Cornell Law Review

Volume 41
Issue 1 *Fall 1955*

Article 3

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THE REGULATION OF COMPETITIVE BUSINESS FORCES: THE OBSTACLE RACE IN TRANSPORTATION

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Transportation has become, as everyone knows, a fiercely competitive business.[1] An important current question is, how far should public authority go in trying to exercise control? The White House recently released a report which indicated that, in the opinion of a Presidential Advisory Committee,[2] the Interstate Commerce Commission[3] has been going too far, and that the Interstate Commerce Act[4] should be amended to make it easier for one form of transportation, such as railroads, to compete with another form, such as highway or water carriage. It is the purpose of this paper to examine some of the background for this conclusion and to consider its validity.

As it is now, practically every move the railroads make or try to make in the competitive race is subject to ICC approval, and common carriers on the highways are subject to essentially the same control.[5] The ICC also regulates motor contract carriage and certain limited transportation on the inland waterways.[6] Pipe lines and freight forwarders, also under the ICC, are contestants in the same race.[7] But the ICC does not super-

* See Contributors' Section, Masthead, p. 105, for biographical data.

1 In 1953 the railroad share of total inter-city ton-miles dropped to 51.63% while the truck share rose to 17.38%. The water carrier share was 17.02% and the pipe line share 13.93%. 68 I.C.C. Ann. Rep. 30 (1954). For a graphic display of the trends since 1929, see "Transportation: Who'll Be Carrying the Load—and Why," Business Week, March 20, 1954, at 102. Informal, preliminary estimates for 1954 indicate a railroad proportion of slightly less than 50%, with a corresponding increase in the truck share.

2 "Revision of Federal Transportation Policy," a report to the President prepared by the Presidential Advisory Committee on Transport Policy and Organization, released April 18, 1955, by the White House. The members of the committee were: The Secretary of Commerce, Chairman; the Secretary of Defense and the Director of the Office of Defense Mobilization, Ad Hoc Participating Members; the Secretary of the Treasury, the Postmaster General, the Secretary of Agriculture, and the Director of the Bureau of the Budget. The committee introduced its report by finding: "Within the short span of one generation this country has witnessed a transportation revolution."

3 Hereinafter referred to as ICC or Commission.

4 The Interstate Commerce Act is divided into four parts. Part I (49 U.S.C. §§ 1-27 (1952)) deals with railroads and pipe lines; part II (49 U.S.C. §§ 301-28 (1952)) with motor carriers; part III (49 U.S.C. §§ 901-23 (1952)) with water carriers; and part IV (49 U.S.C. §§ 1001-22 (1952)) with freight forwarders.

5 49 U.S.C. §§ 1-27, 301-28 (1952).

6 49 U.S.C. §§ 304(2), 309, 318, 901-23 (1952). Only about 10% of inland water tonnage is subject to ICC control. See note 10 infra.

7 See note 4 supra.

vise all of the competitors. Almost two-thirds of the transportation on the highways is beyond its reach because it is exempted by the specific provisions of the Interstate Commerce Act,[8] or in the form of private transportation.[9] An even greater share of the transportation in the inland waterways is unregulated,[10] and that small part which is under ICC control has a special form of statutory protection when it comes to railroad competition.[11]

The competition, of course, has a hundred different phases. The one which is the principal subject of the report of the Presidential Advisory Committee is competitive rate-making. There, the inquiry was, how specifically should public authority control the rate-making of one agency of transportation when competing with another? In an important sense the present competition can never be a true race because the contestants include (1) those that are subject to complete control, such as the railroads and the common carrier trucks, (2) those that are subject to partial control, such as contract carriers on the highways, and (3) those that are free as the wind, such as exempt and private carriers on the highways and the waterways. But the Presidential Advisory Commit-

8 E.g., 49 U.S.C. § 303(b)(6) (1952) which exempts motor vehicles "used in carrying property consisting of ordinary livestock, fish (including shell fish) or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." This last qualification has been held to apply only when the truck is handling non-exempt commodities at the same time. Interstate Commerce Commission v. Dunn, 166 F.2d 116 (5th Cir. 1948); Interstate Commerce Commission v. Service Trucking Co., 186 F.2d 400 (3d Cir. 1950). Thus a motor carrier can operate as a common carrier subject to regulation in one direction and as an exempt carrier of agricultural commodities in the other. The exemption has been repeatedly broadened both by action of the Congress (in adding horticultural products, July 9, 1952, c. 599, 66 Stat. 479, 49 U.S.C. § 303(b) (4a, 6) (1954 Supp.)) and of the courts. See Interstate Commerce Commission v. Love, 172 F.2d 224 (5th Cir. 1949); Interstate Commerce Commission v. Yeary Transfer Co., Inc., 104 F. Supp. 245 (E.D. Ky. 1952), aff'd, 202 F.2d 151 (6th Cir. 1953); Interstate Commerce Commission v. Wagner, 112 F. Supp. 109 (M.D. Tenn. 1953); Interstate Commerce Commission v. Kroblin, 212 F.2d 555 (8th Cir. 1954), cert. denied, 348 U.S. 836 (1955). Cf. Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951). See Southgate, "Certain Implications of the Agricultural Exemptions," 22 ICC Prac. J. 3 (1954).

9 Private highway transportation, when added to that part which is exempt from regulation or subject to state control, leaves about one-third of the total highway ton-miles under the ICC. 68 I.C.C. Ann. Rep. 30 (1954); Monthly Comment on Transportation Statistics, ICC Bureau of Transport Economics and Statistics, Nov. 10, 1954, p. 14.

10 49 U.S.C. §§ 903(b), (c), (d) (1952) which exempt water transportation of commodities in bulk. These exemptions, which are estimated to include 90% of all inland water tonnage, have been found by the ICC to make "effective regulation of water transportation impossible." 68 I.C.C. Ann. Rep. 20 (1954).

11 49 U.S.C. § 905(c) (1952). See Cotton from Memphis and Helena to New Orleans, 273 I.C.C. 337, 365-66 (1948).

tee, as we shall see later,[12] would make it a better race—by bringing more transportation, now exempt, under regulation and by limiting the restraints on the transportation which is fully regulated. Since the railroads in their competition with the other agencies experience every known form of public control—short of direct government operation—their role as competitors will be used as the example in this paper.

AUTHORITY OF THE ICC

For all of the railroads and those truck and water carriers which come under its jurisdiction, the ICC has authority to fix reasonable minimum rates,[13] and it is this power which is used to control their competitive rate-making. To guide the ICC in its exercise, there is a national transportation policy of the Congress

> . . . to provide for fair and impartial regulation of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each; to provide . . . economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . unfair or destructive competitive practices . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.[14]

For further guidance, each of the several parts of the Interstate Commerce Act includes a rate-making rule which, in much the same language, establishes similar standards for reasonable rates.[15] In the fixing of railroad rates, for instance, the ICC is directed to give due consideration to their effect upon the movement of the traffic "by the carrier or carriers for which the rates are prescribed," to the need of adequate and efficient service "at the lowest cost consistent with the furnishing of such service," and to the need of revenues which will be sufficient for the railroads under efficient management to provide such service.[16]

This is the statutory ground upon which the ICC acts if, to use a hypothetical example, the railroads operating between New Orleans and Memphis, over the vigorous protest of competing barge lines and trucks, move to reduce their rates on sugar to 40 cents per hundred pounds. The barge lines and the trucks first request that the proposed

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12 See pp. 91-92 infra.

13 49 U.S.C. §§ 15(1), 316(e), 318(b), 907(b), 1006(b) (1952).

14 49 U.S.C., preceding §§ 1, 301, 901, 1001 (1952). The special policy for water carriers in 49 U.S.C. § 905(c) (1952) is referred to in note 11 supra and note 181 infra.

15 49 U.S.C. §§ 15a(2), 316(i), 907(f) (1952).

16 49 U.S.C. § 15a(2) (1952).

rate be suspended and that the Commission, following investigation, condemn it as unlawful.[17] Based on the experience of the first six months of 1954, the request for suspension has a better than even chance of being granted,[18] and the ICC will then be faced with the formal question whether the 40-cent rate which the railroads propose to meet truck and barge competition is less than a reasonable minimum rate. In order to determine how the Commission is apt to answer this question, it is necessary to consider its decisions which fall into three possible alternative categories.

First. The ICC will respect the judgment of railroad management that the publication of the 40-cent rate is a wise competitive move and limit its inquiry[19] to the reasonably compensatory character of such a rate. It will hold that the effect of the proposed 40-cent rate on the competing trucks and barges is beside the point and, in any event, not controlling.

Second. The ICC, in addition to inquiring into the reasonably compensatory character of the 40-cent rate, will critically examine its justification from a management standpoint and, in the end, accept the management decision. It will find that the effect of the proposed rate on the trucks and barges, while highly relevant, will not be harmful.

Third. The ICC will upset the management decision because the proposed 40-cent rate, while reasonably compensatory, is lower than necessary to meet the competition and promises to attract more than a fair share of the available traffic. The proposed rate will be found unjustified by the competitive situation and its effect, direct or indirect, upon the competing forms of transportation will be controlling.

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[17] 49 U.S.C. § 15(7) (1952).

[18] "Does the I.C.C. 'Manage' the Railroads?" Address by Anthony F. Arpaia, ICC Commissioner, before the New York Society of Security Analysts at New York, N.Y., December 3, 1954. He said in part:

> According to law, in the absence of special permission, a rate must be filed 30 days before it is to become effective. Within that time a rate can be protested as unlawful on some ground provided for in the Act, and such protest must be made at least 12 days before the effective date. Through a Board of Suspension the Commission can suspend a rate upon protest. The Commission also can suspend on its own initiative. Now, how often are such rates suspended? I took the first six months of 1954 as a representative period. Of approximately 25,000 tariffs covering thousands of rate schedules filed during that period, mostly reductions, 1199 tariffs were protested. Significantly, 90 percent of these protests were by carriers against rates of other carriers. Of those protested only 68 percent were suspended. That the Commission suspends on its own initiative sparingly is revealed by the fact that only 15 of the 1199 schedules, or less than one-half of one percent [sic], were so suspended during the first six months of 1954.

For additional information as to the number of suspensions granted, see 68 I.C.C. Ann. Rep. 106 (1954).

[19] Discrimination among shippers, as a consequence of reduced rates to meet competition, is a separate subject and beyond the scope of this paper.

Any attempt to reconcile the ICC decisions on this subject would be futile. They cannot be fitted into a consistent pattern. Every case, or so it seems, has been handled on an individual basis, with varying standards, and the chances have been good that, once decided, the ICC report has not been cited as a precedent more than once or twice, if that often.

We proceed to examine decisions in each of the three categories. When this has been done, certain points will be made which may partially explain why the ICC decisions on this subject reveal basic conflicts in principle.

1. The Effect of the Proposed 40-cent Rate on the Competing Trucks and Barges is Beside the Point and, in Any Event, Not Controlling.

The *Seatrain* case, decided after the 1940 declaration of a national transportation policy and in its light, is a notable one in point.[20] There, the ICC had previously fixed for Seatrain service between New York Harbor and ports on the Gulf of Mexico a level of rates which was differentially higher than that maintained by the so-called break-bulk water carriers, and Seatrain vigorously objected. Seatrain, of course, constituted a serious threat to the break-bulk service because it carried the freight cars themselves, without breaking bulk, over directly competitive through water-rail routes, and the contention was that, with its superior service, Seatrain would walk away with the business unless compelled to charge higher rates. But this position on the part of the break-bulk lines was overruled, and the objections of Seatrain to an enforced higher level of rates were sustained.

The ICC considered it "necessary" in this case "to take account of the motives of those who have raised the issue of value of service" and to observe that

> Those who urge the higher basis of rates over Seatrain's routes plainly are not concerned over the possibility that shippers may escape a just contribution to carriers' revenues, but fear that their own interests may suffer through a diversion of traffic from competing carriers to Seatrain in the event that the latter secures the basis of rates it here seeks.[21]

The ICC pointed out that "although this evidence has been referred to as pertaining to the question of value of service, actually the question

[20] Seatrain Lines, Inc. v. Akron, C. & Y. Ry., 243 I.C.C. 199 (1940). This decision was made on further hearing, with Commissioner Eastman writing the opinion, and only two dissenters, Commissioners Mahaffie and Patterson. For the national transportation policy, see note 14 supra.

