1958

# Railroad Service Discontinuances

Michael Conant

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*Due to the decline in rail passenger use, many railroads are suffering out-of-pocket losses on passenger services which are wholly uncompensated by the revenues gained from the services. In this Article, Professor Conant studies these losses and their resulting detrimental effects. He concludes that discontinuance of the services upon which losses are sustained is in many cases the only method by which a reduction in passenger deficit may be accomplished, and that "public convenience and necessity" is an improper test to determine when a service discontinuance may take place.*

Michael Conant*

AT THIS writing some of the largest railroads in the United States are recording overall net losses. Among these are the New York Central; Pennsylvania; New York, New Haven and Hartford; and the Chicago, Milwaukee, St. Paul and Pacific.[1] One can infer from earlier studies of railroad passenger deficit that direct operating losses from passenger services are the most important drain on railroad earnings.[2] For this reason, passenger deficit can be deemed a major causal factor of the railroads' net loss position.

A partial remedy for the passenger deficit is to shift more of the burden it creates on to freight shippers by increasing freight rates.[3] This remedy is limited by the fact that freight rates are now so high that even small rate increases will, for many commodities, make rail

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1. MOODY, TRANSPORTATION SERVICE 1337, 1338, 1339, 1345 (1958).

2. *Hearings on Problems of the Railroads Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 63 (1958). Compare BERGE, RAILROAD PASSENGER SERVICE COSTS AND FINANCIAL RESULTS (1956). See also Conant, *The Railroad Passenger Deficit: A Comment*, 33 LAND ECON. 363 (1957). For a study of accounting problems in measuring the passenger deficit, see LADD, COST DATA FOR THE MANAGEMENT OF RAILROAD PASSENGER SERVICE (1957).

3. The ICC takes the passenger deficit into account in the adjustment of interstate freight rates and charges in a general rate case. King v. United States, 344 U.S. 254 (1952).

shipment more expensive than truck shipment and cause shippers to shift to highway transport. The only other remedies are to discontinue operation of passenger trains showing large losses and perhaps lower rates on more traveled segments where demand may be found to be elastic. On some railroads this might mean complete cessation of all passenger service. On most it means an appreciable number of discontinuances and a major revamping of passenger schedules.

This study will examine critically the law of service discontinuances. Before passage of the Transportation Act of 1958, discussed in the conclusion, there was no federal jurisdiction over service discontinuances. Discontinuances were governed by state statute and the regulatory standards developed by state commissions.[4] Special constitutional issues arise in considering service discontinuances by railroads showing overall net losses. For this reason, the law governing service discontinuances on railroads showing overall net profits will be treated first. It will be followed by separate treatment of the special problems of service discontinuances on carriers showing overall net losses.

## I. Net Profit Railroads

Discontinuance of passenger service is but one small aspect of the operation of franchised carriers, governed by statute in most states under the regulatory rule of "public convenience and necessity." Whether explicit in the particular state's statutes or implicit in the general power to regulate railroad service, the carrier must apply to the state's commission for permission to discontinue part or all of its passenger services.[5]

In the usual case the carrier presents evidence of out-of-pocket losses caused by the particular service it wishes to discontinue. If the petition is for particular trains, accounts are presented to show that costs of labor and fuel on these trains exceed the fares collected. If the petition is to discontinue passenger service on an entire segment of line, costs of terminals and special maintenance for passenger service are also included in calculating the particular passenger deficit.

The mere showing of out-of-pocket loss on a particular service by a railroad with overall net profits has usually been ruled insufficient

4. The ICC had authority only to regulate abandonment of all or parts of a railroad line. 41 Stat. 477 (1920), 49 U.S.C. §§ 1(18)–(20) (1952). It had no jurisdiction over service discontinuances, which left such regulation to the states. Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); New York Cent. R.R. Abandonment, 254 I.C.C. 745, 765 (1944); Morris & E.R.R. Proposed Abandonment, 175 I.C.C. 49, 52 (1931); Kansas City So. Application, 94 I.C.C. 691 (1925). See Hendrix, *Railroads — Abandonments and Partial Discontinuances of Passenger Service — Jurisdiction*, 31 N.C.L. Rev. 137 (1952).

