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Eugene D. Anderson

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The Crop Ends Caper:¹ A Microcosm of the Administrative Process

Eugene D. Anderson*

What is a crop end? The answer, which was the subject of a series of cases before the Interstate Commerce Commission, seems about as bizarre as the question itself. However, examination of the litigation raises another question that is vital, particularly today, and that question is whether or not truly meaningful economic regulation by a governmental agency is even possible. Maybe we have fooled ourselves when we assume an affirmative answer to the second question and, instead, center our attention on the problems of properly drafted statutes and staffing.

Mr. Thomas Bellmar was, in many respects, the model traffic officer. He was in charge of the traffic department for a relatively large steel company located in the midwest that used the electric process for making steel. The electric steel process used did not require iron ore to make steel. Instead it used iron and steel scrap. That meant that the inbound product, from which steel was made, was taken from the junk yards and scrap yards that dot our country. It arrived at the mill in question by trucks of all sizes, but mostly by railroad. We will get into what the different types of scrap are in a minute, but the basic point is that their identity was important because the rail rate varied according to the type of scrap being shipped. This meant, obviously, that the lower the cost for scrap paid by the steel company the higher would be its profit on the steel it made. This, in turn, meant that a great deal of attention had to be focused on astute purchasing of scrap from every conceivable source as well as equal attention to getting the scrap into the mill at the lowest price once it was purchased. Success in the latter task required talent in the traffic department.

* A.B., University of Illinois; J.D., Loyola University of Chicago. Eugene D. Anderson, a member of the bars of Illinois and the District of Columbia, is a Washington attorney specializing in transportation.

1. This article can properly be written because, with the retirement of I.C.C. Hearing Examiner Bennett in 1971, all the leading parties involved are now either retired or deceased.

The rail rates on iron and steel scrap never were easy to understand. Their phrasing was supposedly designed to clearly cover all the types of scrap available for rail transportation. In addition they were partially shaped by past litigation. One of the main tariffs which Mr. Bellmar used contained the following commodity description:

Iron or Steel Articles, viz.:

Corp Ends known to the trade as such, of iron or steel sheets, plates or skelp, strip iron, strip steel, band iron or band steel, with or without fish tails, all of miscellaneous unassorted lengths, widths and gauges, and which cannot be damaged by breaking, bending, scratching or exposure to weather. Rate applies on crop ends loaded loose at random or in compressed bales in open top cars, without bracing, blocking or covering.²

The freight rate named was lower for crop ends than comparable rates on scrap. The obvious question for Mr. Bellmar was: what is a crop end? As will be explained, once a question of this type is legitimately asked and an answer actually sought, a whole series of events including adjudication, can automatically result. Due to the nature of the inquirer and the economic stakes involved, these events were certain to occur.

The Basic Principles of Tariff Law

The law of freight tariffs is complicated and, in many ways, a field unto itself. The basic reason for this state of affairs is because of the purposes of tariffs and their necessary scope:

Tariffs of regulated carriers are in the nature of price lists. They are published, posted, and filed to make known to patrons, or shippers, users of the transportation company, the nature of the services offered for sale and the price to be charged for that carrier service . . . Tariffs, as price lists, cover the biggest selling business. Transportation has long ranked all other industry except agriculture³

The first rule of tariff law is that a tariff which is in force has the effect of a statute and is binding alike on both carrier and shipper. The case commonly cited for this principle is *Pennsylvania Railroad Co. v. International Coal Mining Co.*,⁴ where the Court said:

The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike.

2. Item 4295D of Supplement 132 to Western Trunk Line Freight Tariff 5-V, I.C.C. File Number: A 4294.

3. O.L. Mohundro, Mohundro's Notes on Interstate Commerce Law, Tariffs, Privately published for General Accounting Office Transportation Training Class, 1943, at 1, 4.

4. 230 U.S. 184, 197 (1913).

The Interstate Commerce Act⁵ provides:

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.⁶

Under this Section of the Interstate Commerce Act it is boilerplate law that:

There can be but one *applicable* rate at the same time over the same route between the same stations on the same traffic. (emphasis in original)⁷

There are other guiding principles. First:

Tariffs must be considered as a whole. Their intent is not to be defeated by reason of the uncertainty of any particular item, if some other item in the same tariff clearly indicates how the ambiguous item should be construed.⁸

This has resulted in the following rule applicable to ambiguities:

Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the forms to what caused them and what they are intended to cause and do cause.⁹

This means, then, that in the case of a dispute the judge is the Interstate Commerce Commission. The second rule is that where there is a conflict in the tariffs between two commodity descriptions, that which is more specific or particular is the applicable rate.¹⁰ Where there are two rates, meaning

5. 24 Stat. 379 (1887), as amended 49 U.S.C. § 1 (1970).

6. 49 U.S.C. § 6(7) (1970).

7. Bacon Bros. v. Alabama G.S.R. Co., 283 I.C.C. 349, 352 (1951). See also Alloy Steel & Metals Co. v. A.T. & S.F. Ry. Co., 292 I.C.C. 276, 278 (1954), U.S. Industrial Alcohol Co. v. Director General, 68 I.C.C. 389, 392 (1922), and cases cited therein.

8. Kansas Flour Mills Corp. v. Abilene & S. Ry. Co., 195 I.C.C. 277, 281 (1933).

9. Interstate Commerce Commission v. Baltimore & O. R.R. Co., 225 U.S. 326, 345 (1912).

10. Socony Vacuum Oil Co., Inc. v. Lehigh Valley R. Co., 210 I.C.C. 301 (1935); Doughboy Industries, Inc. v. Chicago & N.W. Ry. Co., 284 I.C.C. 329, 332 (1952);

that the same commodity description is applicable, the lower rate is the applicable rate. Where there is doubt, the last rule is that the lower rate applies.¹¹

Since the clincher in all the above rules is that the final word is with the Interstate Commerce Commission, it takes very little imagination to realize the extent of the litigation possibilities. There have been hundreds of decisions on situations on which rate applies: cordwood versus fuelwood;¹² petroleum road oil versus fuel oil;¹³ machinery versus mining machinery;¹⁴ fuller's earth versus ground clay;¹⁵ lubricating oil versus crude petroleum oil;¹⁶ scrap leather having value for fertilizer purposes only versus scrap leather;¹⁷ feeding tankage versus tankage n.o.i.b.n.;¹⁸ gravel versus flintstone pebbles¹⁹ and on and on. Were there any cases on crop ends? Of course! But they did not answer Mr. Bellmar's question.

