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Robert W. Harbeson

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LEGAL ASPECTS OF THE PORT DIFFERENTIAL CONTROVERSY

ROBERT W. HARBESON†

The decision of the Supreme Court in *Texas and Pacific Ry. Company et al. vs. United States et al.*[1] handed down on May 29, 1933, promises to be of far-reaching significance in connection with the long-standing controversy over port differentials and other disputes between sections and localities involving the application of Section 3 of the Interstate Commerce Act. Paragraph 1 of this Section of the Act reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The decision referred to removes from ports and gateways, as regards traffic passing through them the protection afforded by the foregoing Section of the Interstate Commerce Act. Furthermore it holds that a carrier cannot be made subject to a Section 3 order, unless it controls the rates to both the preferred and prejudiced points. The issue is essentially one of statutory construction. It will be best understood if preceded by a review of the significant port differential cases and certain important related decisions.[2]

I

One of the first cases to be decided by the Interstate Commerce Commission related to the lawfulness of equalizing export rates through Boston and New York while charging higher domestic rates to the former city than to the latter.[3] The Commission, in an in-

†Iowa State Teachers College.

[1]289 U. S. 627, 53 Sup. Ct. 768 (1933).

[2]For an extended discussion of port differentials see Harbeson, *The North Atlantic Port Differentials* (1932) 46 Q. J. ECON. 644.

[3]In the Matter of the Export Trade of Boston, 1 I. C. C. 24 (1887).

formal opinion, approved this arrangement, apparently because of a desire to preserve competition between the two ports in the export trade. On the other hand, the following year the Commission upheld higher domestic rates to Boston than to New York primarily on the ground of higher cost of service to the former city.[4] Furthermore, it explicity stated that the superior commercial advantages of New York City could not constitute a basis for the desired equalization. When this issue was raised again in 1892 the Commission refused to change its earlier decision.[5] The well-known *Eau Claire Case,* also decided in the latter year, should be noted in this connection, although it involves only domestic rates and is not concerned with port differentials.[6] In the first place, the doctrine was laid down emphatically that a locality is entitled to the benefit of its natural advantages. Eau Claire, Winona, and La Crosse, Wisconsin, were about equi-distant from the chief market for their lumber, but Eau Claire had advantages in producing lumber which enabled her to market the product at lower cost than her competitors. The Commission held that such advantages could not be neutralized by rate adjustments, saying:

> "That rates should be fixed in inverse proportion to the natural advantages of competing towns with a view of equalizing 'commercial conditions' as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and any exaction of charges unreasonable in themselves or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and policy of the statute."[7]

In the second place, according to Mr. Justice Roberts, this is the first case in which the Commission laid down the principle that where a carrier whose lines reach, or which controls the rate to, one destination is a party to a joint rate to another, but cannot control the latter rate, it cannot be held responsible for discrimination or be made subject to an order to remove undue prejudice under Section 3.[8] This familiar doctrine, later elaborated, will be discussed at length below.

[4]Boston Chamber of Commerce vs. L. S. and M. S. Ry. Co., *et al.*, 1 I. C. C. 436 (1888).

[5]Toledo Produce Exchange et al., vs L. S. and M. S. Ry. Co., *et al.*, 5 I. C. C. 166 (1892).

[6]Eau Claire Board of Trade vs. C. M. and St. P. Ry. Co., *et al.*, 5 I. C. C. 264 (1892). [7]See *id.* at 293.

[8]Texas and Pacific Ry. Co. *et al.* vs. U. S. *et al.*, *supra* note 1, at 649n, Sup. Ct. at 776n (1933).

The port differential controversy proper was initiated by the *New York Produce Exchange Case* in 1898.[9] The contest centered on the differentials as applied to grain, flour, and provisions, and concerned the cities of New York, Philadelphia, and Baltimore. The Commission left the adjustment unchanged. It agreed that the differentials grew out of carrier competition and were to be justified, if at all, on the principle of preserving competition among the ports and among the carriers serving them. On the basis of decisions by the Supreme Court in the *Import Rate Case*[10] and the *Troy Case*,[11] it held that carrier competition "may, therefore, excuse the giving of a preference to a particular locality or a particular commodity, provided the interests of the public are not unduly sacrificed to those of the carrier."[12]

After thus disposing of the question of the legality of the principle on which the differentials were made the Commission turned to the question of whether the particular differentials involved were legitimate. It found that changes in the ocean rate situation, in rate levels, and in the price of grain pointed strongly to the desirability of reducing the differentials favoring Philadelphia and Baltimore. Nevertheless it ordered no change, and its reasons seem rather unsatisfactory. The argument appears to be that although Philadelphia and Baltimore were receiving larger differentials than they were entitled to, this liberality was offset by the fact that New York's commercial advantages enabled her, in spite of this rate handicap, to secure a larger percentage of the high grade exports than formerly. The Commission then proceeded to heap insult upon injury by the following further statement:

> "Again, if we have made an error, it is in favor of the weak and against the strong. New York may have lost somewhat in the matter of foreign commerce, but it is still immeasurably in advance of all rivals. ..... It is almost impossible for us to feel that a locality which engrosses one-half of all the exports and three-fourths of all the imports can justly complain of any undue diversion of its commerce."[13]

It seems clear that this case was decided solely upon a consideration of commercial conditions at the ports concerned and upon a

[9]New York Produce Exchange vs. Baltimore and Ohio R. R. *et al.*, 7 I. C. C. 612 (1898).

[10]Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666 (1896).

[11]Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45 (1897).

[12]See New York Produce Exchange v. Baltimore and Ohio R. R. et al. *supra* note 9, at 660.

