Michigan Law Review

Volume 33 | Issue 3

1935

COOPERATION BETWEEN THE INTERSTATE COMMERCE COMMISSION AND THE STATE COMMISSIONS IN RAILROAD REGULATION

Martin L. Lindahl
Dartmouth College

COOPERATION BETWEEN THE INTERSTATE COMMERCE COMMISSION AND THE STATE COMMISSIONS IN RAILROAD REGULATION

Martin L. Lindahl *

COOPERATION between the Interstate Commerce Commission and the state commissions in railroad regulation has been developed to increase the effectiveness of public control under our dual regulatory system. The division of power between federal and state governments, based upon the traditional distinction between interstate and intrastate commerce, has led to a multitude of diverse and conflicting statutes and administrative orders applicable to the same set of transportation agencies. In large measure the problem of dual control has been solved by giving to the federal government a virtually complete occupancy of the fields of rate, finance, and service regulation of interstate railways.[1] This recognition of the predominance of the national interest in the transportation system has resulted in a large diminution of the powers formerly exercised by the individual states.

But the mere centralization of authority over an industry operating in a vast geographical and economic area cannot solve the very real problem of conflicting national and local interests. Practically all matters which come before the Interstate Commerce Commission, whether rates, extensions, abandonments, or car service, present a commingling of interests, national and local, which must be carefully weighed and equitably adjusted. The danger is that a central tribunal, burdened with a great variety of onerous regulatory tasks and far removed from the localities most vitally affected, will give insufficient consideration to local conditions in applying general policies to specific situations. Co-operation of the state commissions with the Interstate Commerce Commission is designed to meet this difficulty; the latter is aided in its formulation of decisions by the recommendations and advice of administrative officers having an intimate knowledge of local economic

* Instructor in Economics, Dartmouth College. A.B., Carleton College; A.M., University of Washington (Seattle); Ph.D., Michigan.

This article is based on a dissertation submitted to the faculty of the Department of Economics in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the University of Michigan.—*Ed.*

[1] See 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, c. 9 (1931); and REYNOLDS, THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES (1928).

conditions. Moreover, to the extent that the state commissions retain original jurisdiction over intrastate rates,[2] the co-operative method also helps to harmonize interstate-intrastate rate relationships.

This article will be confined to a consideration of the co-operative mechanism in the regulation of interstate railways. But in passing it should be noted that the possibilities of co-operation between state and federal authorities are much broader. Practices in the railway field afford a precedent for the administrative control of other interstate subjects. The legislatures of more and more states are enacting statutes providing for co-operation with the national government in its effort to rehabilitate industry and to eliminate unfair competitive practices under the National Recovery Act.[3] Moreover, co-operation with

[2] The federal authority over intrastate rates is confined to rates which are found to discriminate unjustly against interstate commerce. Houston & Texas Ry. ("Shreveport" case) v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914); Wisconsin R. R. Comm. v. C., B. & Q. R. R., 257 U. S. 563, 42 Sup. Ct. 232 (1922); Florida v. United States, 282 U. S. 194, 51 Sup. Ct. 119 (1931).

[3] The statutes usually provide for the suspension of the state anti-trust acts with respect to transactions under any agreement or code of unfair practices approved by the President pursuant to the National Recovery Act. The laws of Kansas and Texas deal exclusively with this matter, each providing that compliance with code provisions under the federal act constitutes a defense in state anti-trust prosecutions.

A second common provision is that the codes of fair competition approved by the President shall be applicable to commerce which is purely intrastate in character. For example, the New York statute, sec. 2, par. 1, provides that upon the filing of a federal code with the secretary of state "such code . . . shall be the standard of fair competition for such trade or industry . . . in the state as to transactions intrastate in character, and any violation of any provision of such code . . . shall be a misdemeanor," punishable by fine. This provision in the state laws has the obvious advantage of preventing violators from escaping punishment by urging that code provisions are ineffective with respect to intrastate transactions. Intrastate transactions may be brought within the provisions of the codes on the theory that they "affect" interstate commerce (see Victor & Silverman et al. v. Ickes, Secretary of the Interior, 1 S. C. D. C. (N. S.) 58 (1933), following the doctrine of the Shreveport and Wisconsin cases, supra, n. 2), but state action removes the uncertainty of possible unfavorable court interpretation and has the added virtue of bolstering up the federal enforcement machinery with that of state officers and courts.

Finally, most of the state legislation provides for the utilization by the President of state and local officers in the administration and enforcement of the National Recovery Act. This extends the "consent of the State" necessary for the exercise of the power to utilize state agencies conferred upon the President in sec. 2, par. (a) of the Recovery Act. The provision in the California statute, c. 1039, Laws of 1933, sec. 2, is typical:

> "To effectuate the policy set forth in Section 2 (a) of Title I of the National Industrial Recovery Act, the President of the United States is hereby authorized to appoint and utilize such State and local officers and employees as he may find necessary in the administration and enforcement of the said Act and to prescribe their authorities, duties and responsibilities."

To what extent this authority has or will be utilized in practice cannot now be

state commissions appears to be an integral part of the administrative machinery in the current proposals for the federal regulation of interstate transmission of electric power [4] and interstate transportation by motor vehicle.[5] Careful analysis of regulatory problems and the recognition of the constant interaction of economic phenomena in the constitutionally separate interstate and intrastate fields are revealing the inadequacy of exclusive state or federal intervention and directing attention more and more to the possibilities of joint or co-operative action.

Our subject — co-operation in the regulation of interstate railways — will be considered under the following heads:

(1) Co-operation prior to 1920,

(2) Provisions of the Transportation Act of 1920,

(3) Co-operation since 1920, including the methods and success of co-operation, in respect to car service matters, to extension and abandonment cases, and to rate cases.

ascertained, but the enabling provisions open up great possibilities for a well co-ordinated and efficient administrative system.

[4] See S. 3869, 71st Cong., 2nd Sess. (1930), introduced by Senator Couzens to amend the Federal Water Power Act so as to extend the authority of the Federal Power Commission to the regulation of service and rates for electric power transmitted interstate. The method of regulation involves the use of joint boards, composed of a representative from each state concerned to be appointed by the state commission unless other provisions for appointment are made, which shall hear and consider petitions pertaining to rates, charges, service, or abandonment of service in the first instance. The decision of a joint board is to be final unless exceptions to the decision are filed with the Commission, in which event the Commission is to assume appellate jurisdiction.

It is further provided that the Commission and any joint board "shall, in co-operation with the several State commissions, utilize to the fullest extent practicable, all reports, records, data, and other information in the custody of such State commissions, pertinent to the performance of the duties of the commission or joint board."

[5] See bills for motor vehicle control introduced by Senator Dill and Congressman Rayburn during the last session of Congress (S. 3171 and H. R. 6836, 73rd Cong., 2nd Sess., 1934), for provisions regarding joint boards and co-operation similar to the above.

The system of joint boards, members of which would in practice be drawn from the membership of state commissions, appears to be an excellent device for handling these matters which require federal control because of their interstate character but which economically are largely local or regional in character. The state commissions have already amassed stores of information with respect to the operating companies to be regulated, have developed some degree of expertness in these fields, and are more familiar with local industrial conditions than federal agencies are likely to be. To require the federal authorities, severally, to supervise financial and service matters, to make valuations, and to perform the numerous other tasks incident to rate regulation of industries that operate chiefly intrastate would seem to be an extravagant procedure. Moreover, participation of the state agencies in the disposition of interstate matters would make it possible to co-ordinate and integrate intrastate policies of regulation with those in the interstate field.

I

COOPERATION PRIOR TO 1920

The system of co-operation which prevails today, based upon congressional enactment [6] and express judicial recognition,[7] is an outgrowth of some measure of joint action which developed informally and without legal sanction shortly after the establishment of the Interstate Commerce Commission in 1887. An early recognition of the need for joint deliberation and action is found in the organization of the National Association of Railroad and Utilities Commissioners in 1889.[8] The objectives were to lay a foundation for satisfactory legislation, to secure the greatest possible uniformity in state and federal laws, and in so far as possible to harmonize the regulatory policies and administration of the state and federal tribunals.

In some fields of administrative activity, notably uniform classification of freight [9] and accounts and statistics,[10] the state commissions

[6] Interstate Commerce Act, sec. 13, par. (3) (U. S. C. tit. 49).

[7] Wisconsin R. R. Comm. v. C., B. & Q. R. R., 257 U. S. 563 at 591, 42 Sup. Ct. 232 (1922); and Board v. Great Northern Ry., 281 U. S. 412 at 426-428 and 430, 50 Sup. Ct. 391 at 395-396 (1930).

[8] Judge Thomas M. Cooley, first chairman of the Interstate Commerce Commission, called together the state commissioners for the first conference in Washington in 1889. At the initial conference, he said: "We are all engaged in kindred work, and not kindred work merely, but in a large degree in the same work. . . . it is of the highest importance that there should be harmony in the legislation of control, so that this system can be controlled as nearly as possible — as nearly as the local conditions of the country will enable it to be controlled — harmoniously and as a unit." National Association of Railroad and Utilities Commissioners, PROCEEDINGS, 1889, p. 1 (hereafter referred to as PROCEEDINGS). For further references to the need for co-operation, see PROCEEDINGS: 1907, p. 17; 1908, p. 10; 1909, p. 9; 1910, pp. 10-11; 1913, pp. 8, 12; 1914, p. 2.

[9] The aim was to eliminate the confusion and discrimination emanating from multiple classifications of freight, including the three leading territorial classificatons and numerous state classifications, by the adoption of a single uniform classification. See, for example, PROCEEDINGS: 1889, pp. 36-60; 1894, pp. 34-44; 1907, pp. 129-141; 1910, pp. 107-109; 1915, pp. 319-327. The chief advance in interstate classification has been the consolidation of the three major classifications into a single volume and the adoption of uniform rules and descriptions (1919), but much progress has been made in the elimination of the superfluous and burdensome state classifications. It appears that all states except Illinois have adopted the governing interstate territorial classification, although some southern states are still engaged in removing certain exceptions to classification and less-than-carload commodity rates. I. C. C. ANNUAL REPORTS: 1920, pp. 44-46; 1926, p. 47; Southern Class Rate Investigation, 100 I. C. C. 513 (1925).

[10] Because of the usefulness of statistical data in the regulatory process, it was of prime importance that sound and uniform accounting and statistical methods be developed. Regulatory commissions, both individually and through the National Association, engaged in research and study of railway accounting practices and methods, form and content of carriers' reports, and methods of collecting and collating statistics. See PRO-

were of substantial aid to the Interstate Commerce Commission from the beginning. When the Commission undertook its comprehensive valuation project in 1913, the state commissions again rendered valuable service to the Commission and to the public.[11] These were matters

CEEDINGS: 1889, pp. 2-3, 9-23; 1907, pp. 84-87; 1908, pp. 138-142; 1910, pp. 21-23. In 1909 the Interstate Commerce Commission reported as follows with respect to the co-operation of the state commissions:

"Since 1887 there has been a close working understanding between the Interstate Commerce Commission and a large number of the state railroad commissions relative to the form of reports rendered by carriers. The accounting orders of the Commission, whether for steam railways, electric railways, express companies, or other transportation agencies engaged in both state and interstate business, have, without exception, been accepted by the state railroad commissioners. The forms of annual report also, so far as the fundamental principles and important classifications are concerned, are the same for the state commissions and the Interstate Commerce Commission. . . . It seems essential that the accounting and statistical work of all agencies of government which exercise supervision over common carriers should be conducted in the spirit of cooperation, and on this point the situation is wholly satisfactory." ANNUAL REPORT, 1909, p. 57.

In more recent years the state commissions have assisted the Commission in the investigation and formulation of regulations for the segregation of expenses and revenues as between freight and passenger service, the revision of the accounting regulations so as to provide for a system of continuous routine cost accounting, and the institution of a complete system of depreciation accounting for steam railroads and telephone companies. See In re Separation of Operating Expenses, 30 I. C. C. 676 (1914); General Revision of Accounting Rules for Steam Railroads, Proposed Report in I. C. C. Ex Parte 91 (1929); and Telephone and Railroad Depreciation Charges, 118 I. C. C. 295 (1926); 177 I. C. C. 351 (1931). In the fixing of rates of depreciation for the various classes of property of telephone companies the state commissions are to undertake the original investigations, the orders of the Commission to be made following the recommendations of the state commissions (177 I. C. C. 351 at 446). This procedure was inaugurated because the great bulk of telephone business is of "strictly local concern" and in order to relieve the Commission of the burden of determining depreciation percentages for the large number of operating companies. Steps were immediately taken by the state commissions, through the National Association, for preliminary research with respect to service lines and depreciation percentages of telephone plant and equipment. PROCEEDINGS: 1930, pp. 112-118, 257; 1931, pp. 136-146; 1932, pp. 410-451.

[11] Prior to the enactment of the Valuation Act of 1913 (37 Stat. 701), eleven states had engaged in the valuation of railroad property for rate-making purposes, thus focusing public attention upon the theories and methods of valuation and developing a mass of practical information and experience which was of value despite great variance in methods and standards (PROCEEDINGS, 1912, pp. 34-89). In the initial stages of the federal valuation project the co-operation of the state commissions took the form of participation by committees of the National Association in the conferences held by the Bureau of Valuation of the Commission with representatives of the carriers relative to procedure, interpretation of the language and terms in the statute, and the manner in which the various elements of value should be ascertained (PROCEEDINGS, 1914, pp. 170-185; 1915, pp. 375-378). Later, state commissions maintained close contact with the actual field work and made independent researches concerning various aspects of the valuation project, thus enabling the individual commissions and the Solicitor of the National Association to analyze critically the underlying engineering, land, and account-

for the most part upon which the state and federal interests were not in serious conflict, hence the regulatory agencies were able to approach them in an impartial and scientific spirit.

Co-operation was also tried with some success in the more controversial and difficult field of rate regulation. Lack of uniformity and harmony in intrastate-interstate rate relationships and the essentially harmful economic results flowing from narrow and selfish local rate policies were matters which confronted the Interstate Commerce Commission and the state regulatory bodies at an early date.[12] Co-operation between the commissions was suggested as a remedy by the Committee on Legislation of the National Association of Railroad and Utilities Commissioners in 1910.[13] But the idea was not pushed to the forefront until the United States Supreme Court upheld the Commission's authority to regulate intrastate rates which discriminated unjustly against persons and localities in interstate commerce, in the famous *Shreveport* decision of 1914.[14] In 1916 the Commission sought authority from Congress to permit it to co-operate officially with the state commissions in rate matters.[15] The National Association of Railroad and Utilities Commissioners supported the Commission's recommendation and adopted a resolution directing its committee on state and federal legislation to "confer and co-operate" with the members of the Commission in an endeavor to secure a congressional enactment authorizing co-operation.[16]

ing reports, and the tentative valuations submitted by the Commission, and to participate helpfully in conferences and hearings relative thereto (PROCEEDINGS, 1916, pp. 190-191, 200-202, 204-205; I. C. C. ANNUAL REPORT, 1925, p. 17). Such co-operative aid as was rendered the Commission by the state commissions was of particular significance from the point of view of the public interest, because no other private organization or governmental agency undertook to present the viewpoint of the public in opposition to the strong representations of the self-interested carriers.

[12] See, for example, In the Matter of Freight Rates, 11 I. C. Rep. 180 (1905); Saunders & Co. v. Southern Express Co., 18 I. C. C. 415 (1910); Railroad Comm. of Louisiana v. St. L. S. W. Ry., 23 I. C. C. 31 (1912); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913).

[13] See report, PROCEEDINGS, 1910, pp. 57-59.

[14] Houston & Texas Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

[15] The Commission stated (ANNUAL REPORT, 1916, p. 90):

> "Viewing the entire situation as it has been depicted in proceedings before us, affecting widely scattered localities and territories throughout the United States, we believe that without abdicating any of the federal authority to finally control questions affecting interstate and foreign commerce we should be authorized to cooperate with state commissions in efforts to reconcile upon a single record the conflict between the state and the interstate rates."

The recommendation was reiterated in ANNUAL REPORTS: 1917, pp. 58-59; and 1918, p. 3.

[16] PROCEEDINGS, 1917, p. 41.

The practicability of co-operative action had been established by the results achieved in a series of cases in which the Commission had held joint hearings with state commissions without sanction of statute.[17] The most fruitful of these cases appear to have been investigations involving the rates of the New England carriers. In the New England Investigation[18] the rates and charges of the Boston and Maine were reviewed in joint hearings and conferences by the Commission and the state commissions of Massachusetts, Maine, New Hampshire, and Vermont. Increases in class freight rates were agreed upon and were permitted to go into effect on both interstate and intrastate traffic.[19] Also, in Proposed Increases in New England,[20] all of the six New England state commissions joined with the Interstate Commerce Commission in its investigation. Advances in freight rates were agreed upon, which brought the rates on New England traffic substantially above those in the adjacent trunk-line territory. These experiences with co-operation while attempted in the relatively small and economically homogeneous area of New England, proved the feasibility of co-operation and augured well for its general acceptance.[21]

II

TRANSPORTATION ACT OF 1920

The authority of the Interstate Commerce Commission over interstate railroads was greatly extended in the Transportation Act. Among other things, the Commission was given control over consolidation and pooling,[22] the issuance of securities,[23] and the construction and abandon-

[17] ANNUAL REPORT, 1917, pp. 58-59.

[18] 27 I. C. C. 560 (1913).

[19] Letter from John E. Benton to Charles E. Elmquist, President of the National Association, dated January 29, 1919. Reprinted in SENATE COMMITTEE HEARINGS ON EXTENSION OF GOVERNMENT CONTROL OF THE RAILROADS, 1919, Vol. I, pp. 752-754.

