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Criteria in the Establishment of Freight Rate Divisions

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CRITERIA IN THE ESTABLISHMENT OF FREIGHT RATE DIVISIONS

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When a loaded freight car is moved by rail from a station in New York to a delivery point in Georgia, a joint through rate is ordinarily applicable. This means that all of the individual railroads which participate in the through transportation have concurred in a rate of, say, 60 cents per hundred pounds, and that is what is collected, either at origin by way of prepayment or at destination from the consignee. It is here that the question of divisions is presented. How will the lines which hauled this car, the Delaware & Hudson to Wilkes Barre, the Pennsylvania to Potomac Yards (Washington), the Southern to Macon, and the Central of Georgia to destination, divide the 60 cents? Ordinarily, there is a form of agreement—manifested by a so-called divisions sheet.[1] But the agreement is sometimes kicked overboard, or there is none, or there has been a change in the conditions that existed when the divisional basis was originally fixed.

The controversies, which go to the Interstate Commerce Commission[2]

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* See Contributors' Section, Masthead, p. 271, for biographical data.

[1] A divisions sheet is a publication in the form of a tariff which is circulated among connecting carriers to guide their auditors in the distribution of revenues arising from interline traffic. Generally speaking, divisions sheets are not on public file.

[2] Hereinafter referred to as the Commission.

Prior to the Hepburn amendment in 1906, the Interstate Commerce Act contained no provision relating to divisions or their prescription by the Commission. The amendment, enacted as part of what is now section 15 (1) and reenacted without change by the Mann-Elkins Act, 36 Stat. 539 (1910) provided as follows:

> Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upou the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The uncertainties as to the Commission's powers under this provision led to the enactment of section 15 (6) of the Interstate Commerce Act as part of the Transportation Act of 1920 [Feb. 28, 1920, c. 91 § 418 (1920)] 49 U.S.C. § 15 (6) (1946). See Pittsburgh & W. Va. Ry. v. Pittsburgh & L.E.R.R., 61 I.C.C. 272 (1921); New England Divisions, 62 I.C.C. 513 (1921), 66 I.C.C. 196 (1922), order sustained, Akron, C. & Y. Ry. v. United States, 282 Fed. 306 (S.D.N.Y. 1922), aff'd, New England Divisions Case, 261 U.S. 184 (1923); also New England Divisions, 126 I.C.C. 579 (1927).

In addition to specifying the criteria enumerated in the text infra, section 15 (6), presently in effect, provides as follows:

in the first instance, fall into two types. The first is over primary divisions of rates which apply between different rate territories.[3] In the cited example, for instance, the Delaware & Hudson and the Pennsylvania, along with other carriers operating north of the interterritorial gateways, including Potomac Yards, would be ranged against the Southern and the Central of Georgia and all of the other Southern lines in a contest over the primary revenue proportions which should accrue north and south of the boundary line.[4] These cases are apt to involve all of the carriers in the respective freight rate territories and divisions of rates on practically all traffic moving between them. The second type of controversy is where an individual carrier is dissatisfied with the divisions which it receives, and these may be its divisions of rates applying on local traffic within the territory or its subdivisions of primary divisions on interterritorial traffic.

But whether the controversy is between all of the railroads in one territory and all of the railroads in another over primary divisions of rates which produce annual freight revenues of hundreds of millions of dollars,[5] or between a single short-line railroad and its trunk-line con-

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Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith.

[3] The problem of dividing rates does not arise when a so-called combination of local rates is applicable, and each carrier retains the rate which it contributes to the through charge. In certain circumstances, however, rates which are the aggregate of intermediate rates become, in substance and effect, joint rates and as such, subject to the Commission's power to divide. See Official Western Trunk Line Divisions, 269 I.C.C. 765, 778-782 (1948); Agwilines, Inc. v. Akron C. & Y. Ry., 248 I.C.C. 255, 273-274 (1941); Southwestern-Official Divisions, 234 I.C.C. 135, 164-165 (1939).

[4] In such a proceeding, subdivisions of the primary divisions among the carriers within the two territories would not be in issue.

The boundary line between North and South is, generally speaking, the Ohio River to Kenova, W. Va., and thence, a line extending through southern West Virginia and Virginia to Hampton Roads, Va. Western territory is separated from the South and North by the Mississippi River (with certain exceptions).

[5] The estimated annual freight revenues which the Commission divided in the recently concluded litigation between the railroads in the North (Official territory so-called)

nection over revenues which the former requires to live,[6] there is no difference in the criteria. Since 1920 they have been found in section 15 (6) of the Interstate Commerce Act:

> In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to:
> [1] the efficiency with which the carriers concerned are operated,
> [2] the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and
> [3] the importance to the public of the transportation services of such carriers; and
> [4] also whether any particular participating carrier is an originating, intermediate, or delivering line, and
> [5] any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.[7]

These criteria are not to be ignored. In *Brimstone R.R. & Canal Co. v. United States*,[8] the Supreme Court annulled an order prescribing divisions in the making of which "the Commission failed to consider the items definitely specified by section 15 (6)."

It is the purpose of this article to take a look at each of these statutory criteria and to see how they have fared in actual application. In the conclusion, it will be suggested that, if there is continued improvement in the art of railroad cost-finding, one principal criterion for the dividing of rates may in time emerge as presumptively correct, and this will be the proportionate costs which the opposing carriers incur in providing their respective parts of the through service. If Carrier A or the carriers in Region A have 57 per cent of the costs for the through transportation, they should, in other words, receive 57 per cent of the through revenues, provided of course the costs on both sides are no higher than they should be and represent a service for which there is an established public need.

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and those in the South (Southern territory) amounted to 644 million dollars. Official-Southern Divisions, 287 I.C.C. 497 (1953); 289 I.C.C. 4 (1953). This litigation is sometimes referred to herein as the recent North-South case.

A companion case involved the divisions of rates between the North and Southwest (Arkansas, Louisiana, Oklahoma and Texas). Official-Southwestern Divisions, 287 I.C.C. 553 (1953).

[6] Cf. Montana Western Ry. Abandonment, 275 I.C.C. 512 (1951), upheld in Great Northern Ry. v. United States, 343 U.S. 562 (1952).

[7] See note 2 supra.

[8] 276 U.S. 109, 117 (1928).

1. Operating Efficiency

In accordance with the statute, the first criterion to which the Commission "shall give due consideration" is "the efficiency with which the carriers concerned are operated."

