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THE HOCH-SMITH RESOLUTION AND THE CONSIDERATION OF COMMERCIAL CON- DITIONS IN RATE-FIXING

HARVEY C. MANSFIELD*

I.

The intimate and reciprocal relationship between railroad rate structures and the economic development of the competing localities which are dependent upon the carriers has been the source of many spectacular and bitterly fought railroad rate cases. Probably more than any other single human agency, the railroads are responsible for our present economic map. At the same time, few facts have been more persistently reiterated in our industrial history than the vitality of sectional jealousies. The subjection of the commercial destinies of sectional interests to railroad domination has not been welcomed by the victims.¹ When the railroads were not merely the principal, but substantially the only means of commercial transportation—and in those remaining fields where they still are—competing localities interested in each stage of the economic process have fought time and again before the Interstate Commerce Commission for positions of relative advantage.

With regard to each major commodity the story is repeated. Producers desiring to reach the same markets, markets desiring to reach the same producing fields, intermediate gateways desiring to divert traffic through their routes, all have come to the Commission to improve their positions at the expense of their competitors. Such has been the stuff of the *Intermountain Rate Cases*,² the *Lake Cargo*³ and other coal cases, the *Sugar Cases of 1922*⁴, the *Salt Cases*,⁵ grain cases,

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¹Take, as a random sample, this comment from a trade-journal editorial discussing "The Pittsburgh Rate Case" in 1912: "This disposition on the part of the railroads to be the ruling factor in the destiny of any coal field is a distinct imposition on the industry, and one long resented by it." (1912) 1 COAL AGE 950.

²21 I. C. C. 329 and 400 (1911); 191 Fed. 856 (Comm. Ct. 1911); 234 U. S. 476, 34 Sup. Ct. 986 (1914).

³22 I. C. C. 604 and 640 (1912); 46 I. C. C. 159 (1917); 101 I. C. C. 513 (1925); 126 I. C. C. 309 (1927); 139 I. C. C. 367 (1928). Court decisions in this case are cited *infra* notes 10 and 11. *Western Pennsylvania Coal Traffic Bureau v. B. & O. R. R. et al.*, Docket No. 23241, recently argued before the Commission, is the latest in the series. ⁴81 I. C. C. 448 (1923).

⁵92 I. C. C. 388 (1924); 6 F. (2d) 315 (N. D. Ohio, 1925); 122 I. C. C. 21 (1927); 22 F. (2d) 199 (W. D. N. Y. 1927).

cotton cases, and port differential cases. To curb the railroads in the exercise of their rate-making powers in such fashion as to promote or discourage the development of localities was one of the principal objects of regulatory legislation. Section 3 of the Interstate Commerce Act, prohibiting undue preference and prejudice, and Section 4, the long-and-short-haul clause, clearly embody this aim.^{5a}

Yet the transfer of one carrier power after another to the field of Commission control served only to increase the emphasis with which the Commission repeated that within the maximum limits which it might impose the managerial discretion of the carrier was untrammelled.⁶ With the economic effects upon those who felt their influence of rates lawfully set, the Commission declined to be concerned. The railroads were still expected to compete with each other, and in the hope of increasing traffic might offer shippers voluntarily conditions that the Commission could not or would not impose. Thus the carriers' power to influence the course of economic development has remained large.

Perhaps no group of shippers have been more consistently resentful of this domination by their carriers, or more indefatigably vocal in expressing their resentment, than the agricultural communities of the middle west. No group has more successfully organized its political force for the purpose of influencing legislation than the national farm organizations that maintain lobbies or legislative bureaus in Washington.⁷ Since the time of the Granger movement the farmers have complained of the treatment accorded them by their carriers as compared with that enjoyed by the industrial communities of the East. The obvious railroad rejoinders, based on differences in cost and in traffic density, did little to assuage their wrath.

Naturally, those who complain of discrimination are those who suffer from it, and their evidence consists chiefly of a recital of their woes. Not all economic woe is the result of rate discrimination, but there are not many instances of wide depression where the victims

^{5a}41 Stat. 479, 480 (1920), 49 U. S. C. A. §§ 3, 4 (1929).