Crop Ends Known to the Trade as Such

The key crop ends commodity description contained the enigmatic phrase "known to the trade as such." Even if one were able to isolate and determine what a crop end was, what about the phrase? What did it mean? Did "as such" modify "trade" or "crop ends?" If it modified "trade" the inquiry must then determine what trade as such. Was the trade to be everybody within the iron and steel scrap business? The steel mills? The carriers? All or what combination? How about just the scrap trade in Milwaukee, Wisconsin? If so, what happens if Milwaukee looks at one type scrap as crop ends and St. Louis, Missouri, disagrees?

In 1928 the Interstate Commerce Commission handed down its first crop end decision, *Wrought Washer Manufacturing Co. v. Pere Marquette Railway*

Milwaukee Electric Ry. & T. Co., Applicable Tariff Provisions, 299 I.C.C. 91, 93 (1956); Asbestos Engineering & Supply Co. v. Atchison T. & S.F. Ry. Co., 299 I.C.C. 588, 590 (1956); Budd v. Chesapeake & O. Ry. Co., 291 I.C.C. 398, 400 (1954); Max N. Tobias Bag Co., Inc. v. Pan-Atlantic S.S. Corp., 293 I.C.C. 392, 396 (1954).

11. See *Odell Hardware Co. v. Southern Ry. Co.*, 299 I.C.C. 761, 764 (1957); *Celotex Co. v. Atlantic Coast Line R.R. Co.*, 179 I.C.C. 307, 310 (1931). Shinn, *Freight Tariff Interpretation*, 31 ICC PRAC. J. at 3 (Oct. 1963). The author states that this rule was developed by the Commission because of the decision in *Chicago, Ill. L. Ry. Co. v. International Milling Co.*, 33 F.2d 636 (1929), in which the court would not apply the old rule that the earliest tariff rates applied.

12. *Carrollton Excelsior & Fuel Co. v. Southern Ry. Co.*, 211 I.C.C. 271 (1935).

13. *White and Miller v. Pacific Electric Ry. Co.*, 235 I.C.C. 35 (1939).

14. *Stevens Bros. v. Northern Pac. Ry. Co.*, 219 I.C.C. 481 (1936).

15. *Eastern Clay Products v. N.Y. Cent. R.R. Co.*, 243 I.C.C. 1 (1940).

16. *Markstein v. Missouri P.R. Co.*, 243 I.C.C. 354 (1941).

17. *H.C. Godman Co. v. Penn R.R. Co.*, 251 I.C.C. 586 (1942).

18. *Buffalo Meat Products, Inc. v. Boston & A. R.R.*, 253 I.C.C. 106 (1942).

19. *Patterson Foundry & Machine Co. v. Chicago, B & Q R.R. Co.*, 262 I.C.C. 339 (1945).

20. 136 I.C.C. 703 (1928).

*Co.*²⁰ At issue were the rates on various items that were produced by a steel mill, including crop ends. As part of the decision the Commission described the various commodities that it was talking about, describing crop ends as follows:

Crop ends and fish tails—These are pieces of iron or steel generally irregular in outline and differing in length, thickness, and weight, which are cropped off of prime sheets, plates, or strips. The samples exhibited ranged from 18 inches to 36 inches in length, from 4 to 18 inches in width, and from 1/8 to 3/16 inch in thickness. Such crop ends do not conform to the uniform thickness and width of the sheets, plates, or strips from which they are cropped and, as shipped, they are sometimes slightly rusty. On account of their short length, irregularity in shape, and other imperfections they are not merchantable as sheets, plates, or strips. The minimum length of strip steel salable as such is 10 feet. Fish tails are crop ends resembling in shape the tail of a fish. Some of these crop ends, such as crop ends of skelp strips, can be used for making washers in some instances without reheating and rerolling. Complainant also receives crop ends of sheet bars which are about 8 inches wide and 3/8 inch thick.²¹

In *Wrought Washer Manufacturing Co. v. Pere Marquette Railway Co.*, a second decision on this point,²² again the concentration was on crop ends that were produced by steel mills. Interestingly, however, it was recognized that there was difficulty in phrasing a proper commodity description:

Complainants contend that crop ends are scrap material. A witness for complainant in No. 20784 testified that when a piece of skelp or strip steel, say up to 20 feet long with a fish-tail or other irregularity on one end is to be sold as a crop end it is deemed advisable to shear it into shorter pieces for convenience in handling and more particularly to avoid having it compete with prime material. It is sheared to random lengths, and some of the pieces do not have irregular ends. Apparently this is not always the practice at some of the mills as to strips, as a photograph introduced in evidence shows strips marked "washer scrap" which were not cut up. Aside from their being loaded at random in open cars with other kinds of material as covered by the consolidated complaints, some of the cut up pieces of crop ends may range in quality up to prime material. The fish-tail or irregular end may be only a foot or two in length or it may extend many feet, and some of the pieces so cut up may be entirely free from blemishes. It would be difficult to arrive at a fair description of crop ends, taking into consideration trade practices, which would exclude entirely cut-off pieces

21. *Id.* at 704-05.

22. 159 I.C.C. 75 (1929), which was consolidated with other dockets that presented the same issue—the rate level on crop ends among other commodities. Technically the record was re-opened. In 1931 there was a third report which dealt with the question of reparations, not the description itself.

that might be akin to prime material but for the indiscriminate manner of shipping. The material sold as crop ends, and known to the trade as such, includes pieces with or without fish-tails or similar irregularities, and at the argument defendants in all of the complaint cases except No. 20205 agreed to that description.²³

In this second report in *Wrought Washer* the phrase "known to the trade as such" enters the scene, evidently as descriptive language used for clarification by the Commission. An examination of the record made 34 years later showed that it was language presented to the Commission by the litigants and adopted by it. This is important and will be discussed later.

Although the *Wrought Washer* cases talked about crop ends that were produced by steel mills, the question that arose was whether or not only steel mills could produce them. Could steel fabricating plants or scrap yards do so? In answer to this the cases were contradictory. One said yes,²⁴ another no.²⁵ Both cases pre-date Mr. Bellmar's decision. However, the negative case is crucial to our story and, notwithstanding its admonition to the shipper not to ship crop ends from a scrap yard where it held they did not originate, it hedged.²⁶

23. *Id.* at 81-82.