In no important divisions case has the Commission ever made a finding of inefficiency as such.[9] One reason is that, in most of the controversies, there has been no such issue, and neither side has questioned the efficiency of the other.[10] Another reason is that inefficiency is hard to prove. Comparative performance figures are held insufficient,[11] and testimony based on personal knowledge is largely unobtainable. Employees of the inefficient line are not going to admit inefficiency; and employees of other lines, even if willing to talk publicly cannot speak from personal knowledge and experience. Qualified outside experts in the railroad field are few and far between, and in any event, their principal reliance would have to be on "the comparison of mere figures" which the Commission finds inadequate.[12]

The importance of evidence of operating efficiency is in its bearing upon transportation costs. In the recent *North-South* case,[13] as well as

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[9] Cf. Walter P. Gardner, Trustee of Central Railroad of New Jersey v. Akron, C. & Y. R.R., 276 I.C.C. 655 (1949). There, the Commission reversed its prior action in 272 I.C.C. 529 (1948) and denied the Jersey Central increased proportions of the through rates to and from New York to represent the added cost of its harbor floatage and lighterage service. While the Commission's action was based on other grounds, it did cite its decision in State of New Jersey v. B. & O. R.R., 245 I.C.C. 581, 591 (1941), and pointed out at 660-661:

> So far as this record reveals, no substantial change has been made in the lighterage service since that finding was made. Plainly, it would be inequitable to expect the nonharbor lines, who are not in any way responsible for the harbor service, to bear any part of the cost of furnishing such service which may be entailed by inefficient operation.

[10] Official-Western Trunk Line Divisions, supra note 3, at 744; Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175, 193 (1939) (herein sometimes referred to as the former North-South case); Alton R.R. v. Akron, C. & Y. R.R., 215 I.C.C. 317, 321 (1936); Divisions of Freight Rates in Western and Mountain Pacific Territories, 203 I.C.C. 299, 304 (1934); Divisions of Freight Rates, 148 I.C.C. 457, 473-474, 477 (1928); 156 I.C.C. 94, 101 (1929).

[11] Official-Southern Divisions, supra note 5, at 512; Florida East Coast Ry. v. Atlantic Coast Line R.R., 235 I.C.C. 211, 231 (1939).

[12] Florida East Coast Ry. v. Atlantic Coast Line R.R., 235 I.C.C. 211 at 231 (1939). It may also be noted that a finding of inefficiency would in effect be an indictment of individuals, and understandably, the Commission will not permit this if there is a plausible escape. Moreover, since World War II, successive freight rate increases have been allowed on the finding, implied if not express, that the nation's railroads are operated efficiently. Increased Freight Rates, 276 I.C.C. 9, 24-31 (1949).

[13] Official-Southern Divisions, supra note 5

in the companion one involving the primary divisions of rates between the North and Southwest,[14] divisions to apply in the future were in issue, and in seeking drastic revisions of the bases prescribed prior to World War II, the Northern lines put their entire case—to all practical purposes—upon a showing of higher post-war costs in their area than in the other territories—an alleged reversal of the condition upon which the Commission had previously acted.[15] To this position the answering argument of the Southern lines was that relatively less efficient operations in the North since the War had produced expense levels in that territory which, as compared with those in the South, could not "justifiably be accepted as guides for the future." In a direct sense, the Southern lines' argument was rejected because the Commission refused to find the Northern operations relatively less efficient. In another sense, however, the Southern lines were partially successful, because the Commission set aside the expense levels in the North, as it understood them—the same result which presumably would have followed a finding of relative inefficiency. The following conclusions in the Commission's report are pertinent:

> . . . As indicated in the foregoing quotation from *New England Divisions, supra,* the cost of service which is of prime importance in considering divisions is "cost under economical and efficient management." We do not interpret section 15 (6) as requiring us to determine whether one group of carriers is more or less efficiently operated than another, but rather to give due consideration to any evidence which might tend to indicate that the showing as to cost of service is affected by wasteful or inefficient management.
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> . . . If we were to give controlling weight to the cost studies of the northern lines for 1946 and 1948 in this record, the differentially higher basis of divisional factors sought by those lines would be justified. We do not accept that showing at face value because, admittedly, there were certain important items of expense in those years which may reasonably be regarded as transient, particularly in the northern lines' accounts for maintenance of way and structures and equipment. This was particularly true of the Pennsylvania, which in 1948 and the two following years had high freight-car repair costs apparently cyclic in nature.[16]

While operating efficiency appears as the first of the statutory criteria to guide the Commission in the fixing of divisions, it has no real standing as a separate test. This is not because of the difficulty of

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[14] Official-Southwestern Divisions, supra note 5.

[15] In the former North-South case (Divisions of Rates, Official and Southern Territories, note 10 supra), as well as Southwestern-Official Divisions, supra note 3.

[16] Official-Southern Divisions, supra note 5, at 525-526.

proof previously adverted to. Rather it is because evidence of efficiency or inefficiency is principally important in interpreting the results produced by other criteria, such as comparative costs[17] and relative revenue needs.[18] Even if the statute failed to include this criterion, it is clear that a display of higher costs by one side could be met by evidence that such costs were higher than they should be, or a showing of greater revenue needs[19] could be offset by evidence that such needs were greater than they should be. Operating efficiency, as a separate criterion, makes no separate contribution. It does help in appraising the value of other tests, but such an appraisal would be obtainable (within the limits of available proof) in any event.

2. Revenue Needs

The second statutory criterion is "the amount of revenue required to pay their [the contending carriers'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." This is usually referred to as the test of relative revenue needs.

The litigation which this criterion has inspired has been extensive. In the Commission's original report in *New England Divisions*[20] it was found that the lines in that territory, which were in financial distress, could not force the lines west of the Hudson River to pay larger divisions "merely because" such western carriers "considered as a whole, have not failed in so great a degree to earn a fair return upon the value of their property devoted to the public service, although this is one factor which may be taken into consideration."[21] Commissioner Eastman vigorously dissented and, pointing to the statutory criterion presently under discussion (as well as the further one[22] of "the importance to the public of the transportation services of such carriers") said:

> . . . It follows that we can attach no weight to these matters which have been given so much prominence in the law unless we are prepared to accept the conclusion that in some cases it may be just and equitable and in the public interest to divide joint rates in disproportion to the amount and cost of the service rendered.
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> It is, I think, an inevitable conclusion that Congress intended to give us a wider jurisdiction and discretion in determining divisions than would

17 Official Southern Divisions, supra note 5.

18 The second statutory criterion which is discussed infra.

19 Ibid.

20 62 I.C.C. 513 (1921).

21 Id. at 562.

22 Considered infra.

> have been proper if such determination were viewed merely as an isolated problem. In other words, divisions were regarded in connection with and as a phase of the larger problem of assuring a national transportation system sound and healthy in all its parts, and it was the definite intent to permit us, in fixing divisions, to take into consideration this larger end.[23] . . . I find no difficulty, therefore, in reaching the conclusion that in this case we have both the right and the duty to consider, not only the relative importance and cost of the service rendered by the respective carriers, but also the *financial needs* of the New England roads and the consequences to the entire country if they should meet with serious financial trouble.[24]

Commissioner Eastman's view soon prevailed, and in its decision following reargument[25] the Commission increased the divisions of the New England lines because of their greater revenue needs. This action was upheld in the courts. The Supreme Court, relying upon the "new railroad policy" introduced by the Transportation Act of 1920 which "sought to ensure, also, adequate transportation service," held that the "division of joint rates in the public interest" was one of "two new devices" adopted to "secure revenues adequate to satisfy the needs of the weak carriers."[26] One year later, in 1924, the Supreme Court, referring to its decision in the *New England Divisions* case, pointed out:

> . . . It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system" provided the share left to its connections is "adequate to avoid a confiscatory result."[27]

The exercise of this power to help lines with greater revenue needs has since been reviewed on a number of occasions. In its report on further hearing in *New England Divisions*[28] the Commission issued a caution against its misuse, and in *Brimstone R.R. & Canal Co. v. United States*, the Supreme Court said that nothing in the *New England Divisions* case

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23 62 I.C.C. 513, 568 (1921).

