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ConstrucTive criticism of the work of the Interstate Commerce Commission requires a thoroughly objective approach and intimate understanding of what the Commission does and of the reasons for its actions. The magnitude and complexity of the Commission's activities create a formidable task for anyone who would sit in judgment. While criticism of public agencies is a prerogative of any qualified citizen, these comments will demonstrate that Dr. Huntington's article in the JOURNAL, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," reflects none of the qualifications needed for helpful criticism but rather is an effort to prove a thesis at whatever cost to the facts.

The Thesis

Dr. Huntington's thesis may be summarized as follows: The Commission has fallen from its high estate as the "premier federal agency in the transportation field" and now is in danger of elimination or reduction to a secondary position. The responsibility for this "marasmus"1 lies in its failure to "adjust its sources of support so as to correspond with changes in the strength of their political pressures,"2 or, stated otherwise, in its "continued dependence upon railroad support." The Commission was created and given strong powers to bring the railroads to task in the interest of farmers and other shippers. It reached its peak of power and prestige in the decade following passage of the Hepburn Act (1906) "while still dependent upon consumer, public, and presidential support." Thereafter, following passage of the Transportation Act of 1920, it turned more and more to the railroads for support and expansion of its powers. In a period which has seen dynamic changes in transportation, it "remains primarily a 'railroad' agency," unresponsive to the demands of the new forces in transportation. The successful adjustment it made after 1920 has not been duplicated in later years. "Consequently, it

* An article in 61 YALE L.J. 467-509 (April, 1952) by Samuel P. Huntington, Instructor in Government, Harvard University (hereinafter cited as Huntington).
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is losing its leadership to those agencies which are more responsive to the needs and demands of the times.3

This "pattern of affiliation of the Commission with the railroads" has resulted in the alienation of non-railroad interest groups and of other Government agencies, has led to subversion of the intent of Congress, and has resulted in "passivity and loss of leadership."

"... When such a commission loses its objectivity and impartiality by becoming dependent upon the support of a single narrow interest group, obviously the rationale for maintaining its independence has ceased to exist, and it becomes necessary to subordinate this agency to some other agency possessing a broader outlook and a broader basis of political support. ..."

"The Interstate Commerce Commission should be abolished as an independent agency. Its executive functions should be transferred, as the Hoover Commission recommended, to the Secretary of Commerce. The motor and water carriers should be emancipated by dividing the regulatory functions of the ICC among three separate commissions dealing respectively with rail, water, and highway transportation. These three commissions should all be placed within the Department of Commerce in a position similar to that of the Maritime Board and subject to the same general policy guidance of the Secretary."4

The author's presentation of this thesis has the earmarks of disinterested scholarship and may have received some acceptance. The present writer therefore has considered it necessary to bring together facts which confute the author's remarkable thesis and show the unrealistic and harmful nature of his recommendations.5

Basic Facts and Considerations

Certain basic matters which bear on the issues raised in the paper need first to be noted. The year 1935 was the beginning of a new era in the Commission's work. Theretofore, it had regulated railroads primarily. The adverse effects of uncontrolled motor transportation on motor carriers themselves and on railroads, shippers, and the public were becoming more and more evident in the Twenties and Thirties. The Commission advocated the extension of regulation to this field, and it understood how large a task it was assuming when Congress placed many thousands of motor carriers under its jurisdiction in 1935.6 Its work load and problems were augmented when it received greater jurisdiction over water carriers in 1940 and when

3. Huntington, p. 473.
5. These comments, prepared in response to an inquiry directed to the writer by an editor of the JOURNAL, are offered in a personal capacity and solely on the responsibility of the writer. To meet limitations of space, some subjects have been passed over entirely or treated very briefly.
A CRITIQUE OF "THE MARASMUS"

freight forwarders first came directly under its jurisdiction in 1942. It regulates about 22,000 carriers; in addition, many thousands of exempt and private interstate motor carriers are subject to its safety and hours-of-service regulations, and there are many special duties.

With the possible exception of pipe lines, each mode of transportation or carrier is engaged in a competitive struggle, often carried to extremes, and each naturally desires to win its points before the Commission. No agency has such diverse and complex regulatory responsibilities; yet, as will be shown, this concentration of authority is completely necessary. The administrative process followed is a democratic one. Every person receives a fair and open trial, though delays result for which the Commission is criticized in some quarters. It is not unnatural that other criticisms occur, but Dr. Huntington is on very weak ground in generally identifying such criticisms with Commission error. The ends each mode of transportation or each carrier seeks to attain by fault-finding tactics are largely self-serving. Out of this competitive array of interests, however, the Commission must try to find the true public interest on the basis of the facts as developed on an open record and under a law which necessarily leaves much to Commission discretion.

The burdens imposed on the Commission by competitive conditions are increased by the great variety of factual contexts in which competition takes place. The railroads, performing the largest single transportation task, for many years have been facing widespread, aggressive motor and other competition. This rivalry is the more difficult to deal with because of the great number of motor carriers, from relatively large to very small, with their diverse characteristics. Like the railroads, a good many carriers undertake to handle all traffic within their capabilities, but some do not provide a complete common-carrier service; others are specialists. Contract carriers, by their nature are subject to less comprehensive regulation. In addition, both regulated motor carriers and railroads face the actual or potential competition of shipper-operated transportation, while vast and growing areas of exempt motor transport create further harassments. Water transportation exhibits similar variation in size of carriers, degree of specialization, and carrier status. Some of its branches, in difficulty prior to Commission regulation and feeling the further effects of wartime cessation of operations, now find themselves the high-cost carriers. Yet other branches are in sound condition. Again, exemptions and private carriage are large factors.

Users of various transport services also bring many, often very serious, problems before the Commission. For example, increases in rate levels affect long- and short-haul shippers differently, and continual allegations of unjust discrimination occur. The recently accelerated industrial development of certain regions was inspired partly by higher rates on shipments from or to other regions; this development in turn has imposed new pressures upon those engaged in making such shipments. And shippers' ability to operate
as private carriers adds to the problems of for-hire carriers and other shippers.

This competitive picture constitutes only a partial source of the problems brought before the Commission from day to day. Advances in costs create other problems. All are expected to be handled fairly and openly, as expeditiously as possible, and in observance of the terms of the Act and the complex and challenging statement found in the congressional declaration of transportation policy. In view of this difficult assignment—more recently coupled with a fund shortage resulting from the drive for economy in government spending—it is perhaps obvious to say that not every decision of the Commission has proved a wise one. In what follows, therefore, it is to be understood that the present writer does not assume that the Commission is above error. No human institution has attained such a status.

The errors to be discussed in the Huntington paper may be grouped reasonably well under four major heads: failure to understand Commission administration of statutory standards; failure to go beyond the form of things to the underlying economic conditions; failure to recognize the place of the independent commission; and incorrect conclusions as to technical procedural and administrative matters. The question of the Commission's "viability" then will be turned to, after which a few remarks will be offered as to the author's proposed new regulatory setup.

FAILURE TO UNDERSTAND COMMISSION ADMINISTRATION OF STATUTORY STANDARDS

Before and After 1920—The General Picture

Prior to 1920, according to the article, the Commission was concerned primarily with the advancement of shipper interests; since 1920, its main concern has been with the welfare of the railroads.

It is true that Federal regulation was enacted in 1887 and strengthened in 1906 and 1910 essentially in response to shipper demands; but it was obvious in 1887 that regulation, so far as it succeeded, also would tend to save the railroads from their own efforts to destroy one another. It likewise is true that the Commission did not readily permit general increases in rates from 1911 to 1917. Simply stated, it was not convinced in some instances that the evidence, including the showing as to carriers' financial condition, justified increases. The railroads in 1911 were endeavoring to discover what they could get out of the revamped Act. The Commission could not overlook various financial practices which subsequent legislation and regulation were to end. It was skeptical of railroad investment accounts as a rate base and sought authority to make a valuation. The fact is, how-

8. 17 ICC Ann. Rep. 26 (1903). First sought in 1903, the Valuation Act was passed in 1913. Results of this work were used first in Increased Rates, 1920, 58 I.C.C. 220, 227-30 (1920).
ever, that the increases granted in 1914 and after were not “only a minor fraction” of those requested, for the Commission knew full well the rights of the carriers under the law and the importance of adequate earnings. The inference that, as a matter of policy, it considered primarily shipper needs is therefore mistaken.

Costs increased while the railroads were making their vital contribution in World War I, and there definitely was a “railroad problem” when the time came to resume private operation. At that time there was little motor competition, and water competition was not extensive. The Transportation Act of 1920 sought by various means (consolidation, control of security issues, etc.) to strengthen the rail industry and enable it to improve service. The author points out only some of the essentials of this legislation and fails to note that it also represented shipper interests. The Act provided, for the first time, specific statutory affirmation of the judicially-recognized right of railroads to a fair return on the value of property they devoted to the public service. The Commission was directed to initiate or adjust rates to provide such a return “as nearly as may be.”

The statement that the Commission “immediately prior to [World War I] had eliminated the worst discriminatory practices” probably can be accepted, but the further observation that these “vigorous actions” had “reduced the interest and political activity of shipper groups” is not entitled to great weight. The Commission’s decisions over the years indicate that shipper interest is, in fact, extensive. Moreover, shipper influence on legislation clearly continues to be substantial. But the nub of the matter is that the Commission was concerned not with its “viability” but with the law as it stood in 1920 and after. The law obviously comprehends the rights of shippers as well as those of the railroads. In the face of this statutory policy, the author must assume a very heavy burden of proof when he uses such expressions as “turning more and more to the railroad industry.”

9. See the notable decision in Advances in Rates—Western District, 20 I.C.C. 307, 379 (1911). Language there used would have fitted some later decisions.

10. The careful analysis of the 1911-17 decisions made by Professor L. L. Sharfman, in The Interstate Commerce Commission, III-B, 33-48 (1936), led him to conclude that the early decisions were sound from both a legal and an economic standpoint and that there was a lack of boldness in dealing with the emerging difficulties of the war period. There is no indication in his analysis that the Commission put shipper above railroad interests. The present writer may add that knowledge of price behaviors and of means of forecasting earnings was rudimentary in those days compared with what it since has become.

11. See Hearings before Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, 65th Cong., 3d Sess. (1919). See testimony of the witnesses Rich and Freer, id. at 704-33, 1183-89. Some shipper opposition was against features which did not get into the legislation.

12. See, e.g., the author’s own discussion of farm group opposition to rate increases in the Twenties and his reference to the Hoch-Smith Resolution (1925). Huntington, p. 482.
Rail-Motor Competition

A long indictment must be analyzed to the extent space permits. Its pervasive theme is that the Commission's rate and other policies have consistently favored railroads over motor competitors.

Rate-making procedures. The author's own analysis serves to show how highly competitive our transportation system is. The essence of any competitive regime is the right of producers to initiate price changes. This primary right is provided for by the Act and recognized by the courts. The Act, in fact, presupposes use of this right, and it is exercised extensively. Exercise of the right is subject, of course, to the requirement that the rates as changed do not violate the Act; and the right is at times subject to minimum or maximum prescribed rates. Carriers and shippers are not debarred, however, from requesting changes in such minima or maxima. In the case of some large rate adjustments, in fact, departures from the reasonable maximum level are the rule rather than the exception. Between maximum and minimum rate limits there is room for reductions or increases, and they are common. Every rate move taken by a carrier or a group of carriers may be protested by other carriers or by shippers, and such protests may result in suspension of the proposed change. Or the Commission, on its own motion, may act to suspend. After investigation, the proposal is approved or disapproved, and sometimes disapproval is accompanied by an indication of what an acceptable rate would be. Carriers are free, however, to put rates into effect at the end of seven months, the maximum statutory suspension period. This, then, is the general framework within which rate changes are made.

The decline of value-of-service criteria. Railroad rates formerly reflected the influence of value-of-service consideration more than they do now. Rates were relatively high on better grades of traffic, on shorter hauls, or both, because this traffic could pay the price; high rates thus lost little volume. Revenue from these rates helped to make possible low rates on traffic for which low rates were crucial. The resulting distribution of the burden of supporting the railroads was regarded as generally equitable and economically sound. This setup, however, provided a rich vein of traffic whose relatively high rail rates made it ripe for tapping by motor carriers with

13. See, e.g., Lumber from Pac. Coast to Eastern Ports, 210 I.C.C. 317, 345 (1935), in which the Commission cited United States v. Illinois Cent. R.R., 263 U.S. 515, 522 (1924), and ICC v. Chicago G.W. Ry., 209 U.S. 108, 118 (1908). In the latter case the Supreme Court reminded the Commission that railroads are private property and that the Commission is not a general manager.

14. Some indication is provided by the fact that tariff filings of all kinds averaged 550 each working day in a recent twelve-month period. 65 ICC ANN. REV. 137 (1951).

15. E.g., the adjustment of rail rates on cotton in Rate Structure Investigation, Part 3, Cotton, 165 I.C.C. 595 (1930), and in supplementary decisions never became fully effective and came to be used less and less because of truck competition.
their faster and more complete service, if not lower rates.\textsuperscript{10} Reduction of the higher rates was thus natural and necessary for the railroads,\textsuperscript{17} and within their legal right. And as many of the higher rates were materially above costs on any reckoning basis, reductions could be substantial without bringing the rates to an unduly low level.\textsuperscript{18} The period covered by the author's criticism of railroad rate reductions falls within this period of partial dissolution of the value-of-service criterion in railroad rates. The notion that any cut below the level of maximum reasonable rates is an unfair competitive practice, which appears to underlie much of the author's reasoning, is unsound on economic grounds and in terms of any carrier's legal rights.

\textbf{Burden of proof.} The charge here is that from 1937 to 1940 motor carriers, but not railroads, had to justify rate reductions, even though a 1938 amendment made the burden-of-proof provisions identical for the two carrier groups. Actually, until 1940 the statute required neither group to justify reductions; the 1938 change concerned \textit{increases} and merely harmonized the rail and the motor carrier provisions. It is true that from 1937 to 1940 the motor carrier division disallowed reductions on lack of evidence that the rates would be compensatory,\textsuperscript{19} but, as shown by the protests, it acted with the welfare of motor carriers in mind. Railroads long had been supplying data to justify reductions.

\textbf{Minimum rate orders.} In the author's view, the comprehensive orders (entered in the Northeast and Middle West) prescribing minimum motor carrier rates, while initially requested by the motor carriers, subsequently made rate reductions much more difficult for such carriers than for railroads. But the purpose of the orders—prevention of destructive competition—obviously would have been defeated by greater liberality in allowing reductions. Moreover, shippers had an interest in stable motor rates. The Commission did enter many supplementary orders which, as fast as possible, granted or denied requests for relief from the orders.\textsuperscript{20} The essential question is whether the orders were removed as soon as they became unnecessary.\textsuperscript{21} The Commission had no desire to maintain the orders, and, despite motor carrier objections, termination took place as soon as practicable.

\begin{itemize}
\item \textsuperscript{16} See 53 ICC ANN. REP. 25-7 (1939).
\item \textsuperscript{17} See Locklin, \textit{Rates and Rate Structures in Natural Resources Planning Board, Transportation and National Policy} 105 (1942).
\item \textsuperscript{18} 53 ICC ANN. REP. 26-7 (1939).
\item \textsuperscript{19} See Rates over Carpet City Trucking, 4 M.C.C. 589, 593 (1933); Rates of Lambert Transfer, 3 M.C.C. 651 (1937). See also Consolidated Freight Co., Commodities from Flint, Mich., 21 M.C.C. 329, 331 (1940).
\item \textsuperscript{20} Thus, in Central Territory Rates, 8 M.C.C. 131 (1933), thirty-nine supplementary reports, some covering a great many individual rates, had been entered by October 10, 1941. Where there were no protests, action was very prompt. Where necessary, the Commission even aided carriers in making appropriate filings.
\item \textsuperscript{21} 57 ICC ANN. REP. 97-8 (1943).
\end{itemize}
The statement that the Commission's action "in these cases was in sharp contrast to its normal policy in rail cases" raises the question of whether the orders were needed. Cited, among others, are decisions in which the Commission refused to set rail rate minima, stating in one decision that its minimum rate power "should be sparingly exercised and only in cases where it clearly appears that its exercise is necessary in order that substantial public injury may be avoided." Statements in these decisions still hold true. There was no pressing emergency in the rail cases; only a small fraction of the carriers' traffic was involved. Many of the motor carriers, however, were operating at a loss, and the admonition in the Sugar Cases that managers should try to compose their differences had not yielded results. Congress in 1935 directed the Commission to prevent destructive competition in motor transportation; similar legislation in 1920 had concerned railroad rates. In both fields, broad use of the minimum rate power is resorted to only when there is no alternative. Treatment of motor and rail groups differed only where conditions in the motor field required drastic, emergency action to save the industry.

