PRESENT PROBLEMS IN RAILWAY REGULATION

THE three vital features of the Mann-Elkins law of 1910 were: the creation of the Commerce Court, for the purpose of expediting the judicial review of cases appealed from the Interstate Commerce Commission; the grant of power to suspend rate advances pending examination as to their reasonableness; and the rehabilitation of the long-and-short-haul clause. The law was passed on June 18, 1910. Within the brief period since that time, it has successfully emerged from a supreme test respecting rate advances; enough experience has already been had with the new Commerce Court to warrant an opinion as to its merits as a special tribunal for the review of transportation decisions; and, finally, an opinion by the Interstate Commerce Commission has been rendered, and is now under review by the Supreme Court of the United States, in the most important case ever likely to arise under the long-and-short-haul clause. Predictions were freely made in 1910 that certain shortcomings in the revised law, particularly the failure to grant control over minimum rates and the establishment of differentials between rates, would soon have to be remedied. Recent experience throws some light upon these questions also. It is thus an opportune time to review the entire situation respecting federal railroad regulation.

When the Commerce Court was created, fears were entertained that it would not have enough business to employ its time. This prediction is far from being realized, judging by the record of the first year.[1] Including thirty-six cases transferred to it from the various federal circuit courts, a total of fifty-seven suits had been placed upon its docket up to December 20, 1911. Fifty-four of these cases directly concerned orders of the Interstate Commerce Commission, the large majority (forty-four) being suits brought by carriers to set aside such

[1] Interstate Commerce Commission, Annual Report, 1911, pp. 53, 57, 59 and 206.

orders. The commission appealed to the court but once for enforcement of its mandates, the remaining nine cases being appeals of shippers for relief. But a number of these suits have been withdrawn or dismissed, or else lie outside the class of what may fairly be called contested cases. Only thirty-eight of them are in reality of significance as throwing light upon the function of the court as an appellate tribunal, standing between the Interstate Commerce Commission and the Supreme Court of the United States. Thirty of these had been disposed of up to December 20, 1911. That the court takes itself seriously as a check upon, rather than a mentor of, the commission is evidenced by the fact that restraining orders or final decrees in favor of the railroads and against the shippers and the commission were issued in all but three really important cases out of the entire thirty. And even of these three cases the Commerce Court held two to be outside its jurisdiction, while in the third the carriers had already joined in the view of the commission, so that there was really no contest.[1]

A bitter campaign for the abolition of the Commerce Court, as a result of the tendency of its decisions, was waged in Congress during the session of 1911–12. The House of Representatives, in response to popular feeling, promptly passed a bill abolishing it forthwith, the vote standing 120 to 49, with many Republicans joining the Democrats in its condemnation. A sharp contest was precipitated in the Senate over "the legislative recall of judges," as the matter was not inaptly termed. The administration, through the attorney-general, ably defended the imperiled court.[2] Evidence was adduced to show that the commission had been sustained in a larger proportion of cases

[1] Since this time a number of cases have been decided, on the whole more favorably to the commission. Notably in the Willamette lumber case, for example, it was fully upheld: no. 59 April session, 1912; and also concerning southern rates: no. 40, February session, 1912. In June several petitions were dismissed for lack of jurisdiction. In the Shreveport case, notable as involving conflict of federal and state authority, the commission's order was enjoined in June on the ground of confiscation of property.

[2] 62d Congress, Second Session, H. R. no. 472, and Hearings on H. R. 1907–08 before House Committee on Interstate Commerce, March 14, 1912.

than under the old circuit-court system[1]; that injunctions had not issued with greater freedom than formerly, and that none of them turned upon questions of fact; and, finally, that the administration plan had been very much more expeditious. But so far as Congress is concerned this evidence seems not to have been convincing. The Senate soon followed the House of Representatives, by a vote of 36 to 23 defeating an amendment to the Legislative, Executive and Judicial Appropriation Bill that made provision for further maintenance of the court. So strong was the feeling that only by a close vote was an amendment defeated which sought to legislate the justices out of office as well as out of the Commerce Court. The final conference agreement between the two houses, appended to the appropriation bill above mentioned, definitely abolished the court but reassigned the justices to service in the circuit courts, from which most of them were drawn. These details are highly significant as indicating the impatience of Congress with any attempt at interference with the positive program of administrative control of railroads decreed in 1906–10. The fate of the court now seems to rest in the hands of the president, its original sponsor. A delicate situation, concerning the relations between Congress and the executive in the matter of legislative "riders" to appropriation bills, seems likely to result. Whether such summary proceedings as those initiated by Congress are warranted by the situation would seem to depend upon the final disposition of the contested cases by the Supreme Court, before which tribunal most of them are now pending on appeal. If it appear that the court has in reality, as alleged, sought to usurp powers legitimately exercised by the commission, the case for abolition will be greatly strengthened. But, in any event, the certainty of a presidential veto of any law affecting this pet project of the administration promises to render the present attack upon the Commerce Court abortive.[2]

The determination of the proper scope and function of the

[1] *Cf.* the writer's analysis in the *Atlantic Monthly*, September, 1905.

[2] As this issue goes to press, the bill, with the "rider" abolishing the Commerce Court, has passed both houses; the president has vetoed it; and an attempt to pass it over the veto has failed in the Senate.—EDS.

Commerce Court was substantially forwarded by several decisions of the Supreme Court of the United States in June, 1912. The general effect of these was substantially to curtail the overweening ambition of the intermediate judicial body. Following the Goodrich Transit Company opinion,[1] which reversed the Commerce Court, all three of these latest opinions on appeal again favored the Interstate Commerce Commission as against its judicial reviewer. In two instances, the assumed jurisdiction of the new court was denied; while in the third, although its jurisdiction was recognized, its decision was reversed. Because of their bearing upon the action of Congress, a brief review of these cases may not be out of place.

