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The Railroad Passenger Problem—At the Crossroads

Thomas H. Trimarco

John H. Hines Jr

THE RAILROAD PASSENGER PROBLEM—AT THE CROSSROADS

> The troubles in our transportation system are deep; and no just and comprehensive set of goals—which meets all the needs of each mode of transportation as well as shippers, consumers, taxpayers and the general public—can be quickly or easily reached. But few areas of public concern are more basic to our progress as a nation.[1]

In these words President Kennedy urged Congress to meet the difficulties and complexities of our transportation problem. Two years have since elapsed but all levels of government—federal, state, and local—continue to be faced with an important aspect of this problem, the continued decline in the competitive position of our nation's railroads.

Since World War II the railroads have experienced serious decreases both in their passenger and freight traffic and in their revenues. However, this article is concerned only with the passenger problem. Such narrow coverage is not intended to minimize the seriousness of the downward trend in freight revenues, which have always been the chief source of railroad income.[2] But a curtailing of passenger losses in both intercity and commuter services would plug the drain from freight revenues and thus alleviate a financial burden which this privately owned industry has long endured for the public benefit.

The Passenger Problem

"Passenger Deficit"

The Interstate Commerce Commission has defined the term "passenger deficit" as the ". . . amount by which the revenues from railroad passenger-service operations fall short of covering operating expenses, taxes, and net rents assigned or apportioned to this service."[3] Since 1930, except for the war years, 1942 through 1945, when gas rationing was responsible for peak operational levels on the rails, the railroads have suffered a passenger deficit. The deficit was $233 million in 1936, fluctuated between $226 million and $262 million from 1937 through 1941, and then, after four years of wartime profits, steadily rose until 1957 when it reached the all-time high

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[1] President Kennedy, Special Message to the Congress on Transportation, H. Doc. No. 384, 87th Cong., 2d Sess. 5985, 5990 (1962).

[2] 75 ICC Ann. Rep. (Supp. 1962, at 149).

[3] 306 I.C.C. 417, 419 (1959). It should be noted that in the use of the term "passenger deficit" no distinction is made between long-haul intercity service and short-haul commuter service. Also it should be noted that, while it is impossible to delineate in all cases the costs attributable to passenger and freight service, the ICC feels that about 75% of such costs can be separated. Those expenses which are clearly accountable to one service or the other are referred to as "solely related" expenses and the ICC has set up rules for determining them. Although these rules have been criticized, the Commission believes they are ". . . adequate for the purpose for which they are intended." 302 I.C.C. 735, 738 (1958).

of $723.4 million.[4] *In this year, 1957, operating expenses attributable to passenger service exceeded passenger revenues by more than 58 percent.*[5] More recent figures show that the passenger deficit has dropped from $408.2 million in 1961 to $394.3 million in 1962, a reduction of 3.4%.[6] However, since 1946, the total loss apportioned to passenger service has approached $10 billion, which represents a serious drag not only on the railroads but on the economy of the nation as well.

Causes of Passenger Deficit

Decrease in Passenger Traffic.—The primary reason for these staggering losses has been, quite simply, the decreased public demand for passenger service. Once again, statistics best relate the tale. Each year in the eleven year period from 1952 through 1962, the total number of intercity and commuter passengers carried by the railroads declined. The industry transported 471 million passengers in 1952, 382 million in 1958 and only 313 million in 1962.[7] These figures become even more significant when it is realized that in the 20 year period from 1940 to 1959, total intercity passenger miles by all modes of travel have increased over two and one-half times and that the average person in the United States has doubled the amount he travels.[8]

The principal reasons for the decline in railroad passenger traffic are well-known: the automobile and the airplane. Both have made remarkable advances in technology and through substantial federal subsidies are now serving all geographic locations within the country. Also, people have come to enjoy the freedoms provided by private vehicles. No longer need they endure the schedule restrictions of public transportation.[9]

Increase in Operating Expenses.—A second reason for the passenger deficit has been the steady increase in operating expenses. From 1947 to 1957, while passenger traffic and revenues steadily fell, total operating expenses increased by 7%.[10] The fact that management was slow to decrease total train miles in response to the declining demand for passenger service accounted in large part for this worsening revenue-expense relationship. Present facts indicate, however, that the problem of high operating expenses is

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4 306 I.C.C. 417, 486 (1959).

5 Ibid.

6 77 ICC Ann. Rep. 87 (1963). An interesting aspect of these startling statistics is that from 1936 to 1941, a period of retarded economic activity, the losses suffered were considerably less than those suffered from 1947 to 1957, a period of relative prosperity. This incongruity is only partly tempered by factors such as increased fares, wages, taxes, materials and the decrease in the value of the dollar. Encouragement should be drawn, however, from the declining deficit rate of late, which is indicative of improvements to be explained later.

7 Id. at 226.

8 Special Study Group on Transportation Policies in the United States, 87th Cong., 1st Sess., Report on National Transportation Policy 275 (Comm. Print 1961) [hereinafter cited as Doyle Report].

