THE FOURTH SECTION, OR THE LONG AND SHORT HAUL


The United States Commerce Court, in granting a permanent injunction against the Interstate Commerce Commission in the important Intermountain Rate Cases, has probably rendered the most significant decision up to the present moment dealing with the Fourth Section of the Act to Regulate Commerce, governing long and short haul rates of west-bound trans-continental traffic. This decision may be regarded as a hard blow to the commission's power to make sweeping reductions in the form of general blanket railroad rates extending over the entire country, affecting practically all the railroads, and applying to nearly all articles in interstate commerce. The upsetting of the commission's orders by the Commerce Court may prove to be a hindrance, producing annoyance and a feeling of uncertainty in commercial affairs, rather than a solution of complex railroad questions.

The orders of the commission have always been accepted by the public as just and equitable, and steadily brought forth a sentiment of confidence in the Interstate Commerce Commission that is uncommon with other courts which lacked the faculty of penetrating the intricacy of legal traffic questions and deciding them in a manner capable of being understood without the aid of a legal mind to explain their meaning. For this reason, the general public has great confidence in the Interstate Commerce Commission, and even the railroads which have suffered by adverse rulings have praised the intellectual efforts of that body as freely as the shippers who were benefitted by the decisions; also, when the decisions were adverse to the shippers, the impartiality of the commission has been admitted.

To reach a clear understanding of the west-bound trans-continental rate questions and the situation to which the orders applied, it is necessary to refer to the period when the discovery of gold first brought California into prominence, when the only means by which freight could practically be transported to that new country from the territory east of the Rocky Mountains was by clipper ships sailing around Cape Horn to the Golden Gate.
which route continued to be the usual and ordinary course of transportation. Later, the first trans-continental railroad was built to San Francisco, then a great thriving community, dependent largely upon the East for its manufactures and food supplies to be brought entirely by this water route. Naturally the first task of the trans-continental lines was to wrench traffic from the water carriers, who compelled the railroad to take traffic from the Atlantic Seaboard at a rate not necessarily as low, but one in the entire as favorable as the shippers could obtain from the water carriers, whose low rates completely governed traffic conditions from the eastern territory to San Francisco. The City of New York was the port of departure for this water-borne traffic upon the Atlantic around Cape Horn, and later by the Panama route, in which the Panama Railroad from Panama across the Isthmus to Colon became a great factor, thence by ships to San Francisco on the Pacific Coast. The next advance in these water routes was effected by the establishment of a line of steamships which plied between New York and San Francisco through the Straits of Magellan and surpassed the old style sailing vessel. Freight could then be carried in larger quantities and time was reduced to a period of sixty to ninety days from New York to the Pacific Coast. The last route to be opened was that via the Tehauntepec Railroad, which is owned and operated by the Mexican Government across the lower extremity of Mexico for a distance of one hundred and eighty miles. By this route, traffic is taken from New York to Coatzacoalcos, thence by rail to Salina Cruz, and thence by water to San Francisco. This is, to-day, the favorite water route, over which large quantities of traffic are actually moved, and will continue such until the opening of the great Panama Canal, and when this waterway is open for business, both rates and facilities will be much better than at present. By all these water routes, the rate has always been somewhat lower per hundred pounds than the rail trans-continental rate, for the water transportation has limited the rate obtainable by the carriers between New York and Pacific Coast terminals.

As manufacturing developed, similar enterprises familiar to the eastern country were located in the middle West, east of the Missouri River, and a demand for rail rates was made which would give the interior manufacturers an opportunity to compete in the markets of the Pacific Coast. The same articles produced at Chicago, as in New York City, to reach San Francisco by water
must first be transported by railroad to New York and thence taken aboard by a steamship company. Consequently, the cost of carriage was greater from Chicago than from New York, and therefore higher to San Francisco on account of the interior railroad rate to New York. It would follow that, as the distance from the Atlantic Coast increases, the cost of carriage by water also increases, and the direct effect of water competition decreases. The water rate is not a regular and permanent rate, but rather fluctuates from day to day and season to season, while the rates of the trans-continental lines depend upon whether it is the purpose to handle much or little of the business. A rate of one dollar per one hundred pounds will carry little of the commodity; eighty-five cents per one hundred pounds will carry some of it; seventy cents per one hundred pounds may drive the steamships out of business.

The real complaint before the commission was directed towards the alleged discrimination against the City of Spokane, Reno, and other interior cities, by the rail lines, which resulted from the fact that the railroads charged from the eastern points of origin to Seattle, Portland, San Francisco, and other Pacific terminals lower rates than were applied at Spokane and Reno, although the traffic moved through Spokane and Reno to reach these farther distant points.