The Proctor and Gamble Company, well-known soap manufacturers, had complained of certain regulations concerning demurrage upon their tank cars. The commission upheld the carriers, affirming that their rules were proper and lawful. The complainants thereupon appealed to the Commerce Court, which claimed jurisdiction to award pecuniary relief; although in this instance it declined so to do, on the ground that the commission had rightfully decided the matter in the first instance. Appeal then followed to the Supreme Court, with the odd circumstance that the commission and the railways joined issue against the shippers. The question was largely a legal one, involving definition of the jurisdiction of the new tribunal. The Supreme Court in this instance[2]—and, it may be added, in the Cincinnati Freight Bureau case,[3] which similarly involved the relative powers of the court and the commission—unanimously affirmed the right of the commission to decide such matters of fact finally.

To recognize the existence in the court below [the Commerce Court] of the power which it deemed it possessed, would result in frustrating the legislative public policy which led to the adoption of the act. . . . The act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce. . . . It was

[1] Discussed *infra*, p. 433.

[2] Proctor and Gamble Company *v.* United States, 32 Supreme Court Rep. 761.

[3] Hooker *v.* Interstate Commerce Commission, 188 Fed. Rep. 242.

not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient. . . . Wholly irrespective of the general considerations stated, we think the conclusion of the [Commerce] Court, as to its possession of jurisdiction over the subject referred to, was clearly repugnant in other respects to the express terms of the act.[1]

Such a pronouncement, following the line of decisions headed by the Illinois Central car-distribution case,[2] must make for concentration of responsibility and more effective regulation in the years to come.

The third decision of the Supreme Court, above referred to, is known as the "restrictive rate case."[3] Might railway companies—the Baltimore and Ohio and others—charge a different rate for the carriage of coal to railways than to other shippers, the coal being intended for the use of the railways as fuel? In this instance the commission forbade the practice. Its order was then promptly enjoined by the Commerce Court. Jurisdiction of the Commerce Court was conceded by the Supreme Court in this instance also, but its opinion was again flatly reversed. The issue at bottom was really a question of value of service as against cost of service in the determination of reasonable rates. Obviously the cost of carrying railway-fuel coal between two given points is practically the same as that of carrying commercial coal. The commission, supported now by the Supreme Court in frowning upon any difference in the charge, was thus according priority to this consideration of cost. The view of the Commerce Court, which was here reversed, tended, on the other hand, to emphasize such facts as that the two sorts of coal were intended for different purposes and did not come in competition with one another as to price. In other words, the value of service—what the traffic would bear—was given greater weight than mere considerations of cost. The Supreme Court declined to accept this view, preferring to regard transportation as a matter of physical carriage

[1] 32 Supreme Court Rep. 766, 768.

[2] I. C. C. *v.* Illinois Central Railroad Company, 215 U. S. 452.

[3] I. C. C. *v.* Baltimore and Ohio Railroad Company, 32 Supreme Court Rep. 742.

of goods, rather than to look beyond this essential service "to the greater or less inducement to seek the service"—that is to say, to regard its commercial aspects.

The last of this batch of Supreme Court decisions was mainly on a question at law, *viz.* the right of the Commerce Court to enjoin the enforcement of an order of the commission concerning certain allowances for lighterage and terminal service on sugar in New York harbor.[1] The judicial poise of the Supreme Court was here evidenced in its affirmation of the right of the Commerce Court to issue the injunction. The plain purpose of the law in setting up this intermediate tribunal as a safeguard against abuse of administrative authority was given effect; but it was ordered, nevertheless, that the case be remanded, to be disposed of on its merits before the Interstate Commerce Commission, the forum selected by Congress for that purpose.

The grist of cases appealed to the Commerce Court may profitably be divided for discussion into two groups, *viz.* those which clearly concern questions of law and those in which matters of fact or economic conclusions based thereon are primarily at stake. The first group of purely law cases need detain us but briefly. There can be little doubt about the necessity of judicial review of law findings of the commission. The best illustration is afforded by the first decision of the Commerce Court to be reviewed by the Supreme Court of the United States.[2] Inland water carriers were not placed under the jurisdiction of the Act to Regulate Commerce by the Mann-Elkins amendments of 1910, except in so far as they were joined in control with railroads or might enter into arrangements for continuous shipments with carriers by land. But the commission, having always required railroads to file accounts covering both their local and interstate business, called upon the carriers on the Great Lakes to render similar statements as to their entire traffic, whether subject to federal control or not. This

[1] United States *v.* Baltimore and Ohio Railroad Company, 32 Supreme Court Rep. 817.

[2] Goodrich Transit Company *v.* I. C. C., Commerce Court, 190 Fed. Rep. 943 (1911). I. C. C. *v.* Goodrich Transit Company, 32 Supreme Court Rep. 436.

the water lines refused to do. The Commerce Court, in overruling the commission, did not question the power of Congress to require such accounts, but held that it was its intention to confine publicity to that portion of the lake traffic over which the jurisdiction of the commission actually extended. It thus appears that the law point was doubly important, inasmuch as its determination affected not alone the enforcement of publicity for water lines but also of all carriers by land, so far as their intrastate business was concerned. Fortunately the Supreme Court, in sustaining the commission, held that the Commerce Court had erred in confusing "knowledge" of intrastate business with its "regulation." As to the former, the authority of the commission was fully upheld. This and the important question upon which the entire intermountain rate controversy rests, namely, as to the authority of the commission to prescribe relativity of rates,[1] are the most important points of law yet raised before the new tribunal. Other legal questions decided by the Commerce Court—generally in favor of the railroads, be it observed—were: whether reparation might be claimed for an unreasonable rate when the burden had been already passed on to the consumer[2]; whether the Nashville Grain Exchange might lawfully intervene in proceedings before the commission under the liberal terms of the law of 1910[3]; whether "separately established rates" applied by a carrier to through traffic when there is a through rate but no joint rate are matters of interstate commerce or not[4]; as to the limitations by law of the right of carriers to refund overcharges to shippers[5]; and whether the Union Stockyards Company was a common carrier engaged in interstate commerce, and thus subject to control as to preferential treatment of shippers.[6] However these cases may be finally decided by the court of last resort, there can be no conflict of powers between the Commerce Court and the

[1] *Cf. infra*, pp. 451 *et seq.*

[2] Russe and Burgess *v.* I. C. C., 193 Fed. Rep. 678.

[3] Nashville Grain Exchange *v.* United States, 191 Fed. Rep. 37.