24. *Erman-Howell Division v. Chicago, M., St. P. & P. R.R. Co.*, 291 I.C.C. 520 (1954). In that case the plaintiff was described as ". . . a corporation, . . . engaged in the purchase, sale, and distribution of scrap iron and steel." *Id.* at 520. The complaint was that a higher rate existed on crop ends known to the trade as such from the destination in question and that a lower rate on scrap iron or steel should have applied. The Commission said the commodity shipped was crop ends,

On the other hand, the record is definite that crop ends can be used either for further manufacture of such articles as nuts, bolts, or washers, or for remelting purposes. There is no showing that the commodity had value only for remelting purposes.

Id. at 521. Since the scrap item referred to was scrap for remelting purposes only, that rate did not apply.

25. *Iron or Steel Articles - Fond du Lac, Wis., to Chicago, Ill.*, unprinted decision of Rates and Practices Review Board, served July 8, 1963.

26. *Id.* The decision, which became the final decision of the Interstate Commerce Commission, stated as follows:

It appears from the record that some of the materials shipped from Fond du Lac to Chicago are known to the trade as No. 1 bundles and No. 1 busheling, and the question is whether "crop ends" include material so described. Various witnesses from the scrap iron industry and steel companies stated that No. 1 bundles of scrap iron and steel are not crop ends of iron and steel articles and are not known to them as crop ends. As defined by these witnesses, No. 1 bundles are composed of plain sheet steel skeleton scrap, trimmings, and punchings. Since they are light and bulky, they are compressed into bundles for charging in steel mill furnaces. The materials graded as No. 1 busheling are similar to those in No. 1 bundles except that they are more compact and may not exceed 12 inches in any dimension. "Specifications for Iron and Steel Scrap," a booklet issued by the Institute of Scrap Iron & Steel, Inc., defines No. 1 bundles and No. 1 busheling as specific grades of scrap iron and steel. There is no reference in this publication to either of these grades of scrap iron and steel as crop ends of iron or steel sheets, plates,

The Decision to Ship Crop Ends and its Consequences

In the early 1950's, Mr. Bellmar's company decided that crop ends, as described in the rail tariffs, included some types of iron and steel scrap that were produced by steel fabricating plants and sold largely through scrap yards. As a result the electric steel producer was able to obtain a buying advantage over one of its steel making competitors which was buying scrap and shipping it by barge to its river-site mill. At stake was the best scrap, unpainted or coated steel leftovers from steel fabricating plants. These plants purchased steel sheets or plate (the difference between sheet steel and steel plate lies essentially in their thickness) and either cut out shapes or punched out shapes from them. The main types of material were known as clips and skeltons, busheling and bundles,²⁷ all of the best (or number 1) variety.

The clincher in the decision was the above quote from *Wrought Washer*. Steel mill crop ends were cut (cropped) into shorter pieces to avoid having them compete with the prime material from which they were cut, and if they were placed alongside busheling or clips of like thickness, or made into bundles, it would be impossible to tell the mill crop ends from the other material. Therefore, all must be the same—crop ends. Why does the cut (crop) have to be from the end of the sheet? Why not the middle? Either way there was no chemical change in the material. In producing mill crop ends the cuts are from the ends of the plate or sheets. A fabricating plant cuts (usually punches) out shapes from the plates and sheets. The re-

skelp, or strip, etc. From the evidence, we conclude that No. 1 bundles and No. 1 busheling are specific grades of scrap iron and steel and in the trade are purchased and sold as such, and not as crop ends. *Id.* at 3.

The hedge:

We desire to emphasize that our finding herein is not to be construed as a finding that the term "crop ends" includes No. 1 bundles or No. 1 busheling. The shipper is admonished not to bill at the proposed rate, and the carrier not to transport at that rate, commodities other than those clearly within the accompanying commodity description. *Id.* at 7.

27. Definitions are dull, but necessary here. The Institute of Scrap Iron and Steel supplied the following definitions which were used:

No. 1 busheling: Clean new wrought iron or steel scrap $\frac{1}{8}$ inch and over in thickness, not exceeding 12 inches in any dimension, including new factory busheling 20 gauge or heavier (for example, sheet clippings, stampings, etc.). . . Must be free of metal coated, limed, or porcelain enameled stock.

No. 1 bundles: New black steel sheet scrap, clippings, or skeleton scrap, hydraulically compressed or hand bundles so charging box size and weighing not less than 75 pounds per cubic foot. (Hand bundles must also be tightly secured and stand handling with a magnet.) Must be free of paint or protective coating of any kind. . .

Skeletons and clips were generic terms describing material which did not fit into the busheling definition because it was over 12 inches in dimension or because the gauge was under $\frac{1}{8}$ inch. They were not defined by the Institute at the time.

sulting leftover is called a skeleton. Furthermore, referring to *Wrought Washer* again, if crop ends were used to punch out shapes (washers, for example) and the remaining skeleton was still a crop end, and since they could not be differentiated from busheling or clips that originated in steel fabricating, were not they also crop ends? As for bundles, the reasoning was easier because once part of a bundle the material loses its identity, particularly in a hydraulically compressed bundle. The reasoning seemed unassailable.

The problems at hand were first to sell the approach to the source of supply, the scrap yards and other sources steel scrap. Then all the papers, particularly the shipping documents,²⁸ would have to conform to the rail tariff description. Finally, the railroads would have to be persuaded that the interpretation was appropriate because the crop end rate structure would have to be expanded—there were simply not enough crop end rates between enough places.²⁹ A review of pertinent files does indicate that the shipper tried to avoid Interstate Commerce Commission involvement. However, trouble began immediately.

The railroads have their own policing bureau which is designed to make certain that the commodity supposedly being shipped actually is the commodity in the rail cars. Coal cannot be labeled apples on shipping documents. This policing bureau is the Western Weighing and Inspection Bureau, commonly called by its initials—the WWIB. It becomes the second component of our story. The WWIB, as early as 1954, began changing the bill of lading descriptions on cars of crop ends destined to the electric steel maker to read scrap, and instructed the rail carriers involved to issue balance due bills on the freight rate. However, Mr. Bellmar was able to

28. Actually the matter was more complicated than just the shipping documents. Mr. Bellmar was of the opinion that “. . . the entire commercial transaction consisting of Purchase Orders and Invoices confirm the description. . . .” The reason was that this was necessary to conform to the “known to the trade” requirement. Recalling the use of the term “as such” at the end of the description, Mr. Bellmar was of the opinion that it modified “crop ends,” therefore to match the shipping documents and the commercial papers with the tariff description was all that was needed. Bellmar Traffic Department Memo 274, October 19, 1953.