[13]See *id.* at 684.

desire to enable them to compete on even terms for a share of the foreign and domestic trade. When the issue arose again in 1905 it included Boston as well as the other three leading north Atlantic ports.[14] This time the Commission, acting merely as an arbitrator, reduced the differentials on export flour and on ex-lake grain and made the latter applicable to Philadelphia as well as to Baltimore. The decision was apparently made on the same grounds as in the preceding case. The emphasis on competition was carried so far as to suggest that, if Boston could not compete on even terms under the existing rate adjustment, it might be necessary to grant it rates differentially lower than those applying through New York in spite of the longer and more expensive rail haul. Furthermore, the Commission stated that "to decree that traffic should always move by the cheapest route would be to entirely eliminate competition, which, within reasonable bounds, is for the interest of the general public."[15] Apparently neither of the considerations advanced in the *Eau Claire Case* were applied in these early export rate cases.

The writer is inclined to agree with Professor Hammond that these cases represent an un-economic exaggeration of competition. But, as the latter points out:

> "The Act to Regulate Commerce was passed by a Congress which was strongly of the belief that competition between railroads was salutary in its workings and was to be fostered. The purpose of regulation was not to thwart competition but to check monopoly. The framers of the Act and those who voted for it may not have rightly understood the nature of railway competition and its effect in producing discriminations, but there can be no doubt that they intended that the Act should promote competition between carriers and between places, and that they placed reliance on competition as a rate-making force beneficent in its results."[16]

Two cases decided in 1907 mark the beginning of a transition in the Commission's treatment of port differentials. The domestic differential of 2 cents per 100 pounds above New York on flour shipped to Boston was upheld on the ground of longer distance and higher cost of transportation to the latter city than to the former.[17] The Commission refused to require the Pennsylvania Railroad to apply the

[14]In the matter of Differential Freight Rates to and from North Atlantic Ports, 11 I. C. C. 13 (1905).

[15]See *id.* at 76.

[16]HAMMOND, RAILWAY RATE THEORIES OF THE INTERSTATE COMMERCE COMMISSION (1911) 108-9.

[17]Banner Milling Co. v. N. Y. C. & H. R. R. R., 13 I. C. C. 31 (1907).

same differential on ex-lake grain from Buffalo to Philadelphia and Baltimore as it applied on all-rail grain from Chicago to those points, holding that the failure of Buffalo to secure the same differential as Chicago was due to its location, a disadvantage which the carrier could not be required to equalize.[18]

In the *Chicago Board of Trade Case* decided in 1911 the complainant, being interested in developing the water-rail route for grain from the West to the seaboard, contended that the maintenance of ex-lake grain rates from Buffalo to the seaboard higher than the division of the all-rail rate received by the carriers east of Buffalo was an unjust discrimination against the water-rail route.[19] The Board of Trade really wished to have the ex-lake rate made equal to the division of the all-rail rate received by the carriers east of Buffalo, and so to secure a water-rail rate below the all-rail rate. The Commission, however, refused to act. It found that the ex-lake rates were reasonable under Section 1, that the rail lines would reduce the all-rail rate to match any reductions in the water-rail rate, and, interpreting the law as it then stood, held that the divisions received by carriers party to joint rates were not of public concern and could not be used as a standard of reasonableness or a measure of discrimination. It further stated that it did not feel at liberty to change rate adjustments merely to enable more grain to move through a given market. Finally, in *Ashland Fire Brick Co. v. Southern Ry.*, decided in the same year, the Commission held that where a carrier reaches, or participates in joint rates to, two points from a common origin, but, because of competition, controls the rate to but one of those points, it cannot be held guilty of undue preference or prejudice as regards those points under Section 3.[20] This doctrine has since been known as the *Ashland* rule.

The foregoing doctrine was applied in the north Atlantic port differential cases in 1912, 1925, and 1929.[21] The essential idea was clearly stated in the 1912 case as follows:

> "The competitive conditions at Baltimore and Philadelphia are created by those systems (the Baltimore and Ohio and Penn-

[18]Washburn-Crosby Co. v. Penna. R. R. Co., 13 I. C. C. 40 (1907).

[19]Board of Trade of the City of Chicago v. Atlantic City R. R. Co., *et al.*, 20 I. C. C. 504 (1911). [20]22 I. C. C. 115 (1911).

[21]Chamber of Commerce of State of New York *et al.* v. N. Y. C. and H. R. R. R. Co., *et al*, 24 I. C. C. 55 (1912); rehearing, 24 I. C. C. 674 (1912); rehearing 27 I. C. C. 238 (1913); Maritime Assn. of Boston Chamber of Commerce *et al.* v. Ann Arbor R. R. Co. *et al.*, 95 I. C. C. 539 (1925); rehearing, 126 I. C. C. 199 (1927); Baltimore Chamber of Commerce v. Ann Arbor R. R. Co. *et al.*, 159 I. C. C. 691 (1929).

> sylvania), and the rate situation to and from these ports is controlled by them. It was this control by these systems that led to the making of the differential agreement. We do not recognize such an agreement as lawful, but the conditions which brought it about are as strong today as they ever were and we find now, as we found in the *North Atlantic Ports Case, supra,* that the Pennsylvania and the Baltimore and Ohio have the lawful right to maintain lower rates to and from Baltimore and Philadelphia than they contemporaneously maintain to and from New York. They would probably also have the right to make these rates the same to and from all of those ports if they chose to do so."[22]

In none of these latter three cases did the Commission change the differential adjustment. It turned a deaf ear to showings by the complainants, especially Boston, that their business had been declining, allegedly because of the differentials. It specifically and emphatically refused to attach weight to commercial conditions and to the argument that ports should enjoy rates which would enable them to compete on even terms. Instead it emphasized the right of localities to enjoy their natural advantages and those resulting from enterprise and investment.

In the development of this doctrine the Commission was by no means unanimous. The most notable dissenting opinion was that of Commissioner Eastman in the 1929 ease. He felt that the larger differentials asked by Baltimore were justified by lower line-haul and terminal costs. He denied the advantage of rate equalization, pointing out that it resulted in the averaging up of rates over various routes. There are passages which indicate that the Commissioner favored granting Baltimore's demands because of the deeline in traffic through the latter port, allegedly a result of too small differentials. Finally, he took up the question of the liability of the carriers under Section 3. He confessed to some doubt as to whether the mere fact of participation in the rates to and from both cities was sufficient ground for establishing such liability, saying that on the other hand "it may be argued with force that it is our duty to look to the substance rather than to the form and to consider the extent to which defendants participate in what are in reality the rate-making routes to and from the rival ports."[23] He concluded, however, apparently relying on the opinion of Mr. Justice Brandeis in the *Illinois Central*

[22]Chamber of Commerce of State of New York *et al.* v. N. Y. C. and H. R. R. R. Co. *et al., supra* note 21, at 75.