5. See Great No. Ry. v. Board of R.R. Comm'rs, 130 Mont. 627, 298 P.2d 1093 (1956) and cases cited therein. See Annot., 70 A.L.R. 845 (1931).

grounds for discontinuance.[6] Public necessity and convenience may require that a railroad operating profitably render some passenger services at a loss. It is settled law that such a requirement is not confiscatory in the sense of an unconstitutional taking of property without just compensation.[7]

Public convenience and necessity is an amorphous concept, and in many situations, when used as a regulatory standard, it is, for practical purposes, vague and unworkable. In a petition to discontinue passenger trains, carrier loss is weighed against public need. The relevant factors considered in determining whether the test of "public convenience and necessity" has been met were summarizd in *Illinois Cent. R.R. v. Illinois Commerce Comm'n* as: (1) the cost (direct operating loss) of providing the service; (2) the use made by the public of the service; and (3) the availability and adequacy of other transportation facilities.[8] In a Virginia case, five criteria were listed: (1) the character and population of the territory served; (2) the public patronage or lack of it;(3) the facilities remaining; (4) the expense of operation as compared with the revenue from it; and (5) the operations of the carrier as a whole.[9] Standards (2) and (3) in the *Illinois* case and (1), (2), and (3) in the Virginia case, the "elements of public need," cannot be measured in dollar terms. Hence, in different cases, even before the same commission, these factors may be given different weight. And, in some cases, local political pressures are alleged to play a part in a commission's determination that public need outweighs the carrier's losses.[10]

Since the criteria of public convenience and necessity are to a great extent unmeasurable, there is no way to predict how courts reviewing commission determinations will react to the frequent commission holding that passenger services operated at a large deficit are still a public necessity. In the courts where the commission's findings of fact are not reviewable unless clearly against the mani-

6. Southern Pac. Co. v. Public Util. Comm'n, 41 Cal. 2d 354, 367, 260 P.2d 70, 77 (1953), *appeal dismissed*, 346 U.S. 919 (1954); Illinois Cent. R.R. v. Public Serv. Comm'n, 225 Ind. 643, 75 N.E.2d 900 (1947); Chicago, M., St. P. & P.R.R. v. Board of R.R. Comm'rs, 126 Mont. 568, 255 P.2d 346 (1953), *cert. denied*, 346 U.S. 823 (1953).

7. Chicago, M., St. P. & Pac. R.R. v. Illinois, 356 U.S. 906 (1958); Chesapeake & O. Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917); Missouri Pac. Ry. v. Kansas *ex. rel.* R.R. Comm'rs, 216 U.S. 262, 278 (1910); Atlantic Coast Line v. North Carolina Comm'n, 206 U.S. 1 (1907). See Mr. Justice Frankfurter concurring in Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 352–53 (1951).

8. Thompson v. Illinois Commerce Comm'n, 1 Ill. 2d 350, 115 N.E.2d 622 (1953); Illinois Cent. R.R. v. Illinois Commerce Comm'n, 410 Ill. 77, 101 N.E.2d 588 (1951). See Commuters' Comm. v. Pennsylvania Pub. Util. Comm'n, 170 Pa. Super. 596, 88 A.2d 420 (1952).

9. Southern Ry. v. Commonwealth, 196 Va. 1086, 1093, 86 S.E.2d 839, 841 (1955).

10. Martin, *Legal Problems of the Railroad Passenger Deficit*, 22 ICC PRAC. J. 275, 277 (1955).

fest weight of the evidence, the court is likely to affirm the commission.[11] Where the court hears the facts *de novo* and makes its own findings, there is a greater chance of reversal in favor of discontinuance.[12]