[21] Id. at 212.

seems to be what the traffic will bear," and it found that an increase in Seatrain's rates "in all probability, would . . . require Seatrain to charge somewhat more than the traffic will bear."[22] It held that higher rates to protect the break-bulk water carriers (as well as the railroads) would have no justification from the point of view of comparative costs[23] and would operate, moreover, "to deprive shippers of much of the benefit of an improvement in service which has been accomplished without an increase in the cost thereof."[24] It emphasized that the differentials which had been fixed in the past between the rates for competing all-rail and water-rail routes were supported by differences in costs, although differences in the value of the services had also been a factor in certain instances.[25]

The ICC's final reason for upholding Seatrain's objection to higher rates was the fact that, in 1940, the rate-making rules[26] of the Interstate Commerce Act had been modified

> . . . so as to require us, in the exercise of our authority to prescribe just and reasonable rates, to "give due consideration, among other factors, to the effect of rates upon the movement of traffic *by the carrier or carriers for which the rates are prescribed* * * *."[27]

The modification—which consisted of the insertion of the italicized phrase into each of the rate-making rules[28]—was regarded by the ICC "as of particular interest,"[29] and it held that its

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[22] Id. at 211-12.

[23] The ICC said:

> We may safely conclude from the cost evidence that the Seatrain unit costs are no greater than those of the break-bulk lines and probably are materially less.

Id. at 211.

[24] Id. at 215.

[25] The ICC said further:

> It is true that we have in effect sanctioned . . . , although we have not prescribed, differentially lower water-rail rates where there was no advantage and in some instances a clear disadvantage in cost in comparison with the competitive all-rail routes, but such rates have been voluntarily maintained for many years, and doubts were resolved in their favor because of their competitive origin and long standing.

Id. at 216. Cf. Alabama G.S.R. Co. v. United States, 340 U.S. 216, 223 (1950) where the Supreme Court said that:

> Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. . . . The shipper's evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation.

[26] See notes 15 and 16 supra.

[27] 243 I.C.C. at 214.

[28] 54 Stat. 912 (1940), 49 U.S.C. § 15a(2) (1952).

[29] 243 I.C.C. at 214.

> . . . meaning, supported also by the legislative history, seems to be that no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor.[30]

The ICC had come to the same conclusion as in the *Seatrain* case prior to the 1940 declaration of a national transportation policy and modification of the rate-making rules. The case of *Petroleum and Petroleum Products from California to Arizona*,[31] for example, was an investigation on the Commission's own motion of the levels of both rail and motor carrier rates which were involved in a struggle for this traffic. Cost estimates for both types of transportation were submitted, and the Commission held that by "all the tests which we ordinarily employ, the present rail rates are higher than reasonable minimum rates."[32] The motor carriers insisted nevertheless that the rail rates be increased in order to permit them to operate with profit and, pointing to the special command in the Motor Carrier Act of 1935[33] that the inherent advantages of motor carrier transportation be recognized,[34] they argued on brief:

> The Commission, we are convinced, has been clothed with power to increase the rates of one transportation agency, even though they may be compensatory, if such a step is essential to prevent destructive competition and to preserve to the public the benefits flowing from healthy com-

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30 Ibid.

31 241 I.C.C. 21 (1940).

32 Id. at 40.

33 49 Stat. 543 (1935), now part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-27 (1952).

34 This special command, enacted as § 202(a) of the Motor Carrier Act of 1935, was a declaration of Congressional policy that transportation by motor carriers be regulated

> . . . in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions, in such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers. . . .

Later, this special policy for motor carriers was largely absorbed by the 1940 declaration of national transportation policy which, as we have seen, called upon the Commission "to recognize and preserve the inherent advantages of each" form of transportation subject to regulation under the Interstate Commerce Act. 49 U.S.C. preceding §§ 1, 301, 901, 1001 (1952). See note 14 supra. But it is still true that, by the so-called rule of rate-making which governs the regulation of motor carrier rates, the ICC is required to "give due consideration, among other factors, to the inherent advantages of transportation by such carriers; . . ." 49 U.S.C. § 316(i) (1952). Although otherwise comparable, the rule of rate-making for railroads does not include this factor, 49 U.S.C. § 15a(2) (1952), nor is it included in the rule of rate-making for water carriers under part III of the Act, 49 U.S.C. § 907(f) (1952). For freight forwarders under part IV "the Commission shall give due consideration, among other factors, to the inherent nature of freight forwarding; . . ." 49 U.S.C. § 1006(d) (1952). In the light of the uniform provisions of the national transportation policy, however, the special protection of the "inherent advantages" of motor carriers in the rule of rate-making in part II is without special significance. Cf. Tires between Points in the South, 243 I.C.C. 767, 773 (1941).

petition between two agencies of transportation whose perpetuation is in the public interest.[35]

But the ICC did not accept this argument. It held that in "fairness" it should also recognize the inherent advantages of rail transportation, and the "inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service."[36] While acknowledging that the "element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged," it said that this element "may become the dominant factor where two different modes of transportation are competing for the same traffic."[37] The ICC went on to hold that it should intervene in the competition between railroads and motor carriers only when the rates "under the stress of such competition may decrease until they reach or even fall below the out-of-pocket cost," and that:

> If the costs of one transportation agency are so high as to prevent profitable operation at rates which permit the competing agency to perform satisfactory service to the public and to earn a good profit, it seems obvious that the high-cost agency in meeting the rates of the low-cost agency is attempting to compete on a nonprofit basis. To direct the low-cost agency in these circumstances to increase its rates . . . would be regulation in the interest of the high-cost agency rather than in the public interest.[38]

Applying this principle[39] to the facts before it the ICC refused to in-

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[35] 241 I.C.C. at 40-41.

[36] Id. at 42. Thus did the Commission's decision in the cited case foreshadow the 1940 declaration of national transportation policy which called for a recognition of the "inherent advantages" of each form of transportation, including rail. Note 14 supra. See Tires between Points in the South, 243 I.C.C. 767 (1941).

[37] 241 I.C.C. at 42. The Commission added:

> In such a case the other factors which influence the fixing of rates on such a volume of movement, value of service to the shipper, and the value of the commodity are of less importance.

Ibid. And so far as the value of the service by established transportation agencies is concerned, it pointed out that this element of rate-making "has been diminished by the fact that a shipper or consumer can perform his own hauling service over the highways." Ibid.

[38] Id. at 43.

[39] This principle had equal application, prior to the national transportation policy and the modification of the rate-making rules in 1940, when railroads undertook to meet water competition. In Malt Liquors from New Orleans to Arkansas, 238 I.C.C. 415 (1940), the Commission upheld a majority of Division 2, Commissioner Alldredge dissenting, in approving rail rates designed to meet unregulated barge competition up the Mississippi River to Camden, Arkansas, with distribution beyond by truck. The Commission cited the decision of the Supreme Court in Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 288 (1934), in applying the rule that "carriers by rail shall not be required to maintain a rate that is too high for fear that through a change they may cut into the profits of carriers by water." 238 I.C.C. at 417.

crease the rail rates on petroleum from California to Arizona but it also refused to increase the motor carrier rates—although barely covering costs—because the "testimony of the shippers is that they will not pay any higher rates."[40]

This basic approach to competitive rate-making was later followed in several proceedings.[41] On one occasion the ICC's Division 2 approved a reduced rail rate, shown to be compensatory, even though the shipper had testified that it would mean the transfer of its entire movement from tank truck to tank car and "notwithstanding the possible injurious effect of the suspended rate upon the business of protestant [tank trucker]."[42] On another occasion the ICC's Division 3 pointed out that "The fact that the effect [of the proposed rate] may be to attract traffic now moving by other forms of transportation is not of legal significance."[43] The ICC has brushed aside the contention that proposed rates were lower than necessary to meet the competition with the finding that this did not constitute a "claim" that the rates in question were "lower than reasonable minima,"[44] and it has emphasized that the "practical question" of whether a particular competitive situation could be met with a rate higher than the one proposed was for the "managerial discretion" of the railroads.[45] In a case where the evidence was not sufficiently comprehensive to permit a computation of the comparative costs to the shipper of using the com-

[40] 241 I.C.C. at 44.

[41] See, for example, Roofing and Building Materials in New England, 278 I.C.C. 413, 415 (1950); Brass and Bronze Articles between Southwestern and Western Trunk Line Territories, 270 I.C.C. 791, 795 (1948); Metals from Chicago to Detroit, 246 I.C.C. 350, 352 (1941); Dressed Poultry from Omaha, Nebr., to Austin, Minn., 246 I.C.C. 270, 272 (1941); Office Supplies from Gloucester, Mass., to Chicago, 245 I.C.C. 669, 672-73 (1941); Automobiles from Evansville, Ind., to the South, 245 I.C.C. 339, 345-46 (1941). Cf. Meats and Packing House Products from Denver to Idaho, 246 I.C.C. 489 (1941).

[42] Petroleum Products from Baltimore to Martinsburg, W. Va., 246 I.C.C. 496, 498 (1941).

[43] Groceries from Boston to Maine and Vermont, 248 I.C.C. 199, 202 (1941). In Soda Ash from Baton Rouge, La., to Cantonment, Fla., 248 I.C.C. 231, 237 (1941), it was pointed out, in reference to proposed railroad rates, that "the mere fact that their effect may be to attract traffic now handled by other forms of transportation affords no basis for disapproval." Cf. Unfinished Cotton Goods from Texas to New Orleans, 248 I.C.C. 721, 724 (1942).

[44] All Freight from Chicago and St. Louis to Santa Rosa, N. Mexico, 243 I.C.C. 517, 520 (1941).

[45] Empty Containers in Western Trunk Line and Southwestern Territories, 246 I.C.C. 253, 255 (1941). Prior to the 1940 declaration of a national transportation policy, this was apt to be the ICC's approach to competitive rates. See Malt Beverage between Portland and Washington Points, 237 I.C.C. 34, 37 (1940); Commodities between El Paso, Tex., Colorado, and New Mexico, 237 I.C.C. 113, 116 (1940); Plumber's Goods from North Pacific Ports to Aberdeen, 237 I.C.C. 181, 185 (1940), with Commissioner Alldredge dissenting.

peting forms of transportation, the ICC has held the "inadequacy not a fatal defect, for the question here is whether the proposed rates [by one form of transportation] are lawful."[46]

In *New Automobiles in Interstate Commerce*[47] the ICC appeared to adopt the rule of the *Seatrain* case. This was regarded as most significant at the time because the ICC there undertook following the war, to "set forth our views respecting the policy of the law subsequent to the Transportation Act of 1940," and in doing so, it specifically recognized that there had been "deviations" in past decisions—decisions both before and after the 1940 declaration of policy.[48] In the recent decision in *Canned Goods in Official Territory*[49] the ICC said that the "inherent advantage of transporting canned goods by rail" which was "the relatively low cost of the service" should be recognized in the fixing of minimum rates for rail service.[50]

There have been, in addition, decisions approving competitive rates on a showing that they were compensatory so far as the sponsoring carriers were concerned,[51] and, while not entirely clear in each instance, the effect of the rates on the competing form was subordinated as an issue. Certainly that was the case when, by a vote of 6 to 5, the ICC upheld drastically reduced rates on petroleum products which came before it in *Petroleum from Los Angeles and El Paso to Arizona and New Mexico*[52] and which had been sponsored by the railroads for the purpose of fore-

[46] Automobiles from Memphis to Arkansas and Louisiana, 245 I.C.C. 334, 337 (1940).

[47] 259 I.C.C. 475 (1945). The rail rates therein prescribed were later modified, 263 I.C.C. 771 (1945).

[48] 259 I.C.C. at 537-39.

[49] 294 I.C.C. 371 (1955).

[50] Id. at 389. Nevertheless, despite this finding the ICC prescribed the same minimum rates for standard loadings, rail and truck. In his concurring in part expression, Commissioner Freas pointed out: "To permit trucks at 28,000 pounds to meet the 36,000-pound rail rates in instances where the rails are the low cost form of transportation is not bringing about equality of opportunity." Id. at 391.