24 Id. at 569.

25 New England Divisions, 66 I.C.C. 196 (1922). See note 2 supra.

26 New England Divisions Case, 261 U.S. 184, 189, 191 (1923). See note 2 supra.

27 United States v. Abilene & So. Ry., 265 U.S. 274, 284-285 (1924).

28 126 I.C.C. 579 (1927). The Commission said at 599:

> The dangers in such an assumption that deficiencies in local earnings must inevitably be made up on interchange business at the expense of connecting lines are obvious. Communities and the roads which serve them might too readily arrive at the conclusion that they are "unable" to increase local rates and, in disregard of the principle of self-help, unduly rely upon others to carry their burdens. However, it is clear that the financial needs of weaker lines are an important factor in our consideration of divisions.

"supports the view that the Commission may take something from one carrier merely because its net revenue appears unduly large and donate this to another demanding nothing and not in need."[29] In *Beaumont, S. L. & W. Ry. v. United States,* the same court made it clear that, while "The Commission must consider the financial conditions of the carriers . . . it is not required to make that the only test."[30] In a dispute over divisions of rates on a *single* commodity (citrus fruit moving from Florida to destinations north of the Potomac and Ohio Rivers) the Commission, while rejecting the argument "that financial conditions can be given weight only as a kind of last-resort remedy to prevent immediate abandonment of the weaker road," took the much greater *overall* revenue needs of the Florida lines into account,[31] and this action the Supreme Court expressly upheld.[32]

The Commission has characterized as "unsound" the argument that "divisions . . . cannot be increased merely because of . . . financial needs unless the share left the connecting carriers constitutes a fair return" and pointed out that:

> We are not prevented from taking into account the financial condition of the short lines in fixing divisions on the traffic here involved merely because the aggregate earnings of the standard lines on all their business are unsatisfactory to those lines.[33]

When disparate revenue needs have been assailed as reflecting different results from passenger services, the Commission has employed a formula for equalizing that influence.[34] This is not to say that passen-

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29 276 U.S. 104 at 116 (1928).

30 282 U.S. 74 at 87 (1930).

31 Atlantic Coast Line R.R. v. Arcade & A. R.R., 198 I.C.C. 375 (1934). For the first and principal report in the same proceeding, see Atlantic Coast Line R.R. v. Arcade & A. R.R., 194 I.C.C. 729 (1933).

32 Baltimore & O. R.R. v. United States, 298 U.S. 349 (1936). The Commission's decision was also upheld against the contention that it "subordinated all other findings and facts to the single element of financial need." See the opinion in the lower court, Baltimore & O. R.R. v. United States, 9 F. Supp. 181 (E.D. Va. 1934). The contention so turned down relied heavily upon Commissioner Eastman's dissent which said:

> To reach their conclusions, the majority are obliged to lean on the fact that while both sets of lines are badly off financially, the southern lines appear to be worse off than the northern . . . while financial need is doubtless important, I cannot weigh it in the balance near so heavily as do the majority.

194 I.C.C. 729, 762 (1933).

33 Short Lines' Divisions, Official Territory, 205 I.C.C. 61, 65 (1934).

34 Originally applied in Divisions of Freight Rate, supra note 10. The formula is described in Atlantic Coast Line R.R. v. Arcade & A. R.R., 194 I.C.C. 729, 755 (1933).

> . . . The passenger operating ratio being higher in the southern district than that in the eastern region, enough of the deficiency in the Soutb may be apportioned to passenger revenues to make the average passenger operating ratios the same in the two groups. The remainder of the deficiency for the southern district is apportioned bebetween the two services in the ratio of the revenues as thus modified. In the case of the

ger operations are properly eliminated when applying the yardsticks which control the level of freight rate divisions. Quite the contrary is true. Passenger operations are not only a factor in passing upon the level of freight rates themselves, but they are also included when it comes to the later division of those rates.[35]

In the recent *North-South* case,[36] the Northern lines, which were the moving parties, took the position that their allegedly greater revenue needs should not be used as a basis of divisions more favorable to them than "required" by the evidence of comparative costs.[37] Their argument was that "relative costs have come to be recognized as the measure of relative revenue needs."[38] While the Commission found in its decision that "relative revenue needs of opposing groups of railroads must be taken into account in prescribing divisions," there was no indication that they exerted any special influence or produced a result which otherwise would not have been arrived at.[39]

Greater revenue needs are usually traceable to higher costs, though it is of course possible to have them because the composition of the traffic is less favorable,[40] or the rates less well adjusted.[41] But certainly the

eastern group the deficiency is apportioned between the two services without such modification. . . . The constructive freight deficiency of the southern roads was 7.7 percent of their freight operating revenue, and that of the eastern lines was 6.6 percent. The financial condition of the southern roads is therefore less favorable.

35 For a full discussion of the legal point, see the Commission's decision in Increased Freight Rates, 276 I.C.C. 9 at 32-35 (1949). In the cited proceeding, proposed increases in freight rates were justified in part by deficits in the passenger service, and in finding that this justification was proper, the Commission observed:

The carriers seem to have come to this conclusion in their contentions among themselves as to the adjustment of their divisions, Florida East Coast Ry. v. Atlantic Coast Line R.R., 235 I.C.C. 211 at 238. Huntingdon & B. T. M. R. & C. v. Pennsylvania R.R., 183 I.C.C. 685.

36 287 I.C.C. 497 (1953).

37 Ibid. In this litigation cited in note 5 supra, the Northern lines argued, at pp. 191, 354 of their original brief dated May 2, 1951, that they were "not seeking divisions 'larger than justice merely as between the parties would suggest.'" The quoted phrase is from the Supreme Court's opinion in United States v. Abilene & So. Ry., note 27, supra.

38 See p. 3 of Northern lines' exceptions dated April 7, 1952, to Examiners' proposed report.

39 Official Southern Divisions, 287 I.C.C. 497 (1953). The actual divisions prescribed were equal prorating factors for equal distances in each territory, and on the question of relative revenue needs the Commission observed that "in the 31-year period from 1921 to 1951 the annual average rates of return for the two groups of carriers were substantially equal, 3.81 per cent for the southern lines and 3.85 per cent for the northern." (287 I.C.C. 497 at 504.)

40 A railroad with a preponderance of products of mines or manufactured goods as traffic is presumably in a better revenue position than one which principally transports agricultural products, animals, and animal products, or forest products. See first and principal report in Atlantic Coast Line R.R. v. Arcade & A. R.R., note 31 supra, at 758; also

influence of the former in producing different revenue results is becoming less as industrialization spreads through the South and West, and the influence of the latter is diminished as rate levels tend to seek a common level. The higher costs which greater revenue needs will ordinarily reflect arise from less operating efficiency, less traffic density, greater investment costs, more terminal in relation to line-haul expense, tougher terrain and weather conditions, and a number of other possible causes. And when conditions of this kind are in fact the reason for the greater revenue needs, there is no point in using such needs as a separate test for divisions. This is because they are only a manifestation of an underlying condition—a higher cost level—which itself is to be taken into account in dividing the rates. Like operating efficiency, relative revenue needs as a statutory criterion make no separate contribution—no contribution, that is, beyond the one made by the disparate costs which almost always will be found to underlie different revenue needs.