Competitive rate adjustments. "Throughout this period [1935-40] the Commission in a number of cases encouraged the railroads to exercise their managerial discretion by meeting motor carrier competition through various devices." The reference to "managerial discretion" is significant. So long as the means are lawful—i.e., so long as the rates as reduced are reasonably compensatory, are no lower than necessary to meet the competition, and do not result in undue preference or unjust discrimination or the breakdown of a reasonable rate structure—the carriers are within their rights in effecting reductions. In 1935 the railroads sought to increase their rates. The Commission viewed the requested increases as "an inadequate and dangerous method of meeting these new problems" of increased competition. Greater study should be given, it said, to the revenue effects of changes in particular rates and to other ways of increasing net earnings. Contrary to the author's "affiliation" doctrine, the Commission, basically critical of rail efforts to increase rates during the depression period, granted less than the increases requested, and then on only a temporary basis. It was concerned not only with the need for increased net earnings but also with the justness and reason-

22. Sugar Cases of 1922, 81 I.C.C. 448 (1923); Ex-Lake Iron Ore from Chicago to Granite City, 123 I.C.C. 503 (1927). Cited in Huntington, p. 493 n.115.
23. Ibid.
24. Ibid.
25. Presumably, the author would be critical of extensive minimum rate orders in water transportation. See Locklin, supra note 17, at 114, for an account of Maritime Commission action as to westbound intercoastal rates.
28. See cases cited in Huntington, p. 483 n.72. It was not until 1938 that a ten percent increase was allowed.
ablleness of the rates as proposed to be increased. The Commission was not hostile to other modes of transportation, regulated or not, though it would have appreciated more adequate cost and other data from these sources. The basic consideration, however, is that the railroads had the legal right to adjust their rates to the new competitive conditions. The Commission's admonitions called for such downward adjustments rather than for a policy of shifting the burden of increased costs to shippers. Its attitude was in the public interest.

"The injurious effects of proposed railroad competitive rates upon motor carriers were not sufficient cause to invalidate the rates." The decisions cited doubtless are intended to develop a contrast in the treatment given rail and motor rate reductions. Four of the eight decisions in the rail field have no or very little bearing on the rail-motor rates. The others resulted in letting reduced rail rates go in over motor carrier protests, but only after findings that the rates would be reasonably compensatory and not in violation of any provision of the Act. Private and buy-and-sell motor competition was a factor in one of these cases. In another, the Commission stated that inability of motor carriers to meet the rate and to operate profitably is "not indicative of unlawfulness in and of itself," and in another it said: "The fact that the effect may be to attract traffic now moving by other forms of transportation is not of legal significance." There is nothing in the Act which requires the Commission to keep the rates of one mode or agency of transportation at a level needed for the protection of another mode or agency. This basic consideration, overlooked by the author, has been pointed out in countless reports and has not been rejected by the courts. The right to compete within reasonable limits is basic to the maintenance of an essentially competitive regime in transportation.

The author then cites fourteen motor carrier decisions. The bearing of some of them on the point is not at all clear. In most of the cases the reductions proposed were not allowed. In general, the requested rate cuts were either opposed or only faintly supported by motor carriers. Most of the proposals involved efforts of a single motor carrier or a few carriers to de-

32. The decision in Petroleum between Washington, Oregon, Idaho & Montana, 234 I.C.C. 609 (1939), which the author seems to have misconstrued, was rendered prior to the amendments of the rate-making rules of the various parts of the act in 1940. Decisions which reject "umbrella" rate making under the present wording of these rules are numerous. See, e.g., New Automobiles in Interstate Commerce, 259 I.C.C. 475, 538-9 (1945) (rail-motor-water); Citrus Fruit from Florida to North Atlantic Ports, 266 I.C.C. 627, 633-5 (1946) (rail-water); and Boots and Shoes from Boston, Hartford, and New York, 42 M.C.C. 90, 93 (1943) (rail-motor). As a result of the Petroleum decision, in fact, the bulk of the petroleum traffic involved moves by water in connection with trucks.
velop traffic on a return-trip, out-of-pocket-cost basis at very low earnings per ton- and truck-mile. Existing motor rate structures and motor carrier earnings would have been jeopardized, contrary to Sections 202(a) and 216(b) of the Motor Carrier Act, 1935, with indirect effects on railroad rate structures as well. The Commission recognized that such decreased rates could be allowed only if similarly low competitive rates had to be met. In short, the unfavorable decisions reflected ill-conceived, even ignorant, efforts to carry motor carrier competition to extremes, to the disadvantage of the industry. There is no evidence that the standards of reasonableness applied were different from those used in the rail cases.

The author brings together another miscellany of decisions, very few of which are later than 1942, in a further effort to show favored treatment of railroads. A remark, obscured in a footnote, that "many" of the cases in which reductions of motor rates were proposed "involved competition between motor carriers as well as between motor carriers and railroads,"33 substantially changes the color the author would give the decisions by his criticisms. Generally, motor carriers were pitted against one another in these cases. The motor competition varyingly involved not only other regulated common carriers but also contract carriers and exempt, private, and intrastate carriers. The principal reason for the denials was that the rates would be noncompensatory;34 many were justifiable, if at all, only on a back-haul basis. Adequate cost data usually were lacking. The likelihood that other carriers would counter with reductions meant that both motor and rail carriers would suffer unnecessary revenue losses, and efforts to maintain rate structures which lend strength to the motor carrier industry would be defeated.35 Not all of the cited cases, however, resulted in denials or complete denials. The article does not pay adequate attention to cases in which reductions were approved or to the large number of reductions which become effective without suspension. The railroads, more experienced in presenting evidence, naturally fared better; they did not make proposals which obviously had no chance of approval. Some of their proposals were coupled with increases in carload minimums.

"ICC action in regard to the most heavily competitive commodities was almost invariably favorable to railroads."36 Despite known losses, the railroads fought to hold "the most competitive traffic": less-than-carload (L.C.L.). It was not surprising that railroads made reductions in this period on this vulnerable traffic; the alternative was to abandon most L.C.L. business to trucks, with increased costs on what was left. Railroads as common carriers

33. Huntington, p. 495 n.124.
34. In Refrigerator Material, Memphis, Tenn., to Dayton, Ohio, 4 M.C.C. 187, 188 (1938), the proposed rate would have yielded only six cents a vehicle-mile.
35. See Locklin, supra note 17, at 114: "This [use of cost criteria] suggests that rates prescribed by the Commission conform with the standards of normal competition."
36. Huntington, p. 495.
have to provide L.C.L. service; they are faced, in fact, with continuing shipper pressure for better service. Yet the trucks had taken away much of the more desirable L.C.L. traffic, leaving the railroads with a disproportionate amount of undesirable "balloon" traffic and small-station business. For railroads, it was thus a business necessity (as well as a legal right) to try to stem the loss of desirable L.C.L. traffic by reducing rates and improving service. Reductions, however, must meet the tests of reasonableness. Various important proceedings now before the Commission involve the future of certain L.C.L. rates.

A review of cases on "other highly competitive commodities," such as automobiles and petroleum products, would be incomplete without inclusion of more recent decisions than the ones cited, which, with one exception, cover 1934-42. Several of the cited cases have been considered herein in other connections.38

"The railroads during this period were frequently permitted to quote competitive rates of a type denied to the motor carriers." Rails could set rates on an added-cost basis (variable costs only), while their competitors' rates were required to cover full costs (constant and variable costs). Railroads, in fact, still put in some rates based on less than full costs.40 But the author's discussion of this whole problem is oversimplified. There are essential differences in the economic characteristics of rail and motor carriers. Costs of motor carriers are 90 percent or more variable with volume.41 Because of this fact, together with the prevailing nature of competition, motor carriers normally have an average operating ratio of about 93 to 95 percent; in other words, five to seven cents of each revenue dollar stand between an operating profit and an operating loss. A sudden increase in costs could wipe out this

37. See, e.g., All Commodities, L.C.L. between Me., Mass., & N.H., 255 I.C.C. 85, 91 (1942). As a result of the decision in Class Rate Investigation, 1939, 231 I.C.C. 513 (1951), the vast majority of L.C.L. rates are now maintained on a maximum reasonable basis.

38. Cases are cited in Huntington, p. 496 nn.128, 129. The decision in Naval Stores from Miss. to Gulf Ports, 235 I.C.C. 723 (1940), cited by the author as "typical," resulted in the Commission's permitting a reduction in rail rates over motor carrier protests without prescription of a minimum for the rail rates. Five Commissioners dissented, one of whom said: "I am inclined to think, however, that in the future the decision here made will be regarded as an anomaly. It is entirely at variance with previously well-considered decisions in which similar questions were presented." Id. at 741. The 1940 amendment of § 15a of the Interstate Commerce Act and similar wording in other parts of the Act made it clear that the Commission should not fix rates in such a way as to protect one mode of transportation by setting the rates of another at a level above costs. The Commission obviously retained jurisdiction over future changes in the Naval Stores case rates.

39. Huntington, p. 496.

40. Such reductions generally result from other than motor competition.

margin; rate reductions could have a similar effect, particularly because the high percentage of variable expense means that volume increases will not effect substantial declines in unit costs. And, in fact, any increase in volume would tend to be temporary, for it would result in rate reductions by competing carriers. These competing carriers, therefore, generally oppose proposed reductions.

On the other hand, variable costs of railroads approximate only 80 percent of the total. Railroads' large fixed plants usually have much unused capacity, and increased volume generally means that lower unit costs can be achieved. Hence, rail can more readily reduce rates without endangering net earnings. Within limits, shippers as a whole gain when railroads obtain traffic at rates based on something over added or out-of-pocket costs, for rails thereby can effect a contribution to their constant costs. Railroad rates competitive with motor transportation, however, generally do not go below fully-distributed costs.

The Commission, in discussing the possibility of such rail reductions, also has called attention to another significant difference between the two fields:

"The dangers are, if anything, even greater in the case of motor carriers than in the case of railroads. An unbalanced condition of truck traffic, because of the greater number of operators, is apt to be somewhat of an individual matter. That is to say, the traffic of one truck operator may preponderate in one direction, whereas that of a competing operator may preponderate in the other. As between operators, therefore, the application of the 'out-of-pocket' cost method of making rates might well result in a break-down of the rates in both directions."

To a lesser extent railroads also would suffer if the margin between rates and out-of-pocket costs became too slim. The Commission has recognized this danger to rail and motor carriers on many occasions, and as a result it imposes limitations on both rail and motor rate reductions. Moreover, the Commission has said:

"It must frankly be recognized, however, that if the railroads are hereafter to be allowed to apply this [out-of-pocket cost] theory in competing with the trucks, the latter must fairly be allowed equal leeway. To that extent it is possible that it may be necessary to

42. See Refrigerator Material, Memphis, Tenn., to Dayton, Ohio, 4 M.C.C. 187, 189 (1938).
43. See Towne, supra note 41, at 399-400.
45. Refrigerator Material case, supra note 34, at 189. See also Locklin, supra note 17, at 113.
reconsider the conclusion here reached in the light of subsequent events." 47

This principle has been applied in other cases. 48

Another of Dr. Huntington's examples of alleged anti-motor discrimination involving competitive rates is the point that "[t]he railroads were permitted to introduce volume minimum rates (rates applicable only to a minimum volume larger than a carload or truckload); the same privilege was denied to motor carriers." 49 Actually, the use of multiple-car rates was condemned in the ICC's first volume of decisions and continued to be prohibited until fairly recently, when departures were permitted in a few instances under special circumstances. 50 The Commission has felt that such rates would work hardships on small shippers and encourage concentration in industry. In any event, because of the nature of the competition or the commodities, distances, and low rates involved, the few ICC grants of permission to railroads are of no interest or concern to motor carriers.

Moreover, motor transport conditions are not favorable to volume minimum rates. It is not recognizably cheaper to move two or three truckloads from a plant in a day than to move one load. 52 There also are complications in the enforcement of a rate to which, say, a 50,000-pound minimum applies. Yet there are many motor classification ratings which apply on minimum amounts up to 50,000 pounds or more, though in some territories there are no such ratings and few commodity rates which provide for minima above the capacity of the vehicles in use. The Commission will not necessarily condemn a minimum above vehicle capacity; it tends to look at the reasonableness of the revenue per truck- or per ton-mile.

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47. Refrigerator Material case, supra note 34, at 190.
49. Huntington, pp. 496-7.
51. The reduction, less than requested, allowed in Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I.C.C. 485 (1939), was to prevent diversion to private barging transportation. Other examples include multiple-car rates on exceptionally long hauls of heavy-moving bauxite ore from the Gulf to the Pacific northwest, put in during the war, and coal from Arkansas and Oklahoma to St. Louis. Denials were made in Limestone to Baton Rouge, 270 I.C.C. 584 (1943); Pig Lead from Brownsville, Tex., to Chicago and St. Louis, 280 I.C.C. 585 (1951); Petroleum Products from Salt Lake City to Spokane, 273 I.C.C. 756 (1949). The first two denials involved water-carrier protests; in the third the railroads were endeavoring to forestall construction of a pipe line. Shipper requests for such rates were denied in Petroleum Rail Shippers' Ass'n v. Alton & S.R.R., 243 I.C.C. 559 (1941). Consideration was given in these cases to costs and other relevant factors.
52. Rugs and Matting from East to Western T.L. Territory, 31 M.C.C. 193 (1941), 35 M.C.C. 641 (1942), rev'd sub nom. Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944); Rugs and Matting, etc., 43 M.C.C. 540 (1944) (reconsideration of prior decision).
“Also,” Dr. Huntington notes, “freight forwarders and motor carriers were not allowed to charge joint rates . . . nor were motor carriers allowed to charge proportional rates (lower rates on through traffic) on freight forwarder traffic.” Various interests tried to have the Motor Carrier Act so construed as to give forwarders a common-carrier status, without which they could not lawfully have joint rates with motor carriers or use proportional rates. Arguments supporting this construction were far-fetched on their face and inconsistent with the legislative history and commonly accepted rules of statutory construction; the Commission thus rejected these arguments.

Both Congress and the Commission labored at great length to determine the appropriate relationship of forwarders to other transportation agencies. Subsequently, Congress authorized joint rates, which actually were in effect from 1942 to September 20, 1951. Later, it gave forwarders common-carrier status and specified the conditions under which they could use motor common-carrier service. In fact, the Commission, at congressional request, permitted motor carriers to depart from the law as construed by the Commission and the courts, while awaiting final clarification of the issues by legislation.

As indicated earlier, Dr. Huntington has confined his detailed treatment of rate decisions to a fairly early period in the regulation of motor carriers. Documentation of his statement that after World War II railroads again “received the favor and indulgence of the ICC” consists largely of obscure references to a weekly publication of American Trucking Associations, Inc., and to a hearing which developed nothing in point. In any event, it should come as no surprise that the Commission, mindful of the requirements of Section 15a and of the rights conferred on carriers by other sections of the Interstate Commerce Act, permitted railroads to make post-war cuts in particular rates after the general rate level had been pushed up by increased costs. The Commission also is mindful of the corresponding rules of rate making in other parts of the Act and of all provisions of the Act which bear on the lawfulness of rates. It does not knowingly permit noncompensatory rates in any field of transportation.

