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# THE RISE OF THE INTERSTATE COMMERCE COMMISSION

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## THE RISE OF THE INTERSTATE COMMERCE COMMISSION\*

### I.

It is hardly necessary at this time to call special attention to the practical importance to every member of the community of the charges made by the railroads. To the vast majority these charges are an important part of the cost of their food; it is in the power of the great trunk lines, except where the law can restrain them, by an increase of rates to cause a famine as serious as would be caused by a complete failure of the crops. And to a great number of our people,—to the great farmers of the interior, to the ranch men of the plains, to the planters of the South, to the manufacturers of the seaboard, and to the millions of their employees who are dependent upon their prosperity,—railroad charges are of greater immediate importance. The railroads, if unrestrained by law, can prosper or can ruin them; they can build up a great and flourishing business, or they can turn an industrious city into a wilderness again. That power such as this should be the subject of legal restraint is inevitable; that the legal qualities and limitations of such restraint should be of the greatest interest to the profession and to the people at large is clear. From the earliest times some restraint has been exercised over such lines of industry as are of vital interest to

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the public. The protection of the weak against the actual physical violence of the strong is the fundamental function of government in the modern sense; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful.

## II.

At the time of the beginning of the railroads every inducement was held out by the authorities of the State to those who would devote their capital to construction of these highways. In the early charters the legislatures not only often permitted profits which to-day would seem incredible, but gave exclusive franchises to protect the proprietors in getting the returns expected. After some experience with this policy, however, the legislatures began to grow cautious about granting exclusive rights for railroad construction; for it was felt, in accordance with the theory of political economy then in vogue, that competition would protect the public in all contingencies. This policy of *laissez faire* had hardly been developed when it was discovered that not only did unrestricted railroad building produce wastes costly to all concerned, but that the inevitable end of all such competition was a combination of some sort, which would almost inevitably result in higher rates. There followed a period of legislative control by direct action, rates being drastically reduced by popular clamor; but it turned out that much of this legislation was so ill advised as to practically bring the business of transportation to a standstill. Not until what may be called our own time has it been discovered that although control was necessary it could be better exercised by commissions given jurisdiction to deal with particular problems upon general principles enounced by the legislature. Only recently, therefore, has it generally been appreciated that an administrative body with its elasticity of procedure can do more to protect the public than any judicial tribunal with its inherent limitation to private litigation.

The passing of the Act to Regulate Commerce by the Congress of 1887 marks the beginning of an epoch in the exercise of the power of the federal government over interstate commerce. Before that time the control of the conduct of commerce between the states granted to the nation under the constitution had been by legislation, taking effect directly by force of its provisions upon the matters within its scope. A fundamental change was

wrought by the establishment of a body of experts to effect the administration of a statute by deciding whether its general provisions were so applicable to particular facts as to call for action of the government. The constitution of the Interstate Commerce Commission in 1887 marks the beginning of federal regulation in this intimate way by delegated power of the businesses affected by a public interest subject to the jurisdiction of the national government. It had been worked out into practice in the state governments to a certain extent during the preceding decade; and there had been some experience with railroad commissions with powers over intrastate transportation. But as to interstate transportation it was doubtful on the decisions of the courts whether there was any duty resting upon the railroads to make their charges reasonable and equal to all shippers. At all events, if there were such duties in respect to interstate transportation it had become abundantly clear by 1887 that the cumbrous process of accidental suits by private parties constituted no real check to stop the railroads in extortionate charging, mitigated only by competition at junction points, and outright rebating, practiced openly to get business. Settling beyond question the law against such dereliction in the duties owed by the railroads to the public was requisite, but even more necessary was the establishing of a body specially charged with the enforcement of these rules of law.

In tracing the rise of commission control of railroad operations by the federal government one ought really to go back at least as far as the English Railway and Canal Traffic Acts beginning in 1854, and the railroad commission laws passed in many of the states beginning in 1867. Congress in framing this Act to Regulate Commerce in 1887 laid down in the first four sections certain general rules: first, that charges must be reasonable; second, that there should be no more discriminations between shippers; third, that there should be no undue preferences between localities; and fourth, that no less should be charged for a long haul than for a short haul included within it. The phraseology of these provisions was obviously in the language of some earlier provisions of existing statutes, and consequently the interpretation which the courts of those jurisdictions had already put upon the form of language used has, by a familiar canon of statutory construction, been held to be persuasive in later decisions of the courts interpreting the powers of the Commission under the Act. The limited extent of the scope

of the jurisdiction of the Commission established by the Act originally is to be noted. It extended only to carriers by railroad engaged in interstate and foreign commerce; it did not cover carriers by water unless operated under the control of a railroad; and even now it does not cover port to port business as such. And as to railroad service itself, the Act did not go far toward including services incidental to carriage by rail, which have since been found so necessarily involved with it as to make the supervision over them by the Commission provided in later amendments indispensable.