This City of Spokane is located about four hundred miles east of the Pacific Ocean in the midst of a region rich in agricultural and mineral resources. Between it and the coast lies the Cascade Range of mountains. Spokane being the principal city east of the mountains, it aims to distribute to the country which surrounds it, in which attempts it meets severe competition from Seattle, Tacoma and Portland. Traffic is handled by the great trunk lines, the Northern Pacific and the Great Northern, from eastern points of origin to the Pacific Coast cities, which passes through Spokane and over the Cascade Range. Notwithstanding this the rates to Spokane from St. Paul and the Missouri River are much higher than rates from the same points to Seattle, Tacoma and Portland. Merchandise shipped from the territory east of the mountains can be hauled through the city of Spokane, across the mountains to Seattle and from Seattle back over the mountains a second time at a less transportation charge than it can be transported to Spokane and then distributed to that territory. It is a manifest economic waste to haul traffic over the Cascade Mountains and back again. The interest of the public and the carriers as much require that
the business should stop at Spokane instead of going on to Seattle as that it should originate in the middle West instead of upon the Atlantic Seaboard. Spokane insists that if the carriers give to Seattle the right to buy in both New York and Chicago when its location entitles it to buy in New York alone, they should give to Spokane, which is nearer by four hundred miles, the right to buy in New York and Chicago. New York argues that if Chicago is given an opportunity to sell in Seattle, then New York shall be given an opportunity to sell in Spokane. Or the same blanket rate which is applied on the East should be applied on the West. Many actual examples of shipments were presented to the commission, one example of which was a carload of books originating at Chicago. The Northern Pacific received for its haul from St. Paul to Spokane, a distance of 1,500 miles, $855.65. Had the same car gone to Seattle, involving an additional haul of one-fourth of the distance over the most expensive part of the entire route, the receipts of the Northern Pacific would have been $500.35.

The commission ascertains that in this competition there is a proper market competition, that Chicago, with all its political and financial strength, demands that it shall be accorded the same right to sell in San Francisco which its rival New York has. Its argument is this: If this traffic moves by rail from New York it passes through Chicago, and is hauled 1,000 miles farther than in case it originated at Chicago. If it originates at Chicago there is eliminated from the service the useless waste of energy involved in transporting the business for the first 1,000 miles. Therefore, if this traffic is to move by rail such a rate should be made as will move it from Chicago and not from New York.

The carriers are best gratified to have all traffic business originate at the nearest point to eliminate useless transportation expense. Chicago should be allowed to sell in San Francisco and the interests of San Francisco should be allowed to purchase in both Chicago and New York. The haul is shorter from Chicago and intermediate points and less expensive. Logically, it would seem that the trans-continental lines from the middle West would make rates favorable from these points for their own interests. Distribution is easier and the revenue from traffic created at these points belongs entirely to the line itself.

It is said that the amount of the movement by water is so insignificant that it should be disregarded. To show that such is not
insignificant the commission had the manifest of two ships from New York to San Francisco in both hearings of the Spokane Case. These showed in detail the articles transported, the point where they originated, the destination for which they were intended and the rate of the movement. In both these transactions, it was conclusively proven that the transportation moved as ordinary commerce between New York and San Francisco by water at rates materially lower than transported by rail carriers. San Francisco was used as a destination port upon the Pacific Coast, and in some instances the rates to San Francisco are a trifle lower than to the other coast cities; although, generally speaking, the San Francisco rate is mentioned at Los Angeles, Portland, Seattle and Tacoma, and other points of the coast. As a result, this active competition between New York and San Francisco between the Atlantic and Pacific Coasts limits the rate of transportation which can be charged for the same articles between the same points by the railroad carriers.

It is for the interest of the rail lines which begin at Chicago to apply a lower rate from Chicago than applied from New York, but it is a reality that carriers maintain the same trans-continental rate from Chicago as from New York by reason of the indirect result of water competition. By this method there must be a proportional division of the transportation charges on traffic brought from New York. To best comprehend the reason, assume that a building requiring a large amount of structural steel is to be erected in San Francisco. All such structural steel is manufactured at Chicago and on the Atlantic Seaboard. The cost of production is the same at both points. That which is produced at the Atlantic Seaboard can be transported by water from the point of origin to San Francisco, thus the rate is determined by the water competition. The seaboard manufacturers of steel seek to compete with the Chicago producers in the San Francisco market on an equal basis, therefore it is necessary the rate from both points must be the same, and business cannot move from Chicago unless the rate from that point is as low as from the seaboard points. If the steel is bought in Chicago and is transported by the Atchison, Topeka and Santa Fe Railway, which line begins at Chicago and ends at San Francisco, the entire freight money is retained by this line; upon the other hand, if the steel is bought in New York and moved by Pennsylvania Railroad or other line to Chicago and there delivered to the Atchison, Topeka & Santa
Fe Railway, this line receives a division of the transportation charges. The service performed by the line from Chicago is the same in either case, but the compensation is larger when the freight originates at Chicago, therefore it is for the interest of the Atchison, Topeka and Santa Fe Railway to establish a rate from Chicago which will originate the business in that city instead of allowing it to originate upon the Atlantic Seaboard. The railroad from New York to Chicago urges the business to begin at New York, and as a compromise it is finally agreed to apply the same rate from both points. Almost any other article of commerce would be similar to steel moving between the East and the West. The water rate being determined in competition to the seaboard points does actually dictate the rate for the interior points.