[20] 49 I. C. C. 421 (1918).

[21] The RAILWAY AGE GAZETTE for December 7, 1917, commented editorially as follows (pp. 1012-1013):

"The plan followed in the conduct of the recent hearing at Boston in the New England rate advance case has made a very favorable impression upon railroad officers and others who were present. . . . We believe the only really effective way to accomplish the desired result would be to give the federal commission exclusive jurisdiction over the rates of carriers subject to its authority, but until this has been done, the commission's plan represents a desirable attempt toward a compromise."

[22] Interstate Commerce Act, sec. 5, pars. (1) to (9) incl. (U. S. C. tit. 49).

[23] Interstate Commerce Act, sec. 20a, pars. (1) to (11) incl. (U. S. C. tit. 49).

ment of lines.[24] Its power respecting car service and the routing of traffic was broadened,[25] and it was instructed to fix rates so that the carriers as a whole, under honest and efficient management, would earn a fair return upon the aggregate value of the property used for transportation service.[26] The Commission was given authority to prescribe intrastate rates in order to remove undue prejudice against persons and localities in interstate commerce or "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." [27] This provision writes into the statute the authority already exercised under section 3 of the earlier act and upheld in the *Shreveport* case, but, as judicially construed, the provision goes beyond the doctrine of the *Shreveport* case. The Commission has the affirmative duty to fix rates which will permit the maintenance of an adequate transportation system, and the prohibition of "unjust discrimination against interstate commerce" has been interpreted to include substantial disparities in the levels of interstate and intrastate rates which cause a burden upon interstate commerce through the failure of intrastate traffic to contribute a fair proportionate share to the cost of maintaining an adequate transportation system.[28] The Commission can prevent both prejudice to specific interstate localities and persons and the depletion of the revenues of the carriers caused by the imposition of unduly low intrastate rates by state authority.

In order to safeguard the interests of the states and to utilize the services of the state commissions in the administration of this more comprehensive regulatory statute, whose provisions vacated some powers formerly exercised by the states, Congress provided a legal basis for co-operation between the state and federal tribunals.[29] The statutory authorization provides, first, that the Commission shall notify interested states of all proceedings bringing into issue any rate, regulation, or practice made or imposed by state authorities; second, that the Commission may confer with state authorities with respect to the "relationship between rate structures and practices" of carriers subject to state and federal regulation, and may, under rules to be prescribed by it, hold joint hearings "on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or

[24] Interstate Commerce Act, sec. 1, pars. (18) to (22) incl. (U. S. C. tit. 49).
[25] Interstate Commerce Act, sec. 1, pars. (10) to (17) incl. (U. S. C. tit. 49).
[26] Interstate Commerce Act, sec. 15a (U. S. C. tit. 49).
[27] Interstate Commerce Act, sec. 13, par. (4) (U. S. C. tit. 49).
[28] Wisconsin R. R. Comm. v. C., B. & Q. R. R., 257 U. S. 563, 42 Sup. Ct. 232 (1922).
[29] Interstate Commerce Act, sec. 13, par. (3) (U. S. C. tit. 49).

may be affected by the action taken by the Commission"; and, finally, that the Commission may "avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act." These provisions grant to the Commission in broad terms the authorization sought by it and the state commissions. In order that the state authorities may be aware of any proceedings bringing into question their prescribed rates or regulations, the Commission is required to give them due notice, thus insuring them an opportunity either to intervene in behalf of local interests or to suggest co-operative action. Joint hearings and conferences are provided for at the discretion of the Commission. It was contemplated that the method of harmonizing conflicting views through deliberations upon a joint record, already successfully tried in rate cases prior to 1920, would be employed as the regular procedure. Utilization of the facilities and services of the state commissions, while not mandatory upon the Commission, is designed to enhance the efficiency of administration and to promote co-operation in general.

Having obtained the desired congressional authorization, the next step was the working out of satisfactory arrangements for actual co-operation. Early efforts to arrive at an agreement between the Commission and the state commissions were not successful.[30] It was not until the Supreme Court had upheld the Commission's exercise of authority over the general level of discriminatory intrastate rates and had referred with approval to the use of the co-operative method in

[30] The initiative was taken by the state commissions through the National Association, but the attitude of the Commission precluded an agreement upon principles and procedure. The Commission took the position that co-operation was inappropriate in two classes of cases, namely, those in which a disparity between intrastate and interstate rates was due to the requirements of state law which the state tribunal deemed itself unable to alter, and those in which a rate disparity was caused by the action of the state commission itself and in which it appeared as a party in the litigation. The representatives of the National Association urged that these classes of cases were the very ones to which the co-operative procedure should be applied in order that the exercise of federal power might be avoided. There can be no doubt that Congress intended the inclusion of the typical Shreveport case in the plan for co-operation. As the committee of state commissioners stated:

> "All of the discussion of cooperation which antedated the enactment of the provisions of section 13 (3), of which we have any knowledge, went upon the theory that frank and full discussion and comparison of information and views would in a given case be likely to lead to common conclusions, either as to the non-existence of discrimination, or as to the method by which it should be removed." PROCEEDINGS, 1921, p. 309.

intrastate rate cases,[31] that the Commission was willing to subscribe to a formal plan.[32]

The final co-operative agreement deals primarily with the classes of cases in which co-operation may be invoked and the procedure to be followed. Prefaced by conciliatory statements concerning the common purpose of state and federal control and the general aims of co-operation, the document mentions specifically certain types of cases which may be handled co-operatively, and includes others in general terms. Those enumerated are: rate cases before the Commission which involve intrastate rates alleged to discriminate unjustly against interstate commerce or interstate rates whose modification may substantially affect the relationship between state and interstate rate structures, rate cases before state commissions in which decisions may affect intrastate-interstate rate relationships, applications for certificates of convenience and necessity involving construction of new lines or abandonment of existing lines, and proceedings with respect to car service. But the plan also mentions "any matter or proceeding where the one commission may be of the opinion that matters of mutual concern are involved and where cooperation may be had to advantage."[33] Thus, no matters are specifically excluded from the co-operative arrangement; the general provisions permit of the inclusion of practically any proceeding or administrative matter in which conflict of regulatory authority might occur.

Joint conferences and hearings are the forms of co-operative procedure provided for in the agreement, which relates almost entirely to rate proceedings. Since co-operation is a matter of agreement between the interested commissions, the preliminary step must be notification of pending proceedings and an exchange of views as to whether co-opera-

[31] In Wisconsin R. R. Comm. v. C., B. & Q. R. R., 257 U. S. 563 (n. 28, supra), the Supreme Court stated (p. 591):

"in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion."

[32] The original plan was formulated by a joint committee of state and federal commissioners in May 1922. A revised plan, extending the principle of co-operation to virtually all regulatory matters and modifying the details of procedure slightly, was adopted by the Commission and the National Association in October 1925. The co-operative agreements are set forth in I. C. C. ANNUAL REPORTS: 1922, pp. 233-234; and 1925, pp. 273-277.

[33] COOPERATIVE AGREEMENT, PROCEDURE RECOMMENDED, par. 4 (I. C. C. ANNUAL REPORT, 1925, p. 275).

tion shall be invoked. It is provided that either a state or the federal commission may suggest co-operative action in any proceeding before the other tribunal. If the commissions concur as to the desirability of acting co-operatively, a joint conference is to be held to survey the situation and to arrange for a joint hearing if such is deemed advisable. If the case goes to trial, the next step is the holding of the joint hearing "provided a proceeding or proceedings be pending before the State commission in which action can be taken upon the common record." [34] The latter condition is easily met either through the institution of proceedings by the carriers or by the state commission on its own motion.[35] A second prerequisite relating to the joint hearing is that state commissioners or their representatives shall not sit with members of the Commission or its examiners in cases in which they appear as advocates.[36] The purpose of this rule is to harmonize the co-operative procedure with the well-founded legal doctrine of separation of the judicial function from that of the advocate. It is intended to eliminate prejudice and partisanship on the part of the co-operating commissioners. But the regulation, as stated in the agreement itself, does not debar a state commission from "causing pertinent evidence to be presented in any such case with respect to the matters in issue." [37] Statutes of various

[34] COOPERATIVE AGREEMENT, PROCEDURE RECOMMENDED, par. 1 (I. C. C. ANNUAL REPORT, 1925, p. 275).

[35] John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, comments as follows in Bulletin No. 92-1930, p. 2, reprinted in PROCEEDINGS, 1930, pp. 142-143:

> "The cooperative agreement . . . states the case where proceedings are pending before each commission as that in which a joint hearing should be had. . . . The condition, recognized as desirable in the case of cooperation, . . . is ordinarily met by state commissions without difficulty. . . . In some cases in which the cooperation of state commissions with the federal commission is considered desirable by both, it is not practicable, or perhaps even possible, to meet the condition as to the pendency of proceedings before both. The agreement itself recognizes that there may be 'special cases where it may be found necessary or desirable to depart therefrom.' . . . In such cases cooperation may be arranged without regard to the pendency of proceedings. Examples are *Mutual Creamery Co. v. American Express Co.*, 132 I. C. C. 207, *Ex Parte* 87, and the several No. 17,000 proceedings. In these the fact that before various commissions no proceedings were pending was not considered an impediment to cooperation by those commissions, and to their representation upon cooperating committees."

[36] The prohibition is put delicately but clearly as follows: "It is our judgment that State commissioners or their representatives would not expect or desire to sit with members of the Interstate Commerce Commission . . . in any case in which they appear as advocates." COOPERATIVE AGREEMENT, PROCEDURE RECOMMENDED, par. 5 (I. C. C., ANNUAL REPORT, 1925, p. 275).

[37] COOPERATIVE AGREEMENT, PROCEDURE RECOMMENDED, par. 5 (I. C. C., ANNUAL REPORT, 1925, p. 275).

states require the state commissions to represent the interests of shippers in proceedings before the Commission, but active co-operation by state authorities does not preclude compliance with these laws. However, it is presumed that the rate experts and attorneys of the state commissions will participate in co-operative cases not in the capacity of litigants but for the purpose of introducing evidence which will yield a richer and more comprehensive record.[38] The whole matter of partisanship in the actual operation of the co-operative procedure raises some difficult issues and problems which will be treated at a later point in this paper.[39]

Following the joint hearing, the accepted procedure contemplates the holding of informal conferences by the co-operating state commissioners and the federal commissioner or examiner, upon the issues and the evidence developed in the common record. When a co-operative case comes to oral argument before the Commission "it is to be understood that the cooperating state commissioners will be expected to sit with the Interstate Commerce Commission at the argument, if they so desire, and afterwards to take part in a joint conference to consider the disposition of the case." [40] In the final disposition of the case, therefore, the co-operating commissioners have ample opportunity to deliberate with and advise the members of the Commission. It is believed that the personal contacts and exchange of ideas afforded by these private and informal conferences will yield a better mutual understanding of the issues and result in decisions which adjust conflicting points of view in a manner satisfactory to both local and national interests.

The plan of co-operation, outlined above, is notable for its simplicity and lack of rigid rules and regulations. It suggests a course of procedure which is flexible and well calculated to bring the commis-

[38] Note the following from John E. Benton in Bulletin No. 92-1930, Nat. Ass'n of Railroad and Utility Com'rs, p. 4, reprinted in PROCEEDINGS, 1930, p. 145:

> "The rule, however, does not prevent a state commission from permitting its attorneys and experts to aid in developing the record by the preparation and presentation of evidence, and by briefing and arguing the same. . . . The design of such participation, however, should be the same as is the design of the Interstate Commerce Commission or of a state commission when it causes its own experts to introduce evidence in a proceeding before itself alone. They do not appear in the capacity of litigants or partisans, but to illuminate the record, and thus to enable the commissioners more certainly to reach right conclusions."

[39] See PROCEEDINGS, 1925, pp. 54-67, for an interesting debate by the members of the National Association of Railroad and Utilities Commissioners upon the question of the propriety of state commissions performing the dual functions of judge and litigant in co-operative proceedings.

[40] COOPERATIVE AGREEMENT, PROCEDURE RECOMMENDED, par. 9 (I. C. C. ANNUAL REPORT, 1925, p. 276).

sioners together on a common basis so that differences may be composed and maladjustments averted. However, a system of rules and regulations alone will not promote real co-operation. Working together for the attainment of a common goal must "in the nature of things be of the spirit," a fact recognized in the co-operative agreement. In order to appraise the system of co-operation which has evolved under the accepted procedure, one must look to the way it has actually functioned.

III

COOPERATION SINCE 1920

Since the enactment of the Transportation Act, and particularly since the promulgation of the original co-operative agreement in 1922, co-operation has become an established practice in several of the more important fields of regulatory activity. The formal co-operative procedure was designed primarily to deal with rate control, inasmuch as independent action on the part of the state and federal tribunals wrought the greatest injury to the shipping public and the carriers in this field. But co-operative action has also developed in the regulation of car service and extensions and abandonments under different and somewhat less formal methods. Co-operation in all of these fields will need to be examined. Accordingly, the method of co-operation, its extent, the benefits derived from it, and its limitations will be taken up, first as to car service matters, then as to extension and abandonment cases, and finally as to rate cases.

1. *Car Service Matters*

Even in normal circumstances equitable rules and practices concerning the quality and quantity of car service to shippers are of interest to the public. In times of car shortage the problem of service and distribution becomes a matter of grave concern. Accordingly, the Commission has been vested with complete control over the carriers' regulations and practices relating to adequate car service in normal times, and has been endowed with sweeping powers to suspend summarily existing regulations and to dictate regulations for the operation of railway equipment and facilities in the event of shortage of equipment, congestion of traffic, or the existence of any other emergency requiring immediate action.[41] By the exercise of this broad authority, the states are

[41] Interstate Commerce Act, sec. 1, pars. (10) to (17) incl. (U. S. C. tit. 49). See 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 235-239 (1931), for an incisive analysis of the car-service provisions.

precluded from asserting control over car service matters in interstate commerce.[42] In fact, the assertion of control by the Commission interferes with and actually prevents state regulation of car service and distribution in purely intrastate commerce. The reason for this sweeping effect of federal orders is that both kinds of traffic depend upon the same supply of cars for their movement, and it is virtually impossible to assign cars for use in the one kind or the other. As the Commission stated in the first case involving the assignment of cars to coal mines in times of car shortage, a carrier "can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense." [43] It is quite impracticable, therefore, to attempt to divide the regulatory authority on the basis of the destination of the cars. Any rules or regulations promulgated for equitable car distribution must apply to both types of traffic, and such has been the practice of the Commission in the exercise of its authority.[44] It should be noted, however, that the Interstate Commerce Act provides that nothing in the act shall impair the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, "except in so far as such requirement is inconsistent with any lawful order of the Commission." [45] In territory where no order of the Commission is in force with respect to the distribution of cars, the state commissions can make regulations to protect intrastate shippers, and such orders will necessarily affect interstate traffic, for the available cars will be allocated as between all industries and shippers.

That the matter of car service and distribution is one of national concern and can be handled adequately only by a national agency is

[42] With few exceptions, state statutes relating to car-service and distribution regulations affecting interstate transportation have been declared invalid by the United States Supreme Court. See Chicago R. I. & P. Ry. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174 (1913); Missouri Pacific R. R. v. Stroud, 267 U. S. 404, 45 Sup. Ct. 243 (1925).

[43] Railroad Commission of Ohio v. Hocking Valley Ry., 12 I. C. Rep. 398 at 403 (1907).

[44] Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520 (1923); 93 I. C. C. 701 (1924). Also, in the exercise of emergency powers, see: traffic congestion of 1920, ANNUAL REPORT, 1920, pp. 11-25; coal strike of 1922, ANNUAL REPORT, 1922, pp. 9-16; Florida boom of 1925, ANNUAL REPORT, 1926, pp. 61-63; Mississippi flood, ANNUAL REPORT, 1927, pp. 35-36.

[45] Sec. 1, par. (17).

not open to serious doubt. In making and enforcing rules with regard to the distribution of cars as between large trunk-line carriers, the state commission, with its limited territorial jurisdiction, would be quite ineffective. In transportation emergencies, such as occurred in 1920 on a nation-wide scale and such as arise in various sections of the country from time to time because of strikes, booms, and seasonal demands for the movement of such commodities as fruits, grain, and coal, it is patent that only a centralized organization with the power to control and co-ordinate the whole of the nation's transportation facilities can effect a free and orderly distribution of commodities. But close supervision is of paramount importance in order to secure good service continuously. Unlike the fixing of a schedule of rates, which virtually enforces itself after the schedule has been settled, the quality of service is affected by a whole series of acts, large and small, performed by shippers and by individuals in the employ of the carriers. To control all these acts, an administrative organization is required which maintains close contact with situations throughout the country and which is capable of adjusting difficulties with promptness and ingenuity.

The state commissions have felt from the beginning that it is impracticable for the Interstate Commerce Commission to attempt to supervise the distribution of cars as between individual shippers throughout the United States, and that shippers should be able to appeal to governmental agencies within reasonable reach to enforce car service rules. But while they have been unsuccessful in any attempts to increase their authority,[46] they have been drawn into the picture by the Commission itself through the avenue of co-operation, direct or indirect.

Because car shortages and emergencies arise sporadically and make necessary only the occasional mobilization of regulatory forces, direct co-operation is less frequent than it is in rate and extension and abandonment proceedings. However, it was stated by the Commission in the Annual Report for 1926 that "in matters affecting car service nearly all of the States have lent us their aid. In some no occasion arose, and in others more than one." [47] Co-operation was had by the Commission

[46] The National Association of Railroad and Utilities Commissioners adopted resolutions in 1923, 1924 and 1925, urging Congress to amend the Interstate Commerce Act in such wise that the state commissions could make reasonable orders and regulations, not in conflict with federal laws or orders, requiring cars within their borders to be equitably distributed to both interstate and intrastate shippers. PROCEEDINGS, 1923, p. 277; 1925, p. 386.