Recently a number of state courts have taken a new view of public necessity when reviewing commission denials of passenger service discontinuances, and many commission denials of discontinuances have been reversed. The change has been in the relative weight of the evidence required. The burden of proof of lack of public necessity is, of course, still on the carrier petitioning to discontinue services presently rendered pursuant to its franchise.[13] The new approach to sustaining this burden, which has been approved by the courts of many states, requires the carrier to prove its direct operating loss and meet the test of only *one* of the two elements of public necessity outlined in the *Illinois Central* case. Proof of direct operating losses on the trains to be discontinued plus adequate substitute bus service was sufficient in six states to reverse commission denial of discontinuance.[14] In these cases the carrier did not have to prove lack of use, although usually the patronage was slight. Likewise, proof of direct operating losses on the trains together with evidence that the public had virtually abandoned use of the trains was a sufficient ground in eight states to reverse a commission denial of discontinuance.[15] In these cases, adequate substitute public transportation did not have to be proved. In effect this is a recognition that in many areas the private automobile has replaced public transportation. Thus, an entire passenger train will not be required to operate to carry the very few people who prefer trains to buses or private automobiles. The

11. Chicago, R.I. & Pac. R.R. v. State Corp. Comm'n, 177 Kan. 697, 282 P.2d 405 (1955); New York Cent. R.R. v. Public Serv. Comm'n, 278 App. Div. 725, 103 N.Y.S.2d 217 (1951); Sherwood v. Pennsylvania Pub. Util. Comm'n, 177 Pa. Super. 6, 109 A.2d 220 (1954).

12. Corporation Comm'n v. Southern Pac. Co., 55 Ariz. 173, 99 P.2d 702 (1940).

13. In Matter of Union Pac. R.R., 64 Idaho 597, 605, 134 P.2d 1073, 1076 (1943); Gardner v. Commerce Comm'n, 400 Ill. 123, 129, 79 N.E.2d, 71, 75 (1948).

14. Corporation Comm'n v. Southern Pac. Co., 55 Ariz. 173, 99 P.2d 702 (1940); Illinois Cent. R.R. v. Illinois Commerce Comm'n, 410 Ill. 77, 101 N.E.2d 588 (1951); Chicago, R.I. & Pac. R.R. v. Louisiana Pub. Serv. Comm'n, 234 La. 462, 100 So. 2d 471 (1958); Chicago & N.W. Ry. v. Michigan Pub. Serv. Comm'n, 329 Mich. 432, 45 N.W.2d 520 (1951); Application of Chicago, R.I. & Pac. R.R., 166 Neb. 32, 87 N.W.2d 616 (1958); St. Louis-San Francisco Ry. v. State, 262 P.2d 168 (Okla. 1953).

15. Thompson v. Illinois Commerce Comm'n, 1 Ill. 2d 350, 115 N.E.2d 622 (1953); Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 182 Kan. 603, 322 P.2d 715 (1958); Texas & N.O.R.R. v. Louisiana Pub. Serv. Comm'n, 233 La. 787, 98 So. 2d 189 (1957); Chicago, M., St. P. & Pac. R.R. v. Michigan Pub. Serv. Comm'n, 338 Mich. 9, 12, 61 N.W.2d 24, 26 (1953); Application of Chicago, B. & Q.R.R., 166 Neb. 29, 87 N.W.2d 630 (1958); Baltimore & O.R.R. v. Public Util. Comm'n, 160 Ohio St. 67, 113 N.E.2d 240 (1953); Missouri-Kansas-Texas R.R. v. State, 319 P.2d 590 (Okla. 1957), citing many earlier Oklahoma cases; City of Princeton v. Public Serv. Comm'n, 268 Wis. 542, 68 N.W.2d 420 (1955).

courts distinguish public necessity from transportation needs of a few individuals who wish to continue riding trains.[16] The effect of the direct operating loss caused by the service sought to be discontinued on the financial health of the carrier is one of the factors to be weighed in considering public need. Some evidence of the public's need for the service must be offered by the individuals or municipalities protesting a discontinuance petition.[17]

Three states have been found which have statutes which favor passenger train discontinuances. In Texas, a finding that particular passenger services do not and will not pay their costs plus a reasonable return on property employed makes a discontinuance order *mandatory*.[18] In Kentucky, if operating loss is proven, discontinuance must be allowed if either (1) there is no reasonable probability that such conditions will change for the better, or (2) the service has become unnecessary in the public interest. If the first of these alternatives is proved, denial of discontinuance is error.[19] In Tennessee, authorization for discontinuance of any passenger train is mandatory if, for twelve months or more, direct operating costs of a train exceed its aggregate gross revenue by more than thirty per cent.[20]

One should not infer from the previous discussion that the standard of public convenience and necessity in discontinuance cases is developing into a predictable body of rules. In a number of recent cases courts have affirmed denials of discontinuance by commissions even though the carriers showed large out-of-pocket losses incurred by continuance of the train service and slight use of the services.[21] The New Jersey legislature passed a resolution against further discontinuances pending a public study of the problem but the court refused to give it the status of a legislative act.[22] Hence, there still remains no way to predict future commission reaction to a petition for discontinuance of passenger services.