⁶For example, Commissioner Lane in one of the early Lake Cargo cases: "This Commission does not sit as a supreme traffic manager for the railroads of the country. . . It is not our function to equalize commercial conditions or to establish zones of trade or bring markets into competition one with another. . . In so far as the West Virginia miner needs to rely upon the sympathy of his serving carrier or upon its policy with respect to the wisdom of making a low rate in order to secure his traffic or develop his mines to serve a distant territory, his appeal must be to such carrier and not to this Commission." Advance in Coal Rates by the C. & O., 22 I. C. C. 604, 612 (1912). See *infra* note 17.

⁷Especially the American Farm Bureau Federation and the National Grange.

are not persuaded that lower rates would help them. More than a showing of depression, however, is necessary to establish unlawful discrimination under Section 3 of the Interstate Commerce Act. The post-war depression in agriculture had not proceeded very far, therefore, when the agitation in Congress to secure more favorable treatment for farm products in the matter of rates began to insist upon new legislation. The movement resulted, early in 1925, in the passage of the Hoch-Smith Resolution.⁸

The Resolution, as passed, affected other fields besides agriculture, though no other subject was specifically mentioned. On its face it seemed to reverse long-standing policy by ordering the Interstate Commerce Commission, in fixing rates, to give attention to the conditions prevailing in each industry and the relative price levels of commodities. Thus it seemed to make the need of rate relief the criterion for granting it, at the expense of the railroads or of more prosperous shippers. If it was somewhat of a departure as an exercise of the commerce power, it was certainly not novel as a reflection of Congressional impulses. The legal result seemed to be, if need were the basis of relief, that in those situations where industries or communities were already complaining of rate discriminations under Section 3 of the Interstate Commerce Act, there was added another cause for action, depressed condition. Most cases involving the farmer had also elements of the latter. Final judicial interpretation of the Resolution has therefore been anticipated with interest.

The Resolution was quickly seized upon by coal interests then en-

⁸43 STAT. 801 (1925), 49 U. S. C. A. § 55 (1929) approved Jan. 30, 1925. The Resolution declared it to be "the true policy in rate-making, . . . that the conditions which at any given time prevail in our several industries should be considered, in so far as it is legally possible to do so, to the end that commodities may freely move." It directed the Commission to enter upon a thorough investigation and revision of the entire freight rate structure of the country, to correct unlawful rates, and in doing so, to "give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation." Finally, it directed the Commission, in view of the existing depression in agriculture, "to effect. . . such lawful changes in the rate structure. . . as will promote the freedom of movement by common carriers of the products of agriculture. . . at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Federal court decisions, including that of the Supreme Court in the Ann Arbor case, and Commission reports, interpreting or citing the Resolution, are collected in *Interstate Commerce Acts Annotated*, pp. 2833-2841, a compilation by Commissioner Aitchison recently published in five volumes as SEN. DOC. 166, 70th Cong., 1st Sess. (1930).

gaged in one phase of the *Lake Cargo Coal* controversy. The depressed and disorganized condition of this industry over a period of years was as notorious and as serious as anything experienced in agriculture. The issues in the *Lake Cargo* cases concerned the relationship of the rates on coal shipments from the Pennsylvania and Ohio fields on the one hand, and from the West Virginia and Kentucky fields on the other, to Lake Erie ports for transshipment in cargo vessels to the Northwest. The lake markets are a competitive focus of the bituminous industry, and under the existing adjustment the more distant southern producers were able to make large inroads upon what the northern coal operators had come to regard as "their" markets. Both sides urged the Resolution in support of their claims and vied in a showing of depression, in addition to their claims under Sections 1 and 3. A Commission decision in 1925 adverse to the Pennsylvania contentions was reconsidered, stirring a political turmoil in the Senate. It was followed by two decisions adverse to West Virginia.⁹ One ordered a reduction in the Pittsburgh rate; the other forbade a corresponding reduction from West Virginia. The latter of these was enjoined by a three-judge federal court, which denounced the Commission's arrogation of the power to determine the economic destinies of particular sections of the country.¹⁰ The appeal from this decision seemed likely to draw from the Supreme Court an authoritative exposition of the Resolution. During the pendency of the appeal, however, while feeling between the political representatives of the two sections was at its highest, and both sides belabored the Commission, the railroads involved came to a compromise agreement on the rates. The Court, doubtless much relieved, thereupon dismissed the case as moot,¹¹ although the original complainants, the shippers, were not parties to the agreement. Another case was necessary to force the issue; and it came in the form of a contest between the California fruit interests and the railroads serving them.