[47] ANNUAL REPORT, 1926, p. 1.

in six car-service cases in each of the years 1926 and 1927; [48] in more recent reports it is mentioned that no co-operation was had in such cases. But indirect co-operation on the part of the state commissions is more or less continuous. This is given through their participation in the work of the Regional Shippers' Advisory Boards, voluntary organizations of shippers functioning under the auspices of the Car Service Division of the American Railway Association.

The transportation breakdown which occurred in 1920 will serve as an example of the way in which the state commissions have aided the Commission and the public. Due to the unprecedented traffic congestion and upon appeal by the carriers, the Commission invoked its emergency powers and required carriers, among other things, to forward traffic by the most available routes regardless of routing, to suspend conflicting car-service regulations and rules, and to allocate empty equipment among the lines in a prescribed manner. In order to obtain full and accurate information with respect to traffic conditions throughout the country, particularly at important gateways, the Commission organized terminal committees in thirty railroad centers. These committees were composed of a federal service agent, who acted as chairman, and representatives of the shippers, the carriers, and the state regulatory commission. In addition to keeping the Commission advised as to conditions and needs, the committees were expected to do that which could be done informally to relieve congestion and to facilitate the movement of commodities. According to the Commission, "these committees played an important part in relieving the unprecedented congestion." [49] Although the immediate purpose for their organization passed with the return to normal, the committees were continued for a time in order to insure the fullest co-operation between the carriers and the regulatory bodies.[50]

[48] ANNUAL REPORT, 1926, p. 1; 1927, p. 65.

[49] ANNUAL REPORT, 1920, p. 16.

[50] Several other instances of co-operation are worthy of note. With the resumption of mining in the Pennsylvania bituminous coal fields following the strikes of the union coal miners and railroad shopmen in 1922, it was found necessary to supervise the shipments of coal out of the state in order to facilitate the movement and to secure equitable distribution of loadings to the various important consuming destinations. The Commission established co-operative relations with the Pennsylvania Commission to achieve these ends, certain agents of the state body being appointed federal agents to perform the function of designating the class of priority for interstate shipments. Thus, advantage was taken of the expertness of state officers with respect to local service problems and the wasteful duplication of facilities was avoided. (ANNUAL REPORT, 1922, pp. 9-16.) The Wisconsin Railroad Commission and the Interstate Commerce Commission conducted a joint investigation with respect to complaints of unsatisfactory service

Since 1927 the Commission has divided the country into fifteen zones for the purpose of administering car-service provisions, and a service agent has been assigned to each zone with headquarters at an important terminal. This makes it possible for the agent to keep in close touch with commodity movements, the supply of equipment, and car distribution, and to note abnormal circumstances and adjust matters of dispute between carriers and shippers. According to W. P. Bartel, Director of the Bureau of Service, the relations between the service agents and the state authorities are very friendly and mutually advantageous. When complaints of poor service or disputes are brought to the attention of the state commissions, they often appeal to the service agents for assistance. In like manner the state officials render assistance to the service agents.

Indirectly the state commissions and the Interstate Commerce Commission co-operate in service matters through the operations of the Regional Shippers' Advisory Boards. These boards, thirteen in number, are comprised of shippers within designated operating territories. They meet at three-month intervals for the purpose of considering economic and transportation conditions, settling differences between shippers and the railways, effecting a more even distribution of commodities, and estimating the car requirements for the succeeding ninety days.[51] It appears that the efforts of the boards, particularly in analyzing transportation requirements for the future and leveling out the volume of distribution, have been of great value to the carriers in avoiding car shortages at the sources of production, and congestion at consuming points.[52] From their inception the Interstate Commerce

in the transportation of livestock. The commissions found that the complaints were well-founded and through informal negotiations with the railways succeeded in obtaining readjustments of practically all livestock schedules from shipping points in Wisconsin to the livestock markets of Chicago and other cities. Loading at a more satisfactory time in the day, shortening the time en route, and eliminating in some cases the necessity for feeding in transit constituted substantial relief to the farmers of the state. (ANNUAL REPORT 1930, p. 46.) A similar case involved the attempts of the commissions of Florida, Alabama and North Carolina to secure express refrigerator carload service in the transportation of strawberries and dewberries from the South to the North in place of the regular freight service, thus cutting down the time in transit. Failing in their efforts, the state commissions appealed to the federal Commission, who investigated the situation and ordered the establishment of the improved service. Transportation of Strawberries by Express, 151 I. C. C. 553, 156 I. C. C. 4 (1929).

[51] For a statement of the objects of the Regional Shippers' Advisory Boards, see PROCEEDINGS OF THE TRANS-MISSOURI-KANSAS SHIPPERS' ADVISORY BOARD, 13th Regular Meeting, March 16, 1926, p. 3.

[52] Note the following:

"The 13 regional advisory boards of the American Railway Association have

Commission has endorsed their program and has predicted valuable contributions to the improvement of railway service.[53] Agents of the Bureau of Service of the Commission attend their meetings quite regularly, with the intent of acquainting themselves with current and anticipated developments and of rendering aid in the carrying out of specific projects. The information concerning commodity production and distribution and transportation requirements brought together by these organizations is of value to the regulatory agencies. Moreover, to the extent that service problems are attacked and solved through joint action of shippers and carriers, the Commission is relieved of mediatory and regulatory tasks which doubtless it is pleased to relinquish.[54]

The state commissions fit into this general picture, as already pointed out, through their participation in the activities of the Regional Advisory Boards. Representatives of the state commissions within the jurisdiction of each board are members-at-large in practically all cases. As such they usually attend the meetings and participate in the deliberations, even if they do not play an active part in the functioning of the boards. But in a number of the shippers' organizations — particularly in the Middle West, where car supply is a real problem at times

manifested even greater activity during the past year than before, demonstrating further the value of this form of cooperation between industry in general and the railroads in maintaining efficiency in railway service. . . . Prompt loading and unloading of cars, and the more efficient utilization of freight cars through heavier loading, have received serious consideration, to the benefit of shippers and receivers of freight as well as of the railroads. . . . Through the advisory boards, estimates of freight-car requirements for both seasonal and regular-moving freight are being obtained. These national forecasts, issued quarterly, have not only proved valuable to the railroads in planning the mobilization of their equipment to meet the needs of industry, but they also are being used quite extensively as indicators of business trends. It is, moreover, in part due to the efforts of these organizations that freight is delivered today in approximately one-half of the time required eight years ago." 1 COMMERCE YEARBOOK, 1930, p. 569.

[53] The Commission has said: "Both carriers and shippers are thus in position to understand more clearly each other's problems, and through this meeting on common ground can harmonize their differences. As a result better transportation service seems assured." (ANNUAL REPORT, 1923, p. 54.) Again: "Much good has been accomplished and better transportation service secured through these cooperative efforts. Our service agents work in close cooperation with these boards, and attend the meetings whenever practicable to do so." *Ibid.*, 1924, p. 63.

[54] In practical administration probably the closest contacts of the Commission are maintained with the parent organization, the Car Service Division of the American Railway Association. It is through the Car Service Division that car service rules are devised and agreed upon by the railways, subject to the approval of the Commission, and their observance urged and enforced. The representatives of the two service agencies exchange information and co-operate in the solution of such specific problems as those attending the seasonal movements of grain and citrus fruits.

— the members of state commissions have taken a most active part, even the leading rôle in some instances.[55] Thus, some state commissions have aided substantially in developing good transportation service, and have been of assistance to the Car Service Division and the Interstate Commerce Commission.[56]

Summarizing briefly, it has been noted that although the Interstate Commerce Commission has occupied the field of car-service regulation to the exclusion of the states even as regards intrastate commerce (when federal orders are in effect), the state commissions participate in the regulatory process through co-operation. Directly, they have assisted in the handling of emergency situations, and have worked with the Commission in the investigation and disposition of car-service matters both informally and formally. Indirectly, the state regulatory bodies

[55] For example, Chairman Clyde M. Reed of the Kansas Commission, Commissioner H. G. Taylor of Nebraska, and Chairman Burr of the Florida Commission have occupied the posts of chairmen of the Trans-Missouri-Kansas Board, the Central Western Regional Board, and the Florida Advisory Board, respectively.

[56] Note the following from an address by Mr. H. G. Taylor, Manager of the Public Relations Committee of the American Railway Association:

"In the creation of these Advisory Boards the railroad commissions particularly of the Missouri and Mississippi valleys were substantial factors in the pioneering work that was necessary and in the support to these organizations which was essential in making them a success at the beginning. This was true of practically all the commissions from Texas north until we reached North Dakota. . . ." PROCEEDINGS OF THE NORTHWEST SHIPPERS' ADVISORY BOARD, 28th Meeting, July 23, 1929, p. 14.

The emergency situation created by the Florida boom of 1925 and 1926 affords a specific example of leadership and co-operation by state authorities. Because of the unprecedented volume of traffic destined for Florida East Coast points and the inadequacy of facilities, it became necessary to place an embargo upon all carload freight moving into Florida, with the exception of food, perishables, and petroleum products. Representatives of the Federal Bureau of Service and the Car Service Division worked with the carriers and the receivers of freight in an effort to straighten out the transportation tangle, but it seems that the potent factor in bringing order into the situation was the work of the Florida Advisory Board of Shippers and Receivers of Freight, organized by the Florida Railroad Commission and the Car Service Division. The Advisory Board, with Chairman Burr of the state commission as chief executive, established operating machinery for controlling the volume of traffic, for the division of available transportation equitably among all receivers, and for the improvement of facilities. Permits for the movement of goods were issued by the carriers on the basis of the information assembled and supplied by the Advisory Board. The system was eminently successful in meeting the problem, and a large share of the credit for the beneficial results seems to be due to the Florida Railroad Commission, whose chairman participated most actively in the work of the Advisory Board. I. C. C. ANNUAL REPORT, 1926, pp. 61-63; Railroad Commission of Florida, ANNUAL REPORTS: 1925, pp. 28-30, 15-21; 1926, pp. 20-25; PROCEEDINGS OF THE FLORIDA DIVISION OF THE SOUTHEASTERN ADVISORY BOARD, 4th Meeting, May 15, 1926, p. 15.

have co-operated through their activities in the Regional Shippers' Advisory Boards. Through these practical expedients the state commissions have voluntarily served the Commission in matters touching closely the interests of local shippers. Being conversant with local situations, the state commissions are in a position to do effective work in devising and enforcing regulations for local car distribution and in adjusting tangled local traffic conditions.

However, it is unlikely that the state commissions will play more than a supplementary part in this field. With the development of extensive field services by the Car Service Division of the American Railway Association and the Bureau of Service of the Interstate Commerce Commission, the needs in this direction are fairly well taken care of. These agencies not only maintain reasonably close contact with local situations, but are so centralized and unified as to be able to control and supervise the distribution of the nation's total supply of railway equipment and services in the interests of all shippers and consumers.

2. *Extension and Abandonment Cases*

Investing the Commission with control over new construction and abandonments has had the effect of divesting the states of practically all authority over interstate carriers in this field.[57] This was undoubtedly in the best interests of effective regulation. The close relationship between property investment of carriers and their financial status requires that the regulatory agency having responsibility for the adequacy and efficiency of the transportation system be given complete control over matters affecting the carriers' financial resources. Nevertheless, questions of constructing or abandoning rail properties may be of great local concern, and state regulatory bodies, having intimate knowledge of local conditions and being appreciative of local interests and needs, should have a part in their consideration and disposition.[58]

[57] Two decisions of the Supreme Court are significant. In Texas v. Eastern Texas R. R., 258 U. S. 204, 42 Sup. Ct. 281 (1922), the Commission was upheld in its authorization of the abandonment in interstate commerce of an interstate carrier's entire line located wholly within the state of Texas. Authority to permit abandonment of intrastate operations was denied, for after discontinuance of interstate service no shortage in earnings could burden interstate commerce. It was held in Colorado v. United States, 271 U. S. 153, 46 Sup. Ct. 452 (1926), that the Commission has the authority to permit the total abandonment of a branch line located wholly within a state, owned and operated by an interstate carrier.

[58] It is worthy of note that in order to ensure the proper consideration of local interests, the Interstate Commerce Act [sec. 1, par. (19)] provides that a copy of every application for an extension or abandonment of line must be filed with the governor of

The Commission has recognized this fact, and has realized from the beginning that the state commissions can be of material assistance to it in this regard. Co-operative relations with the state commissions were established in this field as early as 1920, and the Commission was able to state in its Annual Report for that year that "the cooperation extended us by the state authorities in these matters has, in general, been prompt, cordial, and helpful." [59] This type of co-operation was, then, already well established some two years before an agreement between the state and federal commissions was reached concerning co-operation in rate cases.

Pursuant to the statutory provision that the Commission may avail itself "of the cooperation, service, records and facilities of . . . state authorities," [60] the most common method of enlisting the services of the state commissions is to invite them to hold the original hearings. The hearings are usually held by the full state commission or a member thereof, although in a few instances it has been noted that an examiner of the state tribunal is assigned to the task. Testimony is taken and transcripts, together with the exhibits, are forwarded to the Commission. Recommendations as to the disposition of the cases are usually accompanied by a detailed analysis of the evidence and a statement of the reasons for the suggested decision.

Another practice, although not common, is for members of state commissions to sit with examiners or members of the Interstate Commerce Commission. Federal commissioners were assisted by state commissions in the hearings on the proposed abandonments of the Boston & Maine in New England,[61] and the hearings on certain construction applications in the state of New Mexico.[62] The former proceedings involved a portion of the mileage contained in the Boston & Maine's proposed plan for the abandonment of about one thousand miles of line, and because the contemplated action seemed to be so important and far-reaching to both the carrier and New England interests, Commissioner Meyer sat with the New Hampshire and Massachusetts Commissions in order to obtain a thorough understanding of the situation.

each state affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities may make representations deemed proper for preserving the rights of their people.

[59] ANNUAL REPORT, 1920, p. 33.

[60] Interstate Commerce Act, sec. 13, par. (3) (U. S. C. tit. 49).

[61] Abandonment of Branches by B. & M. R. R., 105 I. C. C. 13 (1925); 105 I. C. C. 68 (1925).

[62] Proposed Construction of Line by C., C. & M. R. R., 94 I. C. C. 676 (1925); Construction of Extension by N. M. C. Ry., 99 I. C. C. 389 (1925).

That the co-operative method bulks large in the handling of extension and abandonment proceedings is evidenced by the fact that in the ten-year period following the enactment of the Transportation Act, the state commissions held hearings in 330 cases.[63] The total number of applications for certificates for construction and abandonment within the period, 1920 to 1930 inclusive, including those denied, issued, or dismissed, was 931.[64] In determining the ratio of cases heard by state commissions to the total number of cases disposed of by the Commission, it should be noted that a large percentage, probably about 35 per cent, is handled without formal hearing, some abandonment and a large number of construction applications being uncontested. Of the cases in which formal hearings were actually held, therefore, something over one-half were handled in co-operation with the state commissions.

The extent to which the Commission has accepted the findings and recommendations of the state commissions is important evidence of the effectiveness of the co-operative method. The Commission has repeatedly pointed out that it has followed the recommendations in a great majority of cases.[65] A review of the cases verifies this statement. Of the 160 abandonment cases in which hearings were held by the state commissions, recommendations were made in 95 cases. These were accepted in whole or in large part by the Commission in 77 cases and rejected in only 18 instances. With regard to construction cases, co-operation was had in 82 proceedings, and of the 54 recommendations, 44 were accepted and 10 rejected.[66] The disparity between the total number of cases heard by the state commissions and the number of recommendations is due to the fact that in some cases no formal recommendations as to disposition are made.

The making of recommendations to the Commission is not re-

[63] I. C. C. ANNUAL REPORTS, 1920 to 1930, incl. The period under consideration really extends from March 1, 1920, to October 31, 1930, something like ten years and eight months. However, the Commission had heard only nine cases and had decided none up to November 1, 1920.

[64] I. C. C. ANNUAL REPORTS, 1920 to 1930, incl.

[65] See, for example, ANNUAL REPORTS: 1921, p. 17; 1927, p. 4; 1933, p. 37.

[66] These figures were taken and compiled from the volumes of the Finance Reports issued from 1920 to 1930, inclusive, the cases being those decided up through October 31, 1930. It may be observed that only 242 co-operative cases are included in the above data, whereas the Annual Reports of the Commission indicate 330 for the period. This difference is accounted for by the fact that the Commission's figures deal with hearings in individual finance applications, whereas the writer's compilations relate to the number of reports, several applications occasionally being consolidated for hearing and decision.

stricted to proceedings in which the state commissions have held the hearings. Recommendations may be made in proceedings in which no hearings are required. Where hearings are not held by the state commissions it is probably true that their recommendations are less valuable. However, the record of acceptance by the Commission is quite as good. In the period under consideration recommendations were made in 67 abandonment cases and in 107 construction cases; they were accepted by the Commission in 56 and 95 cases, respectively.[67]

The degree to which the Commission has acted in accordance with the recommendations of the local regulatory agencies indicates that substantial weight has been given to their suggestions in reaching final decisions. This is to be expected in cases where state commissioners make impartial analyses of the facts and exercise sound judgment. Their knowledge of local situations is very apt to be superior to that of administrative officers far removed from the scene and too busy to go beyond a survey of the record in the proceedings. The aid of the state authorities is particularly valuable in proceedings involving the construction, abandonment, or unified operation of facilities of interstate carriers within great metropolitan areas such as New York or Chicago. For example, the New York Central sought authority to improve its facilities through the abandonment and new construction of lines within New York City. The Commission granted the application on the recommendation of the state commission. Although Commissioner Eastman entertained a somewhat different opinion with regard to the proper construction and ownership of the facilities, he concurred in the result. His remarks concerning the inadequacy of his knowledge of the situation and his reluctance to oppose the granting of the application are illuminating. He stated in his concurring opinion: [68]

> "In view of the tremendous amount of time which has been devoted to this project by the municipal, State, and railroad representatives and their agreement upon the plans which we are in effect asked to approve, and in view of my very inadequate

[67] Mr. Justice Brandeis, in his opinion in Colorado v. United States, 271 U. S. 153, 167, 46 Sup. Ct. 452, 455 (1926), sets forth comparable data with respect to the acceptance of recommendations of state authorities in abandonment cases decided prior to February 18, 1926.