[51] Petroleum Haulers of New England, Inc. v. Boston and Maine Railroad, 269 I.C.C. 6 (1947); Commodities from California to Arizona and New Mexico, 245 I.C.C. 545 (1941); Petroleum Products between Western Trunk Line Points, 243 I.C.C. 7 (1940); Electrical Appliances from Knoxville, Tenn., 237 I.C.C. 86 (1940); cf. Salt from Kansas and Utah to Colorado, Wyoming, Kansas, Missouri and New Mexico, 251 I.C.C. 283 (1942); Antifreeze Preparations in Official Territory, 245 I.C.C. 694 (1941).

[52] 287 I.C.C. 731 (1953). The Commission's approval was later upset by a three-judge federal district court on the ground that, in its decision, the Commission had not passed on the question of whether, from the point of view of national defense, the construction of a pipe line would be desirable. Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72 (S.D.Cal. 1953). The court held that under the national transportation policy the Commission was obligated to make such an inquiry. This subject is referred to at pp. 89-91 infra.

stalling the construction of a pipe line. In that proceeding the proposed rates were shown to be sufficiently high to make an annual contribution of one million dollars to overhead expenses.[53] In still other proceedings the compensatory character of the proposed rates has been responsible—or seemingly so—for Commission approval.[54] The question of what particular cost level competitive rates should cover before they become reasonably compensatory has been answered in several ways,[55] but on at least one important occasion the Commission flatly rejected the argument that such rates could be no lower than fully distributed costs,[56] and said:

> Rates . . . when they cover much more than out-of-pocket costs may, because of the traffic they attract, make a greater contribution toward the indirect or constant costs than higher rates that would meet the fully distributed costs.[57]

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[53] 287 I.C.C. at 736-37.

[54] Confectionery from Illinois, Kansas, and Missouri to Kansas and Missouri, 251 I.C.C. 65, 70 (1942), where the proposed rates were found "sufficiently high to assure respondents profitable operation"; Beer from Kansas City to Little Rock and Pine Bluff, 238 I.C.C. 618, 620 (1940), and Empty Containers in Western Trunk Line and Southwestern Territories, 246 I.C.C. 253, 254, 256 (1941), where the rates were found "high enough to assure profitable operation"; Grain from Illinois Territory to Gulf Ports for Export, 237 I.C.C. 715, 723-24 (1940), where the rates "would increase respondents' revenues"; Packing House Products from Denver and Pueblo to Arizona, 238 I.C.C. 569, 572 (1940), where the rates "would yield a substantial profit above cost"; Alcoholic Liquors from Twin Cities to Fargo, N. Dakota, 238 I.C.C. 555, 558 (1940), where the rates were "sufficiently high to assure profitable operation"; Flavoring Syrup from New Orleans to Mississippi, 238 I.C.C. 171, 178 (1940), where "the opposing parties concede that they would be compensatory"; Sugar from Mobile, New Orleans, etc. to Alabama and Georgia, 237 I.C.C. 221, 226 (1940), where the rates would "result in increased revenues."

Cf. Candy from California to Idaho, 251 I.C.C. 1 (1942); Malt Liquors from Texas to Interior Louisiana, 241 I.C.C. 492 (1940); Cotton Piece Goods from Alabama to Jackson, Miss., 238 I.C.C. 379 (1940); Wrought Iron Pipe from Memphis to Arkansas, Louisiana, and Texas, 237 I.C.C. 161 (1940); Canned Goods from Savannah to Georgia, 237 I.C.C. 175 (1940).

[55] Cf. Middle Atlantic States M.C. Conf., Inc. v. C.R. of N.J., 232 I.C.C. 381, 391 (1938); All Commodities, less than Carloads, between Maine, Mass., and N. Hampshire, 255 I.C.C. 85, 88-89 (1942); Refrigeration Charges from Florida, 85 I.C.C. 247, 352 (1923); Boileau v. Pittsburgh and Lake Erie R.R., 24 I.C.C. 129, 132 (1912). See Wilson and Rose, "Out-of-Pocket Cost in Railroad Freight Rates," 60 Q.J. Econ. 546 (1946). A standard authority on this subject is Clark, The Economics of Overhead Costs, at 259-317 (1923).

[56] Petroleum Haulers of New England, Inc. v. Boston and Maine Railroad, 269 I.C.C. 6, 20 (1947).

[57] Ibid. To the same effect, International Minerals & Chemical Corporation v. Atlantic Coast Line Railroad Company, 269 I.C.C. 611, 625 (1948), where the lowering of rates to increase the contribution to constant expenses was recognized as a management problem. Cf. Salt from Kansas and Utah to Colorado, Wyoming, Kansas, Missouri, and New Mexico, 251 I.C.C. 283, 287 (1942), where the Commission pointed out:

> It is clear that no one can properly deduce from those facts that respondents' revenue will be reduced under the present rates, provided they attract more traffic. Obviously, revenue is not reduced by a reduction in rates which have attracted no traffic.

A real show-down on the question of whether rail rates should be forced to a level sufficiently high to protect competing agencies occurred when plans for the resumption of coastal water service, following its suspension during the war, were being made. At the instance of the Maritime Commission, the ICC first called upon the railroads to cancel competitive rates which it had previously authorized as departures from the long-and-short-haul clause of section 4,[58] including such rates as had obtained between important stations on the Pacific Coast,[59] and it then undertook to investigate whether the higher rates which the railroads proposed to substitute were reasonable minimum rates.[60] In deciding this issue in the affirmative, the ICC said that it was largely guided by evidence of the cost of the service, and for the most part, "the advantage of lower cost lies with the rails."[61] It added:

> The basic issue is whether the coastal rates of the rail respondents are unreasonably low. To support an order prescribing minimum reasonable rail rates, it must appear that the existing rates are below the level of what is just and reasonable. The present record, replete with estimates of the cost of conducting the rail service, does not permit such a finding . . . .[62]

The ICC went on to find that merely to equalize the cost to the shipper of using the projected water service with the cost of the rail service an average increase of 27.2 percent in the rail rates would be required, and even such an increase would make no allowance "for the intangible disadvantages of water movement, such as slower service, infrequent sailings, delay of shipments, and unreliability of schedules."[63] The ICC observed:

> The relative costs shown pose the serious question whether there can be economic justification for increasing rail rates to divert traffic from the rails to the water lines, thus to incur port costs which alone substantially equal the entire cost of handling the traffic by rail.[64]

And its conclusion was:

> The plight of the water lines is not caused by an unreasonably low level of rail rates, but is primarily due to their own high terminal costs and to the accessorial costs incurred when a shipper uses water service. The

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[58] 49 U.S.C. § 4(1) (1952).

[59] 60 I.C.C. Ann. Rep. 32-34 (1946); 61 I.C.C. Ann. Rep. 47-50 (1947); 62 I.C.C. Ann. Rep. 49-54 (1948); 63 I.C.C. Ann. Rep. 52-53 (1949); 64 I.C.C. Ann. Rep. 51-52 (1950).

[60] E.g., All Rail Commodity Rates between California, Oregon, and Washington, 268 I.C.C. 515 (1947), 277 I.C.C. 511 (1950).

[61] 277 I.C.C. at 563-64.

[62] Id. at 564.

[63] Id. at 557-58.

[64] Id. at 560.

> coastwise water lines cannot attract the tonnage they desire for hauls such as those between the Pacific coast ports, when their patrons must incur costs merely in getting shipments on and off the vessel, frequently equal to and sometimes more than the full cost to the competing railroad of making shipment by rail between the same points, profit added.[65]

Under the decisions cited in this first sub-section, the railroads proposing the 40-cent rate on sugar from New Orleans to Memphis would be able to make that rate effective by proving that it was compensatory. The effect of that rate upon the competing trucks and barges would be immaterial and, in any event, not controlling.

2. *The Effect of the Proposed 40-cent Rate on the Competing Trucks and Barges, While Highly Relevant, Will Not Be Harmful.*

We turn now to the second type of decision as applied to this case, that is, the decisions where the ICC, while still approving the 40-cent rate, would do so only after finding that its impact upon the competing forms of transportation would not be harmful and that the rate was in fact justified by the competitive situation.[66] These are the cases where, in addition to passing upon the compensatory character of proposed rates, the ICC has taken a long, hard look at their probable effect upon the competing forms and decided the issue in favor of the railroads. Here, the crucial test has been, are the sponsored rates lower than necessary to meet the competition and thus likely to attract more than a "fair share" of the traffic?

Indeed it would sometimes appear as if, contrary to the provisions of the Interstate Commerce Act as interpreted and applied in the decisions cited in the foregoing section of this paper, there was a separate statutory test for a minimum rate—over and above the requirement of reasonableness.[67] In one case the ICC first determined that the proposed rate was not lower than necessary and *then* added: "Nor is it below a reasonable minimum."[68] In another case the competitive rates which the railroads proposed were upheld as "[n]ot unjust, unreasonable, or *otherwise* unlawful, *and* . . . no lower than necessary to meet motor truck competition and to obtain a fair share of the available traffic."[69] (Emphasis added.) The finding in still another case was that the proposed rates were "not

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[65] Id. at 567.

[66] Supra, p. 60.

[67] See p. 59 supra; note 13 supra.

[68] Powdered or Flaked Milk from Vermont to Boston, 246 I.C.C. 522, 524 (1941).

[69] Drugs, Medicines, Chemicals, and Toilet Preparations in Official Territory, 284 I.C.C. 33, 37 (1951).

shown to be less than reasonably compensatory, unduly prejudicial, or otherwise unlawful *and* that they are justified."[70] (Emphasis added.)

On many occasions the ICC has agreed with the railroads that the proposed rates were no lower than necessary to meet the competition.[71] Sometimes it has reached the same conclusion but used different words as: "We are not inclined to agree with protestants' view that [the] reductions are unnecessary and wasteful. . . . "[72] But seldom has the ICC been willing to say, as it did in one decision in 1941: "The fact that the shipper will not use respondents' facilities at a rate higher than 25 cents indicates that the proposed rate is not lower than is necessary to get the business."[73] In deciding whether a rate is lower than necessary to meet a competitive situation, the ICC has been inclined to discount what the shipper has said—despite the fact that it is the shipper—and only the shipper—who by selecting the form of transportation to be used makes the real decision.[74]

Thus has the ICC felt called upon to review the competitive impact of proposed rates and to assure itself that the other mode of transport would not be hurt. In one case the only protesting truck line already had more business than it could handle, and this was cited as a reason for allowing the rail rates to be reduced,[75] and in another case it was important that the competitive rates under attack had done no more than to restore to the railroads the same share of competitive traffic that they had had prior to the war.[76] The ICC, in approving rates to meet private truck competition, has been influenced by the fact that their establishment was "not an attempt to capture traffic from common or contract carriers by motor vehicles."[77] The failure of competitors to

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[70] Cotton Linters from Texas to Louisiana and Texas Ports, 237 I.C.C. 425, 431 (1940).

[71] Beer and Empty Containers Between New Orleans and Texas, 281 I.C.C. 792, 796 (1951); Alcoholic Liquors within, from and to the Southwest, 279 I.C.C. 284, 290 (1950); Packing House Products from Denver and Pueblo to Arizona, 238 I.C.C. 569, 575 (1940); Cotton Linters from Arkansas to New Orleans, La., 237 I.C.C. 615, 621 (1940); Petroleum, less than Carloads, in the South, 237 I.C.C. 419, 424 (1940); Corn Grits from Kankakee, Ill., to Battle Creek, Mich., 237 I.C.C. 413, 417 (1940).

[72] Cotton Piece Goods from Georgia to Savannah, Ga., 237 I.C.C. 169, 171 (1940). Cf. Sulphate of Alumina from New Orleans and Mobile to Houston, 284 I.C.C. 418, 420 (1952), where the rates were not "competitively unfair."

[73] Dressed Poultry from Omaha, Nebr., to Austin, Minn., 246 I.C.C. 270, 272 (1941).

[74] See pp. 84, 85, 88 infra. See also Petroleum Products in Illinois Territory, 280 I.C.C. 681, 687-88 (1951).

[75] Fish from New Bedford, Mass., to New York, 248 I.C.C. 535, 539 (1942).

[76] Petroleum Haulers of New England, Inc. v. Boston and Maine Railroad, 269 I.C.C. 6, 13 (1947).

