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Thesis

The Power of Congress to Regulate Commerce between the States with an Especial Consideration of the Interstate Commerce Act.

by

Charles H. Blood.
The passage of the "Interstate Commerce Act" is suggestive of the fact that changes in theories, long unquestioned, regarding the true relations which exist between State and citizen are being made simultaneously with changes in industrial methods. These are no less interesting from a legal, than from a political, social and economical point of view. The laissez faire doctrine of the Physiocrats that absolute freedom of competition will conduce to the highest welfare of society seems not well adapted, in many respects, to an age of corporations and vast accumulations of capital, and occasionally Bellamies are found who are confident that the true solution of all social problems is to be found in absolute governmental regulation of all industries. Absurd, doubtlessly, as are such suggested remedies, their mere existence, nevertheless, but proves the presence of actual evils and we may wonder if it be not indicative of a tendency on the part of the government
to assume a supervision and control of private industries.

That Congress, in the passage of the "Interstate Commerce Act," has exercised an authority over individuals acting, in a private capacity, never before attempted by any such sweeping measure is unquestioned, but that the passage of similar measures in reference to other industries would be improbable is apparent if we but consider the nature of the enterprise to which the Act applies. Railroading is a quasi-public business, and because of its peculiarly commercial nature, congress may, without violating the constitution of the United States, subject it to greater restrictions than ordinary enterprises conducted by private capital.

The constitutional right of the legislature to pass the Act is conferred by Section 8 of Article I of the constitution of the United States, according to the provisions of which congress is given the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." A due
conception of the extent of the powers which were intended to be conveyed upon congress by this section can only adequately be conceived by a consideration of the high regard in which this provision was held at the time of its adoption in the constitution, and this of course, can only be appreciated by a perusal of the debates in the constitutional convention, as reported in the "Federalist". Suffice it to say that the imbecility of the confederation was largely due to the policy of protection and commercial discriminations which was maintained by the various states with the consequent excitation of animosities between the States, so that "the need of some equitable and just regulation of commerce was among the most influential causes leading to the constitutional convention." "It was intended" said the learned judge in Cook v. State of Pa. 97 U. S. 563 in his allusion to the power conferred upon Congress to regulate commerce, "to guard against any taxation by the states which would interfere with the freest inter-
change of commodities among the people of the different States." (Wabash, St. Louis and Pacific R. R. v. Illinois 118 U. S. 557) or, as was suggested by Mr. Madison in 1781, it was indispensably necessary that the United States; in Congress assembled, should be vested with the right of superintending the commercial relations of every state, that none might take place which should be contrary to the general interests. The intention to remove the discriminations which existed under the Confederation further appears by Section 9 of Article I of the Constitution which provides that "No tax or duty shall be laid on any articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

Although Sections 8 and 9 of Article I, as cited, confer in terms upon Congress the right to regulate
commerce between the States" and by the regulation of commerce must clearly be included the regulation of railroads as an instrument of commerce, yet it can in no wise be claimed that this power to regulate is absolute but on the contrary, it must be subjected to certain limitations and restrictions. By the Fifth Amendment of the constitution of the United States it is provided that "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation", and as is suggested by Mr. Van Holst in his work on "Constitutional Limitations" (p 252) the use of the term "due process of law" places a limitation upon the powers of the legislative as well as upon those of the executive and judicial departments of the government. It would therefore be clearly unlawful for congress in the exercise of its powers to regulate railroads to compel them to continue business at a loss or to establish such low rates as to render profits im-
possible. As a general rule it is doubtless true, as was so clearly express by Chief Justice Field in his dissenting opinion in the case of Munn v. State of Illinois 94 U. S. 113, that "those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered"; yet in the case of railroads, possessed as they are of a quasi-public character, it has long been conceded that a prevention of improper profits could not be considered a deprivation of property without due process of law within the meaning of the constitutional prohibition. In fact as early as the year 1810, in the English case of Aldmitt v. Inglis 12 East 527, Lord Ellenborough said "There is no doubt that the general principle is favored that every man may fix what price he pleases upon his own property, but if for a particular purpose the public have a right to resort to the premises and he have a monopoly of them, if he
will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

The English rule has, unquestionably been recognized in this country, for in an action brought in the year 1876 by the Chicago, Burlington and Quincy Railroad against the State of Iowa, 94 U. S. 155, the defendant had passed an act regulating charges on railroads and the plaintiff claimed such act to be a violation of Section 1 of the Fourteenth Amendment which provided that "No State shall deprive any person of life, liberty or property without due process of law." In rendering the decision of the court in favor of the defendant Chief Justice Waite said "Railroads are chartered and given extraordinary powers by the legislature in order that they may the better serve the public in that capacity, and therefore they are subject to legislative control as to rates of fare."