Administration of motor carrier regulation. The author states that the reshaping of the administration of motor carrier regulation along functional

53. Huntington, p. 497.
54. Freight forwarders always had been treated by railroads as shippers.
56. The freight-forwarder part of the Act (IV) was added in 1942, but forwarders did not obtained common-carrier status until December 20, 1950. 64 STAT. 1113 (1950).
57. See 55 ICC ANN. REP. 32 (1941).
58. Transport Topics. No page references are given to this publication, issues of which range from sixteen to sixty or more pages. The author’s general failure to indicate the pages in a decision relied on to support his interpretation of a specific point often throws an unjustified burden on the reader.
59. See p. 176 supra.
lines constituted in effect a reneging on a promise given the industry as a condition precedent to its acceptance of regulation. In the formative stages of this regulation, the work was handled by a division of Commissioners with duties, as members of that division, which related solely to motor carrier matters, but with opportunity for appeal to the entire Commission, and there was (and is) a separate bureau devoted to administrative work in the field. It presumably is thought that a separate division and bureau would understand motor carrier problems better and give them more sympathetic consideration than would divisions or bureaus concerned with several modes of transportation.69

The changes referred to were made in part in 1939. Section 17(2) of the Interstate Commerce Act was amended in September, 1940, to read, in part, as follows:

"The assignment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged."61

This legislation was an outcome of the very competition which the author's own citations reveal so fully. Because both rail and motor rates must be considered in a large proportion of rate cases, continued use of two separate divisions to hear rate proceedings would have been undesirable. The steps taken under the 1940 legislation assure motor carriers of all previous rights and of equal opportunity with the railroads to secure adequate consideration of their claims. If the author urges that the mental processes of some of the Commissioners preclude fair treatment for motor carriers, he is making a serious charge of inability to base decisions on the evidence. Actually, most examiners who prepare proposed reports or review reports in motor carrier rate cases are on the staff of the Bureau of Motor Carriers, but this fact should be given little weight. All staff members are career employees, many with experience in more than one branch of the Commission's work. None has any reason to depart from the evidence or evaluate it so as to favor a particular form of transportation. If he did, his efforts would not survive the review process. And the "emasculating" of the Bureau of Motor Carriers was

60. It is worth noting that the motor carrier division rendered many of the rate decisions the author considers to have been unfairly disadvantageous to motor carriers.

61. 54 Stat. 914 (1940), 49 U.S.C. § 17(2) (1946). Commissioner Eastman, Chairman of the Commission's Legislative Committee, indicated his individual approval of a functional division of the Commission's work but stated that the Commission had not reached a conclusion on the matter. Hearings before House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. 91 (1939). He stated shortly thereafter that the Commission was opposed to a similar but somewhat broader provision and said it should be free to adjust its internal organization. Hearings before Senate Committee on Interstate Commerce on Transportation Act of 1939, 76th Cong., 1st Sess. 774-5 (1939).
brought about primarily to obtain coordinated and therefore more efficient handling of the kinds of problem (such as accounting or tariffs) susceptible of similar treatment in the various fields of transportation. Consolidation of staff work along functional lines should not and undoubtedly has not affected the interests of a particular group of carriers. Moreover, the bureau still has important functions.

Operating rights. The Commission is charged with having “narrowly interpreted the ‘grandfather clause’ (statutory authorization of operating rights to carriers for bona fide operations on a given date) so as to deny certificates and permits to many operating truck lines”; or it “has frequently severely restricted them as to the territory or classes of shippers which might be served or the commodities which might be transported.” An informal type of procedure was used so far as possible in order to expedite handling of some 84,000 applications. Other carriers’ present and future operations were at stake. Hence, the Commission felt it had to insist on adequate proof of bona fide operation on the grandfather date and to adopt literal and specific standards rather than standards which would leave open ends. Carriers quickly became aware of the value of these “rights” and many claimed all they thought they could possibly get, although they may not have possessed facilities to handle the traffic so claimed. In trying to hew to the line, the Commission actually was benefiting the motor carrier industry in given areas and in the country as a whole. Even so, the Commission probably was more generous, by and large, than the law required it to be. A few appeals were won in court, and some resulted in greater liberality in subsequent decisions. The Commission frequently has given carriers certificates on a showing of public convenience and necessity for operations which they could not prove on the “grandfather” basis and also rights which have enabled more efficient operations. Furthermore, it should be noted that railroad opposition to the granting of “grandfather” applications was a minor fact compared to the opposition of competing motor carriers. In fact, railroads and members of Congress claim that the Commission has been unduly liberal in granting rights and has not sufficiently considered the availability of rail service.

62. For one thing, when such consolidations occur, the separate motor carrier entities have been preserved, as in the Bureau of Traffic, where the section of motor tariffs is headed by an assistant director who formerly was chief of the same section in the Bureau of Motor Carriers. The present director of the Bureau of Accounts and Cost Finding formerly was the chief of the section of accounts of the Bureau of Motor Carriers.

63. Huntington, p. 498.

64. As where “grandfather” rights covered only one-way hauls.

Two of the cases cited in Huntington, p. 498 n.139, are completely misconstrued; the third involved a question as to continuity of operations and application of the bankruptcy laws.

Many thousands of motor carrier applications have been granted where there was rail service; denials because of such service have been extremely few in proportion. The Commission believes it has given appropriate consideration to the legitimate railroad protests. Accordingly, on the basis of complaints by railroads and certain shippers, a bill (S. 2351) was introduced in the 82d Congress to require that "due consideration" be given "to such adverse effect upon and the adequacy of all other types of transportation already providing similar service. . . ." The Commission's Legislative Committee did not give the bill its support.66

Railroad penetration of motor transport field. We are told that the Commission "for almost a decade" granted railroads operating rights and authority to acquire existing motor carriers in such a way as to "raise general fears in the motor carriers as to the extent to which the Commission really wished to preserve the independent trucker."67

The record shows that, with very minor exceptions (as to which protests were rare), all grants of new authority for property operations have been limited to operations "auxiliary to and supplemental of" rail operations. These limitations have been termed "coordinating conditions." The Commission permitted railroads to continue a service they had been rendering, in some instances for over a century, but with the assistance of a new instrument—the truck. This policy is continuing. The record also shows that for a period there was a divergence in the extent and manner of applying the "coordinating conditions" to acquisitions of existing carriers.68 The Commission has succeeded, however, in generally eliminating this divergence, but only over very strong opposition of the affected railroads.69 At the present time most rail-motor service is subject to the requirement of a prior or subsequent rail haul or limited by a so-called key-point restriction, which prohibits service between any two key points or through more than one. As a result, railroads can conduct "all-motor" service to a very limited extent except where a railroad or its subsidiary had "grandfather" rights in such service. Accordingly, the Commission continues to be criticized by the railroads for its allegedly narrow interpretation of the intent of the law.70

66. Hearings before Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation, 82d Cong., 2d Sess. 223-4 (1952).
70. See, e.g., testimony of W. L. Grubbs in Hearings before Senate Committee on Interstate and Foreign Commerce on Domestic Land and Water Transportation Pursuant to S. Res. 50, 81st Cong., 2d Sess. 250-2 (1950), stating that Commission restrictions "have served to hamper the railroads from making full and economical use of motor vehicles in
Whether motor carrier fears of engulfment by rail-conducted motor operations had any basis can be answered in part by certain statistics. In a test week in 1944, operations conducted directly by class I railroads, or for them by controlled or other motor carriers, accounted for 3.9 percent of the vehicle-miles of all class I intercity motor carriers of property, and for a smaller percentage of course, of the miles of all ICC carriers. Operations of such small proportions, most of them tied in rigidly with rail service, scarcely constitute a threat to the maintenance of independent trucking.

Space limitations forbid discussion of the passenger cases cited by the author beyond stating that independent bus lines usually have not sought the imposition of "coordinating conditions," which as a rule would not be practicable, and that in permitting acquisitions the Commission considers patrons' interests and the need for preservation of essential competition.

Long-haul trucking. "Only recently the Commission announced a policy which would seem to indicate that motor carriers are to be barred from operating upon a transcontinental scale." Reference is to Pacific Intermountain Exp. Co.—Control and Purchase. That decision and its supplement involved the denial of a trucker's application to purchase an eastern carrier to enable provision of a new, one-carrier, coast-to-coast service. Actually, no new policy was adopted. The Commission had to consider whether there was need for the service in the public interest and found that the public interest embraces the interest of competing carriers and of shippers. Other motor carriers would have been injured by changes in interline relationships; railroads and shippers of grains and other commodities were concerned over the effects connection with, or in substitution for, its [sic] rail operation," and recommending legislation.

A full explanation of ICC policy is found in Kansas City Southern Transport Co., Com. Carrier Application, 10 M.C.C. 221 (1938), 28 M.C.C. 5 (1941), one of several leading decisions cited but not explored by Dr. Huntington. This decision discusses, inter alia, the motor carriers' contention that they should be allowed to perform auxiliary or supplemental service in conjunction with railroads. The Commission did not accept the carriers' contention, and the Commission was upheld on this point in ICC v. Parker, 326 U.S. 60 (1945). Independent motor carriers, however, furnish much of this service under contract.

71. ICC, BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, MOTOR OPERATIONS BY OR FOR CLASS I RAILROADS, 1944, STATEMENT NO. 4829, pp. 39-40 (1948). If independent (not-for-rail) operations of rail-controlled motor carriers had been included, the percentage would have been higher, but not appreciably so. The percentage for passenger operations was higher, but the issue has not been raised as to such operations.

72. A discussion of developments in the rail-motor field is found in 62 ICC ANN. REP. 54-9 (1948). It may be noted that Burlington and Santa Fe subsidiaries and more recently the Union Pacific and Chicago & North Western have sold their interests in large motor-bus operations to independent carriers.

73. Huntington, p. 499.
74. 57 M.C.C. 341 (1950).
75. Pacific Intermountain Exp. Co.—Control and Purchase, 57 M.C.C. 467 (1951).
of possible additional diversion of traffic from rail service. Moreover, existing rail and motor facilities were found to be meeting all requirements. Commissioner Knudson, concurring, pointed out, among other things, that applicant was specializing on high-grade traffic mainly between large cities; in contrast to the railroads, applicant did not bear the burden of serving less profitable traffic and smaller places. Refusal to grant the application did not debar transcontinental service, which was—and still is—conducted through trailer interchanges. In sum, the Commission has no set formula for judging applications which involve a large territorial reach. Some are granted and some denied. 

Rail-Water Competition

Prior to mid-Twenties. Prior to the mid-Twenties the Commission “had adequately balanced the interests” of rail and water carriers, Dr. Huntington says; he complains only about the administration of a phase of the Panama Canal Act of 1912. He misunderstands, however, the reasons for the Panama Canal Act decisions which he cites. Also, important factors favoring the water carriers are overlooked. The statute virtually bars railroads from entering into water transportation (aside from ancillary harbor operations), and Commission decisions under other provisions of the Panama Canal Act granted benefits to water transportation. Another fact is most significant: the Commission placed rail rates in various areas on a “dry-land” basis after the decline in water transportation. The resulting removal of low, water-compelled rail rates created conditions essential to the rejuvenation of important branches of water transportation after World War I.

77. Specialized haulers generally have less difficulty in establishing that existing service is not adequate.

78. Huntington, pp. 499-500.

79. The decisions rested in large part on public representations as to the need for continuing the service under railroad auspices. On the other hand, the Commission required a substantial number of divorcements. The most far-reaching one, in Lake Line Applications under Panama Canal Act, 33 I.C.C. 699 (1915), cited as if it accepted the railroad position, had unfortunate effects, in the eyes of some, on “package” freight service in that area. For details of administration of the act and some discussion of the effects of the decisions, see Sen. Doc. No. 152, 73d Cong., 2d Sess., App. I (1934); ICC, Bureau of Transport Economics and Statistics, Historical Development of Transport Coordination and Integration in the United States, Statement No. 5015, c. IV (1950). See also Sugar Cases of 1922, 81 I.C.C. 448, 467 (1923). The number of rail-controlled line-haul water operations now remaining is very small.


81. See testimony of Commissioner Charles D. Mahaffie in Hearings before Sub-Committee of House Committee on Interstate and Foreign Commerce on Transportation Problems, 81st Cong., 2d Sess. 183-4 (1950).
Mid-Twenties to 1940. "Beginning in this period, . . . the railroads instituted a concerted competitive drive against the water carriers. In this they had the virtually complete cooperation of the ICC."82 Before going further, it should be noted that the railroads were on sound legal ground in reducing rates so long as the resulting charges met the tests mentioned earlier;83 that this period of rising inland water competition appeared to the railroads to call for immediate efforts to protect their traffic; that severe financial emergency in the Thirties required maximum possible conservation of revenues, even if reduced rates were involved; and that port-to-port rates were unregulated,84 with resulting inadequate knowledge by railroads and the Commission of rates, costs, and other pertinent phases of the competition.85 Moreover, free use of improved waterways has long aggrieved railroads and undoubtedly has figured in their attitude toward water transportation. Their effort to secure consideration of this subject in Rail and Barge Joint Rates 86 was unsuccessful. When the Commission was given control of port-to-port rates in 1940, many for-hire operations were exempted.87

During federal operation of the railroads, a twenty percent differential was set, representing the extent to which rail-water rates were lower than all-rail rates. The first specific charge is in substance that in some instances reduction of this differential to fifteen or ten percent showed hostility to water transportation. But the reasons for reduction yield a different conclusion. The Denison Act 88 gave common carriers on designated waterways the right to obtain certificates of public convenience and necessity for the mere asking; it also required the Commission to direct all connecting railroads—and their connections in turn—to join with water carriers in through routes and joint rates to the extent necessary or desirable in the public interest. The Commission also was to fix reasonable minimum differentials between rail-water and all-rail rates. Over strong railroad protests and unsuccessful court action, the Commission construed this act literally and to the advantage of the water carriers.89 However, in the first case cited by the author, Through Routes and Joint Rates,90 the Inland Waterways Corporation sought application of the twenty percent differential to traffic which in some instances would move over very

82. Huntington, pp. 499-500.
83. See p. 178 supra.
84. With exceptions no longer important or pertinent here.
86. 270 I.C.C. 591 (1948).
87. See note 201 infra.
88. Section 2(e), 45 Stat. 978 (1928) ; repealed as of October 1, 1940.
90. 153 I.C.C. 129 (1929).
circuitous routes compared with direct all-rail routes, and to some traffic on which barge haul would be so short, compared to the rail, as to create the possibility that the barge-rail cost might exceed the all-rail cost. In the interest of reasonable economy the Commission prescribed a lower differential where these conditions would exist. It also sought to avoid sharp differences in rates at border points. The Commission then directed all railroads to participate with barge lines and other water carriers in through routes and joint rates on the basis of a twenty or a ten percent differential. This sweeping order was based on the economics of the situation and reflected a sincere effort to implement the public interest under legislation especially enacted to favor water transportation. It is, therefore, far from the fact that the Commission acquiesced in the railroads' "persistent refusal" to enter into joint rates and through routes with the water carriers "despite congressional pressure to the contrary." The increasing use of the Denison Act ended when the Supreme Court subjected it to an impracticable construction.

The notion that water carriers participating in rail-water rates were made to bear the full burden of the differential also is in error. Barring conditions not here pertinent, barge lines generally have conceded that railroads are entitled to a division equal to the amount they receive to or from the same interchange point on all-rail traffic. Water carriers could not logically expect the railroads to be interested in promoting water transportation by taking less revenue than they would receive from the all-rail rates to which the barge-rail rates were differentially related.

"[T]he Commission began to permit railroads to charge discriminatory rates on traffic which had a prior or subsequent haul by water." The first case cited is not in point. Nor is the second, as the proposed rail rates were condemned specifically to protect water competition and the shippers' advantage in location on navigable waters. In this case the Commission cited the author's third case for support. In the last cited case, rail proposals to eliminate water carriers from application of the proportional rates similarly were found unlawful. On this subject, therefore, the author misunderstands his own citations; this defect is not uncommon in the article.