[77] Dressed Poultry from Omaha, Nebr., to Austin, Minn., 246 I.C.C. 270, 272 (1941).

support their protests against railroad rates with affirmative evidence has also helped in obtaining approval.[78]

Rates have been upheld because they would attract no more than a fair share of the available traffic. The apparent theory has been that, regardless of the inherent advantages or characteristics of the several transportation agencies, competitive traffic must be divided fairly. Thus have proposed rates been sustained because they were "necessary for the respondents to regain and retain a fair share of this traffic,"[79] or "would in all probability return a portion of the traffic to the rails,"[80] or "were necessary to enable the respondents to retrieve some of the traffic."[81] The ICC has found that, while "none of this traffic is now moving by rail at the present rail rates, . . . a fair share of the traffic may be expected to move by rail at the rates proposed."[82] In the transportation of gun wad felt from Newark, New Jersey, to Anoka, Minnesota, there was no railroad participation, and a reduced rate was proposed for the purpose of obtaining "a fair share" of the traffic.[83] The motor carriers protested, and their protest was upheld by a majority of Division 2, Commissioner Freas dissenting, with the finding that:

> A showing that a rate is compensatory is not itself justification for its establishment for the purpose of meeting competition, although compensatory the establishment thereof could constitute an unfair or destructive competitive practice. . . .
>
> . . . Other than their [respondents'] statement that the rate is necessary to attract a fair share of the traffic to their lines, they have offered no probative evidence to show the competitive necessity for the proposed rate. . . .[84]

Later the Division reversed itself on a finding that the proposed railroad rate represented about the same relationship to the motor carrier rate as had previously existed—a relationship under which the railroads had had "a good share" of the traffic—and it concluded:

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78 Rye-Krisp from Twin Cities to Chicago, 241 I.C.C. 203 (1940). Cf. Candy Between the East and the Pacific Coast, 278 I.C.C. 535 (1950).

79 Alcoholic Liquors in the South, 279 I.C.C. 81, 93-94 (1950). From this decision by Division 3 Commissioner Knudson dissented and regarded it as "doubtful that the rail carriers . . . would be able to regain any considerable portion of the traffic." Cf. Unmanufactured Tobacco from, to, and within the South, 279 I.C.C. 729 (1950).

80 Oleomargarine, Cincinnati and Columbus to East, 294 I.C.C. 349 (1955).

81 Malt Liquors and Containers between New Jersey, Maryland, and District of Columbia, 294 I.C.C. 420 (1955).

82 Magazines, Oleo, and Rubber—Central to East Points, 294 I.C.C. 363 (1955). The Division held that "these rates will recognize the respondents' [railroads] inherent advantage of greater carrying capacity of their equipment in competing for a fair share of the traffic."

83 Gun Wad Felt—Newark; N.J., to Anoka, Minn., 293 I.C.C. 318 (1954).

84 Id. at 319.

> It is thus reasonable to assume that the proposed rate would draw to the respondents no more than a fair share of this traffic and thus would not be lower than necessary to meet the motor-carrier competition.[85]

The requirement that a competitive rate be no lower than necessary to attract a fair share of the traffic has recently been referred to by the ICC as the "primary issue"[86] and the "paramount question."[87] And if this test has not been satisfied, the compensatory character of proposed rates has not even been considered. As stated by Division 2 in an instance where the Pan-Atlantic Steamship Corporation protested certain reduced railroad rates:

> The primary issue presented for our consideration is whether the rate proposed is lower than necessary for respondents to regain or to retain a fair share of this scrap tobacco traffic. In view of our conclusions hereinafter with respect thereto, it is unnecessary to determine whether or not the proposed rate is compensatory.[88]

In proceedings of this character the evidence has been directed to the point of whether, in the light of the relative advantages and disadvantages of the competing services, the proposed railroad rates should be higher or lower than, or the same as, the costs to the shipper of using the other service.[89] In one case the ICC will conclude that "In view of

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[85] Gun Wad Felt—Newark, N.J., to Anoka, Minn., 294 I.C.C. 404 (1955). Commissioner Alldredge, dissenting, said in part:

> In the absence of evidence of record clearly showing that the rate parity presently existing between the motor carriers and railroads has operated to deprive the railroads of all of this traffic, and that the proposed rate is necessary to enable respondents to compete fairly for a share of the traffic, the conclusion is inescapable that they have not sustained their burden of proof.

[86] Scrap Tobacco from Newark, N.J., to Selma, Ala., 293 I.C.C. 427, 428 (1954). Petition for reconsideration denied Jan. 3, 1955.

[87] Pig Lead from Texas to East St. Louis and St. Louis, 292 I.C.C. 797, 799 (1954).

[88] Scrap Tobacco from Newark, N.J., to Selma, Ala., 293 I.C.C. 427, 428 (1954).

[89] E.g., in reviewing competitive rates for petroleum traffic, the ICC reports are full of the advantages and disadvantages of rail, water, and motor carrier services. Petroleum, Baltimore to Florida and Georgia, 291 I.C.C. 367, 372-74 (1954); Petroleum from Colorado and Wyoming to Western Trunk Line Territory, 289 I.C.C. 457, 460 (1953), aff'd sub nom. Ward Transport Inc. et al. v. United States, 125 F. Supp. 363 (D. Colo. 1954), aff'd, 348 U.S. 979 (1955); Southwestern Tank Truck Carriers Committee v. Abilene & Southern Ry. Co., 284 I.C.C. 75, 80-81 (1952); Petroleum Products in Illinois Territory, 280 I.C.C. 681, 687 (1951); Petroleum in Southern Territory, Rail, 278 I.C.C. 323, 328-29 (1950), modified 280 I.C.C. 755 (1951). In the decision last cited the ICC was upset in court. Atlanta & St. Andrews Bay Ry. v. United States, 104 F. Supp. 193 (M.D. Ala. 1952).

The same approach is used in reviewing competitive rates on other traffic. Iron and Steel Articles to Savannah, Ga., 293 I.C.C. 675, 677 (1954); Woodpulp—St. Marys, Ga., to Gilman, Vt., 291 I.C.C. 517, 518 (1954); Proportional Rates from Port Wentworth to Edgewater, 291 I.C.C. 415, 419 (1954); Cf. Mfg. Tobacco, Va. & N.C. to Official Points, 293 I.C.C. 133, 137 (1954); Mfg. Tobacco from Kentucky, N.C. & Va. to the South, 292 I.C.C. 427, 433-34 (1954).

the amount by which the total cost of transporting by rail under the proposed rate will exceed the total cost by barge it is unlikely that the proposed rate will divert an undue amount of traffic, if any. . . . "[90] In another case, as we shall see in the following sub-section of this paper, the ICC will arrive at a contrary answer.[91] Occasionally it will reconsider its approval of competitive rates after they have gone into effect, and their impact upon the competing form of transportation will then be a matter of proof. The railroads may be able to show that the reduced rates, while increasing their business, did not leave the competing water and motor carriers high and dry—by any means.[92] Or they may be in a position to prove that, as a consequence of the ICC's failure to allow reductions previously proposed, most of the traffic left the rails and was then on the water.[93] Even in the latter circumstances rates which the railroads have regarded as necessary to participate in the traffic have been disallowed.[94] In one instance the trucks complained of a rail rate "only slightly lower" than their level, but since the railroads were able to prove that the trucks had all of the business when the rates were equal, the assailed rate was held "not lower than necessary for the defendants to regain a fair share," and the ICC dismissed the complaint.[95]

The ICC has suggested that, in requiring competitive rates to be at a level which will attract no more than a fair share of the business, it is avoiding the "unfair or destructive competitive practices" which are barred by the national transportation policy. Thus it has held a "claim of destructive competition" to be "unfounded" "in the absence of proof of an excessive diversion of tonnage caused by reduced rail rates."[96] As stated by one of the Commissioners in approving reduced rail rates:

In Boots and Shoes from Mishawaka, Ind., to Boston, Mass., 278 I.C.C. 773, 776 (1950), the ICC said:

> To determine a just competitive basis between the rail and motor-carrier rates, it is essential that the total transportation costs to the shipper incurred in the respective forms of transportation be considered.

[90] Iron and Steel Billets, Houston to Baton Rouge, 293 I.C.C. 233, 235 (1954). Division 2, with Commissioner Freas dissenting, had previously held the rate to be lower than necessary, 292 I.C.C. 7 (1954). In Woodpulp from St. Marys, Ga., to Gilman, Vt., 291 I.C.C. 517 (1954), it appeared that Seatrain's rate which was 2 cents less had acquired 80% of the business and threatened to have it all, and the ICC thereupon allowed the all-rail routes to equalize.

[91] See pp. 74-82 infra.

[92] Automobiles from Detroit to the East, 288 I.C.C. 351 (1953), 292 I.C.C. 167 (1954). Cf. Tinplate, Atlantic to Pacific Coast Ports, 293 I.C.C. 157 (1954).

[93] Aluminum Articles from Texas to Illinois and Iowa, 293 I.C.C. 467, 469 (1954).

[94] Id. at 472. Cf. Sulphur from Louisiana and Texas to Nashville and Old Hickory, 283 I.C.C. 628 (1951).

[95] Emery Transportation Co. v. Baltimore & O. R.R., 292 I.C.C. 346, 348 (1954).

[96] All Commodity Rates between California and Oregon-Washington, 293 I.C.C. 327,

> I vote for this report because the protestant barge lines have failed to show competitive damage.[97]

Under the decisions which have been referred to in this section, the railroads would still be able to make effective the 40-cent rate on sugar from New Orleans to Memphis but only after the ICC had found that it would not attract more than a fair share of the available traffic, was competitively justified, and would not hurt the competing trucks and barges. We pass finally to those decisions where the 40-cent rate rate—even though compensatory—would be disallowed by the ICC.

3. The Effect of the Proposed 40-cent Rate on the Competing Trucks and Barges Will Be Harmful. As a Consequence, this Rate, Although Compensatory, is Less Than a Reasonable Minimum Rate.

The ICC on many occasions has stopped the railroads from publishing compensatory rates because they threatened to hurt the competing trucks or water carriers. It has also increased existing rates for the same reason.

In the transportation of petroleum there has been the keenest kind of competition, and the proportion handled by rail has been constantly slipping—despite tremendous increases in production. The railroads have made many attempts to arrest this trend. Sometimes they have been successful, and the ICC has held that the effect of the competitive rates upon the tank truckers was beside the point.[98] Other times, and for no clear reason, the answer has been different. In *Petroleum Products in Illinois Territory*,[99] for instance, it appeared that the railroad proportion of the traffic had dropped from 57.6 percent in 1940 to 12.1 percent in 1948 and, according to the ICC's report, the "records are convincing that this traffic is continuing to be diverted to motor truck competition."[100] To turn the tide the railroads proposed to reduce their rates from a level which was slightly in excess of the truck rates to one which averaged 1.5 cents below. According to the ICC report, such rates were regarded by the shippers as necessary if the railroads were to participate in the traffic, and the shipper at one key origin, Robinson, Illinois, advised

339 (1954). For a contrary suggestion, see Soybeans from Pensacola, Fla., to New Orleans, La., for Export, 293 I.C.C. 634, 638 (1954).

97 Barytes from Missouri Points to Charleston, W. Va., 291 I.C.C. 501, 503 (1954). See also Sulphate of Alumina, New Orleans and Mobile to Houston, 284 I.C.C. 418 (1952); Scrap Tin Plate, Tampa to Carteret and Sewaren, N.J., 279 I.C.C. 168, 170 (1950); Phosphate Rock from New Jersey to Buffalo, N.Y. District, 279 I.C.C. 658, 661 (1950).

98 Petroleum and Petroleum Products from California to Arizona, 241 I.C.C. 21 (1940); Petroleum Products from Baltimore to Martinsburg, W. Va., 246 I.C.C. 496 (1941). These decisions are referred to in the first section of this paper at pp. 61-68 supra.

99 280 I.C.C. 681 (1951).