In this case the court suggested that the right of legislative control always existed and could not be
lost by mere non-user for twenty years, intimating that it would be unlawful to exercise it unless occasion demanded, inasmuch as no government ought unnecessarily to interfere with the private rights of its citizens. Twelve years later in 1888 Judge Love thus concisely summarized the relation which exists between sovereignty and railroads "Whoever in my opinion, in a legal proceeding considers a railway company as a corporation for mere pecuniary profit to the owners of the property, without taking into account their character as 'quasi-public corporations' having public duties to perform, takes a view of the subject altogether narrow and misleading. It is the duty of the government to provide and regulate because indispensable to society and because individuals are incompetent to establish and control them." (Chicago, Burlington and Quincy R. R. Co. v. Burlington C. R. and U. Ry Co. 34 Fed. Rep. 481.) The rule as it exists to-day was concisely expressed by Lord Chief Justice Hale, two hundred years ago, when
he said "when property is affected with a public interest it ceases to be private property only."

In the interpretation of the commerce clause of the constitution, however, there has been, as regards the relation supposed to exist between the general government and the states in reference to the power of regulating commerce, a confusing number of conflicting decisions and opinions, and judicial interpretation did not recognize the absolutely exclusive jurisdiction of congress over subjects of interstate commerce until within a very recent period. In fact by the almost unanimous concurrence of decisions before 1886 the States were allowed in certain cases, to exercise a certain amount of control over interstate commerce. In a case decided in 1876 (Hunn v. State of Illinois 94 U. S. 113) the judge said "It is not everything which affects commerce which amounts to a regulation of it within the meaning of the constitution. The regulation of elevators is of domestic concern and until congress
acts directly in reference to interstate relations
the state may exercise all acts of government over
them," although it was conceded that interstate com-
merce was affected by such regulation. And again in
the case of the Chicago, Burlington and Quincey R. R.
v. State of Iowa 94 U. S. 155, the court said "A State
may pass such rules as are necessary to promote the
welfare of its citizens within its own jurisdiction
even though those without the state may be indirectly
affected." The same general principle was recognized as
early as 1829 in Willson v. Blackbird Creek Marsh Co.
2 Peters 245, and as late as 1882 in Transportation Co.
v. Petersburg 107 U. S. 391. In the latter case the
complainant claimed that wharfage charges were unrea-
sonable and amounted to a regulation of interstate
commerce. The court, however, held that the subject
matter was private property, primarily subject to local
state laws and that until congress had acted, the United
States could not act through its courts upon the sub-
ject.
The right to interfere directly, however, with interstate commerce was seldom claimed by the States and in 1870 (15 Wallace 232) an act of the Pennsylvania legislature was held void which levied a tax upon all freight carried through the state by any railroad; and in Hall v. DeCuir 95 U. S. 435, the court said "It is hard to draw the line which separates the powers of the states from the exclusive powers of congress, but we may safely say that a state which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach on the exclusive powers of congress." Thus in Gibbons v. Ogden 9 Wheaton 1, a state law giving Livingston and Fulton the exclusive right to navigate New York waters with steam was held unconstitutional as a direct interference with commerce while in 107 N. Y. 678 a regulation of the times of opening and closing bridges was considered within the jurisdiction of the State as only indirectly affecting Commerce. This distinction, so long preserved,
undoubtedly owed its existence to a large extent, to the high regard in which was held the police power of the states. In a case decided as late as the year 1885 (The Gloucester Ferry Co. v. State of Pa. 114 U. S. 196) the court said "It was not intended by the grant to congress of power to regulate commerce to supercede or interfere with the power of the State to establish police regulations for the better protection and enjoyment of property. As the general police power can be better exercised by local authority and mischiefs are not likely to spring therefrom so long as power to arrest collision resides in the national congress, the regulation by congress cannot often exclude the establishment of other regulations by the state covering very many particulars." And again "As to those subjects of commerce which are local or limited in their nature or sphere of action, the state may prescribe regulations until congress assumes control of them; as to such as are national in their character and require
uniformity of regulation the power of congress is ex-
clusive and until congress acts such commerce is en-
titled to be free from state exactions and burdens." The law therefore in 1885 was not essentially differ-
ent from that recognized in 1834 when the chief justice in Gibbon v. Ogden, 9 Wheaten 1, suggested that "If a state in passing laws on subjects acknowledged to be within its control and with a view to those objects, shall adopt a measure of the same character which congress may adopt (but has not yet adopted) "it does not derive its authority from the particular power granted, but from some other which remains with the state." Consequently we find that until the year 1886, in the absence of express regulations by congress, interstate commerce might be burdened to a large extent by the states if the burdensome laws but took the nature of police regulations. Since the decision in the Wabash, St. Louis and Pacific R. R. v. State of Illinois 113 U. S. 557, the decisions of the Supreme
Court recognizing the legality of the exercise of the police power of the states although thereby interstate commerce might be indirectly effected has been expressly repudiated. In "In re Barber 33 Fed. Rep. 641", where under the pretence of in exercise of the police power, a sale of dressed meats was prohibited in Minnesota unless the animal was inspected alive twenty-four hours before such sale, the question was raised as to the extent of the powers reserved to the states and in the Federal Constitution. The court decided the law requiring such inspection to be unconstitutional and suggested that although the police power of affording protection to health was a recognized power, yet it should not usurp federal powers, "and courts will look at the effect and operation of any law and will not be controlled by its mere form." One year later in 1887 the question seemed to be finally settled the court declaring in the case of "Kugler v. State of Kansas 123 U. S. 623, that a "state when
providing for the protection of the public health, the public morals or public safety is subject to the paramount authority of the Constitution of the United States; and may not violate rights secured or guaranteed by that instrument or interfere with the execution of powers confided to the general government."