3. THE IMPORTANCE TO THE PUBLIC OF THE SERVICE INVOLVED

This is the third criterion. The wording of the statute is that the Commission in fixing divisions shall give due consideration to "the importance to the public of the transportation services of such carriers."

For the most part, this test has been accepted by the courts and the Commission as a requirement that the public interest be consulted in the fixing of divisions,[42] and as further support for divisions "larger than justice merely as between the parties would suggest" in order to maintain an adequate transportation system.[43] In certain instances the Commission, referring to this yardstick, has noted that the "importance to the public of the transportation service rendered by each participating carrier is relatively equal," or that there is no dispute on this

North Carolina Corp. Comm. v. Akron C. & Y. R.R., 213 I.C.C. 259, 286-287 (1953). But cf. Official-Southern Divisions, supra note 39, at 523-524.

41 In the Commission's decision on reargument in New England Divisions, 66 I.C.C. 196, 202 (1922), it observed: "nor does the evidence indicate that the financial needs of the New England lines are ascribable to the low level of their local freight rates or passenger fares."

42 Beaumont, S. L. & W. Ry. v. United States, supra note 30, at 797; Brimstone R.R. & Canal Co. v. United States, supra note 29, at 116; New England Divisions case, 261 U.S. 184, 194-195 (1923). See note 2 supra.

43 United States v. Abilene & So. Ry., supra note 27, at 284-285. In Commissioner Eastman's dissent from the Commission's first decision in New England Divisions this criterion of the "importance to the public of the transportation services of such carrier" was linked with the one of relative revenue needs as granting the Commission "power to deal with the critical situation which the case presents." [62 I.C.C. 513, 568-569 (1921)].

point.[44] In other instances, it has simply been taken "into consideration."[45]

If larger divisions are sought for the performance of service in which there is little or no public interest, this is the criterion which comes into play, but in the very nature of things such a situation is not often presented. In a few cases the challenge has been there, but the Commission has turned it down with the finding that "under existing conditions" the service "cannot be withdrawn without serious consequences to all who are dependent upon its continuance," or "We have no question that there is public necessity for the continued operation."[46] Increased divisions have, however, been denied where the additional service advanced as the justification (while benefiting the lumber company which owned the line) was found to be "unnecessary and uneconomic . . . and not in the public interest," and to fall "under the ban of inefficiency."[47] Increased divisions have also been withheld where the routes were merely competitive and "relatively less important than those of defendants as a whole."[48] In connection with competitive routes between the North and Southwest which operated through the Southeast, the Commission, on another occasion, said:

> It would not be proper to discount the value of the service performed by the southern carriers . . . because their routes are alternative to others via St. Louis.[49]

Like the criteria of operating efficiency and relative revenue needs discussed above, "the importance to the public of the transportation services" provided by the carriers whose divisions are under review

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[44] Official-Western Trunk Line Divisions, 269 I.C.C. 765, 774 (1948); Divisions of Freight Rates in Western and Mountain-Pacific Territory, 203 I.C.C. 299, 304 (1934); Atchison, T. & S. F. Ry. v. B. & O. R.R., 174 I.C.C. 321, 331 (1931); Chesapeake & O. Ry. v. A. C. R.R., 153 I.C.C. 511, 547 (1929). Cf. first decision in New England Divisions, 62 I.C.C. 513, 516 (1921) where the Commission said: "'The importance to the public of the transportation services of' the complainants is conceded, and of it we take judicial notice, as well as of that of the principal defendants."

[45] See second report in Divisions of Freight Rates, 156 I.C.C. 94, 101 (1929). See also Commissioner Caskie, dissenting in part, in Florida East Coast Ry. v. Atlantic Coast Line R.R., 235 I.C.C. 211 (1939).

[46] Divisions of Joint Rates, etc. of Missouri & N. A. Ry., 98 I.C.C. 119, 124 (1925); Freeman and Boettcher, Receivers v. A. T. & S. F. Ry., 73 I.C.C. 178, 183 (1922). Cf. Minnesota-Atlantic Transit Co. v. C. M. St. P. & P. R.R., 194 I.C.C. 111, 119 (1933).

[47] Christie & Eastern Ry. v. K.C.S. Ry., 93 I.C.C. 675, 679 (1924).

[48] Alton R.R. v. Akron, C. & Y. R.R., 215 I.C.C. 317, 322 (1936). When this litigation reached the Supreme Court it merely held with respect to "the importance to the public of the transportation services of such carriers," that the judgment of the court could be invoked as to whether this language meant the importance of the particular services provided under the divisions in question or the importance of all the transportation services provided by complainants. Alton R.R. v. United States, 287 U.S. 229 (1932).

[49] Southwestern-Official Divisions, 234 I.C.C. 135, 162 (1939).

makes—as a separate test—no separate contribution. If the service to the public is of questionable importance, the cost of providing it will doubtless be high, and in dealing with the evidence of such high costs, the way is certainly open to prove lack of public interest in a continuation of the service. A specific statutory criterion is not needed for this purpose.

4. ORIGINATING, INTERMEDIATE, OR DELIVERING SERVICE

The fourth criterion is "whether any particular participating carrier is an originating, intermediate, or delivering line." The character of the service has a direct bearing upon reasonable divisions.

In the days before the elaborate cost formulae which the cost section of the Commission devised[50] in an effort to separate terminal from line-haul costs—thus permitting a statement of average unit transportation expenses which could be applied to any length of haul, by different types of equipment, including empty return movements—it was recognized as a general rule that the carrier which originated or terminated the traffic was entitled to more than its share of the revenues based on proportionate mileage.[51] As stated in the typical decision in *Pittsburgh & W. Va. Ry. v. Pittsburgh & L. E. R.R.*, the "defendants concede that complainants, as the line burdened with the cost of originating and assembling the shipments, are entitled to relatively larger divisions in proportion to length of haul than are the intermediate lines and, to a lesser extent, the delivering lines."[52] Indeed, in *New England Divisions* it was "the terminal character of complainants' operations" which was at the bottom of the controversy,[53] and in the large divisions cases which followed the proceedings elaborate and separate studies have usually been submitted not only for the purpose of showing terminal costs as such but

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50 Known as Rail Form A. See Sen. Doc. No. 63, 78 Cong., 1st Sess. (1943), entitled "Rail Freight Service Costs in the Various Rate Territories of the United States"—Letter from the Chairman, Interstate Commerce Commission, transmitting in response to Senate Resolution No. 119, certain information, etc. See also "Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs," as prepared April, 1948, by the cost section of the Interstate Commerce Commission.

51 Through Routes and Joint Rates, 174 I.C.C. 477, 485 (1931); Middle Creek R.R. v. B. & O. R.R., 168 I.C.C. 110, 116-117 (1930); U.S. War Department v. A. & S. Ry., 92 I.C.C. 528-538 (1924). The usual allowance for terminal service was in the form of an additional mileage block or constructive mileage Western Md. Ry. v. Pennsylvania R.R., 169 I.C.C. 495, 501 (1930); Manistee & N. Ry. v. Ann Arbor R.R., 160 I.C.C. 187, 193 (1929).

