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### The Interstate Commerce Commission and the Anti-Trust Acts

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## NOTES AND COMMENT

### THE INTERSTATE COMMERCE COMMISSION AND THE ANTI-TRUST ACTS

The extent of the authority of the Interstate Commerce Commission with respect to freight rates has recently developed into a major issue by reason of the acceptance by the United States Supreme Court of jurisdiction in the *Georgia* rate case.<sup>1</sup> Objection to acceptance of jurisdiction by the Supreme Court was based upon the argument that it would require the Court to usurp the rate-making regulatory functions of the Interstate Commerce Commission.<sup>2</sup> To determine the validity of this contention three fundamental questions require analysis:

1. Does the Sherman Anti-Trust Act apply to such combinations to fix rates as Georgia claims exist in the transportation field?

2. Is the United States Supreme Court permitted to take jurisdiction of the case without violation of Section 16 of the Clayton Anti-Trust Act?

3. Do other jurisdictional factors permit the State of Georgia the use of the United States Supreme Court as a forum?

Unless all three of these questions are answered in the affirmative, the Supreme Court's right to take jurisdiction is open to serious objection.

#### I

Congress has delegated to the Interstate Commerce Commission, a *quasi*-judicial body, control over freight rate-making. Like the Federal Trade Commission, the Interstate Commerce Commission is an arm of Congress and is "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed. . . ." <sup>3</sup>

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<sup>1</sup> *State of Georgia v. Pennsylvania R. R. Co. et al.*, — U. S. —, 89 L. ed. 758 (1945). The complaint in this case was brought directly to the Supreme Court by Governor Ellis Arnall of Georgia. He charged that alleged rate discrimination was in violation of the federal anti-trust laws and had prevented the South from developing industrially. The court by a five-to-four decision decided to take jurisdiction of this case. Associate Justice William O. Douglas wrote the majority opinion. Chief Justice Harlan F. Stone dissented, joined by Associate Justices Owen J. Roberts, Felix Frankfurter and Robert H. Jackson, who were of the opinion that acceptance of jurisdiction could not fail but to bring chaos into the field of interstate rate-making.

<sup>2</sup> For the extent of the power of the Interstate Commerce Commission with reference to rate-making and regulatory functions, see *Illinois Central R. R. v. Interstate Commerce Commission*, 206 U. S. 441, 454, 51 L. ed. 1128 (1907).

<sup>3</sup> *Rathbun v. United States*, 295 U. S. 602, 628, 79 L. ed. 1611 (1935); also see I. L. Sharfman, *The Interstate Commerce Commission; An Appraisal* (1937) 46 YALE L. J. 965, 947-954.

It is a non-political expert body, with continuity in office, high traditions of service, and impartial judgment. It has been enlarged from its original five members, when the first Act to Regulate Commerce<sup>4</sup> was passed on February 4, 1887, into a body now comprising eleven members. Its functions have increased as new legislation was passed to meet the problems presented by the mushroom growth of our transportation system which paralleled the economic and industrial expansion of a vigorous young America. The authority of the Interstate Commerce Commission is determined by the various acts to regulate commerce beginning with the Act of 1887<sup>5</sup> and amended by subsequent legislation, including the recent Motor Carrier Act<sup>6</sup> and Regulation of Freight Forwarders.<sup>7</sup> With the foregoing additions the Act now consists of a preamble setting forth the transportation policy of our country, and of four sections which provide for all phases of transportation except Air Transport (Part 1—Rail, Part 2—Motor, Part 3—Water, Part 4—Freight Forwarders).

In accordance with the statutory authority granted to it, the Interstate Commerce Commission has developed a complete organization for handling litigation pertaining to the general rate structure, as well as for the examination of rights and routes of common carriers.<sup>8</sup> Scrutiny of the Act, however, reveals a gap in the authority of the Interstate Commerce Commission; it has no control over a rate-fixing conspiracy which results in restraint of trade and strait of trade, for this is the province of the Sherman Anti-Trust Act<sup>9</sup> and therefore was never delegated to the Interstate Commerce Commission.<sup>10</sup> Congress has granted to the Commission the power to lift the ban of the anti-trust laws in mergers or consolidations,<sup>11</sup> and the carriers are authorized by the statutes<sup>12</sup> to make agreements for joint rates and with respect to such rates the Commission has jurisdiction. However, the Commission has apparently no control over carrier activities resulting in unreasonable combinations in commerce between the states.