In recent years, nearly every kind of manufacture on the Atlantic Seaboard is produced in the middle West territory north of the Potomac and Ohio Rivers and as far west as the Missouri River. The intermountain country is mostly supplied from the intermediate points, which are made almost the exclusive market of origin by policy of the railroad, striving for best individual interests in the market competition. As a result, these contending forces have applied rates upon a particular article from New York to San Francisco of $1 per 100 pounds and applying the $1 rate from Omaha to San Francisco, about 1,500 miles west of New York, and sometimes applying the same $1 rate from Denver to San Francisco, approximately 2,000 miles west of New York. With the great development in the intermountain country, the railroads have continually improved facilities, thereby reducing operating expenses, and increasing the revenue. Today the western railroads are comparatively as strong as those found in the entire country. The Union Pacific, extending for a thousand miles from Omaha to Ogden, is double tracked for a considerable portion of the distance. The Southern Pacific has arranged for the double tracking of its entire line from Ogden to San Francisco. The Northern Pacific has long stretches of double track between St. Paul and Tacoma and in the near future will become a completely double-tracked railroad. All these improvements are made to secure a large proportion of transcontinental traffic.

Competition seems very active at the present time. Independent lines have been established on the Pacific Coast. The Panama
Railroad has become an actual competitor for traffic. The American-Hawaiian Line in competition has reduced its transportation charges. New lines of steamships have been established from New Orleans to San Francisco, actually carrying consignments of lumber for 45 cents per 100 pounds, and shipments of lumber were moved from Memphis to San Francisco at 55 cents per 100 pounds, as against the present 75 cent trans-continental rate. The carriers have met this competitive situation by establishing from the Atlantic Seaboard to Pacific Coast ports a series of commodity rates. There class rates may be disregarded, since no traffic actually moves under them, the business being handled under some 1,300 commodity items, said to be so adjusted as to best meet this water competitive situation. These rates to Pacific Coast terminals are made applicable not only from the Atlantic Seaboard where water competition exists, but from territory as far west as the Missouri River and even Colorado; that is, the same rate to Pacific Coast terminals is made from Colorado common points and all territory east, thus creating a blanket some 2,000 miles in width.

The reputed trans-continental territory extends from Maine to the coast of California in the West, and blanket rates are practically the same upon all classes and commodities to the Pacific Coast terminals. The Pacific Coast terminal includes specifically the cities of Seattle, Portland, Astoria, Tacoma, San Francisco, Los Angeles and San Diego. All these points are located at harbors where steamships and sailing vessels engaged in inter-oceanic traffic touch except Los Angeles, which is connected with San Pedro by a municipal railroad, which city by circumstances has been made a “terminal point.” The American-Hawaiian Steamship Line stops at San Diego, but does not stop at San Pedro, but, by arrangement, the Santa Fe Railroad extends to this and other steamship lines, and a schedule of class rates for San Diego to Los Angeles is approximately the same as that in force over the San Pedro line from San Pedro to Los Angeles. San Jose is located ten or twelve miles from the San Francisco Bay, and can be reached by water, but being on the main line of the Santa Fe Railroad, it receives a very low rate per ton of freight from San Francisco. This city and all others in the neighborhood of San Francisco obtain, by reason of railroad and water competition, the same rates as San Francisco.

Transcontinental rates were unknown in the early days of the Union Pacific and Central Pacific Railroads, and shipments took
THE FOURTH SECTION

a rate made up of the combination of locals. The Central Pacific was constructed to transport traffic from the coast to interior points across the Sierra Nevada Mountains in competition with the slow mule-team trains that supplied the rich mining towns. By this railroad the ocean freight landed at San Francisco was distributed in ordinary time. When through transcontinental rates were first introduced, traffic was handled under the contract system, entered into by the individual shippers and railroads for all traffic by the year to exclude the ocean carriers, for which preferential agreement the carriers tendered a rebate. Severe competition opened between the railroads and ocean carriers for supremacy, and the carriers showed a determination to destroy water competition by making various rates to shippers as high or low as the traffic would bear, without regularity. During these years of competition between ocean and rail lines, class rates to Pacific Coast terminals increased with the distance, and commodity rates scaled up from the seaboard, while the class rates scaled downward, making a constant higher class rate from New York than from Chicago, but often a lower commodity rate from New York than from Chicago.

The Panama route which had been opened and operated for expediting transportation since the rush to California for gold, was under the control of the Pacific Mail Steamship Company. This company was subsidized by the Union and Southern Pacific Railroads, so that from 1871 to 1893 the Panama offered no serious competition to railroads. The Southern Pacific Railroad obtained control of the Pacific Mail Steamship Company about 1900 and took care of water competition so well that clipper ships were practically destroyed, placing transcontinental lines in the control of the ocean and inland transportation. The Southern Pacific established the Sunset-Gulf Route, which carried about 75 per cent of traffic between the Gulf and the Atlantic Seaboard. During these days, "all sorts of rates could be had, and all sorts of tariffs could be found."