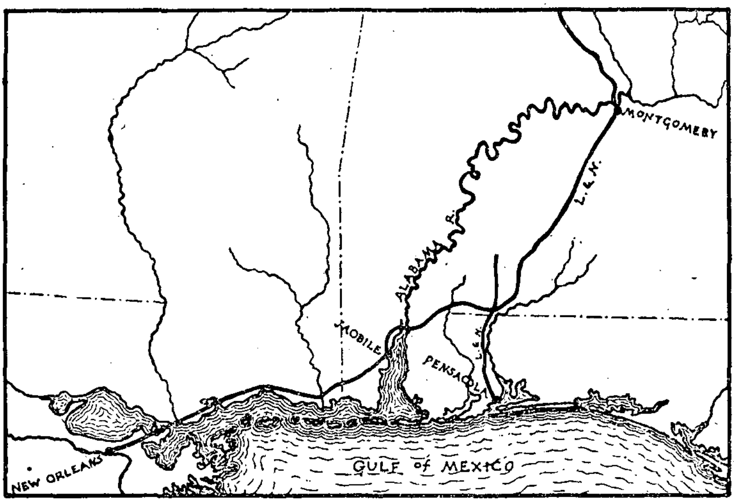
[4] Denver and Rio Grande Railroad Company *v.* I. C. C., 195 Fed. Rep. 968.

[5] Arkansas Fertilizer Company *v.* United States, 193 Fed. Rep. 667.

[6] United States *v.* Union Stockyard and Transit Company, 192 Fed. Rep. 330.

commission in regard to such matters of law.[1] The real bone of contention between the two bodies—the administrative and the judicial—is the question of their respective powers outside the field of law.

A typical case before the Commerce Court concerned rates from New Orleans to several competing cities on the line of the Louisville and Nashville Railroad.[2] An interesting phase of local discrimination appeared. The accompanying map discloses the situation.



Normally the through rate from New Orleans to Montgomery (the long-distance point) would be less than the sum of the local rates from New Orleans to Mobile (the intermediate point) and then from Mobile on to Montgomery. This would conform to the general rule, which is based on the simple fact that through rates, being competi-

[1] The fine point involved in the revival of the Cincinnati Freight Bureau case, Hooker *v.* I. C. C., 188 Fed. Rep. 242, is too complicated for discussion here. It will be fully considered in the writer's forthcoming treatise on the subject now in press.

[2] Louisville and Nashville Railroad Company *v.* I. C. C., 195 Fed. Rep. 541. In this case there was no dispute as to facts, but only as to the conclusion to be drawn therefrom. A straight difference on points of fact was raised in the Pacific Coast switching cases: Atchison, Topeka and Santa Fé Railway Company *v.* I. C. C., 188 Fed. Rep. 229. The dissenting opinion, 188 Fed. Rep. 929, as to usurpation of the rights of the commission, is significant. *Cf.* Annual Report I. C. C., 1911, p. 56.

tive, are usually forced below the range of local charges, commonly unaffected by such competition. In this case the situation was unique. Water competition affected the local rates, both into Mobile from New Orleans by sea, on the one side, and then up the Alabama to Montgomery by river steamer on the other. But such water competition did not apply to the through rate, probably because through shipment by water would necessitate a transfer *en route* from a gulf steamer to a river boat at Mobile. Thus in this case it came about that local competition was keener than the rivalry as to through traffic. The Louisville and Nashville, nevertheless, had secured the bulk of the business to Mobile by reason of the low local rates by rail which had been allowed for many years, even after practical elimination of the water lines. The situation was certainly anomalous, from the viewpoint of cost of service by rail alone, in that the freight rate was higher on goods sent to Montgomery direct than when shipped on a combination of local rates on Mobile traffic. This situation, it is apparent, would enable Mobile jobbers to buy goods in New Orleans and actually lay them down in Montgomery for less than the freight charges to the Montgomery dealers who were on the spot. The same situation prevailed at Pensacola.

The immediate cause of dispute was the promulgation by the commission in 1907, under the new powers conferred by the Hepburn Act, of a rule that through rates must not exceed the the combination of locals between the same points. To comply with this rule, the Louisville and Nashville, in this instance, faced the alternative either of reducing the through rate from New Orleans to Montgomery to the sum of its local charges, or else of raising one or both of the latter. The railroad naturally chose the latter course—now enabled to do so with safety as the boat lines had long since been put out of business. It advanced its local rates from New Orleans to Mobile sufficiently to make the new combination of local charges equal the through rate to Montgomery. The commission, on complaint of Montgomery, suspended this advance; seeking to compel the railroad to even things up, not by advance of the local charges but by a reduction of the through rate. This, it is obvious, would relieve Montgomery of the discrimination in favor of Mobile of which it complained. As to none of the facts above outlined was there dispute between the court and the commission. The controversy turned upon which of the two remedies should be chosen to meet the situation. Were the through rates unreasonably high? This was the commission's contention. If so, equalization should be attained by their reduction. Or, on the other hand, were the local rates unreasonably low? If so, they might be evened upward with propriety. This was the contention of the Commerce Court, leading it to set aside the order of the commission. Which was the body competent to pass upon such issues? The Supreme Court had to be called upon to decide. And in the meantime, there was the same old story of delay, while irreparable loss to shippers went on.

In another recent instance, the California lemon rate case,[1] the issue was even more sharply drawn between the commission and the Commerce Court. The latter, it is averred, not even contented to draw its own conclusions in matters of fact, made an "attempt to look into the mind of the commission for the purpose of ascertaining the reasons on which its order was based." The case dated from 1909, when the blanket rate from the entire territory east of the Rocky Mountains was advanced by the railroads from $1.00 to $1.15. This action followed the imposition of a high protective duty on lemons in the Payne-Aldrich tariff. After careful investigation the commission, reviewing the whole matter of rates upon citrus fruits, ordered the lemon rate to be reduced once more to $1.00. Appeal was promptly taken to the Commerce Court, which set aside the order as without the scope of authority delegated by Congress. The court held that the commission had sought so to adjust rates as to afford protection to the California lemon industry against foreign competition, especially from the growers in Sicily, in place of confining its attention to the "intrinsic reasonableness" of the transportation charge. The

[1] Atchison, Topeka and Santa Fé Railway Company *v.* I C. C., Commerce Court, April session, 1911, no. 7; 190 Fed. Rep. 591. Second opinion in 22 I. C. C. Rep. 149.

gage thus thrown down was promptly taken up by the commission in a second opinion, rendered within two months of the injunction granted by the Commerce Court. This time, it exhaustively considered all phases of the cost and manner of transportation for oranges and lemons and re-affirmed its opinion that the rate of $1.00 per hundred pounds was reasonable. At this writing the matter rests there. What the Commerce Court will do remains to be seen. The case, as restated by the commission, is masterly in its discussion of the responsibilities laid upon it by the law. "Is the country to be treated as a whole for commercial purposes, or shall it be infinitely divided?"