The power delegated the Interstate Commerce Commission by Congress in the rate-construction field is practically exclusive. Its determinations may only be appealed to the federal courts in specific

<sup>4</sup> 24 STAT. 379, 384, 49 U. S. C. A. §§ 1-27 (1887), as amended.

<sup>5</sup> *Ibid.*

<sup>6</sup> MOTOR CARRIER ACT, 49 Stat. 543, 49 U. S. C. A. §§ 301-327 (1935).

<sup>7</sup> FREIGHT FORWARDER ACT, 56 Stat. 300, 49 U. S. C. A. §§ 1001-1002 (1942).

<sup>8</sup> HILLYER, MCFARLAND, HILLYER, *MANUAL OF PRACTICE AND PROCEDURE BEFORE I. C. C.* (1945) 41-57.

<sup>9</sup> SHERMAN ANTI-TRUST ACT, 26 Stat. 210, 15 U. S. C. A. §§ 1-7 (1890).

<sup>10</sup> Burchmore, *Regulatory and Anti-Trust Statutes* (May, 1944), Proc. Inst. of Trans., N. Y. U. L. Q. REV. (Supp.) 91-103.

<sup>11</sup> *New York Central Securities Corp. v. United States*, 287 U. S. 12, 77 L. ed. 138 (1932).

<sup>12</sup> 54 STAT. 900, 49 U. S. C. A. §§ 1(4), 6.

instances<sup>13</sup> and even then there is a presumption that the rate accepted by the Commission is reasonable.<sup>14</sup> A specific procedure and practice<sup>15</sup> in the handling of rate matters has been developed by the Commission. The primary source for rate initiation and promulgation is the rate bureau<sup>16</sup> established by various conferences of carriers. These rate bureaus formulate rates taking into consideration such transportation factors as density of traffic, distance, value of commodity, and cubic content. Two types of rates are set up, Class rates and Special Commodity rates. The latter differ from the former in that they are adopted to accommodate large regular movements of particular commodities (mostly bulk articles such as coal, cotton, oil, grain) and do not appear in the Consolidated Freight Classification but rather in special Commodity Tariffs. After these rates have been formulated they are published and thirty days are allotted for the public to protest or otherwise impeach their reasonableness. If there is no valid opposition to their becoming effective they then are made part of the general rate structure and appear in the regular tariffs.

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<sup>13</sup> HILLYER, MCFARLAND, HILLYER, *supra* note 8, at 58, "The well-ascertained law is that courts are without power to weigh the evidence introduced before the Commission, or pass upon the soundness of the Commission's conclusions. The only instances in which the courts will review findings of fact by the Commission are where the Commission has acted arbitrarily or without evidence to support its conclusions, or has transcended its constitutional or statutory powers." See also *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 235, 75 L. ed. 999 (1931); cf. *Interstate Commerce Commission v. Del. L. & W. R. R. Co.*, 220 U. S. 235, 55 L. ed. 448 (1911).

Cases brought to enforce, enjoin or set aside orders of the Commission are governed by Title 28, §§ 41, 43, 44, 45a, 46, 47, 47a and 48 of the U. S. C. A. (except suits to collect awards of reparations, which may be filed in the appropriate federal or state court pursuant to provisions of Section 16 of Interstate Commerce Act). Any party or parties in interest may appear in the court case on their own motion and as of right. The District Court may in appropriate circumstances grant (1) a temporary stay or suspension for not more than 60 days upon a specific finding of "irreparable damage", (2) an interlocutory injunction, (3) a permanent injunction. The order must be made by a special three-judge court.

See *North Dakota ex rel. Lemke v. Chicago & North Western Ry.*, 257 U. S. 485, 66 L. ed. 329 (1922); cf. *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 66 L. ed. 531 (1922).

<sup>14</sup> *Keogh v. Chicago N. W. Ry.*, 260 U. S. 156, 67 L. ed. 183 (1922), where Justice Brandeis held that though a combination of carriers to fix reasonable and non-discriminatory rates may be illegal under anti-trust acts nevertheless shipper may not recover damages if the rates so fixed has been approved by the Interstate Commerce Commission; that approval of rates by the Commission establishes that they are reasonable and not discriminatory. *Accord*, *Louisville & N. Ry. v. United States*, 245 U. S. 463, 466, 62 L. ed. 400 (1918)—In a suit to set aside an order of the Commission where the evidence before the Commission was conflicting and ample to sustain the findings, they are conclusive.