Although, therefore, it must now be conceded that no urgency for the use of the police power can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress by the Constitution, yet a just recognition of state rights renders it imperative that an exercise of police power should not be regarded as an unconstitutional act merely because it may result in an interference with interstate commerce. On the contrary it must be clearly established that the law in question must necessarily result in such interference or its constitutionality will not be questioned.

(Dizo v. Loyd 36 Federal Reporter 651 (1888))
The absolute exclusiveness of the power of Congress to deal with interstate commerce having been established, it will not be foreign to our purpose to note the comprehensiveness of the term itself and the liberality displayed in its interpretation in order that we may the more readily appreciate the liberal powers assumed by Congress in the passage of the "Interstate Commerce Act."

The complaints alleging a violation of the provision of the Constitution which confers upon Congress the exclusive power to regulate commerce, have been innumerable and as varied in their nature as the numberless forms with which interstate commerce may be clothed in a commercial nation like our own, subdivided as it is into nearly half a hundred states and territories. The regulation of commerce we have seen to have been one of the main objects of the formation of our constitution and consequently it is deemed necessary that the grant be as large as the mischief. In consequence of the liberal construction it has been exercised as well in the
prohibition of half-pilotage fees when permitted by state laws, as in declaring unconstitutional statutes requiring licenses of foreign peddlers and importers. (Mcal v. Alemeda 31 Fed. Rep. 363; Welton v. State of Missouri 91 U. S. 275; Brown v. Maryland 12 Wheaton 419-443.) As was suggested by the court in the latter case, freedom of commerce involves both liberty of importation and of sale, for there can be little difference between a tax imposed upon goods as they enter the state and one imposed immediately afterwards, "for were it otherwise the real objects of the constitutional provision might be defeated." So, too, a license tax on express companies was held unconstitutional (United States Express Co. v. Allen 39 Fed. Rep. 712) as not sufficiently distinguished between state and interstate commerce; and a tax on telegraph poles was for the same reason held invalid as to a company engaged in both state and interstate business (City of St. Louis v. West. Union Telegraph Co. 39 Fed. Rep. 59). It is
thus very apparent that the commercial power of congress is wide reaching in its operation. As the learned Justice Bradley remarked in 1887 "The power to regulate, as applied to the general government, has a most extensive application. With regard to commerce it has been expressly held that it is not confined to commercial transactions, but extends to seamanship, navigation, and all the appliances and facilities of commerce, and it must extend to these or it cannot embrace the whole subject. Stockton v. Baltimore and N. Y. R. R. Co. 32 Federal Reporter 9.