The intermountain rate cases, subsequently discussed as a phase of the long-and-short-haul question, illustrate even more clearly these conflicts between the court and the commission. But they introduced no new legal technicalities. They merely emphasize the critical nature of the controversy, so far as it concerns the larger constitutional question of separation of powers between the three main branches of our government.

The situation, as revealed by these typical cases, reduces itself, in brief, to this: it is the same old question of broad *versus* narrow court review all over again. The Commerce Court holds it to be its proper function, as a court of law, to review in the broadest way all cases which come before it on appeal. The commission, on the other hand, maintains that not only all matters of fact, but all inferences as to economic facts, of necessity lie solely within the range of its authority. And it is certainly true that, without some such limitation upon the right of review, the commission might about as well retire from the field of regulation entirely, and content itself with enforcing the safety appliance laws, collecting statistics and serving as a general publicity office. Fortunately the situation promises to be saved by the line of Supreme Court decisions flowing from the Illinois Central case.[1] The making of a rate for the future being a legislative and not a judicial function, the power to determine that a particular rate is or is not reasonable

[1] I. C. C. *v.* Illinois Central Railroad Company, 215 U. S. 452. These decisions also will be fully discussed in the writer's forthcoming treatise above mentioned.

for the future, or that a particular discrimination is or is not undue, is a discretionary legislative power which can not be reviewed by the judiciary. If the Supreme Court in due time applies this reasoning to these later cases, the Commerce Court may confidently be expected to take its proper place in the federal scheme of things. Until it is forced to do so, much of the railroad legislation of recent years will fail to ensure that full measure of certainty and promptitude of relief to which the country is entitled, and which it is bound to have.

A prime test of the second important feature of the Mann-Elkins law, that which conferred power to suspend rate advances pending examination as to their reasonableness, was had in 1910. It has been so ably described elsewhere,[1] however, that it may merely be mentioned in passing. No new issues have since arisen; whereas in respect of the third feature of the law, the most important case ever likely to come before the Interstate Commerce Commission is now before the Supreme Court of the United States for final settlement. This issue, therefore, must claim priority by reason of its great importance, both in a legal and a commercial sense.

The intermountain rate cases, affording the first crucial test of the long-and-short-haul amendments of 1910, are doubly significant at this time. They afford a prime example of the struggle for supremacy between the administrative and the judicial branches of the government. And they also stand foremost among all the transportation controversies of the last generation. The grievances are long-standing. They have been before the Interstate Commerce Commission since 1889.[2] They comprehend geographically a range of interests covering the entire northern half of the United States. While the Rocky Mountain territory and the Pacific coast terminals are most directly concerned, the rights in trade of every factory and distributing point east of Denver are indirectly involved, in so far

[1] *American Economic Review*, vol. i (1911), pp. 766–789; *Yale Review*, 1910, pp. 268–288; files of the *Railway Age Gazette*; and Boston *Transcript*, November 12, 19 and 21, 1910.

[2] 5 I. C. C. Rep. 478, 510.

as they participate in commerce with the Far West. Not even the inevitable conflict over remodeling the southern "basing point" system, by enforcement of the new fourth section of the Mann-Elkins law, is equal to this one, either in geographical scope or commercial importance. And at the same time the fact that the new Commerce Court is on trial for its life—this being one of its leading cases on appeal—endows the controversy with an even greater significance. Both in the eyes of the law and of commerce and finance, the issue is plainly of the first importance.

The transportation grievance of the tier of Rocky Mountain communities from Washington to Arizona, although simple, divides naturally into two parts.[1] The first is that the freight rates from all eastern territory to these localities are from one-quarter to over 100 per cent higher than to the Pacific coast, although the goods in transit pass their very doors and may be hauled a distance greater by one-fourth. A carload of glassware from Pittsburg to Spokane, Washington, pays a freight rate of $649.44; while the charge to Seattle, 400 miles farther west, is only $393.60. A first-class commodity (car-load) rate from Omaha to Reno, Nevada, is $858. If the goods are delivered 154 miles farther west, at Sacramento, passing through Reno *en route*, the freight bill amounts to but $600. But this discrimination is less than half the indictment, inasmuch as the compelling force of ocean competition at the coast is conceded by all. It may well be that San Francisco and its sister terminal points are unreasonably favored, rather than that the intermountain rates are unduly high in themselves. The carriers by land may indeed be, as they allege, powerless in the face of a water competition beyond their control. And if they are thus impotent, surely the government cannot account their tariffs unlawful, however irregular they may be.

The second item in the complaint of the intermountain cities is held to show the cloven hoof of the transcontinental carriers. These mountain rates, relatively so high by comparison with

[1] For Spokane, 15 I. C. C. Rep. 376 (1909); 19 *ibid.* 162 (1910); 21 *ibid.* 400 (1911). For Nevada: 19 *ibid.* 238 (1910) and 21 *ibid.* 329 (1911). The latest Denver case is 15 *ibid.* 555. For Salt Lake City: 19 *ibid.* 218.

more remote terminals, are equally high from every point east of Denver over a territory two thousand miles in width.[1] In other words, entirely regardless of distance, the freight rate to Spokane or Reno, whether from New York, Chicago, St. Paul, Omaha or even Denver, is the same. It is indeed a blanket rate, like the fixed charge of two cents for postage. And it makes no difference how near any point in this wide zone may be, the disparity in rates against the intermountain points is relatively the same. Thus our two concrete examples, above cited, are for shipments from Pittsburg and Omaha, respectively; but in any case, be the point of origin as remote as Portland, Maine, or even as near as Colorado "common points," the disparity of rates is unchanged. They are always very much higher to the intermountain cities than on to the Pacific coast; although the carriers east of the Missouri river get no more for their portion of the haul when the goods are bound for Spokane than if they go on to Seattle for a much lower through charge. This latter fact, of course, narrows the complaint down to the policy of the western lines. The discrimination, if it be one, is clearly of their making. Whatever trouble there be originates west of the Missouri river. However much the other railroads all over the country may have joined in transcontinental business, they remain impartial onlookers in this particular contest.