The original Act went no further than to give the Commission the power to investigate alleged violations of the Act and to make orders thereon; and jurisdiction was given to the courts to act in support of such orders. Generally speaking, there was no idea of giving the Commission anything but supervisory power over the railroads; the Commission was primarily established by the Congress as an investigating body. It did have powers, however, in addition to conducting general investigations, to hear particular complaints; but in respect to such complaints, it had no powers of its own to grant relief. The most that the Commission could do was to make findings on such complaints, and its report thereupon could be used as *prima facie* evidence in proceedings in the courts based upon the wrongs alleged. However, the railroads in these subsequent proceedings, which were virtually regarded as *de novo*, put in any evidence they had, and it was more or less of a scandal that the railroads showed very generally a disposition in important cases to withhold much of their evidence from the Commission and produce it before the courts, with the result that the courts would very frequently come to a different conclusion from that which the Commission had announced.

### III.

It was found from the very outset, that the Commission had not been given in this legislation of 1887 the equipment to carry out the objects for which it was created, moderate as these were in their purpose. The Commission was particularly charged with seeing whether rates were reasonable in themselves, and whether rebates were being given; but the carriers were not required to file their schedules of rates so that it could be known how matters stood, and what was being done. Moreover, although the duty to investigate conditions and report thereon was imposed upon

the Commission, its powers to call witnesses and elicit testimony were by no means sufficient for the purpose. The Amendments of 1889 and 1891 were, therefore, necessary to clear things up in these two respects, if the Commission was to have any real power to accomplish the objects for which it was created. In 1903 the so-called Elkins Act was passed to perfect the Act. In the first section carriers in interstate commerce are made criminally responsible for violations of the Act. In the second section provision is made for bringing into any proceeding before the Commission all carriers or other persons interested in the inquiry. In the third section jurisdiction is given to the courts sitting in equity, at the request of the Commission, to inquire into and enjoin any infraction of the provisions of the Act. These suits are prosecuted by the District Attorneys under order of the Attorney-General, and do not preclude suit by private persons. And provision has since been made for speedy trial by expediting such suits.

It seems to have been undoubtedly the intention of the framers of section 4, the long and short haul clause, to forbid absolutely the practice of charging more for a shorter haul, unless upon application to the Commission express permission so to charge was given. The section, however, was a matter of contention between the two houses of Congress, and as it was finally passed the qualifying phrase "under substantially similar circumstances and conditions" was inserted, without probably any very clear belief that the meaning of the section was thereby fundamentally altered. At first the railroads acted upon the supposition that express permission of the Commission must be obtained according to the proviso in the section, if a greater charge was to be made for the shorter haul, and this seemed to be the view at first taken by the courts. The philosophy of the Act was that competition would reduce the rates to a fair amount at all competitive points, and that the fourth section would then keep the rates at non-competitive points down to the level of the competitive rates. The courts, however, finally decided, in view of the limitation of the section to cases where the conditions were substantially similar, that competition with other carriers would justify a lower rate for the longer haul; and as practically all cases of the sort before the passage of the Act had been due to the competition of other carriers, this decision in effect nullified the whole section, until, as will be seen later, its force was restored in 1910 by amendment to the Act.

At the outset the Commission claimed that under the Act it had the power not merely to forbid an unreasonable rate, but also to indicate to any railroad what it would regard as a reasonable rate for any particular service, and that then the railroad disregarding such recommendation would be subject to the action of the courts. The lower federal courts, however, from the beginning denied this power to the Commission. The question did not reach the Supreme Court of the United States for ten years, but finally the issue was fairly presented. The Supreme Court of the United States, in deciding that the Commission had no power to fix rates, points out how fundamental was the distinction in administration between the power, judicial in its character, of finding unreasonable the rates being charged by the carrier as compared with the power, legislative in its essence, of giving orders to the carriers as to what rates should be charged in the future. After that time the Commission under certain circumstances advised a railroad that in its opinion a reasonable rate would be no greater than a sum named; but no attempt was made to go further than this in fixing rates, until in 1906, as will be seen, this power was given it by amendment to the Act.

