THE INTERSTATE COMMERCE COMMISSION — THE FIRST TWENTY-FIVE YEARS

GEORGE M. CHANDLER

MR. CHANDLER: Thank you.

Let's go back a little further first. The year 1873, if you will cast your minds back, was a very bad year for the railways. It was not a very good year for anyone actually. There was something called the Panic of 1873, and of course the Republicans, as once again and as usual, were about to lose control of the Congress. The railroads were in the middle of it all. The panic was really precipitated by the financial failure of Jay Cook, who was the financier behind the Northern Pacific, and 1873 found about one-fifth of the nation's railroad mileage in bankruptcy. That may sound familiar to some of you.

Incentives, which Mr. Miller has talked about, such as the 150 million acres or so of public land that were given to the railways together with fantastic opportunities for profit, both in railroad operation and in railroad construction, had led to a tremendous over-building in areas of the country that were still really empty. Having built their tracks, the railroads then went out and rustled up some settlers. They planted them along their lines, and then, not surprisingly, they proceeded to exploit this first generation of captive shippers. The result, quite naturally, was public protest, centered largely in the farming communities of the upper Midwest.

These were issues made to order for a rising organization called the Patrons of Husbandry, usually called the Grange. A spokesman for the Granger Movement attacked many economic and financial evils of the day, but their target was railroad rates and the rates charged by other middlemen that stood between the farmer and his markets. Grange's first big success at the polls came in 1874, particularly at the state level, and

the result was the passage of railroad regulatory legislation in a number of Midwestern states.

In the early years of railroading, railway building and operations were characterized by positive thinking and equally positive action. Railroads were not seen as a threat, and the railroad legislation of the period before the 1870s was primarily devoted to chartering new carriers and providing incentives to persuade them to build lines where individual state and local governments wanted them. So the new rail regulatory legislation was the first kind of statutes of this sort. They were directed almost exclusively at rate levels. They set upper limits to the amount that carriers could charge, and universally they established regulatory commissions to carry out their functions. These laws were generally upheld by the courts as legitimate exercises of public power over common carriage.

However, by the time the new laws had gotten on the books, the Panic of 1873 had been followed by a long lasting general depression. Rate levels ceased to be such a big issue. Rail revenues fell by approximately one third between 1870 and 1880.

Shipper complaints, however, did not come to an end. They simply changed direction. They shifted to new and equally undesirable railroad practices, such as wholesale discrimination against individual people, communities, and commodities. These are practices which the state maximum rate laws were, of course, not even intended to address.

At the same time, worsening financial conditions led to a degree of sympathy for the railroads' problems. Legislative concessions weakened what few regulatory constraints there were. This may sound familiar to some of you, too. Moreover, state regulation was proving ineffective because it necessarily stopped at state lines; whereas, most of the traffic was becoming longer haul, interstate in nature.

The railroads now are becoming even more unpopular with their customers, but they are also becoming pretty unhappy about themselves. The over construction of the past two decades together with the general economic malaise in the country had made it increasingly difficult for the carriers to turn a profit by competing with each other, and they were thus inclined to turn more and more to mutual agreements, to cut up the markets and share the profits, the railroad pools. The organization of pools began in earnest in the 1870s, but actually they never worked very well. Railroads were really not able to subordinate their own private interests in order to work together effectively. Various schemes were tried in efforts to make the pools work. One pool, in an attempt to provide a strong and impartial hand at the helm, appointed, as its Chairman, a distinguished jurist from the State of Michigan named Thomas M. Cooley. That did not work very well either.

More and more railroad executives began looking to the federal gov-

ernment for help. This may sound familiar too. They had already sought federal legislation to protect them against the attacks of such subversives as Grangers and strikers, and they began to see a federal regulatory presence as preferable to piecemeal state regulation of their affairs.