29. The *Wrought Washer* decision held that the rates on crop ends should not exceed the rates on billets. Billets are the second shape that steel mills used to produce, the first being ingots or “pigs.” These primary shapes were produced directly from or by the blast furnace and then remelted and further purified and made into what were called billets, which resembled large square steel bars. Billets were rolled into sheets or plate. In compliance with the I.C.C. decision, the rails equalized the crop ends and billet rates! Whenever there was a crop end rate quoted it was always the same as the billet rate. The rates on iron and steel scrap were not the subject of a mandatory I.C.C. order and, as a result, were on a different level and independent of the billet rate ceiling. They could have been lower, but they were not except for some instances and these were normally major steel producing points in the midwest. For the scrap producing points the rates were normally higher.

persuade the WWIB to change its mind and correct its actions.³⁰ Recall that *Erman-Howell* was decided in January of that same year.³¹ However, once the WWIB has changed shipping documents and issued balance due advice to the carriers, the forbidden box is opened and it is sometimes impossible to restore things to their former state without either litigation or at least its threat. The reason is the Elkins Act.³²

The Elkins Act is, as statutory deterrents go, possibly the most effective of all. It is so effective that it often has become an excuse for intellectual inadequacy. Who knows the number of times a shipper has been confronted with carrier refusal to do something that seemed entirely proper with the excuse being the Elkins Act. The Elkins Act is a criminal statute which forbids every ". . . person or corporation, whether carrier or shipper . . ." from offering, granting, giving, soliciting, accepting or receiving any ". . . rebates, concession, or discrimination. . . ." ³³ The power of the Elkins Act is not just the way it is enforced, but the penalty. It carries a high fine which is applicable to each and every shipment plus the threat of a jail sentence. The fine is high enough to make any violation just bad business. The courts, moreover, have liberally interpreted the mission of the Elkins Act with language such as in the following case:

The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.³⁴

As might be concluded, it is the threat of the Act which is the deterrent, not just its administration.³⁵

A classic violation of the Elkins Act would be where a shipper gets a rebate, which is simply paying less than the published freight rate for freight shipped. The traditional way in which this was done was to mislabel the freight shipped and have it shipped as a commodity which carried a lower

30. Bellmar Memo 627, July 26, 1954.

31. *Supra*, note 24.

32. *Id.*

33. *Id.*

34. *U.S. v. Union Pacific R.R. Co.*, 173 F. Supp. 397, 412 (1959). This is famous language.

35. The Act is administered by the Bureau of Enforcement of the Interstate Commerce Commission, working with the Justice Department.

rate. The WWIB was to prevent this, or, when they detected it, to have the railroads issue correction bills. This would avoid Elkins Act liability. The reason was because of the measure of intent needed to violate the Elkins Act. When speaking of this criminal statute, with its broad mission and liberal interpretation given it by the courts, we do not deal in terms of malice, express or implied, nor do we deal in willfulness, but whether the Elkins Act was "knowingly" violated!³⁶

36. The Elkins Act was enacted in 1903. The Supreme Court decision in *Armour Packing Co. v. U.S.*, 209 U.S. 56, 72 (1908) set out the basic policy for construction of the Act, *Lehigh Coal & Nav. Co. v. U.S.*, 250 U.S. 556, 563 (1919). But that case involved acts which occurred before the 1906 amendment to the Elkins Act, which added the term "knowingly." This was accomplished by the Hepburn Act (34 Stat. 584, (1906)) which changed the controlling sentence for our purpose by adding the underlined words:

Every person or corporation, *whether carrier or shipper*, who shall, knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination, shall be guilty of a misdemeanor . . . (emphasis supplied).

In *U.S. v. Delaware, L. & W. Ry. Co.*, 152 F. 269 (2d Cir. 1907), the court ruled upon a demurrer by the defendant:

Another ground of demurrer to this indictment is that none of the counts alleged that the defendant knowingly gave any rebates. The allegations are in substance that the defendant unlawfully and willfully gave the rebates. The indictment admittedly would be sufficient in this respect under the Elkins Act, but it is claimed that the so-called "Hepburn Act," passed in 1906, made it necessary in this case to allege that the defendant knowingly gave the rebates.

Id. at 274. The court implied that the intent was changed in 1906 but applied the pre-1906 version of the Act. See *Delaware*, at 274-76 for a discussion of the court's theory which does not directly concern the instant discussion. The implication was that the test of "unlawful and willful" was less strict than "knowingly." This implication probably is true even though a case the court relied upon, *U.S. v. Chicago, St. P., M. & O. Ry. Co.*, 151 F. 84, 96-97 (D. Minn. 1907), *aff'd* 162 F. 835 (8th Cir. 1908), *cert denied*, 212 U.S. 579, said:

It was asserted that the Elkins law was a harsh and stringent law, subjecting those who had given or accepted rebates or concessions, not knowing that they were giving or accepting such rebates or concessions, to its penalties, and that Congress recognizing this, amended and superseded that law by the Hepburn law; that by inserting the word "knowingly" in the Hepburn law it evinced its recognition of the harshness of the Elkins law . . . [I]t might also be said that Congress did not recognize the harshness of the Elkins law by inserting in the amendment thereto the word "knowingly," but inserted that word for another and a very good reason. The punishment prescribed by the Hepburn law, amending and superseding it, is fine or imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Does it not strike one with much greater force that the word "knowingly" was inserted because the offense had thus been made an infamous one?

While *Milwaukee Road* may be sophistry, the definitive decision in *Armour Packing* indicates the harsh aspect of the pre-1906 version of the Elkins Act:

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit

As stated above, once the WWIB enters into a situation, it is often hard to disengage the WWIB, and, even if that is done, there is danger that the In-

any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. Wherever such transportation is received, there the offense is to be deemed to have been committed. Why may this not be so? In this feature of the statute, the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed.

Congress also embraced in § 1 of the Elkins Act offenses not depending upon actual transportation through districts; and as to the trial of such, it also made provisions in the venue section.

For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, "whereby any other advantage is given or discrimination is practiced" in respect of interstate transportation.

209 U.S. at 72-74. The conclusion that insertion of the term "knowingly" tempered the harsh effect of the Elkins law seems inescapable. There is a not-too-clear reference to this in the reported argument for the United States in *Lehigh Coal & Nav. Co. v. U.S.*, 250 U.S. 556, 557-58 (1919). The opinion did not discuss this point at all, see *Lehigh* at 565. See also *U.S. v. Altman*, 8 F. Supp. 880, 884 (W.D.N.Y. 1934), where "knowingly" was held to include the term "willful."