9 See 306 I.C.C. 417, 429 (1959) and 77 ICC Ann. Rep. 140 (1962), which gave ample proof of this trend. Private automobile travel has increased from 83.6% of total passenger miles in 1949 to about 90% in 1961. At the same time railroads have dropped from 8% of that total to about 3.7%.

10 306 I.C.C. 417, 436 (1959).

somewhat less acute, for despite a $5½ million decrease in passenger revenues from 1961 to 1962,[11] the passenger deficit for that same period saw a $14 million decline,[12] necessarily signifying a diminution in operating expenses, taxes and rents of $9 million. Indeed, the observation has been made that the ". . . fact that this [revenue-expense] relationship is improving since 1957 through a vigorous campaign of service reduction and revenue increase suggests that equal vigor 20 or 30 years earlier might have left rail passenger services in much better condition financially."[13]

Attempts to Reduce or Eliminate the Passenger Deficit

Changes in Rates.—In an attempt to compensate for the drop in passenger volume and the consequent loss in revenues, rates have been increased. ICC figures indicate that revenue per passenger mile has increased from 2.665 cents in 1952, to 2.903 cents in 1958, to the high of 3.113 cents in 1962.[14] This boost in fares, however, has failed to prevent sharp revenue losses. In 1952 revenues from passenger services were $906 million, in 1958 they were $675 million, and in 1962, only $619 million.[15]

Many views have been expressed about whether an increase or decrease in rates would more effectively reduce the passenger deficit. At the ICC hearing on the Railroad Passenger Train Deficit,[16] conflicting views were taken by the Administrator of General Services, which represents the United States Government, and the National Coal Association. The former recommended a reduction in passenger rates whereas the latter felt that efficient management and the public interest required an increase and that this would not seriously affect the volume of travel in the South and West. The ICC did not draw any conclusions but did remark ". . . that the railroads are best suited to volume carriage and that in order to put passenger travel on a paying basis they must devise ways of encouraging volume travel."[17]

After years of ineffective government regulation there is growing support to allow the individual carriers to determine rates according to their own economic climate. This position has been taken, for example, by the Senate Committee on Commerce, which, in the Doyle Report (1961), indicated disenchantment with the present system of transportation regulation;[18] by economist Eric Schenker who feels that rate-making practices must be "changed to conform with the changing economic characteristics of the industry;"[19] and also by President Kennedy who requested Congress to

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[11] 77 ICC Ann. Rep. 224 (1963).

[12] Id. at 87.

[13] Doyle Report, supra note 8, at 299.

[14] 77 ICC Ann. Rep. 226 (1963).

[15] Id. at 224.

[16] 306 I.C.C. 417 (1959).

[17] Id. at 446.

[18] Doyle Report, supra note 8, at 158.

[19] Schenker, Public Policy in the Transport Market, 71 Pub. Util. Fort. 25, 36 (April 25, 1963).

remove minimum rate restrictions on intercity passenger traffic so that competition would once again be free and open.[20]

The inability of the railroads to prosper under present governmental control is proof enough that "the common sense of the thing is to move in the direction of greater freedom of choice."[21]

Improvements in Equipment and Service.—The railroads have also attempted to halt the decline of passenger volume by upgrading their equipment in the hopes that increased comfort, luxury and speed of service would induce people back to the rails. But such attempts have largely failed. Between 1946 and 1957, a period when patronage was steadily declining, the railroads increased their net investment in passenger cars and passenger locomotives by about half a billion dollars.[22] In addition, many spent unprecedented sums for advertising and promotion programs. Nevertheless, increased losses were experienced. A prime example is the New York Central which, in the years following World War II, spent a quarter of a billion dollars for improved passenger service facilities and $14 million in advertising. However, in 1956 its losses amounted to $48 million.[23] Of course many railroads have not been willing or able to improve service. This has led to the unsurprising conclusion that:

> [W]hile the airlines and buslines have been maintaining modern fleets and introducing improvements as rapidly as practical the railroads, except for isolated carriers, have not done so. The result is that the average piece of railroad equipment is less attractive to passengers than that of their competitors and may in some respects be less comfortable.[24]

Despite the truth of this observation, even where equipment and services have been improved, the anticipated increase in passengers has not been realized. Thus it would seem that the solution to the passenger deficit does not rest in this area.

Reduction in Operating Expenses and Taxes.—In another logical attempt to reduce the passenger deficit the railroads have sought to reduce their operating costs. Unfortunately, their ability to do this has been hampered by the fact that material and labor costs and taxes comprise more

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[20] Special Message to the Congress on Transportation, supra note 1, at 5986. In this message President Kennedy stated that:

> the traveling public, like the commercial shipper, is also uninterested in paying higher rates to subsidize weak segments of the transportation industry. Chronic overcapacity and deficits can be ended in the long run only in an industry made fit, lean and progressive by vigorous competition and innovation. But this is not possible as long as Federal agencies fix uniform minimum rates for passenger travel. I recommend, therefore, that the Congress enact legislation which would eventually limit the control of intercity passenger rates to the establishment of maximum rates only.