The factor of time seems to have been a great consideration in transporting freight, and for this economy of time the merchants preferred the steamship service to the original clipper ships. Then time was shortened by the steamships trans-shipping by railroad for a part of the distance across lower Mexico. In the meantime the railroads had reduced the time of transportation from the Atlantic Seaboard to San Francisco to twenty-five days, giving
a service never before equalled by ocean carriers, and much to the liking of shippers. Charges were nearly the same, and the result of rail and ocean competition was that railroad carriers secured nearly the entire tonnage by manipulation. These trans-continental lines are not entirely at liberty to disregard the ocean, although ship lines have been bought, subsidized or controlled by the railroad companies in the struggle for supremacy, yet there constantly exists a possibility of steamship lines being organized, which seems to hold the railroads in check. In this mode of shipment, the railroads will soon face another factor of water competition of far more vital importance and interest than any agent in the history of transportation. The cutting of the Panama Canal will materially reduce the time in transporting freight by steamship from New York to San Francisco to a limit of time of twelve or fourteen days. This new feature in water transportation may again produce a rate war between the giants of commerce, with beneficial results to shippers in general, by the establishment of astoundingly low rates never conceived by the visionary traffic managers.

The commission finds then with the first tariffs that were filed with the commission a $3 first class rate from New York to San Francisco, a lower rate obtaining from Pittsburg, a still lower rate from Cincinnati, and so by steps to the Missouri River. These graded rates remained in effect until 1889, when we find the first evidence of the institution of a great eastern blanket of class rates. This was at first not formally recognized in the tariffs, but was effected by eastern carriers through a system of rebates from the published rates. Things appear to have gone peacefully for the next few years. The only serious competition which the railroads met by water was that of the Southern-Pacific-Sunset line from New York, which apparently applied from the New York piers whatever the all-rail rates were from Chicago. These were paper rates and it is impossible to ascertain what the actual rates were at this time. These paper rates having subdued ocean competition, then an increase of rates was gradually forced on transcontinental traffic by the carriers. But the railroads soon reduced these increased rates to an absurdly low mark to drive out a new steamship line organized by merchants of San Francisco who, in turn, suffered heavily and soon desisted to transact business in competition with the railroads.

The blanket system of rates was established in 1898 by agreement between the eastern and western carriers to attract shippers,
and included all points from the Atlantic Seaboard to the Missouri River. In recent years these blankets to the Pacific Coast territories have been slightly changed by carriers until now they include two-thirds of the country westward or extending from Portland, Maine, to Denver, Colorado. The railroad policy for these apparently artificial rate adjustments may be based on sound railroad reasoning calculated to protect self-interest, but it surely does not appear logical and justifiable, or satisfactory to shippers and merchants located at intermediate points. If these artificial conditions continue, rate wars may be prevented indefinitely unless some reactionary carrier regards itself oppressed and breaks agreement. It will be noticed that railroads assert that rates from coast to coast are forced by water competition, and to justify the same rates from interior points to coast points they rely on market competition, although the effect of water competition both from Atlantic Seaboard cities and from the interior points upon rates to the Pacific Coast was fully recognized by the commission, yet the railroad managers admit that they have done everything possible by purchase, subsidizing and terrorizing steamship lines until the oceans appear neutralized for the present.

It is the intent of Congress that territories must be treated fairly by the carrier in relation to one another. The old policy of carriers to show preference to certain locations for geographical reasons, or desire to develop one locality and retard another and nearer point, does not appear to be based on principles of equity. The power of the commission to permit exceptions to the prohibitory clause of the section can hardly be adjudged an arbitrary exercise in special cases where exceptions could be made to appear within legal bounds, also in instances of carriers seeking the exception they must affirmatively show that no injustice will be done to any intermediate points by making lower rates to the further points.

The commission believes that the meaning of the law is to prohibit the higher rate for the shorter haul and such prohibition to be a rule of initial application by railroads, for which the commission may designate only in special cases where the transportation circumstances are beyond the carrier's control. It will be necessary for the carrier to clearly establish before the commission the actual necessity to prefer the distant point and that, compelled by the imperative law of competition, it does not violate the law by discriminating against the intermediate point, which discrimina-
tion should not be such as to offend the reasonable standards of the law, for a limitation should be set by the commission, who may at intervals prescribe the extent to which such common carrier may be entirely relieved from the operation of this section. To obtain this exception the carrier must come forward and substantiate a clear title instead of the complaining shipper establishing beyond a doubt an injustice of undue discrimination, thus reducing to a minimum the discrimination in rate between controverted points. The approximate result of the change in the statute manifests an inclination toward harmony between communities, individuals and carriers, and frustrates oppression and injustice; and lodges with the commission, if Congress means anything, all the power to pass in judgment upon the effect of railroad policy which defaults from the intention of the law.

