⁷³ By September 1951 the cumulative percentage increases granted by the Commission amounted to an increase of 67.6% in basic freight rates over the June 1946 level. The actual increase in the rate level from 1946 to 1950 was 35.6%. The drastic rise in wholesale prices has made it impossible for the Commission to maintain the 1945 cushion between prices and rates. The Commission has, however, been suc-

25 (1927), 132 I.C.C. 582 (1927), ordered a reduction in rates, but this was reversed by the Supreme Court on the grounds that the resolution was a mere expression of Congressional opinion and did not change the existing law. *Ann Arbor Railroad v. United States*, 281 U.S. 658 (1930). For a description of the alienation of the shipper and farmer groups from the Commission, see FAINSOD & GORDON, *GOVERNMENT AND THE AMERICAN ECONOMY* 269 (1941).

72. Fifteen Per Cent Case, 1931, 178 I.C.C. 539 (1931), 179 I.C.C. 215 (1931), 191 I.C.C. 361 (1933); General Rate Level Investigation, 1933, 195 I.C.C. 5 (1933); Emergency Freight Charges, 1935, 208 I.C.C. 4 (1935), 215 I.C.C. 439 (1936), 219 I.C.C. 565 (1936); General Commodity Rate Increases, 1937, 223 I.C.C. 657 (1937), 229 I.C.C. 435 (1938); Fifteen Per Cent Case 1937-1938, 226 I.C.C. 41 (1938).

73. Increased Railway Rates, Fares, and Charges, 1942, 248 I.C.C. 545 (1942) authorized a six per cent increase, which was suspended, 255 I.C.C. 357 (1943), and restored, 264 I.C.C. 695 (1946). See also Increased Railway Rates, Fares, and Charges, 1946, 264 I.C.C. 695 (1946), 266 I.C.C. 537 (1946); Increased Freight Rates, 1947, 269 I.C.C. 33 (1947), 270 I.C.C. 81 (1947), 270 I.C.C. 93 (1948), 270 I.C.C. 403 (1948); Increased Freight Rates, 1948, 272 I.C.C. 695 (1948), 276 I.C.C. 9 (1949); Increased Freight Rates, 1951, 280 I.C.C. 179, mimeographed report, Aug. 2, 1951. The ICC has not been unaware of the harmful effects of its policy: "One consequence of the cumulative rate increases of the past 3 years undoubtedly has been a disturbance of many processes of production and distribution with permanent changes in the economic map of the country, although other factors have also contributed to the same result." 63 ICC ANN. REP. 2-3 (1949).

RAILROAD FREIGHT RATES AND WHOLESALE PRICES
1913 = 100



SOURCE: For indexes from 1908 through 1947 the source is Transcript of Record, p. 3, Exhibit No. 54, testimony of C. E. Childe, *Ex Parte* No. 168, Increased Freight Rates, 1948, 272 I.C.C. 695 (1948), 276 I.C.C. 9 (1949). For indexes from 1948 through 1950 the source is letter of C. E. Childe to the author, Jan. 23, 1952. Mr. Childe compiled the freight rate level index from data in the annual issues of ICC, STATISTICS OF RAILWAYS IN THE UNITED STATES. The figures for the years from 1908 through 1949 are all steam railways. The figures for 1950 are based upon data for Class I steam railways only. The wholesale price index is calculated from the index published by the Bureau of Labor Statistics.

cessful in preserving the 1913 relationship: in 1949 the rate index was 231.2, the price index 222.1; in 1950 the rate index was 229.5 and the price index 231.4. Considering the normal tendency of regulated and administered prices to lag far behind violent fluctuations in the general price level, the action of the Commission in moving rates up along with prices is eloquent testimony to its sensitivity to railroad interests. The speed of the ICC in increasing freight rates during this period contrasts with its tardiness during the World War I inflation and has evoked praise from the railroads and envy from other carrier groups regulated by less considerate commissions.⁷⁴

The responsiveness of the ICC to rail freight rate demands since it became dependent upon railroad support has been paralleled by its acquiescence to railroad requests for passenger fare, Pullman charge, express rate, and mail pay increases. Only rarely since the middle thirties has the Commission refused a petition for increased passenger fares, and since 1940 the Commission has a perfect record of giving the roads exactly what they have asked for in important passenger fare cases.⁷⁵ As a result, coach fares in the East have gone up 68.75% and parlor car fares 50% since 1940. This has been enough to place them in some instances above the competitive air fares. Comparable increases requested by the railroads have been approved by the Commission in various other areas of rail pricing.⁷⁶

74. *Hearings on National Transportation Policy*, *supra* note 27, at 82-3, 91-3, 440-1; *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 209, 257-9. For the dissident voice of Robert R. Young, see *Hearings on National Transportation Policy*, *supra* at 320, and 12 LAW & CONTEMP. PROB. 627-9; for the envious voice of W. A. Patterson, president of United Air Lines, see 49 Aviation Week 43 (Nov. 8, 1948); *Stewardship of the Airlines by the CAB*, 15 J. of AIR L. & COMMERCE 391-2 (1948).

75. Passenger Fares and Surcharges, 214 I.C.C. 174 (1936); Eastern Passenger Fares in Coaches, 227 I.C.C. 17 (1938), 227 I.C.C. 685 (1938), 237 I.C.C. 271 (1940); Increased Railway Rates, Fares, and Charges, 1942, 248 I.C.C. 545 (1942), 259 I.C.C. 159 (1944), 266 I.C.C. 537, 603-6 (1946); Increased Passenger Fares, New Haven Railroad, 268 I.C.C. 303 (1947); Increased Passenger Fares, Eastern Railroads, 268 I.C.C. 457 (1947); Increased Passenger Fares, Southern Railroads, 269 I.C.C. 240 (1947); Increased Passenger Fares, Western Railroads, 269 I.C.C. 281 (1947); Increased Coach Fares on Western Railroads, 269 I.C.C. 632 (1947); Increased Coach Fares, New Haven Railroad, 269 I.C.C. 291 (1947); Increased Fares, Eastern Railroads, 1948, 272 I.C.C. 17 (1948); Increased Fares, Eastern Railroads, 1949, 276 I.C.C. 433 (1949). It is easier for the Commission to approve fare increases than to approve rate increases because the political strength of the opposition is weaker against the former than against the latter.

76. Express Rates, 1938-1939, 231 I.C.C. 471 (1939); Express LCL Emergency Charges, 253 I.C.C. 339 (1946); Increased Express Rates and Charges, 1946, 266 I.C.C. 369 (1946), 269 I.C.C. 161 (1947), 273 I.C.C. 231 (1948); Increased Express Rates and Charges, 1949, 277 I.C.C. 249 (1950); Increased Passenger Fares, Eastern Railroads, 269 I.C.C. 87 (1947); Commutation Fares between New Orleans and Gulf Coast, 270 I.C.C. 281 (1948); Jersey Central Commutation Fares, 273 I.C.C. 693 (1949); Weehawken Ferry Fares and Charges, 277 I.C.C. 95 (1950); Hudson & Manhattan R. Co. Passenger Fares, 1949, 277 I.C.C. 313 (1950); N.J.-N.Y. Commutation Fares, 277 I.C.C. 459 (1950); Commutation Fares, Eastern Railroads, 278 I.C.C. 491 (1950); Railway Mail Pay, 269 I.C.C. 357 (1947); 64 ICC ANN. REP. 44 (1950).

In granting railroad requests for rate and fare increases the ICC has repeatedly come into conflict with other government agencies and non-railroad groups. These fall into three main categories.

Shipper interests. These include both private groups and government agencies. The Department of Agriculture has regularly appeared before the Commission in behalf of agricultural interests and either opposed the procedure used by the Commission in considering the railroad request or, as in most cases, opposed outright an increase in rates.⁷⁷ In 1948 the Department attempted without success to get the ICC to investigate the economy and efficiency of the railroads with a view to determining whether the plea for increased rates was only the result of poor management.⁷⁸ Other government agencies which have appeared in opposition to increased rates include the Tennessee Valley Authority, Consumers Counsel for the Bituminous Coal Commission, Office of Solid Fuels Coordinator, General Services Administration, Department of Commerce, and the Department of the Interior.⁷⁹ In a 1951 rate case the Attorney General appeared on behalf of the United States in opposition to the interim increase.⁸⁰

Price stabilization interests. During and immediately after the Second World War the OPA and the Economic Stabilization Agency frequently came into conflict with the ICC. Under the provisions of the price control acts the authority of these agencies did not extend to prices otherwise subject to federal regulation. The OPA was successful in 1943 in getting the ICC to suspend its previously granted six per cent freight rate increase but not in securing the removal of the ten per cent increase in passenger fares granted at the same time.⁸¹ Subsequently the OPA tried unsuccessfully to get the Commission to cancel the suspended rates, and in 1946 unsuccessfully opposed

77. *Ex Parte* No. 148, Increased Railway Rates, Fares, and Charges, 1942, 248 I.C.C. 545 (1942), 264 I.C.C. 695, 717-20 (1946), 266 I.C.C. 537, 554-7 (1946); *Ex Parte* No. 163, Increased Express Rates and Charges, 1946, 266 I.C.C. 369, 376-7 (1946); *Ex Parte* No. 168, Increased Freight Rates, 1948, 272 I.C.C. 695, 703-7 (1948); *Ex Parte* No. 169, Increased Express Rates and Charges, 1949, 277 I.C.C. 249, 266-9 (1950); *Ex Parte* No. 175, Increased Freight Rates, 1951, 280 I.C.C. 179, 188 (1951). Statutory authority for the intervention of the Secretary of Agriculture is § 201 Agricultural Adjustment Act of 1938, 52 STAT. 36 (1938). See also 95 CONG. REC. A-2002-5 (1949).

78. *Ex Parte* No. 168, Increased Freight Rates, 1948, 272 I.C.C. 695, 705-6 (1948), 276 I.C.C. 9, 24-31 (1949).

79 See notes 72, 73, 76 *supra*.

80. Memorandum brief of the United States and the Attorney General, (mimeo). *Ex Parte* No. 175, Increased Freight Rates, 1951, 280 I.C.C. 179 (1951).

81. Increased Rates, Fares, and Charges, 1942, 248 I.C.C. 545, 571-4 (1942), 255 I.C.C. 357 (1943). The suspension of the rate increase did not hurt the railroads, which during the war earned higher rates of return on their investment than they had for twenty years previously. Despite this, the members of the Commission were initially divided evenly and Commissioner Eastman had to be recalled temporarily from his position as Director of the Office of Defense Transportation to break the tie. See 114 RAILWAY AGE 783 (April 17, 1943).

further rate increases.⁸² Throughout most of the war there was a running battle between the OPA and the ICC over the extent to which the ICC in enforcing the Interstate Commerce Act was bound by the policies of the price control acts. A series of Commission decisions and court cases on this question was finally resolved in favor of the ICC.⁸³ During the present period of price controls the Office of Price Stabilization has resumed the battle with the Commission. It unsuccessfully opposed the 1951 freight rate increases and has also appeared in opposition to a commuter fare rise.⁸⁴

State and local interests. The ICC has generally been much more favorable to rate and fare increases than have state and local regulatory bodies. Consequently the Commission has frequently come into conflict with such agencies over the extent to which Commission-approved increases for interstate traffic should be extended to intrastate traffic. Under the law the Commission can prescribe rates upon the latter when it finds that the existing rates cause undue, unjust or unreasonable disadvantage to or discrimination against interstate commerce.⁸⁵ State regulatory bodies have jealously defended their jurisdictions against the Commission's efforts to intrude thereon for the benefit of the railroads.⁸⁶

82. *Ibid.* *Ex Parte* No. 148, Increased Railway Rates, Fares, and Charges, 1942, 259 I.C.C. 159 (1944), 264 I.C.C. 695 (1946), 266 I.C.C. 537 (1946).