We must not, however, infer from the nature of the cases already cited, that the power of the general government is limited to the prevention of interference on the part of the states with interstate commerce. On the contrary, congress has affirmative powers and may exercise active control of commerce between the states. In the language of Judge Story, as quoted
from the case of The United States v. Coombs 12 Peters 72. "Congress has general authority to make all laws necessary to execute its delegated constitutional powers." Accordingly in 1887 congress authorized the building of a bridge across an interstate navigable stream in Maryland although the State strongly objected to such construction, and the question being raised in the action of Decker against The Baltimore and N. Y. R. R. Co. 30 Fed. Rep. 723, the Supreme Court of the United States declared the exercise of such power to be constitutional; and in another case almost identical with the one last cited, the same court declared that congress not only might confer upon a private corporation the right to construct such a bridge but might also grant to such corporation land belonging to an objecting state for the purpose of such construction. Pennsylvania R. R. Co. v. Baltimore & N. Y. Ry Co. 37 Fed. Rep. 29. These decisions, alone, are sufficient in a general way, to sustain the con-
stitutionality of the "Inter-state Commerce Act," and as Justice Field remarked in 1883, although he was one of those who most strenuously favored the rights of the States to interfere with interstate commerce under an exercise of the police power, "Congress has the exclusive and affirmative right of control of that portion of commerce with foreign countries and among the States which consists of the carriage of persons and the transportation, purchase, sale and exchange of commodities."

The commercial power of congress having been more or less fully considered and the constitutionality of affirmative action established, it remains for us to consider somewhat more in detail the exercise of this power as applied to railway legislation and the "Inter-state Commerce Act."

For several decades it has been apparent, for various reasons the principle of which, perhaps, is the wonderful and rapid development of railway in-
dustries and consequent changing methods, that the old rules of the Common Law upon the subject of commerce were no longer applicable to present methods of transportation and consequently attempts have been made very generally, to supplement them by statutes. It is most interesting to note the marked change in the character of this railway legislation in the United States since 1870. Before that date all legislation seems to have been made for the purpose of assisting railway construction by such measures as legislative land grants and the bonding of towns. Since the marked tendency, however, of later years, of consolidation and extension, the aim of legislation has been the remedy of abuses, the protection of the shipper rather than the protection of the railroad investor. Prior to the passage of the "Interstate Commerce Act" all remedial railway legislation was made by the states and consequently was local and ineffectual and yet may be considered of inestimable value as paving the way for
intelligent congressional action. The "Granger" legislation, between 1870 and 1877, in attempting to establish iron clad rules and fixed rates of charges for railroads was not only probably unconstitutional when viewed in the light of the last decision of the Supreme Court of the United States rendered March 24th, 1870 in the case of The Chicago, M. & St. P. Ry. Co. v. State of Minnesota, but was also not based upon a scientific study of the railway problem and consequently failed most certainly to accomplish the good results aimed at, yet it just as certainly served a great purpose by attracting public attention and thus revealing a certain conception of the true relation which railways bear to the public. Such legislation was invalidated, it is said, not so much by constitutional limitations as by industrial ones.

The next effort to regulate abuses, made between 1880 and 1885, was one based on a sounder policy, I refer to the establishment of railway commissions,
which possessed little real administrative power but were to secure reform through publicity, to shape legislation rather than to make arbitrary laws, and which therefore were unquestionably constitutional according to the decision of the Supreme Court, last cited. The Massachusetts Commission, although at first ridiculed because of its lack of power, soon gained the confidence and respect not only of the public generally but of the railroad officials themselves, it appearing that the permanent interests of the corporations and of the public were closely allied, and consequently other states were not slow in establishing, similar commissions. The worst feature, however, of these commissions was to be found in their lack of jurisdiction over questions of interstate commerce, which is so closely and in so many ways connected with state commerce, and attempts to adjust the relations between the two have been made ever since the proposal of the "Reagan Bill" in 1878, finally culminating
in the action taken by congress in the passage of the "Interstate Commerce Act" in 1887.