[68] New York Central R. Co. Abandonment, 158 I. C. C. 309 at 312 (1929). For similar cases in which the recommendations of the California Commission were accepted, see Unified Operation at Los Angeles Harbor, 150 I. C. C. 649 (1929); Acquisition and Construction by Alameda Belt Line, 105 I. C. C. 349 (1926).

knowledge of the situation, I would not be justified in setting my opinion against theirs, even if I had a more positive conviction with respect to the project than I now entertain."

However, most abandonment and construction cases relate not to metropolitan areas, but to less populous communities scattered throughout the nation. Here, also, the opinions of the local authorities are highly regarded. When in 1925 the Boston & Maine, having been in a precarious financial condition for over a decade, sought to abandon the whole or portions of some sixteen unprofitable branch lines located in the states of New Hampshire and Massachusetts, the Massachusetts Department of Public Utilities participated in the hearings and conveyed extended recommendations to the Commission concerning the branch lines located within Massachusetts.[69] The cases involved the difficult task of weighing the benefits of continued operation to particular communities against the "burdens and retarding effect" of such operation upon the development of the Boston & Maine system as a whole. As the Interstate Commerce Commission stated: "In all of these cases we are confronted with a great number of local issues as well as with the problem of deciding the question of what will ultimately benefit the greatest number to the largest extent." [70]

The Massachusetts Commission reviewed the evidence and recommended that permission be granted to abandon four branch lines and portions of two others, a total mileage of approximately 35 miles. Substitute motor service was to be maintained by the carrier where conditions warranted such service. Public convenience and necessity were deemed to require the operation of the balance of the mileage under consideration, about 51 miles of line. However, negotiations undertaken by the state commissioners with the railroad resulted in the formulation of plans for curtailment of service and other operating economies on these lines, which were expected to effect substantial reductions in the cost of operation. The decisions of the Commission [71] were in strict conformity with the recommendations of the Massachusetts Commission, with the result that needless expenditures were eliminated and service reasonably required by the public was re-

[69] Letter from the Massachusetts Department of Public Utilities to the Interstate Commerce Commission, July 25, 1925, RECORD, FINANCE DOCKET No. 4353; *ibid.*, July 15, 1926, RECORD, FINANCE DOCKET No. 5096.

[70] B. & M. R. R. Abandonment of Branches, 105 I. C. C. 68 at 69 (1925).

[71] B. & M. R. R. Abandonment of Branches, 105 I. C. C. 68 (1925); Abandonment by B. & M. R. R., 117 I. C. C. 679 (1927).

tained.[72] The activity of the local authorities in working informally with the railroad in the removal of wasteful services was a significant factor in the proceedings and suggests the possibilities of the co-operative plan in this direction.

Likewise, sound analyses of applications for the construction of new lines have been forwarded to the Commission in an impressive number of cases. Frequently, very complicated situations arise where two or more carriers seek to extend their lines into areas that are deemed to require railroad service, and the recommendations of the state commissions serve as valuable guides in reaching decisions. For example, in a proceeding involving the applications of the Northern Pacific and a subsidiary of the Great Northern to construct extensions of their lines into the same general area in eastern Montana, the Montana Commission held the hearing and issued a comprehensive report. It found that the construction of a line was in the public interest, but that undue duplication of facilities would result if both lines were built; it recommended the granting of the petition of the Northern Pacific.[73] The factors which led to the support of the project of the Northern Pacific were, among others, the probability of greater net earnings despite the greater mileage required, and the practically unanimous endorsement of the communities to be served. The decision of the Commission adopted the well-reasoned opinion of the Montana Commission.[74]

It is to be expected, of course, that the Commission will not accept recommendations of state commissions in all cases.[75] Indeed, one

[72] There have been numerous instances where, at the suggestion of the state commission, authorization to abandon has been denied or deferred until some future date. This has given the patrons of the line an opportunity to show whether with their co-operation and patronage financial results will improve, or, if the situation seems hopeless, an adequate opportunity to devise means of securing substitute transport service. See, for example: Abandonment of Red Mountain Branch by N. P. Ry, 86 I. C. C. 609 (1924), 99 I. C. C. 618 (1925); Abandonment of Line by C., M. & St. P. Ry., 99 I. C. C. 493 (1925), 162 I. C. C. 89 (1930); Abandonment of Portion of Southern Ry., 117 I. C. C. 47 (1926).

[73] Report of Montana Board of Railroad Commissioners, RECORD, FINANCE DOCKET No. 5941.

[74] Construction by Northern Pacific Ry., 124 I. C. C. 547 (1927). For a similar proceeding involving the applications of four carriers to construct approximately 677 miles of main line and branches in the so-called South Plains area of Texas, see Construction by Ft. Worth & Denver South Plains Ry., 117 I. C. C. 233 (1926). The result conformed with the recommendations of the Texas Commission in part.

[75] Counsel for the parties in a proceeding often appeal to the Commission's past record in adopting the great majority of recommendations of state commissions when the recommendation conforms with their views. See Abandonment by Detroit & Mack-

would be skeptical of the co-operative arrangement if all recommendations were accepted, for it would indicate the subordination of the federal agency to the wills of the states, a result repugnant to the idea of a responsible, centralized regulatory system. Not all opinions of state commissions are based upon impartial analyses of the facts or the application of sound principles. Abandonment cases appear in which the recommendations of the state commissions have given undue weight to local need for service, and have neglected losses incurred and their effect upon system revenues as a whole.

When the abandonment of a railroad in its entirety is in issue and the showing of a sustained loss is made, it is well established law as well as sound economic doctrine that the constitutional guarantee of due process of law precludes enforced operation.[76] Yet decisions have been recommended by the state commissions which would have amounted to confiscation, thus making impossible their acceptance by the Commission.[77] However, the great majority of abandonment ap-

inac Ry., 138 I. C. C. 576 (1928). An elaborate argument for the acceptance of a state commission's opinion was made in the petition for rehearing in Construction of Line by Jefferson Southwestern, 76 I. C. C. 778 (1923); 86 I. C. C. 796 (1924). It was first pointed out that the members of the Illinois Commission were charged by statute with the duty of familiarizing themselves with transportation conditions and the needs of the public throughout the state, and that because of the limited territory they were more intimately acquainted with local conditions than the federal Commission could possibly be. It was stated:

> "The members of the Illinois Commission heard the evidence in the case. . . . Obviously they enjoy an advantage in weighing the evidence and reaching a proper conclusion upon it over the members of Division 4 of the I. C. C., who wrote the report and who heard not a syllable of the testimony and probably never met a single witness who testified in this case. It is hardly disrespectful to suggest, when we bear in mind the multitude of duties and the magnitude of the tasks confronting the I. C. C., that no member of Division 4 even saw the transcript, much less read the evidence in this case." Petition for Rehearing, RECORD, FINANCE DOCKET No. 2556.

[76] Railroad Commission of Texas v. Eastern Texas R. R., 264 U. S. 79, 44 Sup. Ct. 247 (1924), and cases there cited: Brooks-Scanlon Co. v. Railroad Comm. of Louisiana, 251 U. S. 396 at 399, 40 Sup. Ct. 183 at 184 (1920); Bullock v. R. R. Comm. of Florida, 254 U. S. 513, 520, 41 Sup. Ct. 192, 194 (1921). Mr. Justice Van Devanter stated in the Eastern Texas case (264 U. S. at 85):

> "The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road."

[77] In Abandonment of Wyoming & Missouri River Ry., 131 I. C. C. 145 (1927), the state commissions of South Dakota and Wyoming recommended the refusal of a certificate to a carrier operating 17.64 miles of line which had not earned its operating

plications relate to branch lines and as the law stands today a carrier has no absolute legal right to abandon an unprofitable branch line,[78] unless perhaps the operation of this line so depletes the revenues of the company as to render the operation of the whole unprofitable. Administrative tribunals invested with the authority to determine what public convenience and necessity require may exercise discretion in the matter within comparatively wide limits. Some proceedings relating to branch line abandonments, particularly of those carriers that are operated profitably as a whole, involve extremely close questions. Often it is difficult to ascertain whether or not a particular segment of line is operated unprofitably. Railway cost accounting has not been developed to the point where precise calculations can be made. Hence, there may be disagreement as to the actual existence of alleged losses. But state commissions have advised the denial of applications where it was clearly shown that the operating expenses and overhead charges properly allocable to a branch line greatly exceeded the operating revenues assigned to it on a mileage basis. They have been overzealous in their effort to protect the interest of the local shipper, and have recommended the denial of certificates on grounds that do not bear close scrutiny [79] or for reasons that have no direct relation to the question of abandonment.[80] The Commission, functioning within the

expenses since 1910. In view of the general lapse of agriculture in the region and the increased utilization of motor trucks, it seemed clear that there was no hope of profitable operation in the future. Similarly, in Abandonment of Hawkinsville & Florida Southern Ry., 70 I. C. C. 566 (1921), the Georgia Commission suggested the denial of the application of the receiver to abandon the 93-mile line. It was shown that a deficit of $408,643.97 had been incurred from June 1, 1913, to December 31, 1920, and that patrons of the line could be served by adjacent carriers. The superior court of Bibb County, Georgia, had previously decreed "that the further operation of the properties of the defendant is useless and wasteful and should be terminated in order that the properties and estate of the defendant should not be needlessly consumed," and had directed that authorization to abandon be sought.

[78] In Public-Convenience Application of G. B. & W. R. R., 70 I. C. C. 251 (1921), the Commission stated the rule of law as follows (p. 253):

"It has uniformly been held that the cessation of a particular service is not to be justified merely because it results in a loss, considered by itself, and that consideration must be given to the business as a whole. Atlantic Coast Line v. N. Car. Corp. Com., 206 U. S. 1; Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262; Puget Sound Traction Co. v. Reynolds, 244 U. S., 574. . . ."

[79] See, for example, Abandonment by Chicago & Alton R. R., 117 I. C. C. 711 (1927); Abandonment of Line by El Paso & S. W. R. R., 150 I. C. C. 577 (1929); Minneapolis, St. P. & S. S. M. Ry. Co. Abandonment, 162 I. C. C. 175 (1930); Abandonment of Line by C., M. & St. P. Ry., 82 I. C. C. 274 (1923).

[80] Abandonment by C., M. & St. P. Ry., 162 I. C. C. 449 (1930). The Wisconsin Commission conceded that the operation of the five-mile portion of line by the

bounds of the law relating to confiscation, cannot accept the recommendations of state commissions in these instances.

In cases relating to new construction, also, it is manifest that state commission suggestions cannot be accepted at all points. While public regulation cannot eliminate all risk of failure of enterprises, this should be one of the major ends in view in the granting of certificates for new construction. Whether a proposed line will be able to secure within a reasonable time sufficient traffic to pay the cost of rendering the service is always a leading issue. It is to be expected, therefore, that the Commission would refuse authorization for the construction of a line, of which it could say: "Our conclusion is that the project has not been well studied, that the engineering features are not sufficiently known, that the construction cost has been much underestimated, that the line would have no considerable value as a through route, and that it would not have enough traffic to justify its construction in whole or in part." [81] Yet the New Mexico Commission had recommended that permission to construct the line be granted.[82] A

Milwaukee was most unprofitable, but fastened on the point that its abandonment would result in a longer mileage for rate-making purposes between Milwaukee and Beloit and points beyond. Traffic had been routed over an alternative line of road in the past and the same service was to be rendered in the future. The state tribunal appealed as follows:

> "This commission does not feel that the Milwaukee Road should be permitted to select a longer mileage route, when they have a shorter mileage route that could and should be maintained. Wisconsin furnishes a great deal of business to the Milwaukee Road and this commission feels that the state is entitled to some consideration in return. . . ." RECORD, FINANCE DOCKET No. 7704.

[81] Public Convenience Application of C., C. & M. R. R., 86 I. C. C. 18 (1923). A new company proposed to construct a line of about 550 miles in length in the state of New Mexico, the railroad to be operated in conjunction with a 1200-mile proposed project in Mexico.

[82] RECORD, FINANCE DOCKET No. 2626. Excerpts from the Exceptions to the Examiners' Report, filed by the Attorney and Financial Agent of the applicant (*ibid.*), indicate the nature of the scheme and its sponsorship:

> "2. If a section of the country, needing development as badly as the one through which the proposed road would go and the builders are deprived of all constitutional rights by two examiners, who have no other interest in the matter other than the salaries which they draw, then it is time for us to revert more closely to the constitution where every man has the same right under the law. . . .
>
> "4. Just because the examiners cannot see tonnage sufficient to earn a fair return on the investment, is that a reason for turning down the application? None of our great railroad systems have had tonnage on paper to take care of a fair return on the investment and none of our great railroad systems which have had coal, iron, copper, lead, zinc, gold, silver, alum, agriculture, horticulture and stock raising and in fact everything that makes for tonnage and a great industrial center, have been junked. The Orient cannot be a concrete example because she has but very few of those things on her entire line as enumerated above."

further question to be considered in determining public convenience and necessity is whether the proposed line of railroad will parallel and compete with existing carriers, thus serving only a local demand and interfering with the welfare of railroads already in the field. It is apparent that an established interstate carrier can serve a region to better advantage through the extension of its lines than can a struggling short line railroad already operating or a new company contemplating construction and operation. But the state commissions have not always taken adequate account of this phase of the problem. They have been wont to recommend the approval of applications from the first carrier willing to enter the field.[83] A sounder appreciation of the general public interests has precluded their acceptance by the Commission.

The foregoing facts and considerations point to the benefits and limitations of co-operation in the disposition of extension and abandonment cases. The chief benefit is, of course, that co-operation furnishes a method whereby better adjustments may be made between national and local interests. State commissions are afforded an opportunity to suggest decisions in their capacity of quasi-judicial bodies. These recommendations form a part of the record and serve to inform the Commission, far removed from the scene of the controversy and without an intimate knowledge of the conditions surrounding the case, of a decision that a local regulatory agency regards as sound and just after a careful review of all the evidence.

That the Commission has seen fit to adopt the suggestions of the states in the majority of cases might suggest that the paramount authority has been relaxed in deference to the state commissions. But an examination of the evidence and recommendations in individual cases seems to show that sound judgment has been exercised by the Commission. The record of the Commission's disposition of abandonment and construction applications indicates that the Commission has not been unduly lenient in either type of case.[84]

[83] See Construction by Aroostook Valley R. R., 105 I. C. C. 643 (1926); Construction by Northern Oklahoma Rys., 111 I. C. C. 765 (1926); Construction by Reader R. R., 131 I. C. C. 51 (1927). In the latter proceeding, the Arkansas Railroad Commission recommended the approval of the application of the Reader Railroad, then operating 23.5 miles of road, for a 63-mile extension into territory surrounded by six large and established carriers, no point in the region being more than 15 miles from an existing road. The record showed that economic development in the territory could and would be taken care of by the carriers in the field.

[84] In the eleven-year period, 1922 to 1932, inclusive, of the 687 abandonment applications embracing 11,260 miles of railroad, 586 applications, involving 9,652

Other benefits, requiring no elaboration, are the informal solution of local problems through personal contacts and conferences between state agencies and the carriers, of which the work of the Massachusetts Commission is a good example; and the administrative relief accorded the Commission through the delegation to the state commissions of the hearings in individual proceedings.

The functioning of the co-operative method in the field of extensions and abandonments has also revealed some distinct limitations upon its effectiveness. They result from the character of the recommendations made by the state commissions, both as to their quality and quantity. In the first place, co-operation can only be made an outstanding success if unprejudiced decisions are rendered by the state commissions. Despite the willingness of the Interstate Commerce Commission to give weight to their opinions because of their knowledge of local conditions, it cannot do so unless all factors of the public interest have been taken into account.

In the second place, the failure of the state tribunals to make recommendations in a very considerable percentage of the cases which are heard by them constitutes a great weakness in the procedure. Failure to advise means that the Commission does not receive the benefit of a judicially determined local point of view and co-operation becomes simply the routine task of taking evidence for the Commission. Off hand, one would expect that state commissions would welcome this opportunity to express opinions in cases concerning trackage located within their jurisdictions. The explanation of the failure to seize this opportunity is not always the same. Perhaps sometimes the state commissions have difficulty in reaching conclusions in closely contested cases, but probably more often the explanation is to be found in legal restrictions or in considerations of political expediency. The Texas Commission has held hearings in abandonment cases but has made no recommendations, the reason being that a Texas statute prohibits the abandonment of lines of railroad.[85] The New Hampshire

miles of line, were granted; 52 applications, involving 916 miles, were withdrawn or dismissed; and 31 applications, involving a total of 672 miles, were denied. During the same period, of 481 applications for the construction of new lines or the extension of existing lines, involving 21,067 miles of line, 290 applications, involving 9,775 miles, were granted; 76 applications, involving 4,397 miles, were dismissed or withdrawn; and 72 applications, involving 5,899 miles, were denied. ANNUAL REPORTS, 1922-1932. Thus, the Commission has denied only about 6 per cent of the mileage sought to be abandoned, and has granted about 46 per cent of the mileage which the carriers sought to construct.