16. Illinois Cent. R.R. v. Illinois Commerce Comm'n, 397 Ill. 323, 327, 74 N.E.2d 545, 547 (1947); Application of Chicago, R.I. & Pac. R.R., 87 N.W.2d 616, 618 (Neb. 1958).

17. In Baltimore & O.R.R. v. Public Util. Comm'n, 160 Ohio St. 67, 113 N.E.2d 240 (1953), the court reversed a commission denial of discontinuance where the facts showed large operating losses and very little patronage on the trains, and there was no evidence offered in opposition to the discontinuance.

18. Texas & N.O.R.R. v. Railroad Comm'n, 145 Tex. 541, 545, 200 S.W.2d 626, 629 (1947).

19. Commonwealth v. Illinois Cent. R.R., 299 S.W.2d 803 (Ky. App. 1957); Railroad Comm'n v. Illinois Cent. R.R., 265 S.W.2d 797 (Ky. App. 1954).

20. Louisville & N.R.R. v. Fowler, 197 Tenn. 266, 271 S.W.2d 188 (1954).

21. State v. Duluth M. & I. Ry., 246 Minn. 383, 75 N.W.2d 398 (1956); Chicago, M., St. P. & P.R.R. v. Board of R.R. Comm'rs, 126 Mont. 568, 255 P.2d 346 (1953); Pennsylvania R.R. v. Board of Pub. Util. Comm'rs, 48 N.J. Super. 216, 137 A.2d 76 (1957); Delaware & H.R.R. v. Public Serv. Comm'n, 285 App. Div. 326, 136 N.Y.S.2d 510 (1954).

22. *In re* New York S. & W.R.R., 25 N.J. 343, 136 A.2d 408 (1957).

While the rule of public convenience and necessity gives no measurable standards for railroad service discontinuances, designing a better rule is not easy. Much of the trouble in commission denials of discontinuances, in spite of heavy losses and little use, appears to stem from the presumption that there is a public necessity for all trains now running. The trouble can largely be eliminated by discarding the public convenience and necessity test and adopting a "fixed amount" or "percentage of loss on the specific service" test for discontinuance. A rule of this type was adopted in the Tennessee statute. If public convenience and necessity is kept as the standard, a legislative revision of the burden of proof could be adopted in order to eliminate the presumption that there *is* a public necessity for all trains currently operated. Such a statute would put the burden of coming forward with evidence on the carrier requesting a service discontinuance to prove its out-of-pocket losses on the trains concerned, *i.e.*, that the direct operating expenses that would be escaped by discontinuing the train or trains exceeds the gross revenue from the train or trains. Once such a case is made, the statute would shift the burden of persuasion to the protestants to show public necessity for continued service and convince the commission that public necessity outweighs the operating losses of the carrier thereby eliminating the presumption. In a period of sharply declining passenger traffic, it is only sensible to shift to the few remaining users the burden of showing why the service should be continued in spite of proven out-of-pocket losses. Such a statute would not cure the basic weaknesses of the public convenience and necessity test—the incomparability of dollar losses and the elements of public need. It would, however, give the commissions a test more consistent with the economic facts of life. To the extent that the test would facilitate the discontinuance of loss services, both freight shippers and railroad stockholders could gain some relief from the burden of the passenger deficit.