To the observer it would appear as conclusive that the undue and unreasonable discriminations are brought to a certain termination. The old section was regarded by Congress as inadequate and the moment had come to cast it aside and substitute another section to meet prevailing conditions. This new section places the burden upon the carrier to establish its right to an exception from the general rule set down that the shorter haul shall not be charged the higher rate. Under the old section, the carrier possessed the right, without any previous action of the commission, to charge more for a shorter than a longer haul if the circumstances and conditions of the two hauls were substantially dissimilar. As it then stood, the Fourth Section afforded no relief for those who complained of the smaller charge for the longer distance, unless the complaining party should file a petition before the Interstate Commerce Commission and should obtain an order affirmatively declaring that the circumstances and conditions of the longer haul were not substantially dissimilar from those of the shorter haul. In consideration of the new Fourth Section, Congress seems to have become concerned that somehow the carrier was availing itself of the power of initiation by practically admitting all prohibition as to the greater charge for the shorter distance. Under the lamentation of the public as to unjust discrimination by carriers, Congress became assured there existed a great evil which necessitated destruction, believing that the courts have actually destroyed its life by the construction they placed upon it. By the adoption of this new Fourth Section, Congress has undertaken to specify distinctly the one practice which it
especially desires to destroy, and imposes upon the commission a restriction not to permit a greater charge for shorter haul unless such discrimination, preference, or practice can be shown not to be a discrimination that is unjust, a preference that is undue, or, a practice that is unreasonable, because of peculiar facts and conditions.

This new Fourth Section exhibits no difference of intent from the section reported by Senator Cullum to the Senate twenty-five years ago when Congress was declaring against the injustice of unjust discrimination by railroads. Returning to the adoption of the Act to Regulate Commerce, it will be noted that the House adopted an inflexible rule on the subject forbidding absolutely the greater charge for the short haul, while the Senate adopted the view that the rule should be subject to exceptions whenever conditions and circumstances should be such as to demand it. These divergent views between the House and Senate were sent to a conference committee and the result was that the section passed that the rule should be subject to exceptions required by any substantial dissimilarity of circumstances and conditions. When Congress determined to strengthen the long and short haul section in 1910, Mr. Hardy, of Texas, presented an amendment the effect of which was to make the Fourth Section more rigid and absolute by striking out all proviso and make a rule inflexible by positively forbidding the greater charge for the shorter haul. This appears to avoid discrimination by giving preference to location and places upon the carrier the burden to justify a condition when the charge for the short haul over the same line shall not be undue preference or unjust discrimination.

Here is the Fourth Section as originally enacted and no change was made until June 18th, 1910, when Congress amended it by striking out the words, “Under substantially similar circumstances and conditions,” as marked in heavy type:

“That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission
appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The Fourth Section prohibits, in general terms, the charging of more for the short than for the long haul, but provides that the commission may, upon application to it, relieve carriers from the obligation of this section by permitting the higher rate at the immediate point. If this language were to be taken at its face value, the commission would be invested with the arbitrary power of granting such relief in one case and denying it in another, although the two cases were practically identical. The commission has held, however, that it was not the intent of Congress to attempt to confer such arbitrary jurisdiction upon this commission, but that it must act, in passing upon these Fourth-Section applications in view of the other sections and provisions of the act to regulate commerce. And it is the duty of the commission to inquire with respect to each application whether, if the carrier is allowed to make the higher charge at the immediate point, it will result in rates which are unreasonable or unduly discriminatory.

The section also authorizes the commission to prescribe the extent to which the carrier may be relieved from the rule of the section. The commission understands this to mean that if it reaches the conclusion that some higher charge might properly be imposed at the intermediate point, but that the present discrimination is too great, then it may fix the extent to which the rate at the short-distance point may exceed that at the long-distance point.

The Commerce Court deduces from decisions the rule that where competition exists at the longer distance point the rate to that point cannot be made the measure of a rate to the intermediate point. But it is obvious that a compelled rate, to the extent that it is not voluntary, cannot with justice be made the measure of a reasonable rate. Wherever the rate to the long-distance point is fixed and beyond the control of the applicant, the commission does not require the applicant to observe any relation between the long-distance and the intermediate rate; it has simply inquired whether the intermediate rate is reasonable; for example, it sometimes happens, that a State commission names a rate
between two points within a State. A circuitous interstate line desires to meet this rate. Under these circumstances the commission recognizes the State rate as fixed, and if it finds that the other route is circuitous and that its intermediate rates are reasonable, it permits the long line to meet the State rate without reference to its intermediate rates. If the State commission were to advance or to reduce its rate the interstate line might vary its own tariff between those points without any charge whatever at the intermediate point.