52 61 I.C.C. 272, 283-284 (1921).

53 62 I.C.C. 513, 517 (1921).

also of emphasizing special terminal burdens,[54] particularly in the origination and delivery of perishable shipments.[55]

As a corollary, the less costly nature of intermediate service has been specifically recognized and acted upon, and "A reduction reflecting the fact that they perform no origin or destination terminal service" was ordered in the divisional factors for the Southern lines serving as a bridge between the North and the Southwest.[56] As stated in the Commission's report:

> . . . The fact that the southern roads are intermediate carriers performing no originating or delivery service must, of course, be taken into account, and we agree with defendants that any form of mileage prorate is particularly objectionable where it is applied to intermediate hauls of considerable length.[57]

Again, in *Official-Western Trunk Line Divisions* it was found that:

> The western lines are intermediate carriers with respect to this part of the haul, and because of this circumstance, their divisions therefor may properly be lower than those they receive on traffic originated or delivered at the river crossings.[58]

This criterion is basic in the fixing of reasonable divisions. Its importance as an abstract test, however, is diminishing as the technique of cost-finding is improved, and it becomes more possible to spell out in terms of actual figures (average though they be) the real meaning of "whether any particular participating carrier is an originating, intermediate, or delivering line." From a divisions point of view, there is no siguificance as such in the performance of an originating service, or an intermediate service, or a delivery service. What counts is the impact upon costs, and the average figures, which can now be estimated, are beginning to tell the story in this regard. With the availability of even more cost data, it should some day be possible to spell out in dollars and cents the actual significance of "whether any particular participating carrier is an originating, intermediate, or delivering line."

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[54] Division of Rates, Official and Southern Territories, 234 I.C.C. 175, 209-215 (1939); Divisions of Freight Rates in Western and Mountain-Pacific Territories, 203 I.C.C. 299, 318, 320-321, 324, 330-332, 338, 347 (1934); Atlantic Coast Line R.R. v. Arcade & A. R.R., 194 I.C.C. 729, 742-743, 745-747 (1933).

[55] Here the question often has been as to which of the terminal services—at origin or destination—should outweigh the other. See Atlantic Coast Line R.R. v. Arcade & A. R.R., 194 I.C.C. 729, 746-747 (1933); Divisions of Freight Rates in Western and Mountain-Pacific Territories, 203 I.C.C. 299, 320-321 (1934); Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175, 219 (1939).

[56] Southwestern-Official Divisions, 234 I.C.C. 135 (1939).

[57] Id. at 162.

[58] 269 I.C.C. 765 at 781 (1948).

And when that time comes, the importance of this criterion as a separate test will disappear because it will be able to reveal nothing which will not be revealed by the costs themselves.

5. Other Facts and Circumstances

The statute finally provides that the Commission shall consider "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

It will be recognized that this does not necessarily rule out mileage. Rather, as stated by the Commission in its first decision in *New England Divisions:*

> The words "without regard to the mileage haul" do not forbid consideration of the element of distance. They serve rather to emphasize the fact that other specified elements may outweigh the element of distance in which event we may properly disregard the mileage haul. The clause is inclusive rather than exclusive, and the general words "among other things" constitute a clear exposition of the intent of Congress that we should consider all the facts and circumstances.[59]

However, the "any other" facts or circumstances are the ones which have dominated the decisions of the Commission, and they have divided themselves into two categories. The first has included those facts or circumstances which directly or indirectly bear upon transportation costs. The second has related to historical considerations, the background of the divisions under review, and the level of the rates being divided.

Looking at the first category, we find the Commission referring to the population and the industrial and agricultural development of the areas served by the carriers whose divisions are in dispute.[60] These have implications so far as traffic density is concerned, and traffic density in turn may influence transportation costs.[61] In the Commission's reports too, there are found elaborate descriptions of the operating difficulties encountered by the contesting railroads, including most particularly those attributable to mountain grades,[62] excessive curvature,[63] extreme

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[59] 62 I.C.C. 513 at 560-561 (1921).

[60] Official-Southwestern Divisions, 287 I.C.C. 553, 559-561 (1953); Official-Southern Divisions, 287 I.C.C. 497, 501-503 (1953); Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175, 198, 210 (1939); Divisions of Freight Rates in Western and Mountain-Pacific Territories, 203 I.C.C. 299, 312 (1934); Atlantic Coast Line R.R. v. Arcade & A. R.R., 194 I.C.C. 729, 749-750 (1933); Divisions of Freight Rates, 148 I.C.C. 457, 464-466 (1928).

[61] Atlantic Coast Line R.R. v. B. & O. R.R., 16 F. Supp. 647, 652 (D. Md. 1936).

[62] Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra note 60, at 317-320, 340, 346-347.

[63] Id. at 322-323, 340, 346-347.

climatic conditions,[64] congested terminal areas,[65] special services provided for special traffic such as perishables,[66] and others. All of these conditions suggest higher costs,[67] but as stated by the Commission in a typical report, "they throw no light whatever on the extent" to which the costs are higher.[68] The same may be said of higher (or lower) wage levels,[69] remoteness from (or nearness to) sources of fuel,[70] variations in freight-car ownership costs,[71] greater (or lesser) empty car mileage,[72] an obligation to weigh and bill the shipments,[73] more (or less) intermediate transfers,[74] and hundreds of other elements which, ultimately, are translatable into terms of higher (or lower) transportation costs.

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[64] Id. at 317.

[65] Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 745, 748-749 (1921); New England Divisions, 62 I.C.C. 513, 527 (1921). Cf. Official-Southern Divisions, supra note 60, at 538-539.

[66] Divisions of Rates, Official and Southern Territories, supra note 60, at 210, 215-217 (1925); Erie R.R. v. A. & V. Ry., 98 I.C.C. 268, 273, 280 (1925). Cf. Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 729, 743-744, 747, 757-758.

[67] In Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra note 10, at 323, the Commission said:

> Even though the study does not show the precise effect of grades and curves on the various classes of train costs, it tends to confirm the common impression that the cost of operation is increased by heavy gradients and many degrees of curvature.

[68] In Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 757, the Commission pointed out:

> The voluminous evidence descriptive of operating conditions cannot be translated into terms of costs for the purpose of comparing the two groups of roads in this respect.

To the same effect is the decision in Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra note 60, at 317, where comparable operating details "have the characteristic in common that they throw no light whatever on the extent to which aggregate transportation costs west of the gateways on the transcontinental routes exceed those east thereof, if they exceed them at all."

[69] Short Lines' Divisions, Official Territory, 205 I.C.C. 61, 73 (1934); Divisions of Joint Rates, etc., of M. & N. A. R.R., 68 I.C.C. 47, 50 (1922); New England Divisions, 66 I.C.C. 196, 200, 209 (1922).

[70] Carriers' Division of Bituminous Coal Rates, 85 I.C.C. 617, 625 (1924); New England Divisions, supra note 69, at 200; Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra note 60, at 318-319.