[23]See Baltimore Chamber of Commerce v. Ann Arbor R. R. Co. *et al., supra* note 21, at 708.

Case,[24] that since the same carriers served or participated in rates to all the ports concerned they could be held responsible under Section 3.

Nor was this doctrine applied in all of the north Atlantic port cases of this period. In the rehearing of the 1925 differential case in 1927,[25] in which the differentials on ex-lake grain were in issue, it was held that the Ashland rule justified the differentials as against Boston but not as against New York. The differentials were nevertheless upheld, with the remark that New York was not injured by the arrangement. It was recognized that the differentials could not be upheld on the basis of transportation conditions. Likewise in an important case decided in 1928 the Commission, in a divided opinion, upheld a differential of 1.5 cents per 100 pounds on ex-lake grain in favor of Oswego, New York under Buffalo.[26] The New York Central and Lackawanna served both Buffalo and Oswego, but the New York, Ontario and Western served only Oswego and other lines served only Buffalo. Nevertheless the Commission held that the two first-named roads controlled the rates from both cities. It argued that the Buffalo roads would not be likely to reduce the rates on the large amount of traffic through that city so as to secure the small amount of business which Oswego might attract because of the differential. It argued also that with the opening of the new Welland Canal the main flow of grain beyond Buffalo would be to Canadian ports.

The dissenting commissioners held that the *Ashland* rule applied, and emphasized that the Canadian lines would be likely to cut rates if Oswego secured any substantial amount of business as a result of the differential and that they could not be restrained in so doing by the Commission. The majority, speaking through Commissioner Eastman, held in effect that the *Ashland* rule applied in this case in *form* rather than in *substance,* and that considerations of the substance of the situation should control. It is interesting to note that in the following year in his dissenting opinion in the 1929 differential ease, just referred to, he brushed aside considerations of substance in deciding the question of responsibility of the carriers under Section 3 and reached a decision based upon the form of the situation instead. It may be strongly suspected that the real basis of his decisions in both

[24]United States, Interstate Commerce Commission, and Swift Lumber Co. v. Illinois Central R. R. Co. *et al.,* 263 U. S. 515, 44 Sup. Ct. 189 (1924).

[25]Maritime Assn. of Boston Chamber of Commerce *et al.* v. Ann Arbor R. R. Co. *et. al., supra* note 21.

[26]City of Oswego, N. Y. v. B. & O. R. R. Co., *et al.,* 146 I. C. C. 293 (1928); rehearing, 151 I. C. C. 717 (1929).

cases was the desire to increase the commercial prosperity of the complaining cities, and that to accomplish this object he found it necessary to decide on the substance of the situation in the one case and the form, in the other. It should be noted, however, that consideration of cost of service played an important part in his reasoning in both cases.

In recent years the scope of the port differential controversy has been broadened to include ports in the Pacific Northwest and on the Gulf coast. In 1920 the Commission prescribed rates 10 per cent lower to Portland, Oregon, than to the Puget Sound gateways from a considerable part of the Columbia River basin, formerly equalized, basing its decision on the shorter distance and water-level haul to the former city and on the finding that the same lines controlled the rates to the rival ports.[27] This last was held in spite of the fact that the Chicago, Milwaukee, and St. Paul served the Puget Sound cities but did not serve or participate in joint rates to Portland. It should also be noted that in considering this question the Spokane, Portland and Seattle was regarded as part of the Great Northern and Northern Pacific systems, by which it is jointly controlled. The doctrine that a locality is entitled to the benefits of advantageous location was reiterated. This decision was upheld on three subsequent occasions.

The history of the Gulf port differential controversy, which is the immediate background of the decision of the Supreme Court to which we shall soon give extended attention, may be dated back to 1923, when the Commission approved the equalization of domestic rates on cotton from Oklahoma to New Orleans and Galveston.[28] It was stated that the equalization had been of long standing, had been voluntarily entered into by the carriers, and appeared to be in the interest of producers and shippers. It was also pointed out that different carriers served the two ports, thus suggesting the applicability of the *Ashland* rule. In two cases decided in 1926 and 1928 respectively the Commission refused to equalize Galveston and Houston as to export rates on cottonseed and vegetable cake and meal.[29] It rejected arguments based on a consideration of commercial conditions at the two ports and the desirability of maintaining the ports on an even competitive footing, and applied the *Ashland* rule.

[27]Inland Empire Shippers League v. Director General, Oregon-Washington R. R. and Nav. Co., *et al.*, 59 I. C. C. 321 (1920). *Aff'd* in 62 I. C. C. 633 (1921); 107 I. C. C. 110 (1926); 164 I. C. C. 619 (1930).

[28]Galveston Com. Assn., et al., v. Alabama and Vicksburg Ry. Co., *et. al.*, 77 I. C. C. 388 (1923).

[29]Galveston Com. Assn., et al., v. Abilene and Southern Ry. Co., *et al.*, 109 I. C. C. 114 (1926); 142 I. C. C. 23 (1928).

In 1925 the Commission was asked to establish differentials on export, import, and coastwise traffic in favor of Galveston under New Orleans from Oklahoma, Texas, and portions of Kansas and Louisiana.[30] After remarking that a line had to be found beyond which distance could not be disregarded where the result was to build up one port at the expense of another it prescribed equalization where the difference in distance to the two ports was less than 100 miles and differentials on certain commodities in favor of Galveston where the difference in distance was greater. Upon rehearing of the case in 1927 the Commission reversed itself as to grain, grain products and petroleum and its products, prescribing equalization of rates to the two ports from defined areas.[31] On other specified commodities the differentials ordered in the earlier case were modified but retained. In general these were retained where the difference in distance from origin points to the two ports was over 25 per cent.