## II. Net Loss Railroads

Railroads operating with *overall* net losses, and having the prospect of continued net losses over the foreseeable economic horizon, are particularly anxious to get off the road to bankruptcy by discontinuing the specific services causing out-of-pocket losses. There is little law on the subject. The few decisions ruling directly on the rights of a net loss railroad to discontinue particular losing services tend to confuse two related but separate constitutional issues. The first is the usual standard of review for all commission rulings based on public convenience and necessity, the due process question of whether the commission's action was reasonable; *i.e.*, not arbitrary

or capricious. The second, the one to be analyzed here, is an eminent domain question. The gist of the holdings on this latter issue is that refusal of a state commission to permit a net loss railroad to discontinue specific services showing losses of such magnitude that they jeopardize possible recovery to profitable operations is an unconstitutional taking of private property for a public use without just compensation.[23] The practical effect of this rule is that railroads operating at overall net losses have an *absolute* right to mitigate the loss by discontinuing specific services showing very large direct operating losses. Commission attempts to block the discontinuances are confiscatory and therefore uncontitutional.

Before discussing the discontinuance cases on net loss roads it will be helpful to survey the legal and logical background to these cases found in the law of complete and partial abandonments by net loss railroads. Apart from statute or express contract, a railroad is not bound to continue operations at a loss, if there is no reasonable prospect of profitable operations in the future. And it is settled that a net loss railroad has a constitutional right to abandon its entire operations, forfeit its charter and retire from business.[24] To compel it to go on at a loss would be to cause its assets to be wasted away until exhausted. This would deprive the creditors and owners of the salvage value of the assets calculated on the date the directors decide there is no reasonable prospect of recovery. For this reason it would be an unconstitutional taking of property without just compensation.

In *Brooks-Scanlon v. Railroad Comm'n*, Mr. Justice Holmes stated that "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage."[25] This dictum on the constitutional right to abandon particular net loss branches of an overall net loss railroad is supported by authority.[26] The rule follows from the right of the directors, when they decide there is no reasonable prospect of recovery, to abandon an entire net loss road. What if the directors decide that there is no reasonable

23. Although the eminent domain protection of the fifth amendment to the constitution was originally held by the Supreme Court not to be operative against the states, the fourteenth amendment has been held to incorporate this section as a protection against state action. United Ry. & Elec. Co. v. West, 280 U.S. 234 (1930); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897); Scott v. Toledo, 36 Fed. 385, 395 (N.D. Ohio 1888).

24. Railroad Comm'n v. Eastern Texas R.R., 264 U.S. 79 (1924); Bullock v. Railroad Comm'n, 254 U.S. 513 (1921); Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920); see Annot., 11 A.L.R. 252 (1921).

25. Brooks-Scanlon Co. v. Railroad Comm'n, *supra* note 24, at 399.

26. Iowa v. Old Colony Trust Co., 215 Fed. 307 (8th Cir. 1914); Board of Comm'rs v. Public Util. Comm'n, 107 Ohio St. 442, 140 N.E. 87 (1923); Sherwood v. Atlantic & D. Ry., 94 Va. 291, 26 S.E. 943 (1897). See Annot., 10 A.L.R.2d 1121, 1130–34 (1950).

prospect of recovery to a state of net profit operations *unless* particular branches of the road showing very large losses are abandoned? Where losses on a branch jeopardize the future of a railroad currently showing overall net losses, partial abandonment must be granted on the same constitutional grounds as permit an entire abandonment. To rule otherwise would be to give commissions power to force the railroad to either (1) continue to consume its capital until forced to abandon all operations, or (2) abandon all operations immediately. Where the remedy of partial abandonment will save the profitable parts of the line for the public use, denial of the remedy is confiscation.[27] The total value of the profitable parts of the carrier, if continued as an operating railroad, will surely be greater than the salvage value of the assets used on those parts if immediate, entire abandonment must be adopted as the only alternative to slow death. Denial of partial abandonment would confiscate this difference in value. Therefore, the net loss railroad has a constitutional right to discontinue branches causing that loss so that the remainder of the road may recover and survive.

A constitutional right to *discontinue* specific net loss services on a railroad showing overall net losses follows the same logic as the right to partial abandonments on a net loss road. Whether the railroads' possibility of recovery to profitable operation is jeopardized by heavy loss branches that it wishes to abandon or by heavy loss services that it wishes to discontinue, the consequences of denial are the same. In either case its revenue will be insufficient to replace its equipment and eventually total abandonment must result. The passenger service deficits imperiling the future of many major railroads operating at overall net losses in 1958 make discontinuance of part or all of those services on most lines imperative. The constitutional right to discontinue such services on roads showing overall net losses in spite of commission denials should enable many roads to survive the present railroad crisis.