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91. See Inland Waterways Corp. v. Alabama G.S.R.R., 151 I.C.C. 126, 144 (1929). The Mississippi Valley Barge Line Co. itself proposed a lower differential than twenty percent. Application of Mississippi Valley B.L. Co., 167 I.C.C. 41, 45 (1930). There was, in fact, nothing magical or very authoritative about the twenty percent differential. Its origin is obscure; some have traced it back to German practices.

92. Huntington, p. 500.

93. See note 89 supra.

94. See Rail and Barge Joint Rates, 270 I.C.C. 591, 612-13 (1948).

95. Huntington, p. 500.

96. Ex-River Grain from St. Louis to the South, 203 I.C.C. 385, 391 (1934).


Evaluation of the statement that the Commission was "liberal" in permitting railroads to depart from the long-and-short-haul provision of the Act involves technical matters which cannot be discussed here. But it should be noted that while Section 500 of the Transportation Act of 1920 called for preservation of both rail and water transportation "in full vigor," the Commission did not have jurisdiction then over port-to-port rates and had no way of securing information as to water transport costs. On the other hand, it was given definite responsibilities for a railroad industry which after the mid-Twenties was suffering severe competitive losses and later was in poor financial condition. Its decisions reflected the statutory standards and the conditions of individual cases. The further charge that the Commission co-operated with the railroads to evade Section 4(2) of the Act is answered completely in Skinner & Eddy Corp. v. United States.

It is true that in various revenue proceedings, in which a general percentage increase in rail rates has been authorized, the Commission has permitted railroads to effect lesser or no increases in those rates applying to certain water-competitive traffic. No carrier, rail or water, can be compelled to charge rates which would drive traffic to a competitor if the traffic could be retained by lower rates. Such rates, however, must meet all tests of lawfulness. The same comment applies to the remark that the Commission has shown "a marked tendency to permit the railroads to lower rates on highly competitive items, at times such reductions going below the fully compensatory level." The rule consistently followed is that water-competitive rates must be no lower than necessary to meet the competition and high enough to cover out-of-pocket costs and make at least some contribution to fixed costs in those types of cases where rates do not cover fully-distributed costs.

1940 to date. The author states that in applying the Water Carrier Act of 1940, the Commission "has continued most of the policies which alienated the barge lines in the 1930's. The Commission is still reluctant to require railroads to enter into through routes and joint rates with the water lines."

100. The author's idea that there was something nefarious about granting so-called "flexible" relief, when the alternative would have been delay and harrassment in meeting water competition, is far-fetched. In the infrequent cases in which "flexible" relief was permitted, definite limits were set below which the railroads were not permitted to go. One effect was to require the railroads to increase their rates should the water carriers see fit to increase theirs. See Pacific Coast Fourth Section Applications, 165 I.C.C. 373, 404 (1930); Sugar from California to Chicago, 211 I.C.C. 239, 254 (1935).


102. Huntington, p. 502. The author also alludes here to the lack of an adequate administrative bureau for water carrier regulation. Much of the work is assigned to other bureaus. The Bureau of Water Carriers and Freight Forwarders should have a larger staff, however, to do the work assigned to it. Adequate funds would solve this problem. See 65 ICC ANN. REP. 126, 143 (1951).
The evidence offered is very sketchy: a general statement by a waterways association and one decision.\textsuperscript{103} Dr. Huntington complains about the long delay in deciding \textit{Rail and Barge Rates};\textsuperscript{104} this delay resulted mainly from reopening the record for admission of new evidence and from the complex nature of the cost and other exhibits. As joint rates were in effect while the case was pending, it does not appear that the delay was unduly “burdensome.” Contrary to the author’s statement, the Commission’s final decision gave the water carriers approximately what they had asked for.\textsuperscript{105} This treatment was accorded despite evidence which showed that barge-rail costs \textit{exceeded} all-rail costs and that costs provided no basis for differentials. The Commission grounded its decision, not on costs, but on the lower quality of barge-line service and the declared policy of Congress to promote water transportation on the Mississippi River and its tributaries, particularly as this policy related to the Inland Waterways Corporation.\textsuperscript{106} The great increase in terminal handling costs and other costs, coupled with service disabilities, has caused common carrier barge lines largely to eschew L.C.L. business, and some have abandoned port-to-port and rail-barge carload traffic.\textsuperscript{107} Thus, aside from the largely unavoidable delay, it is difficult to see wherein the water lines have reasonable cause for complaint over the decision.

Next referred to are the so-called \textit{Mechling} decisions, eventually reversed by the Supreme Court for having held that rail proportional rates applicable on grain and grain products from Chicago to eastern points could not be used in connection with ex-barge grain.\textsuperscript{108} The Commission’s position arose out of differences in conditions in all-rail and barge-rail movements, including the absence of Commission control over the inbound barge rates. “Despite this action,” the author adds, “the Commission has allowed the railroads to maintain similar discriminatory rates on a large volume of traffic, this necessitating further legal action on the part of water carriers.”\textsuperscript{109} The one case cited as proof is still under consideration.\textsuperscript{110} The allegation of “continued

\textsuperscript{103} Inland Nav. Co. v. Big Creek & T.R.R., 281 I.C.C. 515 (1951). Only two commodities were involved. As to petroleum, the Commission found that the proposed rail-barge route would tend to destroy an existing truck-barge movement, which in many ways was more economical than rail-barge. The rail-barge movement would have involved an expensive transfer of grain through an elevator. This transfer, with other factors, would have rendered the service uneconomical.

\textsuperscript{104} 270 I.C.C. 591 (1943). See also 65 ICC ANNU. REP. 54-5 (1951).


\textsuperscript{106} Rail and Barge Joint Rates, 270 I.C.C. 591, 609-13 (1943).


\textsuperscript{108} Huntington, p. 503 and n.165.

\textsuperscript{109} Huntington, p. 503.

"liberality" in granting fourth-section relief, discussed above, has no adequate factual support in the general remarks found in the cited sources. And the author has ignored decisions which denied railroad applications to reduce water-competitive rates and decisions which permitted reductions in water rates over railroad protests. Adequate documentation in the later period again is lacking.

Something also is said about the effects of the Commission's "railroad partiality" on coastwise and intercoastal carriers. There is no mention of the one fact which dominates the whole postwar rail-water scene in this area: increased labor and other costs of water carriers—especially for classes of traffic which require a large amount of shore labor and expensive accessorial services. The interruption of services during the war was an adverse factor, as the author states, but he does not mention postwar interruptions resulting from many labor-management differences, shifts in areas of production and consumption, or the mounting difficulties of these carriers before Commission regulation began. The purport of his remarks is that the Commission should raise rail rates to enable water carriers to become as active as they were before the war. The law does not permit the Commission to deprive railroads or other carriers of the right to compete within lawful limits. Moreover, the increases in rail rates sought by water carriers would impair the position of shippers competing with shippers (such as those at interior points) whose rates would not be increased correspondingly. The possibility of removal of plants to avoid payment of high rates and diversion of traffic to trucks were other necessary considerations.

The conclusion that the "net result of these [five major ICC postwar] investigations [of rail and water rates] has been virtually inconsequential" is true only if it is thought that the investigations should have restored coastwise and intercoastal shipping to complete health. In the light, however, of the legal and economic factors stated above, the Commission's actual accomplishments under a statute whose basic concept is one of competition have

111. See p. 192 supra.
112. The examples which follow include decisions reached after completion of Dr. Huntington's article, but others could have been found without difficulty. Divisions of Freight Rates, 156 I.C.C. 94, 96 (1929); Application of American Barge Line Co., 200 I.C.C. 717 (1934); Wood Pulp, Houston, Tex., to Cincinnati and Hamilton, Ohio, 280 I.C.C. 388 (1951); Cigars from Tampa, Fla., to New York, N.Y., 283 I.C.C. 787 (1951); Ground Barite, Arkansas, Missouri, Georgia to Louisiana, 283 I.C.C. 665 (1951); Sugar Cases of 1951, 284 I.C.C. 333 (1952); Sulphur, Port Sulphur, La., and Texas to Hamilton, Ohio, 284 I.C.C. 275 (1952); Sulphur from Louisiana and Texas to Nashville and Old Hickory, 283 I.C.C. 628 (1952).
114. See All Rail Commodity Rates between California, Oregon, and Washington, 277 I.C.C. 511, 554-63 (1950).
been substantial.116 The Pacific coastwise water carriers did not immediately take advantage of the opportunity to petition for removal of the rail fourth-section orders which they considered disadvantageous to their recovery, but once this petition was filed, the Commission acted promptly. Numerous show-cause orders were issued against the railroads. The Commission called attention to steps water carriers could take under its outstanding orders, and they took these steps, with good results.117 ICC removed all fourth-section relief from railroad rates on the Pacific coast118 and required other adjustments involving rates between interior points and the ports—all with advantage to the water carriers. Substantial increases in rail rates resulted, apart from the general increases.119 When, however, water carrier terminal costs alone exceeded the total rail costs between the same ports,120 the Commission could not relieve the serious economic disability of the carriers.121 It could act only where other factors indicated that such rail rates could be increased. Moreover, it had to consider the possibility that upgrading of water-competitive rail rates might injure shippers and entire trading areas.122 Where their interests and conditions permitted, water carriers have benefited greatly by advancing their rates with general increases in rail rates. A condition of rising costs before the war123 has become more serious in the postwar period for certain types of water carriers.124 The Commission, however, is not responsible for the basic condition of water transportation and cannot do the impossible to overcome this condition.125

116. The Commission's concern over the problems of water carriers is shown by a series of chapters on "Water-Competitive Rail Rates" in its more recent annual reports. These chapters provide a summary of what the Commission did. Its recent decision in Class Rates Investigation, 1939, 286 I.C.C. 5 (1952), in which, over very strong railroad objection, it required the continuance of ocean-rail class rates on the previously established differential basis, should not go unnoticed here.


118. As a result of the decision in All-Rail Commodity Rates between California, Oregon, and Washington, 268 I.C.C. 515 (1947), 277 I.C.C. 511 (1950).

119. See All-Rail case, supra note 118, 277 I.C.C. 513, 517-18.

120. See id. at 560, 567.

121. In id. at 567, the Commission stated: "On the whole record we find that a level of rail rates between the ports, which would be high enough to permit the water lines to establish port-to-port rates on a basis differentially lower but still yielding sufficient revenues to cover costs of the service and return some profit, would be substantially higher than any reasonable minimum level which we could require."

122. Shippers and the Department of Agriculture were prepared to offer determined opposition to increases in rail rates for the benefit of water lines in the three discontinued proceedings cited in Huntington, p. 483 n.172. See also Increased Freight Rates, 1947, 270 I.C.C. 403, 444-5 (1948).

123. See 60 ICC Ann. Rep. 32 (1946); testimony of Wm. Radner, Hearings before Senate Committee on Interstate and Foreign Commerce on Merchant Marine Study and Investigation, 81st Cong., 1st Sess. 1141 (1949).


125. An effort to analyze the postwar problems of water carriers and to understand their needs was made in Morgan, Problems in the Regulation of Domestic Transportation by Water (Ex parte No. 165) (1946).
The charge that the Commission's interpretation of the certificate provisions "has also hamstrung the water carriers in a number of ways" presumably refers to the "grandfather" certificates. As in the case of motor carriers, the Commission believed that a more or less literal construction of the statute was required. Judging by the efforts of competing water carriers to secure restriction of these grants, there must be considerable satisfaction in the water carrier industry with what was done. The Commission has permitted additional operations by "grandfather" carriers on a showing of public convenience and necessity and thus has enabled better operating setups. It has been charged, in fact, with being unduly liberal in granting operating rights.

Monopoly and Antitrust

The author's position on this subject is as follows: The Commission's vigorously critical attitude toward monopoly before 1920, "while dependent upon public and shipper support," gave way after the 1920 legislation to interpretations "colored by its dependence upon railroad support." It has facilitated the reduction of competition among railroads and aided their development of cooperative devices designed to increase group solidarity. It generally has failed to cooperate with the Department of Justice. For the most part, it has gone along with the wishes of the railroads in Section 5 cases (consolidations, mergers, etc.).

A partial recital of the record since 1920, however, clearly shows no change in the Commission's critical attitude toward undesirable railroad practices: (1) The pre-1920 investigations and the more adequate control over financial practices provided in 1920 have discouraged practices which had been sources of complaint. (2) The proceedings in valuation and re-capture cases showed no softness whatever toward railroad claims. (3) Reorganization proceedings have simplified and strengthened railroad capital structures and reduced the confusing complexities of intercorporate relations. (4) Searching "financial" investigations have been made since 1920. (5) The Commission's field accountants scrutinize carrier records continuously. (6) The Commission has cooperated with other agencies on impor-

127. See Hearings, supra note 70, at 278, 1422.
128. Huntington, p. 488; see, generally, id. at pp. 488-92.
131. Funds for this type of work, and also for valuation work, unfortunately have been curtailed. See 65 ICC Ann. Rep. 140, 142 (1951).
tant investigations of mutual interest. Over objections in some quarters, it required competitive bidding in the sale of certain securities and, under specified conditions, requires the setting up of sinking funds for debt retirement. (9) Proceedings on unification applications showed the need for bringing holding-company activities under more effective control; legislation to this end was sought and procured.

The central theme of the indictment is, however, failure of the Commission to follow the views of the Department of Justice. The answer is simple: the Commission has followed the statutes which govern its actions and thus has endeavored to apply the will of Congress to particular situations.

The Commission, the author argues, "has in some instances positively affected the conclusion of antitrust suits . . . [and] has in effect reversed successful antitrust suits by approving under Section 5 . . . practices which had previously been found to be in violation of those laws." Inasmuch as Congress, after due deliberation, gave the Commission specific authority to approve acquisitions of control found consistent with the public interest, the argument has no basis whatever. Congress specifically provided for resort to a "rule of reason" in the interpretation of the antitrust laws in this field. The Commission has the responsibility of carrying out this policy, on the basis of the facts in individual proceedings. The assumption that any action it takes which lacks the approval of other agencies is in error is tantamount to asking the Commission to disregard the law it is required to administer.


135. See Control of Erie R.R. and Pere Marquette Ry., 138 I.C.C. 517 (1923), 150 I.C.C. 751 (1929). In the first decision, the Commission said: "Financial manipulation of great railroad properties as an accompaniment of acquisition or consolidation under the law should not be tolerated." 138 I.C.C. at 533.


137. Huntington, p. 489.

138. Reference is to the passage of § 5 of the Interstate Commerce Act in 1920 and of similar legislation applicable to motor carriers, in 1935. In 1940, § 5 was modified to bring motor and water carriers under its terms.

139. This subject was studied by a House subcommittee, which summarized replies from varied sources as follows: "Exception of common carriers from the application of the anti-trust statutes where the activities in question are under the supervision of the regulatory agency. Sentiment, particularly as expressed by users of transportation, is overwhelmingly in favor of such an exemption." H. Rep. No. 2735, 79th Cong., 2d Sess., pt. 1, ix (1946).
The Commission is said to have helped to conceal, and possibly to have sponsored, the Western Commissioner Agreement of 1932. Contrary to the author's statement, the Agreement was not confined to rate matters; reductions of competitive wastes figured prominently. In attempting to ameliorate the effects of severe railroad depression, the Agreement was akin to the Emergency Railroad Transportation Act of 1933 and NIRA code legislation. In *Fifteen Per Cent Case, 1931*, the Commission had urged the railroads to cooperate to reduce competitive wastes, in keeping with the spirit of the Transportation Act of 1920. It is possible, though opinion is divided, that the Agreement should have been filed. Its existence was, however, a matter of common knowledge. Not much was accomplished. There was no debarment of individual action. Here, as elsewhere, the Sherman Act has been a continuing deterrent to efficiency in transport operations.