[85] Railroad Commission of Texas, 38th ANNUAL REPORT, 1929, p. 14.

Commission declined to render a decision in the case involving the abandonment of certain branch lines by the Boston & Maine, because the legislature had gone on record as opposed to the abandonment of any rail lines in New Hampshire.[86] In other instances the lack of recommendations may be explained on the ground that although a state commission deems a certain decision to be justified on the basis of the facts, it may be regarded as unwise to suggest such a holding because the state commission is obligated to defend its citizens in proceedings before the Commission or because of the possibility of adverse criticism by the electorate.[87] But whatever the reasons, the failure of the commissions to make recommendations tends to reduce the effectiveness of co-operative action.

3. *Rate Cases*

The crux of the conflict between the nation and the states is to be found in the field of rate regulation. Both the historical background of co-operation and the terms of the co-operative agreement itself which outline the method of joint hearings and conferences applicable in rate proceedings [88] indicate that co-operation was designed primarily to perfect the regulatory process in this sphere. The chief test of its value must lie, therefore, in the results accruing from its operation in the field of rate control.

(a) *Extent of Cooperation — Examples*

It has become the settled policy of the Commission to invite the assistance of the state commissions both in cases involving specific

[86] The New Hampshire Commission sat with Commissioner Meyer in the proceedings (Abandonment of Branches by B. & M. R. R., 105 I. C. C. 13), but informed him of the action of the legislature in a letter of December 17, 1924 (RECORD, FINANCE DOCKET No. 4475). Commissioner Meyer sent a copy of the tentative report in the case and suggested that, "If you cannot express yourselves officially but feel that you can give me personally the benefit of your individual and unofficial views, I shall appreciate that." (Letter of October 30, 1925, *ibid.*) But the New Hampshire Commission replied, "We do not feel, under the circumstances, that it would be wise for us to make any comment or suggestions." Letter of November 3, 1925, *ibid.*

[87] In recommending the granting of the application of the Northern Pacific to abandon its Boulder-Elkhorn Branch, the Montana Commission aroused considerable feeling on the part of officials and citizens of the state (Correspondence, RECORD, FINANCE DOCKET No. 5595). The Commission reversed the decision of the Montana Commission and of the federal examiner by denying the petition of the carrier in Abandonment by N. P. Ry., 124 I. C. C. 657 (1927). In view of this experience it is unlikely that the Montana Commission will endorse further abandonments, unless they are clearly in accord with the views of the politically most powerful officials and citizens of the state.

[88] See pp. 347 to 349, incl., supra.

charges, that intrastate rates discriminate against interstate commerce, and in general rate investigations covering the whole country or classification territories thereof. Practically all of the state commissions have accepted these opportunities to participate in the determination of issues affecting intrastate rates. From the promulgation of the co-operative agreement in 1922 to the end of 1925, 41 state commissions had co-operated in proceedings in which the relationship between interstate and intrastate rates was involved.[89] Subsequent years, under the modified and stronger agreement, have yielded a substantial number of cases involving interstate-intrastate rate relationships, there being 51 in 1926, 28 in 1927, 28 in 1928, 26 in 1929, 22 in 1930, 20 in 1931, 22 in 1932, and 14 in 1933.[90]

There has also been active co-operation, usually through the medium of committees representing large groups of states, in many of the general rate investigations conducted since 1920. These include Increased Rates, 1920,[91] Express Rates, 1922,[92] Southern Class Rate Investigation,[93] Fifteen Per Cent Case, 1931,[94] and the numerous inquiries instituted pursuant to the Hoch-Smith Resolution.[95] At the present time the state commissions are co-operating with the Commission in its investigations of passenger fares and surcharges [96] and of the carriers' petition for increases in freight rates.[97]

The operation of the co-operative system in the important field of rates and charges can be illustrated by a consideration of some typical cases. First we shall consider a case under section 13, to wit, one in which a complaint is brought alleging that intrastate rates in force in a particular state are unjustly discriminatory against persons and localities in interstate commerce or against interstate commerce in general.

A recent proceeding, Rates on Petroleum and Its Products in Montana,[98] was of this type. Acting independently of the Commission, the Montana Board of Railroad Commissioners instituted in 1928 an in-

[89] I. C. C. ANNUAL REPORT, 1925, pp. 1-2.

[90] I. C. C. ANNUAL REPORT, 1926, p. 1; 1927, p. 65; 1928, p. 61; 1929, p. 67; 1930, p. 74; 1931, p. 81; 1932, p. 35; 1933, p. 32.

[91] 58 I. C. C. 220 (1920).

[92] 83 I. C. C. 606 (1923); 89 I. C. C. 297 (1924).

[93] 100 I. C. C. 513 (1925); 109 I. C. C. 300 (1926); 113 I. C. C. 200 (1926); 128 I. C. C. 567 (1927).

[94] 178 I. C. C. 539 (1931); 179 I. C. C. 215 (1931); 191 I. C. C. 361 (1933).

[95] No. 17,000, Rate Structure Investigation.

[96] Passenger Fares and Surcharges, No. 26,550.

[97] Ex Parte 115.

[98] 176 I. C. C. 707 (1931).

vestigation into the prevailing rates on intrastate traffic in refined and crude oil. The proceeding resulted in substantial rate reductions, averaging 28.3 per cent on refined oil, 24.9 per cent on low-grade products, and 8.3 per cent on crude oil. Following the issuance of the order of the Montana Board, effective April 17, 1929, complaints were filed by the carriers and the Commission instituted an investigation as to the reasonableness of interstate rates applying from Wyoming refining points to Montana destinations and as to the alleged discriminatory character of the 1929 scale of intrastate rates in Montana. Here were the makings of a typical conflict between the Commission and a state commission, with the Commission pursuing an independent inquiry, finding unjust discrimination against interstate commerce, and issuing an order requiring the carriers to increase intrastate rates. Such a federal order would have "frozen" the intrastate rates, that is, removed them from the jurisdiction of the state commission until the state commission formally acquiesced in the changed level and the Interstate Commerce Commission rescinded its order. And the Commission could not regulate them further, except on another discrimination complaint, because it has no original jurisdiction over intrastate rates. In other words, with federal orders in force, intrastate rates cannot be modified or adjusted to meet changing economic and transportation conditions.

But instead of allowing matters to take this unsatisfactory course, the Montana Board reopened its docket for rehearing the local with the federal case and the whole matter was heard co-operatively upon a common record. The investigation disclosed that the interstate rates from Wyoming points to Montana destinations, assailed by shippers as unreasonably high and defended by the carriers, ranged from about 39 to 49 per cent above the 1929 scale of Montana rates. This evidence plus the showing of diversion of traffic from refineries in Wyoming and loss of revenue to the carriers made it apparent that unjust discrimination prevailed. However, the evidence submitted with respect to the cost of rendering service and comparisons with refined oil rates in other territories also convinced the Commission that the assailed interstate rates were too high. Hence, substantial reductions in the interstate rates were ordered. But the Montana single-line scale on refined oil averaged about 11.5 per cent lower than the interstate scale. A similar disparity existed with respect to low-grade petroleum products. Because of these rate disparities, the Commission made the finding that unjust discrimination against interstate commerce prevailed and would continue to prevail until the intrastate rates in Montana

were increased. Like findings were made by the Montana Board and a readjustment in intrastate rates was made effective simultaneously with the change in interstate charges.

It is noteworthy that through joint action a situation which had been created by independent action on the part of each commission was easily corrected. The interstate rates, found by the Commission to be not unreasonable in 1925, were declared to be unreasonably high for the future on a later record. Likewise, the intrastate rates, previously found to be proper by the Montana Board, were admitted to be too low on the more recent and more comprehensive record. The two sets of rates were brought into proper alignment when a record was co-operatively made and the issues jointly considered. This action eliminated the necessity for the exercise of federal authority over the internal commerce of the state and prevented disharmony between the two regulatory bodies.[99]

Of a second type of co-operative proceeding, a general rate investigation, none affords a better example than the Southern Class Rate Investigation.[100] This was a proceeding of significance, for though sweeping readjustments had been made prior to this time, never had the freight rate structure of a whole classification territory been made the subject of intensive investigation. The purpose was not to affect the aggregate revenues of the carriers, but to institute a class rate structure which would be as simple as possible, be in conformity with the public interest, and be free from undue prejudice.

Intrastate rates were not brought formally within the scope of the

[99] Effective adjustments of interstate-intrastate controversies have been made in a large number of cases. See, for example, Minimum Carload Weights on Hogs, 81 I. C. C. 373 (1923); Iola Cement Mills Traffic Ass'n v. A. W. Ry., 87 I. C. C. 451 (1924); Nebraska Livestock Case, 89 I. C. C. 444 (1924); Oklahoma Corporation Commission v. A. & S. Ry., 69 I. C. C. 207 (1922), 101 I. C. C. 116 (1925). For lists of formal cases handled co-operatively in recent years, see reports of the Committee on Co-Operation between Federal and State Commissions of the National Association of Railroad and Utilities Commissioners, PROCEEDINGS: 1930, pp. 133-134; 1931, pp. 51-52; 1932, p. 655; 1933, p. 472.

[100] Docket No. 13,494. Reported in 100 I. C. C. 513 (1925); 109 I. C. C. 300 (1926); 113 I. C. C. 200 (1926); 128 I. C. C. 567 (1927).

The United States is divided into three major classification territories, known as Official, Southern, and Western. Official territory includes, with certain minor exceptions, that portion of the United States lying *north* of the Ohio River and of a line drawn from Ashland, Kentucky, through Roanoke and Lynchburg to Norfolk, Virginia; and *east* of Lake Michigan and a line drawn from Chicago, through Peoria, to St. Louis, thence to the mouth of the Ohio River. The Southern classification governs the territory south of Official territory and east of the Mississippi River. Western classification territory embraces the remainder of the United States, roughly the territory west of Chicago and of the Mississippi River south of St. Louis.

investigation, although the railroads had urged their inclusion along with the interstate rates. Nevertheless, it was one of the major intents of the Commission that the ultimate result would be the establishment of a greater degree of harmony between the interstate and intrastate rates within Southern territory. Accordingly, it was recognized that "it will be necessary for the Commission to fix interstate class rates which may serve as a reasonable and proper guide to the State commissions in the adjustment of the intrastate class rates." [101] This was essentially true. It was common knowledge that the interstate structure was chaotic, many important interstate rates being unduly low because of existing or past water, rail, and market competition. In such circumstances it was not difficult for a state commission to find particular rates with which favorable comparisons of intrastate rates could be made, and in many instances, justifiably. From a revenue point of view, however, it was clear that the intrastate rates of a number of states — notably Georgia, Virginia, North Carolina, and South Carolina — were unduly depressed and yielded proportionately less revenue than the rates on interstate traffic.[102] Nevertheless, the first step in the process of harmonization was, as the Commission observed, to establish a uniform and equitable scale of rates for interstate application.

In order to fix a satisfactory scale of interstate rates and to secure the application of the same scale on intrastate commerce, the state commissions were invited to co-operate with the Commission. A committee of state commissioners, five in number, was appointed by the state commissions. It included commissioners from the states of Georgia,

[101] 100 I. C. C. 513 at 519 (1925).

Class rates are the rates applicable upon each of the various classes of freight established by the governing classifications referred to in the preceding note. For convenience, individual items of freight are classified according to such considerations as space occupied, value, risk, volume of tonnage, nature of equipment required, and governing competitive conditions. In Southern classification territory, for example, articles are now assigned to twelve classes, and the rates for each class scale downward from Class 1 to Class 12, the rates on Class 12 being 17.5 per cent of the first class rates. Commodity rates, on the other hand, are rates quoted upon single items which have been removed from the classification lists and accorded special treatment.

[102] The evidence of record showed clearly that there existed a substantial disparity between interstate and intrastate rates. The traffic tests of 1922, which disclosed the revenues of the railroads under the existing rates and the carriers' proposed rates, showed that revenue from interstate traffic would have been increased by 13.5 per cent under the proposed higher rates. When the proposed rates were applied to intrastate traffic, a revenue increase of 36.3 per cent was shown, nearly three times as great in terms of percentages. 100 I. C. C. 513 at 596 (1925).

By comparing the average per cent of increase on intraterritorial traffic moving

Alabama, Florida, Virginia, and North Carolina.[103] These commissioners sat throughout the hearings and the oral argument, and participated in the conferences relating to the final disposition of the case. They did not function in an advisory capacity with respect to the aspects of the investigation relating to interterritorial rates with Official territory, for clearly it would have been unfair to the shippers and state commissions of Official territory for the commissions of the South to exert influence with regard to these rates when this territory was not represented. But as regards intraterritorial rates, both interstate and intrastate, the committee worked closely with Commissioner Eastman and the examiners who assisted him.

Although intrastate rates were not included on the formal docket in the case, evidence concerning them was freely taken in order that a clear picture of the whole situation might be obtained. The state commissions, even though acting in an advisory capacity, were permitted to present evidence, and they availed themselves of the opportunity to present much valuable data. It was the practice for rate experts and

interstate with the percentages of increase on intrastate traffic, the carriers were able to compare the existing level of class rates in each state with the average level of interstate rates in Southern territory. The results were as follows [100 I. C. C. 513 at 598-599 (1925)]:

	July Test	*November Test*
Alabama	96.36%	98.80%
Georgia	82.36	77.72
Kentucky	91.61	100.58
Louisiana	100.52	100.25
Mississippi	93.62	98.62
North Carolina	71.17	71.68
South Carolina	82.12	84.75
Tennessee	97.04	97.49
Virginia	76.26	.....

[103] The co-operating commissioner from North Carolina, Commissioner Maxwell, resigned from the co-operating body because he regarded the carriers' proposals for the adjustment of rates to Carolina territory as "unconscionable." He said: ". . . I am persuaded to ask your permission to retire . . . that I may take squarely the position which the character of these proposals seem to force my sense of propriety to assume and which my obligations to the shippers of North Carolina impose,— that of a direct adverse party to the carriers in the trial of these issues." (Letter to Commissioner Eastman of June 5, 1922, Record, Docket No. 13,494, Vol. 1a.) Commissioner Eastman accepted the resignation with keen regret. He said: ". . . we are sure that your decision has been reached reluctantly and from a sense of what you believe to be your duty; but this does not lessen our regret, for we feel very strongly that cooperation between Federal and State authorities is essential in the public interest, particularly in the regulation of railroad rates, and we have not only hoped but have been and still are confident that good results will flow from the cooperation which has been inaugurated in this proceeding." Letter to Commissioner Maxwell of June 9, 1922, *ibid.*

attorneys of the state commissions to submit testimony at the hearings and to argue orally before the joint tribunal. The purpose, of course, was to make the record as comprehensive and illuminating as possible. Commissioner Eastman, in assenting to the introduction of evidence by the state commissions, was careful to point out that it should not preclude the state commissioners from considering the entire record from the point of view of impartial judges with the public interest at heart. He said: "We assume, of course, that any such evidence will be introduced for the purpose of making the record as complete as possible and will in no way hinder the state commissions, in their cooperation with us, from considering the entire record from the standpoint of the general public interest which both they and we represent." [104]

Three questions present themselves with respect to the functioning of the co-operative method in the conduct and disposition of the proceeding. First, in what ways did the co-operating commissioners actually aid the Interstate Commerce Commission? Second, what influence, if any, did the state commissioners exert upon the final decision? Third, did the state commissions readjust their intrastate rate structures in conformity with the interstate rate structure approved in the decision of the Commission? Evidence bearing upon these queries will be considered.

Commissioner Eastman, in his noteworthy report for the whole Commission, states that the co-operation of the state commissions was of "notable aid" in the conduct of the investigation. Since the aid and advice of state commissioners must come largely through the exchange of ideas in conferences and since no public records of these are kept, it is difficult to ascertain the extent and character of their aid. However, some evidence is at hand. For example, subsequent to conferences which Commissioner Eastman had held with the members of the co-operating committee after the oral argument, the Commissioner outlined his plan for disposing of the case and requested a further conference prior to submitting his report to the whole Commission.[105] Two points of some significance were raised. First, he pointed out that rates to Florida peninsula points were not shown, but that his plan was to prescribe all-rail and water-rail rates to each of three or four groups within Florida, the rates to be fixed somewhat above the interstate scale for Southern territory. He requested the advice of Commis-

[104] Letter to Commissioner Perry of Georgia, Chairman of the Cooperating Committee, dated May 4, 1922, Record, Docket No. 13,494, Vol. 1a.

[105] Letters of June 6, 1925, to Commissioners Perry, Patterson, and Burr, 1922, Record, Docket No. 13,494, Vol. 1k.

sioner Burr of Florida with respect to the division of Florida into groups and the rates which should be prescribed. Second, he asked the Georgia Commission to consider carefully the boundary lines which he had marked out as between certain groups within the state of Georgia. Apprehension was expressed lest various towns and communities had been separated which ought to have been included in the same group. These were matters of local concern primarily, concerning which the state commissioners could render invaluable advice.

The state commissions were also of assistance in the supervision of the elaborate traffic test conducted by the carriers in 1924,[106] and the handling of the rate adjustments for the short or weak lines. Most of the short or weak lines were situated wholly within the boundaries of single states and it was the view of the Commission that their financial needs could be better ascertained by the individual state commissions. Many of these carriers had already been granted fourth-section relief because of financial exigencies, which enabled them to meet the competition of standard lines at junction points and to charge higher rates to intermediate points.[106a] The Commission made a general finding which named the short or weak lines and provided that arbitraries over the prescribed interstate scale be granted on both local and joint hauls. Each individual road was free to propose the arbitraries deemed necessary to insure a livelihood. The Commission said:

[106] The traffic test consisted in the application of the rates recommended in the proposed report to actual movements of traffic in order to ascertain the effect upon the revenues of the carriers. It was necessary for the carriers to calculate many thousands of distances, which required checking by the Traffic Bureau of the Commission. Commissioner Eastman requested the state commissions to become familiar with the details of the traffic test, which resulted in a meeting of the traffic experts of the state commissions, the carriers, and the Commission, and assistance in the large task of checking the distances.