The real basis of the Commission's reversal, to which the Court subsequently took exception, is best indicated in the following language of the majority opinion:

> "While such commercial advantages (of New Orleans) as are above enumerated cannot be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmance of the findings in the original report *would not be likely to cause serious injury to the port of New Orleans*....
>
> Healthy competition is no less important between ports than between rail and water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographic advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade. Such a policy also encourages waste in rail transportation."[32]

The decision exempted the Texas and Pacific (hereafter called the T. and P.) from liability under the order by an application of the *Ashland* rule, since that road reached only New Orleans and not the Texas ports on its own rails.

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[30]Galveston Com. Assn. v. Galveston, Harrisburg and San Antonio Ry. Co., *et al.*, 100 I. C. C. 110 (1925).

[31]Galveston Com. Assn. v. Galveston, Harrisburg and San Antonio Ry. Co., *et al.*, 128 I. C. C. 349 (1927).

[32]See *id.* at 368–69. Italics mine.

Eight of the ten commissioners who took part in the case filed separate views. One minority group dissented on the ground that the T. and P. was a part of the Missouri Pacific system along with the International and Great Northern and Gulf Coast Lines, and if these were one system the T. and P., of course, could not be properly exempted from the order. The majority, however, on the precedent of old Supreme Court doctrine, found the T. and P. to be an independently operated carrier not to be regarded as part of the Missouri Pacific.[33] Another minority group dissented from the finding that the facts presented a case of undue preference, on the ground that the difference in treatment was forced by competition at New Orleans.

The exemption of the T. and P., of course, threatened to make the rate structure unstable and the other earriers promptly protested such exemption. In 1929, by a majority vote, the Commission reversed itself and ordered the T. and P. to conform to the order.[34] It refused to consider the question whether the T. and P. was a part of the Missouri Pacific and reached its decision upon a reconsideration of the *Ashland* rule. After reviewing the leading relevant Supreme Court cases, which will be considered below, the Commission concluded that:

> "the foregoing expressions by the Supreme Court leave no room for doubt that the construction of our powers under section 3 (1) of the act as announced in *Ashland Fire Brick Co. v. S. Ry. Co., supra,* is too narrow, and that in the situations before us in the instant cases we have the power to require the New Orleans carriers to remove the undue prejudice herein found to exist."[35]

II

Matters stood thus when the issue came before the Supreme Court in the case to which reference was made at the beginning of this paper. "The gravamen of the complaint", said Mr. Justice Roberts, "is that in many instances the distance to New Orleans is so much greater than that to the Texas ports, and the increased haul so important a part of

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[33]Citing Pullman Car Co. v. M. P. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194 (1885); see C. M. and St. P. Ry. Co. v. Minn. Civic Assn., 247 U. S. 490, 500, 38 Sup. Ct. 553 (1918). The cases cited in this last reference are Peterson v. C. R. I. and P. Ry. Co., 205 U. S. 364, 51 L. ed. 841 (1907); I. C. C. v. Stickney *et al.*, 215 U. S. 98, 30 Sup Ct. 66 (1909); U. S. v. D. and H. Co., 213 U. S. 366, 53 L. ed. 836 (1909); U. S. v. D. L. and W. R. R. Co., 238 U S. 516, 35 Sup. Ct. 873 (1915). Neither the cases cited by the Commission nor the foregoing cases, however, deal with the issue in connection with a situation such as the one here being considered. For a review of the whole controversy see MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1932) Ch. 7.

[34]Galveston Com. Assn. v. Galveston, Harrisburg and San Antonio Ry. Co., *et al.*, 160 I. C. C. 345 (1929). [35]See *id.* at 358.

the service rendered, that this factor should be reflected in a fixed differential in rates."[36] The Commission was challenged only in so far as it directed the T. and P. and the Louisiana Railway and Navigation Co. (hereafter called the L. R. and N.) to conform to its order in the 1929 decision. It found that the rates to the two ports were not unreasonable *per se* under Section 1 of the Interstate Commerce Act and that in neither case were they so low as to burden other traffic, so that there was no basis for an order fixing minimum rates under Section 15 (1). The parties agreed that authority for the order had to be found in Section 3 (1), so that the question before the Court was narrowed to the construction of this Section. In the consideration of this question the Court found it necessary to dispose of two issues: (1) are ports "localities" susceptible of undue preference or prejudices within the meaning of Section 3; (2) assuming that the Commission has the power to remove discriminatory rates involving two or more ports may it order the removal of such discrimination by carriers which control the rates to but one of the ports concerned—in other words, is the *Ashland* rule as applied in the port cases valid? These issues will be taken up in turn.

The majority began by stating that long prior to the passage of the Act to Regulate Commerce railways equalized rates through the ports reached by their own lines with those maintained by their rivals to other ports or established differentials in favor of their own ports in order to retain a portion of the competitive export business; that these practices were not indnlged in either to aid or to harm a port as such, but solely to obtain or retain business for the carrier's own line; that carriers in competition for business may, within the zone of rcasonableness, adjust their rates so as to obtain or retain the desired traffic for their own lines;[37] but that the carriers in establishing equalizations and differentials may not do so with the motive of injuring or aiding a shipper, a particular kind of traffic or a locality, "for so to do is to depart from the transportation standard, conformity to which the act contemplates."[38] Justice Roberts continued:

> "The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare."[39]

[36]Texas and Pacific Ry. Co. et al. v. U. S. *et al.*, 289 U. S. 627, 632-33, 53 Sup. Ct. 768, 771 (1933).

[37]Citing Alabama Midland Case, 168 U. S. 144, 18 Sup. Ct. 45 (1897); Skinner and Eddy Corp. v. U. S., 249 U. S. 557, 39 Sup. Ct. 375 (1919); Illinois Central Case, 263 U. S. 515, 44 Sup. Ct. 189 (1924).

[38]See Texas and Pacific Ry. Co. et al. v. U. S. *et al.*, *supra* note 36, at 637, Sup. Ct. at 771 (1933).