The leading case on the constitutional right to discontinue particular loss services on a railroad showing overall net losses is *Mississippi R.R. Comm'n v. Mobile & O.R.R.*[28] While operating at a deficit and without obtaining permission from the Mississippi Railroad Commission, the Mobile & Ohio discontinued the operation of six passenger trains. The commission ordered the service restored. The carrier obtained an order from a three-judge district court en-

27. "[T]he loss was traced to the three branch lines. By discontinuing that service it is possible to operate the remainder. If the branches are not abandoned the whole system is lost. . . . [T]he action of the city council [denying abandonment] . . . must be held to be unreasonable, and the enforcement of the regulatory statute in the circumstances found to amount to a deprivation of rights protected by the Constitution." Crawford v. Duluth St. Ry., 60 F.2d 212, 216 (7th Cir. 1932).

28. 244 U.S. 388 (1917); see Annot., 123 A.L.R. 922, 930–33 (1939).

joining enforcement of the commission's order. It submitted evidence of its overall net losses and of the operating losses on each of the six discontinued trains. The Supreme Court affirmed the injunction:

> [W]e fully agree with the district court in concluding that the order of the Commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the Commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the 14th Amendment to the Constitution of the United States.[29]

The rule of the *Mobile* case was followed in a case involving the Delaware & Hudson railroad.[30] The carrier, which had lost money for three years, was ordered by the New York Public Service Commission to restore operation of one train it had discontinued. In light of its overall losses the court held the order arbitrary and unreasonable. Holding its enforcement would be repugnant to the Constitution, the commission's order was annulled:

> The state has the right to regulate the conduct of railroads within its borders and may require that reasonable and adequate facilities be provided to serve, not only the necessities, but the convenience of the communities which are tributary, but the property used is entitled to the full protection of the law and cannot be taken from its owners without just compensation.[31]

Only one other case has put the confiscation issue in discontinuance cases by net loss roads before the courts, and there the carrier failed to prove its overall losses. While in receivership, the New Jersey & New York Railroad petitioned to discontinue one passenger train, which the carrier's accountants showed would reduce its *net* operating loss of $165,303 by $34,000 or twenty per cent. The New Jersey Public Utility Commission denied the petition and found public necessity for continuance of the train. The Superior Court affirmed the commission.[32] It held that there was no constitutional right, regardless of public convenience and necessity, to discontinue one train on a net loss railroad. In effect it held that the railroad had

29. 244 U.S. at 396 (1917). A similar ruling was made when the State of Maryland passed a statute requiring a net loss railroad to operate two additional trains. "In the long run all attempts to secure for the public so costly a facility must prove futile no matter what the courts do or leave undone. If that facility cannot be furnished otherwise than by the expenditure of the capital invested, sooner or later the exhaustion of the corporation's capital will make it impossible for the corporation to render any service whatsoever. . . . If legislation of the character of that under consideration can be upheld, a public service corporation may be forced first to consume all its property and then have its charter taken away in the end." Washington, P. & C. Ry. v. Magruder, 198 Fed. 218, 231 (C.C.D. Md. 1912).

30. Delaware & H.R.R. v. Public Serv. Comm'n, 245 App. Div. 66, 281 N.Y. Supp. 155 (1935).

31. *Id.* at 68, 281 N.Y. Supp. at 157.

32. *In re* New Jersey & N.Y.R.R., 23 N.J. Super. 1, 92 A.2d 515 (App. Div. 1952).

no remedy. Its only alternatives were either to abandon business entirely or expire slowly.

On appeal the Supreme Court of New Jersey subscribed to this same theory but held that it was not necessary to determine the question.[33] It held that although the business was in receivership and conducted by a trustee, its joint operations with the Erie Railroad and the ownership of eighty per cent of its stock by the Erie made it part of the Erie. Since Erie was showing overall net profits, it held that petitioner had failed to prove a loss in its entire business. Mr. Justice Brennan (now of the United States Supreme Court) dissented from this decision, pointing out that the railroad could not go on indefinitely as a losing venture. He did not, however, take the next logical step and say that forcing continued operation of the train was a taking of property from the creditor-owners without just compensation.