[106a] A word of explanation with respect to the nature of fourth-section relief and the arbitraries granted the weak lines may be helpful. Section 4 of the Interstate Commerce Act provides that it shall be unlawful for any carrier to charge any greater compensation for the transportation of passengers or property "for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." However, the Commission may give relief from the operation of this section. After appropriate investigation, the Commission is authorized, with certain restrictions, to permit justifiable departures from the general rule laid down in this so-called long-and-short-haul clause.

Arbitraries are rate increments in excess of the rates applicable over standard railways which the weak roads were permitted to charge. The purpose of allowing these higher rates upon the weak roads was, of course, to enable these carriers to earn greater revenues than they would have earned under the standard rates.

> "It is our hope that the State commissions will then bring to our attention cases, either before or after the rates become effective, where the rates so proposed appear to be unjust and unreasonable or where the four-section relief which has been granted or is sought ought, in their opinion, to be withdrawn or withheld. Shippers served by these lines will, of course, be at liberty also to make complaint, but we hope that they will in the first instance bring such complaints to the attention of the State commissions, for we are desirous, particularly in the case of these little lines, of having the advice and help of the State authorities." [107]

The second query, above proposed, relates to the influence which the co-operating commissioners exerted upon the final disposition of the issues. It is impossible to ascertain the exact weight accorded their views. Yet there is convincing evidence that real weight was attached to the views of the state commissioners in connection with the central matter of the level of the interstate scale of rates. As one would anticipate, the carriers proposed the highest scale of class rates and the highest percentage relationship on classes below the first of any suggested by the parties to the proceeding. After the traffic test of 1922, which showed a very substantial increase in revenue under the carriers' proposed rates, the carriers were prepared to accept the lower percentage relationships between classes as proposed by the shippers but still urged the acceptance of their distance scale. The Southern Traffic League and the state commissions of Tennessee and Mississippi proposed distance scales which were considerably lower than that of the railroads.[108] With these proposals before it the Commission proceeded to prescribe a distance scale for intraterritorial application within the South.

Because class rates in Southern territory were already high as compared with rates in the adjoining Official territory, it was thought to be inadvisable to increase them. Commissioner Eastman pointed out that making the scale of class rates high had the effect of increasing the number of commodity rates, whereas simplification of the Southern tariffs required the elimination of many of the classification exceptions and many of the less-than-carload and carload commodity rates. But "even more important," in the language of the Commission's report, "is the matter of harmony between interstate and intrastate rates. Any

[107] 100 I. C. C. 513 at 654 (1925).

[108] For a comparison of the proposed scales, see Appendix *A*, 100 I. C. C. 513 at 711 (1925). A distance or mileage scale is a schedule showing increases in rates for increases in the distance over which freight is moved. The rates, although they increase directly, usually do not increase proportionately, with increases in the distance.

attempt to increase materially the present general level of class rates within the South would imperil the opportunity to secure harmony through cooperative action." [109] This was true with respect to the shorter distances particularly, although another reason advanced for keeping these rates down was the vulnerability of short-haul distributive traffic to motor-truck competition.

It is apparent from the Commission's statement with regard to the guiding influences in determining the distance scale that the views of the co-operating commissions and the desire for uniform rates on class traffic throughout the South were substantial factors in molding the final decision. The interstate scale which was prescribed was in large measure a compromise between the proposed scales of the railroads, the shippers, and the state commissions,[110] and did not differ greatly from those in effect in some of the southern states.[111] Moreover, it appears that the co-operating committee was in agreement with Commissioner Eastman as to the distance scale to be prescribed and the collateral issues involved in the case.[112]

The final question concerns the extent to which the state commissions accepted the decision of the Commission. It was generally as-

[109] 100 I. C. C. 513 at 645 (1925).

[110] See Southern Class Rate Investigation, Second Supplemental Report on Reconsideration, Appendix K-2, 113 I. C. C. 200 at 207 (1926), for the distance scale finally approved by the Commission. This scale is substantially lower than that proposed by the carriers for the shorter distances but higher for distances above 800 miles.

[111] That there was no great disparity is evidenced by the comments of some of the state commissions. The Mississippi Railroad Commission stated that the level of class rates (interstate) was somewhat lower than the existing intrastate level, excepting the proposed cancellation of less-than-carload commodity rates, which latter would result in substantial increases in transportation costs in the state (21st Report, 1927, p. 8). The Alabama Public Service Commission stated: "So far as strictly class-rate traffic is concerned, the proposed rates will mean a general reduction in this state." (38th Annual Report, 1927, p. 328.) The Florida Railroad Commission said that first and second class rates were increased slightly, but that there were reductions in the rates on other traffic, so in general there was no increase in revenues (32d Annual Report, 1928, pp. 7-8). In Georgia, Virginia, and the Carolinas, where the intrastate rates had been depressed considerably more than in the other states, the interstate scale required an upward adjustment of the intrastate class rates.

[112] In a letter to Commissioner Eastman of June 15, 1925 (Record, Docket No. 13,494, Vol. 1k), it was stated:

> "We take this opportunity to thank you for the courteous, patient, and painstaking manner in which you have conducted this investigation. The burden of the responsibility has necessarily been upon you and the great amount of time and effort which you have devoted to this case is fully appreciated by us. We are gratified that we have been able to reach an harmonious agreement upon your proposed report and await with much interest your advice as to date for final conference with the full Commission."

sumed at the start of the investigation that the state commissions would readjust their rate structures to conform with the structure decided upon for interstate traffic. This assumption was supported by the evidence of record, for no witnesses for the carriers or the shippers defended the existing lack of uniformity in intrastate-interstate rate relationships. The Commission, in so far as the effect of rate changes upon revenues was taken into account in reaching its conclusion, proceeded upon the assumption that intrastate rates would be revised. With the discrepancies and inconsistencies in the interstate rates ironed out, intrastate revisions could be easily made.

The readjustment of interstate class rates, which required a thorough-going reorganization of the rate structure, became effective on January 15, 1928. Pursuant to applications filed by the carriers with the commissions of the southern states, similar readjustments were made effective on intrastate traffic on the same date in Alabama, Georgia, and Kentucky. Other states, with the exception of North Carolina, followed with voluntary readjustments, so that by February 11, 1930, intrastate class rates within Kentucky, Tennessee, Alabama, Mississippi, Georgia, Florida, South Carolina, and the portions of Virginia and Louisiana within Southern territory, were constructed in the same manner as interstate rates.[113] This meant the application of the so-called K-2 interstate scale to class traffic and the adoption of the Southern Classification in states that had previously had their own, but it did not mean the cancellation of exceptions to classification and less-than-carload commodity rates that the carriers had prayed for. These were to be eliminated by the carriers in interstate commerce after conferences with shippers, since the Commission had found no justification for them. Pending the outcome of such action, the majority of state commissions postponed investigation and decision.[114] As regards the weak

[113] Virginia Corporation Comm. v. A. & R. R. R., 161 I. C. C. 273 at 282 (1930).

[114] Georgia and Florida, for example, denied the applications for the present, but indicated that investigations into the matter would be made in the future (Georgia Public Service Commission, 56th Annual Report, 1929, p. 123; Florida Railroad Commission, 32d Annual Report, 1928, p. 20). The Alabama Public Service Commission allowed the cancellation of many statutory commodity rates, classification exceptions, and less-than-carload commodity rates in the original proceeding, and later, upon further investigation, eliminated nearly all except those sought to be retained by the carriers (40th Annual Report, 1929, p. 159).

Some doubt has been expressed as to whether all classification exceptions will be removed voluntarily. In a letter to the writer of May 4th, 1931, Mr. J. E. Tilford, Chairman of the Southern Freight Association, said:

"With the exception of North Carolina it was not necessary to appeal to the

and short line carriers, the state commissions permitted arbitraries based upon the differentials prescribed by the Commission for application to the Florida peninsula.

The North Carolina Commission denied the petition of the carriers for application of the interstate scale to intrastate traffic. This would have required an increase of approximately 24 per cent in the existing rates. Such an increase was claimed to be unfair to shippers because of the state's proximity to the lower-rated Official territory. It was denied on the further ground that it would compel the utilization of motor-trucks.[115] The refusal to act led to the filing of a discrimination complaint with the Interstate Commerce Commission by the Corporation Commission of the neighboring state of Virginia.[116] The subsequent investigation revealed a wide spread between the interstate rates between Virginia and North Carolina points and the intrastate rates within North Carolina, which could not be justified on the ground of dissimilar transportation conditions within Virginia-Carolina territory. Preferential treatment to intrastate shippers of North Carolina having been "abundantly shown," Commissioner Eastman concluded that "a finding of undue prejudice and preference is inescapable." [117] An order removing this unjust discrimination was entered, but it was withdrawn when the North Carolina Commission, "after consultation with [the

Interstate Commerce Commission in connection with the intrastate rates, although it is proper to state that a number of the southern states made exceptions to the application of the rates on certain commodities. We may find it necessary to take these exceptions to the Commission under Thirteenth Section proceedings at a later date."

[115] North Carolina Corporation Commission, 25th Biennial Report, 1929-1930, p. iv.

[116] Virginia Corporation Comm. v. A. & R. R. R., 136 I. C. C. 173 (1927); 161 I. C. C. 273 (1930); 165 I. C. C. 31 (1930); 169 I. C. C. 728 (1930). It is interesting to note that the Virginia Commission joined with the North Carolina Commission in assailing the new interstate scale as being unreasonably high. It was the contention of these states that they should constitute a "buffer territory" between the Southern and Official territories, with rates approximately 10 per cent less than the Southern scale. Portions of Kansas and Missouri had been treated in this manner in the Consolidated Southwestern Cases. The Virginia Commission granted the increases in intrastate rates rather reluctantly. It stated *inter alia*:

"While it may well be that it would not be unreasonable or unjust to prescribe for intrastate application in Virginia in Southern Classification territory class rates lower than those hereinafter prescribed which are the same as those prescribed for interstate application in Southern territory . . . , yet for the present in order to remove any question of undue or unjust discrimination against interstate commerce . . ." such rates will be prescribed and governed by Southern Classification. Case No. 3102, Report of Virginia Corporation Commission, 1929, p. 6 at 10.

[117] 161 I. C. C. 273 at 278 (1930).

Governor] and representative groups of shippers of the State, including the best legal talent," agreed to put non-discriminatory rates into effect, and thus retained its jurisdiction over purely intrastate rate matters.[118]

Co-operation was, therefore, an important factor in securing a sound and uniform rate structure in Southern territory. The presence of the state commissioners in an advisory capacity made it certain that local interests would be adequately considered in the creation of the larger interstate adjustment. Having had a part in the hearing of the testimony and the deliberations pending the final decision, and having come to an agreement with regard to the disposition of the manifold issues involved, the state commissions were prepared to act in accordance with the decision of the Commission. Uniform interstate and intrastate class rates were established, and a source of conflict between the state and federal commissions eliminated. Only the recalcitrance of North Carolina, which made further litigation necessary, marred the smooth operation of the co-operative plan.

(b) *Benefits of Cooperation*

One of the advantages of co-operation, viewed by many regulatory officials as the chief advantage, is the avoidance of conflict between the state and federal commissions. The authority of the Commission to control intrastate rates which discriminate against interstate commerce unjustly has been clearly established, but the assertion of federal power over intrastate rates is not an altogether desirable course. In the first place, it engenders animosity between the regulatory agencies, which is not only undesirable *per se* but hinders the dispassionate consideration of issues and policies upon their merits. In the second place, it reduces the effectiveness of rate control because federal orders have the effect of ousting the state commissions from their primary jurisdiction over intrastate rates. For these reasons the exercise of federal power, while necessary in some instances, is to be avoided. As Commissioner Meyer has stated, "Even in respect of the intrastate-interstate maladjustments to which the jurisdiction of this Commission extends, the wisdom of avoiding its exercise, in the mutual interest of shipper and carrier, is now concretely recognized." [119]

The rate structure investigations which have been made by the

[118] North Carolina Corporation Commission, 25th Biennial Report, 1929-1930, p. iv.

[119] Letter to John E. Benton from Commissioner B. H. Meyer, dated January 19, 1923.

Commission in recent years have disclosed a striking lack of uniformity in intrastate rates as between states as well as a lack of harmony between intrastate and interstate rates. This was noted in the review of the Southern Class Rate Investigation. It has also been revealed by the numerous inquiries involving class and commodity rates in the Rate Structure Investigation.[120] For example, in Western Trunk-Line Class Rates, it was stated that, despite identical transportation and operating conditions for both kinds of traffic, "in most w. t. l. States class rates are maintained on intrastate traffic lower, and sometimes materially lower, than on interstate traffic." [121] Such situations as these make for controversies before the Commission and the assertion of federal power if readjustments are not made voluntarily by the commissions concerned. Like situations may arise after the granting of general rate advances by the Commission, if state commissions do not allow corresponding increases on intrastate traffic, and may likewise require the issuance of mandatory orders.

In order to avoid the exercise of its authority, the Commission has followed the practice of giving the state commissions every reasonable opportunity to make voluntary rate readjustments under the co-operative arrangement. The Commission has declined to make formal findings with regard to intrastate rate discrimination in comprehensive proceedings even when this was urged by the carriers. In Western Trunk-Line Class Rates, it was stated:

> "The commissions of the w. t. l. States are cooperating with us, . . . and some have already conducted hearings in their intrastate cases. Under the cooperative plan the State commissions will pursue their own course under the laws in their respective States in matters presented by the carriers' petitions and State cases cov-

[120] See, for example, No. 17,000, Rate Structure Investigation: Part 2, Western Trunk Line Class Rates, 164 I. C. C. 1 (1930); Part 3, Cotton, 165 I. C. C. 595 (1930); Part 4-A, Refined Petroleum Products in the Southwest, 171 I. C. C. 381 (1931); Part 7, Grain and Grain Products, 164 I. C. C. 619 (1930); Part 9, Livestock—Western District Rates, 176 I. C. C. 1 (1931); Livestock—Southern Territory, Rates, 171 I. C. C. 721 (1930); Part 10, Hay Rates within Western District, 195 I. C. C. 461 (1933). In the important Grain and Grain Products case, the Commission stated:

> "An important issue is the relation between interstate and intrastate rates. The complaints of discrimination against interstate shippers have been numerous. The desirability of uniformity in rate levels in the same general territory, for both interstate and intrastate shipments, is apparent. Instead of any reasonable approach to this uniformity there is a wide disparity between not only interstate and intrastate levels, but between intrastate levels themselves. . . ." 164 I. C. C. 619 at 696.

[121] 164 I. C. C. 1 at 206 (1930).

ering intrastate rates and exceptions. There is no indication that they will not continue their fullest cooperation and render decisions as early as feasible on the matters under their jurisdiction and affected by these proceedings. Under these circumstances . . . there is no compelling reason for findings with respect to the intrastate situations until the State commissions have had a reasonable opportunity to exercise their judgment." [122]

But even in cases where the Commission has made specific findings of unjust discrimination, the state commissions have been extended the opportunity to remove the maladjustments.[123] Control over intrastate

[122] 164 I. C. C. 1 at 206 (1930). The Commission's original order of investigation in Docket No. 17,000, Rate Structure Investigation, covered intrastate as well as interstate rates. It was the usual practice to defer findings relating to intrastate rate discrimination. Specific findings were made and orders issued only in instances where it was made abundantly clear that the state commissions would not co-operate.

[123] For example, in Rate Structure Investigation, Part 3, Cotton, 165 I. C. C. 595 (1930), Texas intrastate rates were found to be unduly prejudicial to Oklahoma shippers. No order was issued. The Commission said: "Pursuant to our usual practice we will make no section 13 order at this time but will leave to the Texas commission, in the first instance, the removal of the violation of section 13 which is here found to exist." (p. 667.) This practice has also been followed in discrimination proceedings in which the state authorities did not co-operate in a judicial capacity. See, for example, Consolidated Southwestern Cases, 123 I. C. C. 203 (1927); Clay County Crushed Rock Co. v. A., T. & S. F. Ry., 144 I. C. C. 355 (1928).

In Oklahoma Corporation Comm. v. A. & S. Ry., 69 I. C. C. 207 (1922); 101 I. C. C. 116 (1925), Commissioner Hall dissented from the practice of leaving the correction of maladjustments to the state commissions in the first instance. He believed that it was an unsound policy because of the possibility that the state commission might not wholly remove the discrimination. Moreover, he urged that the mandate of section 13 (4) — that the Commission "shall prescribe the (intrastate) rate"— lawfully precluded delegating this function to the state tribunal. He said, in part:

"Doubtless the Texas commission will act wisely and the results in this instance may prove all that could be desired. But they may not. The Oklahoma commission has a right under the Federal law as construed by the Supreme Court, and under the law of Oklahoma, to come to us for a determination of this controversy. My firm belief that State and Federal tribunals should cooperate to the fullest extent lawfully possible for the one and the other is fortified and permeated by like conviction that neither a State nor a Federal tribunal can disregard the law of its being or in cooperative endeavor go counter to the fundamental principles of justice. No man is a safe judge in his own cause. . . ." 101 I. C. C. 116 at 135.