Passenger tariffs are generally constructed upon a mileage basis. We have uniformly recognized the short line as the rate-making factor and have permitted the circuitous line to meet the rate of the short line without any reference to its intermediate points so long as the fare to those points was properly constructed. So, again, where a freight rate upon a particular commodity is made by a short interstate line we have permitted its circuitous competitor to meet the short-line rate without reference to its intermediate territory, provided it was clear that the short line did make the rate, that the long line simply met that rate, and that its intermediate rates were apparently upon a proper basis. If the short line were in the future to reduce that rate, the long line is allowed by the terms of our orders to meet that reduction without a corresponding reduction at intermediate territory.

The commission refers to these illustrations for the purpose of making it perfectly plain that it has recognized from the first the injustice of making a rate over which the carrier has no control, whatever the measure of its other rates, whether they be intermediate rates or whether they be upon other parts of its system. It has established a relation between these Pacific Coast terminal rates and corresponding rates to interior territory because neither the terminal rate nor the interior rate is fixed by causes over which the carrier has no control, but both are, within certain limits, voluntary.

The carriers themselves in making their transcontinental rates have divided the United States into five territorial zones or groups. In dealing with this situation, the commission also divide the country into five geographical zones, saying that from no point in Zone 1 should a higher rate be made to an intermediate point than to the Pacific Coast terminals; than from Zone 2 the intermediate rate might exceed the terminal rate by 7 per cent; from Zone 3, by 15 per cent; and from Zone 4 by 25 per cent. No opinion was expressed at the time as to the rate from Zone 5.
Zone No. 1 comprises all that portion of the United States lying west of a line called line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of transcontinental group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of line No. 1 and west of a line called line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Macinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of transcontinental group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of transcontinental group C; thence follows the east boundary of group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of line No. 2 and north of the south boundary of transcontinental group C, and west of line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va.; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of line No. 3 and north of the south boundary of transcontinental group C.

Zone No. 5 embraces all territory south and east of transcontinental group C.

The Commerce Court agrees with the Commission that the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910, is constitutional. It also agrees that the first proviso of the Fourth Section is to be literally construed and if, under such construction, no limit has been imposed upon and no standard given to guide the exercise of the commission's discretion in granting authority to depart from the rule forbidding a lesser rate for the longer than the shorter haul in the same direction and over the same line, the proviso would be unconstitutional as an unlawful delegation of legislative power. And if the proviso were for this reason illegal, the entire section would thereby be
nullified, inasmuch as both the context and the history of the act demonstrated that the proviso is an integral part of the section and that a hard and fast rule, absolutely prohibiting such a lesser rate would not have been enacted. And it is further agreed that it is the right and duty of the commission to examine and approve, or disapprove, each application by a carrier to charge more for a shorter than for a longer haul for the purpose of ascertaining whether there are competitive conditions at the more distant point which do not exist at the intermediate point. The original Fourth Section was construed to give the right to carriers to establish a less rate for the long haul with application to the commission, although they frequently applied to the commission for authority to make such a rate. After such construction, the carriers often abused this privilege by making the longer haul rate less than that for the shorter haul under substantially similar conditions and circumstances. This abuse was one of the prime causes that led to the amendment of the section, whereby the clause "under substantially similar circumstances and conditions" was eliminated, compelling the carrier to make application to the commission to continue the practice. If an original complaint charged the violation of both the Third and Fourth Sections, Section 3 was considered not violated by making a lesser charge for the longer haul than for the shorter haul if the longer haul was forced by competition and was not unremunerative. So that the construction of Section 3 is not changed by the amendment to the Fourth Section.

The Commerce Court held that the orders of the commission do not establish absolute rates for either the long or short haul, or prescribe the extent in dollars and cents that the short haul may exceed some definitely fixed long haul rate, but establishes a relation between any long haul rate that the carrier may put into effect and the short haul determining that Zone 1, the western short haul rate, shall exceed the long haul rate, and that from Zones 2, 3 and 4, the short haul shall not exceed the long haul rate by more than 7, 15, and 25 per cent, respectively. These orders were determined by the commission on the fact that the Pacific Coast rates from some sections of the eastern territory were forced by water competition, while the rates from other sections were forced by market competition; as the New York-Seattle rate was based by the railroads on the ocean competition and the rate was granted from St. Paul to Seattle to enable St. Paul to
compete with New York in the Seattle market. The commission's order is not based upon the current coast rates, but it determines the relation of the short haul rates to any coast rates that might be established by the carriers. It makes illegal a rate from Chicago to Spokane more than 7 per cent higher than an unreasonably low but remunerative Chicago-Seattle rate forced by competition, even though the Chicago-Spokane rate, be reasonable per se, and not in violation of any portion of the act. It also declares that the practical effect of the commission's order is either to compel a blanket rate from the entire East to the entire West, or to prevent the carriers from obtaining all the business which they now secure without loss by making rates which enable merchants to meet market competition. For example, if the forced New York-Seattle rate is $1.00, the St. Paul-Seattle rate cannot be made higher by the St. Paul carrier unless it gives up the benefit of business which market competition at Seattle might bring to it. As long as it charges no one else an unreasonable rate, and as long as it does not carry to coast, it is entitled to grant St. Paul the market competitive rate of $1.00. Under the commissioner's order, the carriers' rate to Spokane in that event could not exceed $1.00, while the New York carrier could charge $1.25. The latter would also have the right to enable New York to meet St. Paul competition in Spokane. To do this, it would have to reduce the New York-Spokane rate to $1.00. The result would be either to compel a blanket rate from all points east of St. Paul or to force the carriers to give up some business which could be carried without loss to themselves or, it may be, to others. The order does not secure to Spokane a market competition over St. Paul and New York, since it empowers the railroads to charge a higher rate from New York, which might exclude New York from the Spokane market. Spokane and other interior points would then be placed on an equality with Seattle and other Pacific Coast points, the former located 400 miles in the interior from the coast.