The importance of the "pre-1906" cases is that they seem to indicate that "knowingly" softens the application of the Elkins Act. This is an all-important point. The problem thus becomes how to define and apply the term, the cases, and the Act, to both carrier and shipper. Examination of the cases indicates no substantial distinction. Therefore, this discussion will not segregate, as such, remembering, however, that:

In this respect the shipper and the carrier stand on different ground. The carrier is required by a separate provision of the law to establish and publish rates (section 6) and is forbidden to charge or collect from the shipper a rate greater or less than such established and published rate; and as to the carrier, the doctrine laid down by Wharton and by Judge Cooley in *Bonker v. People*, 37 Mich. 4, that ignorance of the fact is no defense is perhaps applicable; for the carrier having established and filed the rate, can very justly be denied the right to plead that he overlooked or forgot the rate that he has thus knowingly established and filed. But is the ordinary shipper, under any reasonable view of the situation to which the law relates, thus bound—bound at his peril, under this law intended to promote commerce, to cipher out, before he can safely put anything that he has into commerce, all the confusing papers and figures that generally make up the tariff sheet? Plainly not, it seems to us.

Standard Oil Co. of Indiana v. United States, 164 F. 376, 382 (7th Cir. 1908) cert. denied, 212 U.S. 579 (1908).

"Knowingly" does not just mean "knowingly." This is bad logic as well as unsound legal reasoning. There are questions of fact and questions of law in every Elkins Act case. For example, a party can be mistaken (mind not in accord with objective reality) or not knowledgeable (with or without design) of both facts as well as the law. As will be shown, the courts have ignored fine-line distinctions.

In *Wisconsin Central Ry. Co. v. U.S.*, 169 F. 76, 78 (8th Cir. 1909), the court seemed to equate "knowingly" with awareness. However, without any real discussion it was found that the carrier defendant had actual knowledge of the rebate in question. Likewise, the court tried in *Standard Oil*, referring to shipper awareness to distinguish the *Armour* construction by holding that less duty rested upon shipper than carrier when it was believed by the former that a correct tariff rate was being applied. It was

terstate Commerce Commission's Bureau of Enforcement will enter the picture. In addition, it is relatively easy to keep a matter boiling, particularly

brought out in the case that the shipper also examined the tariffs. *See also* Standard Oil Co. of N.Y. v. United States, 179 F. 614 (2d Cir. 1910) where it had actual knowledge of the tariff and that it was paying less. *See also* Nichols & Cox Lumber Co. v. United States, 212 F. 588, 593 (6th Cir. 1914), *cert. denied*, 234 U.S. 762 (1914), where the court dodged discussing a "good faith" defense. In U.S. v. Merchants' & Miners' Transp. Co., 187 F. 363, 366 (5th Cir. 1911), knowledge was implied in an obvious situation:

Nor can a corporation be heard to deny that it did not know of the rate which itself had established in accordance with the law, as a justification for its departure therefrom. In *Atchison, Topeka & Santa Fe Railway Company v. United States* (C.C.A.) 170 F. 256, 95 C.C.A. 452, the Circuit Court of Appeals for the Ninth Circuit declared:

"Since the defendant, of course, knew, and must be held to have known, the tariff of rates established and published by itself, the averment that, notwithstanding the alleged rate of \$70 for the car referred to, the defendant in fact charged and accepted \$64.75 only, would seem to be sufficient to constitute the concession prohibited by the statute."

Following these cases, the Supreme Court in *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155 (1912), imposed knowledge in a case where a shipper made a special contract with the carrier whereby extra services were extracted not covered in the tariff under which the goods were moving. The Court declared:

That the defendant in error [shipper] did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Texas & P. Railway Co. v. Mugg*, 202 U.S. 242, 225 U.S. at 166.

The conclusion is that actual knowledge and deliberate lack of actual knowledge generally constitute "knowingly."

In *United States v. Erie R. Co.*, 222 F. 444, 448 (D.N.J. 1915), the court developed some of the questions implicit in the above discussion. The defendant contended that "knowingly" was to be equated only with actual knowledge. The actual issue involved facts ancillary to tariff application:

. . . if through its agents it honestly believed, at the time the rate was given, that this particular shipment was to be taken from the dock where it had been landed by the steamer on which it was imported (a fact which would have made the import rate lawful), but it later developed that the goods were not originally unloaded from the steamer on the dock from which they were taken by the defendant, it could not be held to have *knowingly granted* a concession, because it did not know of the facts essential to make the import rate inapplicable and the granting of it unlawful. (emphasis in original)

The court, however, stated that willful ignorance was no excuse, relying upon *Nichols & Cox Lumber Co. v. U.S.*, *supra*. This, in my opinion was a mistake since the facts indicated that the shipper in question had actual knowledge of some of the applicable rates and the court seemed to be saying mere ignorance of related rates was not enough. Also the *Erie* case cites *Armour*, mixing "willful" into the issue in an improper fashion. With an opportunity to clarify matters, the court stated:

It thus appears that the Supreme Court has given its sanction to the proposition that one may be held criminally responsible for purposely keeping himself in ignorance of facts, when the crime with which he is charged required *knowledge* of those facts. I can perceive no difference in principle between that case and the one at bar. I think, also, that the same rule may be properly gathered from that part of the decision of the Circuit Court of Appeals of the Sixth Circuit, in *Grand Rapids & I. Ry. Co. v. United States*, *supra*, which deals with the question as to whether the refunds or concessions were given

if there is enough money involved. That element was present here. Second, Mr. Bellmar had a counterpart in the competitor that was barging

knowingly. It is true that this question was not directly passed upon in that case, but I think the remarks of the court lend support to the view here entertained . . . The word "knowingly" was not construed in any other than its accepted legal meaning, but there was applied, not by way of statutory construction, a principle of law, namely, that where one upon whom a duty to know is cast intentionally or willfully keeps himself in ignorance, he will be estopped to deny knowledge of what he would have learned by reasonable inquiry and investigation.

222 F. at 450. Shortly thereafter, the Third Circuit in *Central R.R. Co. of New Jersey v. U.S.*, 229 F. 501, 509 (1915) said that mistake was no defense to the Elkins Act. Resort to authority, beginning with *Armour* supposedly substantiated that conclusion.