It would seem that the above constitutes a rather narrow construction of the law, for there is no direction requiring that the rates be prescribed immediately and directly. The Commission relinquishes no authority in the matter, for if substantial compliance with the necessities in the case is not made by the state authorities, it can step in to rectify the situation at any stage of the procedure. Furthermore, as a matter of policy and practice the weight of evidence seems to be in its favor. It is true that the state authority, due to self-interest, may be dilatory in removing discrimination and may not proceed to the limits required in the case. These are dangers associated with

rates has been wrested from the state commissions only when they have absolutely refused to adjust them to a reasonable conformance with the rates found proper for interstate commerce.

The significant fact is that the Commission has found it necessary to issue orders affecting intrastate rates in co-operative proceedings in relatively few instances. This has been notably true with respect to the comprehensive investigations of rate structures. The nation-wide inquiry into interstate express rates, occasioned by the failure of a number of state commissions to allow increases granted by the Commission, resulted in a general revision of the express rate structure.[124] The interstate express rates prescribed by the Commission, acceptable to the committee of co-operating commissions, were promptly applied to intrastate traffic by the state commissions.[125] A single order, that applying to the discriminatory situation in North Carolina, was required to achieve rate uniformity in the South.[126] Of the inquiries in No. 17,000, Rate Structure Investigation, the Commission only found it necessary to issue orders against Louisiana in the Sand and Gravel [127] investiga-

the practice. However, the advantages of permitting local authorities to prescribe the essentially local rates on the basis deemed most practicable in their wisdom (on the general level found reasonable for that area), and the elimination of "frozen" rate structures are of such significance as to appear to outweigh the disadvantages.

[124] Express Rates, 1922, 83 I. C. C. 606 (1923); 89 I. C. C. 297 (1924).

[125] The effective date of the Commission's order was March 1, 1925. On October 31, 1925, the Commission was able to state: "Express class rates computed on the bases prescribed for interstate traffic have been adopted and made effective upon intrastate traffic in all of the States except one, so that there is now substantial uniformity in interstate and intrastate express class rates throughout the country." ANNUAL REPORT, 1925, p. 47. The Wisconsin Railroad Commission, after independent hearing and investigation, prescribed an intrastate rate structure which differed in some respects from the interstate basis of rates. The express company did not object to the Wisconsin adjustment. The revision process was unduly protracted, however, since the new rates did not become effective until August 15, 1930. Record, Docket No. 13,930.

[126] Virginia Corporation Comm. v. A. & R. R. R., 136 I. C. C. 173 (1927); 161 I. C. C. 273 (1930); 165 I. C. C. 31 (1930); 169 I. C. C. 728 (1930).

[127] Sand, Gravel, Crushed Stone, and Shells, 155 I. C. C. 247 (1929); 177 I. C. C. 621 (1931). The Commissions of Kansas, Missouri, Oklahoma, Texas, and Arkansas approved the interstate bases of rates for application to intrastate traffic, but the Louisiana Commission denied the application of the scales to intrastate commerce, except in the northern part of the state where prejudice to Arkansas shippers was irrefutable. The Louisiana rates, commonly known as "good roads" scales, were on the average 35 per cent lower than the approved interstate rates. Because of the unjust discrimination which would result from this substantial disparity between rates in Louisiana and interstate rates, as well as intrastate rates in the other states of the southwestern group, and because of the refusal of the Louisiana Commission to remove the discrimination, the Commission was compelled to issue an order. 155 I. C. C. 247 (1929).

The Louisiana Commission "has declined to enter an investigation into the

tion, and against Kansas in Western Trunk Line Class Rates.[128] Other proceedings and orders may be necessary in the latter inquiry, with regard to the rates in Iowa and Colorado particularly.[129]

The failure of the Commissions of North Carolina, Louisiana, Kansas, and Iowa to give effect to the decisions believed to be in the public interest by the majority of commissions concerned in these proceedings may be accounted for in part by the fact that these states are located adjacent to lower-rated territories. Transportation conditions do not differ substantially at the margin, and it is always possible to adduce some evidence to show that rates should be prescribed on the level accorded the more favored territory. However, it is impracticable to fix rates which reflect minute differences in conditions — topography, traffic density, nature of traffic, etc.— and where the bulk of a state's territory is properly zoned, minute discrepancies at the margin have to be ignored.

Less satisfactory results have been achieved by co-operation in the general revenue proceedings such as Increased Rates, 1920,[130] and the Fifteen Per Cent Case, 1931.[131] Co-operation was tried in the former proceeding immediately following the enactment of the Transportation

lawfulness of the intrastate rates in Louisiana or to cooperate with us in this proceeding," stated the Commission in Refined Petroleum Products in the Southwest, 171 I. C. C. 381 at 432 (1931); 174 I. C. C. 745 (1931). Specific findings of unjust discrimination with respect to Louisiana rates were made, but the state commission was permitted to correct the maladjustment.

The current attitude of the Louisiana Commission is interesting in view of its ardent prosecution of its grievances against Texas in the Shreveport case some two decades ago.

[128] See Chamber of Commerce, Kansas City v. Atchison, T. & S. F. Ry., 164 I. C. C. 302 at 310 (1930). The Commission stated:

> "But Kansas intrastate rates stand upon a different footing. They were found unduly preferential three years ago in *Southwestern cases*; and on a separate record are here found unduly prejudicial to these complainants and unjustly discriminatory against interstate commerce. In all the circumstances we perceive no valid reason for deferring the entry of an order effective coincidentally with the establishment of the interstate rates in compliance with the *Western Trunk-Line case.*"

[129] The Commission reported as follows with respect to state action in Western Trunk-Line Class Rates: "The interstate basis has been authorized in Kansas, in the northern peninsula of Michigan, and in approximately the northern one-half of Missouri, and with slight modification in South Dakota; a scale of distance rates and relations of classes much lower than the interstate basis has been ordered in Iowa; and a general change from the present rates has been denied in Colorado east of the Rocky Mountains." ANNUAL REPORT, 1931, p .71.

[130] 58 I. C. C. 220 (1920).

[131] 178 I. C. C. 539 (1931); 179 I. C. C. 215 (1931); 191 I. C. C. 361 (1933).

Act of 1920 and prior to the formulation of any agreement embodying rules and regulations. The co-operating state commissioners approved of the increases granted by the Commission and recommended similar action by the states.[132] However, about one-half of the state commissions denied increases in intrastate rates corresponding to those authorized and applied on interstate commerce. This led to the institution of a long series of discrimination proceedings on petitions of the carriers and the issuance of orders controlling intrastate rates.[133] The failure of the state commissions to harmonize their intrastate rates with the level of interstate rates was due to a number of factors. These were the unprecedented amount of the increases, the lack of jurisdiction over passenger fares fixed by statute, the failure of the carriers to comply with state laws requiring an affirmative showing of the reasonableness of the state advances, the attempt to exercise some discretion as to the amount of the increases, and, on the part of some commissions, a lack of appreciation of the revenue needs of the carriers.

In the Fifteen Per Cent Case, 1931, above-mentioned, the co-operating state commissioners agreed with the Commission that the railroads' proposal for a 15 per cent advance in freight rates should be denied,[134] but it is not clear whether they considered in conference, or whether they approved of, the surcharges which were allowed upon particular commodities in the Commission's decision. The majority of state commissions permitted like increases on intrastate traffic, but at least thirteen state commissions either failed to grant any emergency relief or excepted commodities included in the Commission's authorization.[135] Tweive other state tribunals, plus five of the original thirteen,

[132] Senate Hearings on the Modification of Transportation Act, 1921-1922, p. 21.

[133] For a list of the proceedings thus instituted by the Commission under section 13 of the Act, see ANNUAL REPORT, 1921, pp. 32-34. For a careful and illuminating treatment of these cases, see 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 239-246, 287-301 (1931).

[134] 178 I. C. C. 539 at 577 (1931). Concerning the disposition of the application for a general advance in rates, Mr. John E. Benton, General Solicitor for the National Association, commented as follows (Bulletin No. 131-1931, p. 4): "The state commissions will, I am satisfied, generally commend the report in this case. Never before has a report of the Interstate Commerce Commission to such an extent and in such clear and certain terms placed the sanction of the approval of that Commission upon views which the state commissions have urged."

[135] Increases in Intrastate Freight Rates, 186 I. C. C. 615 (1932). The Commission did not consider the situation to be particularly grave. It stated (p. 621): "In a spirit of cooperation the State commissions also permitted them [the surcharges] to become quite generally effective intrastate. We are dealing in the instant proceeding with certain of the comparatively few exceptions where the surcharges were not permitted to become effective intrastate."

refused to adhere to the Commission's later decision to extend the surcharge period for six months.[136] Pursuant to petitions filed by the carriers, the Commission instituted discrimination proceedings as to intrastate rates in these states and found unjust discrimination to exist with respect to the great majority of intrastate rates involved.[137] It was necessary to issue orders in about ten instances.[138]

The refusal of some of the state commissions to permit the surcharges upon particular commodities believed by the Commission to be able to bear temporary increases was founded upon the conviction that rate increases would so reduce the volume of traffic as to yield no greater revenue, perhaps less, than the prevailing rates. This position has a very substantial foundation in a period of falling commodity prices, of exceedingly slack trade, and of keen competition from motor carriers and other transport agencies. It was to be reasonably expected, therefore, that there would be disagreement between the state and federal commissions relative to the specific commodities which could bear rate increases. This was especially apt to occur, since the state commissions were dealing with traffic which is largely short-haul in character and hence peculiarly vulnerable to motor-truck competition. The Commission acknowledged the validity of the state commissions' views in some instances by sustaining them in their exception of certain commodities.[139] In fact, there is reason to think that the Commission did not go far enough in this direction.[140] The Commission was on questionable ground in finding that any of the lower intrastate rates

[136] 191 I. C. C. 361 (1933). Annual Report, 1933, p. 14.

[137] Increases in Intrastate Freight Rates, 186 I. C. C. 615 (1932); 191 I. C. C. 351 (1933); Surcharges on Intrastate Traffic within North Carolina, 194 I. C. C. 329 (1933); Surcharges on Intrastate Traffic within Kansas, 195 I. C. C. 499 (1933); Surcharge on Bituminous Coal within Ohio, 192 I. C. C. 734 (1933).

[138] See Annual Report, 1933, pp. 14-15, for a brief survey of the disposition of the proceedings.

[139] Increases in Intrastate Freight Rates, 186 I. C. C. 615 at 633-634, 657 (1932).

[140] Increases in Intrastate Freight Rates, 186 I. C. C. 615 (1932). This was the view of Commissioners Aitchison, Brainerd, and Tate, who dissented from the majority report. Commissioner Lewis, in his concurring statement, said (p. 666):

"While we have sustained various commissions in their exception of furniture, oil, nonferrous metals, and some other commodities, such exceptions have been based on some ruling or decision of ours since our findings in Ex Parte No. 103, or by some act of the carrier. This is hedging in the field of review and justification too closely.

"I believe that there are additional instances in which we should not have attempted to set aside exceptions as to particular traffic made by State authorities."

discriminated against interstate commerce in general.[141] That the Commission was not altogether convinced of the wisdom of the rate increases is evidenced by its denial of the carriers' petition for permission to collect the emergency surcharges for an indefinite period and the granting of permission only to continue the surcharges for six months after March 31, 1933.[142]

Co-operation has not been effective to eliminate all conflict between the state and federal commissions, but on the whole it has functioned reasonably well. One reason for this is that state commissioners must familiarize themselves with the facts and issues in cases transcending their usual jurisdiction, thus broadening their points of view. Since they assist in the formulation of policies and decisions relating to major rate adjustments, there is a much greater likelihood that rates under state jurisdiction will be modified voluntarily to conform to the rates found reasonable for interstate commerce. The degree to which this has been realized in general rate investigations has already been noted. Also where disparities in interstate-intrastate rate relationships have arisen because of independent action on the part of either the state or

[141] In order to find unjust discrimination against interstate commerce as a whole it must be shown that revenue losses are resulting from the lower intrastate rates [Florida v. United States, 282 U. S. 194, 51 Sup. Ct. 119 (1931)]. In other words, it must be shown that increasing intrastate rates will yield greater revenue. The carriers did not make this showing convincingly, since they simply calculated revenue losses on the basis of applying surcharges to the past volume of traffic, taking no account of probable decreases in traffic from diversion to motor carriers and other factors. The Commission was unable to make the essential finding. It stated: "Where we make such a finding [of unjust discrimination against interstate commerce] and require an increase in the intrastate rates, it is to be understood that we conclude that no positive finding in regard to the revenue outcome of the increase can be justified." 186 I. C. C. 615 at 627. Yet federal authority was asserted over the intrastate rates in question. The more sound view, both legally and economically, would seem to have been that stated by Commissioner Aitchison in his dissenting expression (*ibid.*, p. 667): "The action of the State Commissions here vacated is at least as likely to conserve the revenues of the rail carriers as that prescribed by the majority, and in such circumstances, the presumption of validity of the State action with which we start can not be said to be overcome."

The Supreme Court upheld the action of the Commission in a unanimous decision in United States v. Louisiana, 290 U. S. 70, 54 Sup. Ct. 28 (1933). The Court found that the contention that the finding of unjust discrimination was unsupported by a finding that the increased intrastate rates would yield increased revenue was without merit. The Court observed that the Commission had stated that it could not make a "positive finding" with respect to the revenue outcome, but pointed out that such a finding required "a prediction involving, especially since 1930, many elements of uncertainty." A reading of the report as a whole, concluded the Court, indicated that the Commission had found that the "probability of increased revenue was sufficiently great" to warrant the exercise of its authority.

[142] 191 I. C. C. 361 (1933).

federal commissions, reconsideration of these situations upon a common record has led to an amicable disposition of problems without recourse to federal action or resort to the courts.

Another distinct advantage of co-operation in rate cases, similar to the advantage which we have already stressed in discussing co-operation in car service matters and matters of extensions and abandonments, is the opportunity it offers for a realistic consideration by the Commission of issues pertaining to local conditions. This advantage has been attained in two ways. First, the participation of state commissioners in the hearings and conferences in the original rate investigations enables them to influence the determination of the level and relationship of rates. The extent to which co-operating commissioners actually influence decisions of the Commission is problematical, but it does appear that their views are given weight. There may be a danger in going too far in this direction, but there can be little doubt that the advice of officials familiar with commercial and transportation conditions in a given area and probably more conversant with the facts of a given case than are the federal commissioners is of value in molding an intelligent decision and may be utilized with propriety.[143] Second, the fixing of rates to fit any peculiar local conditions which may obtain is also secured by the Commission's co-operative practice of holding the exercise of its power over discriminatory intrastate rates in abeyance in order that the state commissions may adjust their rates to the general level found reasonable for interstate commerce. The fact that the Commission does not require that intrastate rates be maintained on the exact level of interstate rates,[144] makes this action on the part of the state commissions the more effective in meeting varied conditions.[145]

Finally, co-operation in rate cases has led to the performance of a

[143] A good illustration of the utility of the knowledge and experience of state commissioners to the Commission in the adjustment of rates in local areas is afforded by the recent adjustments in cotton rates in the Southwest. On April 21, 1931, the carriers were authorized to reduce their rates to Texas ports in order to meet suddenly intense truck competition [174 I. C. C. 9 (1931)]. In filing such reduced rates with the Commission, the carriers were required to supply copies of the applications to and orders of the Texas Commission concerning intrastate rates reduced from and to those points. The Commission stated (at p. 18): "It will be our purpose in dealing with this truck-competitive situation to work in the closest possible cooperation with interested State commissions."

[144] Ohio State Rates on Sand, Gravel, Stone, and Paving Blocks, 85 I. C. C. 66 at 75 (1923).

[145] In accord with the dictum of the Supreme Court in the Wisconsin Passenger Fares case that intrastate-interstate rate disparities should be found unlawful only when they are substantial and operate as real discriminations and obstructions to interstate commerce. 257 U. S. 563 at 590 (1922).

few administrative tasks by the state bodies, which has lightened in some small measure the work of the heavily-burdened Interstate Commerce Commission. The state commissions have observed and audited the extensive terminal cost studies and traffic tests performed by the carriers,[146] have carried forward individual studies of the costs of rendering transportation service,[147] and have investigated and made recommendations with regard to the special needs of short-line carriers which could not be included in blanket rate adjustments.[148] These services have also enhanced the quality of the determinations of the Commission.

(c) *Limitations and Problems of Cooperation*

A system of co-operation cannot be expected to eliminate all conflicts between the states and the federal government, for so long as there continue to be marked differences in the economic and industrial characteristics of individual states and regions the basis for divergent interests will prevail. Where particular industries predominate in certain states, such as lumbering, mining, agriculture, and horticulture in the South and West, these interests are apt to be strongly articulate in pressing for advantages in freight rates and service. A state commission, usually regarded as a protector of the interests of producers within its jurisdiction, has great difficulty in resisting these claims and is often unable to subscribe to a sound rate policy for a particular region or for the nation as a whole. This is well illustrated by the attitudes of some state commissions with respect to rate revisions on agricultural products during the last decade. However, in those states where industry and commerce are much more diversified, for example, in the Eastern territory and to a growing degree in the South, no single interest is sufficiently predominant to influence unduly the policy of the state. In other words, conflict is predicated upon basic economic differences. Co-operation cannot totally eliminate conflict; at most it can aid in enlightening regulatory bodies with regard to both local and national conditions and in effecting a reconciliation between the various conflicting interests through joint consideration and compromise.

[146] Southern Class Rate Investigation, 100 I. C. C. 513 (1925); Western Trunk-Line Class Rates, 164 I. C. C. 1 (1930).

[147] Western Trunk-Line Class Rates, 164 I. C. C. 1 (1930); Grain and Grain Products, 164 I. C. C. 619 (1930); Livestock—Western District Rates, 176 I. C. C. 1 (1931).