The attitude of the courts toward the Interstate Commerce Act caused considerable dissatisfaction, especially in those parts of the country where the great bulk of freight originates, and the desire for further regulation culminated in the passage of the Rate Regulation Act of 1906. This action of Congress had been foreshadowed by a very considerable body of similar legislation in the states just previously. It was characteristic of this legislation that it confers on the railway commissions the power of fixing a maximum rate; and the giving of such power to the Interstate Commerce Commission was in fact the chief object of those who secured the passage of the Railroad Rate Act. The decisions of the Supreme Court which had given most dissatisfaction were the decision denying the Commission the power to fix rates and that permitting the carrier to charge a less sum for a longer haul. In addition to this, certain omissions in the original Act were found to work badly, in view of the railroad practices. Most of these defects had been remedied by legislation in England. It was believed by a large portion of the shippers that the railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers.

## IV.

The Hepburn Act of 1906 was put in the form of an amendment to the original Interstate Commerce Act as has been the practice; and its object was to perfect that Act by an extension of its scope. It increased the number of commissioners from five to seven; and their salaries from \$7,500 to \$10,000. It included in the provisions of the Act express and sleeping-car companies and pipe lines for the transportation of oil. And along with the increase in the scope of its jurisdiction there was a striking change in the extent of its powers. Under the old law, the Commission was primarily an investigating body, aiding the legislative branch by showing it the way. Its powers were hardly more than administrative, being confined largely to supervision by inquiry into the course the carriers were taking, rather than any regulation of their conduct by order. But from now on the Commission may fairly be said to have combined in its constitution quasi-judicial functions along with its administrative duties. It henceforth not merely declares matters of which complaint has been made so improper that relief should be granted; but it fixes for the future the standard of propriety to be observed. Since this time it has become a regulating commission with the fundamental powers characteristic of such bodies. It remained only to develop those powers still further by subsequent legislation.

The most important feature of this 1906 Amendment was that giving the Commission the power to fix maximum rates. The fixing of maximum rates already had not been uncommon in the states; and in other countries it had been usual, if not universal. In England, maximum rates were fixed, not by the Railway and Canal Commission, but by the Board of Trade, one of the executive departments of the government, after due hearing; and the rates thus fixed were enacted in the form of statute by Parliament, after an opportunity for hearing before a committee. The provisions of the Hepburn Act which are still in force were that upon complaint the Commission, after hearing, shall determine a reasonable maximum rate, which shall take effect at such time after thirty days as may be fixed by the Commission, and shall continue in force not more than two years, unless suspended or set aside by the Commission or the courts. The carrier aggrieved may appeal to the courts for an injunction against the rate so fixed; but no injunction or interlocutory order shall

be issued without a hearing after five days' notice to the Commission. An appeal from the Circuit Court lies directly to the Supreme Court, and preference is given to such cases. No change in rates, even within this maximum, shall be made by the carriers until after thirty days' notice, unless this period is shortened by the Commission.

One of the most galling monopolies established by action of the railroads, and permissible under the original act, was that due to the use of private facilities. For example, a few great corporations, by contract with the railroads, established a monopoly of the supply of refrigerator cars for the carriage of perishable fruit; and a similar and hardly less far-reaching monopoly was created in tank cars. The evil of the private car line was felt in two directions: first, the charge to ordinary shippers using the cars was increased by monopolistic rates; second, the charge to the owners of the cars was greatly lessened by rebates for the use of the cars. In the first section of the Hepburn Act it was provided that the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, and that it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish just and reasonable rates applicable thereto. In a later section it was further provided that if the owner of property transported, furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

Another matter, which was even at that time being considered as leading to abuses which ought to be brought within the power of the Commission to remedy, was the matter of the industrial railways. These are short lines of railway, owned in some connection with the industries which they were primarily designed to serve; either the corporation owning the industry owns the railroad, or its ownership is vested in those who are prominent in it. These railroads are usually operated in pretense at least as common carriers, however improbable it may be that anyone else will want to ship over them. And posing as connecting carriers they have always been accustomed to see that they got a good division as originating carriers out of the joint rate.