[39]See *id.* at 638, Sup. Ct. at 772.

The Court then proceeded to dispose of the whole question of the legality of the Commission's action in regarding the rate adjustment in question as involving the applicability of Section 3. It held that it was never intended that the statute should forbid discrimination against places which were not points of origin or ultimate destination, and that the word "locality" as used in Section 3 "was not intended to cover a junction, a way station, a gateway, or a port, as respects traffic passing through it."[40] It brushed aside the argument that the Commission had always treated ports as localities within the meaning of Section 3 and had exercised the power to abate discrimination by prescribing differentials in export rates with the remark that "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts."[41]

In support of his position Justice Roberts pointed out that "both equalizations and differentials had for some time been maintained in the rates to various Atlantic ports," and that "Congress was aware of this, and had no intention of interfering with the maintenance of these rate adjustments."[42] Reliance was also placed on statements made at the hearings on the Hepburn Act, such as the following:

> "We do not give them (the Commission) the power to say which port shall be built up, which city shall be preferred; we leave open the competitive forces of the railways... It will not give the Commission the power to determine differentials, the power to say whether grain from the Northwest shall be shipped for export by way of the Gulf ports or the north Atlantic ports, the power to destroy the law of competition."[43]

The Court had no difficulty in finding that the Commission had exceeded its powers in the instant case, as is shown by the following:

> "The Commission's three reports abound with statements that a differential in favor of the Texas ports will divert traffic running to New Orleans and send it through the Texas ports. Petroleum is one of the commodities as to which complaint is made. There is no transportation difference discoverable on the record between this traffic and that of the other freights affected by the order. But the Commission concluded that New Orleans was not receiving more than its fair share of this business, and that a differential advantage would be of little benefit to the Texas ports by diverting this commodity to them, and therefore refused to make any order respecting the rates on petroleum and its products ... *The plain purpose of the orders was to build up the*

[40] *Ibid.*

[41] See *id.* at 640, Sup. Ct. at 773. [42] *Ibid.*

[43] 40 Cong. Rec. 2247 (1906). Quoted in Texas and Pacific Ry. Co. *et al.* v. U. S. *et al.*, *supra* note one at 642n, Sup. Ct. at 774n (1933).

Texas ports by diverting export and import traffic to them. As we have shown, Section 3 grants no such power."[44]

On one question of fact Justice Roberts seems clearly to be in error. He says:

> "The choice of route is determined *solely* by the rail rates from or to the ports. If these are equalized, the shipper has an option; but, if they are disparate, the route through the port taking the higher rate is *necessarily* excluded."[45]

This is, of course, true as a general proposition, but there are notable exceptions. The combined rail-ocean rates through New York are differentially higher than through Philadelphia and Baltimore, yet the first-named port secures the lion's share of the foreign trade of the north Atlantic. Likewise the combined rail-ocean rates through Boston and New York are equal, but the former city has long complained of the decline of its export trade. The explanation of the situation is to be found in the existence of numerous non-rate advantages in shipping through New York. And the Commission evidently felt that equalization would unduly strengthen New Orleans at the expense of the Texas ports. The decisive question is whether the *advantages of transportation* through the various ports are equal.[46]

Mr. Justice Stone, in his dissenting opinion, argued that the purpose of the statute was to suppress every form of unreasonable discrimination whatsoever which it was within the power of Congress to condemn, and that he could find nothing in the history of the statute which suggested that any exceptions were intended.[47] He pointed out that the commercial interests of a port may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination. A rate discrimination against a port, said Justice Stone, which is "sufficient to destroy the business of banks, marine insurance companies, freight forwarders, freight and ship brokers, stevedores, tonnage companies, pilots, dry docks, ship supply and bunker coal merchants, customs brokers, export and import commission houses, centered there, would seem to

[44]See Texas and Pacific Ry. Co. *et al.* v. U. S. *et al.*, *supra* note 1, at 645, Sup. Ct. at 774 (1933). Italics mine.

[45]See *id.* at 635, Sup. Ct. at 771. Italics mine.

[46]Harbeson, *supra* note 2, at 663 *ff.* See also Harbeson, *Transportation Developments and the North Atlantic Ports* (1933) 12 HARV. BUS. REV. 82.

[47]Citing Merchants Warehouse Co. v. U. S., 283 U. S. 501, 51 Sup. Ct. 505 (1931); Louisville and Nashville R. R. Co. v. U. S., 282 U. S. 740, 51 Sup. Ct. 297 (1931); Louisville and Nashville R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265 (1911); the Shreveport Case, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

have an effect upon the commerce and general welfare of the country of precisely the kind which the act was intended to prohibit and the Commission empowered to prevent. So the Commission has concluded in a series of cases dealing with discrimination against ports, going back to the first years of its existence." (Citing the port differential cases reviewed in the foregoing).[48]

The minority also contended that in determining the question whether a particular power was granted to the Commission when the meaning of the statute was doubtful on its face, the Court had often said that administrative construction was of persuasive force. It was also said that the refusal to interfere with the equalizations and differentials maintained in rates to the north Atlantic ports since before the passage of the Interstate Commerce Act could not properly be interpreted as showing an intent to exclude ports from the scope of Section 3, because the effect of that rate adjustment was to preserve rather than to destroy a fair distribution of the traffic from the West to the Atlantic seaboard. Finally, with regard to the quotations from the hearings on the Hepburn Act, given by the majority, purporting to show that it was intended to exclude ports from the scope of Section 3, Justice Stone pointed to other statements to the effect that Section 3 was comprehensive in its application and had not been amended, limited, or extended by the act in question.[49] He stated also that the asserted lack of power to fix differentials was due to the lack of power to fix minimum rates rather than that a port was not a "locality" within the meaning of Section 3.

To the writer, Justice Stone's reasoning on this point seems preferable to that of the majority. Professor Jones, speaking of the conditions which led to the passage of the Act to Regulate Commerce, states that there was a great deal of complaint concerning local discrimination in the seventies, and that by the middle of the eighties "discrimination, whether between localities, persons, or commodities, constituted the *principal* grievance."[50] In view of this fact, and of the inconclusiveness, to say the least, of the evidence from the hearings on the Hepburn Act quoted by the majority, and of the magnitude of the

[48]See Texas and Pacific Ry Co. *et al.* v. U. S. *et al., supra* note 1, at 659, Sup. Ct. at 780 (1933).