Some of the causes of the apparently abnormal western rate adjustment were perfectly plain. The low rates to the coast were due to water competition, which, while now under some measure of railroad control—partially "neutralized" in fact[2]—is always present and potentially great. It will be even more controlling when the Panama canal is opened. To meet this situation, the carriers have established a series of through commodity rates which practically cover all the transcontinental business. For all this traffic exposed to water competition, the carriers allege, the intermountain territory is, if not geographically, at least for

[1] Shown by a map in 19 I. C. C. Rep. 241.

[2] 19 I. C. C. Rep. 250; 21 *ibid.* 351, 416–421; Dunn, The American Transportation Question, pp. 178–221.

purposes of rate-making, more remote. They consequently add to the low through rate the charge for the local back-haul from the coast, in determining the charge to all the intermediate cities. Thus, they allege, a discrimination is forced upon them, not of their own creation. They could not grade all their intermediate rates down to a through tariff thus fixed at the farther end. It would mean bankruptcy. Thus far the situation is analogous to Hadley's classic oyster-car case.[1] The main difficulty arises in explaining the second half of the scheme. How did the blanket or "postage-stamp" rate zone arise, permitting exactly the same rates, whether to Spokane or Seattle, from points scattered over a territory covering practically two-thirds of the United States? Is it an artificial scheme, modifiable at the will of the carriers or of the government; or, like the law of gravitation, is it beyond the control of either?

West-bound rates from New York, Chicago, Omaha and St. Paul have come to be fixed at the same level by the forces of commercial competition between centers bidding for the far-western market. They were originally graded somewhat according to distance in the early days.[2] And it is plain that water competition, at first confined to the Atlantic seaboard, gradually extended inland. In order to secure the business to San Francisco by steamer or clipper ship, the rail charges from Pittsburg or Buffalo back to Philadelphia or New York would be absorbed in the through rate, thus gradually extending the benefits of water competition farther and farther west from the seaboard cities. And, of course, as population and manufactures grew in the Middle West, the narrow margin of such competition steadily and inexorably extended the zone of blanket rates, based on New York, in from the Atlantic coast. The direct all-rail carriers, of course, met this competition at all points. Manufactures and population continued to spread toward the West; but, imperceptibly, with ever-widening distance inland from the Atlantic, a new competitive factor

[1] Discussed by the author in *Quarterly Journal of Economics*, vol. xxiii (1909), p. 472.

[2] 9 I. C. C. Rep. 318 *et seq.*

appeared. As the force of direct water competition lessened, market competition began to gather strength. One need not go so far as to concede that "market competition is a euphemism for railroad policy," in order to realize that artificial, rather than natural, influences gradually came to bear in the westward extension of the blanket rate. The western lines, getting the whole rate on shoes for the Pacific slope from St. Louis, while getting only a part of it if the goods came from New England, had a direct motive to put St Louis into the western market and thereafter to hold it there at all cost. Every increment in the St. Louis traffic, moreover, was surely theirs for ever. It could not be stolen away, as it might if it originated at Boston. It became a settled policy of these western lines, therefore, to meet even the water-compelled seaboard rates at all points, no matter how far west. The blanket zone thus steadily widened, out of all semblance to its originally modest proportions as based upon water competition alone. A competition natural in origin gradually merged into another of an entirely artificial sort.

The importance of both the intermountain and Pacific-coast traffic originating along the western confines of the blanket zone is steadily increasing. One record showed that three-fourths of the business at Reno, Nevada, originated west of Chicago. It all moved on the same rate as freight from Portland, Maine, whether destined to Nevada or to the Pacific coast. The disparity against Nevada was the same in either case. It was to hold this traffic, originating west of Chicago, against all eastern competitors, that the blanket zone was so abnormally widened by the trans-Missouri railroads.

For years the transcontinental rate scheme has been before the Interstate Commerce Commission. A number of decisions[1] were rendered prior to 1910, under the old long-and-short-haul clause, emasculated as it was by the Alabama Midland decision of 1896. The Hepburn amendments of 1906 had so far strengthened the hands of the commission that it made several attempts to deal with the question. But the orders in these cases were

[1] Best reviewed in the brief for the United States in the case of U. S. *v.* Atchison, Topeka and Santa Fé Railway, Supreme Court, October term, 1911, p. 10.

confined to classified tonnage, although it was clear that most of the transcontinental business moved under commodity rates. Such car-load or wholesale tonnage, of course, is the only sort actually affected by the competition by sea. This fact greatly aggravated the discrimination against which the intermountain cities complained. For, in absence of such water competition, they enjoyed relatively fewer commodity ratings. And their youthful, though ambitious, jobbing trade was dependent upon just such special car-load rates in competition with wholesalers on the Pacific coast. If "tin boxes and lard pails, nested," moved in car-loads, Seattle got them from "anywhere east" for a commodity rate of 85 cents, as against the regular fourth-class rate to Spokane of $1.90 per hundred pounds. The commission grappled with the problem of such discrimination manfully, but made little headway until the new law of 1910 put it in better case. Then for the first time it tackled the heart of the matter, in revising the commodity rates in the great cases now under review. There is evidence that the railroads were endeavoring to remodel their tariffs under pressure in some degree from the commission even before the amendment of the law in 1910. It was recognized that some modification of the existing scheme was needed.[1] It was relatively easy to re-arrange mere class rates.[2] They were little affected by water competition. But the commodity schedules, concerned in these last cases, were far more important commercially.