But if this tap line really is a common carrier although the public resorting to it is small, there would seem to be no way to prevent this; but even so the Commission could be given power to pass upon the propriety of the division. If, however, it is really a plant facility it should not have any such standing whatsoever to get what would virtually be a rebate, if it went beyond a switching allowance, duly sanctioned by the Commission and made to all shippers furnishing such facilities. It will be seen, therefore, that by getting powers over divisions and allowances the Commission in 1906 got a measure of control over the situation as a whole.

## V.

By the Mann Act of 1910 a number of amendments of great importance were made to the Act to Regulate Commerce, whereby the jurisdiction of the Commission was extended into new fields and its powers over the companies subject to its jurisdiction strengthened. Telephone and telegraph companies, whether wire or wireless, were put under the power of the Commission so far as Congress could constitutionally extend jurisdiction. The fourth section of the Act relating to the long and short haul was changed so as to put an end to the controversy as to the extent of its provisions. The power over through rates was made positive, the whole matter being left to the Commission subject to certain provisos. The power of the Commission over rates and schedules was made more extensive; in particular the Commission was given power to suspend advances in rates pending investigation thereof. The power to compel switch connections was given wider scopes with proper safeguards for the business of the railroads. There were other amendments of less importance, such as change in the requirements as to annual reports and further powers over accounts consequent thereon. Lawyers who are prone to criticise the way in which legislation is drafted cannot but admire the skill with which these various amendments cured weaknesses in the powers of the Commission which experience had brought to light.

The controversy which began a generation ago as to the true meaning of the long and short haul clause was finally settled by this legislation by taking out the clause concerning similar circumstances and conditions, by virtue of which the courts had practically nullified the statute, and unequivocally making it

unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for transportation for a shorter than for a longer distance over the same line in the same direction the shorter being included within the longer distance. The Commission was confirmed in its jurisdiction to authorize carriers to make charges which would otherwise be in violation of this section, by acting upon applications from time to time and thereupon determining the extent to which a designated common carrier might be relieved from the operation of the section. It was provided as a temporary measure that rates lawfully in effect at the time of the passage of the Act might be kept in force provided applications under the section covering them had been duly filed; and this situation has not altogether been cleared up at present.

Perhaps the most consequential change in the Act was the provision giving the Commission special powers over new schedules filed with it. The Commission may thereupon, either upon complaint or upon its own initiative, without complaint at once and, if it so orders, without answer being filed by the interested carriers provided they have had reasonable notice, enter upon a hearing concerning the propriety of the change proposed. Pending hearing and decision thereon, the Commission may by simply delivering to the carriers the reasons for taking action suspend the operation of such schedule for four months beyond the time when it would otherwise go into effect; and if the hearing is not completed the time may be further extended for a period not exceeding six months. After full hearing, whether completed before or after the rate goes into effect, the Commission may make such order as lies within its jurisdiction over rates. At any hearing involving a rate sought to be increased after the passage of the Act of 1910 the burden of proof to show that the increased rate or proposed increased rates is just and reasonable shall be upon the common carriers, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it, and decide the same as speedily as possible.

The Hepburn Act provided that the Commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of the Act, and the carriers com-

plained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route existed. The limitations which the Supreme Court had found in the power of the Commission under the 1906 Amendment to establish through routes only when no satisfactory through route existed as the courts themselves viewed the evidence, was eliminated by making the clause in the 1910 Amendment read so that the Commission in its own discretion as to the necessity therefor, might act at any time in this matter after hearing, whenever the carriers had failed to establish joint rates themselves. However, a railroad was protected against being shorthauled by an explicit clause in this Mann Act to the effect that, in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through routes, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

## VI.

Included in the Panama Act of 1912 were various clauses of great importance in extending the power of the Commission to protect transportation by water, although the commerce moving wholly by water is still excluded from the jurisdiction of the Commission. Railroad ownership or control in any way of water lines is forbidden save in particular cases where the Commission may find that such ownership is in the public interest. And to promote the competition of water lines it is provided that the Commission shall have jurisdiction: (a) To establish physical connection by spur tracks between the lines of a rail carrier and the docks of a water carrier, whenever such connection is practicable and the amount of business offered is sufficient to justify it; (b) to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced; (c) to establish maximum proportional rates by rail to and from the

ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply; (d) if any rail carrier subject to the Act to Regulate Commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, for the handling of through business between interior points of the United States and such foreign country, the Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

