

Competition and Railroad Price Discrimination

Robert W. Blanchette

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Robert W. Blanchette, *Competition and Railroad Price Discrimination*, 54 Cornell L. Rev. 636 (1969)
Available at: <http://scholarship.law.cornell.edu/clr/vol54/iss4/8>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEWS

Competition and Railroad Price Discrimination. JORDAN JAY HILLMAN. Evanston, Illinois: The Transportation Center at Northwestern University. 1968. Pp. xii, 164. \$7.50.

No more occult ritual is observed in the law than the tripartite process by which railroad rates are fixed. Mr. Hillman's book offers a microscopic view into each aspect of this complex triad, from legislative articulation of policy to enforcement of the statutory standard by the administrative agency and review by the courts. Although careful to avoid striking any accusatory notes, his thorough analysis lays bare the inherent debilities of the oldest of our regulatory processes.

The major portion of the book is devoted to tracing the ancient battle against long-haul discrimination by railroads—the imposition of a lower charge for a longer haul along the same line. This decried practice, which discriminated against shippers who incurred higher rates for shorter hauls, first became the concern of Congress in the 1870's.

For the better part of two decades, Congress pondered the dilemma created by the fact that price discrimination of this nature was often militated by the force of competition. Thus, short-haul shippers located at noncompetitive points were charged higher rates pegged at what the traffic would bear in order that long-haul shippers could be lured from the waterways and from other rail carriers with prices geared solely to marginal costs. Although the inequality and its political overtones were obvious, a Spencerian age could not comfortably condemn the competitive motive that often prompted the discrimination. The legislative debates were conducted in a confused atmosphere where neither economic nor political reality was clearly defined. The dilemma was never resolved, but the conclusion was reached that such important decisions could not be left to the whimsical discretion of unregulated railroads.

An uneasy compromise was finally reached in section 4 of the Interstate Commerce Act of 1887 which provided that:

[I]t shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance¹

¹ Act of Feb. 4, 1887, ch. 104, § 4, 24 Stat. 380, as amended, 49 U.S.C. § 4(1) (1964).

Whether the words "under substantially similar circumstances and conditions" would justify price discrimination to meet competitive forces was left uncertain, advocates for both sides citing the same words as supporting irreconcilable positions. In the words of one of the draftsmen: "[T]he best we can do is to pass the best bill we can, and it is for the commission and the railroads and the courts to construe it afterward."²

The interpretation of the statute over the next twenty-three years is described in a chapter aptly sub-titled "The Fruits of Cultivated Ambiguity." From 1887 to 1910, the Commission and the Supreme Court entered the fray with a bitter exhibition of battledore and shuttlecock. At every opportunity, the Commission used its regulatory powers to promote what it felt to be the dominant egalitarian theme of the 1887 Act which it viewed as flatly requiring "the same rates for similar services rendered by the carrier in transporting similar freight over its line."³ With equal persistence, the Supreme Court sought to justify competitively induced discrimination.

Notwithstanding reversals of its orders, the Commission insisted that competition was "wasteful,"⁴ while the Court remained adamant in the view that "free and unrestricted competition in the matter of railroad charges . . . is the law now governing the subject."⁵ Only with the passage of the Mann-Elkins Act of 1910 was the Commission's view as to section 4 of the Act to prevail.⁶

That it should have taken over thirty years to develop a major point in transportation policy is not merely an interesting historical reflection on the leisurely pace of a past era. Even today the question of how low modern railroads may reduce costs to meet intermodal competition threatens to break all records for length in progressing to ultimate resolution. In 1940, Congress, in a major declaration of National Transportation Policy, stated its goal to be the "fair and impartial regulation of all modes of transportation subject to the provisions

² P. 22, quoting Senator Cullum, 18 CONG. REC. 490 (1887).

³ New York Bd. of Trade & Transp. v. Penn. R.R., 4 I.C.C. 447, 514, 3 I.C. Rep. 417, 444 (1891).

⁴ 14 ICC ANN. REP. 13 (1900).

⁵ United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 337 (1897).

⁶ The amendment of 1910, *inter alia*, deleted the troublesome clause, "under substantially similar circumstances and conditions." Act of June 18, 1910, ch. 309, § 8, 36 Stat. 547.

The identical language in § 2 of the Interstate Commerce Act, dealing with special rates and rebates, remains to this day because it was indicated that Congress intended different meanings to the same words in §§ 2 and 4. *Wight v. United States*, 167 U.S. 512, 518 (1897) (*dicta*).

of this Act, so administered as to recognize and preserve the inherent advantages of each"⁷ A decade later it became apparent that the Commission was using its rate-making powers to handicap railroads in meeting other competitors, such as barges which had cost but not service advantages. The matter was ultimately redefined by Congress in 1958. The power of the Commission over reasonable minimum charges was tempered by a directive that rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."⁸

The fruits of this new cultivated ambiguity are still being culled. While the Commission considered that the 1958 amendment "brought about no fundamental change in the law,"⁹ the Supreme Court, in 1963, admonished the Commission that it had improperly interpreted the mandate of Congress.¹⁰ By mid-1968, however, the matter of how the statute should be enforced was still unresolved. Concurring in the *Ingot Molds* decision,¹¹ Justice Harlan properly noted that the question was still where it was five years ago, with new litigation required to resolve the issue.¹²

In the face of such frustrations, it is not surprising that railroads increasingly cast about for diversification in unregulated industries!

As Mr. Hillman's painstaking analysis reveals, a chief problem is that the regulatory process must grapple with modern transportation complexities using an outmoded statutory scheme derived from the political environment of another age. Sadly, history may support the author's conclusion that future Congresses will no better than past ones be able to subordinate political considerations to the "logic of economics." Although unavoidably following from these premises, the author's conclusion that the job must be left to a revitalized regulatory process ends the book on a too quixotic tenor. Not only the transportation industry, but all who labor in jurisprudence, would welcome an elaboration of Mr. Hillman's thesis that administrative agencies and reviewing courts should now grasp that hitherto evasive formula that will henceforth permit them to avoid easy rationalizations, perceive more deeply distinctions between present and past

⁷ Interstate Commerce Act of 1940, § I, 54 Stat. 899, 49 U.S.C. § 1nt (1964).

⁸ Transportation Act of 1958, § 6, 72 Stat. 572, 49 U.S.C. § 15a(3) (1964).

⁹ *New York, N.H. & H.R.R. v. United States*, 199 F. Supp. 635, 642 (D. Conn. 1961).

¹⁰ *ICC v. New York, N.H. & H.R.R.*, 372 U.S. 744 (1963).

¹¹ *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968).

¹² *Id.* at 597.

economic policies, recognize candidly the limitations of precedent, and focus on present issues of substance, freely overruling archaic decisions whenever necessary.

In 1962, President Kennedy described the situation as a "chaotic patchwork of inconsistent and often obsolete legislation and regulation."¹³ Now as in the past, this situation subjects transportation to "excessive, cumbersome and time-consuming regulatory supervision that shackles and distorts managerial initiative."¹⁴ Mr. Hillman has given us a valuable documentation of this theme.

*Robert W. Blanchette**

¹³ Transportation Message from President Kennedy to Congress, 108 CONG. REC. 5985 (1962).

¹⁴ *Id.*

* Member of the Connecticut Bar; General Attorney—New England, Penn Central Company, formerly General Counsel of the New Haven Railroad. B.A. 1953, University of Connecticut; LL.B. 1957, Yale Law School.