The Commerce Court says that assuming that the Fourth Section is valid, the orders of the commission extend far beyond the power conferred to it; that the authority assumed by the commission here is not implied from the right to prescribe the extent to which, from time to time, the carrier may be relieved, in the words of the statute, but this authority, given by the proviso, is upon the application of the carrier in "special cases," after inves-
investigation to permit the charging of less for longer than for shorter distances, the commission having the right from time to time to prescribe the extent to which the carrier may be relieved from the absolute prohibition against this, which is otherwise imposed upon it. Also, there must be set up and made out in such instance of the application by the carrier a special case, entitling the carrier to relief, which determines the limits of the commission's authority then to investigate and approve the application if the case warrants such, otherwise to refuse it. The Commission cannot proceed if it does not approve and make rates, or lay down rules by which they shall be made, upon its own initiative, as the carrier in making application for approval, does not submit or subject itself to any such exaction.

In the concurring opinion, Judge Archbald held that by "No device can the whole United States be made a 'special case;' nor can the commission, upon any just conception of its powers, lay down a hard and fast rule which shall apply to every long and short haul case wherever originating, or whatever its destination from east to west across the country." The establishment of zones with varying percentages entirely disregards the right of the carriers to have considered what, in each instance, is a reasonable rate between points involved, and overrides the right of carriers to make a less than reasonable rate to and from competitive points from whatever cause competition arises, and, lastly, it is an attempt to overcome the advantages possessed by coast over inland cities in the face of what nature has provided. For all these reasons, the Commerce Court declares that the orders of the Commission are clearly invalid.

The idea dwelt upon by the Commerce Court, and apparently controlling in its decision, seems to be that so long as the rate at the intermediate point is reasonable, it is a matter of indifference to that locality what rate may be made to the more distant point. This utterly ignores the fact that the railroad is a public servant, owing a common duty to both the long distance and the intermediate point, and that no rate to the intermediate point can be reasonable so long as the carrier is maintaining at the more distant point a lower rate, except in so far as that lower rate is compelled by causes which the carrier does not control. If the carrier by its voluntary act maintains the lower charge to the more distant point, that in and of itself makes the higher charge at the intermediate point unreasonable.
In the opinion of the Commerce Court, if the commission finds competitive conditions at the more distant point which do not obtain at the intermediate point, it must grant the relief, and can only inquire whether the intermediate rate is reasonable. The commission believes it must go further, and must inquire, not only whether competitive conditions do exist at the more distant point, but also whether those conditions justify the discrimination against the intermediate point evidenced by the rates in force. If it finds that those competitive conditions do exist, but do not justify a discrimination of the degree now in force, then it is the duty of the commission to prescribe the extent to which the discrimination may go, if at all.

It cannot be denied that each locality is entitled to its natural advantages. San Francisco and Seattle are situated on the ocean. If they can obtain freight by water by reason of their geographical location, this is a natural advantage which the railroads have a right to recognize as compared with Reno and Spokane. These coast cities are entitled to their freight rate which the water would give them if no railroad existed, but they are not entitled to a rail rate 25 per cent lower. The commission contends that the railroads must not give the coast cities an additional artificial advantage. No other carriers in this country enjoy such long hauls upon so great a volume of high class traffic as do these trans-continental railroads. This is evidenced by fine earnings, as well as credited to the competency of their fine management. If the policy that a railroad should charge what the traffic will bear is the criterion for railroad rates, no exception can be taken to the present transcontinental situation, for it is masterfully designed to secure a maximum of revenue and yet develop such industries and benefit such communities as the railroad in its wisdom may wish to promote and thrive for the growth of the Pacific Coast community.

By market competition, Kansas City and Denver are given access to San Francisco, or Seattle at certain freight rates. The commission contends that Reno and Spokane should be given an equal rate. The former scale is not the result of compulsion, but they are the voluntary rates made according to railroad policy to give these cities access to coast markets. The assertion that there is a long and short haul section under which a carrier may not charge more for the shorter than for the longer haul, but that the railroads may to any extent they please carry out a policy of
THE FOURTH SECTION

blanketing the country for the benefit of the farther points, is a flagrant fiction in face of congressional legislation positively enacted to relieve the country of unjust discrimination practiced by carriers for selfish interest. In order for the carrier to obtain business which otherwise would not be obtainable, the policy of market competition is adopted to give lower rates for all interior cities two-thirds the distance across the country to these coast cities than to the interior points. If the Interstate Commerce Commission succeeds in convincing the Supreme Court of the United States that this sort of discrimination should not be tolerated, the shipping public will be protected from unjust preferences.