II.

The long-awaited decision in *Ann Arbor R. R. et al. v. United States et al.*¹² is the first, and perhaps will be the last expression by the Supreme Court upon the Hoch-Smith Resolution, now past six years

⁹*Supra* note 3. The principal incidents of the political turmoil are related by G. H. Robinson, *The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission*, (1929) 42 HARV. L. REV. 610, 631.

¹⁰*Anchor Coal Co. v. United States*, 25 F. (2d) 462 (S. D. W. Va. 1928).

¹¹*U. S. v. Anchor Coal Co.*, 279 U. S. 812, 49 Sup. Ct. 262 (1929). Memo. opin.

¹²281 U. S. 658, 50 Sup. Ct. 444 (1930). The opinion includes a reprint of the Resolution in full.

old. The original complainants in the case were the California Growers' and Shippers' Protective League, an association of deciduous fruit growers, whose products, chiefly grapes, constituted the largest single item in west-east transcontinental freight. California fruit is grown in quantities largely in excess of local requirements, and the bulk of it is shipped to eastern markets, there to compete, especially on the Atlantic seaboard, with fruit from Florida and elsewhere. It is able to enter eastern markets only by reason, first, of a highly developed organization of growers that regulates comprehensively the marketing of its members' produce, both the quality and the quantity of fruit sold, and second, of a competitive freight rate that ignores the greater distance.

The rate zones on freight from California east, designated by the letters A to J and covering the area from the Atlantic west to Denver, are all blanketed together for deciduous fruit, and a single freight rate, (exclusive of the graduated refrigeration charge), applies to the haul from California, whether the shipment be consigned to Kansas or to New York. This is the largest rate blanket in the United States. It was established by the western trunk line carriers, on the one hand, to meet the requirements of the long-and-short-haul clause, and on the other to increase their volume of traffic, a need they have long felt, by enabling the large producing field they served to reach the widest possible markets. This rate structure was the result of keen competition, both among the carriers for traffic, and among the California, Florida and other shippers for markets. It was built up largely on opportunist principles, over a period of years that saw America transfer its gastronomic affections from bread and meat to fruit and vegetables, and it has survived with little change.

In 1923 the California growers attacked the transcontinental blanket rate of \$1.73 per hundred pounds, in carloads, applicable on deciduous fruits to all the rate territories east of the Denver group, asserting that the figure was unreasonable and unduly preferential and prejudicial. They relied upon Sections 1 and 3 of the Interstate Commerce Act. They declared that while freight charges meant little when fruit prices were high, they meant much when prices were low; and they showed that since 1922 prices had been low without any corresponding decrease in production costs, and that freight rates on deciduous fruits since the war had not decreased proportionately with those on other articles. The Hoch-Smith Resolution was passed while the case was still being considered, but after the argument had been heard, and so did not greatly effect it at that stage. The decision on this original petition was rendered on June 25, 1925, by Division 1,

Commissioners McChord, Lewis, and McManamy. It found the rates not unreasonable or unduly prejudicial, and dismissed the complaint, but "without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000."¹³

This Docket No. 17000 is the one in which the Commission was assembling its general investigation of the entire rate structure, as commanded by the first paragraph of the Hoch-Smith Resolution. At the time of this 1925 decision the Resolution had been on the statute books a scant five months. Acting on the implied invitation, the fruit growers, a year and a half later, renewed their complaint, placing more reliance on the Resolution than on Sections 1 and 3 of the Act. This time they secured a reversal in the Commission. Its order granted a reduction,¹⁴ and it is this order which has itself just been reversed by the Supreme Court in the *Ann Arbor* decision.