100 Id. at 686.

that "the proposed rates . . . were necessary in order to meet private truck competition."[101]

But the ICC refused to accept the proposed rates and insisted upon a level which generally approximated the truck level and in certain instances was even higher. For example:[102]

Origin	*Destination*	*Truck Rates*	*Rail Distance*	*Minimum Rail Rates as Fixed by ICC*
Whiting, Ind.	Forrest, Ill.	13.5¢	91	14.5¢
Wood River-Roxana, Ill.	Herrin, Ill.	12.5¢	104	13.5¢
Robinson, Ill.	Bloomington, Ill.	17.7¢	151	18.5¢

It should be repeated that this ICC action was taken despite clear shipper testimony that, for rail participation, lower rates than available by truck were required and despite an express finding by the ICC that "except for distances under about 75 miles, the respondents [the railroads] are the low-cost agency on this traffic."[103] Parenthetically, it may be noted that to certain destinations the rail rates fixed as minima by the Commission were exactly the same rates as "suggested" by the protesting tank truckers.[104] The reason for the higher minimum rail rates, as stated in the ICC report, was that:

> It is of great importance that each be afforded a fair opportunity to compete for this traffic . . . the proposed rates . . . would reverse the present situation and deprive the tank-truck operators of a fair opportunity to compete with the respondents. Being lower than necessary to meet the competition, they would result in an undue burden upon the respondents' other traffic.[105]

Today, petroleum traffic in Illinois has deserted the railroads, and they are seriously considering another effort to establish competitive rates. This traffic will move by railroad at rates which are unquestionably compensatory; there was no issue on that point during the course of the cited litigation.

Again, in *Petroleum Products in California and Oregon*[106] the railroads, with their traffic off 80 percent in the face of greatly increased produc-

101 Id. at 683, 687, 688.

102 Id. at 694. Cf. approved rail rates to Areas II and III as shown in Appendix 1 with truck rates and distances in Exhibit 22, Witness Geoghegan for protesting tank truckers, ICC Docket 5756.

103 Id. at 690.

104 Id. at 694. See rates suggested by protestants to Area II and those approved by ICC as set forth in Appendix 1.

105 Id. at 691.

106 284 I.C.C. 287 (1952).

tion, sought to help themselves with rates which, on the whole, were slightly lower than the costs to the shipper of using the competitive barge-truck routes. The barge operation, incidentally, was exempt from regulation, and a large part of the trucking was private.[107] But the ICC declined to approve the proposed rates even though finding them to "yield revenue substantially in excess of direct costs . . . and . . . contribute substantially to the overhead burden and profits."[108] In setting a higher rail level as minimum, it emphasized:

> Costs are not, however, the sole criterion. An important consideration is whether the proposed reduced rates are lower than necessary to meet the competition encountered. No justification appears for the establishment of levels of rates lower than the total expenses to shippers incurred in the transportation over the competitive routes. . . .[109]

This rejection of compensatory rates was in accord with a leading decision which the ICC had reached before the 1940 declaration of a national transportation policy and which, upheld in the courts, has been cited for the point that competitive rates—aside from being compensatory—must not disrupt the competitive balance.[110]

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[107] Id. at 288, 296, 297, 299, 301.

[108] Id. at 296, 304.

[109] Id. at 304, 305.

[110] Petroleum between Washington, Oregon, Idaho, and Montana, 234 I.C.C. 609 (1939), upheld in Scandrett v. United States, 32 F. Supp. 995 (D. Ore. 1940), aff'd per curiam, 312 U.S. 661 (1941).

Further examples of such control of competitive rate-making include Petroleum Products from Los Angeles to Arizona and New Mexico, 280 I.C.C. 509 (1951), and Southwestern Tank Truck Carriers Committee v. A. & S. Ry., 284 I.C.C. 75 (1952). In the former, proposed railroad rates were found to be too low even though (1) "substantially higher than the out-of-pocket costs for performing the service," (2) the value of railroad service was less (with a transit time of 3 to 8 days as compared with overnight service by truck), and (3) the "increasing importance" of private tank truck operation. Id. at 511, 512, 514, 516. In the latter proceeding, the tank truckers filed a complaint against reduced railroad rates and the ICC required the railroads to increase them despite the facts that (1) "comparisons of record indicate that the assailed rates are compensatory . . . . car-mile revenues under the assailed scale are substantially higher than the average for all carload traffic," (2) "truck service is of greater value to the shipping public than rail service," and (3) "although the production of refined oil in this territory increased from 1929 to 1949 by 118 percent, the tonnage originated by the railroads decreased by 40 percent." Id. at 81, 84. The reason for forcing this increase upon the railroads was that the "assailed scale . . . appears to be unduly low in view of the competitive situation." Id. at 85. The ICC, in short, upheld the tank truckers' argument that they could not exist profitably under railroad rates which produced more revenue than average railroad traffic. Ultimately, this complaint was dismissed on petition of complainants when the defendant railroads increased their rates under Ex Parte 175, Increased Freight Rates, 284 I.C.C. 589 (1952), and thus provided "substantially the same relief." See unreported ICC order in Docket No. 30694, Southwestern Tank Truck Carriers Committee v. A. & S. Ry. entered December 16, 1952. Cf. Manufactured Tobacco from Virginia and North Carolina to Official Points. 293 I.C.C. 133, 141 (1954).

Over a considerable period of time the movement of sugar by rail has been declining as the use of barge service has increased. In 1951 the railroads made a determined effort to stem the tide, but the ICC found the proposed reductions "not necessary in order to meet fairly the barge competition," and it pointed to the heavy dependence of the barge lines on this traffic.[111] Three years later, although the sugar consumption at three important Ohio River destinations, Cincinnati, Louisville, and Evansville, had increased by one-third, the rail movement had declined a further 36 percent and the barge tonnage was up to a point where it comprised 87 percent of the total.[112] Again the railroads made an effort to be competitive, but the ICC, although finding "the evidence is convincing that the proposed rates would be reasonably compensatory," refused to allow them.[113] On the contrary, the ICC held that rates less than 10 percent in excess of the full costs to the shipper of nsing the water service would be below reasonable mimima.[114] Moreover, it imposed this competitive handicap on the railroads despite evidence that "the slowness of barge transportation is often advantageous to the shipper where storage space may not be available."[115]

Following the war there was in prospect a heavy movement of imported scrap rails through ports on the Gulf of Mexico for delivery at Chicago and other cities, and as found by the ICC, "apparently, the controlling factor in the selection of the route is the over-all cost of handling from ship to destination;" time in transit is "not important."[116] In order to be competitive with the barges, the railroads proposed reduced rates, including one of $8.87 per ton from New Orleans to Chicago.[117] This rate would have yielded revenues per car of $495.61, per car-mile of 54.3 cents, and per ton-mile of 8.7 mills, and the traffic would have been loaded in equipment otherwise moving empty.[118] The rate, however, was found to be less than a reasonable minimum for the reason

See also: All Commodities, Less Than Carload, between Maine, Massachusetts, and New Hampshire, 255 I.C.C. 85 (1942); Drugs in Southern Territory, 246 I.C.C. 563, 571-72 (1941); Boots and Shoes from Massachusetts to New York City, 246 I.C.C. 332, 338 (1941); Rubber Tires from California to Idaho and Utah, 245 I.C.C. 661, 666 (1941); All Freight from Salt Lake City, Utah, to Boise, Idaho, 245 I.C.C. 57, 66 (1941); Petroleum from South Atlantic Ports to Southeast, 245 I.C.C. 23 (1941).

111 Sugar Cases of 1951, 284 I.C.C. 333, 352 (1952).

112 Sugar—Atlantic and Gulf Ports to Ohio River Crossings, I. & S. Docket No. 6202, mimeographed report of Division 2, June 17, 1955, at 5.

113 Id. at 8.

114 Id. at 24.

115 Id. at 9.

116 Scrap Rails from Southern Ports to Chicago, 283 I.C.C. 357, 359 (1951).

117 Id. at 358.

118 Ibid.

that the differential of 30 to 33 cents which it would reflect over the full costs to the shipper of using the competing barge service was inadequate and, if allowed, "would eliminate water competition."[119] The ICC held further that while the proposed rates were reasonably compensatory, they were nevertheless "unreasonably low, in violation of Section 1, construed in the light of the national transportation policy."[120] In a prior proceeding where similar action had been taken the ICC had said:

> The Transportation Act of 1940 imposes on us the duty to scrutinize rates purportedly made on the out-of-pocket cost or minimum rate theory to meet alleged competition and to reject them even if they yield something above all costs.[121]

In a series of proceedings involving manufactured tobacco—a traffic which had been deserting the rails in ever-increasing amounts—the railroads were denied the right to set rates which would have averaged somewhat less than truck rates despite the established fact that the trucks rendered a greater measure of service and more valuable service.[122] One conclusion of the ICC's Division 2 was that "the rail and motor carriers are substantially competitive and capable of securing a fair share of this traffic at equal rates."[123] On other commodities also the ICC has upheld claims by motor carriers that competitive rates proposed by railroads were designed to exclude them from participation—although the rates in question produced much higher than average railroad earnings—higher earnings than under rates previously approved by the Commission on the same character of traffic.[124]

Indeed, certain of the decisions have appeared to go beyond an enforced sharing of traffic with the competing form of transportation and to reflect a view that the railroads should let their competitors have it all.[125] In the movement of aluminum from Texas to destinations on the

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[119] Id. at 360-61.

[120] Id. at 361.

[121] Scrap Iron from New Orleans and Mobile to St. Louis and Chicago, 272 I.C.C. 781, 792 (1948).

[122] Tobacco from North Carolina Points to Southern Points (Rail), 280 I.C.C. 767, 771-72 (1951); Cigarettes and Tobacco, N.C. to Official Territory, 281 I.C.C. 127, 137-38 (1951); Tobacco from Louisville to Alabama, Georgia, and Tennessee, 281 I.C.C. 343, 345 (1951); Manufactured Tobacco from Louisville, Ky., to the South, 283 I.C.C. 142, 145 (1951).

[123] Tobacco from North Carolina Points to Southern Points (Rail), 280 I.C.C. 767, 773 (1951).

[124] Groceries from Ogden and Salt Lake City, Utah, to Idaho, 266 I.C.C. 293 (1946). Cf. Points from Newark, N.J., to Philadelphia, Pa., 248 I.C.C. 484, 485 (1942). Cf. also Shoe Dressing in Official Territory, 246 I.C.C. 579, 580 (1941).

[125] In Pig Lead from Brownsville, Tex., to Chicago and St. Louis, 280 I.C.C. 585 (1951) the railroads proposed so-called multiple car rates to compete with barge transportation,

upper Mississippi River the railroads tried to meet the competition with a reduced rate in 1951, and when this was disallowed,[126] the tonnage, as predicted, was diverted to the water—during the open season of navigation.[127] Later, supported by the shippers, the railroads tried again, with a rate which was from 51 to 64 cents higher than the total costs of using the water service.[128] But again the ICC withheld authority because

> . . . we conclude that a greater spread between the rail and water transportation costs than would result from the rate proposed is necessary for competition that is not unfair or destructive, as required for consistency with the national transportation policy.[129]

On certain occasions, when rejecting compensatory rates because lower than necessary to meet the competition, the ICC has suggested that, by inviting retaliation and the consequent disruption of rate structures, transportation agencies do not gain, although the shipping public may—depending upon the point of view. It has also spoken of "a needless sacrifice of carrier revenue"[130] and the threat of rate wars.[131] Reference has been made to the "sensitive nature" of the rate adjustment,[132] and if competing forms of carriage have threatened to follow suit in reducing

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but the ICC declined to permit them. It found discrimination, although no shipper or receiver complained, and it also found that the reduction would seriously hurt the barge carrier. During the course of the oral argument before Division 3, on February 14, 1951, the following exchange took place between counsel for the railroads and two of the three members of the Division (Transcript at 236-37):

> Comm'r Johnson: I am here to find out why you should participate in the traffic.
>
> Mr. Gray: This is traffic moving from Brownsville to Chicago.
>
> Comm'r Johnson: I want to know why the railroads should participate in traffic of that sort where speed has no essentiality at all. I want to know what the barge is for? Why the United States Government spent billions of dollars on these rivers and inland waterways if slow, low-grade traffic has an equal rate by rail?
>
> Mr. Gray: I do not want to get into the philosophy—
>
> Comm'r Johnson: That is what we are here for.
>
> Mr. Gray: The Commission, under the Interstate Commerce Act, as I understand it, is not to divide my traffic up with some other traffic. It is going to take an amendment to do that.
>
> Comm'r Patterson: Hold on here about this amendment. I think the amendment is already in there. . . .