[21] Davison, Transportation Regulation: How Much? How Long?, 50 Va. L. Rev. 5, 22 (1964).

[22] 306 I.C.C. 417, 448 (1959).

[23] Doyle Report, supra note 8, at 294.

[24] Id. at 278.

than four-fifths of their total expenses.[25] These costs, of course, are beyond the ready control of management. To be sure, some operating expenses have been reduced. For instance, despite a $250 million increase in total revenues in 1962, taxations for all services were reduced by $86 million and this favorable trend continued into the first six months of 1963.[26] But while taxes diminish, wages, depreciation, and the cost of materials and other expenses continue to rise.[27] When these factors are related to passenger service, there appears to be no hope that the passenger deficit can be substantially reduced by attempts to reduce operating expenses.

Discontinuances.—With the volume of traffic continuing to sag and the failure of the previously mentioned attempts to recapture losses, some of the railroads have attempted to eliminate the passenger deficit entirely by discontinuing unprofitable trains and services. Unfortunately, prior to 1958 the sole forums to which they could proceed for consideration of their discontinuance requests were the state regulatory commissions which by and large were unsympathetic to their plight.[28] Until 1958, there was no federal legislation in the discontinuance area. While the ICC had plenary power under the Transportation Act of 1920[29] to authorize the abandonment of *all* operations over a given line, it had no power whatever to authorize the discontinuance of a particular train or service, leaving in operation on the same line other trains and services. In short, until 1958 the ICC could order abandonments but not discontinuances. In 1958, however, Congress filled the gap in the powers of the ICC by adding Section 13a to the Interstate Commerce Act.[30] The relief provided by Section 13a was badly needed at this particular time because of a near-calamitous, $860 million drop in freight revenues which left the railroads unable to absorb their

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[25] Id. at 563.

[26] 77 ICC Ann. Rep. 88 (1963).

[27] Ibid.

[28] Although precise figures are unavailable to illustrate the unsympathetic attitude of some of the state commissions, evidence submitted by a Senate Committee on Interstate and Foreign Commerce to the ICC shows that:

> Without reciting individual cases, the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many such cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

S. Rep. No. 1647, 85th Cong., 2d Sess. 22 (1958).

[29] 41 Stat. 477-78 (1920), 49 U.S.C. § 1(18) (1958). This Act provides in pertinent part that:

> No carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

See New Jersey v. New York S. & W.R., 372 U.S. 1 (1962), in which the Court discusses this section in depth.

[30] 72 Stat. 571 (1958), 49 U.S.C. § 13a (1958).

passenger losses with the relative ease they had earlier experienced.[31] As might be expected, since the passage of Section 13a, the principal means of controlling the passenger deficit has been to obtain discontinuances, and the results have been most encouraging. For the year 1959, the first full year in which the ICC had power to grant discontinuances, the amount by which passenger expenses exceeded passenger revenues dipped to 30%, the lowest figure since 1948.[32]

Section 13(a) of the Interstate Commerce Act[33]

Under the Transportation Act of 1920, the ICC was given the power to permit abandonments, even where the line lay wholly within a state, where it could be shown that continued operation would constitute an undue burden on interstate commerce. The landmark case in the abandonment area was *Colorado v. United States*[34] in which the Supreme Court upheld the Commissioner's order to abandon a particular branch line. The state had argued that the order could not be upheld since there had been no finding that the railroad was suffering a net loss on its combined freight and passenger services and since there was thus no proof that further operations would constitute an undue burden on interstate commerce. But the Court rejected this argument, stating that the act did not require the railroad to be suffering a combined net loss but only that the "abandonment be consistent with public necessity and convenience."[35] As Mr. Justice Brandeis put it, the Commissioner was to balance the interests involved, "the effort being to decide what fairness to all concerned demands."[36]

In enacting Section 13a in 1958, Congress turned to the law on abandonments for guidelines. Under Section 13a, in order for the Commissioner to grant or acquiesce in any discontinuance, he must first find that the service in question is not required by public convenience and necessity,

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[31] In 1956, the freight revenue total was approximately $9 billion. In 1957, this figure dropped $3 million. In 1958, however, freight revenue fell some $860 million.

[32] Doyle Report, supra note 8, at 287.

[33] 72 Stat. 571 (1958), 49 U.S.C. § 13a (1958), provides in pertinent part:

> The Commission may grant such authority only after full hearing and upon findings that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce.

[34] 271 U.S. 153 (1925).

[35] Id. at 168.

[36] Id. at 169. The Court also set out on page 166 the scope of the ICC's authority in making abandonment decisions.