The Commission had meanwhile got under way in Docket 17000, and had at the same time invited the views of shippers, carriers and the public generally as to the meaning of the Resolution and the procedure to be followed under it.¹⁵ Opinion had been sharply divided in Congress as to whether the Resolution was a gesture, "a mere sop . . . that Members . . . will fondly carry home to show to their farmer friends," or whether it added anything to the Commission's power, and if so, whether wisely. Individual Commissioners also were not at one in interpreting its language.¹⁶ Pressure from shippers, however, was insistent that conditions prevailing in various industries

¹³California Growers' and Shippers' Protective League v. Southern Pacific R. R., 100 I. C. C. 79, 108 (1925).

¹⁴California Growers' and Shippers' Protective League v. So. Pac. Co. et al., 129 I. C. C. 25 (1927).

¹⁵39th ANN. REP., I. C. C., 37-40 (1925). Current progress in Docket No. 17000 is briefly reviewed in each succeeding Annual Report.

¹⁶The debates in Congress prior to its passage were brief and inconclusive. See, for examples, 65 CONG. REC. 8336 ff. and 65 CONG. REC. 11022 ff. (1924). They are summarized and commented on by G. H. Robinson, *op. cit. supra* note 9, at 618-619, n. 30. Expressions of the views of individual members of the Commission may be found in some of the reports in Docket 17000; in the *Hearings before the Senate Committee on Interstate Commerce on the Confirmation of John J. Esch*, 70th Cong., 1st Sess., 143-144, 223 (1928); in the *Lake Cargo Case*, 126 I. C. C. 309, 367, 374; and in (1929) 43 TRAFFIC WORLD 170; not to mention the opinions in the case here reviewed.

The Resolution was the outgrowth of several measures previously introduced, some of which undoubtedly were intended to alter basically the Interstate Commerce Act. But the Resolution as finally allowed by its opponents to pass, was amended in the direction of vagueness.

should be considered, and the Commissioners evidently felt that while members of Congress might vote as a gesture, they themselves were scarcely at liberty to treat so lightly what had in law the force of a statute.^{16a} A majority felt, therefore, that the Resolution commanded them substantively to abandon the position they had long held, which had been given its classic form by Commissioner Lane:

"It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as part of one great whole, and apportion to each a certain territory, or to require all to meet upon a common basis at all points."¹⁷

In so doing, the Commission gave up a line fortified by expressions of the Supreme Court of similar import.¹⁸ They began, in a series of cases commencing even before *Ex parte 87, Revenues in the Western District*,¹⁹ the first case under Docket 17000, to take account of the

^{16a}Joint resolutions "are really bills and in procedure are treated like bills. Opinion as to what a joint resolution might include has changed from time to time." R. LUCE, *LEGISLATIVE PROCEDURE* (1922) 556; I WATSON, *THE CONSTITUTION* (1910) 379. The distinction between the two is purely historical, and is recognizable now only in the form of the enacting clause. Watson's statement, *ibid.*, that "a statute can neither be repealed nor amended by a joint resolution", rests on an Ohio decision, *State v. Kinney*, 56 Ohio St. 721 (1897), and is contrary to the present settled procedure of Congress. There has been no direct adjudication of the point in a Federal court, but in the Ann Arbor case under discussion, the Supreme Court, in denying that the Hoch-Smith resolution had changed the interstate commerce act, tacitly assumed that it *could* have done so, else the decision should have gone on that ground. The distinction between joint and concurrent resolutions, the latter of which do not require the President's signature and have no legislative effect, was the subject of a report by the Senate Judiciary Committee, Rep. No. 1355, 54th Cong., 2d Sess.

¹⁷*Ashland Fire Brick Co. v. So. Ry. Co.*, 22 I. C. C. 115, 121 (1911).