[49]40 Cong. Rec. 2085, 4111 (1906). Also 17 Cong. Rec. 7277, 7294, 7298 (1886); 18 Cong. Rec. 485–86 (1887).

[50]PRINCIPLES OF RAILWAY TRANSPORTATION, p. 213. Italics mine. The same thought was repeated in the Shreveport Case *supra* note 47, at 356, Sup. Ct. at 838 (1914), the Court saying that "It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at."

interests in port cities which might be destroyed by unjustly discriminatory rates, the reasoning of the majority on this point seems to the writer to be unduly narrow and formalistic.

Turning to the second question before the Court — the validity of the *Ashland* rule — Justice Roberts remarked that that doctrine had been applied by the Commission in at least forty-five cases,[61] and then proceeded to consider the leading decisions of the Court interpreting this doctrine. The majority upheld the validity of the *Ashland* rule, holding that to be subject to an order under Section 3 a carrier or group of carriers must be the common source of the discrimination complained of — must "effectively participate" in both the preferential and prejudicial rates; that the situation must be such that the carriers have an "actual alternative" to raise one rate, lower the other, or alter both; and that they do not have such an alternative uuless they control the rates to both the preferred and the prejudiced points.[62] The Commission had found that the T. and P. and L. R. and N. did not control the rates to the Texas ports, but nevertheless subjected them to a Section 3 order because it felt that previous expressions of the Court had made the doctrine just stated inapplicable in the situation before it.

In *St. Louis Southwestern Ry. Co. vs. U. S.*[63] it was held that a carrier need not reach both the prejudiced and preferred points over its own rails to be liable to a Section 3 order; it was enough if it reached one point and participated in a through route and joint rate to the other. Its control over the rates to both points was not altered by the mere fact that it served ouly one directly. The appellees contended that since the T. and P. and L. R. and N. reached New Orleans directly, and participated in joint rates to the Texas ports they could be reached by a Section 3 order upon the precedent of this decision. Clearly, they controlled the New Orleans rate, and it was argued that they could reduce the rates to the Texas ports by agreement with their connections; or in default of such agreement they could reduce their divisions of the joint rates and secure a corresponding reduction in the latter on applieation to the Commission under Section 15 (6). But the majority pointed out that the *St. Louis Southwestern Case* did not apply in this situation, because the order in that case was for the establishment of a reasonable joint rate or new through routes and joint rates, and was held to be primarily an order under

[61]Texas and Pacific Ry. Co. *et al.*, v. U. S. *et al.*, *supra* note 1, at 649n, Sup. Ct. at 776n (1933).

[62]See *id.* at 650, Sup. Ct. at 776.

[63]245 U. S. 136, 38 Sup. Ct. 49 (1917).

Section 15 rather than under Section 3; and also because in that case "no question as to the control of the rate to both points by any carrier affected by the order was raised or decided."[54] In other words, if the mere fact that a carrier did not reach both the preferred and prejudiced points over its own rails did not absolve it from responsibility under Section 3, neither was the *mere fact* that it reached the one point directly and the other over connections with which it had joint rates conclusive evidence of its control of the rates to both points and hence its liability under Section 3. And in the present case the Commission had found that the T. and P. and L. R. and N. did *not* control the rates to the Texas ports.

The Court also relied upon its decision in *Central R. R. Co. of New Jersey vs. U. S.*[55], in which it reversed an early departure by the Commission from a rigid interpretation of the *Ashland* rule. The Central of New Jersey and Pennsylvania had refused to allow to shippers on their lines the creosoting-in-transit privilege which was allowed by their western and southern connections with whom they had joint rates. The Commission took such participation in joint rates as sufficient to establish liability under Section 3 and ordered the eastern roads to grant the privilege in question to shippers on their lines. In reversing the Commission the Court said:

> "But the participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination *only if each carrier has participated in some way in that which causes the unjust discrimination,* as where a lower joint rate is given to one locality than to another similarly situated. If this were not so the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers . . . What Congress sought to prevent by that section (section 3) as originally enacted was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers."[56]

The appellees placed chief reliance upon the *Illinois Central Case* of 1924.[57] The Illinois Central had equalized rates on lumber to certain destinations from all its main and branch line points in a prescribed blanket origin territory, and from points on certain independent short lines within that area, but had refused to extend

[54]See Texas and Pacific Ry. Co. *et al.* v. U. S. *et al., supra* note 36, at 652, Sup. Ct. at 777 (1933). [55]257 U. S. 247, 42 Sup. Ct. 80 (1922).

[56]See *id.* at 259, Sup. Ct. at 83. Italics mine.

[57]U. S., Interstate Com. Com., and Swift Lumber Co. v. Illinois Central R. R. Co. *et al.*, supra note 37.

similar blanket rates to producing points on the Fernwood and Gulf, an independent short line in this same area. The Commission ordered both the Illinois Central and Fernwood and Gulf to remove the discrimination by extending blanket rates to points on the latter, and this order was upheld by a unanimous Court. The interesting feature of the latter's decision was its reference to the effect of the enlarged powers granted to the Commission under the Transportation Act of 1920 upon the scope of Section 3, and hence upon the *Ashland* rule. Justice Brandeis said:

> "The innocent character of the discrimination practised by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practised is unjust. Such was the law even before the Transportation Act, 1920 . . . In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. *For now, the interests of the individual carrier must yield in many respects to the public need. And the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable.*"[58]