Two plans were possible to mitigate the violation of the distance principle.[3] The rates to intermediate points might be lowered toward the long-distance standard. This would enable the railroads to hold the coast traffic against the water lines, but would decrease the revenues from way business. Or, on the other hand, the coast rates might be put up, regardless of water competition, in the expectation that much through business would still go by rail. The differential by land was already considerably higher than by the sea routes. The rail rates might be

[1] *Railway Age Gazette*, May 14, 1909, and November 25, 1910.

[2] Brief for U. S., *loc. cit.*, p. 12.

[3] *Cf.* Commerce Court opinion, 191 Fed. Rep. 864.

increased somewhat further. Some coast business would be lost to the water lines, but on what remained a higher return would accrue. Moreover, a considerable development of interior distributing centers would be bound to ensue. And, best of all, the grievances of these places would be somewhat mitigated.[1] Unfortunately the Pacific coast points were in an uproar at this threat against their supremacy in the jobbing business. And, in the meantime, the new powers under which the present proceedings are taken had been conferred by the Mann-Elkins law. The carriers unaided could probably not have greatly bettered matters. But the government, at all events, chose to deal with it; so that these private attempts came to naught.

The new orders[2] are radically different from the preceding ones, not only in applying to commodity rates, under which most of the tonnage really moves, but also in respect of the form of remedy proposed. The earlier orders, to correct the discrimination, prescribed the absolute rates to be put into effect at various points. The new orders did not establish absolute rates at all, but endeavored, instead, to set up a system of relative rates, or differentials. All the former decisions had held the intermountain rates inherently unreasonable. The new opinions treat them as only relatively so. A clear distinction is drawn between real water competition and that pseudo water competition which resolves itself practically into a mere competition of markets with one another. The guiding principle adopted is that the force of water competition—the only one entirely beyond the carriers' control—of necessity increases with the proximity of the shipping point to the Atlantic seaboard. Business from New York to Seattle by rail must go at rates compelled by water competition. Traffic from Omaha to Reno, Nevada, is surely free from it. Yet under the present system no distinction whatever is made between the

[1] The plan is in *Railway Age Gazette*, June 4, 1909, p. 1182. *Cf.* also Boston *Transcript*, November 28, 1910, for other plans.

[2] 21 I. C. C. Rep. 329, 400. Both the Spokane and Nevada cases are combined in the appeal to the Supreme Court; as is also the independent order of the commission denying relief from the fourth section to the Union Pacific and other roads.

two. All rates are blanketed, regardless of remoteness from the eastern seaports. The new orders substitute a series of zones which suggest those so long prevalent in Trunk Line territory.[1] These are shown on the accompanying map. As one passes westward from zone IV, with water competition under full pressure at New York, the influence of the roundabout carriers by sea progressively diminishes; until, at last, beyond

the Missouri it becomes *nil*. Such water competition affording the only excuse for according lower rates to the Pacific terminals than to intermountain points, it follows that the disparity in charges between interior and coastal points should decrease *pari passu* as the originating point moves farther west. A substantially lower rate from New York to San Francisco than to

[1] Ripley, Railway Problems, p. 309, with map.

Nevada may be permitted : but not from St. Paul or Omaha, for they are entirely beyond the range of such steamship rivalry.

Specifically, the commission in these orders forbade any higher charge to the mountain points from any part of zone I than applied to the Pacific terminals. From zone II, lying 400 miles more to the east, there will probably never be any considerable traffic coming back to New York, in order to go round by sea, but in rare instances there may be some. From this zone, therefore, intermountain rates may be not more than seven per cent above those to the Pacific terminals. And so on as one goes east. Rates from zone III may be not more than 15 per cent higher to Spokane than to Seattle. From zone IV to Reno, Nevada, they may be 25 per cent above those to Sacramento; but the disparity against the intermountain territory, even with water competition in full effect, may never exceed this percentage.

This ingenious plan certainly commends itself in principle to the economic student. It restores in a measure the gradations existing in 1887.[1] It does not create the zones out of whole cloth. It utilizes a scheme for division of territory already adopted by the transcontinental lines for other purposes.[2] And, most important of all, it is elastic, not prescribing absolute rates, but resting content with laying emphasis upon the need of gradation. Yet it grants a substantial measure of relief from the present disparity of rates; for, whereas the former intermountain tariffs from the East are from 50 to 100 per cent above those to the Pacific coast, the difference under this order may never exceed 25 per cent. The new scheme is cleverly planned, also, from a legal-strategic point of view. It can scarcely be attacked under the fourteenth amendment as confiscatory, inasmuch as it leaves so much latitude to the carriers in the readjustment of their tariffs.[3] To overset it on

[1] 9 I. C. C. Rep. 318. The first suggestion I find of graded rates is in the dissenting opinion in this St. Louis Business Men's League case.

[2] Brief for U. S., *loc. cit.*, p. 55. Annual Report I. C. C., 1911, p. 31.

[3] A compromise offered by the railways and accepted by commercial bodies pending the Supreme Court decisions was filed June 18. It is estimated to save Spokane shippers alone about $500,000 annually. Class rates are the commission's from the

this ground, they must prove that from the particular rates which they choose to adopt disaster will flow. This would be an impossible task. The only choice remaining, therefore, was to attack it on the ground that the commission was exceeding its powers, delegated by Congress. This, in effect, was what was done.[1]

The opinion of the Commerce Court,[2] setting aside the intermountain rate orders of the Interstate Commerce Commission, will shortly be reviewed by the Supreme Court of the United States, to which tribunal appeal was promptly taken. Disregarding the dissenting opinion that the entire long-and-short-haul clause, as amended in 1910, is unconstitutional, the significant differences between the Commerce Court and the commission are three in number.

The first point at issue between the court and the commission concerns the differentiation of water competition from so-called market competition.[3] The court refuses to recognize any distinction between the cause of lower rates to the Pacific coast from Omaha or from New York, respectively. It ascribes the disparity in all cases to competitive forces entirely beyond the railroads' control: "If the carrier from St. Paul, in

seaboard, but from interior points are somewhat lower. The acceptance of the distance principle is the significant point.

"As the distance St. Paul to Spokane, approximately 1500 miles, is 150 per cent of the distance Omaha to Salt Lake, approximately 1000 miles, a reasonable rate from St. Paul to Spokane would not be less than 130 per cent of the rate from Missouri river to Salt Lake, and in the proposed tariffs rates from St. Paul to Spokane would be made accordingly.