Prior to both the *Erie* and *Central* cases, was a circuit court opinion in a key case that was appealed to and decided ultimately by the Supreme Court in 1919—*Lehigh Coal and Nav. Co. v. U.S.*, 250 U.S. 556 (1919). In that case the term "knowingly" became the key to the Court's decision. The argument for the United States (as reported) conceded that "knowingly" may exclude responsibility in a mistake of fact, or partial knowledge of essential facts, but lack of knowledge of the law was not to be included; *Central* was distinguished as being a mistake of law. Knowledge of the law was to be presumed. The Court, however, said that, under the facts in the case, the defendant railroad leased a short line railroad to another railroad. Provided in the lease were rates to be charged the lessee for transportation of coal between named points. However, the rate was on a basis of 86 per cent of rates from mines in the general region, the lesser rate being due to favorable distance. However, after 1887 the collection was of 100 per cent with 14 per cent being refunded. After 1906 this practice was mentioned in tariff footnotes and identified as an allowance. There was no attempt at deception. *Armour* was thus distinguished, there being no evasion of the tariff rate. All in all the facts convinced the Court that there was an attempt at compliance with the Elkins Act, but:

There was an omission to comply with the statute and the omission was attempted to be justified by honesty of motive and purpose; here there was compliance or attempted compliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency the belief of the Company in its legality was supported by high authority and those circumstances can bring into action and exculpatory effect the provision of the statute which requires the acceptance of a rebate to be "knowingly" done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

250 U.S. at 564-65. Relying on *Central*, the government said mistake of law was no excuse. The court, disagreeing, said:

Indeed, the contention of the government is somewhat elusive and we are not sure that we exactly estimate it. It is said: "The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the 'allowances' could be justified by the footnote in the tariff, and that, as we have seen, would be a misunderstanding of the Elkins Act and not of the tariff." We are unable to concur. There was no misunderstanding of the Elkins Act or what it required. The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word "knowingly" therefore, as we have already indicated, must be considered and given exculpatory effect if error there was.

250 U.S. at 565-66. Pondering this leads to the conclusion that mistake of law was either not present or is in reality, a fiction.

In *United States v. Olds Motor Works*, 4 F. Supp. 65 (E.D. Mich. 1933), the court said that if a proper interpretation of a tariff rule permitted doing the act in question, it was not in violation of the Elkins Act. This definitely seems to be in accord with

scrap to its mill. This was Mr. R.K. Keas, who was determined to stop the shipments of crop ends by rail. This meant that, even if Mr. Bellmar could end the publicity, Mr. Keas would keep the matter public. The controversy in the industry continued, as it had to, and the controversy spread to the rail carrier, because Mr. Bellmar wanted more crop end origin points. The railroads wanted more business and they possessed some top traffic officers as talented as Messrs. Bellmar or Keas. One can imagine the situation—crop ends were being shipped (or what purported to be crop ends) and one steel producer was able to get its raw material cheaper. A competitor was allegedly hurting as a result. The rails were getting business. Scrap yards were selling scrap (they really did not care to whom they were selling). The WWIB was confused and undecided over whether or not to challenge the commodity descriptions, and the Interstate Commerce Commission was sought by Mr. Keas for informal interpretations on what crop ends were.

The opinion over whether crop ends could originate from scrap yards or steel fabricators was split between midwest steel mills (which mostly said no) and midwest scrap yards and fabricators, which largely held the affirmative position. The generators of the divergent opinions were Messrs. Keas and Bellmar, and the recipient was the WWIB, which felt it was in the middle.

The WWIB mostly wanted advice from the railroads on how to rate crop ends in order to properly police the traffic. They gathered the range of opinions and summarized them in a letter to the rail carrier that originated most of the traffic, the Chicago and North Western Railway.³⁷ The reply (from Mr. Schroeder of the North Western) was that steel mills originated the material, but when fabricating plants started producing crop ends the commodity description was changed to "crop ends known to the trade as such."³⁸

Lehigh. See also *Boone v. United States*, 109 F.2d 560 (6th Cir. 1940). The case showed deception was present.

This discussion has only probed for a definition of "knowingly" in cases where there was a shipper, carrier and a tariff, since *Spencer Kellogg & Sons v. United States*, 20 F.2d 459 (2d Cir.) *cert. denied*, 275 U.S. 566 (1927), held that there did not have to be a shipper-carrier relationship, and hence no tariff within Sec. 6, some interesting possibilities on intent arise. Many of them have not been answered, besides, the entire matter is beyond the scope of this examination. However, see: *Union Pacific R. Co. v. United States*, 313 U.S. 450 (1941) and *United States v. General Motors Corp.*, 226 F.2d 745 (3d Cir. 1955). The cases show that, while in some instances there might be less duty placed on the shipper to ascertain the proper tariff rate, both shipper and carrier may be liable if a special arrangement resulted whereby a less-than-lawful rate was charged. Constructive knowledge will be enough where either or both should have known, but deliberately remained ignorant.

37. WWIB letter of December 1, 1961, to H.J. Schroeder. Exhibit 1 in I.C.C. Docket 34307. Mr. Schroeder was the chief rate making officer of the railroad.

38. December 11, 1961 reply to WWIB from Chicago and North-Western Railway.

The battle began in earnest in 1959 when, after long negotiation, the rails, headed by North Western, agreed to publish crop end rates from new origins. Mr. Keas filed a protest with the Suspension Board of the Interstate Commerce Commission, which, if successful, would have postponed the effective date of the tariffs for seven months and placed the burden of proof upon the carrier to justify the lawfulness of the proposed rates.³⁹ Mr. Keas was not successful and the new crop end rates went into effect in September. The rate level, again, was the billet rate level applied to the origin destination distance at issue. Mr. Bellmar's job was not to negotiate the rate level, which was well below the scrap rate, but to sell the commodity description itself.

Mr. Keas decided not to file a complaint action with the I.C.C. The reason was undoubtedly that the lot of a complainant is a hard one. The complainant has the burden of proof, which is a heavy burden in a situation where the propriety of a carrier freight rate is the issue. Rate cases are complex enough without shouldering the burden of proof, something which shippers have had difficulty doing. Instead, despite rumors that he was going "to court," Mr. Keas wrote the Interstate Commerce Commission's Bureau of Traffic for an informal opinion. The replies were phrased as vaguely as the questions. Mr. Keas asked whether crop ends embraced certain material, avoiding the question of what crop ends actually were. The Commission wrote, after deciding that crop ends were not bundles or busheling, that:

Though the definitions of "crop ends" as quoted in your letter are authoritative and recognized in the trade, the term has a wider

It shows that the means of interpreting a problem depend upon the view taken. By inspecting tariffs only this interpretation was entirely valid. The problem, of course, is that it credited the tariff with changing because the nature of the tariff changed rather than crediting the change in traffic to the tariff.