The appellees insisted that since the orders to remove the discrimination ran against both the trunk line and the short line, and since these orders were sustained by the Court, it necessarily followed that a carrier may be liable for unjust discrimination by virtue of its mere participation in one of the rates whether or not it controlled that rate. Hence it followed that the T. and P. and L. R. and N. could be reached by a Section 3 order in the present case. The answer of the Court, however, applied the same reasoning as in the *St. Louis Southwestern Case*. The trunk line controlled both rates, and action by it was required to correct the disparity. The short line contended that it did not participate in the discrimination because it did not join in the lower rates to the preferred locality maintained by the Illinois Central and hence could not remove the discrimination by its own act. Nevertheless, said the Court, the short line was properly included in the orders to remove the discrimination, for "that carrier, in joining the Illinois Central in establishing the prejudicial through rate, was as much a party to the discrimination as

[58]See *id.* at 525, Sup. Ct. at 193. Italics mine.

if it had also joined in the lower rates to the other points alleged to be unduly preferred. If Fernwood and Gulf could not persuade the Illinois Central to join in a new non-discriminatory rate and accord it a proper division, it had a plain remedy under section 15 of the act. To make the decision a precedent for the instant case, it would have to be found that the New Orleans carriers (the T. and P. and L. R. and N.) effectively controlled both the rates to New Orleans and those to the Texas ports."[59] And, of course, the Commission had found that they did not control the latter rates. In other words, the remedy under Section 15 was available in the case of the Fernwood and Gulf-Illinois Central joint rate because that rate did not have to meet the rate of an independent line connecting the same points; while such a remedy was not available to the T. and P. and L. R. and N. because the joint rates which they established with their connections to the Texas ports were controlled by the rates of independent competing lines to those ports. The majority did not consider the remarks of Justice Brandeis quoted above.

One other case was also considered, *C. I. and L. Ry Co. v. U. S.*[60] In this case three trunk lines had entered into reciprocal switching arrangements with one another at Michigan City, Indiana, but had refused to extend the privilege to an electric interurban line at that city. Although the trunk lines did not connect directly with the electric line but required the services of an intermediate switching carrier the Commission's order directed all three trunk lines to remove the discrimination by extending the privilege in question to the electric line, and this order was upheld by the Court. The appellees had relied on this case because of a dictum to the effect that "wherever discrimination is, in fact, practiced, an order to remove it may issue, and the order may extend to every carrier who participates in inflicting the injury."[61] The majority pointed out, however, that this dictum did not apply in the instant case, because in the case referred to each defendant was solely responsible for the prejudice resulting from its own refusal to maintain interchange arrangements with the electric line, and there was no question as to the ability of each carrier to remove the unjust discrimination which it individually practiced, without reference to the conduct of any other carrier.

With reference to the *Ashland* rule the minority in the instant case merely stated that, in their judgment, the situation presented was identical with that in the *St. Louis Southwesern* and *Illinois Central*

[59]See Texas and Pacific Ry. Co. *et al.* v. U. S. *et al., supra* note 36, at 654, Sup. Ct. at 778 (1933).

[60]270 U. S. 287, 70 L. ed. 590 (1926). [61]See *id.* at 293, L. ed. at 594.

cases, and that the rule of those cases applied. They stated that the legal requirement that the carriers have an alternative in cases involving unjust discrimination to raise one rate, lower the other or alter both, was met in the present case, because the T. and P. and L. R. and N. could admittedly raise the rate to New Orleans and could lower the rates to the Texas ports by agreement with their connections, or in default of such agreement, could reduce their divisions and secure corresponding reductions in the joint rates on application to the Commission under Section 15 (6). This seems to imply either that the T. and P. and L. R. and N. controlled the rates to the Texas ports as well as to New Orleans, or that the question of such control was immaterial. The minority also called attention to the effect of the minimum rate power granted by the Transportation Act of 1920 upon the application of Section 3, and hence, by implieation, questioned the validity of the *Ashland* rule. Inasmuch as the minority argued that Section 3 was intended to remove *every* kind of discrimination which it was within the power of Congress to condemn they were strictly consistent in opposing the *Ashland* rule, for this was an interpretation which narrowed the broad words of the statute.

Assuming that the T. and P. and L. R. and N. are independent lines, not parts of any other systems serving these ports, the logic of the majority appeals to the writer as being stronger than that of minority. However, in the ease of the Texas and Pacific the writer feels that the foregoing assumption is very questionable. It is a known fact that this road is controlled by the Missouri Pacific, along with the International and Grcat Northern and Gulf Coast Lines. If these roads be regarded as one system, there would be no doubt as to the ability of the T. and P. to control the rates to both New Orleans and the Texas ports, and hence no question as to its responsibility under Section 3. In the 1925 case dealing with the Texas-New Orleans rate adjustment the Commission had treated the T. and P. in this way, but in the 1927 rehearing, over the protest of a minority, it reversed itself and held that the T. and P. was to be regarded as an independent line. The question was not considered in its decision on the 1929 rehearing. Since the T. and P. retained its corporate identity and was separately operated the majority of the Commission apparently felt obliged to decide thus upon the precedent of old, and, to the writer, when applied in situations such as the present, questionable Supreme Court doctrine.[62] In the instant case this issue was considered by neither the majority nor minority of the Court.

[62] *Supra*, p. 538. In this connection the treatment of the Spokane, Portland, and Seattle in connection with the Portland-Puget Sound controversy should be recalled. See, *supra* p. 532.

III

What will be the net effect of this decision upon the Commission's ability to control discriminatory rates?

So far as discriminatory rates involving export and import traffic through ports are concerned, the doctrine that ports are not "localities" susceptible of undue preference or prejudice within the meaning of Section 3, as developed in the present case, would seem to preclude direct control. But it is likely that some protection will continue to be afforded through Section 1, which prohibits unreasonable rates. In the first place, it is recognized that there is a zone of reasonableness, within which rates might be varied by the Commission according to a variety of criteria. In practice, commercial conditions are often openly or tacitly one of these criteria. In the second place, the development by the Commission of the concept of "relative reasonableness" blurs the distinction between Sections 1 and 3. The standard of reasonableness of a given rate is found by a comparison with other rates.