[71] Florida East Coast Ry. v. Atlantic Coast Line R.R., 235 I.C.C. 211, 229 (1939); Short Lines' Divisions, Official Territory, 205 I.C.C. 61, 66 (1934); Strouds Creek & M. R.R. v. B. & O. R.R., 159 I.C.C. 601, 605 (1929); Chaffee R.R. v. Western Md. Ry., 102 I.C.C. 59, 60-61 (1925); Virginia Blue Ridge Ry. v. Southern Ry., 96 I.C.C. 591, 594 (1925). Cf. New England Divisions, supra note 65, at 537-538; Through Routes and Joint Rates, 174 I.C.C. 477, 478 (1931).

[72] Divisions of Rates, Official and Southern Territories, supra note 60, at 215; Florida East Coast Ry. v. Atlantic Coast Line R.R., supra note 71, at 222; Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 743, 758; Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra note 60, at 320.

[73] Artemus-Jellico R.R. v. L. & N. R.R., 132 I.C.C. 183, 185 (1927).

[74] Southwestern-Official Divisions, 234 I.C.C. 135, 155 (1939); Divisions of Rates, Official and Southern Territories, supra note 60, at 223.

Density of traffic has often been referred to because of its effect upon unit costs. In the *Beaumont* case the lower court held[75] that it was not essential for the Commission to "state the exact differences in the traffic density and the weight to be attached thereto," and the Supreme Court in turn held[76] that "the greater density found in western trunk line territory makes for lower costs, and that is shown to have been taken into account." But the Commission has been careful to note that the fact of higher density "while it suggests that transportation costs on the transcontinental routes are higher west than east of the gateways, is not at all conclusive on that point, for there are many other factors to be taken into consideration."[77] One is an appreciation of "the extent to which heavier density necessitates greater capital expenditure."[78] Indeed, in referring to this element, the Commission has said that the "vital thing to ascertain" in a divisions case is "obviously the relative cost of service in the two groups, and upon that matter traffic density throws only an indirect and not very illuminating light."[79]

In the prolonged controversy over divisions of citrus fruit rates from Florida,[80] the Southern lines laid great stress upon the heavy density north of the principal gateway, Potomac Yard, and this factor was doubtless responsible for saving the divisions which the Commission prescribed against an attack by the Northern lines on the ground of confiscation. The lower court found:

> . . . The special conditions surrounding the movement of citrus fruit, and especially the transportation by the northern lines of trains made up wholly or in large part of citrus and other perishable foods delivered to them in large quantities at a particular gateway, suggest that in a sense the commodity is dealt with by them in wholesale rather than in retail quantities.[81]

Differences in levels of traffic density, as a fact or circumstance for the Commission to consider in a controversy over divisions, are

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[75] Beaumont, S. L. & W. Ry. v. United States, 36 F.2d 789 (W.D. Mo. 1929).

[76] Beaumont, S. L. & W. Ry. v. United States, 282 U.S. 74 (1930).

[77] Divisions of Freight Rates in Western and Mountain-Pacific Territories, 203 I.C.C. 299, 315 (1934).

[78] Atlantic Coast Line R.R. v. Arcade & A. R.R., 198 I.C.C. 375, 377 (1934). See also fourth report in New England Divisions, 126 I.C.C. 579, 614 (1927).

[79] Divisions of Freight Rates, 148 I.C.C. 457 (1928); 156 I.C.C. 94, 100 (1929).

[80] Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 78.

[81] Baltimore & O. R.R. v. United States, 9 F. Supp. 181, 198 (E.D. Va. 1934), aff'd, 298 U.S. 349 (1936). In Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175, 214 (1939), it was said:

> The fact that the traffic [Florida vegetables] is received by the northern lines, particularly the Pennsylvania, which handles about 76 per cent of the Florida vegetables shipped to official territory, in heavy and fairly regular volume is entitled to important weight.

meaningful from a cost point of view and important for that reason. However, if reliable cost estimates are themselves available, the significance of such differences in density largely disappears. The same is true of differences in other operating conditions which (again in the absence of reliable cost evidence) have been treated in the decisions as facts or circumstances bearing upon the proper level for divisions.

Turning now to the second kind of "any other fact or circumstance," it is found that the Commission, on several occasions, has been influenced by historical considerations. If the complaining carriers have been forced into the acceptance of certain divisions because of the commanding position of their connections as to the collectors of the freight charges, that circumstance will be weighed and may weigh heavily.[82] Under other circumstances, divisions which have been in existence for a long time without complaint have been held to raise no presumption and to shed little if any light on what is correct.[83] Divisions once fair are no indication of present fairness.[84]

Aside from historical grounds, divisions have been attacked and defended because of their relationship to the level of local rates. The significance of such a yardstick[85] depends upon whether or not the rates—

[82] Alton R.R. v. United States, 287 U.S. 229, 236 (1932); Backus Brooks Co. v. Northern Pacific Ry., 21 F.2d 4, 16-18 (9th Cir. 1937); Atlantic Coast Line R.R. v. Pennsylvania R.R., 12 F. Supp. 720, 724 (E.D. Pa. 1935); Baltimore & O. R.R. v. United States, 9 F. Supp. 181, 199 (E.D. Va. 1934); Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 732-733, 756-757; 198 I.C.C. 375, 380-381 (1934). Divisions of Rates, Official and Southern Territories, supra note 81, at 178, 180-181; New England Divisions, 126 I.C.C. 579, 615 (1927). See also Alabama & M. R.R. v. A. T. & S. F. Ry., 95 I.C.C. 385, 403 (1925).

[83] In United States War Dept. v. A. & S. Ry., 155 I.C.C. 343, 347 (1929), the Commission observed that "The point of approach in the public regulation of divisions, also, must of necessity be quite different from that of the railroads in their private negotiations." In referring to carrier-negotiated divisions in Divisions of Freight Rates, 148 I.C.C. 457, 459 (1928), the Commission said:

> No doubt they were the result of bargain and trade and plainly they are not definitely related to any of the criteria which we must consider in determining just, reasonable, and equitable divisions.

For contrary rule prior to enactment of section 15 (6) see Sloss-Sheffield Steel & Iron Co. v. L. & N. R.R., 35 I.C.C. 460, 465 (1915). See also Short Lines' Divisions, Official Territory, 205 I.C.C. 61, 73 (1934).

[84] Atlantic Coast Line R.R. v. Pennsylvania R.R., supra note 82, at 722. On the other hand, the Commission has said that changed conditions raise no presumption of unreasonableness in "old" divisions because "it may be that they were too liberal originally." New England Divisions, 62 I.C.C. 513, 463 (1921).