> [The ICC] may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

and second, that the continuation of the service will unduly burden interstate commerce.[37] The division of the section into two paragraphs is of procedural significance only. Under paragraph (1), a carrier may discontinue an *interstate* train or service of its own accord, subject only to the possible determination by the ICC that such discontinuance is unwarranted, whereas under paragraph (2), the Commission may take action concerning discontinuance of an *intrastate* service only after the appropriate state commission has had the opportunity to act and has refused to authorize the discontinuance.[38]

Southern Ry. v. North Carolina[39]

While the ICC has entertained a number of discontinuance requests since 1958, few of its decisions have been appealed to the district courts. Moreover, with the exception of *Southern Ry. v. North Carolina*, the cases which have been appealed are of minor significance.[40]

The *Southern Railway* case involved a petition to discontinue two passenger trains operating between Greensboro and Goldsboro, N.C., a distance of about 130 miles. After the North Carolina Utilities Commission denied the petition, the railroad turned to the ICC which ordered the dis-

[37] Proving an undue burden on interstate commerce, or, in other words, an undue financial loss, is a requirement of every petitioner for a discontinuance. Railroad attorney David E. Wells states, in a 1959 article on § 13a, that, in theory, any financial loss by a carrier on any portion of its operation constitutes a burden on interstate commerce, even when the carrier's entire operation shows a profit. However, in order to prove an *undue* burden as § 13a requires, the carrier must show that the loss

> is large enough to outweigh facts showing a need by the public for the continued operation of the service. The weighing process cannot be more precisely described. For example, in one case a large loss may not be sufficient while in another a very small loss is enough. A good rule of thumb is that the greater the showing of need for continued service the greater must be the loss for it to be deemed "undue." Conversely, if there is no need shown, any loss at all would be "undue."

Wells, A Review of Interstate Commerce Commission Decisions, 27 ICC Prac. J. 821, 825-26 (1960).

[38] A railroad proceeding under paragraph (1) of § 13a must first file notices of the proposed discontinuance with the ICC, with the Governors of the states in which the train operates, and in every station served by the train. After 30 days, the railroad may discontinue the train unless the Commission has decided to investigate the discontinuance. The Commission may require the railroad to continue operation, pending its investigation, for an additional four months. It also may, at the conclusion of the investigation, order service continued for another year.

[39] 376 U.S. 93 (1964).

[40] Sludden v. United States, 211 F. Supp. 150 (M.D. Pa. 1962), was an action which questioned the constitutionality of § 13a(1). Plaintiff contended that the section, since it concerned intrastate commerce, was an infringement upon the right of the state to regulate intrastate commerce. In finding for the Government the court stated that ". . . the reach of the power of Congress extends to those intrastate activities . . . which are an integral part of a movement in interstate commerce."

City of Philadelphia v. United States, 197 F. Supp. 832 (E.D. Pa. 1961), and Montana v. United States, 202 F. Supp. 660 (D. Mont. 1962), are similar decisions. In each case the petitioner sought to set aside an order of the ICC authorizing the discontinuance of certain passenger train service, and in each case the court found that the evidence sustained the findings of the ICC and dismissed the complaint.

continuance. The Commission found that there had been a substantial decrease in the number of passengers on the trains; that the direct expenses of operating them were over three times their total annual revenue; that discontinuance would save the railroad over $90,000 a year; that the need for the trains was insubstantial when viewed in the light of the density of the population served; and that alternate transportation in the area was adequate. In reaching this decision the Commission gave little or no weight to the overall prosperity of the carrier (its overall profit for 1960 was in excess of $36,000,000) and no consideration whatever to the profitability of freight operations on the line in question ($630,000 profit).

The district court,[41] in setting aside the ICC order, held that it was erroneous for the Commission to order a discontinuance without first determining whether, taking profits from freight operations on the same line into account, the particular line was making a profit. The court also found that the losses from the operation of the two passengers trains were inconsequential in light of the railroad's overall prosperity.

Both the Southern Railway and the United States appealed to the Supreme Court. The Court, in reversing and remanding, held that the legislative history of Section 13a made it plain that where the demands of public convenience and necessity are slight, it is ". . . proper for the Commission, in determining the existence of the burden on interstate commerce, to give little weight to the factor of the carrier's overall prosperity."[42] In addition, the Commission did not have to weigh heavily the freight profits on the line in question.

Mr. Justice Goldberg, joined by the Chief Justice, dissented, taking the position that the Court was misreading the legislative history and the intent of Congress. He conceded that freight profits and overall profits ". . . may not be the controlling factors but, when presented," he said, "they are to be considered."[43] In essence, his position was that the majority did not give sufficient weight to the profits which the railroad was making both overall and on the line in question. Mr. Justice Goldberg then accused the majority of applying the "net loss" standard which Congress had specifically rejected in favor of the twin test adopted.[44] The rejected "net

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41 North Carolina v. United States, 210 F. Supp. 675 (M.D. N.C. 1962).