By the Valuation Act of 1913, the Commission was directed to proceed forthwith to investigate and ascertain the value of all the property owned or used by every common carrier subject to its jurisdiction. Every fact of any sort relating to the properties of the carrier at any time in their existence which might be pertinent is demanded specially. Not only the original cost, as nearly as that can be ascertained, but the present value as exactly as that can be appraised. Nor is Congress contented with this determination of actual conditions, past and present, so far as by human assiduity and ingenuity the past can be unravelled and the present be estimated. The Commission is asked further what it would cost to reproduce these properties new at the present time, and what figures would be set upon them if from the estimated cost of reproduction were deducted their indicated depreciation in their present state. And then follow other questions as to past operations and present conditions of still more difficulty, designed to meet problems of valuation which are bothering even those most conversant with these matters. The Commission is not merely asked to collect all this data and make all these appraisals as to things tangible and intangible, actual and hypothetical. It is told to classify all these things and make comparisons between them, and to state the reasons of these differences and the basis of these values.

By the Clayton Act of 1914, jurisdiction to enforce compliance with certain sections so far as carriers subject to the Act are concerned is vested in the Commission. For instance, there is the section providing that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation also engaged in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose

stock is so acquired and the corporation making the acquisition; and that no corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations. But by explicit proviso nothing therein contained shall be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

In the pamphlet which is kept currently in print by the Government Printing Office collecting between its covers all the laws giving jurisdiction to the Interstate Commerce Commission the history of the fundamental legislation is thus given: "An Act to Regulate Commerce, approved February 4, 1887, as amended by an act approved March 2, 1889 (25 Statutes at Large, 855), by an act approved February 10, 1891 (26 Statutes at Large, 743), by an act approved February 8, 1895 (28 Statutes at Large, 643), by an act approved June 29, 1906 (34 Statutes at Large, 584), by a joint resolution approved June 30, 1906 (34 Statutes at Large, 838), by an act approved April 13, 1908 (35 Statutes at Large, 60), by an act approved February 25, 1909 (35 Statutes at Large, 648), by an act approved June 18, 1910 (36 Statutes at Large, 539), by an act approved August 24, 1912 (37 Statutes at Large, 566), and by an act approved March 1, 1913 (37 Statutes at Large, 701)." It is thus by amendment of the Act from time to time that the expansion of the scope of the function of the Commission has largely been

effected; but incidentally Congress now and then turns the determination of particular matters over to the Commission, as the list of the other laws printed in this same official pamphlet will show: District Court Jurisdiction Act; Compulsory Testimony Act; Immunity of Witnesses Act; Elkins Act; Expediting Act; Clayton Antitrust Act; Government-Aided Railroad and Telegraph Act; Lake Erie and Ohio River Ship Canal Act; Parcel Post Act; Safety Appliances Act; Reports of Accidents Act; Medals of Honor Act; Hours of Service Act; Ash Pan Act; Transportation of Explosives Act; Boiler Inspection Act; and Block Signals Act.

## VII.

As I view the evolution disclosed by this narrative, it seems to me that it is clearly indicated that in its next stage the Interstate Commerce Commission will be empowered to give relief in particular cases of bad service brought to its attention as it has been granted over improper rates. All over the country the state commissions are being given the same measures of power over service which they have over rates. I have often before stated my belief that commissions should have no more jurisdiction in these matters than that of a quasi-judicial body fully empowered to give relief where complaints are found. I do not believe that a commission should be given authority to hand down a new schedule of rates or make up a new time table, as it may in some of the states. The Interstate Commerce Commission has never been given greater power over rates than to reduce particular rates, and then only if the existing rates are in fact clearly found to be unreasonable; and it would not, therefore, be given wider jurisdiction over service than to remedy particular defects plainly shown in proper proceedings. The reason why I do not believe in letting a commission initiate policies is that I do not feel that a commission should not have the power of management; nor do I believe in letting a Commission go outside the record in the proceedings before it and make orders upon its own preconceived notion. But if these limitations are respected the railroads have little to fear from the expert judgment of the national commission on complaint of any dereliction of the duties which a railroad owes to its patrons; and in any event the courts and the constitution will protect them from unreasonable require-

ments. We may, therefore, view with equanimity the approach of the time when the Interstate Commerce Commission will have its jurisdiction extended by further amendments to the Act to Regulate Commerce so as to include every phase of railroad operations affecting transportation between the states or with foreign countries.

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