"From Mississippi common points as defined by current tariffs, the rates would be $112\frac{1}{2}$ per cent of the St. Paul rates.

"From Chicago and common points, the rates would be $116\frac{2}{3}$ per cent of St. Paul rates.

"From Detroit and common points, 125 per cent of the St. Paul rates.

"From Buffalo, Pittsburg and common points, 130 per cent of St. Paul rates.

"From New York, Boston and common points, 130 per cent of St. Paul rates.

"From Colorado common points, 90 per cent of St. Paul rates."

[1] Cf. *Railway Age Gazette*, July 28, 1911, p. 162.

[2] Atchison, Topeka and Santa Fé Railway Company *v.* United States, 191 Fed. Rep. 856.

[3] Market competition is exhaustively discussed by the author in a series of articles in the *Railway Age Gazette*, beginning May 7, 1909.

order to meet new water competition from New York," *etc.* The commission, on the other hand, clearly sets apart market competition, applicable to western cities, from that due to carriage by water, which controls rates from the Atlantic seaboard. The railways, it says, must conform in their rate-making policies to the latter. They are not bound by the former. For market competition (as already quoted) "is a euphemism for railroad policy."[1] And, speaking as an economist, ignorant of the technicalities of the law, I venture to affirm that the commission in this contention is absolutely right.[2] Even as far west as South Bend, Indiana, wagons may go to California by the direct rail route; or, with a change of ten cents in the rate, they may come back to New York and thence go round by sea. Such is the delicacy of adjustment even as far west as Chicago. But the failure to recognize that low rates to the Pacific coast from points west of the Missouri river are due to an entirely different cause—namely, the arbitrary determination of the transcontinental lines to hold the fort for their local clients against all odds—is to commit an egregious economic blunder. Furniture goes from Chicago to San Francisco on rates as low as if compelled by water competition.[3] But such competition never applies to commodities of this bulky sort, even from New York. How much less, then, can water competition apply so far inland? The carriers are bent on keeping Chicago in the market. That is the real reason. The Commerce Court has missed the main point.

Equally sound economic evidence that water competition alone is not responsible for the entire present transcontinental rate system is afforded by the fact that the wide blanket zone, already described, covering two-thirds of the United States for west-bound rates, finds no counterpart in the scheme under which rates are made up in the opposite direction.[4] It is a poor rule which will not work both ways. And surely water com-

[1] 21 I. C. C. Rep. 355, 367; the transcript of testimony here is especially illuminating. *Cf.* also Twenty-fifth Annual Report I. C. C., pp. 30–40.

[2] *Cf.* S. O. Dunn in *Railway Age Gazette*, November 25, 1910.

[3] *Railway Age Gazette*, 1910, p. 1005.

[4] 21 I. C. C. Rep. 418–423 is best on this.

petition, when present, should be potent in either direction. It is undeniable that the absence of pushing cities along the Pacific slope desirous of developing trade relations with the Atlantic states has discouraged even the slightest extension of terminal rates inland. The ironclad monopoly enjoyed by the Harriman and Hill lines would probably prevent this in any event. But the significant point is that there is no demand for a blanket zone for east-bound traffic. Hence water-compelled rates stay where they belong; that is to say, closely confined to the Pacific seaboard cities. Thus it would also have been in the eastern half of the country, had it not been for "market competition" —this artificial factor which the Commerce Court fails utterly to recognize as in a class by itself.

The second vital difference of opinion between the Commerce Court and the commission is economico-legal. The economist in the office of critic here stands upon less firm ground. And yet, whatever the law may be, the reasoning rests upon the interpretation of the facts.[1] The Commerce Court held that "when the rate for the longer haul is forced unreasonably low by competition, the only elements that can enter into the consideration of the rate for the shorter haul are its reasonableness" *etc.*[2] The controlling idea, in other words, in the reviewing judicial mind, was that, so long as the rate at Spokane or Reno was reasonable *in itself*, it was a matter of indifference to that locality what rate might be made to Seattle. All that the Commerce Court needed to do, therefore, was to consider the "intrinsic reasonableness"[3] of the intermediate rate. Not so, held the commission. Whether this charge is reasonable or not is a question of relativity. It depends upon what rate is made to other points all around it and competitive with it. In other words, the intermediate cannot be dissociated from the long-distance point. Railroads as public carriers owe a common duty to both points. No intermediate rate, however low *per se*, can be reasonable, if the carrier is voluntarily offering a lower

[1] *Cf.* Ripley, "Local Discrimination," in *Quarterly Journal of Economics*, vol. xxiii (1909), p. 470.

[2] Brief for the U. S., *loc. cit.*, p. 37; Annual Report I. C. C., 1911, p. 36.

[3] In the lemon rate case also; 190 Fed. Rep. 591. *Cf. supra*, pp. 437, 438.

rate to points beyond. If its lower rate beyond is accorded under compulsion, that of course is a different matter. But in so far as these low Pacific terminal rates are due to an artificial railroad policy, any discrimination against the nearer points is unwarranted.

The analogy is clear between this difference of opinion of commission and court and that between the two schools which would base judicial determination of rates in general upon inherent or relative reasonableness respectively. The "remuneration" test, which the carriers' representatives sought to insert in the law of 1906, seeks to discover innate reasonableness of rates; not affected, that is to say, by the revenue which may accrue from them in the aggregate. The other standard declares such reasonableness to be always dependent upon circumstances; notably upon the amount of the investment and the resultant earning power as arising out of the volume of business carried at the rates in question.[1]

The third difference of opinion between court and commission is purely one of law.[2] Has the latter exceeded its powers delegated by Congress in attempting to fix a *relation* of rates, instead of prescribing certain maximum rates applicable to particular points?[3] The reasoning followed is apparently derived from the Supreme Court opinion in the Chattanooga case.[4] This reasoning, the government now contends in its argument on appeal to that tribunal, is inapplicable to the since amended law. Limits of space and the natural diffidence of an economist alike forbid extended discussion of this nice point at law. The commission alleges that, except by the exercise of such authority to prescribe relativity of rates, it will be powerless to remedy such discriminations in future. In consequence, inasmuch as Congress evidently intended to enable it to afford such remedy, authority over relativity of rates must

[1] H. S. Smalley in *Annals of the American Academy of Political Science*, March, 1907, pp. 299–304. *Cf.* also Ripley, Railway Problems, chapter xxiv. The point will be more fully discussed in the writer's forthcoming Railroads, volume ii, dealing with matters of finance, valuation *etc.*

[2] Annual Report I. C. C., 1911, p. 38. Brief for United States; Supreme Court, nos. 883 *et seq.*, pp. 23–37. Also brief for I. C. C. in the same case.