<sup>15</sup> General Rules of Practice before Interstate Commerce Commission, 49 U. S. C. A. § 17—Rail; § 304(a)—Motor; § 904(a)—Water; § 1003(a)—Forwarder.

<sup>16</sup> *In re* Trans-Continental Freight Bureau, 77 I. C. C. 252, 279.

The entire country has been divided into certain freight rate territories called Official, Southern, and Western. It is with respect to shipments moving from one territory to another that high cost combination rates rather than low through rates have become the practice. It is the contention of Governor Arnall of Georgia that the total effect of these inter-territorial rates has been discrimination between sections to the detriment of the New Industrial South and the benefit of the North (Official territory).<sup>17</sup> The Interstate Commerce Commission has taken cognizance of this matter in the past, and in the case of *State of Alabama v. New York Central*<sup>18</sup> the Commission required application of the so-called destination theory of rate-making upon certain commodities moving from Southern territory into Official territory. In other words, it required through rates from South to North, based upon the level of the rates within the Official territory. But this decision dealt only with a few commodities and in general higher rates predominated for inter-territorial movements of freight than for shipments within freight territories.

If such rate discrimination resulted from concerted action by combinations of carriers, the matter would be subject to the Sherman Anti-Trust Act which prohibits conspiracies in restraint of trade.

The Sherman Anti-Trust Act was enacted three years after the Interstate Commerce Act<sup>19</sup> and has been supplemented by the Clayton Act<sup>20</sup> and the Federal Trade Commission Act.<sup>21</sup> Although nothing in the Act indicates that it is to apply to railroads, the Sherman Act has been construed by the courts as applicable although superseded whenever the Interstate Commerce Act affords a remedy in express terms.<sup>22</sup> Thus it has been held that railroad rate agreements are subject to the Sherman Anti-Trust Act<sup>23</sup> and that a rate agreement and association of all principal railroads of Official territory was unreasonable<sup>24</sup> under the Sherman Anti-Trust Act. Though the railroads and other transport agencies are subject to the general terms of the Anti-Trust Acts, certain exemptions and limitations in particular features are found in these Acts vesting power in the Interstate Commerce Commission.<sup>25</sup> In general, however, it may be said

<sup>17</sup> WIPRUD, *JUSTICE IN TRANSPORTATION* (1945).

<sup>18</sup> 235 I. C. C. 255, 237 I. C. C. 515; also see *In re Livestock to and from the South*, 253 I. C. C. 241.

<sup>19</sup> INTERSTATE COMMERCE ACT, 54 Stat. 898, 49 U. S. C. A. §§ 1-27, 201-327 (1940).

<sup>20</sup> 38 STAT. 734, 15 U. S. C. A. § 217 (1914).

<sup>21</sup> FEDERAL TRADE COMMISSION ACT, 38 Stat. 717, 718, 15 U. S. C. A. §§ 41-47 (1914).

<sup>22</sup> *United States v. Union Pac. R. R.*, 226 U. S. 61, 57 L. ed. 124 (1912).

<sup>23</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. ed. 1007 (1897).

<sup>24</sup> *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. ed. 259 (1898).

<sup>25</sup> 38 STAT. 734, 15 U. S. C. A. § 21 (1914); 38 STAT. 737, 15 U. S. C. A. § 26 (1914).

that though rate violations are subject to the Interstate Commerce Commission,<sup>26</sup> nothing is said about anti-trust violations in the Interstate Commerce Act and therefore in such instances the Sherman Anti-Trust Act would apply.<sup>27</sup>

## II

Whether the United States Supreme Court is permitted to take jurisdiction of the *Georgia* case without a violation of Section 16 of the Clayton Anti-Trust Act<sup>28</sup> is our next point of inquiry. It is worthy to note that this section specifically exempts common carriers from suits in equity seeking injunctive relief under the Clayton Act unless such suit is instituted by the United States. In three pertinent cases the United States Supreme Court has held that Congress did not intend to supplement the remedies provided to a shipper or carrier under the Interstate Commerce Act with triple damages or injunctive relief afforded under the anti-trust laws.<sup>29</sup>