[148] Southern Class Rate Investigation, 100 I. C. C. 513 (1925); Livestock—Western District Rates, 176 I. C. C. 1 (1931); Refined Petroleum Products in the Southwest, 171 I. C. C. 381 (1931).

Another limitation on the effectiveness of co-operative procedure grows out of the partisanship of state commissions. Perhaps the two most essential attributes of an effective court or administrative tribunal are expertness and independence. The Interstate Commerce Commission is generally conceded to meet these qualifications, although some appointments to the Commission and some interferences by the political branches of the government cast doubt upon the wholly informed and independent character of its performance.[149] But the question which is germane to this discussion is whether the inclusion of the state regulatory bodies in rate proceedings is conducive to informed and disinterested administration. Stated otherwise, does the co-operative system conform to sound principles of procedural law and administration?

The state commissions enjoy a peculiar status in the scheme of regulation, for they may and do perform the separate and distinct functions of prosecutors and judges. They function in a judicial capacity as regards matters pertaining to local public utilities and to intrastate railway transportation, but with respect to matters over which they have no jurisdiction, such as interstate railway rates, railroad consolidations, and security issuance, they appear as partisan representatives before the Interstate Commerce Commission. The regulatory statutes of many states actually require the state tribunals to represent the interests of their shippers in proceedings before the Commission. This raises the question how far it is fair and practical for state commissioners to function also in an advisory judicial capacity.

For the same state commissioners to act as advocates in the cases in which they are co-operating is clearly disapproved by the co-operative agreement. It seems that this tenet of procedure is carefully observed in practice, although one instance has been noted where it was not taken seriously, the state commissioner participating in a hearing both as judge and prosecuting attorney.[150] And the accepted practice of allowing state commission experts and attorneys to submit evidence and written and oral argument in proceedings in which commissioners from the same states are co-operating has been challenged on the ground that it is unfair to opposing parties.[151] The criticism appears to have

[149] 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 452-477 (1931).

[150] Commissioner Neal of the Department of Public Works of Washington, in Grain and Grain Products, 164 I. C. C. 619 (1930). See Record, No. 17,000, Part 7, pp. 33884-33902, 36590-36595, 36596-36601, 36779-36788.

[151] See motion of April 12, 1928, filed by Frank A. Leffingwell on behalf of the Texas Industrial Traffic League objecting to the co-operation of the Oklahoma Commission in Grain and Grain Products, 164 I. C. C. 619 (1930), because representatives of the state commission proposed and supported certain rate adjustments for the future.

merit. To permit commissioners to pass judgment upon the contentions of their own organizations is inconsistent with equitable judicial procedure.[152] It is true that the state commissioners are not bound by the contentions of their attorneys in deciding cases, but there is the danger that a really non-partisan consideration of the facts will not be possible in the circumstances.[153] One way to obviate the difficulty would be to preclude the employees from any participation whatsoever,[154] but this would clash with the statutory obligations of some state commissions and would prevent the submission of really helpful statistical evidence and expert testimony. Moreover, it is essential that public authorities participate to insure that the public side of rate questions is adequately presented.[155] Since it is inadvisable to eliminate such participation, therefore, reliance must be placed upon co-operating com-

(Record, No. 17,000, Part 7, Vol. 1a.) See, also, responses of Paul A. Walker, Counsel for the Oklahoma Commission (*ibid.*), and John E. Benton, General Solicitor for the National Association (*ibid.*, Vol. 1c).

[152] John E. Benton views the purpose of state participation in co-operative proceedings as follows (Bulletin No. 92-1930, reprinted in PROCEEDINGS, 1930, p. 145): "The design of such participation . . . should be the same as is the design of the Interstate Commerce Commission or of a state commission when it causes its own experts to introduce evidence in a proceeding before itself alone. They do not appear in the capacity of litigants or partisans, but to illuminate the record, and thus to enable the commissioners more certainly to reach right conclusions." A review of the evidence presented and briefs filed by attorneys and experts of state commissions in co-operative proceedings will show, however, that the general practice is to make *ex parte* representations.

[153] Commissioner Eastman has pointed to the difficulty of keeping within the bounds of propriety in the consideration of issues. He has said: "Upon your part [state commissioners'] the danger is that in giving advice you will be influenced by the fact that the ultimate responsibility is ours and become expedient partisans rather than disinterested judges." PROCEEDINGS, 1926, p. 48.

[154] It is of interest to note that the Texas Commission has pursued the policy of refraining from advocacy in proceedings in which it has co-operated, and has preferred co-operation with the Commission rather than litigation before it. One reason for such a policy appears to be the fact that the interests of the Texas shippers are so widely divergent that the Texas Commission cannot participate as an advocate without embarrassment. 38th Annual Report, 1929, p. 17; 36th Annual Report, 1927, p. 20.

[155] It is important to note that the Interstate Commerce Commission follows the practice of having its employees introduce evidence in several types of cases. Dr. Lorenz, Chief of the Bureau of Statistics, presented a cost analysis in Grain and Grain Products, 164 I. C. C. 619 (1930), although it was made clear that it was an expression of individual view and not an official document (p. 629). Experts prepare evidence and attorneys present it and argue it before the Commission in valuation proceedings, and in cases involving alleged violations of the Clayton Act, i. e., Interstate Commerce Commission v. Pennsylvania R. R., 169 I. C. C. 618 (1930); Interstate Commerce Commission v. B. & O. R .R., 160 I. C. C. 785 (1930). These cases illustrate the conjunction of investigatory and judicial functions which is characteristic of administrative tribunals.

missioners to be open-minded in the appraisal of evidence and solicitous to formulate decisions which are in the broad national interest, and upon the Interstate Commerce Commission to make proper allowances for their possible bias.

A second phase of the question of partisanship is that involved in cases wherein the rates of a particular state are attacked as prejudicial by an adjoining state. Under the co-operative plan the commission of the defendant state is free to sit with the Commission in the hearing and determination of the controversy. Because this state commission sits in judgment upon an alleged illegal rate adjustment of its own making, such an arrangement cannot be regarded as altogether just and proper. The state commissions are supposedly upon an equal footing before the Commission, and any advantage enjoyed by one over another is apt to lead to suspicion of undue influence upon the decision of the Commission and to lack of confidence in the procedure.[156] The difficulty could be remedied by giving representation to both the complaining and defending parties in the controversy, thus permitting the public tribunals concerned to weigh the facts and to settle the case through a sort of arbitration. This is actually done in general rate investigations when the number of commissions is not too great. Another alternative is to permit the co-operation of state commissioners, in cases where their rates are alleged by sister states to be related improperly to the interstate scales, only in exceptional circumstances.

The matter of partisanship constitutes a thorny problem in the co-operative system. To the extent that state commissioners become expedient partisans rather than disinterested judges in co-operative cases, the plan is not a success. It is probably true that some commissions or commissioners utilize their privilege to co-operate with the Commission to further the partisan interests of their constituents or to enhance their own political prestige. However, a survey of the cases reveals many instances of able and impartial service on the part of state commissioners, and many enjoy the confidence of examiners and mem-

[156] Commissioner Aitchison has commented upon the situation as follows:

"Sometimes a State commission finds itself as a party complainant, and the State Commission which is the real defendant then sits co-operatively while the other does not. This is a real source of embarrassment at times, because it is almost impossible to lay the ghost of a doubt in such cases as to whether the conferees may not have some shadow of personal interest in supporting their own decision because it has been attacked. Of course this phase of it is of real concern to the State commission — more so than to the members of the Interstate Commerce Commission." PROCEEDINGS, 1927, p. 71.

bers of the Commission.[157] Moreover, it is probable that the Commission can withstand successfully any partisan efforts to influence decisions. Nevertheless, any innovations looking toward higher standards of judicial performance will enhance the prestige of the co-operative system.

Another important limitation on the effectiveness of co-operation may be found in the unwillingness of state commissions to co-operate. In fact, one test of the practical utility of co-operation is the extent to which state commissions are interested in railway affairs and participate actively in the numerous proceedings before the Commission. The state commissions have assisted the Commission in most of the general rate investigations that have been undertaken during the last 12 years; but it is noteworthy that two major rate investigations, Consolidated Southwestern Cases[158] and Eastern Class-Rate Investigation,[159] were not of a co-operative character. The Texas Commission offered to co-operate in the former proceeding; however, because the genesis of the investigation was the claim of the Oklahoma Commission that the Texas common point system of class and commodity rates was prejudicial to Oklahoma shippers, the Commission believed it would be improper and embarrassing to itself to permit the defendant commissioners to sit in conferences relating to the judgment upon the discrimination charge.[160] While the Commission sought the co-operation

[157] John E. Benton argues effectively that there is no basic reason for partisanship on the part of state commissioners in 13th-section proceedings. He has said (Bulletin No. 81-1930, p. 3):

"Any such scruples have arisen, I think [referring to the doubt as to the propriety of co-operation in 13-section cases], from a failure to give due weight to the fact that rate proceedings by commissions are administrative or legislative rather than judicial, and to the further fact that the state commissioners have no more personal interest in such a proceeding than the Interstate Commerce Commissioners have. Speaking broadly, their interests and duties are at all times the same. It is always the duty of each to secure establishment of the rates subject to his jurisdiction upon a proper basis, and it is not to be presumed that a state commissioner will become partisan and abandon his proper official attitude the moment he has given sanction to a schedule of rates believed by him to be just and reasonable. There is no more reason why a state commissioner should enter a conference in a case in which a schedule once prescribed by him is under challenge with a partisan disposition to resist change therein than there is for an Interstate Commerce Commissioner to enter such conference with a pre-determination to find that the interstate rates (with which the intrastate rates are to be compared) must be declared upon a proper level, and all lower intrastate rates brought to that level."

[158] 123 I. C. C. 203 (1927).

[159] 164 I. C. C. 314 (1930).

[160] Railroad Commission of Texas, 36th Annual Report, 1927, p. 19.

of the state commissions in the Eastern Class Rate case,[161] there was so little interest displayed by the commissions concerned that the invitation was declined.[162] The state commissions in Official territory are characteristically inactive with respect to railway freight rates, a condition which is not conducive to the attainment of co-operation in this important territory.[163]

Neither have all proceedings involving specific interstate-intrastate maladjustments been co-operative. The Commission did not consent to co-operation in the numerous discrimination cases following Increased Rates, 1920, supra, for the states were fighting for a principle of constitutional law and were in no mood to work amicably through co-operation. Also, there have been several important discrimination cases since 1922 which have not been co-operative. Perhaps the most significant of these are the Fargo case[164] and the Watertown cases,[165] proceedings involving the validity of intrastate rates in Minnesota. The Minnesota Commission not only failed to take advantage of the co-operative plan, but intervened in defense of its rates; and tried later to restore the intrastate rates which the Commission had found to be discriminatory against the complaining Dakota cities. The Southern Livestock case,[166] embracing discrimination charges against several states, is another example of the failure of the state commissions to accept the co-operative procedure.

While these instances of lack of co-operation do not prove that the system has broken down, they do show that inherent difficulties in the regulatory mechanism have prevented its universal acceptance and application. Lack of interest in railway rate control, due in large measure to the narrow jurisdiction which the state commissions now enjoy, is a factor which must be reckoned with in the successful operation of

[161] Letter from Commissioner Eastman to Mr. John E. Benton of November 4, 1924. RECORD, Docket No. 15,879, Vol. 1a.

[162] In accepting the refusal, Commissioner Eastman stated: "In view of the inactivity of many of the state commissions in official territory with respect to railroad freight rates, I am inclined to think that the decision of the commissions which has been made with respect to cooperation is a wise one." Letter to Mr. Benton of December 24, 1924. RECORD, Docket No. 15,879, Vol. 1a.

[163] It is worthy of note that the rates prescribed in Eastern Class-Rate Investigation, 164 I. C. C. 314 (1930), were made effective in all the states in trunk-line territory and New England, except in New Jersey. Intrastate Class Rates in New Jersey, 203 I. C. C. 357 (1934).

[164] Fargo Commercial Club v. A. & W. Ry., 98 I. C. C. 691 (1925).

[165] Watertown Chamber of Commerce v. A. & W. Ry., 101 I. C. C. 427 (1925); Watertown Chamber of Commerce v. C. & N. W. Ry., 101 I. C. C. 441 (1925).

[166] 171 I. C. C. 721 (1930).

the plan. Moreover, despite the innovation of the co-operative plan to meet rate situations similar to that presented in the *Shreveport* case, it has not been found altogether workable in such cases. This has been due to the aggressiveness of some state commissions and their willingness to fight out issues in open court, and to the delicacy of the judicial status which it confers upon the defendant state commissions.

Against the advantages of the co-operative system must also be placed the costs, both in time and money, which the states and the public must bear. In the great investigations such as the Southern and Rate Structure Investigations, and the Fifteen Per Cent Case, 1931, the state commissions have been put to great expense in attending the numerous hearings, oral arguments, and conferences. No plan has been evolved for the purpose of equalizing the financial burden as between the various commissions. The result often is that those commissions which have the least to do with respect to the regulation of local utilities and the largest appropriations for railway regulation are the most active in co-operating with the Commission.[167] Attempts have been made to secure appropriations from Congress in order to meet the expenses of the co-operative system, but without success.[168] Co-operative activities would seem to merit such financial support, for although the state commissions are functioning partly in the interests of proper control of local commerce, co-operation is of definite value to the Commission in fixing interstate rates and does contribute materially to the effectiveness of federal control of the national transportation system.[169] It is difficult to ascertain whether the economic and social gains of co-operation are equal to the financial outlays. Certainly the gains are not such as are warranted at any price, yet the rather nominal cost of

[167] Mr. John E. Benton has said: "Shortage of appropriations of certain commissions hamper [sic] the work of their representatives, and in some instances precludes altogether their participation, notwithstanding such participation may be particularly vital by reason of the involvement of their interstate rates, or because they could supply men especially well qualified as to experience and ability." Hearings before Subcommittee of House Committee on Appropriations, Independent Offices Appropriation Bill, 1928, 69th Cong., 2nd Sess., December 1926, p. 471.

[168] Hearings before Subcommittee of House Committee on Appropriations, Independent Offices Appropriation Bill, 1928, 69th Cong., 2nd Sess., December 1926, pp. 469-472; PROCEEDINGS, 1927, pp. 15-17.

[169] It is noteworthy that in the bills providing for the regulation of motor vehicle carriers introduced by Senator Dill and Congressman Rayburn during the last session of Congress, it is provided that the expenses of co-operating state commissioners shall be paid with federal funds. S. 3171, sec. 305 (c) and H. R. 6836, sec. 3 (c), 73rd Cong., 2nd Sess., 1934.

co-operation,[170] although badly allocated as between the states, would seem not to be unreasonable.

A second practical difficulty which seems to have caused apprehension with regard to the workability of co-operation has been the lack of promptness in the handling of co-operative cases. It is clear that the great length of time consumed in the investigation and decision of the major rate proceedings of the last decade cannot be attributed to co-operation, for their scope has been extremely broad and the issues difficult. Yet it is probably true that the participation of a larger, more heterogeneous tribunal causes delay in the conduct of hearings and argument, and protracted discussion and deliberation upon the issues. Commissioner Aitchison, in pointing to the difficulty, has said: "Obviously there is a good deal of chance for lost motion and delay in a co-operative case. If the co-operative agreement is to work well, it must be made to work with reasonable speed in the cases where it is applied." [171] In rate cases of more limited scope there would seem to be much less reason for delay. Nevertheless, the promptness with which a tribunal can render its decisions is an important test of its efficiency, and co-operation cannot be permitted to interfere unduly with the expeditious handling of cases.

From a purely administrative point of view the simplest and least cumbersome method of controlling the railway carriers would be to centralize all authority in the federal government. Brushing aside the state commissions entirely would eliminate a host of diverse laws and regulations, and would give free rein to the Interstate Commerce Commission to formulate regulatory policy and to execute its decisions without fear of conflicting state action and extended litigation. But even if this were constitutionally possible, it is very doubtful whether the gains would exceed the losses in terms of local autonomy and of control based upon full knowledge of local needs and conditions. Co-operation aims to make the best possible use of regulatory agencies as they exist today.

The aims which underlay the establishment of the co-operative system have been realized in substantial measure. In a variety of ways and with respect to a considerable number of regulatory problems the

[170] President Shaughnessy of the National Association of Railroad and Utilities Commissioners suggested that $100,000 be appropriated by Congress to meet expenditures incurred by state commissions in co-operative work for the fiscal year 1928. Mr. Benton estimated that between $50,000 and $100,000 would be necessary. Hearings before Subcommittee of House Committee on Appropriations, Independent Offices Appropriation Bill, 1928, 69th Cong., 2nd Sess., December 1926, pp. 471-472.

[171] PROCEEDINGS, 1927, p. 70.

knowledge and experience of state commissioners have been utilized so as to secure decisions based upon a more realistic and adequate conception of local conditions and needs. Significant contributions have been made by the state commissions in the regulation of accounts and statistics, valuation, service, extensions and abandonments, and rates and charges. The co-operation has been achieved without the relinquishment of the final authority of the Commission or interference with the execution of broad national regulatory policies. Conflict between the state and federal commissions with respect to rates and extensions and abandonments has been avoided to a large extent, although by no means entirely. To the extent that it has been eliminated, it has resulted in a more uniform and flexible rate structure, more adequate carrier revenues, and more harmonious relations between the regulatory bodies. These accomplishments point to the practical value of the plan.

Despite its defects and limitations, co-operation stands as a unique and practical mechanism for governmental control in a dual system of government. Its achievements point to the value of further experimentation and development in the railway field, and give some assurance that it will function acceptably in the regulation of interstate motor carriers and interstate transmission of electric power.