In the 1885 hearings on the bill which was to become the first act to regulate commerce, all but one of the railroad witnesses favored federal regulation. When both sides want something, Congress is usually ready to act. There were substantial pressures from the railroad interests in the drafting of the first Interstate Commerce Act, as Mr. Miller has mentioned, but I think we nevertheless have to describe it as pretty effective consumer legislation. It did contain provisions which the railroads were quite willing to live with. These included requirements that rates be reasonable, that unjust discrimination, preference, and prejudice be abolished — or at least they were made unlawful. We never abolished them — tariffs were to be published and rates could be raised only on 10 days notice.

However, the new law also contained a number of provisions against which the railroads had lobbied with great effort, principally the outlawing of pooling and the charging of a higher rate for a short haul than was charged for a longer haul over the same route. That provision, as most of you know, was enacted as Section 4 of the act and has since been called the Fourth Section.

So, a hundred years ago the country got its first real federal regulatory statute. It was both broad in its scope and comprehensive in its details, and I think it was a pretty remarkable achievement.

Another provision of the new law set up the Interstate Commerce Commission with five Presidentially appointed members. As Bob Minor has said, I have a personal interest in one of these men, for Thomas McIntyre Cooley, the first Chairman, was my great-great grandfather. Judge Cooley was without any doubt a most distinguished jurist and legal scholar. He had been Chief Justice of the Michigan Supreme Court for over 20 years. He was the founder and for many years taught at the University of Michigan Law School. One of my law professors, not at Michigan, once described him to our torts class as a one-man American law institute. He wrote treatises restating the law in fields as diverse as constitutional law, tax, and torts.

Despite all these activities, Judge Cooley had time to spend a lot of time working for the railroads. His chairmanship of one of the railroad pools has been mentioned, and at the time of his appointment to the Commission he was serving as receiver of the Wabash. Apparently, it was his association with the railroads, which were pretty unpopular in a populist kind of state like Michigan, which led to his defeat when he ran for reelection to the Michigan Supreme Court in 1884. He was a Republican but was appointed to the Commission by President Cleveland, a Demo-

crat. The other four original members of the ICC, I think without too much exaggeration and denigration, can be described as a recently defeated Congressman and three railroad lawyers.

Whatever their backgrounds may have been, they were ready to go to work. On the 31st of March, they moved into a building on F Street between 13th and 14th, on the north side of the street, still there, and had their first meeting. This was only a week after the last appointments had been cleared by the Congress. Already, on April 5th, the effective date of the Act, we find Judge Cooley engaged in a spirited correspondence over the proper way to apply for Fourth Section relief with no less a person than Leland Stanford, President of the Southern Pacific.

The accepted wisdom is and has been for many years that the Commission faced an impossible regulatory task due to the vagueness and inadequacies of the original statute. The vagueness charge, in my view, is unfounded. The 1887 act is no more vague than most of the laws passed by a timid Congress trying to balance opposing constituent views. It is in the nature of legislators to waffle, and it is the duty of enlightened regulators like you — and like I used to be — to make their waffling work in the real world. Words like "just and reasonable" lack specificity, but they have proved to be pretty useful and I think even pretty understandable criteria for a good many years.

On the other hand, the lack of power on the part of the Commission to enforce its own orders, to conduct investigations that had real teeth in them certainly made its task difficult. But it cannot be said that it was entirely without blame for the difficulties it encountered.

That first decision, which Mr. Miller mentioned, to grant Fourth Section relief was one of many. The Commission granted Fourth Section relief almost without looking at the papers, I think. It never really pushed very hard to persuade the world that it had the authority to set rates for the future. But the basic problem faced by the shippers in dealing with the new Commission was getting their cases decided at all. The Commission gave informal opinions, but only to railroads. So a railroad could get a quick answer very cheaply to a question which a shipper would have to get answered only by going through long and expensive litigation.

The Commission tried to deal with most of its complaints informally. Of the some 9000 complaints it received before 1900, it disposed of about 90 percent of them as informal matters, and even so its cases during that period lasted about four years. But regardless of any of its own shortcomings, by 1900, judicial decisions had made effective implementation of the act virtually impossible. The power to establish rates for the future was denied to the Commission in the Social Circle cases in 1896. The Fourth Section was virtually destroyed by the Supreme Court in 1897, and I think by today's standards we would say that the Court's interfer-

ence was particularly heavy-handed and really quite unjustified. They ruled against the Commission on narrow grounds of statutory interpretation—yes—but they also imposed their own economic theories and reversed the Commission purely on theoretical bases.