The success or failure of this, practically the first attempt of congress to regulate interstate commerce, and the merits of the act itself can only be estimated by its success in operation. Its most commendable feature, by far, judging not merely by the light of previous legislation but in the light of its actual operation, is not to be found in the comprehensiveness of the act, not so much in the number and detail of its provisions as in their flexibility. Congress recognized the fact that the old maxim that "every rule has its exceptions" was applicable in an unusual degree to railroads. While recognizing the fact that railroad wars and the consequent fluctuation of rates "rendered business contracts little more than lotteries" and tended to destroy public confidence, they did not make the remedy worse than the evil, as did the Grangers, by prescribing fixed and invariable maximum rates, even could they have constitutionally done so (41 Albany Law
Journal 355), but contented themselves by prohibiting and declaring to be unlawful every unjust and unreasonable charge for transportation (the constitutionality of which we have already discovered), leaving the determination as to what might constitute an unreasonable charge dependent in each particular case upon the results of the investigations of the commission or the courts. While not ignorant of the fact that unrestrained competition between railroads only resulted in a system of secret rebates and favoritism toward large dealers, destroying publicity of rates, embittering class prejudices by its tendency to aid the strong and depress the weak, not to allude to the moral evil of fostering corruption in favor of localities and political bodies, they did not overlook the fact that many considerations entered into the problem of railway transportation which at first glance are overlooked and that under certain conditions, discriminations were not only not destructive but highly advantageous to all
classes and business interests. Consequently we find no general prohibition of discriminations, but only of unjust discriminations which might arise when a greater compensation was received from one person than from another for a substantially similar service. Likewise only unreasonable preferences to corporations, localities or any particular description of traffic are prohibited; while although by the much discussed "Long and Short Haul Provision" greater compensation in the aggregate was not to be received for the transportation of persons or of like kind of property for a shorter than for a longer distance over the same line, the shorter being included within the longer, yet it is to be particularly noted that such prohibition was applicable only where such transportation was under substantially similar circumstances and conditions, and fearful lest this condition should not be found sufficient to meet all emergencies a proviso was added that in special cases the commission appointed under the pro-
visions of the act might, after investigation, authorize a smaller charge for a longer than for a shorter distance. To quote from the case of "Ex Parte Koehler" (31 Federal Reporter 315), "Congress never intended to make of this act a Procrustian bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule without reference to the probable and even unavoidable differences in the conditions and circumstances under which it must be transacted." "As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible."

These few suggestions as to the nature of those provisions of the Act about which there have been the greatest controversy, evidence the fact that each case must be judged upon its own merits, and that therefore the success or failure of the Act depends largely upon the intelligence and broad mindedness of the commission
itself. The remark of Mr. Seligman made in reference to the "Long and Short Haul Clause" is applicable to many of the most important provisions of the act.

"The country", said this noted economist "is to be congratulated on the legislative recognition of the rule; let us trust that there may be equal cause for congratulation on the official recognition of its limitations." (Political Science Quarterly 22:369)

The question, therefore, naturally arises whether this is not a remarkable power for good or evil to be placed in the hands of five individuals appointed by the president, and yet it is in a consideration of the character and powers of the commission itself that the wisdom of congress is most clearly apparent. We find a body of men created with a capacity for great usefulness and moral influences, yet possessing little actual power and responsibility. The powers of the commission are certainly unique and their constitutionality has not unfrequently been questioned. By Section
the commission "is authorized and required to enforce the provisions of the Act," and by various other sections is given power to a certain extent, to determine controversies arising under the provisions of the Act. Consequently it has been claimed that its creation was unconstitutional upon the ground that, although congress was by the constitution given the power to create inferior courts, the commissioners being appointed for six years had no such tenure of office as is required by the constitution of the members of such inferior courts. This objection, however, is fallacious because the commission cannot be deemed a tribunal although it undoubtedly possesses several remarkable judicial functions. Although by the provisions of Section 9 any person claiming damages for a violation of the Act may, at his election, lay his complaint before the commission or bring suit in any circuit or district court of the United States; although the proceedings before the commission conform in many
respects to those in ordinary courts of law, although a formal complaint is made to the commission, a copy forwarded to the offending carrier, an answer required and an investigation made in order that all parties interested should have an opportunity to present their claims; although after such investigation a report of the findings of fact is made which corresponds very closely to a judicial opinion, and notice sent to the offending carrier to desist from his violation of the Act or to make certain reparation within a specified time to the offending carrier as the case may be, yet there is this essential distinction to be found between the commission and a court in the fact that the commission cannot enforce its decrees nor award damages in violation of the seventh amendment of the Constitution, by which the right of trial by jury is reserved in Common Law suits, and its only remedy in case its recommendations are ignored is by an action somewhat in the nature of an appeal to a United States
district or circuit court, in which the findings of
fact before the commission are prima facie evidence.
Thus the commission, not encroaching upon the proper
functions of a court, performs functions not very dis-
similar to those possessed by a referee, investigating
far more fully by reason of its technical knowledge of
railway questions than could the court itself and yet
at the same time by reason of its inferiority to courts
of law deprived of the power to display favoritism
and corruption.