¹⁸*I. C. C. v. Diffenbaugh*, 222 U. S. 42, 46, 32 Sup. Ct. 22, 24, (1911); *cf.*: "Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions." *Hammer v. Dagenhart*, 247 U. S. 251, 273, 38 Sup. Ct. 529, 532 (1918); *United States v. Ill. Cent. R. R. Co.*, 263 U. S. 515, 524, 44 Sup. Ct. 189, 193 (1924). But the unification under Federal control opened new vistas, and the Transportation Act of 1920 contemplates some equalization among carriers. *New England Divisions Case*, 261 U. S. 184, 43 Sup. Ct. 270 (1923); *Dayton-Goose Cr. Ry. v. United States*, 263 U. S. 456, 44 Sup. Ct. 169 (1924).

¹⁹113 I. C. C. 3 (1926). Commr. Eastman, appearing before the House Appropriations Subcommittee in January, 1929, listed eighteen decisions up to that time that had been influenced by the Resolution. The principal case before the fruit case was *Revenues in Western District*, 113 I. C. C. 3 (1926), where a blanket 5% increase was denied on the ground that no special consideration was shown the products of agriculture. *Hearings before subcommittee of House Appro-*

direction to favor agriculture, the special interest which the Resolution singled out for their attention. The deciduous fruit case was among these.

When the California growers brought on their new proceeding, in December 1926, they made the record more complete and exhaustive than previously. They now showed that their depressed condition, instead of ameliorating, had grown much worse since 1923. They asked that the rate be lowered from \$1.73 to the 1918 level of \$.44, in order that they might compete with eastern growers. This time the full Commission reversed Division 1, and reduced the \$1.73 rate to \$1.60, basing the action largely on the Resolution.²⁰ Notwithstanding that it was admitted that \$1.73 had not long previously been found to be not higher than a maximum reasonable rate, a finding perhaps still valid in 1927,²¹ the Commission nevertheless considered that the Resolution had so changed the law as to require them to set the rates on products of depressed industries at the bottom instead of at the top of the zone of reasonableness.²² They found that \$1.60 met the minimum requirements, as marked out in *Northern Pacific Ry. v. North Dakota*,²³ that a rate set by the Commission must pay all costs assignable to the traffic and at least some contribution to profit. Commissioner Aitchison wrote the opinion, but it evidently represented in its entirety the views of only three of the eleven members.²⁴ A few months afterward, on reconsideration, the Commission

priations Committee, on Independent Offices Appropriations Bill, 70th Cong., 2d Sess., 194 (1929). There have been a number since in Docket 17000. See also citations in Interstate Commerce Acts Annotated, 2836 ff.

²⁰*Supra* note 14.

²¹The Commission denied that there was a presumption that a rate found not unreasonable as of the date of the first hearing in 1923 was still not unreasonable in 1927. *Brief for U. S. and I. C. C.*, on reargument, 30.

²²This implies, at least theoretically, raising, or allowing to be raised, some other rates, to enable the carriers to earn their "fair return;" and that suggests many more questions. See the concurring opinion of Commissioner Woodlock in the fruit case, 129 I. C. C. 25, 58 (1927). Candidates for the raise do not offer themselves.

²³236 U. S. 585, 35 Sup. Ct. 429 (1915).

²⁴Three concurred separately; four did not participate. Commissioner McManamy, who had joined in the earlier decision, dissented. Commissioner Eastman, concurring, thought the rate blanket should be broken up. \$1.73 seemed to him clearly unreasonable for the shorter hauls, but much less clearly so for the haul to the eastern seaboard, where the bulk of the traffic went; especially since the eastern carriers secured only small divisions as their share of the rate. Inasmuch as all parties wanted to keep the blanket, he thought the Resolution gave the benefit of the doubt to the shippers, but he added the *caveat*, that if the reduction granted was justified, probably a stronger case could be made out for reductions on fruit from eastern growing districts.

re-affirmed its decision²⁵ with minor changes, though in the interval Commissioner Eastman swung over to join Commissioner McManamy in dissenting.