42 Supra note 39, at 105.

43 Id. at 110. However, Mr. Justice Goldberg did not in any way specify the degree of weight that the freight profits on the same line or the overall prosperity of the carrier were to carry.

44 The major issue during the legislative development of § 13a was whether the Commission should be required to permit a discontinuance of any train operated at a "net loss," regardless of the public need. As originally reported the bill would have authorized any railroad to discontinue any train unless the Commission found that the operation of such train ". . . is required by public convenience and necessity *and* that such operation or service will not result in a net loss to the carrier. . . ." (Emphasis supplied.) S. Rep. No. 3778, 85th Cong., 2d Sess. 5-6 (1958). The required "net loss" would have to be sustained by the particular train which the railroad was seeking to discontinue. In other words, if the Commission found that the continued operation of a particular train would result in a "net loss" to the carrier, the Commission would have been required to permit discontinuance, regardless of the public need for the service.

loss" standard would have permitted the railroads to discontinue a particular service *regardless of the public need*, so long as the particular service was suffering a net loss.

Despite Mr. Justice Goldberg's contention that the majority was in fact applying the rejected "net loss" standard, the decision of the majority comports with the congressional intent underlying the passage of Section 13a. As the Committee reports point out, the House and Senate Committees firmly opposed the subsidization of losing operations (such as passenger trains) out of revenues derived from other more profitable services (such as freight). For example, the Senate Subcommittee on Interstate and Foreign Commerce, in discussing the legislation, succinctly stated that:

> A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their own way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce.[45]

In refusing to give substantial weight to the overall prosperity of the railroad or to the profitability of other operations on the same line, the majority not only effectuated the intent of Congress but also affirmed the position long taken by the ICC.[46] This position was also taken by at least

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Senator Javits, however, fearing discontinuance of the deficit commuter service upon which some large cities depend for mass public transportation, proposed to amend the bill by deleting the "net loss" standard as an absolute basis for discontinuance, and to substitute a requirement that the Commission balance the public need for the service against the deficit resulting from it. 104 Cong. Rec. 10838-39, 10846-49 (1958). Senator Javits' amendment was rejected, and the "net loss" standard remained in the bill as passed by the Senate.

However, Senator Javits' position won out in the House, and the "net loss" standard was deleted from the bill. 104 Cong. Rec. 12530, 12547-48 (1958). The bill, as amended, provided that factors of public convenience and necessity could override the importance of a net loss on a particular service. The amended bill was accepted by the Senate in conference.

In sum, the legislative history shows that Congress altered the original purpose of the Senate bill, *requiring* the ICC to authorize the discontinuance of every interstate or intrastate train or service operating at a net loss, by *allowing* the Commission to balance the public need for the train or service against the burdens posed by the operating deficit. In any event, the inquiry was to be directed at the particular service to be discontinued and not at the line as a whole.

[45] S. Rep. No. 1647, supra note 28, at 21.

[46] Chicago, M., St. P. & Pac. R.R. Abandonment, 312 I.C.C. 631, 633-34 (1961). Northern Pac. Ry. Discontinuance of Service, 307 I.C.C. 805 (1959), disposed of without printed report. See 26 ICC Prac. J. 1094 (1959). Missouri Pac. Ry. Discontinuance of Service, 307 I.C.C. 809 (1959), disposed of without printed report. See 27 ICC Prac. J. 211 (1959).

In refusing, in discontinuance cases where the public need is slight, to give significant weight to the carrier's overall prosperity or to the profitability of its other operations on the same line, the ICC has merely taken the same position it earlier took in abandonment proceedings. In abandonment cases, where the public need was slight, the ICC gave little weight to the fact that the railroad's overall operations were profit-

one federal district court[47] and the district courts which have had the opportunity to review decisions of the state regulatory commissions.[48]

Though important, the decision in *Southern Railway* is not momentous, for while it permits discontinuance of unprofitable services where the need for them is slight, it does not provide a solution where the need for them is great. In short, *Southern Railway* is no panacea for a far more serious problem facing the railroads today, the commuter service problem. The Court itself was aware of this when it said that:

> [I]n cases . . . involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services.[49]

As might be expected, it is precisely in these densely populated metropolitan areas that the railroads are presently seeking additional savings. But it is also here that attempts to discontinue clearly conflict with the public need. Indeed, this conflict between essential commuter service on the one hand and crippling deficits on the other presents a problem of overriding importance, meriting special attention.

THE COMMUTER PROBLEM[50]

New York, Chicago, Boston, Philadelphia and San Francisco are the only metropolitan areas which depend heavily on the railroads for the movement of people from suburbs to the central city districts. Among these, the New York, Philadelphia and Boston lines are experiencing the most serious financial losses from commuter services.[51] However, the fact that more communities are not immediately affected does not mean that com-

able. New York Cent. R. Abandonment, 254 I.C.C. 745, 761-62 (1944); Long Island R. Abandonment, 166 I.C.C. 671, 676-77 (1930), aff'd sub nom. Transit Comm'n v. United States, 284 U.S. 360, 369-70 (1932). See also Oregon-W.R. Nav. Abandonment, 175 I.C.C. 492, 494-95 (1931); Chicago, M., St. P. & P.R. Abandonment, 72 I.C.C. 315, 320 (1920), aff'd sub nom. Colorado v. United States, 271 U.S. 153 (1925).