When the Clayton Act was adopted in 1914, the Commission had already been given power to fix, and regulate rates by the Hepburn Act<sup>30</sup> and the Mann-Elkins Act.<sup>31</sup> Congress, realizing that indiscriminate suits for injunctions under the anti-trust laws would substitute the many district courts for the Commission—the single rate-making authority—decided to adopt Section 16 of the Clayton Act to avoid confusion and conflict in this field. Thus when Congress by Section 16 of the Clayton Act authorized private suitors to seek re-

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<sup>26</sup> INTERSTATE COMMERCE ACT, 54 Stat. 898, 49 U. S. C. A. § 1 *et seq.* (1940), Part 1, § 13—Rail, Part 2, §§ 204d, 216e, 218b—Water, Part 3, § 307—Motor Carrier, Part 4, §§ 406, 407, 408, 409—Forwarders.

<sup>27</sup> *Georgia v. Pennsylvania R. R.*, *supra*, at 758.

<sup>28</sup> 38 STAT. 737, 15 U. S. C. A. § 26 (1914). Injunctive relief for private parties; exception:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate 'a preliminary injunction may issue; *Provided*, That nothing contained in sections 12, 13, 14-a1, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

<sup>29</sup> *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474, 76 L. ed. 408 (1932); *Central Transfer Co. v. Terminal Railroad Ass'n*, 288 U. S. 469, 77 L. ed. 899 (1933); *Terminal Warehouse Co. v. Pennsylvania R. R. Co.*, 297 U. S. 500, 80 L. ed. 827 (1936).

<sup>30</sup> 34 STAT. 584, 49 U. S. C. A. § 1 (1908).

<sup>31</sup> 36 STAT. 539, 49 U. S. C. A. § 1 (1-9) (1910).

lief by injunction under the anti-trust laws, it was at pains to bar such suits against carriers with respect to matters within control of the Commission. Section 16 was formulated to preclude such breakdown of the uniform rate structure established by the Commission as would inevitably result from the maintenance under the Sherman Act of numerous individual suits like the *Georgia* rate case affecting rates which Congress had left within the Commission's exclusive control in the first instance. Thus the manifest purpose of Section 16<sup>32</sup> was to preclude such suits except by the Federal Government in order to prevent judicial interference with or pre-judgment of the lawfulness of matters which Congress had placed within the jurisdiction of the administrative agency.<sup>33</sup>

### III

Finally, we inquire whether there were other factors, jurisdictional or equitable, permitting consideration of the *Georgia* rate case by the United States Supreme Court. It is undoubtedly true that the United States Constitution provides that in all cases in which a "state shall be a party, the Supreme Court shall have original jurisdiction"<sup>34</sup> and *prima facie* this would seem to give Georgia the right to resort directly to our highest tribunal. But under the acids of legal analysis this right vanishes into nothingness. *Commonwealth of Massachusetts v. Mellon*<sup>35</sup> is authority for the rule that even a state must prove that a justiciable issue exists before it can claim the Supreme Court as a forum. In the *Georgia* rate case while the majority opinion held that such an issue existed, the minority argued with a great deal of persuasiveness that the right of the State of Georgia to sue by reason of its being a shipper of materials and a proprietor of several railroads adversely affected by the present inter-territorial rate structure, was merely a makeshift issue to give the Supreme Court jurisdiction. Georgia's claim of right to institute proceedings as *parens patriae* is a departure from the doctrine enunciated in *Commonwealth of Massachusetts v. Mellon*.<sup>36</sup> The court in that case speaking through Justice Sutherland pointed out that, "it cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. . . . In that field it is the United States, and not the state which represents them as *parens patriae*, when such representation becomes appropriate. . . ." <sup>37</sup>

Furthermore, there were other procedural remedies open to

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<sup>32</sup> *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474, 76 L. ed. 408 (1932).

<sup>33</sup> *Georgia v. Pennsylvania R. R.*, *supra*.

<sup>34</sup> U. S. CONST., Art. III § 2, cl. 2.

<sup>35</sup> 262 U. S. 447, 67 L. ed. 1078 (1922).

<sup>36</sup> 262 U. S. 447, 485, 486, 67 L. ed. 1078 (1922).