83. *Ibid.* 248 I.C.C. 545 (1942), 255 I.C.C. 357 (1943); Increases in Texas Rates, Fares, and Charges, 253 I.C.C. 723 (1942); Mineral Wool from Mo. to Official Territory, 256 I.C.C. 208 (1943); Tar in the Southeast, 258 I.C.C. 403 (1944); Increases in Utah Freight Rates and Charges, 255 I.C.C. 92 (1943); Paints from Minn. to Colo., 256 I.C.C. 127 (1943); Apples, Transcontinental Eastbound, 258 I.C.C. 177 (1944); Rates on Crushed Stone, etc. in Ohio, 259 I.C.C. 423 (1945); LCL Rates between Ark. and La., 258 I.C.C. 525 (1944); Terminal Charges at Pacific Points, 255 I.C.C. 673 (1943); Passenger Fares of M. & M. R. Co., 256 I.C.C. 269 (1943), *rev'd* *Jersey City v. United States*, 54 F. Supp. 315 (D. N.J.), *rev'd*, *ICC v. Jersey City*, 322 U.S. 503 (1944).

84. Increased Freight Rates, 1951, 280 I.C.C. 179 (1951), mimeographed opinion, Aug. 2, 1951, sheets 45-7; N.Y. Times, Aug. 9, 1951, p. 31, col. 8; *id.*, Aug. 10, 1951, p. 17, col. 8; *id.*, Sept. 10, 1951, p. 30, col. 6.

85. Section 13(4), Interstate Commerce Act, 41 STAT. 484 (1920).

86. Increases in Ariz. Freight Rates and Charges, 270 I.C.C. 105 (1948), 272 I.C.C. 507 (1948); Increases in Tenn. Freight Rates and Charges, 272 I.C.C. 625 (1948); Texas Intrastate Rates, 273 I.C.C. 749 (1949), 274 I.C.C. 545 (1949); Miss. Intrastate Express Rates and Charges, 273 I.C.C. 777 (1949), 278 I.C.C. 84 (1950); Increases in Fla. Intrastate Rates, 278 I.C.C. 41 (1950); Kan. Intrastate Rates, 277 I.C.C. 21 (1950). Alabama has given the Commission the most trouble. Ala. Intrastate Fares, 258 I.C.C. 133 (1944), *rev'd*, *Ala. v. United States*, 325 U.S. 535 (1945); Ala. Intrastate Fares, 1948, 273 I.C.C. 627 (1949); Increases in Ala. Freight Rates and Charges, 274 I.C.C. 439 (1949); Ala. Intrastate Express Rates and Charges, 277 I.C.C. 712 (1950); Ala. Intrastate Rates and Charges, 1950, 278 I.C.C. 605 (1950); Note, 60 YALE L. J. 356-62 (1951). The railroads have generally favored the growth of ICC authority at the expense of state regulatory agencies. See *e.g.*, *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 275-7.

Monopoly and Antitrust

The Commission received its principal powers with respect to combinations and competition in the Transportation Act of 1920.⁸⁷ Consequently it was only rarely that it acted in this area while dependent upon shipper and public support. In the few instances in which it did consider problems of monopoly prior to 1920 it was vigorously critical of the railroads.⁸⁸ Its interpretations of the Transportation Act of 1920, on the other hand, have always been colored by its dependence upon railroad support. The Commission has advanced the individual and collective interests of the railroads by facilitating the reduction of competition among them and by aiding their development of cooperative devices designed to increase group solidarity.

In carrying out this necessary consequence of its railroad affiliation, the Commission has repeatedly come into conflict with the Antitrust Division and other groups interested in the maintenance of competition. The Commission early adopted the views of the railroads that collective price-fixing through rate bureaus and conferences was not only necessary and legal but also highly desirable.⁸⁹ This position conflicts with judicial interpretations of the Sherman Act holding (1) that the act is applicable to carriers regulated by the Commission, and (2) that cooperative price-fixing by competing companies is per se a violation of the antitrust laws.⁹⁰ It is, hence, significant that of eleven major antitrust proceedings instituted between 1935 and 1948 by the Department of Justice against carriers subject to ICC regulation, only one, which was against a motor carrier rate bureau, was based upon information referred to the Department by the ICC.⁹¹ In another suit, also against a motor carrier, there was "close cooperation" between the Division and the

87. Section 407, Transportation Act of 1920, 41 STAT. 480-2 (1920).

88. See, e.g., *In re* Financial Investigation of the N.Y., N.H. & Hartford R. R. Co., 31 I.C.C. 32 (1914), especially at pp. 65-70 for a hard-hitting and incisive attack on the New Haven's "policy of transportation monopoly." Unlike subsequent instances the Commission in this case cooperated with the Department of Justice and furnished the latter with a complete record of its hearings. The Department initiated an antitrust suit resulting in a consent decree, *United States v. N.Y., N.H. & Hartford R.R. Co.*, 1 Fed. Antitrust Cas. (D.&J.) 529 (1914). See also WIPRUD, *JUSTICE IN TRANSPORTATION* 51-3 (1945).

89. *In re* Transcontinental Freight Bureau, 77 I.C.C. 252 (1923); Rates between Ariz., Calif., N. M., and Texas, 3 M.C.C. 505 (1937). See also 50 ICC ANN. REP. 74 (1936); WIPRUD, *JUSTICE IN TRANSPORTATION* 96 *et seq.* (1945); DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 51-3 (1946).

90. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

91. *United States v. Middlewest M. Frt. Bur.*, Crim. No. 9905 (D. Colo. 1944); *Hearings on S. 942, supra* note 21, at 267-9; 58 ICC ANN. REP. 30 (1944). Among the other cases instituted against carriers by the Antitrust Division are *United States v. Ass'n of American Railroads*, Civil No. 4551, (D.D.C. 1939); *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), 53 F. Supp. 908 (E.D. Pa. 1944), 55 F. Supp. 985 (E.D. Pa. 1944), 64 F. Supp. 108 (E.D. Pa. 1945), 330 U.S. 806 (1947), *rehearing denied*,

Commission in the investigation preceding the indictment.⁹² In regard to the railroads, however, the Commission has not turned over to the Department evidence of antitrust violations uncovered in the performance of its duties. At least some members of the Commission, for instance, were aware in 1939 of the activities of the railroads and motor carriers in Central Freight Association Territory which became the basis of a grand jury investigation, subsequently terminated without indictment because of the war.⁹³ Of considerably greater significance was Commission awareness, if not sponsorship, of the Western Commissioner Agreement in 1932 among the major railroads operating west of the Mississippi. This established elaborate machinery for the settlement of rate disputes among the participant carriers. Members of the ICC were aware of the existence of the agreement during the eleven years it was in force.⁹⁴ No attempt was made, however, to discover its provisions in detail or to require it to be filed with the Commission in accordance with Sec. 6(5) of the Interstate Commerce Act. The Justice Department consequently did not learn of it until 1943. It requested a copy from the railroads on April 9th of that year. It got a copy on April 14th. The same day the agreement was filed with the ICC.⁹⁵ Nine days later the participating railroads canceled it. This agreement subsequently became the basis of the Department's Lincoln suit against the Association of American Railroads, the Western Association of Railway Executives, and forty-seven individual carriers.

Going beyond non-cooperation, the Commission has in some instances positively affected the conclusion of antitrust suits by the Government. Since it began to become dependent upon railroad support the Commission has in effect reversed successful antitrust suits by approving under Section 5 of the Interstate Commerce Act, and thereby exempting from the antitrust laws, practices which had previously been found to be in violation of those laws.⁹⁶ Similarly, in the recent *Pullman* case the Commission approved the

331 U.S. 865 (1947); *United States v. Allied Van Lines*, Civil No. 44-C-30 (N.D. Ill. 1946); *United States v. Freightways*, Civil No. 22075-R (N.D. Calif. 1944); *United States v. N.Y. Central R. Co.*, Civil No. 24-930 (S.D.N.Y. 1944); *United States v. Ass'n American Railroads*, Civil No. 246 (D. Neb. 1944); *United States v. Pacific Greyhound Lines*, Civil No. 25267 (N.D. Calif. 1945); *United States v. North Coast Transportation Co.*, Civil No. 1675 (W.D. Wash. 1946); *United States v. Railway Express Agency, Inc.*, Civil No. 1155 (D. Del. 1948); *United States v. Universal Carloading & Distributing Co.*, Crim. No. 47665 (W.D. Wash. 1948).

92. *United States v. Freightways*, Civil No. 22075-R (N.D. Calif. 1944); *Transport Topics*, Feb. 9, 1942; 112 *RAILWAY AGE* 353 (Feb. 7, 1942).

93. *Hearings on S. 942*, *supra* note 21, at 464-5.

94. *Id.* at 184-5, 831-2; 94 *CONG. REC.* 6658 (1938); *DRAYTON, TRANSPORTATION UNDER TWO MASTERS* 77-80 (1946).

95. *Hearings on S. 942*, *supra* note 21, at 132-9.

96. *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922), 290 Fed. 443 (D. Utah 1923), *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923). See also *United States v. Lehigh Valley R. Co.*, 254 U.S. 255 (1920), *Control of D., S. and S. R. R. by Lehigh Valley R. R.*, 86 I.C.C. 567 (1924).

sale of the Pullman operating company to the railroads over the objections of the Antitrust Division.⁹⁷ Also, the approval by the Commission of the Western Traffic Association Agreement after the passage of the Reed-Bulwinkle Bill has obstructed the Justice Department's suit against the western railroads.⁹⁸

During the Second World War the ICC and its affiliated agency, the Office of Defense Transportation, endeavored to protect railroad rate bureaus from antitrust prosecution. The Small Business Concerns Act of 1942 authorized the chairman of the War Production Board, after consultation with the Attorney General, to certify to the latter that specified acts of private concerns were approved by him and were "requisite to the prosecution of the war." Such acts would then be immune from attack under the anti-trust laws.⁹⁹ During 1942 and 1943 the ICC and the ODT engaged in an administrative battle with the Antitrust Division to get the chairman of the WPB to exempt rate bureaus from antitrust prosecutions. The specific issue between the two agencies was whether certain restrictions regulating the practices of the bureaus and proposed by the Division should be written into the WPB certificate. In a much broader sense, the issue was one of competition versus regulated monopoly in railroad rate-making.¹⁰⁰ In the end, the two transportation agencies were successful and the certificate was issued with the inclusion of only one minor provision recommended by the Division.¹⁰¹ After the termination of hostilities, the expiration date of the certificate was first fixed for October 1, 1945. However, at the request of ICC Commissioner Johnson, director of the ODT, the life of the certificate was extended another year. Despite renewed requests for further extension a year later, the Civilian Production Administrator permitted it to go out of effect on Oct. 1, 1946.¹⁰²

In addition to this administrative battle, the ICC lobbied before Congress for legislation to exempt permanently the rate bureaus from the danger of prosecution. Such a bill was introduced by Senator Wheeler in 1943 at the request of the ICC.¹⁰³ The Justice Department immediately proposed that

97. *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), 53 F. Supp. 908 (E.D. Pa. 1944), 55 F. Supp. 985 (E.D. Pa. 1944), 64 F. Supp. 108 (E.D. Pa. 1945), 330 U.S. 806 (1947), *rehearing denied*, 331 U.S. 865 (1947); Proposed Pooling of Railroad Earnings and Service Involved in the Operation of the Pullman Co. under Railroad Ownership, 268 I.C.C. 473 (1947). The Commission on one occasion at least has taken similar action in regard to motor carriers. *United States v. Allied Van Lines, Inc.*, Civil No. 44-C-30, (N.D. Ill. 1946); *Allied Van Lines—Purchase—Evanston Fireproof Warehouse*, 40 M.C.C. 557 (1946); *Allied Van Lines—Purchase—Allen*, 45 M.C.C. 751 (1947); *Allied Van Lines—Purchase—Johnson*, 50 M.C.C. 273 (1948).