The author fails to bring out all pertinent facts about the Reed-Bulwinkle Act of 1948 covering carrier's rate-bureaus: (1) As he states, this act gave the ICC, for the first time, a direct hand in the affairs of rate bureaus which choose to make use of its provisions. The opportunity afforded for continuing critical scrutiny of bureaus in the light of the legislative standards substituted positive action for a "hands-off" policy. The Commission accordingly has given close attention to the organizational structures and operations of bureaus which have filed agreements. In most decisions to date it has found it necessary to require changes, particularly to assure free exercise of the right of independent action. As amended, the agreements were found not to diminish essential competition. There is no evidence whatever of what the author calls "a lenient policy." (2) The article does not consider the demoralizing and wasteful effects of any substantial change in, or alternative to, rate bureaus. Such bureaus, adapting their organizations and methods to the conditions faced after two adverse decisions, had been operating for many years with established procedures and with opportunity for any interested party to intervene. An important bureau, investigated in 1923 at the request of the Senate, was found to be functioning for the most part in a desirable manner. No Senate action followed. No complaints filed in any

140. 178 I.C.C. 539, 585-6 (1931).
142. In World War I the railroads were crippled in their efforts to do the best possible job with their resources by fear of prosecution under the Sherman Act. See *HINES, WAR HISTORY OF AMERICAN RAILROADS* 14-15, 17-18 (1928). In World War II the Act again was an obstructive factor. See *Office of Defense Transportation, Civilian War Transportation* 122-3 (1948). See also 58 ICC ANN. REP. 29-31 (1944).
143. See Western Traffic Ass'n Agreement, 276 I.C.C. 183, 212-15 (1949).
144. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).
145. See Trans-Continental Freight Bureau, 77 I.C.C. 252 (1923).
court had been made by shippers. There were, however, features of bureau practice which required clarification, as shown by the wording of Section 5a.

(3) Shippers almost unanimously desired legislation giving these bureaus a defined status. Shipper organizations, the association of state commissioners, motor carriers, and responsible public officials supported this legislation. Only with the broadest possible endorsement could it have been passed over presidential veto. To imply that the Commission and the railroads alone procured passage of this legislation is to ignore the evidence. And one may ask in this connection if broad sponsorship of this type of legislation is not indicative of the Commission's "viability." (4) If there were any merit in the author's attack, it would be obliterated by the fact that motor and water carriers and freight forwarders, which also have had their rate bureaus, also are covered by the legislation and have filed agreements for approval.

Criticisms of the Pullman and Associated Transport decisions reveal little understanding of the issues. The first proceeding involved approval or disapproval of a proposed pooling arrangement; no other plan was before the Commission. Public advantage and the lack of undue restraint of competition were controlling. What, in the circumstances, would the author have had the Commission do? In the Associated case, the essential fact was the existence of a plethora of competition. The effort to find a railroad interest in the proceeding was patently unrealistic; moreover, the question of a railroad interest became moot.

The statement that "[i]t is rare that applications to purchase, merge, or lease railroad lines or to acquire ownership of such lines or to enter into operating agreements with such lines are turned down by the Commission" ignores important facts and decisions. The Transportation Act of 1920 attached great importance to consolidation of railroads. From 1920 to 1940 the Commission acted under a wording of Section 5 which specified that, in passing upon a unification application, it should consider the relation of the proposal to the consolidation plan the Commission was to draw up. This plan was to preserve competition to the extent possible and maintain existing routes and channels of trade. The Commission obeyed these requirements as best it could. It accordingly looked with disfavor on railroad steps.


147. Joint action by different modes of transportation, such as railroads and motor carriers, is barred by § 5a, except as to matters relating to transportation under joint rates or over through routes.

The author's reference to the so-called "administrative battle" about rate bureaus during the war is one of the subjects passed over here because of space limitations. See note 5 supra.


150. Huntington, p. 491.
inconsistent with the plan, invoked the antitrust laws, and brought about the trusteeing of the voting stock of certain railroads. It investigated the Van Sweringen empire, put together in this period by means beyond the Commission's control and doomed soon to collapse. The Commission's efforts to require the Pennsylvania to dispose of its holdings of Lehigh Valley and Wabash stock were overturned in court on the ground that the acquisition of this stock was for investment purposes. Subsequently, in authorizing the Pennsylvania to acquire control of the Wabash, the Commission required the Pennsylvania to trustee the stock of the Lehigh Valley and the New Haven. No one familiar with these various stormy episodes would question the toughness of the Commission's efforts to maintain competition.

In 1940, after it became clear that the Commission's consolidation "plan" would not be carried out by the railroads, the law was changed in this respect to the present wording of Section 5. Since then there have been relatively few consolidation proposals not involving changes in the relations of railroads already parts of a given system. One exception is the acquisition of the Alton by the Gulf, Mobile & Ohio, but Commission approval of the creation of a new North-South system could scarcely be considered an infringement on competition. The Commission denied the Santa Fe's application to acquire entrance into St. Louis from Kansas City on the grounds that ample competition existed and that diversions would have far-reaching effects. ICC also allowed the Central of Georgia to obtain control of the Savannah & Atlanta on a finding that the need for strengthening the Central of Georgia (which had been turned loose by the Illinois Central) was a factor more important than the loss of a relatively small amount of competition.

In saying that "applications to permit interlocking directorates are almost invariably approved," the author misses the essential point that most such applications involve intrasystem officials. The Commission's extreme diligence where possibility of reduced competition exists indicates its devotion to the principle of maintaining competition in the public interest.

152. The two Baltimore and Ohio R.R. cases, supra note 151.
153. See p. 197 supra.
156. E.g., Pere Marquette Ry. Merger, 267 I.C.C. 207 (1947) (merger of the Pere Marquette into the Chesapeake & Ohio), and numerous instances of changes to simplify intercorporate structures in which there was little or no public interest, as shown by the absence of protests. Minority stockholders objected in some instances.
160. See Directors of Wheeling & L.E., 138 I.C.C. 643 (1928); Application of Leonor F. Loree, 145 I.C.C. 521 (1928); In re Rand, 175 I.C.C. 587 (1931); In re Astor, 193 I.C.C.
The reader should consider the statement of national transportation policy, particularly the provisions relative to the fostering of sound conditions in transportation without unfair or destructive competitive practices, and also the rate-making provisions of Sections 15a, 216(i), 307(f), and 406(d). He then should ask himself whether the Commission would be discharging its responsibilities if it attempted to be guided to a substantial extent by the Sherman Act, passed at a time when railroads had the field of transportation substantially to themselves and regulation lacked effective force.161 The Commission endeavors to maintain competition in transportation, where forces are at work which would suppress it contrary to the public interest,162 but its more formidable task, particularly since 1935, has been to see that competition does not get out of hand, to the injury of carriers, shippers, and the public.

**FAILURE TO CONSIDER ECONOMIC REALITIES**

*The Level of Rates and Fares*

This subject is one of the "four major areas of Commission activity" which illustrates the author's view that "... in the rough world of competitive politics nothing comes for free. Political support must be purchased, and the price which the ICC has paid for its railroad support may be traced throughout almost all important phases of its policy and behavior."163

The "ease" with which railroads in recent years have obtained increased charges is said to have been the subject of "considerable unfavorable com-

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528 (1933); *In re Smith*, 252 I.C.C. 656 (1942); *In re Coverdale*, 252 I.C.C. 672 (1942); *In re Boatner*, 257 I.C.C. 369 (1944); *Chesapeake & Ohio Ry. Purchase*, 271 I.C.C. 5 (1948). In the *Astor* case the railroads involved were the Delaware & Hudson, the Great Northern, and the Illinois Central. Though these roads were physically far apart, the Commission held that it had not been shown that public or private interests might not be affected by an interlocking director.

161. See 58 ICC ANN. REP. 30-1 (1944). See also Associated Transport, Inc., Control and Consolidation, 38 M.C.C. 137, 150 (1942); Western Traffic Association—Agreement, 276 I.C.C. 183, 211-12 (1949) (noting the statement of the Supreme Court that the Transportation Act is not only a more recent but a more specific expression of policy as to antitrust matters).

162. Rail lines are so rarely constructed at this time that we can better turn to motor carrier cases for statements of Commission policy. Motor-bus transportation has attributes which create a tendency, unless checked, toward a monopolistic structure of operations. The Commission frequently has encouraged the maintenance of competitive services. See Pan-American Bus Lines Operation, 1 M.C.C. 190, 208 (1936); *Santa Fe Trail Stages, Inc., Com. Carrier Application*, 21 M.C.C. 725, 749-50 (1940); All-American Bus Lines Com. Carrier Application, 18 M.C.C. 755, 786 (1939); Mt. Hood Stages, Inc.—Extension of Operations—Boise-Salt Lake City, 44 M.C.C. 535, 548 (1945). The general situation in motor property operations is one of an abundance of competition. In *Balch & Martin Motor Exp. Com. Carrier Application*, 47 M.C.C. 75, 78 (1947), the Commission said: "We believe that when the available traffic permits it, competition should be encouraged."

163. Huntington, p. 481; rates and fares are discussed *id.* at pp. 481-7.
ment." It contrasts with the use of "rigorous criteria" from 1911 to 1918. "In 1920, as its support from non-railroad sources was beginning to weaken, the Commission approved a major increase. . . ." In 1922 it ordered a 10 percent reduction but "did not restore the prewar relationship between prices and rates." From 1924 to 1929, rates were stabilized at about 165 percent of the 1913 level, whereas prices had fallen back to about 149 percent. From 1924 through 1945, the Commission was able to maintain a rate level well above the price level. When wholesale prices began to shoot upward in 1946, the Commission "made valiant efforts to keep up with these skyrocketing prices." In 1950, the rate index, according to the article, was 229.5 (1913 = 100) and the price index was 231.4. "Considering the normal tendency of regulated and administered prices to lag far behind violent fluctuations in the general price level, the action of the Commission in moving rates up along with prices is eloquent testimony to its sensitivity to railroad interests. . . ."104

Freight rates and price levels. The author's discussion is a bundle of errors and inconsistencies. The importance he attaches to the relation between rates and wholesale prices is shown by the reproduction (with extensions from 1948 through 1950) of a chart introduced in a Commission proceeding. The chart was taken from a sheet in Exhibit 54, Ex parte No. 168, Increased Freight Rates, 1948,165 following sheet 3 of the exhibit in which the base figures are given. These base figures are the annual revenues per ton and the annual average length of haul. Neither from these two series, nor from the Commission's ton-mile and revenue per ton-mile series, nor from all combined, is it possible to develop "Railroad Rate Levels," the title of the chart in the exhibit. The data are tortured to produce what is shown on the chart. To measure rate changes through time with even reasonable accuracy, it is necessary to segregate the changes in the rates as such from the changes in the consist (the relative importance) of the thousands of commodities carried and also from the changes in the lengths of haul, which vary widely from commodity to commodity and from year to year. Otherwise, the purported changes in rate levels measure changes not only in rates but also in the consist of commodities and distances hauled. Although an attempted adjustment for length of haul was made by the witness who prepared the chart, the extended cross examination by the carriers and from the bench suffices to indicate the unreliability of the figures as a measure of rate levels.166

164. Huntington, p. 485.
165. 272 I.C.C. 695 (1948).
166. Transcript of Record, pp. 2878A-2897, Ex parte No. 168, Increased Freight Rates, 1948, 272 I.C.C. 695 (1948). The following excerpts are in point:

"Q. . . . For the year 1939 the railroad index, according to your method, is 155.6; isn't that right? A. Yes. Q. The railroad index for 1945 is 173.8? A. That is right. Q. Was there any substantial or significant index increases [sic], railroad-wise, in 1945 as against 1939? A. No. Q. Nevertheless, the use of this method of yours produces an 18 point elevation, isn't that so? A. That is correct. Q. Isn't
At intervals over two decades or more, the Commission's staff experimented with the development of an index which would measure actual changes in rate levels. The problem of eliminating changes in consist and length of haul proved baffling, although the Commission, with considerable effort, did develop indexes for anthracite coal, bituminous coal, and iron ore. It was not until 1947, when the Commission began its collection of a one percent sample of railroad waybills, that it became possible to produce a satisfactory measurement of changes in rate level per se, eliminating the extraneous elements mentioned above.\textsuperscript{167} Other criticisms of the chart will be passed over.

The author himself says: "The actual increase in the rate level from 1946 to 1950 was 35.6 percent," as against a much larger increase in "basic freight rates." By "actual increase," he refers undoubtedly to changes in revenue per ton-mile, the use of which for rate level measurement has been criticized above. On the other hand, the cumulative authorized 78.9 percent advance in "basic freight rates" from February, 1938, through May, 1952,\textsuperscript{168} is no indication of the increase which shippers actually pay. In the same period, wholesale prices increased 115 percent.

It is, moreover, economically unsound and impossible to test changes in rate levels by reference to changes in price levels. Railroad costs, not prices in general, must be considered. If the Commission were to follow the author's advocacy, rates would fluctuate greatly in some periods, whereas shippers and other interests find stability of rates essential in business planning.\textsuperscript{169} The

\begin{quote}
that undoubtedly a reflection of the change in consist, length of haul beyond what your method appears to adjust for? A. It is a reflection of the increased portion of the high grade manufactured, miscellaneous, and L.c.l. . . ." \textit{Id.} at 2885A-2886A.

And again:

"Q. And if no increase was made in the rates on any of the commodities on the railroads in those intervening years, but nevertheless your method produces an increase from 155, as an index, to 173, you still find no infirmity in the method? A. You still find that the average went up, yes. Q. Did this go up in spite of the fact that the Commission had not authorized any increases? How did we raise the rates? A. It went up because you sold more high-priced units. Q. Well, that means, then, because we transported a higher percentage of high-priced commodities than we had transported in the earlier period, it is your position that freight rates have increased, even though the rates on specific commodities have not been increased? A. That is right. . . ." \textit{Id.} at 2887A.

167. See \textit{Bureau of Transport Economics and Statistics, Indexes of Averages of Average Freight Rates on Railroad Carload Traffic, 1947-1950} (Statement No. 5150, Oct. 1951). This analysis shows that rates actually paid on carload traffic increased 25 percent, 1947 to 1950. In the same period the increase in wholesale prices was 18.6 percent. See, however, following text paragraph on this page.

168. That is, from the month prior to the one in which the 1938 increase became effective. The increase made in 1942 and removed in 1943 may be disregarded here.


The subject of "flexible freight rates," i.e., rates which fluctuate with prices, has received scattered discussion from time to time. See Duncan, \textit{Flexible Railway Freight Rates}, 30 J. Am. Stat. Ass'n 537-45 (1935).\end{quote}
Commission must set rates which are just and reasonable in themselves, which
represent an equitable distribution of the burden among classes of traffic,
and which, in the aggregate, provide adequate support for the carriers. Where
costs have gone up, where operations are conducted with economy and
efficiency, and where the carriers are earning less than a reasonable return,
the Commission has the responsibility of granting increases, if they will pro-
duce the financial result desired and if the resulting rates will be just and
reasonable. The author would have a difficult time proving that for any ex-
tended period since 1920 the railroads have earned as much as a fair return
on a reasonable rate base. State commissions regularly have allowed public
utilities a greater return than the railroads have averaged.\textsuperscript{170} The railroads
never have ceased criticizing the Commission for its "niggardliness."\textsuperscript{171}
Actually, earnings potentials have been affected by conditions beyond the
control of either the Commission or the railroads, such as mounting external
competition and different degrees of utilization of capacity among railroads.

Since Dr. Huntington feels that the Commission was slow to recognize
increases in wholesale prices in 1911-18 (though increased traffic volume
lessened the need for rate advances) and failed in the Twenties and Thirties
to reduce rates or prevent increases as the general price level fell, how can
he consistently criticize the Commission for advancing rates with unseemly
haste (as he implies) after World War II?\textsuperscript{172} While he mentions the 10 per-
cent reduction ordered in 1922, he complains that rates were not cut further
in a period of agricultural distress of the Twenties (although he refers to
what the Commission attempted to do for shippers under the Hoch-Smith
Resolution). The railroads came out of the first World War with run-down
properties, and severe and costly car shortages occurred. It is not true that
the 1920 increase favored the railroads. Earnings in this period helped railroads
to acquire credit which permitted a large modernization program beginning in
1923.\textsuperscript{173} The country profited greatly from this program. On the other hand,
the author fails to reflect the significance of the Commission's denial of a

\textsuperscript{170} See SMITH, THE FAIR RATE OF RETURN IN PUBLIC UTILITY REGULATION (1932),
especially Appendix A; MILLER & COVER, RATES OF RETURN, CLASS I LINE-HAUL RAIL-

\textsuperscript{171} See testimony of W. S. Franklin in Hearings, infra note 179, at 868-70. Railway
Age, whose favorable remarks about the Commission are pointed to by Dr. Huntington,
frequently has editorialized about the Commission's decisions in rate level proceedings.
See, e.g., The Railways' Shrunk Margin of Profits, July 16, 1951, p. 29; The Public
Must Be Shown How Rate Regulation Has Failed, Sept. 3, 1951, p. 35. No doubt, such
editorials have been well received by the railroads themselves.