This creation of congress, however, is not restrict-
ed, as is a court, to a consideration of matters brought
to its notice by an injured party, but on the contrary is
possessed of unlimited authority to enquire upon its
own account or at the instigation of disinterested
parties into the general management of railroads, and
for this purpose may compel the attendance of wit-
nesses and the production of documents. As was said
by Henry C. Adams it possesses "the most remarkable
espionage and control ever exerted over any business."

It is not, therefore, in its capacity as a semi-tribunal for the punishment of violations of the act that is found the most praiseworthy characteristic feature of the commission, but rather in the character of an investigating board, the object of which is to collect instructive information upon all subjects connected with railroad management. As Charles Francis Adams once remarked, "The solution of any problem is the creation of an intelligent public opinion regarding it," and a history of a short three years has proven that an increase of reliable information in regard to any subject of railway interest leads to a reduction of abuses and renders controversies less numerous. Recognizing this fact and realizing what a vast influence railway problems have upon all industrial, political and social problems, congress has clothed this body with unlimited powers of investigation. By the provisions of Section 20 the commission is authorized
to require annual reports from all carriers subject to the act, at certain specified times, containing not only answers to any specific questions but also containing complete statements of the amount of capital stock and cost of equipments, expenses of management and improvement, earnings and receipts, dividends paid and balances of profit and loss; and again by Section 12 the production of any books, contracts or documents relating to any matter under investigation may be demanded and a compliance with such demand is enforceable by the courts and a refusal punishable as a contempt. Thus the act creates a commission possessing the power to make a complete exhibit of all the operations of the entire railway system of the United States, industrial as well as financial. Accordingly investigations have been made as to the methods of lighting and heating in vogue among railway corporations, as to the use of safety appliances and as to the provisions adopted by the various roads in regard to the technical training
of employees and the establishment of reading and eating rooms for their enjoyment, with the intention doubtless of educating the carriers as well as the public and thus paving the way for improvements and for new legislation upon these and other similar points of interest.

However important have been the investigations upon the subjects of management and equipment, they are all eclipsed by those made upon the subject of "rates", a subject of such great importance to both the railway interests and the public and one into which so many different elements enter that it is not surprising that it is upon this that the special attention of the commission has been concentrated. As has already been suggested, congress has only said that rates must be just and the commission is left the difficult task of determining what constitutes injustice. It has been a principle long recognized in railway ethics that rates cannot be proportionate to the cost of services, for were this so bulky articles could seldom be carried and
the development of many important industries would be
destroyed; but on the contrary that they should depend
rather upon the value of the service rendered. Conse-
quently classifications of freight have always existed
and although owing their very existence to discrimina-
tions yet so far from being founded upon principles of
injustice, good classifications are for various economic
reasons which space prevents our considering, proven to
be an actual benefit even to those very articles most
discriminated against. Yet it has nevertheless been
discovered by the commission that unjust discriminations
were made in favor of various parties under the cloak of
classifications. The attempts to remedy this evil have
been greatly impeded by the variations in the value of
the same articles in different sections of the country
and the consequent variations in the classifications
themselves while to add to the difficulty, each railroad
appeared to have a system of classification peculiar to
itself. To bring harmony out of confusion has been the
work of the commission in this regard. Representatives from different sections have, at the request of the commission assembled at Washington for consultation and now suffice it to say, the tendency is to uniformity in classification and consequently evasions of the act by this subterfuge are less frequently attempted.