98. *Transport Topics*, Nov. 29, 1948; CCH TRADE REG. REP. ¶¶ 61, 168.

99. 56 STAT. 351, 357 (1942).

100. See *Hearings on S. 942*, *supra* note 21, at 259-60.

101. For documents bearing on this administrative controversy, see *id.* at 241-57.

102. 60 ICC ANN. REP. 53 (1946); *Transport Topics*, Oct. 7, 1946.

103. S. 942, 78th Cong., 2d Sess. (1943); 114 RAILWAY AGE 1187 (June 12, 1943).

the same restrictions be written into this measure that it had unsuccessfully urged be included in the WPB certificate. This resulted in a conflict between the two agencies and, since with the issuance of the certificate the issue became temporarily dormant, the legislation was not pushed at that time. Subsequently in the 79th and 80th Congresses the ICC and the railroads renewed their efforts, largely as a result of the Lincoln suit and the decision of the Supreme Court in *Georgia v. Pennsylvania Railroad*.¹⁰⁴ The Commission in its annual report issued at the beginning of 1945 urged the amendment of the Interstate Commerce Act to authorize itself to regulate carrier associations and to exempt them from the antitrust laws.¹⁰⁵ Shortly thereafter Representative Bulwinkle introduced a bill designed to accomplish this purpose. The bill was endorsed by the Commission with suggestions for minor changes,¹⁰⁶ and ICC representatives testified in its favor at the hearings.¹⁰⁷ The need for this legislation likewise became more urgent from the Commission's viewpoint when the WPB exemptions certificate expired in 1946.¹⁰⁸ In the second session of the 79th Congress and in the 80th Congress the Commission renewed its endorsement of legislation along the lines of the Bulwinkle Bill, and in 1948 it approved the conference report of the bill in the form in which it was finally enacted over the President's veto.¹⁰⁹

Under Sections 5 and 5a of the Interstate Commerce Act, the ICC may approve poolings of carriers, consolidations, mergers, acquisitions of control, and agreements relating to rate and charges, and thereby exempt carriers participating in such actions from the antitrust laws. The policy of the ICC in enforcing these sections has generally coincided with the views of the railroads. It is rare that applications to purchase, merge, or lease railroad lines or to acquire ownership of such lines or to enter into operating agreements with such lines are turned down by the Commission. Applications to permit interlocking directorates are also almost invariably approved.¹¹⁰ In one significant case concerning the consolidation of eight motor carriers in which it was alleged that there was a railroad interest, the Commission rejected the arguments of the Antitrust Division, the Department of Agriculture and other groups that the Commission ought not approve transactions which would result in an unreasonable restraint of com-

104. 324 U.S. 439 (1945); 91 CONG. REC. 11749 (1945).

105. 58 ICC ANN. REP. 30-1, 106 (1944).

106. 59 ICC ANN. REP. 32-3 (1945).

107. *Hearings Before a Subcommittee of the House Interstate and Foreign Commerce Committee pursuant to H.R. 2536, 79th Cong., 1st Sess. 14 (1945).*

108. 60 ICC ANN. REP. 53 (1946).

109. 61 ICC ANN. REP. 66 (1947); *Transport Topics*, April 29, 1946, Jan. 27, 1947; 94 CONG. REC. 6642 (1948).

110. See 62 ICC ANN. REP. 58, 77 (1948); 58 *id.* at 43 (1944), 59 *id.* at 56 (1945), 60 *id.* at 63 (1946), 61 *id.* at 73 (1947), 63 *id.* at 77 (1949), 64 *id.* at 75 (1950), also, COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at III-15-18.

petition within the meaning of the antitrust laws. The Supreme Court, on appeal, sustained the Commission, in a divided decision.¹¹¹ In applying the provisions of the Reed-Bulwinkle Bill the ICC has also followed a lenient policy and interpreted broadly the scope of the permissible exemption from the antitrust laws.¹¹²

Rail-Motor Competition

The affiliation of the ICC with the railroads has resulted in an ambiguous relationship between the Commission and the principal railroad-competitive group, the motor carriers. On the one hand, there is a close affiliation between the motor carrier industry and the ICC's Bureau of Motor Carriers, with the two cooperating in the enforcement of the Motor Carrier Act of 1935. The Bureau has consequently been praised by the motor carriers and criticized by the railroads.¹¹³ On the other hand, the relationship between the motor carrier industry and the Commission apart from the BMC has been cool and frequently antagonistic. The reason for this is Commission partiality towards the railroads in conflicts of interest between the two carrier groups. The price of railroad affiliation has been motor carrier alienation.

Because a large portion of railroad traffic is non-competitive and must move by rail, the Commission has been able to aid the railroads by permitting selective rate-cutting during periods of intense rail-motor competition such as that from 1935 through 1941. For three years from 1937 to 1940 the Commission required motor carriers to bear the burden of proof in making competitive rate cuts while at the same time not requiring the railroads to do so. This policy was continued after Congress in 1938 amended the Motor Carrier Act to make its provisions concerning burden of proof identical with those applicable to the railroads.¹¹⁴ During this same period the Commission

111. *Associated Transport, Inc.—Control and Consolidation—Arrow Carrier Corp.*, 38 M.C.C. 137 (1942); *McLean Trucking Co. v. United States*, 48 F. Supp. 933 (S.D. N.Y. 1942), 321 U.S. 67 (1944). Previously the Commission had refused to approve the consolidation of a much larger number of trucking firms. *Transport Company—Control—Arrow Corp.*, 36 M.C.C. 61 (1941).

112. *Western Traffic Ass'n—Agreement*, 276 I.C.C. 183 (1949); *Eastern Railroads—Agreements*, 277 I.C.C. 279 (1950); *Ass'n of American Railroads, Per Diem, Mileage Demurrage, and Storage—Agreement*, 277 I.C.C. 413 (1950); *North Atlantic Port Railroads, Tidewater Coal Agreement*, 278 I.C.C. 525 (1950).

113. *Transport Topics*, Oct. 11, 25, 1937, Jan. 31, Oct. 17, 1938, Feb. 20, July 3, 1939, March 19, 1945, Feb. 4, 1946, Jan. 17, 24, Aug. 29, 1949; 104 *RAILWAY AGE* 19 (March 12, 1938); 106 *id.* at 21 (Feb. 11, 1939), 550 (April 1, 1939); 108 *id.* at 9 (Jan. 13, 1940), 43 (Feb. 24, 1940), 395 (March 2, 1940); 109 *id.* at 389 (Sept. 21, 1940); 110 *id.* at 240 (Feb. 1, 1941); 111 *id.* at 940 (Dec. 6, 1941); *Hearings before Senate Committee on Interstate and Foreign Commerce on the Nominations of Hugh W. Cross, Richard F. Mitchell, James K. Knudson*, 81st Cong., 2d Sess. 8-9, 14-15 (1950).

114. See *Anchor Coal Co. v. United States*, 25 F. 2d 462 (S.D. W.Va. 1928); *Merchant Truckmen's Bureau v. United States*, 16 F. Supp. 998 (S.D. N.Y. 1936);

put further barriers in the way of motor carrier competition by prescribing comprehensive minimum rate levels for motor carriers in the northeast and middle west.¹¹⁵ Although initially requested by the motor carriers, the subsequent effect of these orders was, as Commissioner Eastman pointed out in one dissent, to substitute a much more difficult procedure for motor carriers wishing to lower rates than for railroads.¹¹⁶ The Commission rejected, however, motor carrier petitions to remedy the situation.¹¹⁷ Throughout this period the Commission in a number of cases encouraged the railroads to exercise their managerial discretion by meeting motor carrier competition through various devices.¹¹⁸ The injurious effects of proposed railroad competitive rates upon motor carriers were not sufficient cause to invalidate the rates.¹¹⁹ Railroads were usually permitted to meet

Classification Rating on Radio Bulbs or Tubes, 2 M.C.C. 25 (1937); Rates over Carpet City Trucking, 4 M.C.C. 589 (1938); Rates of Lambert Transfer, 3 M.C.C. 651 (1937); Rates on Lampblack and Phosphates, 8 M.C.C. 404 (1938); H. C. Roulson, Inc., Commodity Rates, 8 M.C.C. 542 (1938); Gulf Ports—Ala., Geo., and Tenn., Commodity Rates, 10 M.C.C. 106 (1938); Confectionery and Shoes over Reliable Transfer, 11 M.C.C. 71 (1939); All-Commodity Rates over Interstate M. Frt. System, 13 M.C.C. 24 (1938); Northcutt Minimum Charges, Ariz. and Calif.—N.M., 14 M.C.C. 611 (1939); Split Deliveries in Chicago Union Stockyards, 14 M.C.C. 743 (1939); Packing House Products—Portland, Ore.—Wash., 17 M.C.C. 255 (1939); Cotton Fabrics and Cotton Piece Goods, 10 M.C.C. 275 (1938); Consolidated Freight Co., Commodities from Flint, Mich., 21 M.C.C. 329 (1940); 52 STAT. 1240 (1938); 54 STAT. 912, 924 (1940); §§ 15 (7), 21b (9), Interstate Commerce Act.

115. Rates over Freight Forwarders, Inc., 4 M.C.C. 68 (1937); Central Territory M.C. Rates, 8 M.C.C. 233 (1938); N. Eng. Terr. M.C. Rates, 8 M.C.C. 287 (1938); Trunk Line Terr. M.C. Rates, 24 M.C.C. 501 (1940); 57 ICC ANN. REP. 97-S (1943). The action of the Commission in these cases was in sharp contrast to its normal policy in rail cases. Sugar Cases of 1922, 81 I.C.C. 448 (1923); Ex-Lake Iron Ore from Chicago to Granite City, 123 I.C.C. 503 (1927); Coal to Philadelphia and within the Delaware Capes, 208 I.C.C. 165 (1935); Motor Transport Club of Mass., Inc. v. B. & M. R. Co., 206 I.C.C. 18 (1934).

116. Trunk Line Terr. M.C. Rates, 24 M.C.C. 501, 625 (1940).

117. Transport Topics, Feb. 10, 1941.

118. Western Trunk Line Class Rates, 210 I.C.C. 312 (1935); Emergency Freight Charges, 1935, 215 I.C.C. 439 (1936); Fuel & Gas Oil to Memphis, Tenn., 218 I.C.C. 106 (1936); All Freight from Chicago & St. Louis to Birmingham, 226 I.C.C. 455 (1938); Sand, Gravel & Stone to Champaign & Urbana, 237 I.C.C. 773 (1940); Bags & Bagging from Portland & Seattle, 238 I.C.C. 717 (1940).