39. The Board of Suspension is, technically, an employee board which is entrusted with the power to act on behalf of the Interstate Commerce Commission, which is itself a form of committee, and, upon protest, the Board decides whether or not to suspend a tariff, which only postpones its effective date for seven months. See Section 15(7) of the Act. If the Board of Suspension decides to suspend, then the burden of proof is upon the proponent of the rate, the carrier which published it, to justify its reasonableness. On the other hand, the Board of Suspension might allow a rate to go into effect and order an investigation into its lawfulness. In this case the rate becomes effective but the burden is still upon the same party to prove its lawfulness. The Board of Suspension might decide to do neither, in which case the only remedy that the protestor has is to file a complaint, and then the protestor is the plaintiff with the burden of proof. The protest filed with the Board of Suspension is in writing and often contains a verified statement, as well as complex legal argument. It can be both evidence and brief, and its purpose is to indicate clearly that a proposed rate or rule is probably unlawful. It is, then, something akin to getting a temporary restraining order in a court. In suspension procedure, any party has the right to a reply, and the replies are often as detailed as the protests.

connotation than is there indicated, and there appears to be no substantial reason for not applying crop end rates on any busheling article or bundles article that meets the relatively explicit, simple requirements of the tariff.⁴⁰

Mr. Kease was not to be so shunted aside. He followed with another letter, again, however, asking specific questions on what types of scrap included crop ends. This time, though, he was more clear:

Question:

Am I correct in understanding that in respect to No. 1 bundles, composed in whole or in part of skeleton scrap . . . the applicable rate is the rate on scrap iron and steel?⁴¹

The answer:

Yes, that is, the crop end rate of Item 1221 would not apply.⁴²

Second Question:

Am I also correct in understanding that in respect to No. 1 busheling, prepared by shearing or punching from clean new wrought iron or steel scrap . . . including new factory busheling . . . the applicable rate would be that on scrap iron or steel?⁴³

With the answer to the first question, above, it would seem that the answer would have to be the same, but:

Answer:

You may be correct (at least up to the word 'including') but I am unable to assure you that you are. Information in our files indicates that the term 'crop ends' was not intended originally to embrace shearings or punchings from 'scrap', but our information is not current and, up to this time, I have been unable to obtain what might be properly considered an authoritative current opinion on the subject . . .⁴⁴

The Commission then repeated that trade usage would prevail. This letter indicated that "as such" modified "trade."

Crop ends seemed destined to move unmolested, so everyone thought, and Mr. Keas was left to decipher his informal opinions. However, like a mushroom which emerges suddenly after the roots have patiently developed, the Elkins Act emerged and generally shattered all peace of mind. Mr. Bellmar's company was notified that a criminal case was being prepared by the

40. Appendix A to Petition for Declaratory Order, I.C.C. Docket 34307.

41. Letter from Mr. Keas to I.C.C., Oct. 29, 1959.

42. I.C.C. reply dated November 6, 1959. Both question and answer were contained in Appendix B to Petition for Declaratory Order in I.C.C. Docket 34307.

43. *Id.* at 2.

44. *Id.*

Department of Justice, alleging a violation of the Elkins Act for knowingly shipping scrap as crop ends! This was in June of 1961.

Subsequent to this development, as discussed above, the WWIB was pressing Mr. Schroeder of the Chicago and North Western Railway for definitive instruction. Almost simultaneously with the threatened Elkins Act action, a complaint was filed with the Interstate Commerce Commission challenging the rate level on scrap items called waster sheets (which were, as the name implies, reject steel sheets). The rates on such items, which moved under scrap rates, were compared with the lower crop end rates and it was alleged that the waster sheet rates were too high. With a perfect chance to resolve at least part of the question of what crop ends really were, the Commission resorted to the mill definition and simply repeated what the evidence stated:

The defendants compare the assailed rates with the rates concurrently maintained on other iron and steel articles such as crop ends and mill warmers. Crop ends are pieces of steel sheets that have been sheared from the ends of the latter in order to produce sheets of uniform size. Mill warmers are steel sheets that have been used to heat the rolls of the mill before the rolling process is begun.⁴⁵

Two months after this decision the railroads published more crop end rates, again from new origins. Again they were protested, by Mr. Keas. Although he failed to get suspension, the Board of Suspension of the Interstate Commerce Commission did order an investigation. In June of 1963 the *Fond du Lac* case was decided, with its ambiguous admonishment concerning crop ends. At this time Mr. Schroeder was about to retire from the railroad. Would he also be brought into a criminal suit? Something had to be done which would accomplish both the resolution of the problem as well as eliminate the threat of criminal indictment.

In August of 1963, the Chicago and North Western Railway filed a petition for a declaratory order with the Interstate Commerce Commission asking for determination of the meaning of "crop ends known to the trade as such." The basis for the petition was Section 5(d) of the Administrative Procedure Act⁴⁶ and its grounds were the instant controversy and the Commission's vague admonition in *Fond du Lac*.⁴⁷ There certainly was a con-

45. *Joliet Wrought Washer Co. v. Chicago, R.I. & P.R.R. Co.*, 315 I.C.C. 477, 481 (1962).

46. 5 U.S.C. § 551, 80 Stat. 381 (1966).

47. The theory is that a controversy or legal uncertainty existed. The declaratory order procedure was a proper vehicle to clarify a commodity description. See *United States v. Northern Pacific Ry. Co.*, 299 I.C.C. 545 (1956); *Movers' & Warehousemen's Association of America, Inc. Petition*, 304 I.C.C. 517 (1958).

trovery, but it is discretionary with the Interstate Commerce Commission, as the Act states, to grant a declaratory order petition. If it does, a hearing is held on the question presented. If it does not, the parties are left to their own devices. Here the Commission granted the petition and titled the case *Clarification of Commodity Description "Crop Ends" for Chicago & North Western Railway Co.* At the moment of docketing, the threat of Elkins Act violations disappeared. How could one be held to "knowingly" violate the Elkins Act when the regulating agency itself agreed that a legal controversy or legal uncertainty over what crop ends were did exist? Shortly after docketing, Mr. Schroeder retired, and shortly before that Mr. Bellmar left the steel company for another business.