It was the intention of congress, however, to create a commission whose duty it might be by their investigations, to discover and to discourage unjust discriminations by whatever devises they be made. (U. S. v. Fozer 37 Fed. Rep. 635) Accordingly whether it arise by means of an unreasonable reduction in rates in favor of large shippers for transportation conducted in their own cars or for articles shipped in one form rather than in another (Schofield v. Lake Shore & Michigan Southern R. R. II Interstate Commerce Reports 90); whether it have its origin in the extravagant and wasteful practice of employing ticket brokers and scalpers who under the pretence of receiving commissions discriminate between
purchasers, injure the public and afford no actual service to the carriers themselves; or whether it exist in the employment of a system of free passes which are most frequently given to those who are least entitled to them from a financial point of view and which can only tend to injure those not receiving them by raising general charges,—unjust discrimination in every form is found by the commission to be within the contemplated prohibition of the act. By numerous exceptions, however, the solicitation of congress for the public weal is evidenced and although passes are prohibited notable exceptions are made in the interests of state or science or to meet the demands of charity; although the obligation imposed upon all carriers to keep posted in each depot a schedule of charges to and from all points, together with the further requirement that a ten days notice shall be given of any advance in such rates but suggest that variations in rates are to be discouraged, yet the issuance of mileage, excursion and commutation
tickets which are offered impartially to all can be productive of no evil and are therefore duly allowed. (In Matter of Passenger Tariffs II Interstate Com. Rep. 649), while party rates and passenger car load rates, often productive of evil practices, have been found by the commission to be within the prohibition of the act.

Space, unfortunately, prevents the extended discussion of the "Long and Short Haul" clause of the Act which its importance might seem to require. Suffice it to say, that in the construction of the phrase "under substantially similar circumstances and conditions" the commission have exercised that same consideration for all interests which has characterized nearly all of their decisions and which the equities of all parties, considered from a legal standpoint, demands. Recognizing the fact that competition is the life of trade, it is only the injustice which arises from human agency and not from uncontrollable circumstance which they have decided to be under the bane of the law. (Business News Associ-
ation of Minn. v. Chicago, St. Paul &c R. R. Co. II Interstate Com. Rep. 52) Consequently they have found that dissimilar circumstances exist wherever between terminal points there exists competition with water routes, with Canadian or other roads not subject to the act and under certain peculiar circumstances between roads subject to the act. (Ex Parte Koehler 31 Fed. Rep. 315). As was suggested by the commission in the case of Read v. Chicago and N. W. R. R. Co. II Interstate Com. Rep. 541, "the question of relative injustice must be viewed on a broader ground than the mere balancing of one rate against another." In fact, the mere permission of group rates is indicative of the fact that all material facts such as the character and quality of the commodity transported, its cost of production, the market cost and the interest which the public has in the use of the commodity are all given due consideration in determining what may constitute dissimilar circumstances and variations from the general rule not unreasonable in themselves are permitted. (Imperial Coal Co. v.
Pittsburg & Lake Erie R. R. II Int. Com. Rep. 618). The fact, too, that the commission has decided, as it did in the case of The Missouri Pacific R'y Co. v. Texas 31 Fed. Rep. 802, that the carrier in the first instance was to be the sole judge as to what might constitute dissimilar circumstances and that the commission would interfere only when after investigation it was made to appear that the judgment of the carrier formulated by selfish interests, well illustrates the intention of the commission to interfere with the exercise of the business discretion of the carriers as little as may be consistent with the interests of the general public.

In concluding our consideration of the exercise by congress of its power to regulate commerce between the states by the passage of the Interstate Commerce Act, it may be said that nearly all of the evils which may exist or have at some time existed in the management of railroads owe their existence to the secrecy of operation so long controlling in the railway industry. It was this
secrecy which, so great is the influence which railways may exert over all business interests, rendered possible the creation of the Standard Oil Trust, which encouraged discriminations between individuals, business interests and localities and thus violated one of the fundamental principles of our government which declares the absolute equality of all men. Inasmuch, too, as railroads are in a certain sense creations of the government, receiving franchises and having delegated to them the right of eminent domain and various functions belonging only to sovereignty, it is but just that this great evil of secrecy be removed and that this industry be subjected to proper governmental supervision, especially since adequate remedies for the evils which have arisen at their hands are not provided for by the Common Law. That the Interstate Commerce Act itself is liberal in favor of the corporation over which supervision is exercised we have already seen that the con-
struction put upon it by the commission and the courts is liberal in favor of the railroads, is fully proven by the decisions in litigated cases; that the general verdict of the public is favorable is undenied and already demands are made that the Act be extended so as to include carriers by water, express companies and telegraph companies. Such extensions would undoubtedly be constitutional and might be attended with good results so long as Congress realizes as it has realized in the passage of the Interstate Commerce Act, that government supervision is widely different from government control.

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Special Authorities

1887 First Annual Report of Interstate Commerce Commission
1888 Second " " " " " "
1889 Third " " " " " "
(Case) Interstate Commerce Report vol. II and III