119. United States v. C. M. St. P. & Pac. Ry. Co., 294 U.S. 499 (1935); Youngstown Sheet & Tube Co. v. United States, 295 U.S. 476 (1935); Lumber from Pac. Coast to Eastern Points, 210 I.C.C. 344 (1935); Lumber between Points in Off. Terr., 219 I.C.C. 427 (1936); Meat and Packing House Products from Chicago, 220 I.C.C. 677 (1937); Lumber from Decatur, Ala. to Gulf Ports, 226 I.C.C. 164 (1938); All Freight from Boston to East Hartford, 223 I.C.C. 421 (1937); Electrical Appliances from Knoxville, 237 I.C.C. 86 (1940); Metals from Chicago to Detroit, 246 I.C.C. 350 (1941); Groceries from Boston to Me. & Vt., 248 I.C.C. 199 (1941); Lubricating Oils and Greases, Okla.-Mo., 9 M.C.C. 465 (1938); Paper Articles Ratings, Ill. Freight. Ass'n Terr. S. W., 10 M.C.C. 329 (1938); Alcoholic Liquors—Ind., Ky., & Ohio-St. Joseph,

motor carrier competition by rate reductions,¹²⁰ and to regain by this means traffic which had been lost to the truckers.¹²¹ Relief from the provisions of Section 4 of the Act prohibiting the charging of a higher rate for a short haul than for a longer one was frequently granted the railroads in this connection.¹²² Rate reductions on competitive traffic not accompanied by reductions upon similar noncompetitive traffic were held not to be prejudicial

Mo., 10 M.C.C. 410 (1938); Butter from Okla. City to Chicago, 19 M.C.C. 53 (1939); Iron & Steel from Pittsburgh & Aliquippa, 21 M.C.C. 791 (1940); Groceries from Aberdeen, S. Dak. to Willmar, Minn., 22 M.C.C. 261 (1940); Coffee, Roasted, from Omaha to Twin Cities, 22 M.C.C. 529 (1940); Paint, etc. from Chattanooga to Ala. & Ga., 19 M.C.C. 1 (1939); Building Material from Ala. to Southern States, 22 M.C.C. 171 (1940); Wool and Mohair from Idaho and Wyo. to Calif., 24 M.C.C. 794 (1940); Alcoholic Liquors from Baltimore to Washington, 24 M.C.C. 419 (1940); Onions and Potatoes from N. Dak. to Twin Cities, 26 M.C.C. 153 (1940); Walsh Trucking Service, Commodities, N.J. and N.Y., 27 M.C.C. 241 (1940); Paper from Mechanic Falls to Boston, 28 M.C.C. 196 (1941).

120. Nonferrous Metals, 234 I.C.C. 319 (1934); Bituminous Coal to Youngstown, 211 I.C.C. 1 (1935); Glass from Okmulgee, Okla. to Kan. & Mo., 218 I.C.C. 650 (1936); Explosives between Calif. & Ariz., 223 I.C.C. 179 (1937); Einecke & Salestein Co. v. No. Pac. Ry. Co., 229 I.C.C. 581 (1938); Switching Rates in Chicago Switching Dist., 232 I.C.C. 585 (1939); Groceries between Ore. & Wash., 234 I.C.C. 344 (1939); Cranberries from Mass. to Harlem Riv. 235 I.C.C. 553 (1939); Malt Liquors from New Orleans to Ark., 237 I.C.C. 103 (1940); Cotton from and to Pts. in the S.W. & Memphis, 237 I.C.C. 7 (1940); Meats, Packing House Products from Chicago to C.F.A. Terr., 237 I.C.C. 525 (1940); Wrought Iron Pipe from Memphis to Ark., La., Texas, 237 I.C.C. 161 (1940); Sugar from Mobile, New Orleans to Ala. & Ga., 237 I.C.C. 221 (1940); Malt Beverages between Portland & Wash., 237 I.C.C. 34 (1940); Cotton Linters from Texas to La. & Texas Ports, 237 I.C.C. 425 (1940); Cottonseed in Ark., Mo., Tenn., 238 I.C.C. 245 (1940); Packing House Products, Denver & Pueblo to Ariz., 238 I.C.C. 569 (1940); Magazines from Chicago to Mo. River Pts., 238 I.C.C. 577 (1940); Macaroni from, to, and between W.T.L. Terr. & S.W., 246 I.C.C. 730 (1941); Paints from Louisville to Memphis, 246 I.C.C. 783 (1941); Fish from New Bedford to N.Y., 248 I.C.C. 535 (1942).

121. Exp. & Imp. Rates to and from Southern Ports, 205 I.C.C. 511 (1934); Grain & Grain Products within Western District and for Export, 237 I.C.C. 145 (1940); Sand & Gravel in the S.W., 241 I.C.C. 769 (1940); Tires between Points in the South, 243 I.C.C. 767 (1941); Commodities, Calif. & Ariz. to N.M., 245 I.C.C. 545 (1941); Window Glass from the S.W. to Mo., 246 I.C.C. 135 (1941); Magazines in Off. Terr., 246 I.C.C. 325 (1941); Salt from Kan. & Utah, 251 I.C.C. 283 (1942).

122. Sugar & Cocoa Butter to Fulton, N.Y., 215 I.C.C. 79 (1936); Sewage Sludge & Tankage from Wisc., 218 I.C.C. 184 (1936); Sugar & Cocoa Butter from Philadelphia, 220 I.C.C. 453 (1937); Sugar from Camden, N.J. to Fulton, N.Y., 231 I.C.C. 211 (1938); Fertilizer between Off. & Southern Terr., 232 I.C.C. 301 (1939); Sand & Gravel in Southern Terr., 234 I.C.C. 433 (1939); Cheese from Pts. in Wisc., 234 I.C.C. 749 (1939); Lumber & Timber from Pts. in Va., 241 I.C.C. 638 (1940); Groceries In Texas, 241 I.C.C. 755 (1940); Horses & Mules from Atlanta Ga., 241 I.C.C. 470 (1940); Cotton Yarn to W.T.L. Terr., 243 I.C.C. 711 (1941). See also Locklin, *Rates and Rate Structures*, in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 120 (1942); Williams, *supra* note 7, at 1354-5 (1950); Transport Topics, Feb. 16, 1942.

or discriminatory.¹²³ On the other hand, attempts by the motor carriers to meet railroad competition or to undercut railroads were usually disapproved by the Commission.¹²⁴

ICC action in regard to the most heavily competitive commodities was almost invariably favorable to railroads. The most competitive traffic between the two types of carriers was that which had normally up to that time moved at railroad less-than-carload (LCL) ratings. It was openly admitted that railroad rates on this traffic did not cover costs.¹²⁵ Despite this, the railroads vigorously attempted to keep this traffic from falling to the motor carriers, and in carrying out their program to this end they received the cooperation of the Commission. In 1936 the Commission permitted the railroads to introduce free pick-up and delivery services and in the following four years gave them further assistance.¹²⁶ The climax of the railroad drive was reached in 1940 when the southern roads filed reduced ratings on some 3,500 commodities and the Commission permitted these changes to go into

123. Ohio Lime Mfgs. v. Pa. R. Co., 214 I.C.C. 417 (1936); Cotton Linters, Texas to La. & Texas Ports, 237 I.C.C. 425 (1940); East St. L. Cotton Oil Co. v. B. & O. R. Co., 243 I.C.C. 43 (1940); Loading Cotton in Okla., 248 I.C.C. 643 (1942), *aff'd*, Barringer & Co. v. United States 319 U.S. 1 (1943); Dried Beans from Mich. to Central Terr., 251 I.C.C. 212 (1942); Hollywood Casket Co. v. A.T. & S.F. Ry. Co., 253 I.C.C. 603 (1942); Grain & Grain Products from Okla. to Texas, 255 I.C.C. 1 (1943); Alden Coal Co. v. Cent. R. of N.J., 256 I.C.C. 401 (1943); Fertilizer from Southern Ports to the South, 264 I.C.C. 121 (1945). Cf. Commission action in comparable situations concerning motor carriers: Central Terr. M.C. Rates, 19 M.C.C. 545 (1939); Classes & Commodities from Omaha to S. Dak., 32 M.C.C. 735 (1942); Calif. M.C. Rates, 41 M.C.C. 19 (1942).

124. Cotton Fabrics & Cotton Piece Goods, 10 M.C.C. 275 (1938); Gulf Ports—Ala., Ga. & Tenn. Commodity Rates, 10 M.C.C. 106 (1938); New England M.C. Rates, 11 M.C.C. 325 (1939), 12 M.C.C. 417 (1939); Rockne Bros. Commodities, Sioux City & S. Dak., 19 M.C.C. 739 (1939); Butter from Okla. City to Chicago, 19 M.C.C. 53 (1939); Coffee, Roasted, from Omaha to Twin Cities, 22 M.C.C. 529 (1940); Mine Cars & Machinery between Denver & El Paso, 22 M.C.C. 317 (1940); Trunk Line Terr. M.C. Rates, 24 M.C.C. 501 (1940); Fruit from New York to Philadelphia, 24 M.C.C. 760 (1940); Paper Boxes from Ohio to Winston-Salem, 24 M.C.C. 203 (1940); Proportional Rates between Norfolk & Richmond, 26 M.C.C. 53 (1940); Keeshin Lines, Commodities, Chicago & Eastern States, 27 M.C.C. 145 (1940); Donaldson Trsfr., Commodities between Ill., Ia., & Nebr., 28 M.C.C. 359 (1941); Beans from Billings, Mont. to S. Dak., 30 M.C.C. 125 (1941); Canned Goods to Ga., N.C., & S.C., 32 M.C.C. 645 (1942); Lumber, Philadelphia to Eastern Pa., 42 M.C.C. 395 (1943); Dairy Products, Northwest to T.L. & N.E. Terrs., 42 M.C.C. 607 (1943); Commodities, Kan. to Ill., Mo. & Okla., 44 M.C.C. 90 (1944). Many of these cases involved competition between motor carriers as well as between motor carriers and railroads.

125. Pick-up and Delivery in Off. Terr., 218 I.C.C. 441, 480 (1936).

126. *Ibid.* A.T.A. v. United States, 17 F. Supp. 655 (D.D.C. 1936); Merchant Truckmen's Bureau of N.Y. v. United States, 16 F. Supp. 993 (S.D.N.Y. 1936); All Commodities LCL between Me., Mass. and N.H. 237 I.C.C. 391 (1940), 255 I.C.C. 85 (1942); Transport Topics, Oct. 16, 1939, Jan. 22, Feb. 5, 26, March 4, 1940. For the railroad program, see *A Specific Program for Recovering LCL*, 107 RAILWAY AGE 878 (Dec. 9, 1939).

effect over the most vigorous motor carrier opposition without even suspending them for investigation.¹²⁷ In the regulation of other highly competitive traffic, such as automobiles, petroleum, and meats ICC actions and policies likewise tended to favor the railroads.¹²⁸ Typical of ICC decisions at this time was one important case dealing with naval stores in which the Commission refused to set minimums beyond which the railroads might not go in meeting motor carrier competition.¹²⁹

The railroads during this period were frequently permitted to quote competitive rates of a type denied to the motor carriers. The Commission required the truckers to base their rates upon the fully allocated cost (constant and variable costs) theory of rate-making while the railroads were permitted to establish rates upon an added cost basis (variable costs only).¹³⁰ The railroads

127. Transport Topics, Aug. 12, 19, Sept. 2, 1940; Freight from Eastern Ports to the South, 245 I.C.C. 207, 211-12 (1941). A similar reduction was planned for Official Territory but never carried through. See *Hearings on S. 942, supra* note 21, at 825, 879; McWilliams, *Highway Transportation After the War: The Future Outlook*, 20 SOCIAL SCI. 304-6 (1945); Laux, *Have the Economic Changes Due to the War Doomed the Shipping Lines?* 14 ICC PRACTITIONER'S J. 132 (1946); 53 ICC ANN. REP. 25 (1939). For subsequent action in in this area, see Transport Topics, Nov. 4, Dec. 18, 1944, Feb. 11, May 6, 13, June 17, 1946; Increased Railway Rates, Fares, & Charges 1942, 256 I.C.C. 502, 258 I.C.C. 455 (1944); Class Rate Investigation, 1939, 262 I.C.C. 447, 697 (1945), 264 I.C.C. 41 (1945); Increased Railway Rates, Fares, & Charges, 1946, 264 I.C.C. 695, 266 I.C.C. 537 (1946).