<sup>37</sup> *Ibid.*

Georgia which might have been exhausted before appeal to the Supreme Court, for Georgia pursued this cause as a litigant pleading for equitable relief. The Interstate Commerce Commission had pending before it in Docket 28300 the entire subject of class rates east of the Rocky Mountains. Georgia appeared in that case and the chairman of its Public Service Commission who testified therein, asked that the Commission prescribe uniform class rates within that area. When the Supreme Court took jurisdiction of the case the Commission had not rendered its decision and until such decision was rendered adverse to the contentions of Georgia, that state had not exhausted its administrative remedies. Thereafter Georgia could have filed an appeal with the district court<sup>38</sup> and only upon a denial of its claim by that tribunal should the action have been carried to the Supreme Court. From the standpoint of practical procedure it would seem far better to have tried the case before a district court rather than compel an already overburdened Supreme Court to appoint a Special Master to hear the case and then review the Master's findings and conclusions.

#### *Conclusions*

1. Control of certain monopolistic practices was never given to the Interstate Commerce Commission so up until now it could only recommend but not effectuate vital changes in the existing rate structure.

2. The Sherman Anti-Trust Act would therefore apply to such rate combinations in restraint of trade as did not come within the jurisdiction of the Commission.

3. However, Section 16 of the Clayton Anti-Trust Act and equitable principles inhibit such suit as was brought by Georgia directly to the United States Supreme Court. Resort by Georgia to a district court or to the Interstate Commerce Commission would have been in order, or the United States itself could bring such suit under the Anti-Trust Acts.

4. The Interstate Commerce Commission itself has already made extensive studies of the question of inter-territorial rates and noted need for changes. In fact Docket Nos. 28300 and 28310 deal with the very problem under discussion.<sup>39</sup>

5. The Interstate Commerce Commission has now acted to equalize the rates<sup>40</sup> and if the tightening of control over rate bureaus

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<sup>38</sup> See note 11 *supra*.

<sup>39</sup> 12 I. C. C. P. Journal 1015—*Important Recent Decision by Commission*; also see *Chattanooga Packet Co. v. I. C. R. Co.*, 33 I. C. C. 384, 392; *Southern Class Rate Investigation*, 100 I. C. C. 513, 663.

<sup>40</sup> N. Y. Times, May 27, 1945, Special Feature Section, p. 10, col. 1, *Freight Rates Pattern Change for the Nation*.



proceeds as projected by the Bulwinkle Bill<sup>41</sup> and the Interstate Commerce Commission itself, there is no need of any injunctive action by the Supreme Court or any further concern by bodies other than Congress and the Interstate Commerce Commission.<sup>42</sup>

6. The pyramiding of regulatory controls and duplication of investigations is poor administration and worse economy. Consideration should be given to enlargement of control of the Interstate Commerce Commission over monopolistic practices in rate promulgation, removing this matter from the sphere of the Sherman Anti-Trust Act.

7. Finally, reduction of political pressure on the Interstate Commerce Commission by politicians and other pressure groups is desirable so that it will be able to continue to do the excellent work it has done in the past toward the goal of a soundly administered transportation system.

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#### THE INTERNATIONAL WAR CRIMINAL TRIALS AND THE COMMON LAW OF WAR

One of the most significant events in human history is at present taking place in Nuernberg, Germany. Here, for the first time, the nations of the earth have united to take legal action against those individuals who, it is alleged, have broken the most primary rules and laws of human society. At Nuernberg for the first time, the nations of this planet are applying internationally those principles of law enforcement which for centuries have been applied on a national scale. But just as every forward step in human progress has been met with opposition, so the international war criminal trials at Nuernberg have met with opposition.

The most frequent criticism hurled at these trials is that they are applying newly created law and that this type of procedure is without legal basis or precedent. Carrying on from there, these

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<sup>41</sup> H.R. 2536—To meet the criticism of the private nature of these rate bureaus the Bulwinkle Bill provides for adequate regulation by the Interstate Commerce Commission of the publishing of rates. The House Commerce Committee has recommended also that the Interstate Commerce Commission be given authorization to require reports from and inspection of the records of rate bureaus.

<sup>42</sup> A. H. Feller, *Administrative Justice*, 27 *Survey Graphic* 494, "No one asks the court to relax its vigilance over administrative agencies; but it must proceed with caution, to intervene only where essential rights are transgressed, and not permit general principles to impede effective enforcement of the law."