The wisdom of the new Commerce Court in exercising its powers by enjoining the orders of the Interstate Commerce Commission has unexpectedly received a severe rebuke by the Supreme Court of the United States in the opinion handed down by Justice Lamar concerning the Northwestern Lumber Cases. Just how much bearing this decision will have upon the consideration of the Fourth Section remains to be seen; nevertheless, it is significant that the orders in the Intermountain Cases will in all probability be sustained. The court has sharply defined the respective powers of the Interstate Commerce Commission and the Commerce Court and clarifies the situation upholding the absolute authority of the Interstate Commerce Commission in the fixing of railroad rates and other questions of fact by denying to the courts the right to set aside orders.

The Supreme Court's opinion in reversing the decree says, in part, that:

There has been no attempt to make an exhaustive statement of the principles involved, but in cases thus far decided it has been settled that the orders of the commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond the statutory power, or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order regular on its face may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law, or (5) that the commission acted so arbitrary and unjustly as to fix rates contrary to evidence or without evidence to support it, or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the sub-
stance and not the shadow determines the validity of the exercise of power.

In determining these mixed questions of law and fact, the courts confine itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency of wisdom of the order, or whether, with like testimony, it would have made a similar ruling. "The findings of the commission" are made by law *prima facie* true, and this court has ascribed to them the "strength due to the judgments of a tribunal appointed by law and informed by experience."

Its conclusions, of course, are subject to review, but when supported by evidence are accepted as final; not that its decision, involving as it does testimony and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to ascertain whether there was substantial evidence to sustain the order.

Considering the case as whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to the presumptions from the long continuance of the low rate when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the commission acted within its power and in view of the statute, its lawful orders cannot be enjoined.

The decision means that if the commission finds a certain railroad rate unreasonable and should fix another rate regarded as reasonable, such order, based upon substantial evidence and not shown as an attempt to establish a confiscatory rate, must be final. The courts are denied the right of an attempt to go back of the commission's finding or make investigation, but must hereafter confine its reviews to questions of law. The Commerce Court has the same power as a Circuit Court and may pass upon the commission's finding as to law. In effect the Supreme Court hold that the Interstate Commerce Commission is a jury whose verdict cannot be set aside. The Interstate Commerce Commission, not the Commerce Court, is the agent of Congress to enforce the interstate commerce laws.

The Act to Regulate Commerce explicitly declares that carriers cannot make unjust discriminatory rates between localities, and the carriers cannot be compelled to transport traffic at an unremunerative rate. All market competition must be given consideration, also, all manufacturers who have expended vast sums of money in developing large factories to produce articles intended for distribution in the markets of the Pacific Coast cities. The
cost of manufacture and market competition are calculated on
established low railroad rates for long haul, without which low
rate it would be impossible to continue business in the face of
ruinous consequences. Also, the rail lines may be deprived of
the use of its property by the decrease of manufactures. To
compel railroads to observe strictly a general rule laid down by
the Fourth Section may necessitate their abandonment of some
classes of freight in traffic competition. Can the proposition be
established that the destruction of traffic would be to deprive a
carrier of the beneficial use of its property. This market com-
petition is a sound principle of economics and is admitted by both
the Interstate Commerce Commission and the Supreme Court of
the United States, that in no instance where substantial competi-
tion exists, can railroad property be used except in recognition of,
and in obedience to, the law of competition, for the reason that
competition is stronger than any law that we can make. It is
also true that the use of a carrier's property, in accordance with
and in obedience to an irresistible law of economics, is right in
itself, and is in the interest of the public.

Every railroad should so arrange, or adjust its tariffs, that the
burden upon freight is made proportional on all its lines calculated
to obtain a profitable revenue. The vast improvements of rivers
and harbors by the expenditure of millions of public money
annually make competition more substantial and efficient; and
operates as a restriction on carriers by rail to foster traffic. The
carriers have a right to do business and a right to charge for each
service a reasonable compensation. The determination of the
reasonable compensation being based on the quantum meruit prin-
ciple, bearing in mind that such determination must not be unjust,
or preference or advantage must not be unreasonable; of course,
if circumstances so differ that the difference is in exact conformity
with the difference of circumstances, there would be no prefer-
ence. Fair and reasonable competition is a public benefit; exces-
sive and unreasonable competition is a public injury. That com-
petition should be regulated and not destroyed is a principle self-
evident and fundamental. The obligation of the people to every
railroad is to pay a just compensation for required services. The
obligation of every railroad is to render a safe, prompt, and proper
service for the compensation received. These obligations are
reciprocal and their enforcement is the completion of govern-
mental duty and power.

Washington, D. C.
Jay Newton Baker.