No other cases have been found that put in issue the constitutional right to discontinue losing services on an overall net loss railroad. Commissions are much more likely to grant discontinuances when the *entire* road is operating at a loss. For this reason the carriers have not often been forced to appeal to the courts in those cases. In many cases where the carrier has review of the denial of discontinuance, the courts have reversed the commission on the grounds that its findings of public necessity were against the weight of the evidence and hence arbitrary and unreasonable. In doing so they find it unnecessary to reach the constitutional issue of confiscation.[34]

It can be argued that there has never been a case decided in the courts where public necessity for specific services of a net loss road was clearly found and a constitutional right to discontinue was upheld. In both the *Mobile & Ohio* and *Delaware & H.R.R. v. Public Serv. Comm'n* cases there were holdings that the commissions' conclusions of public necessity for the trains were unreasonable. The courts did not have to reach the eminent domain issues in those cases. In the *New Jersey* case, the constitutional discussion became dictum by virtue of the finding that the road was part of the Erie, which was showing overall net profit. Hence, the court which next meets the issue of a constitutional right to discontinue services on a net loss road can correctly hold that there is no clear law on the subject.

33. *In re* New Jersey & N.Y.R.R., 12 N.J. 281, 96 A.2d 526 (1953), *appeal dismissed*, 346 U.S. 868 (1953).

34. *E.g.*, Atlantic Coast Line v. Public Serv. Comm'n, 77 F. Supp. 675 (E.D.S.C. 1948); New York Cent. R.R. v. Public Serv. Comm'n, 257 App. Div. 558, 13 N.Y.S.2d 614 (1939); Southern Ry. v. Public Serv. Comm'n, 195 S.C. 247, 10 S.E.2d 769 (1940); see Pennsylvania-Reading Seashore Lines v. Board of Pub. Util. Comm'rs, 5 N.J. 114, 74 A.2d 265 (1950), *cert. denied sub nom.* Brotherhood of R.R. Trainmen v. Pennsylvania-Reading Seashore Lines, 340 U.S. 876 (1950), holding that denial of discontinuance after a finding by the commission of no public necessity was arbitrary and hence without due process.

How should a court treat the subject? Assume there is a clear finding by the commission and courts that the public necessity for the train or trains outweighs the specific loss from those services to be discontinued by the net loss carrier. Assume that the losses from those particular trains jeopardize the entire carrier's future by precluding possible recovery to net profit operations. The situation is analogous to the partial abandonment case, discussed earlier. The carrier, if denied these discontinuances, must either abandon operations entirely or slowly consume its capital and, when unable to replace its equipment, be forced to abandon operations. When there is possible recovery to net profit operations by specific service discontinuances, forcing the road either to leave business or to piecemeal exhaustion of its assets results in taking property for a public purpose without just compensation.

The managers of the net loss railroad would probably first petition the state commission for permission to discontinue unprofitable trains on the conventional ground of lack of public necessity. If the commission denied the petition, the railroad would discontinue the services anyway. The commission would then file an action in the appropriate local court demanding that the trains be restored. The railroad would defend the action on the ground that it was showing overall net losses, and that the specific unprofitable trains which it had discontinued jeopardized its possible recovery to net profit operations. If the railroad successfully carried the burden of proof of these two elements of its defense, the court would enter judgment for it in recognition of its constitutional immunity from confiscation.

One further analogy supporting the above rule must be mentioned. When railroad rates are *set* so low that a well-managed carrier loses money in its overall business, the rate statute or order has the effect of taking private property for public use without just compensation.[35] In such a case specific confiscatory rate statutes or orders which do not enable the carrier to earn out-of-pocket costs will be set aside.[36] Any other holding would allow regulatory commissions to set rates so low that the carrier would be forced to consume its capital in rendering its public service and eventually have

35. Baltimore & O.R.R. v. United States, 345 U.S. 146 (1953) (dictum); Bellamy v. Missouri & N.A.R.R., 215 Fed. 18 (8th Cir. 1914); Capital Transit Co. v. Bosley, 191 Md. 502, 62 A.2d 267 (1948); 13 C.J.S., *Carriers* § 296 (1939). See Norfolk & W. Ry. v. Conley, 236 U.S. 605 (1915) and analysis of rule in Central R.R. of N.J. v. Department of Pub. Util., 10 N.J. 255, 263 90 A.2d 1, 6 (1952), *appeal dismissed*, 345 U.S. 931 (1953); compare this rule as to particular services with Baltimore & O.R.R. v. United States, *supra*. See Harbeson, *A New Judicial Test of Reasonable Rates*, 22 ICC PRAC. J. 789 (1955).