In *Wyoming Coal Co. v. Virginian Ry. Co.*,[63] the Commission met the situation by an order under Section 1 based on "relative reasonableness" and also by an order under Section 3. Its assertion of jurisdiction under both sections was subsequently upheld by the Supreme Court.[64] In *Chemical Lime Co. v. Bellefonte Central R. R. Co.*[65] the Commission handled a situation similar to that in the *Illinois Central Case,* discussed above, by a finding of "relative unreasonableness" under Section 1, with a dissenting minority urging that a Section 3 order should have been used. In both these siutations Section 3 could have been used as well as Section 1, but in the 1928 *Lake Cargo Coal Case,*[66] where there was doubt as to whether Section 3 applied, the Commission used "relative reasonableness" as a standard under Section 1. Commissioner Eastman, in a separate concurring opinion pointed out that the facts used to support this finding were those which would be pertinent to an inquiry under Section 3, and criticized the extension of Section 1 in this way as leading to confusion between the two sections.

The *Ashland* rule, except as to export and import traffic through ports, might be circumvented by orders based on a broad interpretation of Section 15 (1) of the Transportation Act of 1920, which reads in part as follows:

[63]96 I. C. C. 359 (1925); rehearing, 98 I. C. C. 488 (1925).
[64]Virginian Ry. Co. v. U. S., 272 U. S. 658, 47 Sup. Ct. 222 (1926).
[65]147 I. C. C. 285 (1928). [66]139 I. C. C. 367 (1928).

"Whenever . . . the Commission shall be of opinion that any individual or joint rate . . . is or will be unjust or unreasonable or unjustly discriminatory or *unduly preferential or prejudicial,* . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . . or the maximum *or minimum,* or maximum *and minimum,* to be charged . . ." (Italics mine).

Apparently Congress in writing this minimum rate power into the statute had in mind the aid it would give in enforcing the long-and-short haul clause, in protecting water carriers, and in safeguarding carrier revenues, and did not consider its effect upon Section 3.[67] As the section stands, however, it gives the Commission as unrestricted power over minimum rates as it has over maximum rates, so that it could be used to raise an unduly preferential rate as well as an unreasonably low one. It is settled that an order under this section does not require giving the carrier an alternative of raising one rate, lowering another or altering both, so that the *Ashland* rule is not involved. This is the construction of the statute contended for by Justice Brandeis in the *Illinois Central Case,* as quoted above, and by Justice Stone speaking for the minority in the instant case. The issue in the present case, however, was narrowed to the interpretation of Section 3. It is much to be desired that the Court be given an opportunity to construe Section 15 (1) in connection with an issue of the sort raised in the present case.

Apart from the foregoing possibilities, the progress of railway consolidation will continually alter and narrow the application of the *Ashland* rule, except as regards export and import traffic through ports. There will obviously be fewer cases in which a rate relationship between competing centers will be controlled by different lines. However, where combination takes place by stock control the effects along this line will be limited if the Commission is sustained in what seems to the writer to be a very questionable doctrine as to what constitutes membership in a single system, as illustrated by its treatment of the T. and P. in the present case. Apparently the Commission decided as it did in this matter because it felt required to do so on the basis of Supreme Court decisions. A test of what constitutes membership in a single system, in connection with an issue of the sort raised in the present case, is much to be desired.

Finally, the scope of the *Ashland* rule, except as regards export and

[67] MANSFIELD, *op. cit. supra* note 33, at 208. See also references in the Cong. Rec., there cited.

import traffic through ports, may be progressively narrowed by liberal construction of the statute by the Commission. Decisions should be based upon consideration of the substance rather than the mere form of the situation, as in the case involving ex-lake grain rates from Oswego referred to above.[68] Moreover, as Mr. Eastman has pointed out, the doctrine of affirmative and negative orders is another reason for liberal construction and the resolving of doubts in favor of the shippers, since carriers may appeal from an affirmative order holding them liable while shippers have no appeal from negative findings dismissing their complaints.

The decision in the present case upholding the *Ashland* rule, as it stands, limits the Commission's power not only over port differentials but in other sectional controversies, such as those raised in the *Sugar Cases of 1922*,[69] the *Salt Cases of 1923*,[70] the various lake cargo coal cases, and others. What may be said as to the general merits of the doctrine?[71] In defense of the rule it may be argued, in the first place, that it is no more than a reasonable concession to the exigencies of rate making arising from a regime of privately owned competing carriers. And, in the second place, it simplifies somewhat the Commisson's task, facilitating adherence to transportation standards in rate making — assuming that rate making according to such standards is what is desired — by helping the Commission to resist the demands of rival sections and localities which urge consideration of commercial conditions.

On the other hand, the Commission itself recognized that the reasons for the development of the rule were (1) its lack of the minimum rate power and (2) the necessity for treating carriers individually rather than as parts of a single great system.[72] Since the passage of the Transportation Act of 1920, however, the Commission possesses power over minimum rates and the trend has been toward submerging the claims of the individual systems in the interest of the entire railway net. As examples of this last the recapture clause of the Transportation Act and the pooling of revenues from rate increases under the *Fifteen Per Cent Case of 1931*[73] have been cited.[74] Another example is the emphasis on the need of removing duplication and competitive wastes of every sort, manifested both in the latter case and

[68] *Supra*, pp. 000, 000.
[69] 81 I. C. C. 448 (1923).
[70] 92 I. C. C. 388 (1924).
[71] For a good review and criticism see (1934) 47 HARV. L. REV. 494.
[72] Galloway Coal Co. v. A. G. S. R. R. Co., 40 I. C. C. 311 (1916).
[73] 178 I. C. C. 539 (1931).
[74] MANSFIELD, *op. cit. supra* note 33, at 209.

in the Emergency Railroad Transportation Act of 1933. Still another example is the assisting of weak roads by granting them increased divisions of joint rates, as in the *New England Divisions Case*.[75] On the other hand, however, the reeapture clause has now been repealed and the Transportation Act did not compel the carriers to consolidate. Finally, the *Ashland* rule is a stumbling block to those who favor rate making policies in consonance with the now fashionable emphasis upon economic planning and the extension of social control.

[75] 261 U. S. 184, 43 Sup. Ct. 270 (1923).