128. Autos from Evansville, Ind. to the South, 245 I.C.C. 339 (1941); New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945); Petroleum from Calif. to Ore., 214 I.C.C. 668 (1936); Petroleum between Washington & Ore. Pts., 225 I.C.C. 382 (1937), *aff'd*, Diamond Tank Transport, Inc. v. United States, 305 U.S. 567 (1938), Petroleum & Petroleum Products from Calif. to Ariz., 241 I.C.C. 21 (1940); Petroleum between Washington, Ore., Idaho, & Mont., 234 I.C.C. 609 (1939), *aff'd* Scandrett v. United States, 32 F. Supp. 995 (D. Ore. 1940), *crt. denied*, 312 U.S. 661 (1941); Asbury Transp. Co. v. Union Pacific, 248 I.C.C. 741 (1942); Gasoline from San Francisco Bay Pts. to Ogden, 198 I.C.C. 683 (1934), 299 I.C.C. 33 (1938); Bamberger Elec. R. Co. v. Lang, 8 M.C.C. 200 (1938); Meats & Packing House Products, 203 I.C.C. 407 (1934), 208 I.C.C. 469 (1935), 234 I.C.C. 715 (1939).

129. Naval Stores from Miss. to Gulf Ports, 235 I.C.C. 723 (1940).

130. Rate Structure Investigation, Part 3, Cotton, 174 I.C.C. 9 (1931); Exp. & Imp. Rates to and from Southern Ports, 205 I.C.C. 511 (1934); Export & Coastwise Cotton from Texas to New Orleans, 216 I.C.C. 547 (1936); Trucks on Flat Cars between Chicago & Twin Cities, 216 I.C.C. 435 (1936); Pick-up & Delivery in Off. Terr., 218 I.C.C. 441 (1936); Bags & Bagging from New Orleans to Okla., 225 I.C.C. 320 (1937); Autos & Chassis to Chicago, 227 I.C.C. 223 (1938); Ex-Lake Grain to North Atlantic Ports, 235 I.C.C. 415 (1949); All-Freight between Boston & Me. Points, 226 I.C.C. 387 (1938); Paper in Off. Terr., 248 I.C.C. 135 (1941); New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945); Refrigerator Material from Memphis to Dayton, 4 M.C.C. 187 (1938); Grain Products, Lincoln, Neb. to Ill., Idaho, Mimm., 22 M.C.C. 409 (1940); Cotton Yarn & Piece Goods from Texas to Mo., 24 M.C.C. 733 (1940); Harris, Commodities in Colo., Ill., and Neb., 26 M.C.C. 137 (1940); Leather from Middlesboro, Ky. to Chicago, 18 M.C.C. 265 (1939); Automobiles from Detroit to Md., Ohio, Pa., W.Va., 22 M.C.C. 85 (1940); Bamberger Elec. R. Co. v. Lang, 8 M.C.C.

were permitted to introduce volume minimum rates (rates applicable only to a minimum volume larger than a carload or truckload); the same privilege was denied to motor carriers.¹³¹ Similarly, for six years motor carriers were not allowed to utilize all freight rates (rates applicable to carloads of mixed commodities regardless of the latter's classification ratings) while at the same time railroads were permitted to do so.¹³² Also, freight forwarders and motor carriers were not allowed to charge joint rates (single rates quoted by two or more participating carriers) nor were motor carriers allowed to charge proportional rates (lower rates on through traffic) on freight forwarder traffic.¹³³

The incidence of ICC policy during these years can be measured by the criticism from the motor carriers.¹³⁴ During the war the situation eased somewhat as there was plenty of traffic for everyone. After the war when the motor carriers again began to cut into railroad business the latter, encouraged by the Commission, commenced a series of competitive rate reductions. Again they received the favor and indulgence of the ICC, and again the motor car-

200 (1938); Wooden Chairs from Ft. Smith, Ark, to St. Louis, 24 M.C.C. 442 (1940); Rates over Carpet City Trucking, 4 M.C.C. 589 (1948. See also Locklin, *Rates and Rate Structures*, in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 112-13 (1942) and OPPENHEIM, THE NATIONAL TRANSPORTATION POLICY AND INTER-CARRIER COMPETITIVE RATES 110 (1945).

131. Molasses from New Orleans & Harvey, La. to Peoria & Pekin, Ill., 235 I.C.C. 485 (1940); Petroleum Railroad Shippers Ass'n v. Alton & S. R., 243 I.C.C. 589, 646 (1941); New England M. C. Rates, 21 M.C.C. 373 (1940); Paper from Mechanic Falls to Boston, 28 M.C.C. 196 (1941); Trunk Line Terr. M. C. Rates, 24 M.C.C. 501 (1940); Central Terr. M. C. Rates, 30 M.C.C. 149 (1941); Rugs & Matting from the East to Western Trunk Line Terr., 31 M.C.C. 193 (1941), 34 M.C.C. 641 (1942), *rev'd* Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944); Canned Goods, etc., in Rocky Mt. States, 47 M.C.C. 87 (1947); Southeastern Metals Co. v. Roadway Express, 47 M.C.C. 395 (1947).

132. Commodities between Chicago & Twin Cities, 226 I.C.C. 356 (1938); All Freight from Chicago & St. Louis to Birmingham, 226 I.C.C. 455 (1938); Freight from Boston to East Hartford, 223 I.C.C. 421 (1937); All Freight between Boston & Me. Points, 226 I.C.C. 387 (1938); All Freight between Harlem River & Boston, 234 I.C.C. 673 (1939); All Freight to Pacific Coast, 238 I.C.C. 327 (1940), *aff'd*, Pac. Inland Tariff Bur. v. United States, 50 F. Supp. 376 (W.D. Wash. 1943); All Freight Rates in Southern Terr. 253 I.C.C. 623 (1942); Chicago & Wisc. Points Proportional Rates, 10 M.C.C. 556 (1938); Central Terr. M. C. Rates, 12 M.C.C. 153, 17 M.C.C. 543 (1939); All Freight from and to Lincoln & Omaha, Neb., 26 M.C.C. 634 (1940); All Freight Chicago & St. Louis to El Paso, 28 M.C.C. 727 (1941); All Freight between Baltimore & Pittsburgh, 22 M.C.C. 414 (1940); Midwest M. Freight Bur. v. Schaffer, 42 M.C.C. 368 (1943).

133. Acme Fast Freight Com. Car. App., 2 M.C.C. 415 (1937), 8 M.C.C. 211 (1938), 17 M.C.C. 549 (1939), *aff'd*. Acme Fast Frt. v. United States, 30 F. Supp. 968 (S.D.N.Y. 1940), 309 U.S. 638 (1940); Freight Forwarding Investigation, 229 I.C.C. 201 (1938); Tariffs of Forwarding Companies, 23 M.C.C. 95 (1940); Chicago & Wisc. Proportional Rates, 10 M.C.C. 556 (1938), 17 M.C.C. 573 (1939), *aff'd*, United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940).

134. Transport Topics, Dec. 26, 1938, Apr. 17, Oct. 8, 1939, March 10, 1941, Jan. 26, 1942.

riers felt called upon to protest the "tendency upon the part of the ICC to treat 'public interest' and 'railroad interest' as synonymous terms. . . ."¹³⁵

While competitive rate-making has been the single most important field of Commission behavior favoring railroads in their struggle with the motor carriers, other actions and policies of the Commission also deserve mention. In the discussion prior to the passage of the Motor Carrier Act the industry only consented to regulation by the "railroad-minded" ICC on the condition that a separate motor carrier bureau and division be established.¹³⁶ These two bodies became the representatives of the industry within the Commission and as such anathemas to the railroads, who consistently urged the Commission to organize itself on a "functional" rather than an "industry" basis.¹³⁷ In line with these desires the Commission has gradually emasculated the motor carrier units. The division has been stripped of its responsibilities in regard to rates, securities, consolidations, mergers, purchases, accounts, and penalties; the bureau has lost its Section of Traffic, its Section of Accounts, and its functions in connection with motor carrier securities.¹³⁸ In other fields of activity, the Commission has narrowly interpreted the "grandfather clause" (statutory authorization of operating rights to carriers for bona fide operations on a given date) so as to deny certificates and permits to many operating truck lines.¹³⁹ When it has approved such rights it has frequently severely restricted them as to the territory or classes of shippers which might be served or the commodities which might be transported.¹⁴⁰ For almost a decade the Commission interpreted the acquisition, certificate, and affiliation clauses of the Interstate Commerce Act in such a manner as to facilitate railroad penetration into the motor carrier industry and to raise genuine fears in the motor carriers as to the extent to which the Commission really wished to preserve

135. *Id.*, May 30, 1949, April 24, June 19, Aug. 14, 1950, Feb. 5, 1951; 85 *Traffic World* 34 (April 22, 1950), 9 (July 8, 1950); *Business Week*, Feb. 18, May 6, 1950; *Hearings on Cross, Mitchell, and Knudson*, *supra* note 113, at 9; *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 891; 41 *Fortune* 18 (May, 1950); 63 *ICC ANN. REP.* 6 (1949).

136. See note 51, *supra*.

137. *RECOMMENDATIONS UPON THE GENERAL TRANSPORTATION SITUATION* 14 (1938); 109 *RAILWAY AGE* 503 (Oct. 12, 1940); *Transport Topics*, Feb. 20, March 6, 1939, Feb. 6, 1946.

138. 53 *ICC ANN. REP.* 1-5 (1939); *Transport Topics*, Dec. 25, 1944, March 11, Apr. 1, 1946, March 8, 15, 1948.

139. *Vedder Oil Contract Car. App.*, 1 *M.C.C.* 758 (1936); *McDonald v. Thompson*, 305 U.S. 263 (1938); *Gregg Cartage & Storage Co. v. United States* 316 U.S. 74 (1942).

140. *Keystone Trans. Co. Cont. Car. App.*, 19 *M.C.C.* 475 (1939); *United States v. Maher*, 307 U.S. 148 (1939); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *Ziffrin Truck Lines Com. Car. App.*, 6 *M.C.C.* 722 (1938). See, generally, *BOARD OF INVESTIGATION AND RESEARCH, FEDERAL REGULATORY RESTRICTIONS UPON MOTOR AND WATER CARRIERS*, SEN. DOC. NO. 78, 79th Cong., 1st Sess. (1945).

the independent trucker.¹⁴¹ Only recently the Commission announced a policy which would seem to indicate that motor carriers are to be barred from operating upon a transcontinental scale.¹⁴²

The cumulative result of these ICC policies has been the alienation of the motor carriers from the Commission. Motor carrier criticism of the ICC has been consistent and vigorous.¹⁴³ At the end of the war, the truckers seriously considered initiating a drive to free themselves from ICC control.¹⁴⁴ After much discussion and the consideration of alternative plans, the industry now supports the break-up of the ICC into separate regulatory commissions for each type of transportation with an appellate commission to have jurisdiction over controversies involving two or more classes of carriers, the transfer of the executive functions of the ICC to an executive agency, and the further development of a general control over transportation by the Undersecretary of Commerce.¹⁴⁵

Rail-Water Competition

Its affiliation with the railroads has dominated Commission action concerning water carriers and rail-water competition since the middle twenties when the Commission became dependent upon railroad support. Previous to this time the Commission had, with the exception of its administration of the Panama Canal Act, adequately balanced the interests of the two types of carriers.¹⁴⁶ Beginning in this period, however, the railroads instituted a con-

141. Pennsylvania Truck Lines—Control—Barker, 1 M.C.C. 101 (1936), 5 M.C.C. 9 (1937); Burlington Transportation Co.—Purchase—Alverson, 35 M.C.C. 401 (1940); Pacific Motor Trucking Co., Purchase—Valley, 39 M.C.C. 441 (1943); Pacific Motor Trucking Co.—Control—Pacific, 35 M.C.C. 353 (1940); Rock Island M. Transit Co.—Purchase—White Line, 40 M.C.C. 457 (1946), 55 M.C.C. 567 (1949); Gulf Transport Co.—Purchase—Tinsley, 40 M.C.C. 767 (1946); Santa Fe Trail Stages—Control—Rio Grande, 5 M.C.C. 17 (1937); ICC v. Parker, 326 U.S. 60 (1945); Kansas City Southern Transport Co. Comm. Car. App., 10 M.C.C. 221 (1938), 28 M.C.C. 5 (1941).

142. Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, 57 M.C.C. 341, 379 (1950): "In the administration of the national transportation policy the inherent advantages of rail transportation on volume movements of transcontinental traffic are to be preserved." Upon reconsideration the Commission adhered to its previous findings, pointing out, however, that its decision had been based upon the effect of the proposed merger upon motor as well as rail competition. No. MC-F-4401, Report of the Commission On Reconsideration, April 2, 1951.

143. Transport Topics, Dec. 26, 1938, April 17, Oct. 9, 1939, Feb. 24, May 26, 1941, Oct. 22, 1945, March 29, 1948; 86 Traffic World 73 (Feb. 2, 1951); 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 11, 37-8.

144. Transport Topics, Jan. 21, 1946.

145. *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 862-7.

146. See *e.g.*, *Hearings on S. 1629, S. 1632, S. 1635*, *supra* note 48, at 742-3. For ICC interpretation of the Panama Canal Act, 37 STAT. 566 (1912), 54 STAT. 909 (1940), see: Lake Line Applications Under the Panama Canal Act, 33 I.C.C. 699 (1915); Southern Pacific Co. Ownership of Atlantic Steamship Lines, 43 I.C.C. 168, 45 I.C.C. 505 (1917), 59 I.C.C. 67 (1920), 77 I.C.C. 124 (1923); Steamer Lines on Long Island Sound, 50 I.C.C. 634 (1918), 183 I.C.C. 323 (1932); Ocean S. S. Co. of Savannah, 37 I.C.C. 422 (1915), 203 I.C.C. 155 (1934).

certed competitive drive against the water carriers. In this they had the virtually complete cooperation of the ICC. The twenty per cent differential which had been established by the Director General of the railroads during World War I for water rail-competitive rates was reduced to ten or fifteen per cent in a number of cases.¹⁴⁷ The persistent refusal of the railroads to enter into joint rates and through routes with the water carriers was acquiesced in by the Commission despite congressional pressure to the contrary.¹⁴⁸ Where joint rates were established, the participating water carrier was made to bear the full burden of the differential, and the Commission on occasion even permitted the railroad division of the joint rate to be considerably higher than the local rate to the point of interchange, thus virtually penalizing the water carrier for entering into such a relationship.¹⁴⁹ Reversing a previous policy adopted when it was dependent upon farmer and shipper support, the Commission began to permit railroads to charge discriminatory rates on traffic which had a prior or subsequent haul by water.¹⁵⁰ Liberal use was made of the provisions of the Fourth Section of the Interstate Commerce Act allowing the ICC to permit railroads to charge a higher rate for a shorter haul than for a longer one, and the Commission frequently granted "flexible" relief permitting the railroads to meet automatically any competitive reductions by the water carriers.¹⁵¹ In many cases, the Commission cooperated

147. Through Routes and Joint Rates, Inland Waterways Corp., 153 I.C.C. 129 (1929); Application of Mississippi Valley Barge Line Co., 167 I.C.C. 41 (1930); Application of Amer. Barge Line Co., 182 I.C.C. 521 (1932); Application of Inland Nav. Co., 218 I.C.C. 393 (1936); SEN. REP. No. 924, 74th Cong., 1st Sess., pt. 2, 2; *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 783-4, 790, 848-59, 1134.

148. Dep't War v. Abilene & S. Ry. Co., 77 I.C.C. 317 (1923), 92 I.C.C. 528 (1924); Through Routes & Joint Rates, Inland Waterways Corp., 167 I.C.C. 385 (1930), 192 I.C.C. 173 (1933); *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 858-9.

149. See *e.g.*, Inland Waterways Corp. v. Ala. G.S.R. Co., 151 I.C.C. 126 (1929); *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 786-7.

150. Ex-River Grain from St. Louis to the South, 203 I.C.C. 385 (1934); Raw Sugar, New Orleans to Grammercy and Reserve, La., 206 I.C.C. 231 (1935). *Cf.* Chattanooga Packet Co. v. Ill. Cent. R., 33 I.C.C. 384 (1915), Restriction of Proportional Rates, 161 I.C.C. 113 (1930).

151. Pacific Coast Fourth Section Applications, 129 I.C.C. 3 (1927), 165 I.C.C. 373 (1930), 173 I.C.C. 577 (1931), 190 I.C.C. 273 (1932), 196 I.C.C. 296 (1933), 200 I.C.C. 259 (1934); Citrus Fruit from Fla. to North Atlantic Ports, 211 I.C.C. 535 (1935); Sugar From Calif. to Chicago, 211 I.C.C. 239 (1935); Sugar to Va. Ports, 223 I.C.C. 457 (1937); Soya Bean Meal to Pacific Coast Ports, 225 I.C.C. 51 (1937); *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 785-6. From 1930 through 1934 the railroads filed 136 Fourth Section Applications designed to meet water carrier competition. By April 1935, 88 of these had been granted, 19 denied, and 29 were still pending. *Id.* at 857, 970. Three years later Commissioner Eastman ventured the opinion that the Commission had been liberal in granting Fourth Section relief. *Hearings before Senate Committee on Interstate Commerce on S. 1356 and H.R. 1668, 75th Cong. 3d Sess. 802* (1938). A calculation by the Maritime Commission a year later revealed that in 28 recent Fourth Section cases the Commission had granted relief in whole or in part in 25 and had refused relief in 3. UNITED STATES MARITIME COMMISSION, ECONOMIC SURVEY OF COASTWISE AND

with the railroads to evade the statutory requirement that railroads not be allowed to raise depressed rates solely because of the elimination of water competition.¹⁵² In approving general rate increases during this period the Commission frequently acquiesced to railroad requests for the exemption from such increases of heavily water-competitive traffic.¹⁵³ The Commission also showed a marked tendency to permit the railroads to lower rates on highly competitive items, at times such reductions going below the fully compensatory level.¹⁵⁴ In a series of cases concerning the important citrus fruit movement from Florida the Commission engaged in an administrative duel with the Maritime Commission: each agency successively reducing the rates of the carriers subject to its regulation.¹⁵⁵ In the one significant instance during this period in which the ICC was called upon to express its views on federal development of the inland waterways, the Commission delivered a report on a proposed Lake Erie-Ohio River canal which was hostile to waterways interests and favorable to the railroads.¹⁵⁶

As a result of these policies the water carriers, during the thirties, struggled against the extension over them of the power of the "railroad-minded" ICC.

INTERCOASTAL SHIPPING 22 (1939). The Maritime Commission commented on this as follows: "It would seem from these facts that the Interstate Commerce Commission had adopted a liberal policy toward the rail lines in their efforts to capture certain items of traffic moving in the Atlantic and Gulf coastwise trade. Such relief from the operation of the fourth section, in addition to the adjustment of railroad rates on many competitive products at low levels quite apart from fourth section relief, has strengthened the competitive position of the rail lines." See also *id.* at 19, 23-4, 31.

152. Interstate Commerce Act § 4(2). This was done by granting only temporary relief from the requirements of the Fourth Section. Consequently when the temporary order expired the previous rates could be automatically reinstated if the water competition has been eliminated, or if it had not been eliminated, the relief could be extended. Temporary relief was granted in 35 of the 88 cases mentioned in note 151 *supra* where Fourth Section applications were approved. See *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 857, 866-7.

153. Emergency Freight Charges, 1935, 208 I.C.C. 4 (1935); General Commodity Rate Increases, 1937, 223 I.C.C. 657 (1937); Fifteen Per Cent Case, 1937-1938, 226 I.C.C. 41 (1938).

154. Petroleum from New Orleans, 194 I.C.C. 31 (1933); Lumber from Pacific Coast to Eastern Points, 210 I.C.C. 317 (1935); Baskets or Hampers Westbound to Pacific Coast, 214 I.C.C. 121 (1936); Sugar from Weatly, Ark. to Ark. Points, 227 I.C.C. 431 (1938); Inland Empire Paper Co. v. Great Northern Ry. Co., 218 I.C.C. 501 (1936); Malt Liquors from River Crossings to Fla., 227 I.C.C. 285 (1938); Petroleum from La. to Miss., 232 I.C.C. 570 (1932); Grain from Ill. Territory to Gulf Ports for Export, 237 I.C.C. 715 (1940); Canned Goods from St. Louis to Fla., 238 I.C.C. 777 (1940); Lumber from N.C. to N.Y., 245 I.C.C. 231 (1941). See *Hearings on S. 1629, S. 1632, S. 1635, supra* note 48, at 795-6, 787.

155. Citrus Fruit from Fla. to North Atlantic Points, 211 I.C.C. 535 (1935), 218 I.C.C. 637 (1936), 226 I.C.C. 315 (1938); Citrus Fruit from Fla. to Baltimore, 237 I.C.C. 245 (1940); Citrus Fruit from Fla. to Baltimore, 2 U.S.M.C. 210 (1939).

156. Proposed Lake Erie-Ohio River Canal, Report to the President, 235 I.C.C. 753 (1939).

Unlike the motor carriers, they never acquiesced to Commission regulation.¹⁵⁷ In 1940, however, the railroads and the Commission triumphed and the water carrier industry was brought under a comprehensive system of control.¹⁵⁸ This did not ameliorate the antagonism between the water carriers and the Commission, and, again unlike the motor carriers, the water carrier industry never developed affiliations with any significant segment of the ICC. The Commission does not have a separate water carrier division, and, whereas the Bureau of Motor Carriers is the Commission's largest bureau, the Bureau of Water Carriers and Freight Forwarders is one of its smallest. In 1950 this bureau had only twenty-one employees,¹⁵⁹ and in addition to its water carrier duties it also supervised the regulation of freight forwarders and rate bureaus. The water carriers have consequently frequently complained that their interests are neglected, but these complaints have not produced any remedies.¹⁶⁰ The Commission has remained closely affiliated with the railroads.

In applying the provisions of the Transportation Act of 1940 to the inland waterways operators the ICC has continued most of the policies which alienated the barge lines in the 1930's. The Commission is still reluctant to require railroads to enter into through routes and joint rates with the water lines.¹⁶¹ In considering complaints initiated in the middle 1930's as to the rail-barge differential under the all-rail rate, the Commission, in the words of the Hoover Commission study, prolonged the proceeding "beyond all reasonable length," and did not reach a decision until July 1948.¹⁶² This long delay helped the railroads and was burdensome to the water lines.¹⁶³ The final

157. See notes 54, 55 *supra*.

158. 54 STAT. 929 (1940). This became Part III of the Interstate Commerce Act. Previously ICC authority over the water carriers had been limited to through routes and joint rates, Hepburn Act, 34 STAT. 584 (1906), Denison Act, 45 STAT. 978 (1928), Motor Carrier Act, 49 STAT. 543 (1935), and railroad control and operation of competing water carriers, Panama Canal Act, 37 STAT. 560 (1912). In administering § 4 and other provisions dealing with railroad rates, however, the Commission continually had to consider rail-water relationships.

159. *Hearings on Independent Offices Appropriation Bill for 1951, supra* note 5, at 788-9. This was just one per cent of the Commission's staff.

160. *Hearings before Senate Committee on Interstate and Foreign Commerce on the Merchant Marine Study and Investigation*, 81st Cong., 2d Sess. 1158-60, 1201 (1950); COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at III-34, III-38.