[85] A comparable yardstick has been the level of "other" divisions. For its importance see Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 60, at 738-739; Short Lines' Divisions, Official Territory, supra note 83; Agwilines Inc. v. Akron, C. & Y. Ry., 248 I.C.C. 255, 260-261 (1941); Bellefonte Central R.R. v. Pennsylvania R.R., 216 I.C.C. 39, 66 (1936).

as the yardstick—are well adjusted and on a sound basis.[86] If so, as stated in the Commission's fourth report in *New England Divisions,* they constitute "a very significant and valuable test of divisions."[87] However, as the Commission has also pointed out:

> It is well known, as we have pointed out in numerous decisions, that differences in the level of corresponding local rates within particular territories very often do not accord with actual differences in transportation conditions.
>
> . . . Superficially it would seem that divisions should never be higher than corresponding local rates, but this does not necessarily follow. The important thing here is to establish a just, reasonable, and equitable basis of divisions. That done, it is immaterial how it happens in particular instances to compare with unrevised or even revised local rates.[88]

Prior to the uniform class rate levels which became effective as a result of *Class Rate Investigation, 1939,*[89] differences in such levels were often relied upon, but the Commission never regarded them as important in the controversies over divisions. In the first place, the differences did not serve "as an index of the difference in general rate levels,"[90] and secondly, "Class rates do not necessarily furnish an accurate index of relative transportation costs."[91] The purpose of the evidence as to different rate levels was to show, by indirection, disparities in underlying transportation conditions, but as stated by the Commission in *Divisions of Freight Rates in Western and Mountain-Pacific Territories:*

> . . . The evidence in regard to rate levels, taken by and large, indicates a recognition on our part of higher transportation costs in the territory west of the gateways than in the territory east thereof, this tendency being especially marked as to Mountain-Pacific territory. It is, however, not conclusive evidence of higher transportation costs west of the gateways on the traffic here in question, and throws no light on the extent of the excess cost, if any exists.[92]

When, during the depression years preceding World War II, the Commission first undertook in the former *North-South* case to fix the divisions of most of the interterritorial rates applying between the two

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[86] Chesapeake & O. Ry. v. A. C. R.R., 153 I.C.C. 511, 547-548 (1929); Laona & N. R.R. v. M., St. P. & St. Ste. M. Ry, 52 IC.C. 7 (1919).

[87] 126 I.C.C. 579 at 590-591 (1927).

[88] Divisions of Freight Rates, 156 I.C.C. 94, 96 (1929). Compare Southwestern-Official Divisions, 234 I.C.C. 135, 139 (1939); Official-Western Trunk Line Divisions, 269 I.C.C. 769, 781 (1948).

[89] 262 I.C.C. 447 (1945); 281 I.C.C. 213 (1951).

[90] Divisions of Freight Rates, 148 I.C.C. 457, 468 (1928); New England Divisions, 126 I.C.C. 579, 606, 613 (1927).

[91] Southwestern-Official Divisions, 216 I.C.C. 687, 709-710 (1936).

[92] 203 I.C.C. 299, 317 (1934).

territories, comparative rate levels played an important part.[93] There, it was established that the interterritorial rates, on the whole, were on a higher level than those within the North, and the Commission observed that:

> Where the interterritorial rates have been made higher than those in the North, the difference has been deemed to be warranted by the fact that the transportation is partly performed by southern carriers and that the conditions affecting the service were such that on the particular commodity involved the rates might properly be higher relatively than those on similar traffic in the North. In view of the factors which have been responsible for the measure of these rates, therefore, there is logic in the argument of the southern lines that "the rates which contain something above the official level, because of the southern lines' participation, should be divided so as to give the increment in the rate to the southern carriers."[94]

This was the so-called increment theory which the Commission took "into account by allowing the southern lines divisional factors on general traffic higher than those of the northern lines by a uniform percentage."[95] In the cited case there was no finding of relative costs in the two territories partly because of the inconclusive nature of the statistical averages which were then available and partly because of "the fact that the interterritorial rates themselves have not been based upon ascertained differences in such costs."[96] Almost 15 years later, when these same divisions were reviewed in the recent *North-South* case, the rate increments were found to be disappearing and, in any event, the evidence as to costs, according to the Commission, did not support higher divisions in the South than in the North.[97] Whether or not the

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93 Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175 (1939).

94 Id. at 190.

95 Id. at 191.

96 Id. at 190. See note 103 infra.

97 Official-Southern Divisions, 287 I.C.C. 497 (1953). Under the increment theory it will be appreciated that, as stated by the Commission, at 523:

> Recognition of the increment theory in our 1939 report made it logically necessary to prescribe a special basis of divisions for those rates which contained no increment.

At the time of the former North-South case [Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175 (1939)] such rates were strictly limited. But they grew in importance as more traffic from the South was placed on a competitive level with that in the North, and the Commission prescribed interterritorial rates on the so-called destination rate level. In certain instances, the so-called equal factors which the Commission prescribed in the former North-South case for the division of rates with no increment gave the Northern lines larger earnings from the reduced interterritorial rates than they had previously obtained from the higher interterritorial rate level.

In connection with the Commission's reliance upon the increment theory in the former North-South case, the following observation on the part of the Examiners in their proposed report (sheet 27) in the recent North-South case (Official-Southern Divisions, 287

increment theory was sound would seem to depend upon the accuracy with which the increments reflected the then differences in underlying transportation conditions (including, of course, the then differences in the distribution of the transportation burden).

CONCLUSION

The Supreme Court has held:

> . . . There is no single test by which "just," "reasonable" or "equitable" divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what divisions will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases.[98]

The Commission has said the same thing by emphasizing that "Under provisions of the Interstate Commerce Act no one element which we are required to consider is controlling. All pertinent factors must be considered."[99] It has also observed that "Obviously it is impossible to apply any mathematical formula which will operate with precision, and it is necessary to be guided by general judgment after considering and weighing as well as we can the evidence before us."[100] It has also pointed out that "Examination of our prior decisions will show that we at all times have asserted it to be our duty to consider each divisional controversy coming before us strictly on its own merits without regard to any fixed basis or general standard of divisions."[101]

It is doubtless true that the Commission, with the support of the courts, has decided each divisions controversy "without regard to any fixed basis or general standard," and that no one element has been "controlling." In referring to the statutory criteria, the Supreme Court has emphasized that their purpose "is to empower and require the Commission to make divisions that colloquially may be said to be fair."[102] Nevertheless, in looking to the future, it should come as no surprise if a single basis for the establishment of divisions becomes presump-

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I.C.C. 497 (1953)—an observation which incidentally did not find its way into the Commission's final report—is worthy quoting:

> In the former proceedings the Southern lines relied on their "increment" argument to bolster an admittedly deficient showing of comparative costs, and the Commission accepted that substitute.

98 Baltimore & O. R.R. v. United States, 298 U.S. 349, 359 (1936).

99 New Jersey and N.Y. R.R. v. Erie R.R. (1953), mimeographed. Chesapeake & O. Ry. v. A. C. R.R., 153 I.C.C. 511, 547; New England Divisions, 62 I.C.C. 513, 561 (1929).