36. The only exception to this rule on a net loss railroad is where no possible rate increase will save the carrier from failing. In such case it has no value as a going concern and entire abandonment is its only out. Market St. Ry. v. Railroad Comm'n, 324 U.S. 548 (1945). See Baltimore Transit Co. v. Hessey, 196 Md. 141, 75 A.2d 76, *cert. denied*, 340 U.S. 896 (1950), where application of this rule is explained.

to abandon operations entirely. The similarities to the service discontinuance cases are apparent. If the source of overall net losses can be traced to specific rates or to specific services not earning out-of-pocket costs, the rates must be raised or the services discontinued. Forcing a net loss road to operate at rates that do not return direct operating costs or to continue services which show very large direct operating losses are both confiscatory.

## III. Conclusion

The newly enacted Transportation Act of 1958 gives the Interstate Commerce Commission jurisdiction over rail service discontinuances. Under the act, the ICC is authorized to hear original petitions for discontinuance of interstate passenger trains, and where the operation is entirely intrastate, the commission may hear petitions if the state commission has failed to act, or has denied the petition.[37] This should make the prolonged review processes in state courts unnecessary. And though the act adopts the public convenience and necessity standard for determining whether or not service discontinuance should be allowed,[38] it is expected that the ICC will give greater weight to the effect of passenger service deficit on the general shipping and investing public. Hence, a broader interpretation of the economic hazard of requiring railroads to continue services which bring little or no revenue, and the resulting deficits of the railroad will become weighty factors in determination of rail petitions for discontinuance, and in most cases, this kind of interpretation will facilitate discontinuance. Moreover, it is expected that the recent trend in state court decisions reversing state commission denials of rail discontinuance will cause the ICC to recognize the fact that investment capital is being taken to satisfy the few individual passengers who sometimes use rail transportation in preference to other modes, an interest actually "private" in nature. This factor, together with the broader economic inquiry the ICC is expected to make, as mentioned above, should lighten the burden of proving that to discontinue the service is in the public convenience and is necessary.

It is the theory of this Article, however, that it would be to the advantage of all interested parties that the test of "public convenience and necessity" be discarded, or in the alternative, that the

37. Transportation Act of 1958 § 13a, 72 Stat. 569 (U.S. Code Cong. & Ad. News 2969 (Aug. 20, 1958)).

38. The alternate criterion for discontinuance in the 1958 statute is that the continued operation of the service will constitute an unjust and undue burden upon the interstate operations of the carrier or upon interstate commerce. Since this is a new standard, it is not now possible to predict the specific tests that will be developed for it or the extent to which it will be used. See Banta v. United States, 152 F. Supp. 59 (D.N.J.), *aff'd*, 355 U.S. 34 (1957).

criterion used to make up the test be stated more clearly and that the burden of proving "public convenience" and "necessity" be shifted to those who protest the discontinuance, whether the railroad be a "net profit" or a "net loss" road. The act then, is to that extent, inadequate, and causes the railroads seeking discontinuance to bear a burden which is poorly apportioned relative to the interests involved.

Roads showing overall net losses may, of course, urge in addition to the arguments made above, their constitutional right to compensation for the assets used to sustain the services. In such a case, a showing that the losses sustained by the services are of such magnitude that the financial stability of the road is seriously threatened or that the road, if losses continue, may or will not be able to recover to a status of net profit operation should require a mandatory order of discontinuance. If discontinuance is denied, the order should be subject to appeal and reversal on the ground that the denial under such circumstances is unconstitutional in that just compensation is being denied the road for property taken for "public" use.