161. See 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 16: "There seems to be a general feeling among the water-carrier operators that the Interstate Commerce Commission has been lax in enforcing the provisions of these sections, thus denying water carriers the right to participate in through traffic to and from points beyond the port of interchange." For example, see *Inland Nav. Co. v. Big Creek & Telocaset R. Co.*, Docket No. 29458 (1951), 88 Traffic World 27 (Aug. 11, 1951).

162. COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at I-56.

163. *Ibid.* See also: *Hearings on S. Res. 253, 254, 255, 256, supra* note 35, at 133; 1 PRESIDENT'S WATER RESOURCES POLICY COMMISSION, A WATER POLICY FOR THE AMERICAN PEOPLE 437 (1950).

decision of the Commission rejected requests of water carrier interests for a substantial differential under the rail rate. It held that cost-of-service considerations did not justify differentials at all, but also held that congressional policy embodied in Sec. 307(d) of the Interstate Commerce Act required it to maintain some differential beneficial to the water carriers.¹⁶⁴ The ICC has also endeavored to permit railroads to maintain rates discriminating against traffic receiving a water haul. In one notable controversy concerning the shipment of ex-barge grain from Chicago to the east, the Commission's approval of the higher rates charged on such grain was eventually invalidated by the Supreme Court.¹⁶⁵ Despite this action, the Commission has allowed the railroads to maintain similar discriminatory rates on a large volume of traffic, this necessitating further legal action on the part of the water carriers.¹⁶⁶ The continued liberality of the Commission in granting Fourth Section relief, particularly for rates established on an "out-of-pocket" cost basis, has likewise evoked severe criticism from waterway interests.¹⁶⁷ The Commission's interpretation of the certificate provisions of the 1940 Act has also hamstrung the water carriers in a number of ways.¹⁶⁸ These various policies reflecting the Commission's railroad affiliation have caused the inland waterways operators to maintain their critical and even hostile attitude toward the Commission.¹⁶⁹

164. Rail and Barge Joint Rates, 270 I.C.C. 591 (1948). This decision was sustained in the courts against a railroad challenge. *Ala., G.S.R. Co. v. United States*, 88 F. Supp. 982 (N.D. Ill. 1950), *aff'd*, 340 U.S. 216 (1951).

165. Grain Proportionals, Ex-Barge to Official Territory, 246 I.C.C. 353 (1941), 248 I.C.C. 307 (1941), 262 I.C.C. 7 (1945); *Cargill, Inc. v. United States*, 44 F. Supp. 368 (N.D. Ill. 1942); *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943); *ICC v. Meehling*, 330 U.S. 567 (1947). See also *Coast Transp. Co., Inc. v. Aberdeen & R.R. Co.*, 256 I.C.C. 339 (1943), 268 I.C.C. 438 (1947); Grain to, from, and within Southern Territory, 259 I.C.C. 629 (1945), 270 I.C.C. 713 (1948).

166. *Amer. Barge Line Co., Arrow Transportation Co., Inland Waterways Corp. v. Akron C. Y. R. Co. et al*, Docket No. 30744, 87 *Traffic World* 54 (Jan. 27, 1951).

167. 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 15, 63; 1 A WATER POLICY FOR THE AMERICAN PEOPLE, *supra* note 163, at 205-8, 213, 215: "Railroads are permitted to cut rates to move traffic which might otherwise go by water and to recoup their revenues by increasing the rail rates on non-water-competitive traffic." The Rivers and Harbors Congress has urged curbing the ICC's power to grant exemptions to § 4. 85 *Traffic World* 11 (April 1, 1950).

168. *McAllister Lighterage Lines v. United States*, 327 U.S. 655 (1946); *Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944); *Cornell Steamboat Co. v. United States*, 321 U.S. 634 (1944); *Barrett Line v. United States*, 326 U.S. 179 (1945); 56 ICC ANN. REP. 141 (1942); *United States v. Seatrain Lines*, 329 U.S. 424 (1947); 61 ICC ANN. REP. 50-1 (1947); 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 17. See, generally, BOARD OF INVESTIGATION AND RESEARCH, FEDERAL REGULATORY RESTRICTIONS ON MOTOR AND WATER CARRIERS, *supra*, note 140, at 247-66.

169. 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 16-17, 68-9; *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 1271-3, 1287-9, 1394; 1 A WATER POLICY FOR THE AMERICAN PEOPLE, *supra* note 163, at 439. The Rivers and Harbors Congress urged in 1944 that legislation be adopted providing "for the reconstitu-

While the barge lines have suffered from the Commission's railroad partiality, they have at least been able to stay in business. Such has not been the case with the coastwise and intercoastal carriers. The combination of the war, railroad competition, and the unsympathetic attitude of the ICC has drastically weakened the domestic ocean shipping industry.¹⁷⁰ Service was suspended during the war, the traffic went to the rails, and with ICC concurrence it has stayed there. For a year and a half, from the end of the war until July 1947, the War Shipping Administration and the Maritime Commission operated a common and contract carrier service in the intercoastal and coastwise trades.¹⁷¹ The difficulties encountered in this operation made it clear that the resumption of private service would be dependent upon a readjustment of railroad water-competitive rates. Consequently in March 1946 the two maritime agencies asked the Commission to initiate an investigation of these rates. Nine months later the ICC began to comply with this request and instituted the first of five major investigations into water-rail competitive rates.¹⁷² The net result of these investigations has been virtually inconsequential. The water carriers have repeatedly been denied substantial relief which would permit them to resume operations on anything remotely

tion of the Interstate Commerce Commission with a view to securing a wholesome balance between the several competing forms of transportation on the one hand and the general public interest on the other. It is felt that under the existing organization of the Commission there is a steadily diminishing recognition of the necessity for such a balance, and a continuing tendency to serve the interest of the rail carriers at the expense of the other interests named." *Hearings on National Transportation Policy, supra* note 27, at 151.

170. On June 30, 1939 there were 235 vessels of 1,187,000 deadweight tonnage in the coastwise trades and 143 vessels (1,377,000 deadweight tons) in intercoastal service. On Dec. 31, 1949 there were 78 vessels (including 6 government ships operating under charter) with a tonnage of 552,000 deadweight tons in the coastwise trade and 58 vessels (including 32 government ships under charter) of 651,000 deadweight tons in the intercoastal trade. *Hearings on Merchant Marine Study and Investigation, supra* note 160, at 1186. See also 61 ICC ANN. REP. 46-7 (1947); 62 ICC ANN. REP. 47-8 (1948); ICC, Problems in the Regulation of Domestic Transportation by Water, *Ex Parte* No. 165, Report of C. S. Morgan 239-346 (1946). In 1950, the Commission noted a slight improvement in the situation of the water carriers. 64 ICC ANN. REP. 11-15 (1950).

171. War Shipping Administration Temporary Authority Application (Coastwise and Intercoastal), 260 I.C.C. 589 (1945); 60 ICC ANN. REP. 34-5 (1946).

172. 60 ICC ANN. REP. 32-4 (1946); Transcontinental Rail Rates, 268 I.C.C. 567, 569-70 (1947); 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 232-4. The proceedings instituted in this investigation were Docket No. 29663, Transcontinental Rail Rates; No. 29664, Intercoastal Water Rates; No. 29708, All Water, Water-Rail and Rail-Water Rates between Pacific Coast Ports and Interior Points; No. 29721, All Rail Commodity Rates between Calif., Ore. and Wash.; No. 29722, Pacific Coastwise Water Rates. In addition the following proceedings were re-opened: Pacific Coast Fourth Section Applications, 129 I.C.C. 3 (1927); Consolidated Southwestern Cases, 123 I.C.C. 203 (1927); *Bull S.S. Lines v. Abilene & S. Ry. Co.*, 237 I.C.C. 15 (1940); *Tex-O-Kan Flour Mills Co. v. Abilene & S. Ry. Co.*, 241 I.C.C. 243 (1940); *Agwilines, Inc. v. Akron, C. & Y. Ry. Co.*, 248 I.C.C. 255 (1942). For further citations of these cases, see note 173, *infra* and 61 ICC ANN. REP. 50 (1947).

resembling their prewar scale. Practically the only rate increases which have been ordered have been minor ones readily acquiesced to by the railroads.¹⁷³ At the same time the Commission allowed the railroads to introduce lower increases on water-competitive traffic in their general rate advance cases, and also to put into effect in the last few years new lower rates on highly competitive individual items.¹⁷⁴ The result of these policies has been vigorous criticism of the Commission by the alienated water carriers, and various suggestions from them for the reorganization of water carrier regulation.¹⁷⁵

IV. RAILROAD AFFILIATION AND COMMISSION VIABILITY

The pattern of affiliation of the Commission with the railroads described in the preceding pages is the basic reason for the decreasing viability of the Commission. This decline has four significant aspects:

(1) *The alienation of non-railroad interest groups.* This process has been described in regard to the water carriers and motor carriers. The fourth major type of transportation, the air carriers, also recognize the Commission's railroad affiliations and have blocked the extension of Commission power into their field.¹⁷⁶ Among shippers the Commission can only command qualified

173. 61 ICC ANN. REP. 47-9 (1947); 62 *id.* at 6, 49-52 (1948); 64 *id.* at 51 (1950); All Rail Commodity Rates between Calif., Ore. and Wash., 268 I.C.C. 515 (1947), 277 I.C.C. 511 (1950); Agwilines, Inc. v. Akron, C. & Y. Ry. Co., 248 I.C.C. 255 (1941), 266 I.C.C. 78 (1946), 268 I.C.C. 261 (1947); Transcontinental Rail Rates, 268 I.C.C. 567 (1947); Tex-O-Kan Flour Mills v. Abilene & S. Ry. Co., 255 I.C.C. 5 (1942), 263 I.C.C. 91 (1945); 63 ICC ANN. REP. 53 (1949). See comments of Chairman Fleming of the Maritime Commission, *Hearings on Merchant Marine Study and Investigation*, *supra* note 160, at 1187, and Galland, *The Intercoastal Dilemma*, 17 ICC PRACTITIONER'S J. 229-33 (1949). For the importance of the Pacific Coast proceeding to the water carriers, see: *Hearings on Merchant Marine Study and Investigation*, *supra*, at 1157-8, 1202-5; *Hearings on Cross, Mitchell and Knudson*, *supra* note 113, at 22; 85 Traffic World 11 (April 15, 1950).

174. Increased Railway Rates, Fares, and Charges, 1946, 266 I.C.C. 537 (1946); Increased Freight Rates, 1947, 270 I.C.C. 403 (1948); 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 231; ICC Problems in the Regulation of Domestic Transportation by Water, *supra* note 170, at 343; 62 ICC ANN. REP. 48 (1948); *Hearings on Merchant Marine Study and Investigation*, *supra* note 160, at 1236-7. The subcommittee holding these hearings has described the situation in the following terms: "One thing is clear, and that is that the intent of Congress regarding the allowance of discriminatory practices by one form of transportation against another is sufficiently clear to call for an immediate change from what appears to be undue favoritism shown the rail lines in quoting of rates at noncompensatory levels in one place and at inflated levels in another." SEN. REP. No. 2494, 81st Cong., 2d Sess. 90 (1950). See also *id.* at 82.

175. *Hearings on Domestic Land and Water Transportation*, *supra* note 21, at 1251, 1371 *et seq.*; *Hearings on National Transportation Policy*, *supra* note 27, at 170, 176-7; *Hearings on Merchant Marine Study and Investigation*, *supra* note 160, at 1157-67, 1265-6, 1270-1, 1276-7, 1274-5; COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at III-10-11, III-34, III-38.