100 Divisions of Freight Rates, 148 I.C.C. 457, 477 (1928); 156 I.C.C. 94, 103 (1929).

101 Atlantic Coast Line R.R. v. Arcade & A. R.R., 198 I.C.C. 375, 379 (1934).

102 Baltimore & O. R.R. v. United States, supra note 98.

tively correct, and if this happens, the presumption will be in favor of proportionate costs, adjusted (if required and the evidence is available) to reflect future probabilities under efficient operations. While this prediction postulates further improvements in the art of railroad cost finding, the Commission could—even today—come close to justifying it on the following grounds:

First, proportionate costs, if determinable, produce the results which the Commission has apparently had in mind to produce for some time.[103] The significance of the element of cost has always been recognized, and in certain decisions it has been referred to as "vitally important in the determination of divisions."[104] Until recently, however, there has been little beyond the start of a technique, and the Commission, in consequence, has had to resort to a number of different factors which were no more than substitutes—substitutes which, as we have seen, included comparisons of specific elements which presumably bore upon costs or influenced them or reflected them. There has been no alternative—particularly in the large interterritorial disputes—because the statistical averages tendered as "comparative costs" for the lines in the several regions have been far from trustworthy for a variety of reasons.[105]

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[103] In Divisions, of Rates, Official and Southern Territories, supra note 97, at 189-190, the Commission said:

> These differences make it hazardous to express a definite opinion as to relative costs of transportation in the two territories. . . . The statistical evidence, unsatisfactory as it is, leads to the conclusion that transportation costs on the traffic here considered may properly be considered to be higher in the South, and that, although the exact degree of difference is indeterminable, it is not negligible, as the northern lines argue.
>
> We do not understand that the provisions of the Interstate Commerce Act relating to divisions require us to make specific findings as to cost of service where, as here, the record would not permit such findings. It is true that in Divisions of Freight Rates, 156 I.C.C. 94, 103, in prescribing divisions of rates between southwestern and western trunk-line territory we expressed the general conclusion that the cost of service in the Southwest was "somewhere in the neighborhood of 20 per cent greater" than in western trunk-line territory. That conelusion was based on ton-mile figures, but average hauls were about the same and no very important differences in composition of traffic were shown. We stated, however, that "the final result was not the product of the statistics alone, but was reached in the exercise of judgment after considering all of the pertinent evidence."
>
> Another reason which makes it unnecessary for us to attempt a definite appraisal of relative transportation costs is the fact that the interterritorial rates themselves have not been based upon ascertained differences in such costs.

[104] Official-Western Trunk Line Divisions, 269 I.C.C. 765, 776 (1948). In other decisions, costs have been characterized as the "essential question," the "prime," or "paramount" consideration. Divisions of Freight Rates in Western and Mountain-Pacific Territories, 203 I.C.C. 299, 311 (1934); Strouds Creek & M. R.R. v. B. & O. R.R., 159 I.C.C. 601, 608 (1929). In still other decisions, costs have been minimized as "an element," "not the only" criterion and "not necessarily determinative." Brimstone R.R. & Canal Co. v. United States, 276 U.S. 104, 116 (1928); United States v. Abilene & So. Ry., 265 U.S. 274 (1923); Hudson & Manhattan R.R. v. Pennsylvania R.R., 270 I.C.C. 739 (1948).

[105] A comparison of average ton-mile or car-mile costs is almost meaningless unless

With the availability of more accurate costs, this secondary evidence will fade out of the picture. There will not be much point, for instance, in considering different traffic densities in a division case if the costs which are influenced thereby are available. Nor will there be any real reason for taking into account different rate levels as reflecting (presumably) different underlying transportation conditions if the basic costs—which are the primary evidence—are within reach and there is no important difference in the distribution of the transportation burden among commodities. In the recent *North-South* case, as well as the companion one involving divisions between the North and Southwest,[106] the apparent basis for the prescribed divisions was comparative costs, as indicated above, and in employing it, the Commission, among other things, contrasted the evidence then available to it with that submitted at the time of the former *North-South* case. It said:

> Shortly afterward [after the decision in the former *North South* case] we established a cost-finding section, which is now a part of our Bureau of Accounts and Cost Finding, having as one of its objects the development of improved methods for determining transportation costs. After exhaustive investigation that section constructed what has come to be known as Rail Form A, a formula for determining railroad freight service costs, including a separation of the line-haul and terminal elements and a differentiation in respect to load and tare weights per car.[107]

The day will probably never come when further improvement in the technique of cost finding will not be looked for. As it is now, the so-called Form A[108] devised by the Commission's cost section is adjustable only in limited respects for specific traffic and specific operating conditions, and its probative value, therefore, is in direct ratio to the scope of the controversy. Stated differently, the more the divisions in dispute the better the chance that average costs, which are still the end product of Form A, will fit. The only alternative is an expensive and endless series of special cost studies of specific movements and services, but even then, there is no avoidance of the problem of apportioning joint expenses.

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average hauls are identical, the ratio of net to gross load the same, and the traffic composition substantially comparable. See Southwestern-Official Divisions, 234 I.C.C. 135, 148-152 (1939); Divisions of Rates, Official and Southern Territories, supra note 97, at 186-190; Divisions of Freight Rates in Western and Mountain-Pacific Territories, supra 102 at 326, 327, 335, 340-341; Atlantic Coast Line R.R. v. Arcade & A. R.R., supra note 104, at 752, 757.

106 Official-Southwestern Divisions, 287 I.C.C. 553 (1953); Official-Southern Divisions, supra note 97.

107 Official-Southern Divisions, supra note 97, at 507.

108 See note 50 supra.

Second, proportionate costs would seem to satisfy each of the statutory criteria previously discussed and, in fact, serve as a sort of composite edition of all of them.

The first statutory criterion, it will be recalled, is "the efficiency with which the carriers concerned are operated." This makes no separate contribution as a test but comes into play, if at all, as a modifying influence in the comparison of costs. Certainly the only costs which could be controlling in a divisions case would be those which, as stated by the Commission, accrued "under economical and efficient management."[109] The second statutory criterion, "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation," makes no greater contribution as a separate test. This is for the reason that greater or lesser revenue needs will usually be caused by greater or lesser costs, and a recognition of the latter in the fixing of divisions will automatically constitute a recognition of the former. The third criterion is "the importance to the public of the transportation services of such carriers." Here again, the differences if any will be revealed by evidence as to costs, and services for which there is questionable public need can be dealt with in exactly the same way as services which are costly because of inefficiency. The fourth statutory criterion, "whether any particular participating carrier is an originating, intermediate, or delivering line," is also significant because of its cost implications and is fully satisfied by a showing of the costs themselves.

The statute does include as a final criterion "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier." But as we have seen, most of the "any other" facts or circumstances which have entered into the Commission's decisions would be included in, or reflected by, a showing of proportionate costs. Since such a showing would only be presumptively correct, the way would always be open to overcome the influence of proportionate costs if the impact of some "other fact or circumstance" were so heavy as to require it in the interest of "divisions that colloquially may be said to be fair."[110]

Third, the presumption in favor of a well-defined and single standard for divisions would encourage the carriers to compose their differences among themselves and to keep their controversies within the industry.

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109 Official-Southern Divisions, supra note 97, at 524.

110 Baltimore & O. R.R. v. United States, supra note 98.

If it were generally understood that resort to the Commission would probably bring about divisions in accordance with a formula which the carriers might as well apply at home, there should be more of an inclination to stay at home and to settle their differences there. It is still a prerogative of railroad management to agree upon divisions, and every opportunity for its exercise should be afforded. The Commission already has enough responsibilities without having to take on those which the carriers—although having the right—are disinclined to discharge themselves.