Without Mr. Bellmar's presence, the declaratory order proceeding was set for oral hearing. From the beginning it was obvious that the leading parties had different theories of the proper type of proof to be introduced. Mr. Keas was preparing a rate level case, and his lawyer was one of the attorneys that tried the *Wrought Washer* case in the first place! The railroads approached the proceeding as a commodity description case. At the first day of the hearing Examiner Bennett resolved that issue in favor of the railroad theory:

In the off the record discussion we discussed just what was in issue as a result of this petition and this proceeding and it is my view that the matter that we are here to consider is what are 'crop ends' as known to the trade; and, of course, there would be subsidiary questions: what are clips and what are skeletons, and it may be those should be developed in inverse order. I think that the question of the commodity description has no relation to the rates, nor, the movement of these commodities by the carriers
. . . .⁴⁸

The railroads tried a description case. The proof showed that, as everybody knew, the midwest steel interests felt crop ends were produced by steel mills. The midwest scrap yards agreed, but contended they produced such material as well. Rate levels were brought into the case to the limit the examiner would allow.

Also from the beginning it was obvious that the Examiner interpreted "as such" to modify the trade. The I.C.C. participated in the case taking the position that crop ends were produced by steel mills only. It thus played the dual role of judge and prosecutor. Their tariff interpretation witness was the same party that authored the two opinions to Mr. Keas discussed above. He stated that the ". . . tariff meaning is determined by the trade, general

48. Tr. at 620.

commercial understanding in terms."⁴⁹ It was obvious, therefore, what the final opinion would be on that point. However, the matter was really not quite so simple. No cases were found which gave a clue to what the phrase "as such" meant when used as it was in a commodity description. As stated, the entire terminology was developed in *Wrought Washer*. As part of the preparation for the case the North Western inspected the original *Wrought Washer* dockets. It was found that the terminology, "crop ends known to the trade as such," was developed by the parties to the case and supposedly explained to the Commission in oral argument. But the oral argument volume was missing. The Interstate Commerce Commission, at the rail's request, searched for it but was unable to locate it. No other copies of the transcript were ever discovered. How the wording came to be and what its intriguing phrasing was meant to convey was never really known. While that raises an interesting legal question over the function of record keeping and the question of whether there is a right, and its limits, to notice of the basis for decision making, the only outcome was an apology letter from the I.C.C. for losing the transcript from the official docket.

The Examiner's Recommended Report was served in September of 1959. The Examiner held that crop ends only originate at steel mills:

Thus, the meaning of these synonymous terms must be determined in the sense generally understood and accepted in the trade. Obviously, this means the general knowledge and acceptance in all the trade, not merely by some of the trade, nor by some of the producers or consumers. But the only area of general agreement between all of the parties herein which trade in the considered articles, i.e., producers, brokers, purchasers and users, is in regard to crop ends which originate in steel mills. There is no such general agreement between the parties that the described residue, of-fal, or byproduct of steel fabricating plants are crop ends. Indeed, the preponderance of the evidence is to the contrary.

. . . The evidence also indicates that in those instances in which shipments from fabricating plants have been described as crop ends known to the trade as such, the transportation rates on crop ends were lower than those concurrently maintained between the same points on scrap iron or steel for remelting purposes, and that when a rate advantage did not exist, the shipments were not so described.⁵⁰

He made the case a rate case after all, after ruling directly to the contrary that it was not! But were not tariff principles on the side of the scrap yards? As a "final" solution he recommended—not held—that the rates on

49. Clarification of Commodity Description "Crop Ends" for Chicago and North Western Railway Company, 325 I.C.C. 513, 520 (1965).

50. It was vacated in 1939, yet the rate relationship continued!

crop ends and scrap should be the same. While he did not need to rescind the *Wrought Washer* order, which was mandatory, he only made a suggestion. Therefore, in order to comply with the Examiner's suggestion, the railroad would have had to reduce its entire rate structure on scrap something which it was not about to do, or increase the crop end rates which could have disputed rates on steel item as well, again something it was not about to do. The Examiner's decision was affirmed by the Commission.⁵¹ No one was indicted. No rates changed. Mr. Keas immediately retired. No rebilling on freight that moved was ordered. Crop ends only originate from steel mills. But how are origins to be determined? We are back to Mr. Bellmar's point on identical material. Crop ends still continued to move, only their origin was to be first determined to be from a steel mill—not the origin of the traffic, but the origin of the material. Crop ends still continued to be moved from scrap yards. What is done today is irrelevant, the question being whether the shipper and carrier were helped by the decision.

In the course of the litigation every type of basic regulatory device was utilized, including formal adjudication, informal rulings, efforts by a private policing agency to obtain order, an Elkins Act investigation, an attempt to achieve a resolution of the problem by stipulation in the original litigation, and a declaratory order proceeding, all the time surrounded by satellite litigation that could have, but did not, resolve a controversy.

Could the controversy have been resolved? Could the I.C.C. have really regulated, meaning guided or controlled in the public interest? Or is that not the proper definition of regulation? Maybe we should assume that for every Bellmar there is a Keas, and leave the commercial world to itself, tempered by the right of private litigation and limited by basic individual rights. This has been suggested, as has a complete overhaul of the Interstate Commerce Act and the Interstate Commerce Commission as well. If the crop ends confrontation was not a sport, the question is whether it stands as an example of the fact that meaningful economic regulation, as distinguished from imposing limits beyond which an economic struggle cannot go, might not be possible. Does the Commission itself agree? It has recently made statements like the following:

While it is possible, as certain protestants contend, that the respondents could have chosen other 'incentives' and alternatives to achieve the stated objectives of promoting better usage of refrigerator cars on this traffic, that possibility is not the controlling question before us. It must be borne in mind that carrier management

51. *Supra*, note 49.

has a broad latitude under the Interstate Commerce Act to develop and implement the particular elements of their pricing programs. It is a management responsibility—and therefore a correlative management discretion—to select among varying alternatives available in a given pricing situation, so long as its choices are within the law. Unless we can find a management initiative in such a situation to be inconsistent with the national transportation policy, or to be contrary to specific provisions of statutory law, it is not our function or responsibility to substitute our judgment for that of carrier management.⁵²

52. *Vegetables & Melons, Transcontinental Eastbound*, 335 I.C.C. 798, 338 (1970).