\textsuperscript{172} If, as the author states, "administered prices" normally involve a lag, why does
he ignore this lag in discussing the latter part of the period 1911-18? Wholesale prices
(1913=100) declined slightly in 1914 and 1915, averaged 122.5 percent of the 1913 level
in 1916, 168.3 percent in 1917, and 188.1 percent in 1918. Except for a drop in 1911, prices
in 1910-13 were very steady. See pp. 174-5 supra.

\textsuperscript{173} Investment in new lines, extensions, and additions, less retirements, 1921-32,
$6,309,117,000. SEN. DOC. NO. 152, 73D CONG., 2D SES. 2 (1934).
15 percent increase in 1931 174 and a further denial in 1935 175—with only small advances allowed and on a temporary basis—or its concern over the impact of increased rates on shippers.176 Another point not to be overlooked is that wage rates as a rule do not come down when prices in general decline.177 Wage costs and the greater burden of fixed costs during a period of low traffic associated with price recessions tend to militate against rate reductions.

But what are the facts as to the alleged “ease with which the railroads in recent years have obtained advances in rates and fares from the ICC”? The railroads certainly do not share Dr. Huntington’s view.178 Recently the president of the Pennsylvania Railroad testified on two pending bills: S. 2518, to enable the railroads, on a showing of increased costs, to place general increases in rates in effect on thirty days’ notice without suspension but subject to subsequent review by the Commission; and S. 2519, to amend Section 15a to put a more positive duty on the Commission to enable railroads to earn adequate returns. The witness said in effect that the Commission had been not only too slow but too niggardly in granting rate increases in the face of advances in railroad costs.179 Such phrases as “this whole sorry story” and “too little and too late” are indicative of the railroad position. The Commission did not approve S. 2518 or S. 2519.180 Legislation of the kind proposed in S. 2518 does not help the author’s thesis.

Moreover, both water carriers (commonly parties to the rail proceedings and receiving the same rate increase authorizations) and motor carriers have derived great benefits by “following the rails up.” In fact, to be consistent with his “affiliation” thesis, the author should be able to point out that the Commission has not allowed increases in water and motor rate levels or, if such increases have been permitted, to show that railroads were not in fact entitled to rail rate increases under similar circumstances. He does neither of these things.

174. 178 I.C.C. 539 (1931).
175. 208 I.C.C. 4 (1935).
176. See pp. 178-9 supra.
177. Reductions in railroad wage rates were made in 1921 and 1922, and a 10 percent reduction, effective February 1, 1932, was restored on April 1, 1935. Cost-of-living adjustments are a very recent development.
178. W. T. Faricy, president, Association of American Railroads, said in 1948: “These lags are terribly serious when you consider that a wage increase of 1 cent an hour across the board . . . means an added expense of $40,000,000 a year . . . . So, when you have a good-sized wage increase, say a 15 cent increase, you have $600,000,000 of extra expenses.” Hearings before House Committee on Interstate and Foreign Commerce on National Transportation Policy, 81st Cong., 2d Sess. 440 (1948).
179. Hearings before Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation, 82d Cong., 2d Sess. 868-905 (1952). Others testified to the same effect, id. at 915-47.
180. Id. at 1151-6; see also testimony of Commissioner J. Haden Allredge, id. at 1156-8.
The statement that since 1940 the Commission has granted all applications for increases in railroad fares is substantially true as to other than commutation fares, although attention could have been called to the reductions ordered in Passenger Fares and Surcharges.\(^{181}\) Before the war and since the war’s end, railroads have rendered passenger service at a loss\(^{182}\) and often at less than out-of-pocket costs, with a resulting heavy burden on freight traffic; there is little justice in forcing continuation of passenger service losses, which grow as costs increase. The loss situation is as bad, if not worse, in the commutation field. The increases sought have been granted in various instances, but here there also have been suspensions and partial approvals of proposed increases. In some instances the Commission has ordered complete revisions of fare structures.\(^{183}\)

As to increases granted the Railway Express Agency, here again the problem was one of mounting labor and other costs and declining traffic. Payments to railroads for their part of the service were substantially below the cost the rails incurred; in fact, some railroads were getting nothing. Not to have granted increases would have contributed to the demise of an agency whose service is needed by many shippers or would have prolonged the unjustified heavy losses of the railroads.\(^{184}\) The increases by no means eliminated these losses. Moreover, not all requests were allowed.\(^{186}\) Why are these facts ignored?

Conflict with other groups. Finally, we are told that the increases granted the railroads brought the Commission into conflict with other groups.\(^{186}\) First, it is not so obvious as the author supposes that shippers were opposed to general rate increases. Shippers were not disposed, broadly speaking, to object to the early postwar advances.\(^{187}\) Their opposition became greater as the increases cumulated, though some of the objections in the later proceedings were primarily directed to the form an increase might take.\(^{188}\) The citations to substantiate the charge that there has been "‘considerable criticism’" of the increases since 1946 are found to be general statements readily answered by reference to the advances in railroads’ labor and other costs. Strangely

182. See 65 ICC ANN. REP. 41-3 (1951); Monthly Comment (Bureau of Transport Economics and Statistics), May, 1951, pp. 1-5. “Passenger service” refers to passenger-train service, which includes mail, express, etc.
185. See Increased Express Rates on Fruits and Vegetables, 279 I.C.C. 741 (1950); Fish between Midwest and Eastern Points, 284 I.C.C. 47 (1952).
A CRITIQUE OF "THE MARASMUS"

enough, under "shipper interests" the author refers primarily to the appearance of various federal departments as parties to rate proceedings. In some instances, these departments are interested as shippers, but they more generally appear in behalf of particular sectors of the economy. Whatever contribution they may make is considered along with other evidence; the Act permits and requires no more.

Secondly, the important facts in the "running battle between OPA and ICC" throughout most of the war are: (1) the Commission had its own responsibilities but did what it could to lessen the pyramidng of prices following rate increases, and (2) except for a brief period, it allowed no general increase in rail freight rates.189

Thirdly, the Commission is said to have come into conflict with state and local interests. The differences are less than the author supposes. Although delay often occurs, most states usually follow Commission increases with like changes in intrastate rates.190 Since intrastate transportation costs usually increase as much as interstate costs and since the two areas of transportation are largely indistinguishable—which facts the records in such proceedings usually show—differential treatment of intrastate rates is not justified except in special circumstances. Where conflict does result, it often involves questions of discrimination between intrastate and interstate shippers. But the fact that conflicts occur is not a valid criticism of the Commission.191

Expansion of the Commission's Powers

The author's presentation on this subject does not rise much above a superficial statement of how the sides lined up; he does not consider the economic realities which gave rise to the legislation he mentions. His most important subdivision relates to legislation providing for ICC regulation of motor carriers (1935) and water carriers (1940), which he attributes to railroad and Commission efforts. The findings as to motor transport conditions and needs made by Commissioner Eastman as Federal Coordinator of Transportation 192


190. See Hearings, supra note 70, at 259-68, for tabulation presented by railroad witnesses.

191. In stating that "railroads have generally favored the growth of ICC authority at the expense of state regulatory agencies," the author might have mentioned railroads' strong opposition to federal regulation of the sizes and weight of motor vehicles. See Hearings before Senate Committee on Interstate Commerce on S. 2015, 77th Cong., 2d Sess. 442-55 (1942); and testimony of witness Mackie in Hearings, supra note 70, at 180-1.

192. See SEN. Doc. No. 152, 73d Cong., 2d Sess. 13-27 (1934). The Coordinator's conclusion was that "there is a rather general demand for Federal regulation of motor carriers, although views differ as to how far control of truck rates should go and as to numerous details of regulation." Id. at 27. For summary of views on federal regulation and coordination, see id. at 227-35.
are not analyzed. The Coordinator fully considered the viewpoints of the
carriers, shippers, states, and other interests, and he succeeded in presenting
the problem to Congress in a convincing manner. The 1935 legislation, a
culmination of many earlier Congressional inquiries and a reflection of state
experience, received thorough consideration from every angle. The Senate
committee in charge said:193

"Federal regulation . . . has the support of the Coordinator, the
Interstate Commerce Commission, the State commissions,194 the bus
industry, a large part of the shippers, and of the trucking concerns.
. . . Carriers for hire, of all types, generally concede the need for
public regulation in some form. They want some restraining hand."

The stark economic fact is that the transportation of goods by motor
carriers was being conducted under conditions which resembled those of
jungle warfare. The industry was generally lacking in stability, responsi-
bility, reasonable assurance of earning power, and safety of operation on the
highways. Shippers in many instances were attempting to set motor carriers
against one another195 and against railroads, and other shippers were com-
plaining about the undesirable features of motor service. With increasing
injury being inflicted on the railroads, the alternatives were relaxation of
railroad regulation (so that railroads could meet motor carriers on an equal
footing) or regulation of motor carriers.196 The unwisdom of the first course
was widely conceded. Motor truck regulation was needed, however, quite
apart from railroad difficulties, for the industry was periodically destroying
and remaking itself. That the railroads, themselves highly regulated, approved
this legislation is neither surprising nor indicative of more than an effort to
get simple justice; in any case, their advocacy and that of the Commission
could not alone have effected passage of the legislation.197

193. SEN. REP. No. 482, 74th Cong., 2d Sess. 3 (1935).
194. They were "strongly urging . . . Federal regulation to 'stop the gaps' in State
regulation and to enable them more effectively to regulate intrastate transportation. . . ."
Ibid.
196. "This [motor carrier] competition has been carried to an extreme which tends to
undermine the financial stability of the carriers and jeopardizes the maintenance of trans-
portation facilities and service appropriate to the needs of commerce and required in the
public interest. The present chaotic transportation conditions are not satisfactory to in-
vestors, labor, shippers, or the carriers themselves." SEN. REP. No. 482, 74th Cong., 2d Sess.
2 (1935).
197. "The demand for regulation of the motor-transport industry began with the rail-
roads, spread at length to the industry itself, and is now voiced by an important segment of
public opinion." SEN. Doc. No. 152, 73d Cong., 2d Sess. 33 (1934). The bus industry had
been ready for federal regulation for some time; while the coordinator found "there is little
disagreement as to the need for Federal regulation," the industry wished to see what code
regulation could accomplish. Id. at 25.
Legislation extending the scope of water carrier regulation had a somewhat similar history. More water carriers and shippers favored effective regulation than the author's statement indicates. The needs of one branch of the industry had caused passage of the Intercoastal Shipping Act, 1933, and extension of the Act to common carriers on the Great Lakes and in coastwise trades in 1938. The 1939 Senate report clearly indicated the problems resulting from incomplete regulation of water transportation. The Commission interposed no objection to the addition of many exemptions which made the regulatory coverage far less extensive than the author recognizes.

What have been the effects of regulation of motor and water carriers? The motor carrier industry has progressed as it never could have without the better ordering of its affairs, which Commission regulation has made possible. The industry's growth in business, public acceptance, and investments has been remarkable; the railroads have a stronger competitor to deal with than they perhaps anticipated. The effects of water carrier regulation have been obscured by the interruptions in service during World War II and by the basically adverse economic conditions in certain branches of the industry.

198. *Id.* at 164-9.

199. See Morgan, *op. cit.* supra note 125, at 5-7. This regulation was less comprehensive as to subject matter than that passed in 1940.

200. "This [regulation] is not for the purpose of favoring one form of transportation over another or seeking to put any form of transportation out of business; it is, as stated, simply to put them all on a common basis or common starting point in their sharp struggle for business. S. 2009 seeks to do this also. If one or more forms of transportation cannot survive under equality of regulation, they are not entitled to survive. This is not railroad philosophy; it is transportation philosophy. The problem is not a railroad problem, but, is, as the Interstate Commerce Commission has said, a transportation problem." *Sen. Rep. No. 433, 76th Cong., 1st Sess.* 3 (1939).

Referring to rail efforts to obtain repeal of the fourth section, to which repeal water carriers objected, the Committee said: "[I]t was admitted by opponents of the bill that railroads free from any regulation could destroy or seriously impair the business of its competitors. It is necessary then to regulate rail carriers to insure a sound transportation system for this Nation. And the position taken by water carriers that railroads must be regulated, and they should not, though they compete on rights-of-way improved and largely maintained by public funds, is wholly inconsistent and completely untenable." *Id.* at 3.

201. See Morgan, *op. cit.* supra note 125, pt. I. This was a report made in connection with a proceeding, *Ex parte* 165, instituted to obtain information on the effects of the exemptions and the war on conditions in domestic water transportation. The Commission took no action to carry out the recommendations for conditional removal of the "bulk exemptions" made in the report.

202. Ton-miles of intercity carriers increased 222 percent and the revenue from intercity traffic 372 percent, 1929 to 1950; for railroads, the increase in ton-miles was 76.5 percent and in freight revenues 141 percent. Operating revenues of intercity and local ICC carriers advanced 345 percent, while revenues of class I line-haul railroads increased 137 percent. For passenger carriers the revenue increase was 219 percent. *Monthly Comment*, Oct. 12, 1951, p. 12; Nov. 14, 1951, p. 12.
since the war. As for the shippers, their interest in motor rate proceedings is shown by their strong and increasing protests against rate increases.

In discussing rail efforts to transfer Civil Aeronautics Board functions to the Commission and subsequent attempts to place all regulatory and promotional work in the ICC, the author neglects to mention that neither of these proposals has received Commission support.

The author concedes at last that interests other than railroads "have at times supported individual actions of the Commission or defended the Commission against specific attempts to curb its authority. But such action," he adds, "on the part of these interests has always been sporadic and balanced by severe criticism of the Commission and opposition to it in other lines of policy." No documentation accompanies this profound understatement.

**FAILURE TO RECOGNIZE THE IMPORTANCE OF INDEPENDENT, NONPOLITICAL AND UNIFIED ADMINISTRATION**

In line with his thesis of Commission dependence on the railroads for "viability," Dr. Huntington states that "the attitude of the railroads towards the Commission since 1935 can only be described as one of satisfaction, approbation, and confidence." He does cite a staff report to the Hoover Commission to the effect that "carriers may be highly critical of and dissatisfied with particular decisions"; also cited are critical articles by Robert R. Young. But a vast array of criticism, some previously noted in these comments, is reduced to a single footnote. How can the quoted statement be reconciled with complaints of the railroads about the Commission's "too little and too late" policy in their testimony before a Senate Committee about undue ICC liberality in granting operating rights to motor and water carriers.

203. See p. 194 supra.

204. See, e.g., Minimum Charges per Shipment from East to New England, 48 M.C.C. 733 (1948); opposition of shipper organizations to 6 percent increase proposed by Midwest Motor Freight Bureau, reported in Traffic World, June 28, 1952, p. 47; similar protests as to 6 percent increase proposed by Central and Southern Motor Tariff Association. Traffic World, Feb. 2, 1952, p. 17. The opportunity to prove undue prejudice in motor rates is somewhat limited. See Zion Industries, Inc. v. Webber Cartage, Inc., 32 M.C.C. 322 (1942); Middle West General Increases, 48 M.C.C. 541, 553 (1948).