[47] Chicago, B. & Q.R. v. Board of R.R. Comm'rs, 78 F. Supp. 1010 (D. Mont. 1947); Northern Pac. Ry. v. Board of R.R. Comm'rs, 46 F. Supp. 340, 342 (D. Mont. 1942).

[48] Had the case been decided otherwise, that is, had the decision required the Commission to give great weight to the overall prosperity of the carrier regardless of the public need shown, no doubt the railroads would then have been required to substantiate their financial status with detailed facts and figures. As it now stands, however, it appears that in a discontinuance proceeding where the public need is slight, a railroad need not sustain the unnecessary burden and expense of compiling and producing extensive financial records.

[49] Supra note 39, at 105.

[50] Until now, our attention has been focused on the passenger deficit without any distinction between the losses from long-haul intercity traffic and the short-haul commuter trips. Although the ICC Annual Report figures lump the losses into one general category, i.e., passenger deficit, it should be realized that a portion of this deficit is attributable to commuter service.

[51] Doyle Report, supra note 8, at 554.

muter losses are a purely local problem and that solution should be sought solely at the local level. As the Doyle Report clearly indicates:

> The Federal Government has a vital interest in the free flow of commerce in all parts of the United States, in the preservation and propagation of national wealth and tax production, in the provision of the best living and working conditions for the majority of its citizens, and in establishing the facilities and conditions necessary for the national security. To the extent that inadequate urban transportation facilities and the decline of public transport services act to the detriment of these interests, or needlessly increase the total cost of daily economic activities, there is cause for immediate Federal attention.[52]

Indeed, since the railroad commuter problem jeopardizes the economic well-being of five key American cities, there can be no doubt that the national welfare is deeply involved. Therefore, the Federal attention which this problem is now receiving seems well deserved.

Need for Railroad Commuter Service

Concern over the discontinuance of commuter service runs much deeper than over elimination of intercity services. This is because the people of the United States, with improved alternate modes of transportation, no longer depend upon city to city railroads, whereas they do rely heavily on commuter service, especially in the five cities mentioned. Indeed, a study of comprehensive reports on the transportation problems of almost all our larger urban areas forces the conclusion that ". . . elimination of rail service where it is presently moving large numbers of people between suburbs and the central business district is unthinkable."[53] Not only is *elimination* of commuter rail service unthinkable, but the Commerce Department, after studying Philadelphia's transportation problem, concluded, at least with respect to that city, that ". . . urban planning must allow for increased use or at least maintenance of existing transit facilities."[54]

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[52] Id. at 552.

[53] Id. at 567.

[54] U.S. Dep't of Commerce, Federal Transportation Policy and Program, Appendix, at 53 (April, 1960). In commenting upon the advantages derived from the increased use of railroad commuter service during the 1959 experiment, the Commerce Department stated that:

> Reduced traffic congestion was one benefit. Further, the more traffic that can be shifted from the highways, the less the cost to the city of traffic control, including police, as well as street maintenance and construction. It has been estimated that the cost to the City of Philadelphia for a six-month experiment was 6 to 9 cents per ride. But if the people using the rail facilities had to be accommodated by highways and if even 90 percent of the cost of the necessary freeways were paid by user taxes, with the city contributing only 10 percent of the costs, the public subsidy per trip would be 19 cents. To this would be added the cost of parking facilities in the downtown central core which would require an additional 25-cent subsidy. Thus on a round-trip basis the city, even

Further doubts of the necessity for continued commuter operations are quickly dispelled by consideration of the alternatives. Cessation of railroad services would only lead to increased dependence upon the automobile which would lead to further highway congestion, parking problems and tremendous additional costs for adequate auto facilities. Indeed,

> the American Municipal Association has estimated that if the five cities of New York, Chicago, Boston, Philadelphia, and Cleveland were to lose just their rail commuter service, it would cost $31 billion, including financing costs, to build the highways necessary to serve a comparable number of people.[55]

These factors make it apparent that the discontinuances which have proved so helpful in reducing the passenger deficit in intercity operations cannot be intelligently contemplated in the commutation area.