From this decision the carriers appealed. The three-judge court in California, however, declined to grant even so much as a stay of the Commission's order establishing the lowered rates, pending appeal to the Supreme Court.²⁶ In the latter court the appeal was argued and submitted in February 1929; restored to the docket, re-argued in October at the opening of the 1929 term, and decided on the last day of that term, June 2, 1930. The decision vacated the Commission's order.

Mr. Justice Van Devanter, speaking for a unanimous Court, delivered an opinion that bears some internal evidence of hurried composition and is unsatisfying in that it disposes of the case but not of the questions the case raised. It says little more than this: that the Resolution directed such "lawful" changes as could be made in the rate structure, and the lowest possible "lawful" rates for agricultural products. However, since the meaning of "lawful" can be ascertained only by reference to the previously existing Interstate Commerce Act, the Resolution therefore effected no substantive change in that basic act; indeed, so the Court thought, it effected not even a clarification. The criteria of a reasonable rate remain as before.²⁷ As the Commission had ruled that the Resolution *did* alter the Commerce Act, the Commission's decision was reversed. In the Court's opinion the Resolution is "more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making."²⁸ And the Court intimated that if the Resolution was intended to do more, and to reduce rates below the existing lawful standard, a serious question of its constitutional validity would be raised. Whether the question would arise under the due process or the commerce clause is not explained.

The unanimity of the Court, in a field in which it has frequently

²⁵California Growers' and Shippers' Protective League v. So. Pac. Co. et al., 132 I. C. C. 582 (1927).

²⁶Ann Arbor R. R. v. United States et al., 30 F. (2d) 940 (N. D. Cal. 1928).

²⁷Those who have followed labor injunction cases are familiar with the potency of the word "lawful" as a bar to change. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917). For a discussion of its possible effect in limiting changes under the Hoch-Smith Resolution, see D. P. LOCKLIN, RAILROAD REGULATION SINCE 1920 (1928) c. 5.

²⁸Ann Arbor R. R. et al. v. United States et al., *supra* note 12, at 668, 50 Sup. Ct. at 446.

been divided, suggests that a variety of motives may have contributed to the decision. Perhaps the circumstances of the passage of the Act, as a joint resolution rather than as an amendment of the Transportation Act, led some Justices to doubt the seriousness of Congressional intentions; perhaps for that reason minority members were unwilling to make of the case an issue which could only result in setting down in black and white a constitutional restriction on the Commission's power in which later changes might be desirable. In any event, all were content to let the decision rest on a rejection of the Commission's interpretation of the statute.²⁹

The practical result of the decision as regards aid to agriculture is not yet entirely settled, but there is little reason to believe that agricultural interests will find the Resolution materially helpful in the future. One may indeed go further and express a doubt that any conceivable rate changes, made under a much more favorable interpretation than has been given of it, could permanently benefit the majority of the growers of such basic commodities as wheat or cotton. Their troubles are chiefly independent of the freight rates they pay. So long as there persists from year to year a surplus of the commodities they have to sell beyond the requirements of their markets, freight rate changes cannot be expected to help them greatly as a whole. The effect of the surplus is to create a "buyers' market", in which competition between producers who must sell is so keen, that any new benefit, such as a rate reduction, affecting them all, is largely passed on to the buyer in the form of lower prices.³⁰

A somewhat similar situation has for years been characteristic of

²⁹For the Commission's guidance in the future, the opinion is, therefore, as unsatisfactory as that in the valuation decision a year before in *St. Louis & O'Fallon Ry. v. United States* 279 U. S. 461, 49 Sup. Ct. 384 (1929).