126 Aluminum from Point Comfort, Tex., to East Davenport, Iowa, 283 I.C.C. 85 (1951).

127 Aluminum Articles from Texas to Illinois and Iowa, 293 I.C.C. 467, 469 (1954).

128 Id. at 471.

129 Id. at 472.

130 E.g., Magazines—Darby and Philadelphia, Pa., to Texas, 292 I.C.C. 493 (1954); Tobacco from Lancaster Pa., to Selma, 292 I.C.C. 230 (1954); Cigar Boxes from Newark, N. J., to Selma, Ala., 293 I.C.C. 613 (1954).

131 Drugs in Southern Territory, 246 I.C.C. 563, 571-72 (1941); Boots and Shoes from Massachusetts to New York City, 246 I.C.C. 332, 337-38 (1941).

132 Petroleum between Portland and Spokane, P. & S. Ry. Points, 286 I.C.C. 516, 523-24 (1952).

their rates, that threat has led to condemnation of the rail reductions "even if the proposed rates were compensatory."[133]

In one important instance the ICC did not hesitate to increase the rates of the motor carriers in a proceeding involving a highly competitive movement of salt from Kansas, and it only refrained from doing likewise to the rail rates on the understanding that they would voluntarily be increased.[134] The ICC dismissed as unimportant the absence of cost evidence from the record, pointing out that this is only an "element that may be considered in determining the level of a reasonably compensatory rate," and it held that the "paramount duty laid upon us is to regulate both transportation agencies [rail and motor] not in the interest of one or the other of such agencies, but in the public interest."[135] It was apprehensive that:

> If the carriers may continue their present practices without restraint, it is not inconceivable that one strong, well equipped motor carrier might reduce its rates to such an extent as to attract all of the traffic and drive competitors from the field before the rates were raised to a reasonable level.[136]

On another occasion the ICC went so far as to stop a railroad rate reduction because of the testimony of the joint tariff agent of the competing motor carriers that it had been "his observation that whenever the rail carriers reduce their rates, the motor carriers meet the reduction."[137]

Other reasons have been assigned for the rejection of reduced railroad rates, but most of them have borne a relation—at least indirectly—to the probable effect of the reductions on the competing forms of transportation. For instance, the ICC has disapproved reductions in railroad rates because the cost of conducting the projected private trucking which they were desigued to discourage was not satisfactorily proven,[138] or because it

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133 All Freight from Eastern Ports to the South, 245 I.C.C. 207, 218-19 (1941).

134 Morton Salt Co. v. Alton Ry., 264 I.C.C. 71, 75 (1946); second report on reconsideration, 264 I.C.C. 497, 498 (1946).

135 Id. at 88-90.

136 Id. at 90.

137 Rubber Tires from California to Idaho and Utah, 245 I.C.C. 661, 666 (1941). This decision was later reversed when it was understood that the proposed reduction was to meet rail, not truck, competition, 248 I.C.C. 470 (1942).

138 In Meats from Oklahoma City, Okla., to Arkansas, Missouri, and Tennessee, 237 I.C.C. 587 (1940), the railroads were first allowed by Division 3 to publish a reduced level of competitive rates for the purpose of forestalling an expansion of the private trucking operations of Armour & Company, but this authority was withdrawn, by a vote of 6 to 3, when reconsidered by the Commission, 238 I.C.C. 625, 628 (1940). The ICC found:

> To justify reductions in rates, potential competition . . . must consist of something more tangible than a mere intention expressed by a shipper to engage in the transportation of his own products. . . .

did not agree with the management decision to meet the competition.[139]

Perhaps the most significant additional reason for rejecting proposed reductions has been that the resulting rates would not conform to established theories of rate-making, including the classification of freight in accordance with a number of elements but particularly its value and consequent ability to bear the freight charges.[140] Lower rates on high-valued commodities have been fully compensatory from a cost standpoint, but the ICC has nevertheless rejected them on the ground that they would impose "an undue burden" on other traffic. By "undue burden" the ICC has not meant that the traffic would fail to carry its own from the point of view of proportionate costs; on the contrary, it has meant that the traffic, because of its higher value, should be able to carry much more than proportionate costs under a system of rate-making based on the value of the service (which element in turn has meant the value of the commodity and its assumed ability to bear high freight rates).[141]

The ICC has reached such a conclusion in respect to reduced rates

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. . . the evidence is insufficient to establish that the cost of transportation in privately owned trucks as estimated by the shipper is correct.

[139] One reason for the railroads' failure to obtain authority to publish competitive rates on sugar from New Orleans to destinations in Arkansas—rates which "would unquestionably be compensatory"—was the ICC's conclusion that the additional revenues which would be produced "would be offset by substantial losses in gross revenue on their present tonnage to the points affected." Sugar from New Orleans to Arkansas, 243 I.C.C. 703, 705, 707 (1941). Another proposed rate on sugar, this time from the refineries at Savannah, Georgia, for deliveries at Miami, Florida, was turned down for the principal reason that the ICC remained unconvinced that the rate would improve the competitive position of Savannah sugar in the Miami market. Sugar from Savannah and Port Wentworth to Miami, Fla., 283 I.C.C. 297, 301, 304 (1951). There was no lack of conviction, however, on the part of the competing refineries at North Atlantic ports. Id. at 303.

[140] When the railroads, trying to meet truck competition, have proposed so-called all-freight or all-commodity rates—rates which would apply to carload consolidations of smaller shipments of various kinds and descriptions, the ICC has turned thumbs down and expressed the view that, even in competitive rate-making, the proper and separate classification of freight was unavoidable under § 1(6) of the Interstate Commerce Act (49 U.S.C. § 1(6) (1952)). All Freight from Eastern Ports to the South, 245 I.C.C. 207 (1941). This decision by Division 3 was upheld by the Commission, 251 I.C.C. 361, 365 (1942), which said:

> We conclude that the alleged forwarder and potential private-truck competition does not justify the establishment of rates which do not bear their fair share of the transportation burden.

In other decisions, however, the ICC has authorized such rates. All Freight to Pacific Coast, 238 I.C.C. 327 (1940), 248 I.C.C. 73 (1941); All Freight Rates to Points in Southern Territory, 253 I.C.C. 623 (1942). The principle of all-commodity rates continues to be an issue. Merchandise in Mixed Truckloads—East, 63 M.C.C. 453 (1955).

[141] E.g., Alcoholic Liquors in Official Territory, 283 I.C.C. 219, 223, 229 (1951); Southwestern Tank Truck Carriers Committee v. A. & S. Ry., 284 I.C.C. 75, 85 (1952).

on alcoholic beverages, although they averaged 146 percent of fully distributed average costs,[142] and reduced rates on petroleum products which produced "much higher" revenues per car-mile than the average for all traffic.[143] It has made this suggestion in respect to reduced rates on rayon yarn, and on sugar which produced better than average car-mile revenues.[144] When reviewing rates on manufactured tobacco the ICC found it "doubtful" if the proposed rates would allow that traffic —considering its "obviously high value"—to "contribute" its "fair share to the transportation burden."[145] It has made similar suggestions when passing on reduced rates on candy,[146] drugs,[147] and aluminum articles.[148] Recently the ICC, while reviewing both rail and truck rates on cigarettes, ordered an increase in the latter, and again the high value of the traffic was an important reason.[149] In so disposing of competitive rates, the ICC's review has necessarily assumed the continuing validity of a system of rate-making based largely on the value of the commodity—a system which has lost much of its meaning, as we shall presently see,[150] because of the tremendous impact of competition in every phase of transportation.[151]

These, then, are cases where the ICC has rejected compensatory railroad rates as less than reasonable minima, and as a consequence the 40-cent rate on sugar—which, in the example cited above, the railroads desired

142 Ibid.

143 Southwestern Tank Truck Carriers Committee v. A. & S. Ry., 284 I.C.C. 75, 84, 85 (1952); Petroleum Products between Kansas, Oklahoma, Arkansas, Missouri, and Colorado, 245 I.C.C. 617, 638 (1941); Petroleum from South Atlantic Ports to Southeast, 245 I.C.C. 23, 29 (1941).

144 Rayon Yarn from Roanoke, Va., to Lawrence, Mass., 237 I.C.C. 733, 739 (1940); Sugar from Savannah and Port Wentworth to Miami, Fla., 283 I.C.C. 297, 305 (1951). Cf. Sugar—South and Gulf Ports to Southeast, 294 I.C.C. 521 (1955), where higher rate levels, both rail and truck, were required although the lower rail rates as proposed were found compensatory.

145 Tobacco from North Carolina Points to Southern Points (Rail), 280 I.C.C. 767, 774 (1951); Manufactured Tobacco from Virginia and North Carolina to Official Points, 293 I.C.C. 133, 141-42 (1954).

146 Candy from Reading, Pa., to Baltimore, Md., 237 I.C.C. 89 (1940).

147 Drugs in Southern Territory, 246 I.C.C. 563 (1941); cf. Drugs, Medicines, etc., from Chicago, Ill., to the East, 286 I.C.C. 609 (1952); Drugs, Medicines, Chemicals, and Toilet Preparations in Official Territory, 284 I.C.C. 33 (1951); cf. also, Tape and Rubber Articles in Official Territory, 248 I.C.C. 540 (1942); Carpets and Carpeting from Official to Southern Territory, 237 I.C.C. 651 (1940).

148 Aluminum Articles from Texas to Illinois and Iowa, 293 I.C.C. 467, 472 (1954).

149 Manufactured Tobacco, Virginia and North Carolina to Official Points, 293 I.C.C. 133, 141-42 (1954); Manufactured Tobacco, Kentucky, North Carolina, and Virginia to South, 292 I.C.C. 427, 435, 438 (1954).

150 See pp. 85-87 infra.

151 See notes 9 and 10 supra.

to establish from New Orleans to Memphis—would not become effective. A principal reason would be that such a rate, although compensatory, promised to attract more than a fair share of the available traffic and thus to constitute an unfair competitive practice in violation of the national transportation policy. Sometimes, but not always, the threat of a rate war would be referred to. Another possible reason would be that, despite its compensatory character, a higher rate should be required because of the value of sugar as a commodity and its assumed ability to bear such a higher rate.

We pass now to certain general comments on these conflicting decisions of the ICC and point to four possible reasons why the conflicts exist.

General Comment on the ICC Decisions

The ICC has, on the one hand, upheld competitive rates because compensatory, with the clear understanding that their effect upon the competing agency is "not of legal significance." It has, on the other hand, dealt with such rates as if the only real issue was their effect upon the competing agency. In a few instances, it has suggested that both directions were followed in the same decision.[152] There is, as pointed out above, no apparent reconciliation.

Following the 1940 declaration of a national transportation policy, the Supreme Court referred to the ICC as "to some extent the coordinator of the different modes of transportation,"[153] but the ICC has never announced any master plan for the performance of such a function nor has it charted a course. There has been no such thing as a clear and unambiguous statement of principle to control the competition over which the ICC has been authorized to preside. There have been no special rules, or even requirements as to desired evidence, to guide the carriers in presenting competitive rates for its consideration.

The problem of competitive rate-making by the several transportation agencies is of immense proportions, and yet it has only been referred to in the annual reports of the ICC in a cursory manner.[154] Anticipating

[152] Petroleum Products in California and Oregon, 284 I.C.C. 287, 305, 306 (1952); Candy and Confectionery in Official Territory, 279 I.C.C. 703, 706 (1950); Boots or Shoes from Mishawaka, Ind., to Boston, Mass., 278 I.C.C. 773, 779 (1950).

[153] Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194, 205-06 (1944). See comment on this decision in 58 I.C.C. Ann. Rep. 56-58 (1944).