Causes of the Railroad Commuter Problem

Decrease in Passenger Volume.—As in the overall passenger problem mentioned earlier, the primary difficulty facing the commuter railroads is their declining patronage. The industry witnessed a decline in the number of commuter passengers from the wartime high of 322 million in 1945 to the 1960 low of 207 million.[56] The growth of sprawling suburbs and the sensational rise in the use of the private automobile are largely responsible for this decline, for no longer do motoring suburbanites depend heavily on the downtown city area for shopping and entertainment needs. Today they can enjoy the ritualistic weekend spending spree at the extensive, modern and convenient shopping center, a unique American phenomenon. Consequently, people in outlying areas come into the city less often than they used to, and when they do come in, they take their cars. Moreover, the luxury and status of automobile commuting has taken hold as people are now willing to pay more for the real and imagined conveniences of this more flexible mode of travel.[57]

The upsurge in automobile driving has resulted in frantic governmental activity which has seen billions of dollars spent to build new turnpikes, throughways, bridges, tunnels and parking facilities. A vicious circle has ensued with each additional highway improvement inviting more drivers to take the wheel and thereby decreasing further the demand for mass public transportation and finally requiring even more expenditures for highway

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when paying only 10 percent of the highway cost, would still have to spend 44 cents each way if passengers now moving by rail had to be moved on freeways. City officials calculate that the present city subsidy to the automobile commuters is approximately $50 per car per year. . . .

[55] 1964 Adv. Sh. U.S. Code Cong. & Ad. News 2255.

[56] McKenna, Operation Commuter, 70 Pub. Util. Fort. 835 (1962).

[57] Doyle Report, supra note 8, at 284. Figures show that the average fare for railroad coach service in cents per mile is 2.77 whereas the average expense for full costs in a private auto is 4 to 5 cents per mile.

programs.[58] The most unfortunate results have been increased traffic congestion[59] and continual loss of revenue to the railroads.

Decrease in Freight Revenues.—As discussed previously, the billion dollar decline in freight revenues in recent years has made it more difficult for the railroads to absorb their passenger losses.[60] Any hope to regain this freight income swiftly is dim, since the extremely competitive nature of the freight business prohibits, in the view of railroad management, an increase in freight rates, despite rising costs.[61] Consequently, the industry's inability to recoup revenue losses by this and other methods has resulted in its pressing for financial relief through elimination of unprofitable commuter trains.

Inefficient Use of Plant and Personnel.—Another reason for the commuter problem is that peak period requirements for commuter service result in the inefficient use of manpower and equipment for the full day, causing higher costs.[62] Only for 20 hours each week during the morning and evening rush are equipment and personnel operating at full capacity. The remaining hours find equipment and personnel sitting idly, though still incurring costs on the carriers. Only through an increase in off-peak traffic would such high unit costs be reduced.

Poor Pricing and Regulatory Policies.—Another basic cause of the commuter problem is that fares have been very low and subject to irrational and economically unsound pricing practices.[63] The Doyle Report objects that:

> The commuter railroads have given the lowest rates to the peak hour customers who are the most expensive to serve and have given the highest rates to the occasional offpeak customer who does not ride often enough to buy a multiple-ride ticket and who is the least expensive to serve. These customers can be served for a very reasonable fare since a large plant is in operation through the middle

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[58] The Doyle Report, at 555-56, notes an interesting exception to the downward trend in railroad commuter patronage. In the northwestern part of Chicago three commuter lines have seen *increases*. The reason is undoubtedly that highway facilities in that particular area are not as extensive and modern as in other parts of the metropolis, where railroad commuter traffic continues to fall.

[59] 1964 Adv. Sh. U.S. Code Cong. & Ad. News 2255. Here it was noted that:

> it has been estimated that traffic jams cost the Nation about $5 billion a year in time and wages lost, extra fuel consumption, faster vehicle depreciation, lower tax yields, and other inefficiencies. In addition, traffic congestion discourages private investment in central cities, and thereby makes the task of urban renewal much more difficult and costly.

[60] See Passenger Fares, New York, N.H. & H.R. Co., 313 I.C.C. 411, 415 (1961). Here the Commission agreed that:

> the immediate and major cause of the railroad's current financial crisis is the huge passenger deficit coupled with the inability in recent years of freight revenues to absorb any substantial part of those losses.

The Commission, however, let it be known that it was not implying

> that the primary cause of the current financial crisis is the precipitous decline in freight revenue or any other cause other than the respondent's chronic and staggering passenger deficit.

[61] Doyle Report, supra note 8, at 557.

[62] U.S. Dep't of Commerce, supra note 54, at 64.

[63] Doyle Report, supra note 8, at 561.

of the day and the employees must be paid whether they work or not.[64]

Possible Solutions

There are many who still feel that the railroads, like any privately-owned industry, should be left to solve their own financial problems. However, the view quite properly has been taken that ". . . it is not likely that any major railroad will permanently succeed in overcoming a deficit in its commutation service under the circumstances that exist today. . . ."[65] This notion that the railroads are unable to handle the commuter problem themselves is supported by the recently completed project undertaken in Massachusetts by the Mass Transportation Commission, a non-partisan state agency.[66] After conducting intensive experiments[67] on two of the three railroads serving the Boston area, this group concluded that the Boston and Maine Railroad could not stay in operation unless it received some outside help. The Commission's final report noted that:

> The B&M cannot afford the present cash drain from its commutation service. In view of the B&M's strained financial condition, its minimal cash reserves, its heavy capital debt payments, and its recently declining freight revenues, service reduction and fare increases do not, in themselves, offer a practical alternative to discontinuance.[68]

To the extent that many of the roads seem compelled to seek commuter discontinuances unless they receive outside assistance, the problems of the B&M are typical.