176. 1 NATIONAL TRANSPORTATION INQUIRY, *supra* note 23, at 25-30; *Hearings on National Transportation Policy*, *supra* note 27, at 4-8, 22-4; Barker, *State of the Industry*, 5 Air Transport 23 (Oct. 1947).

support from the large industrial shippers of the National Industrial Traffic League, which has always been closely associated with the railroads. Other shippers, and agricultural groups in particular, are generally hostile towards the Commission.¹⁷⁷

(2) *The alienation of other government agencies.* With some agencies, such as the Department of Agriculture and the Maritime Commission, estrangement has developed because these bodies are closely affiliated with interest groups alienated from the Commission. In a larger number of instances, however, it has been because the Commission's espousal of the relatively narrow interests of the railroads has conflicted with the responsibility felt by these other agencies to some broader interest and their dependence upon some broader basis of political support. This is particularly true of such agencies as the Departments of Commerce, Interior, and Defense, the Antitrust Division, and the price stabilization agencies.¹⁷⁸

(3) *Subversion of congressional intent.* In interpreting the Interstate Commerce Act in the interests of the railroads it is quite obvious that the

177. See 21 *Nation's Agriculture* 18 (Jan. 1946), 23 *id.* at 16 (Feb. 1948); *Amer. Farm Bureau Federation*, 25 *Official News Letters* 5 (Dec. 25, 1946), 1, 4 (May 1, 1946); 27 *id.* 5-6 (Dec. 22, 1948); 25 *National Union Farmer* 1-2 (April 15, 1946), 5 (May 1, 1946); 27 *id.* at 7 (Oct. 1949); 95 *CONG. REC. A-2002-05* (1949).

There have been frequent conflicts between the Commission and various government agencies in the latter's capacities as shippers. See *COMMISSION ON ORGANIZATION*, *op. cit. supra* note 5, at III-20-21. The most notable instance of this nature has been the attempt by the Department of Justice to secure refunds of several hundred million dollars in overcharges paid by the government to the railroads during the war. The ICC has resolutely sided with the carriers in this conflict and the government has been unsuccessful in getting its money back. See *United States v. ICC*, 337 U.S. 426 (1949); *Reconstruction Finance Corp. v. Ala. G.S.R. Co.*, 276 I.C.C. 637 (1949); 64 *ICC ANN. REP.* 50 (1950). Legislation introduced into Congress to prevent future suits against the railroads for reparations was supported by the railroads and the ICC and opposed by the Comptroller General, the Secretaries of Defense and Commerce, and the Department of Justice. 86 *Traffic World* 29 (Aug. 26, 1950), 51 (Sept. 9, 1950).

178. See, in general, *COMMISSION ON ORGANIZATION*, *op. cit. supra* note 5, at III-14, III-19, III-22-23, IV-7; Stern, "Inconsistency" in *Government Litigation*, 65 *HARV. L. REV.* 762-3 (1951). For illustrative cases of legal conflicts between the ICC and other agencies, see *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943); *ICC v. Mechling*, 330 U.S. 567 (1947); *United States v. ICC*, 337 U.S. 426 (1949); *ICC v. Jersey City*, 322 U.S. 503 (1944); *North Carolina v. United States*, 325 U.S. 507 (1945); *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947); *Henderson v. United States*, 339 U.S. 816 (1950); *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). The ICC is undoubtedly unique among government agencies in the extent to which it has been involved in legal controversies with other agencies. In discussing the problem of the representation of government interest, Stern, *supra*, at 763-4, speaking in regard to the Federal Communications Commission, Federal Maritime Board and the Department of Agriculture, states that: "Although in theory the same difficulties could arise as with the Interstate Commerce Commission, in practice this has occurred in only one current case, involving the Maritime Commission.¹⁶ Not many cases, either absolutely or in comparison to those under the Interstate Commerce Act, have arisen under these statutes, and these cases have not otherwise resulted in any disagreement or conflict in government interests." Footnote omitted.

Commission is applying the law in a manner not intended by the Congress. In 1940 Congress declared the national transportation policy to include "fair and impartial regulation of all modes of transportation." Congress also wrote into the acts of 1935 and 1940 various provisions designed to insure that this policy would be carried out. The failure of the Commission to do this has resulted in increased criticism of the Commission in Congress.¹⁷⁹

(4) *Passivity and loss of leadership.* The general purpose of the railroads during the past quarter century has been first the preservation, and then subsequently, after it had been lost, the restoration of their transportation monopoly. Because of its affiliation with the railroads the Commission has, like them, become a defender of the status quo. To this end it has maintained an outdated, formalistic type of procedure.¹⁸⁰ It has been slow to introduce the most simple and accepted new techniques of modern management.¹⁸¹ It has failed to develop effective devices for representing the public interest.¹⁸²

179. Two examples of the results of Congress' fear that the ICC was "railroad-minded" are found in the Transportation Act of 1940: the Whittington Amendment providing that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the National Transportation Policy and the revision of the rule of ratemaking to protect motor and water carriers against "umbrella" ratemaking on behalf of the railroads. 54 STAT. 899, 912, 924, 938 (1940). See also Williams, *The ICC and The Regulation of Inter-carrier Competition*, 63 HARV. L. REV. 1353-54 (1950); DEARING & OWEN, NATIONAL TRANSPORTATION POLICY 273 (1949); SEN. REP. No. 2494, 81st Cong., 2d Sess. 90; *Hearings on National Transportation Policy*, *supra* note 27, at 22; 115 RAILWAY AGE 68 (July 10, 1943); *Hearings on J. Monroe Johnson* *supra*, note 8, at 10-11; N.Y. Times, April 15, 1950, p. 21, col. 5.

180. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *op. cit. supra* note 65, *passim*; COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at I-52-59, II-19 IV-32; 61 ICC ANN. REP. 14-19 (1947). The Hoover Commission staff report stated (p. II-24): "To a remarkable extent the Commission has operated by judicial processes, although allowing somewhat more flexibility than is the practice of the courts. Its procedures appear to have become more and more formalized as the volume of its work has increased, its bar has become organized, and its tradition has grown." For criticism of its procedure by motor bus and truck operators, see *Hearings on National Transportation Policy*, *supra* note 27, at 58-9, 146. The Commission procedure in railroad reorganization cases is attacked as "stiff" and "legalistic" in Swaine, *A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act*, 56 HARV. L. REV. 1054-8 (1943).

181. COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at I-23-24: "The Commission completely lacks any provision of organization and management personnel in its administrative set-up. As a result such changes in organization as occur come about in somewhat haphazard way, largely as changes in personnel or other matters of expediency require or suggest." See also *id.* at II-44-47, and LaRoe, *Administrative Side of the Interstate Commerce Commission*, 18 ICC PRACTITIONER'S J. 113-16 (1950). The age and quality of the Commission's personnel has also been the occasion of comment. Commission on Organization, *supra* at II-49-60; Curry, *The Future Place of the Hearing Examiner in the Interstate Commerce Commission*, 17 ICC PRACTITIONER'S J. 313-14 (1950); Williams, *supra* note 179, at 1366-7.

182. This deficiency and the manner in which it benefits the railroads is discussed at length in Davis, *Official Notice*, 62 HARV. L. REV. 542-5 (1949) and Williams, *supra* note 179, at 1364-6.

It has neglected administrative planning, and has failed to develop a coherent transportation policy aside from that of giving the railroads what they want.¹⁸³ As a result, it has been slow to recognize and deal with obvious evils, such as the freight classification problem or the question of state limitations on truck sizes and weights. It has also been unable to adjust its thinking and actions to the new demands of an era in which defense considerations are paramount. These failures of the Commission have inevitably led to the formation within the executive branch of a responsible office which can take the lead in national transportation policy and planning.¹⁸⁴

Given this situation in regard to the ICC, what, then, is desirable public policy? The independence of a regulatory commission is based upon the premise that this independence will aid it in being objective and impartial. When such a commission loses its objectivity and impartiality by becoming dependent upon the support of a single narrow interest group, obviously the rationale for maintaining its independence has ceased to exist, and it becomes necessary to subordinate this agency to some other agency possessing a broader outlook and a broader basis of political support. It is undoubtedly desirable to have an agency within the federal government affiliated with the railroads and able to represent their interests. It is undoubtedly undesirable to have such an agency independent of all administrative supervision, masquerading as an impartial tribunal, and controlling competing carrier groups. Fortunately the recent reorganization of the Maritime Commission suggests a pattern for application to the ICC.

The Interstate Commerce Commission should be abolished as an independent agency. Its executive functions should be transferred, as the Hoover Commission recommended, to the Secretary of Commerce. The motor and water carriers should be emancipated by dividing the regulatory functions of the ICC among three separate commissions dealing respectively with rail, water, and highway transportation. These three commissions should all be placed within the Department of Commerce in a position similar to that

183. The failure of the ICC in this area is best indicated by the recurring creation of temporary transportation planning agencies, *e.g.* National Transportation Committee, 1933, Federal Coordinator of Transportation, 1933-36, the Committee of Three, 1938, the Committee of Six, 1938, the Board of Investigation and Research, 1940-44. Two of the most systematic approaches to transportation policy by federal agencies are those of the NATIONAL RESOURCES PLANNING BOARD, *TRANSPORTATION AND NATIONAL POLICY* (1943) and the SECRETARY OF COMMERCE, *REPORT TO THE PRESIDENT* (1949). For comments on the lack of initiative and advance planning on the part of the ICC, see COMMISSION ON ORGANIZATION, *op. cit. supra* note 5, at II-27-30, II-35-37, IV-19, IV-41-45; *Hearings on Cross, Mitchell and Knudson, supra* note 113, at 23; Davis, *Administrative Powers*, 63 HARV. L. REV. 223-5 (1940); Williams, *supra* note 179, at 1354-5.

184. See note 9 *supra*, and text.

of the Maritime Board and subject to the same general policy guidance of the Secretary.¹⁸⁵

The Supreme Court of the United States once remarked that:

“The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country.”¹⁸⁶

This is not only a norm of public policy; it is also a requisite for administrative viability. The railroads may still, at least in the immediate future, furnish the Commission with powerful political support. But the prolonged failure of the Commission to adhere to the Court's standard must eventually make the Commission unviable and lead to its replacement by other instrumentalities better able to act in the public interest.

185. See COMMISSION ON ORGANIZATION, THE INDEPENDENT REGULATORY COMMISSIONS 12 (1949) for the recommendation of the transfer of the executive functions of the carriers who have also gone on record in favor of separate industry commissions with an appellate commission to resolve conflicting decisions. *Hearings on S. Res. 253, 254, 255, 256, supra* note 35, at 162-3; *Hearings on Domestic Land and Water Transportation*: 862-7; *Transport Topics*, Feb. 5, 1951. Placing the separate commissions in the Department of Commerce would remove the need for an appellate commission since it would be up to the Secretary to define general transportation policies and to resolve differences among the commissions. To leave the separate commissions outside the general policy guidance of the Secretary would be to maintain the existing artificial distinction and conflict between promotional and regulatory policies. COMMISSION ON ORGANIZATION, DEPARTMENT OF COMMERCE 14-15 (1949); SECRETARY OF COMMERCE, REPORT TO THE PRESIDENT 43-6; (1949); 1 PRESIDENT'S WATER RESOURCES POLICY COMMISSION, A WATER POLICY FOR THE AMERICAN PEOPLE 212, 432-3 (1950). The railroads themselves have persuasively argued that this is a distinction that cannot be maintained. *Hearings on Domestic Land and Water Transportation, supra* note 21, at 490-3. The logic of the situation requires the unification of all transportation policy responsibility in the Department of Commerce. See H.R. Doc. Nos. 503, 526, 81st Cong., 2d Sess. (1950).

186. *ICC v. Chicago, R.I. & Pac. Ry. Co.*, 218 U.S. 83, 103 (1910).