[154] 68 I.C.C. Ann. Rep. 4-5 (1954); 67 I.C.C. Ann. Rep. 3-4 (1953); 66 I.C.C. Ann. Rep. 3 (1952); 65 I.C.C. Ann. Rep. 3-4 (1951); 64 I.C.C. Ann. Rep. 4-5 (1950); 63 I.C.C. Ann. Rep. 5 (1949); 61 I.C.C. Ann. Rep. 2 (1947); 59 I.C.C. Ann. Rep. 10 (1945). Following the enactment of the Transportation Act of 1940, the ICC's annual report contained an analysis of the new legislation, but competition among the several agencies in the making of rates was not referred to as a separate subject. 54 I.C.C. Ann. Rep. 1-15 (1940).

the 1940 declaration of transportation policy, the ICC outlined various possibilities for applying it in its 1939 annual report,[155] but since then, it has had little to say.[156]

In at least four different respects the ICC seems to have gone astray in its attempt to control competitive rate-making, and this may serve to explain—in part—why it is impossible to harmonize its decisions.

First: During the past five years or so, the ICC has repeatedly acted as if under some sort of obligation to see that no form of transportation, particularly the railroads, got more than a fair share of the competitive traffic and to condemn as unfair or destructive any rates, including those shown to be fully compensatory, which promised to attract more than a fair share. It has sought to preserve competition by keeping the competitors happy with fair shares for each.

But what is a fair share?

The ICC has never undertaken a definition, and in the nature of things, it never will. If railroad costs between A and B are lower, are the competing motor carriers entitled to participate, and if so, should their share be 10 percent, 50 percent, or 75 percent, or should it be measured by the superiority of their service? If the latter, how does the ICC put itself in the shoes of the shipper? Is the answer affected by the fact that, while the railroads failed to exploit their lower costs and continued to publish higher rates, the motor carriers came in and quietly took over 50 percent of the traffic? Are the railroads then foreclosed—despite their lower costs—from publishing rates which will do more than assure the retention of the 50 percent which is still theirs? And suppose that, in addition to lower costs, the railroads also have the better service?

And how does the ICC give the railroads and the water carriers fair shares of traffic movements which the shippers do not want to divide? Shippers have repeatedly announced that, for particular movements, they

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155 53 I.C.C. Ann. Rep. 26-28 (1939). These possibilities included: (1) the view that minimum rates should be prescribed on the basis of full cost of service plus a profit for the type of transportation which has the advantage, with the high-cost carrier being allowed to meet such rates; (2) the prescription of minimum rates on the basis of the full cost of service plus a profit for both types of carriers; and (3) the opinion that value, as well as cost of service, should be taken into consideration as a factor in prescribing minimum rates, and that rates should be established between the competing forms of transportation which would reflect the respective advantages of their service to the shippers, and would permit both to share in the traffic. Cf. Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates 83-88 (1945).

156 For a penetrating analysis of this inter-agency competitive rate problem, see Williams, "The ICC and the Regulation of Inter-carrier Competition," 63 Harv. L. Rev. 1349 (1950). For an earlier excellent treatment of the same subject, see Dearing and Owen, National Transportation Policy 246-65 (1949).

would use one agency, and that agency would depend upon the outcome of the competitive rate proceeding.[157]

And when it comes to sharing, is there certain traffic—adaptable to water transportation—which the ICC regards as beyond reach although the railroads can participate with compensatory rates and give better service?

The concept of fair shares would seem to be a pipe-dream. It can hardly be anything else when, as we have seen, the ICC does not even regulate the rates of almost two-thirds of the highway and nine-tenths of the waterway transportation. Moreover the concept does not appear to be supported by the provisions of the Interstate Commerce Act. The national transportation policy specifically calls upon the ICC, in the "fair and impartial regulation of all modes of transportation" subject to its jurisdiction, "to recognize and preserve the inherent advantages of each,"[158] and where that inherent advantage is a lower cost level, rates which reflect it should not be denied regardless of their effect upon the competing modes of transportation. In the *Mechling* case[159] the Supreme Court made this point clear in relation to the lower costs of water carriers.[160] There would seem to be no room for a different rule where railroad costs are lower.[161] A higher cost form of transportation will prosper by attracting business with superior service. Of course, if its service is no better, or perhaps inferior, the shippers presumably will give it no business, and it deserves none.

Second: To pass upon competitive rates in the light of the value of the commodity—sometimes described as the value of the service—is becoming less realistic every day.

As early as 1940 the ICC pointed to the "diminished" importance of value of the service as an element in rate-making because of the "fact that a shipper or consumer can perform his own hauling service over the highways,"[162] and only recently did it hold that "common carriers under regulation should be allowed more leeway to meet competition of a ship-

157 E.g., Petroleum Products from Los Angeles to Arizona and New Mexico, 280 I.C.C. 509, 512, 513 (1951); Groceries from Ogden and Salt Lake City, Utah, to Idaho, 266 I.C.C. 293, 294 (1946); cf. Pulpboard from Plymouth, N. C., to Westbrook, Maine, 286 I.C.C. 284 (1952); Pig Iron from Martins Ferry, Ohio, to Wilder, Ky., 270 I.C.C. 783 (1948).

158 49 U.S.C. preceding §§ 1, 301, 901, 1001 (1952).

159 Interstate Commerce Commission v. Mechling, 330 U.S. 567 (1947).

160 Id. at 577, 579.

161 Manufactured Tobacco, Kentucky, North Carolina, and Virginia to the South, 292 I.C.C. 427, 437 (1954).

162 Petroleum and Petroleum Products from California to Arizona, 241 I.C.C. 21, 42 (1940).

per or consignee transporting his own goods than in meeting the competition of another carrier for hire."[163] During the interval, however, it has repeatedly pointed to the value of the commodity as a reason for denying competitive rates, and in certain of the cases, private or exempt transportation has been at the bottom of the competitive struggle.[164]

If all transportation were regnlated, it might be possible—at least in theory—to continue to adhere to the old rate-making principles,[165] with their emphasis upon classification and the value of the commodity, but, even then, it would take a composite edition of the seven wise men to fix the rate differentials between the competing forms of transportation—differentials which would accurately reflect their constantly shifting service advantages and disadvantages. But how long could such differentials—designed to produce fair shares for the competing forms of transportation—be expected to last if one form could improve its net revenues by publishing reduced rates? No one form of transportation, able to improve not only its proportion of the available traffic but also its net revenues,[166] is ever going to be satisfied with an assigned share of the business, and under the American tradition of dynamic competition no one form of transportation *should* be satisfied under the stated conditions.

The point, however, is largely academic as private carriage and other forms of exempt transportation, already of tremendous importance, continue to grow. For whatever the ICC may say, rate-making in accordance with the value of the commodity has been badly punctured. When presented with a choice of public or private transportation, a shipper will not normally be influenced by the ability of his commodity—because of its value—to stand high rates. The only factor which will count with him—or with the exempt carrier—will be the cost of the transportation. As stated recently by the ICC:

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163 Hardware—New Britain to Chicago, 293 I.C.C. 515, 517 (1954).

164 See notes 141-51 supra. Petroleum Products from Los Angeles to Arizona and New Mexico, 280 I.C.C. 509, 511, 512 (1951). Cf. Crude Sulphur—Ohio to Ohio and Erie, Pa., 293 I.C.C. 655, 658-59 (1954). See also Canned Goods in Official Territory, 294 I.C.C. 371 (1955).

165 See pp. 81-82 supra. In 1887 the ICC likened rate-making based on the value of the commodity to "taxation; the value of the article carried being the most important element in determining what shall be paid upon it." 1 I.C.C. Ann. Rep. 31 (1887). In 1894 it referred to classification as "the foundation of rate-making." 8 I.C.C. Ann. Rep. 34 (1894).

166 In Petroleum Haulers of New England, Inc. v. Boston & Maine Railroad, 269 I.C.C. 6, 20 (1947), the ICC said:

> Rates that are depressed to meet competition, as is here the case, when they cover much more than the out-of-pocket costs, may, because of the traffic they attract, make a greater contribution toward the indirect or constant costs than higher rates that would meet the fully distributed costs.

> Much of the evidence on this record concerns private-carrier competition. Both the rail carriers and most of the motor lines are fully cognizant of the existence and increasing use of private carriage in the transportation of canned goods, and any rate structure maintained by the for-hire carriers must give due recognition thereto. Thus, most of the parties realize that the rates and costs of the for-hire carriers cannot advance beyond a point where diversion of traffic to private carriage would result. The record is deficient, however, as to the precise point at which such transition would take place. It does appear that several of the larger canners and supermarket operators now operate extensive fleets of trucks . . . .[167]

Unless private and exempt transportation are going to take over the field,[168] regulated carriers must be free to fix their competitive rates on the basis of costs when it is necessary to do so, and the ICC—except to protect shippers from discrimination—should do nothing to interfere. If particular circumstances permit the maintenance of rates on a higher level—a level which reflects a greater ability to bear freight charges without impeding free movement—the railroads and the trucks and the water carriers must find that higher level, subject only to the ICC's control of maximum rates.

Third: In condemning compensatory rates as less than reasonable minimum rates, the ICC appears to have been misled by a principle which has guided its administration of section 4 of the Interstate Commerce Act.[169]

Under section 4 the ICC, in its discretion, allows a railroad to publish for carriage to a more distant point a rate which is lower than the rate to an intermediate point provided there is competitive necessity and provided further that the rate to the more distant point is, as stated in the statute, "reasonably compensatory for the service performed." Over thirty years ago the ICC defined "reasonably compensatory" as used in this section as meaning, among other things, "no lower than necessary to meet existing competition,"[170] and in applying this definition, it has consistently concerned itself with protecting the competing services against railroad rates which were too low. The theory has been that since the ICC grants relief from the restrictive provisions of section 4 to meet competition it should not allow reduced railroad rates which would have the effect of eliminating their basis, *i.e.*, the competitive service.[171]

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167 Canned Goods in Official Territory, 294 I.C.C. 371, 381 (1955).

168 See Editorial, "Is the 'Common Carrier' Obsolete?" 15 Trains 6 (April 1955); Arpaia, "What Price Regulation?" 22 ICC Prac. J. 659 (1955).

169 49 U.S.C. § 4(1) (1952).

170 Transcontinental Cases of 1922, 74 I.C.C. 48, 71 (1922).

171 Pacific Coast Fourth Section Applications, 264 I.C.C. 36, 39 (1945); Citrus Fruit from Florida to North Atlantic Ports, 266 I.C.C. 627, 636-38 (1946). In Skinner & Eddy Corp. v. United States, 249 U.S. 557, 568 (1918), it was said:

In the administration of section 4 the relation of the proposed rates and railroad costs is usually a routine consideration because the spread is so great as to leave no doubt. The real contest takes place over the contentions of the competing services, usually water carriers,[172] that the proposed rates are not reasonably compensatory because lower than necessary to meet *their* competition. In resolving this issue, the ICC protects the water carriers, as suggested above, by insisting that the rail rates be no lower than (1) the full costs to the shipper of using the water services plus (2) a differential in recognition of the more "valuable" rail service.[173] Water carriers are protected by such higher rail rates—higher, that is, than the full costs to the shipper of using the water service—even when the shipper flatly says that rail service is not more valuable,[174] and despite the absence of protest from water carriers.[175] Such higher rail rates are required although the shipper may suggest that the competing water service is more valuable for his traffic.[176] The measure of protection is still greater if the traffic is important to the water carriers.[177] In fact, among the many proceedings under section 4 since

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The specific purpose of the last paragraph of sec. 4 is to ensure and preserve water competition; to prevent competition that kills. A reduction made under the authority of a fourth section order after full hearing must have been found by the Commission to have been reasonably necessary in order to preserve competition between the rail and the water carrier.

172 As distinguished from truck competition, water competition exists only between certain points, and for that reason, authority to depart from the provisions of § 4 is more important in the case of water competition.

173 E.g., Cylinders and Tanks from Baton Rouge to Evansville, 281 I.C.C. 359 (1951) where proposed rates which were less than 177% of the costs to the shipper of using the competing water services were disallowed as not reasonably compensatory.

Since 1940 there has apparently been only one reported ICC decision under § 4 wherein proposed competitive railroad rates on the same level as the through water costs were approved. Pig Iron from Cleveland and Lorain, Ohio, to Worcester, Mass., 278 I.C.C. 75 (1950). In the cited instance the competition was provided by the private barge movements of an operating subsidiary of the United States Steel Corporation. Cf. Alcohol from Illinois and Indiana to Texas City, Texas, 273 I.C.C. 555, 560 (1949), where the water competition was also by private barge and, in justifying approval of the rates as proposed, the Commission said that the protesting water carriers introduced "no evidence to support their contentions that the proposed adjustment is, or will be, prejudicial to their interests. . . ."