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[64] Ibid.

[65] McKenna, supra note 56, at 836.

[66] Mass Transportation Commission, Mass Transportation in Massachusetts (July, 1964).

[67] The tests for the Boston and Maine consisted of three different phases. During the first phase (January 1963-July 1963) service was increased by 70% while rates were reduced by 30%. In the second phase (August 1963-December 1963) the 70% increase in service was continued while the 30% fare reduction was eliminated as prices returned to pre-experiment levels. Also, new low off-peak fares were introduced. The final phase (January 1964-March 1964) found service readjusted so that some lines received more service while others received less. Rates remained at the level established during the second phase. The findings prove most interesting.

1. Additional passengers were attracted to railroad suburban service during both peak and off-peak hours.
2. Frequency of service is a more important factor than lower fares, in both retaining present passengers and attracting additional passengers to railroad suburban service.
3. Increases in commuter fares, when accompanied by a continuation of a high level of frequency of service, do not necessarily result in decreases in passenger volumes.

Furthermore, it was found that

> *increased service will not eliminate or significantly reduce the current deficit. Although increased service improved patronage, the incremental costs of providing that service were barely offset by revenue increases in the third phase (annualized).* (Emphasis supplied.)

[68] Mass Transportation Commission, supra note 66, at 3.

Indeed, the solution of the problem appears to reside in constructive state and federal programs. Some local and state governments have already taken action, though the nature of the action varies from one area to another. Assistance most commonly offered includes tax relief, direct cash payments to rail carriers, loans to reequip, and efforts to organize public corporations or authorities to deal with mass transportation planning.[69] As an example of state help, Massachusetts has recently formed the Massachusetts Bay Transportation Authority which is empowered to ". . . finance agreements with railroads to provide passenger service to and from Boston. . . ."[70] This act makes available up to ". . . five million dollars to be paid to the authority for not more than one half of the cost to the authority of agreements with railroads. . . ."[71] Though this measure can only be considered a stopgap because of its termination date of 1967, it is an indication of the increasing willingness of the states to cooperate with the railroads. It should be noted, however, that if the towns and communities which compose the Authority do not appreciate the necessity for railroad commuter service and prove unwilling to support contracts made by the Authority with the railroads, this realistic piece of legislation will be wasted.

To assure that local governments meet the commuter problem head-on, the federal government has also created incentives to encourage long-range transportation planning by our cities and towns. For instance, the recently passed Urban Mass Transportation Act of 1964[72] authorizes federal grants and loans to assist state and local government to finance improvements in facilities and equipment in urban mass transportation service, and to coordinate this service with other transportation facilities in the area, especially highways. This act should produce more jointly-sponsored studies of transportation problems in particular areas, as have already taken place in Philadelphia and Boston. In addition, the federal government has tried to assist the commuter railroads through the loan guarantee program operated by the ICC.[73] It appears, however, that the type of legislation offered by the Urban Mass Transportation Act of 1964 will prove the most effective.

In any case, it is obvious that a satisfactory solution to this complex problem does not exist solely within the power of any of the parties concerned. All the parties—the federal, state and local governments, the railroads and the public—must cooperate if this problem is to become history.

Outlook

With continued federal encouragement, the local cities and states should increasingly act to relieve the commuter problem. However, it should be kept in mind that ". . . the will of the metropolitan communities to help can be blunted, if railroad companies continue to prosecute discontinuance

[69] Doyle Report, supra note 8, at 566.
[70] Mass. Acts 1964, ch. 563, § 23 (approved 6/18/64).
[71] Mass. Acts 1964, ch. 563, § 28 (approved 6/18/64).
[72] Public Law 88—365; 78 Stat. 302 (1964).
[73] Doyle Report, supra note 8, at 572.

actions vigorously."[74] Indeed, a bothersome question today is ". . . whether the salutory effect of the discontinuance statute has played its course and may now have a negative effect."[75]

No doubt the final fate of commuter services will depend on the ICC's balancing of the interests. On the one hand the Commission must weigh the Supreme Court's warning that it would be error not to give great weight to the ability of the carrier to absorb even large commuter deficits in the metropolitan areas. On the other, the Commission must weigh the possibility that in situations where the railroad is suffering a combined net loss, the failure to grant a discontinuance would constitute a deprivation of property without due process of law.[76] Indeed, in the final balancing, a third weight could well prove decisive, the willingness or failure of a locality to cooperate with a troubled railroad in its attempts to save rail service.

THOMAS H. TRIMARCO
JOHN H. HINES, JR.

[74] Id. at 575.
[75] Ibid.
[76] Id. at 566.