205. A 1946 survey of opinion showed considerable support for a single agency: "Single versus separate regulatory agencies.—The consensus of opinion of carriers and other respondents is largely in favor of a single regulatory agency. The carriers now regulated by the Interstate Commerce Commission favor a single agency. The air lines, supervised now by a separate regulatory agency, wish to maintain the status quo. Users of transportation largely favor the single regulatory agency." H. REP. No. 2735, 79th Cong., 2d Sess. pt. I, ix (1946).

206. See p. 219 infra.

207. Huntington, pp. 480-1.

208. Huntington, p. 473.

209. See note 171 supra.

210. See Hearings, supra note 70, at 277-8, 349, 1422.
A CRITIQUE OF "THE MARASMUS"

and about undue restrictiveness in granting rights for rail-motor operations reorganization, Section 5, and other proceedings?

Railroad support of the Commission is said to consist, in part, of defense of ICC independence. In 1937 the President's Committee on Administrative Management recommended placing the Commission's "administrative section" and that of other regulatory agencies in a cabinet department and also placing the ICC "judicial section" there for "housekeeping" purposes. "These proposals raised a storm of protest from the ICC-railroad bloc and legislation to effect them was defeated. . . ." The implication is that this "bloc" was the decisive factor. But the author's own citations supply proof of opposition of shippers, the state commissions, and others. These groups, as well as the railroads, understandably fear decisions influenced by political considerations. The same observations apply to Dr. Huntington's attempt to ascribe primarily to the railroads the defeat of the move to place the Commission under a permanent chairman to be appointed by the president. Railroads shared the opposition with American Trucking Associations, Inc., and others. Senator Edwin C. Johnson, Chairman of the Committee on Interstate and Foreign Commerce, strongly opposed the measure as tending to lessen the Commission's independence and as an infringement on the prerogatives of Congress. Could it not be that Congress was willing to give weight to the judgment of the Commission, oldest and most experienced of the regulatory agencies, as to how its internal operations could best be conducted? Again, railroad "opposition to the creation of new agencies which might rival the I.C.C." was shared by others who realize the need of undivided authority.

Railroad opposition to the appearance of federal departments before the Commission (principally in general rate cases) is a natural attitude, which is shared by other groups. Such appearances consume time, and delays in these proceedings cost millions in revenue. While the railroads doubtless concede that special circumstances may require such presentations, they

211. Id. at 250-2, 1417-8. See also pp. 187-8 supra.
212. See the far-reaching Class Rate Investigation, 1939, 281 I.C.C. 213 (1951), and prior decisions.
213. Huntington, p. 474.
214. See testimony, in Hearings before Senate Select Committee on Government Reorganization on S. 2700, 75th Cong., 1st Sess. (1937), of witnesses for National Industrial Traffic League, at 212-14, 250-1; for New Jersey Industrial Traffic League, at 246-9; for National Association of Railroad and Utilities Commissioners, at 224-33; and for Association of ICC Practitioners, at 206-11.
215. The A.T.A. witness said: "While Reorganization Plan No. 7 is a step in the right direction, so far as removing from the Commission the burden of administrative detail is concerned, we believe the value of this streamlining is outweighed by a possibility, even the probability, that the judicial processes may be subjected to political influence." Hearings before Senate Committee on Expenditures in the Executive Department on S. Res. 253-6, 81st Cong., 2d Sess. 162 (1950).
feel that the Commission can reach proper decisions by considering the views of the carriers and shippers directly involved. In this connection, the author also states: "Attempts by existing agencies to influence or dictate ICC policy through intervention in proceedings before the Commission, informal pressure upon commissioners, or by other means, have been severely attacked by the railroads." It suffices here to italicize language which appears to recognize neither statutory duties nor ethics in interagency relations.

More is said in these pages about the matters here briefly discussed.

**Commission Procedures**

While he devotes little space to this subject, the author finds that the Commission "has maintained an outdated, formalistic type of procedure." Also: "It has been slow to introduce the most simple and accepted new techniques of modern management. It has failed to develop effective devices for representing the public interest." As he has made no personal investigation of the subject, we must see if the sources cited justify his remarks.

Cited on the first point is a monograph on the Commission prepared for the Attorney General's Committee on Administrative Procedure (1941), in which the praise given the Commission (as a result of firsthand study) far outweighs the criticism offered. Next cited is a Hoover Commission staff report on the ICC. At the pages mentioned one finds reference to the substantial periods consumed in some proceedings and the considerable celerity in disposing of others; to ICC efforts to reduce delays; to various difficulties and obstacles encountered; to the Commission's effort to obviate appeals to the courts and to strengthen its position in the event such appeals are made; to the general avoidance of "experimentation where economic objectives may appear to conflict with interpretations of the law"; and to Commission concern over the legality of less formal procedures in certain types of cases. These comments scarcely support the author's serious criticism. The source next

216. Huntington, pp. 476-7 (emphasis added).
218. The principal criticism had to do with unduly long records as the result of the Commission's practice of allowing parties opportunity for complete hearing. The Committee recommended greater use of depositions, affidavits, and "canned testimony" and noted the possibility of making greater use of prehearing conferences in certain proceedings, especially in the legislative type of investigations. There were other criticisms of specific procedural steps. Many of the changes proposed were offered as mere suggestions for the Commission to consider. (The Committee also made suggestions to other agencies.) On the other hand, there was much praise for Commission practices: for example, the shortened procedure, "no hearing," or "modified procedure" devices developed by the Commission; the use of the examiner's proposed report system in most formal proceedings; the work of the Bureau of Informal Cases ("an achievement of great worth"); other use of informal methods; and the prehearing conference method used in valuation work ("an overwhelming success").
219. This point raises primarily policy questions and as such does not call for discussion here.
cited is a Commission statement of its position on important matters. Also cited is an article terming Commission procedure in railroad reorganizations "stiff" and "legalistic." The merits of this criticism will not be analyzed except to say that decisions rendered under Section 77 of the Bankruptcy Act must be reviewed by the courts and that the issues are most controversial. The Mahaffie Act was passed in 1948 to enable a "streamlining" of reorganization cases which can be disposed of on a voluntary basis; court approval is unnecessary.

The evidence cited actually indicates that the Commission has continued to do pioneering work in developing more effective procedures. It has benefited by constructive criticism and recognizes the need for using all reasonable means of reducing the time consumed in hearings. But it has had to adopt procedures which might not be necessary if it had a lighter work load, permitting greater consideration of each case's procedural needs, and if it had a more uniformly experienced bar with which to deal. Attorneys could lighten the Commission's task substantially by not insisting on formal proceedings where other means would suffice and by not prolonging proceedings unduly.

The author's second criticism has to do with slowness in adopting "the most simple and accepted new techniques of modern management." The sources cited do not justify this criticism. One of these sources notes certain exceptional cases where work has been shifted between bureaus, but Dr. Huntington could not have known all of the circumstances. And some of this "streamlining" for greater efficiency would run afoul of the author's own criticism of the Commission for having merged work of the Bureau of Motor Carriers with kindred work of other bureaus. The Commission has, however, utilized staff work to achieve greater efficiency, and it is undertaking to establish a position of executive director.

As in the case of other government agencies, there always has been opportunity for greater efficiency in the Commission's operations. Efficiency, however, is not the sole test of successful conduct of this type of work. The

220. The Commission said: "It is reasonable to conclude that... Congress has had in mind the principles governing our actions laid down by the courts over the long years of the Commission's functioning, and has approved the procedures developed." Mention was made specifically of the requirement as to hearing or opportunity for hearing, of basing decisions on the record as made, of the duty which rests on the Commission to see that the facts essential to the preparation of orders are in the record, and, to this end, of the need for adequate funds and freedom from unnecessary restraint.


222. This has involved a large number of detailed steps, but they add up to important savings in time and effort. Passage of Sen. Res. 332, 82d Cong., 2d Sess. (June 26, 1952), authorized the Senate Committee on Interstate and Foreign Commerce to study the organization and operation of the Commission. This study, made in part by an outside agency, should be helpful to the Commission. It does not involve considerations on the policy level, but has to do with management and efficiency problems; it does not signify that other agencies would not benefit from similar studies.
Commission has been painstaking in its efforts to give all parties every opportunity to have their problems thoroughly considered. It never has been criticized as bureaucratic, though it could have gained in efficiency had it been willing to follow a course which would lead to so unwelcome a designation.

The statement that the Commission "has failed to develop effective devices for representing the public interest" relies for support in part on an article on judicial notice. This question is not a new one for the Commission. While in sympathy with the idea that it should make greater use of data not of record, it was so severely admonished on this subject by the Supreme Court that it had to reverse an earlier policy which it deemed in the public interest.

The inference in the other source that the Commission does not take notice of its own decisions unless they are cited of record is definitely in error. Records in other proceedings must, of course, be stipulated. Also, the statement in this source that the Commission does not inquire to any very considerable extent into related rates when particular rates are in issue underestimates what has been done, although present staff limitations do impede such inquiry. Greater use of staff testimony, urged by one of the writers cited, involves the possibility that a staff member, in presenting the results of his work, would sometimes appear to be supporting one side at the expense of the other. There are advantages, however, that make the subject worthy of further consideration.

The Question of the Commission's "Viability"

With the foregoing survey of the record, it is possible to evaluate the author's contention concerning the "decreasing viability" of the Commission and his proposal for a different regulatory setup for transportation.

The Meaning of "Viability"

Dr. Huntington's statement on the meaning of "viability" needs to be set out in full:

"Successful adaptation to changing environmental circumstances is the secret of health and longevity for administrative as well as biological organisms. Every government agency must reflect to some degree the 'felt needs' of its time. In the realm of government, felt needs are expressed through political demands and political pressures. These demands and pressures may come from the president, other administrative agencies and officials, congressmen, political interest groups, and the general public. If an agency is to be viable it must adapt itself to the pressures from these sources so as to maintain a net preponderance of political support over political opposition. It must have sufficient support to maintain and, if necessary, expand its statutory authority, to protect it against attempts to abolish it or subordinate it to other agencies, and to secure for it

223. See ATTORNEY GENERAL'S COMMITTEE, THE INTERSTATE COMMERCE COMMISSION 81-5 (Monograph No. 24, 1941).
necessary appropriations. Consequently, to remain viable over a period of time, an agency must adjust its sources of support so as to correspond with changes in the strength of their political pressures. If the agency fails to make this adjustment, its political support decreases relative to its political opposition, and it may be said to suffer from administrative marasmus. The decline of the ICC may be attributed to its susceptibility to this malady.\footnote{Huntington, p. 470.}

This "agency support theory" appears to have attained the status of an axiom for some political scientists. The author cites what amounts to a handbook of tactics which government agencies can use to get ahead or at least hold on in the battle of the bureaus. The theory, of course, is not without its elements of truth. It is very essential, however, to distinguish among government agencies.

Apparently, the type of agency most clearly subject to the "viability" doctrine is one which caters to the interests of a particular group, such as agriculture, business, or labor. It is not difficult to see that failure to please the mother group would cause trouble for the agency. As the relative political strengths of such groups change from time to time, it is possible for one agency’s activities to be cut down while another’s expand. Certain other agencies have had their origin in well-intended efforts to advance the general public interest but never have gained solid support; they may be put out of business by espousing programs which do not accord with the temper of the dominant party. There is, of course, an essential continuing scrutiny of the worth-whileness of the activities of all government agencies.

So much may be granted in the way of broad generalizations. At this point it is necessary, however, to distinguish further among government agencies. The Commission is one of several which have quasi-judicial, quasi-legislative, and administrative functions, but is unique in that its work comprehends several modes of transportation. It is not a court of law, but most of its work should be appraised in the same manner as is the work of courts. In both instances there is the consideration of controversial issues on an open record, fairly made under established rules. Parties can "go to court" in either instance, but they must leave politics behind. Whatever political demands and pressures exist must be directed at Congress instead. The Commission must act in the coldest neutrality,\footnote{ICC v. Chicago, R.I. & P. Ry., 218 U.S. 88, 102 (1910).} as must a court. Every decision, even certain special ones,\footnote{Suits for reparation might be considered a possible exception, but anyone similarly affected may take advantage of a decision, though not a party. See A. J. Phillips Co. v. Grand Trunk Western Ry., 236 U.S. 662 (1915). See also Pennsylvania R.R. v. Stineman Coal Mining Co., 242 U.S. 293 (1916). Both cases were cited by former Commissioner Clyde B. Aitchison, at Hearings before Subcommittee on Senate Committee on the Judiciary on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess. 413 (1941).} must reflect the public interest as expressed in the statute. To seek favorable reactions to its decisions would be the quickest
possible way for the Commission to destroy itself. Harsh decisions must be rendered and criticism invited—including much which quickly reaches the ears of Congress. This criticism may be carried to such extremes as to cause uninformed persons to question the ability and disinterestedness of the Commission. But unpopularity is a penalty which must be paid if the administrative type of regulation is to be preserved. The alternative is a political type of regulation, under which the political minority expects losses and bides its time. It is not pleasant to contemplate the effects on the nation of a political administration of transportation regulation.

Yet there are steps the Commission could properly take to improve its standing, particularly with respect to securing adequate appropriations. As in the case of the courts, ICC does not defend its decisions against attack; they must speak for themselves. The Commission, however, might encourage wider publicity of its decisions, in view of their effects in all areas of the country, and make more generally known the nature of Commission work and the conditions under which it is conducted. Moreover, since the executive branch of the government also has transportation problems to consider and since transportation is an important segment of the total economy, it appears to the writer that the Commission could foster mutual understanding and exchange of information by increasing its contacts with the chief executive and the departments concerned with transportation. ICC’s relations with Congress are, of course, reasonably close, but it is apparent that more could be done with propriety to let members of Congress know of the Commission’s work and its problems.

What is the Commission’s “Viability” Today?

Carriers and shippers. We now may turn to specific phases of this matter. According to the author, the Commission has “alienated” motor and water carriers, has no friends in civil aviation, and can command only “qualified support from large shippers of the National Industrial Traffic League (which has always been closely associated with the railroads),” while other shippers, and agricultural groups in particular, are “generally hostile.”

We may first consider the motor carriers. As stated earlier, criticisms of the ICC are often self-serving; they should not always be taken at face value. According to the author’s concept of viability, the ultimate tests are whether the motor carrier industry is willing to ask Congress to reduce the Commission’s funds, to cut down its powers, or to seek its displacement, presumably by a more tractable agency, and, in addition, whether the industry can sell any or all of these programs to Congress. The matter of funds will be discussed presently. No instances of a serious motor carrier effort to reduce the Commission’s powers come to mind, though there have been charges in Congress that the Commission has “flouted the intention of Congress” and

resulting calls for more specific congressional directives in the interest of motor or other carriers. Such directives, if enacted, would not necessarily be a validation of the charges made, since the Commission has to live with the Act and, as accurately as possible, reflect the intent of Congress as it presently is made known in the Act. That it willfully has flouted such intent would be prima facie untrue and so wholly out of keeping with the traditions of the Commission as to require the accuser to bear an impossible burden of proof. The best proof, denunciation by Congress, is lacking. The intent of the law, however, is not always clearly discernible. If the Commission misjudges particular statutory language, it desires to be put straight by the courts or Congress, but meanwhile it can follow only its own understanding of the issues and the law, with help from parties to proceedings. It obviously cannot be guided by the wishes of a particular group. Nevertheless, it is believed that informed motor carriers would conclude, if appropriately asked, that the Commission has carried out a difficult job of motor carrier regulation with a commendable degree of success. That greater success could have been achieved with more funds is obvious. Motor carriers want the Commission to be able to do a more effective job.

There are differences in the attitudes of water carriers toward the Commission, but, in view of the analysis previously offered, it appears that many have been expecting the Commission to exercise more authority than it has received. As appreciation of this fact grows, as water carriers more thoroughly understand the bases of Commission decisions, and as some of the carriers learn how to present their cases more effectively, it is reasonable to expect wider realization of the value and need of regulation by the Commission. We do not need to rate the "viability" of the Commission in the field of air transportation, as, in the present writer's view, the Commission is not asking to acquire regulatory control of air transportation.

To some extent, the attitude of shippers, as well as of carriers, depends on how they are affected by particular Commission decisions. But on the whole, year in and year out, shippers respect the Commission for its honest efforts and fairness.