174 Phosphate Rock from Florida to Wilmington, N. C., 279 I.C.C. 579, 584 (1950); Phosphate Rock from Florida to Gulfport, Miss., 284 I.C.C. 677, 683 (1952); Iron and Steel Billets to Chicago, Ill., 246 I.C.C. 293, 296-98 (1941).

175 Lumber from North Carolina to New York, 245 I.C.C. 231 (1941); Blackstrap Molasses from New Orleans and Mobile, 241 I.C.C. 177 (1940); Coke from Lockport, Ill., 238 I.C.C. 4 (1940).

176 Phosphate Rock from Florida Mines to Atlantic Ports, 246 I.C.C. 225, 230 (1941); Crude Sulphur from East St. Louis to Joliet, Ill., 270 I.C.C. 231, 235 (1948).

177 Sugar from Corpus Christi, Tex., to Tampa, Fla., 287 I.C.C. 285 (1952); Cryolite from Natrona, Pa., to Gregory, Tex., 286 I.C.C. 704 (1952); Pulpboard from Southern

1939 there has been found only one where the issue of whether the proposed reduced rate to the more distant point was "reasonably compensatory" was actually decided in the light of the railroad's costs.[178]

However appropriate it may be to protect competitors against railroad rates under section 4, the ICC would seem to have little justification for furnishing such protection in passing upon reasonable minimum rates under other provisions of the Interstate Commerce Act. And yet that is exactly what the ICC has been doing.[179]

Fourth: It has been argued that when the ICC divides the traffic in an effort to keep competitors in business it is acting in the interests of national defense. Both the ICC and the courts seem to have been impressed.[180] The argument runs that in the event of war every agency of

Ports to Eastern Ports, 238 I.C.C. 67 (1940); Phosphate Rock from Southern Ports to Quincy, Ill., 287 I.C.C. 123 (1952).

178 Newsprint Paper from Oswego to Brooklyn, N. Y., 256 I.C.C. 247 (1943).

179 See pp. 74-79 supra. The notion that the railroads should be forced to divide their traffic with competing agencies has been proposed in the form of state legislation. In the Oregon State Senate on January 25, 1955, Senate Bill No. 121, favored by motor carrier and barge interests, would have empowered the Public Utilities Commissioner of Oregon to prescribe minimum rates in the light of their effect upon competitive forms of transportation. The proposed regulations, because of exemptions, would have had little effect on motor carriers and none on water carriers. The Senate Committee voted to table the bill in March 1955.

One incongruous result of ICC condemnation of compensatory rates as constituting unfair competition is indicated when such rates, barred from interstate application, become effective on intrastate traffic. In such circumstances the water and truck competitors have requested the ICC to find the intrastate rates in violation of § 13 of the Interstate Commerce Act (49 U.S.C. § 13(4) (1952)) on the ground that they burdened interstate commerce. But the ICC has refused because unable to find that an increase in such intrastate rates would increase railroad revenues. Pacific Inland Tariff Bureau Inc. v. Southern Pacific Co., 288 I.C.C. 31 (1953).

180 Southwestern Tank Truck Carriers Committee v. A. & S. Ry., 284 I.C.C. 75, 84, 85 (1952). In Cantlay & Tanzola v. United States, 115 F. Supp. 72 (S.D. Cal. 1953), an ICC order approving reduced petroleum rates by rail was, as we have seen in note 52 supra, upset on the ground that the ICC failed to consider whether the national defense would be served by the construction of a pipe line—a project which the reduced rates were designed to forestall. In Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D. Ore. 1955), the district court enjoined another ICC order approving reduced railroad rates on the same commodity (Petroleum in North Pacific Coast Territory, 291 I.C.C. 101 (1953), 292 I.C.C. 317 (1954)) and went even further in requiring findings as to the national defense. The court was not satisfied with the ICC's conclusion that, in the absence of the proposed rates, the railroads would go out of the business of hauling petroleum entirely and held that the conflicting interests of the barges and trucks, mostly unregulated, had to be considered more seriously. Later, on application of the railroads for reconsideration, the court filed a supplemental opinion in this proceeding (Civil Action No. 7278), and said:

> In this case, . . . the issue of whether the barge and truck lines could survive and whether their survival was necessary for agricultural marketing and national defense, was directly raised. . . .
>
> Bluntly stated, we fear that the proposed railroad rates, if approved, will drive the barge lines out of business. . . . Contrary to the railroads' contention, we believe that the Commission was required to consider this matter.

transportation is required and the nation can ill afford to let any of them —even the most marginal operations—go by the wayside in peacetime.

What this means of course, or would mean in actual practice, is that the railroads should do the dividing. For, as we have seen,[181] the ICC cannot force the water carriers—even the small part under regulation—to divide if their rates cover their costs. And while the regulated motor carriers could presumably be required to divide with the railroads, the heavier portions of freight on the highways—being exempt or private—could easily escape because they are beyond reach of ICC control.

But why is it necessary to keep marginal operations alive at the expense of the railroads? Certainly, the Government has not protected marginal railroad operations from the consequences of competition with other forms of transportation, and yet the railroads handled over 90% of the military load during the last war.[182] If standby facilities are needed, let the issue be faced squarely and let the standby facilities be provided as such by the Government.[183] If war comes, greater industrial capacity

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Ward Transport v. United States, 125 F. Supp. 363 (D. Col. 1954), is contra, and the Supreme Court affirmed the judgment, 348 U.S. 979 (1955), despite the fact that the reply to the motion for affirmance consisted of a reproduction in its entirety of the opinion in Pacific Inland Tariff Bureau v. United States, supra.

181 See note 11 supra. For critical comment on this preferential treatment of regulated water carriers, see Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates 71-77 (1945).

182 Report of the Chief of Transportation, Army Service Forces, World War II, War Department, November 30, 1945, at 20, 25.

183 The Secretary of Defense, Mr. Charles E. Wilson, in supporting the recommendations of the Presidential Advisory Committee before a Sub-committee of the House Committee on Interstate and Foreign Commerce, at a hearing September 19, 1955, testified on the subject of transportation facilities required for purpose of national defense. Extracts of the testimony follow:

> Chairman Priest: . . . The question which presented itself to me in my earlier consideration of the report was to what degree we should require excess capacity of common carriers and who, in effect, would pay for that excess capacity. In other words, should the excess capacity of the common carrier be charged in rates to the shipper to support whatever excess capacity we might require in order to meet the problems of defense, particularly the logistics problems? I wonder if you, Mr. Secretary, or any members of the committee, have given any thought to that degree of excess capacity and actually who would pay for it?
>
> Secretary Wilson: I myself have thought about it quite a bit and have had experience with it in World War II. The national policy has been to encourage the railroads particularly to modernize their equipment. They gave them the stepped-up depreciation, and the modernization of the railroads has been a good thing for the country. It has been a good thing for everybody. It does not mean that anybody is going to have directly to pay any more for services or handle it in any special way.
>
> . . . So I do not think any special arrangement has to be made with any transportation company or concern, either trucks or any "green" form of transportation or the railroads, other than has been done by encouraging them to modernize and expand to the degree that they think is sound.
>
> . . . .
>
> Chairman Priest: Just one more question, Mr. Secretary. I think you answered rather satisfactorily and gave a very clear explanation of what, in your mind, the question of excess capacity might mean. I will simply ask this question: It would not be your

will also be needed, but it is not understood that, in the meantime, industries presently operating are being forced to sell at a price which will enable less efficient operators to keep their heads above water. If there is to be competition in transportation, we must be prepared to accept some of the consequences of competition, and no one has ever pointed out how a nation strengthens itself for war by trying to defy the basic principles of economics in peacetime.[184]

CONCLUSION

The enactment of the legislation proposed by the Presidential Advisory Committee on Transport Policy and Organization would set a truer course for competitive transportation.

Under its recommendations the ICC could interfere with competition among the several agencies only if the rates "fail to cover the direct ascertainable cost of producing the service to which the rates apply." No longer could it take account of the effect of rates upon the competing agency of transportation, and the concept of a "fair share" for everyone

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opinion that any common carrier, in its application for a rate or in its approval of a rate, might include a certain cost to provide excess capacity as needed?

Secretary Wilson: No, I would not think so. I would not be for that, myself.

Chairman Priest: I would not, either, and that is why I wanted that point clear. I think you have cleared it very well in your other statement.

Unrevised stenographic transcript of Hearings Before the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess., Washington, D. C., September 19, 1955, at 94, 95, 97, 98, 99.

184 Pegrum, "Public Policy for Motor Transport," 28 Land Econ. 252 (1954). It is said in part:

> . . . The intention to develop a national transportation policy designed to recognize and preserve the inherent advantages of each mode of transportation and to preserve the competitive advantages of each has been reiterated over and over again in legislative debates and in preambles to legislation. The import of the declaration of policy never seems to have been grasped with clarity, however, nor administered with an understanding of the implications. If competition is to have any significance, then suppliers must be allowed to compete. If the inherent advantages of any mode of transport are to be afforded the public, they must be obtained through the competitive process or at least within the concept of the competitive framework. It is only through the medium of competitive concepts that we are able to arrive at an efficient allocation of economic resources.
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> This idea, however, necessitates a distinction between injury to competition and injury to competitors. All competition is injurious to competitors in the sense that it drives out the inefficient and limits the rewards that successful competitors can receive. This is the essence of competition—the incentive to strive for profits, and the compulsion to go somewhere else if they are not forthcoming. Costs to the consuming public are thus kept to the minimum necessary to attract the services for which it is willing to pay.
>
> . . . .
>
> Competitors must either face the hard fact that competition always poses, and always must pose, the threat of a superior rival, or give up the idea of competition altogether. Public policy must give full recognition to the same thing.
>
> That there need to be rules of competition goes without saying but the purpose of such rules is to preserve competition not competitors. Fair competition has meaning only as it enables enterprises to succeed by the sale of their products to consumers who have alternative choices. This does not recognize survival by preying upon or devouring rivals but it does place survival upon the ability to attract customers by superior service or lower prices, or both, in the open market with rivals.

would disappear. If lower costs happen to be the inherent advantage of one form of transportation, the assertion of that advantage would be encouraged, not discouraged. As stated in the report of the Presidential Advisory Committee:

> If the market is to determine the appropriate use of each form of transportation in accord with shippers' judgments of the utility to them in terms of cost and service, rates must be allowed to reflect cost advantages whenever they exist and to their full extent. *Present regulatory policy defeats this prospect in large part since carriers, notwithstanding demonstrated lower costs, are permitted to do no more than to meet the competition facing them which, with some exceptions, means to name the same rate regardless of cost relationships.*[185] (Emphasis added.)

The recommended legislation to implement these conclusions would include a new national transportation policy, the redefinition of a reasonable minimum rate to accomplish the purpose outlined above, a revision of section 4 to enable the railroads (without prior authority) to depart from the long-and-short haul clause in meeting actual competition with reasonable minimum rates, and a shortening of the suspension period[186] from seven to three months, with the burden on the protesting agency of transportation to prove the proposed rates to be less than reasonable minimum rates. In addition, contract motor carriers would have to publish their actual rates, and the exemption from regulation of certain bulk water transportation would come to an end. All of these steps are unanimously recommended for the development and maintenance of dynamic competition between the several agencies of transportation—in keeping with the conditions which obtain today.

The Presidential Advisory Committee, in summary, would have the ICC approve the 40-cent rate on sugar from New Orleans to Memphis provided only that it was compensatory; the effect of such a rate on the competing trucks and barges would be irrelevant. When the shoe was on the other foot, the trucks and barges would, of course, publish their competitive rates under the same conditions. All forms of transportation would compete on terms which are more realistic than is the case today, and the public interest would be served because each form would be allowed to take its proper place and play its proper role—not as a result of government assignment or artificial restraint—but in consequence of competition which would be checked at only one point: No form of transportation could compete against another form with non-compensatory rates. In this way, because of greater efficiency in the operation of the nation's transportation system as a whole, the overall cost of transportation to the public would presumably be reduced.

185 "Revision of Federal Transportation Policy," supra note 2, at 10.

186 49 U.S.C. § 15(7) (1952).