Shippers began to press in earnest for improvements in the statute, and the railroads ultimately came around to the same position. The Court's decisions had in effect left the railroad industry without the services of its umpire, and the railroads were not able to get along with each other without him.

The final straw for the carriers came in rulings that railroad collective ratemaking associations, which had been established with the full support of the Commission, were engaged in unlawful restraint of trade in violation of the antitrust laws. The result was a general clamoring for new legislation, and beginning in 1903, we see a series of important changes in the act, all designed to increase the strength of the Commission and to add to the ammunition available to the railroads' customers.

The Elkins Act of that year made it unlawful to charge any but the published tariff rate. The Hepburn Act of 1906 expanded the Commission's jurisdiction from just railroads and railroad-associated water carriage to include pipelines, sleeping car and express companies, spur lines, and railroad yards. It authorized the Commission to prescribe rates for the future, to fix divisions of revenue among the connecting carriers, and to regulate car hire. It empowered the Commission to enforce its own orders. It established what became the basis for the Uniform System of Accounts, and it increased the size of the Commission to seven members to do all these new things.

I. L. Sharfman, who is a very diligent and lengthy, wordy historian of the ICC, said of the Hepburn Act that — and I quote, "It settled once and for all the fundamental dominance of public over private interests in the functioning of the railroad industry." Brave words, but there may be some here that do not fully agree with them.

In 1910, the Mann-Elkins Act, gave the Commission power to suspend rates pending investigation, gave shippers for the first time the right to route their own traffic. It also created the Commerce Court, which was given exclusive jurisdiction over the Commission's decisions. The Court soon took it upon itself to become the chief regulator, substituting its judgment for that of the Commission. In 1911, it reviewed 30 ICC decisions and reversed 27 of them. That was too much. In 1913, it was abolished.

During the same period, there was increased public and congressional concern about railroad safety. The Commission's responsibilities in this area were gradually increasing. The first Safety Appliance Act had been passed in 1893, but it was not fully implemented by the Commission until 1900. Again, narrow judicial interpretations, particularly in defining

"interstate commerce," rendered the safety provisions largely ineffective. But, by 1911, new legislation had firmly established the Commission's authority to enforce laws governing safety appliances and the hours of service of railroad employees.

We're now coming to the end of the Commission's first quarter-century. At that time, in 1911, it was faced with the necessity of making a big decision about railroad rates. The general increase request had been filed for the carriers nationwide. This brought the Commission face to face with a formidable presence, one Louis D. Brandeis, who filed a brief before the Commission and orally argued in January of 1911, opposing the rate increase.

He advanced the principle of scientific management, arguing that railroad managements were so totally inefficient and wasteful that they could not possibly justify any rate increase. The Commission agreed with him and denied the increase. So we find here at the end of the first quarter-century of the Commission, before World War I even, economists are arising to take an important place in regulatory affairs. Whether for good or for ill, I'll leave that for others to decide.

Thank you.

MR. MINOR: Thank you, George. Our next speaker will cover the period from 1912 to 1937. Bob Calhoun is a graduate of Tufts College, his undergraduate degree at Tufts, Yale Law School and Yale Graduate School, his master of Arts and Economics. Admitted to the District of Columbia Bar, the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D. C. Circuit. He joined the Commission in 1963 as an attorney adviser to former Commissioner, Charles Webb, and became Legislative Counsel to the Commission in 1967.

He went to the U.S. Department of Transportation in September of 1969 and stayed there almost a year. He's been a partner in the prestigious Washington law firm of Sullivan and Wouster since 1971, specializing in transportation and energy regulation and litigation.

He's written articles for the Practicing Law Institute and has to his credit a book entitled *The Interstate Commerce Commission: Cases, Rules and Administrative Discretion*.

A member of the City Council of Alexandria, Director of the Washington Metropolitan Area Transit Authority, and Commissioner on the Northern Virginia Transportation Commission — Bob Calhoun.