If, however, it can be said that any of these carrier or shipper groups are "alienated," then railroads exhibit a similar degree of supposed "alienation." As already indicated in several places, the railroads have always mixed severe criticism—especially of ICC administration of rate levels—with their public expressions of respect.

228. The present position of motor carriers of property, as expressed by American Trucking Associations, Inc., appears to be mainly that the earlier organization of the Commission's work on a type-of-carrier basis should be restored. The different position taken at Hearings, supra note 70, at 862-7, is erroneously assumed by the author to have represented the industry's views.

229. See pp. 194-5 supra.
In general, however, members of the large family of carriers and shippers over which the Commission presides gather together in strong support of the Commission when attacks are made upon its independence. Instances have been cited above. The recent efforts to secure more funds for the Commission were shared by water and motor carriers, shippers, and others.\footnote{230} This specific test of "viability" has been met.

Other agencies. We are told next that the Commission's "affiliation" has caused "alienation" of other government agencies. This "alienation" is said to result in part from the close affiliation of these agencies with interest groups in turn alienated from the Commission; but in more instances, "the Commission's espousal of the relatively narrow interests of the railroads has conflicted with the responsibility felt by these other agencies to some broader interest and their dependence upon some broader basis of support."\footnote{231} Only two answers are necessary: the Commission gives any department its day in court; the Commission must follow the law it administers and can not be bound either by a foreign statute or by the policies of other agencies. It is doubtful that most of the departments are in any sense "alienated," but if such a situation exists, the fault lies not with the Commission.

Congress. While the matter of "subversion of congressional intent" has been discussed above and, in effect, has been covered at many points throughout this paper, "two examples of the results of Congress' fear that the ICC was 'railroad-minded' "\footnote{232} may be analyzed briefly. One is the Whittington amendment of the declaration of national transportation policy.\footnote{233} It is no reflection on an agency long concerned principally with railroad regulation that Congress should express itself as it did in the amendment. The fears of other types of carriers were at least understandable. Moreover, there is reason to believe that the amendment was intended to ensure that the declaration would be treated as affirmative law and not as a preamble of little weight. The other example is the 1940 incorporation in the "rate-making" rules of a provision that the Commission shall give due consideration, in prescribing rates, "to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed."\footnote{234} This language, Dr. Huntington indicates, was used to prevent the Commission from bolstering...
other carriers' rates in order to protect the railroads. But in 1939, while Section 216(d) of the Motor Carrier Act, 1935—barring prejudice "to the traffic of any [non-motor] carrier . . ."—was in effect, the Commission had required the maintenance of a rail rate somewhat higher than the competitive water-motor rate. In view of this decision, it can hardly be said that the 1940 provision represented solely an attempt to protect motor and water carriers against the railroads.

Limits to Commission Planning in Transportation

Dr. Huntington states that the Commission "has failed to develop a coherent transportation policy aside from giving the railroads what they want." Earlier evidence disposes of "giving the railroads what they want." As to a "coherent" policy, it must be repeated that the Commission, as an agency of delegated powers, must confine itself to the authority specifically given it. If the author refers to the "felt need" for coordination of Government regulatory and promotional policies, the answer must be that the Commission has no authority in this field and has expressed a desire not to receive power in areas which involve publicly-provided transportation facilities. Its expert knowledge could be brought to bear on such matters, but it is for others to say that ICC should engage in such work. Commission "viability" in Congress would fall abruptly were it to seek such powers. But if the author means coherence in policy governing matters presently entrusted to the Commission, it may be said that the Commission implements the general statement of congressional policy and the more specific provisions of the statutes, as interpreted in various respects by the courts. Through "case law" evolution


237. See REPORT OF SECRETARY OF COMMERCE ON ISSUES INVOLVED IN A UNIFIED AND COORDINATED FEDERAL PROGRAM IN TRANSPORTATION (1949); DEARING & OWEN, NATIONAL TRANSPORTATION POLICY (1949).

238. See report of ICC's legislative committee, April 11, 1952, on S. 2744, 82d Cong., 2d Sess. (1952), a bill which would authorize the Commission to pass on the economic justification of certain inland waterway improvement projects. The Committee noted that many such projects are of the multiple-purpose type and therefore involve economic considerations outside the fields of transportation. It concluded that the bill "would place upon the Commission major duties that are alien to regulation of transportation" and opposed enactment. It similarly opposed enactment of S. 2743, to give it the duty of assessing tolls. This duty, it said, would be "somewhat different and apart from [the Commission's] primary function as a regulatory agency and which in a sense would be in conflict with that function." Aside from the difficulties presented, it considered such work "beyond the sphere of this Commission's true functions." Hearings, infra note 66, at 1496-7.

239. A single instance of a report on a public transportation project, Report on Lake Erie-Ohio River Canal, 235 I.C.C. 753 (1939), the result of a specific request of the President, is roundly condemned by the author, apparently without consideration of how the findings were reached.
and decisions based on general investigations, it develops principles and precedents for the guidance of all concerned. But ICC procedures are flexible enough to enable adjustments to changing conditions; rigid policies would be tantamount to bureaucracy.

Special circumstances, moreover, militate against such efforts as the Commission may make under its delegated powers to bring more system into transportation. Thus, the “grandfather” clauses caused a lack of control, which permits only those improvements in the basic transportation pattern which can be achieved through grants or denials of applications to engage in or expand transport operations, or to unify existing operations. Also, the Commission has no control over the number of motor vehicles or vessels a carrier may operate under its rights. Finally, there are important exemptions in the acts the Commission administers.

The author’s illustrations of failure “to develop a coherent transportation policy” are not helpful. They have to do with slowness in dealing with “obvious evils, such as the freight classification problem or the question of state limitations on truck sizes and weights.” Under Commission pressure, a uniform national classification for rail traffic finally has been achieved. This work and the development of uniform class rate scales applicable east of Mountain Pacific territory—regarded by some as one of the Commission’s greatest achievements—required time, much of it consumed in overcoming opposition and delaying tactics. As for the size-and-weight problem, the Commission, by congressional direction, made a report and recommended regulation under certain conditions. Railroad, state, and other opposition, coupled with our entry into World War II, served to prevent complete consideration of S. 2015, a bill drawn by the Commission’s staff. Conditions changed in the ensuing years. Motor carriers strongly urged that S. 2363, a sizes-and-weight bill introduced by Senators Johnson and Bricker, not be approved at this time. The problem has angles (such as load capacity of roads and bridges) foreign to the Commission’s assigned tasks.

The author refers to the fact that special agencies, such as the Federal Coordinator of Transportation, have been set up to do work in transportation planning, which he thinks the Commission has neglected. The limitations of the Commission’s functions in “planning” have been noted above. Planning studies, such as Transportation and National Policy of the defunct

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240. Such as the investigation of class rates in large territories, of terminal allowances, of the statutory exemptions, and of leasing practices.

241. To some extent the imperfections of the existing array of carriers are remedied by the dropping out of marginal carriers.


244. See Hearings, supra note 66, at 744-64, 786-7, 792-3, 799-800.
National Resources Planning Board, necessarily embrace subjects (government ownership of railroads and inland waterway improvements, for example) which the Commission could not treat with propriety. Legislative types of reports were made by some special agencies cited by the author. It is highly desirable to obtain the views of varied interests on transportation matters. Nevertheless, the Commission in its annual and special reports has supplied a large volume of legislative recommendations, many of which have been enacted into law. The Commission must recognize that its studies are "official" and therefore tend to bind it in its later work. Even its staff studies may end up in official proceedings and thus carry a weight of authority which does not attach to analyses made by agencies with little or no responsibility in transportation. The Commission recognizes, therefore, that it and its staff cannot rove at will over the transportation field. There is need, however, for more research work than it has been possible to do with available staff manpower.

The Commission and National Defense

The further charge that the Commission has been "unable to adjust its thinking and actions to the new demands of an era in which defense considerations are paramount" shows complete unfamiliarity with the facts. The most important point is that the Commission has carried a large share of the burden of wartime transport administration, including the issuance and enforcement of carloading orders and, through its field staff, the clearing up of tight car or motor terminal situations. The Commission and the war agencies supplement one another. The device of having a single defense transport administrator has important advantages, but without the Commission's help and experience, he would be severely handicapped. All three such administrators have been members of the Commission and, except Commissioner Eastman, had been and continued to be the Commissioner in charge of its Bureau of Service. Also, the Commission fully recognizes the need for enabling carriers to equip themselves for war tasks; a decision of last April clearly showed the importance it attaches to this need. The defense establishment and others familiar with Commission work appreciate the ICC's contribution to the nation's war and defense efforts.

Judicial Review and Appropriations

Two additional attempts to show the "decreasing viability" of the Commission are made. The author states that the Commission's decisions are reversed in the courts more frequently than in the past. From 1936 to 1940, it is said, the Commission was sustained in 93 percent of the cases in the

245. Huntington, p. 508.
246. The facts are stated fully in the Commission's annual reports.
Supreme Court "which involved the Commission or Commission action," whereas in 1941-45 the record was 82 percent, and in 1946-50 it was 74 percent. Statistics of this kind do not prove a trend. Either reversals or affirmances may be bunched in a given period. In addition, the late Commissioner Eastman once said that the Commission would not be doing its duty if it won all its cases; it should, he urged, test its powers in order to get ahead with its task. In any case, most of the reversals mentioned by the author resulted from the absence of findings in the Commission's reports. Funds with which to enlarge the staff of examiners would help in this connection. If, however, statistics are to be used, it would have been more informing if the author had included the Commission's experience in the lower courts. And while no data are readily available, it is apparent that an extremely small percentage of all Commission decisions reach the courts.

The other point is that the Commission's appropriations and the number of its employees have been stationary or declining. Its appropriations for general expenses (of chief interest here) increased 25.8 percent from 1945-46 to 1952-53. Allowing for absorption of salary increases, there has been a slight decline (0.8 percent) in effective funds. Average employment has declined 11.2 percent. Yet it cannot be said that the Commission has been singled out for especially severe treatment; the emphasis on economy in government expenditures has been of a general nature. Carriers, shippers, and others have interceded for increased funds for ICC, as have members of Congress most familiar with the Commission's work and needs, but these efforts have been of relatively little avail in the face of programs to reduce federal appropriations on the basis of general formulas. The Commission's conservative requests for funds in past years, an indication of its respect for the taxpayer's money, have served it to no advantage. When cuts come, they affect the Commission's work vitally. With adequate funds, we should hear little about the Commission's "viability."

248. The author cites Pritchett, The Roosevelt Court 177-80 (1948), where reference is made to 11 cases involving Commission orders. Six were won and 5 were lost (2 by 5-4 votes). It is quite evident, from the percentage which Dr. Huntington himself gives, that there is something wrong with this comparison. A check of data presented by Dr. Huntington has not been undertaken.

It seems that Pritchett has quoted expressions which appeared hostile to the Commission—even though some of the cases in which this language appeared were won by the Commission—and that in other cases he relied upon dissenting opinions.

249. The Commission's decisions and the presentations in their behalf were a large factor in the establishment of the limits of judicial review of administrative proceedings, a development which has benefited other regulatory agencies, federal and state.


251. See p. 218 supra.

Conclusions as to the Commission's "Viability"

The author has misconstrued or inaccurately presented evidence relating to his thesis that the Commission's "viability" is decreasing. In any event, the Commission's functioning cannot be gauged by the results of a popularity poll. Since its beginning it has been the target of criticism, and with expanded duties its problems have increased. There has been constructive criticism helping to secure improvement of the law and better performance by the Commission, but there has also been the expected self-serving criticism. Any other agency which undertook to perform the same functions with the same zeal for protection and advancement of the parties' rights would experience the same attacks. The very power of the Commission, based on a strong law, makes it the target of some who desire a different dispensation in transportation. The Commission must face and ride out these storms, whatever their volume and character. It can do no more.

It would seem that a basic test of "viability" is to be found in the attitude of Congress toward the Commission. There have been criticisms, of course, but there have been important recent expressions of confidence. The author states: "The increase in the Commission's viability was marked by a steady stream of legislation increasing its power" from 1906 to 1914. What, then, we may ask, about the legislation which has increased the Commission's duties in recent years and proposals to place added responsibilities on it? Here we find evidence of "viability" and an answer to the author's allegations of loss of leadership.

Dr. Huntington's Proposal

Dr. Huntington's remedy for the supposed "marasmus"—a creature of exploitation of criticisms of the Commission, neglect of essential facts, and misunderstanding of the Commission's work—is to place the Commission in the Department of Commerce, divide it into three commissions (rail, motor, and water), whose policy determinations would be subject to the will of the Secretary of Commerce. This proposal is made to stand or fall on whether the Commission has been an impartial tribunal. The reader must be the judge of the validity of Dr. Huntington's finding on this subject. All that has been said in these pages bespeaks a different conclusion. The Commission does not have a perfect record of performance; it is not infallible. Its every endeavor, however, has been to abide by the spirit and the letter of the law it administers.

253. Huntington, p. 471 n.16.
254. Huntington, pp. 503-09.
255. "[T]here is no charge that the Commission is biased or unfair; on the contrary the testimony appears to be unanimous that the Commission acts without favor to or prejudice against any litigant or interest." ATTORNEY GENERAL'S COMMITTEE, REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, SEN. DOC. NO. 8, 77th Cong., 1st Sess. 59-60 (1941).
On the other hand, Dr. Huntington's proposal would put an end to independent, nonpolitical consideration of transportation problems and would introduce a separatism in the regulation of different modes of transportation which conflicts with the very essence—the highly competitive nature—of present day transportation.

Possibly the best means of pointing up both the unwisdom and unreality of Dr. Huntington's proposal is to state that sources he cites as authority on other matters fail him completely in his attack on the independence of the Commission and that the Secretary of Commerce has rejected any proposal to transfer regulatory work to that Department. Dr. Huntington's notion that the dispensation he proposes would end "the existing artificial distinction and conflict between promotional and regulatory policies" is too naive to warrant discussion.

Dr. Huntington's article appears to derive from the thinking of a small group of political scientists and others who have sought to get rid of the "independent commission." It seems strange that students of government, with their knowledge of the way our political institutions have developed, should desire to tear down a unique and democratic contribution to the handling of the complex and technical problems with which Congress can not deal directly and which transcend the knowledge and capacity of our courts. The administrative type of agency grew up to meet a definite need, and on the

256. All of the possible citations cannot be referred to, but the following two suffice:

Commission on Organization, Task Force Report on Regulatory Commissions 83-4 (1949): "Most carriers, shippers, and students of transportation appear to agree that the independent status of the Commission should be maintained. That independence is quite real and has a definite and important effect upon the development of transportation policy. Major rate controversies have severe political repercussions; sectional and group interests are deeply involved in such proceedings. In the hands either of the legislature or the Executive, their solution would tend to become trials of political strength."

Testimony of Wilbur J. La Roe, Jr., Hearings, supra note 215, at 207: "The Congress was deliberate in setting up the Interstate Commerce Commission as an independent agency. . . . Through all the years the Commission has been entirely divorced from politics, and this has been one of its greatest elements of strength."

See also Commission on Organization, Staff Report to Committee on Independent Regulatory Commissions IV-46 (1948): "The Interstate Commerce Commission should be continued as an independent agency in order to ensure flexible regulation with the minimum of political influence." And see Cooper, Administrative Agencies and the Courts (1951).

257. "The Office of the Under Secretary for Transportation has no regulatory function. It does not seek or desire it. The Department as a whole has no such function, except in international ocean and international air transportation. Regulatory activity is a quasi-judicial activity; it is and should be exercised by independent agencies." Address by Secretary of Commerce Charles Sawyer, "The Government's Role in Transportation," April 29, 1952.
whole it has met this need. Its success depends on its independent, non-political action under the general directions given it by the legislative branch, subject to judicial review and presidential appointment. Dr. Huntington would destroy this independence and thus eliminate this type of agency. Fortunately, this school of thought finds little support among the interests subject to regulation, the shippers, the members of Congress, or among well-informed students of the regulatory process.
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