[3] Commerce Court opinion, p. 15.

[4] 181 U. S. 1.

be derived by necessary implication. And it is certain, economically speaking, that in this position the commission is once more perfectly right. Whether it is legally so, remains yet to be decided.[1] In this connection, it seems odd that none of the briefs for the government mentions an important instance of the undisputed exercise of such power to establish relativity of rates. The commission has for years, even in absence of any express authorization by law until 1910, freely prescribed details of freight classification in a large number of important cases.[2] It has never done more than to fix relativity; and the constitutionality of its orders has never been attacked.

An entirely new issue is raised at this point. Prescribing relativity of rates implies determination of minimum rates. For if, as in this transcontinental case, the freight rate to Nevada points from New York may never be more than 25 per cent greater than to San Francisco, a lower limit as well as an upper one is thereby prescribed for the latter point, and *vice versa*. The rate to one point once fixed by the carrier, voluntarily if you please, the minimum rate to the other may be necessarily determined thereby. If a dollar rate prevails at Spokane, the Seattle rate must not fall below 75 cents. Is this not something new? Does it not suggest fixing, not maximum rates alone, but absolute rates as well? And if an attempt to fix absolute rates, is it not unconstitutional? There can be no two minds about the need of conferring power upon the Interstate Commerce Commission over minimum or differential rates, if effective government regulation is ever to be attained. This has been my contention for years.[3] It now has the best possible expert support from the side of the carriers.[4] Discriminatory rates can never be corrected until such power is dele-

[1] Of significance on this point is Commissioner Lane's dissent in the lemon rate case, 22 I. C. C. Rep. 156.

[2] For details, *cf.* Hammond, Rate Theories of the Interstate Commerce Commission (1911) and J. Strombeck, Freight Classification (1912).

[3] *Cf. Atlantic Monthly*, September and October, 1905. On shortcomings of the later amendments of the law, *cf.* F. H. Dixon, in *Quarterly Journal of Economics*, vol. xxiii (1910), p. 630.

[4] *Railway Age Gazette*, editorial, January 12, 1912, p. 41; and S. O. Dunn, The American Transportation Question (1912).

gated by Congress or conferred by judicial interpretation of the law. Kansas City now enjoys lower rates to Chicago on packing-house products than are accorded to Omaha. On every sound principle of rate making, the two cities ought to be placed on a parity. But the commission cannot rectify the abuse; for the roads from Kansas City promptly reduce their rates *pari passu* with any reduction of the charge at Omaha.[1] There is no bed rock below which rates cannot go. The Omaha railroads as well as the government are powerless in face of the situation.

May power to fix minimum rates, so necessary to an adequate program of control, be constitutionally delegated by Congress? The question has never been squarely presented to the Supreme Court.[2] But the language in many cases has been such as to indicate that maximum rates alone may be lawfully established. Is the reïteration of the word "maximum" intentional? Or may it be that the judicial mind has never yet contemplated the need of regulating the minimum rate? Surely it seems an anomaly that the government should ever seek to fix such a lower limit, below which compensation may not be had. And yet many cases show that this is absolutely necessary to the end that justice may be done. Or may the unconstitutionality of fixing minimum rates depend upon the fact that, if thus prescribed along with maximum rates, it will amount, practically, to determination of the absolute rate—the bogey which the carriers seem most of all to hold in dread? Interesting and inviting possibilities of judicial interpretation are indeed suggested along this line, were there opportunity to pursue them further.

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[1] *Cf.* the Fort Worth case, decided June 6, 1911; also the Eau Claire case, 5 I. C. C. Rep. 264. The latest case in which the commission has held that it has power to suspend a proposed reduction in rates arises from just such a condition of affairs; *cf.* 22 I. C. C. Rep. 160.

[2] I am indebted to Professor Smalley of Ann Arbor, certainly the best authority among economists, for many citations on this point; as well as to Professor F. H. Dixon for suggestions. *Cf.* also 21 I. C. C. Rep. 415; Annual Report I. C. C., 1911, p. 34; and the Commerce Court opinion under discussion. Commissioner Harlan, in his dissent in the Shreveport case, asserts a clearer right over minimum than over maximum rates as against state authority; 23 I. C. C. Rep. 54.

RECENT TAX REFORMS ABROAD

NOTHING, perhaps, in the history of taxation is more striking than the appearance of successive waves of reform. Between 1893 and 1895 there occurred movements of this character, which culminated at almost the same time in various countries, some of them widely separated from each other. A decade and a half later came another reform movement, which affected some of the same countries and which, although in some respects proceeding still further on the old lines, yet in other ways struck out in a new direction. The years 1909 and 1910 are marked by significant changes in the fiscal systems of Great Britain, Germany and Australia. It is the purpose of this series of articles to consider the real significance of these reforms, and to ascertain what lessons can be derived from them for the United States.

I. *Great Britain*

The first place in the history of the reform movement is occupied by Great Britain in the famous Lloyd George budget. This, while making in some respects a new departure in fiscal policy, is nevertheless to be considered in the main as a logical development of a movement initiated some time ago.

The agitation for augmented revenues in Great Britain has been precipitated, as is well known, by the great increase in expenditures, due partly to the prodigious addition to the naval estimates and partly to the new social legislation on old-age pensions and national insurance. Moreover, it is everywhere conceded that England is on the brink of still greater expenditures. For while it may indeed be expected that the mad race for increased naval armaments will before long reach its term, it is not unlikely that the insurance schemes constitute only the first of a series that will call for increasingly vast outlays. Even if England should adopt the policy of so-called tariff reform, it is improbable that the whole or even the greater part of its increased expenditure will be met by import duties.