³⁰The Bureau of Railway Economics, possibly a not wholly disinterested observer in this case, has recently announced the results of a study of the effect of freight rates on wheat prices, undertaken following the emergency low rates on grain for export published by the carriers at the suggestion of President Hoover in 1929. The conclusions stated are that wheat price levels in 1929-1930 varied in response to the influences of oversupply, weather reports, and competing world market conditions, and that among such factors the influence of freight rates was negligible. *N. Y. Times*, July 28, 1930 and Jan. 5, 1931, at 42. These results are confirmed, generally speaking, by an analysis of the economic condition of grain farmers prepared by an economist on the Commission's staff and appended to the Commission's report in the latest grain case, *Grain and Grain Products*, 164 I. C. C. 619, 756-793 (1930). Compare the comments of individual Commissioners, in the same case, at pp. 713, 731, 735, 736. The operations of agents of the Farm Board in the cash and "futures" markets have introduced another complicating influence on grain prices, irrespective of freight rates.

the coal industry, where productive capacity is vastly in excess of market demands. Consequently rate reductions to groups of shippers have resulted only in lower prices at competitive centers, rather than help to the coal operators. This is one root of the long *Lake Cargo* controversy already mentioned.

Although rate reductions may not help agriculture as a whole and in the long run, it by no means follows that the Resolution, more liberally interpreted, might not have given considerable help, at least for a time, to particular groups. The California fruit case was just such an instance. Competitive selling among the growers was eliminated by their associations and the result of the Commission's second decision, lowering their rates, would have been a considerable competitive advantage to them at the expense of Florida growers, unless and until the latter could secure similar rate reductions, as Commissioner Eastman suggested in his separate concurrence in that decision.^{30a}

Aside from the possible benefits of reductions when secured, there remains the practical question of the likelihood that the Commission will be moved to grant further aid in response to the Resolution as now interpreted. Perusal of the Commission's record since the Supreme Court's *Ann Arbor* ruling suggests a negative answer.³¹ In *Western Trunk Line Class Rates*,³² Part 2 under Docket 17000, made public in July 1930, the Commission ordered a general upward revision of class rates from which certain agricultural products of importance to the farmer were exempted at least for the present. This exemption was made on the ground that "the agricultural industry has not fully recovered from the serious depression following the World War period," and the proposed rates "would in many instances result in substantial increases thereon, for which sufficient justification does not appear." The decision, however, was arrived at on May 6, before the Supreme Court's ruling, although not made public till afterward.

The next report in Docket 17000, *Grain and Grain Products*,³³ which

^{30a}*Supra* note 24.

³¹The Commission in its latest annual report to Congress prudently contents itself with saying, "The effect to be given to the Hoch-Smith Resolution of Congress has been profoundly influenced by the decision of the Supreme Court on June 2, 1930 in *Ann Arbor R. R. Co. v. U. S.*" It quotes and paraphrases the decision and then states that the case has been re-opened and further hearing held. 1930 ANN. REP. I. C. C. 61.

³²164 I. C. C. 1, decided May 6, 1930, but not made public until the new fiscal year made new printing appropriations available. The farmer's main concern, in any event, is rather with commodity rates than class rates.

³³164 I. C. C. 619 (1930). It fills slightly over 200 pages and includes separate concurring expressions from eight of the eleven members of the Commission.

the Commission decided July 1, 1930, should have been the crucial case under the Hoch-Smith Resolution. The grain rate structure was notoriously chaotic. The chief burden of the agricultural depression fell upon the grain farmer. In this case, if anywhere, the practical significance of the Resolution and the extent of the Commission's compliance with it should have been tested. During the hearing of the case exhaustive testimony on the conditions prevailing in grain-farming was presented. A few weeks before the Commission's final decision, however, though long after the hearing and argument on the case, the Supreme Court's *Ann Arbor* decision was rendered, and the Commission took cognizance of it thus:

"The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. (citing the *Ann Arbor* case.) The findings herein are under the provisions of the interstate commerce act."³⁴

In view of the scope and complexity of the grain case it is difficult to generalize upon the results of the decision. Some rates went up and others down. The new structure as a whole, however, in addition to bringing some order out of chaos, seems to have been expected to decrease the carriers' total annual revenues by \$15,000,000. This strengthens the surmise that the Commission in the fruit case might have attained the same end, and have escaped reversal on appeal, had the opinion leaned less frankly upon the Resolution.

Following the grain case came another report in Docket 17000, Part 3, *Cotton*,³⁵ decided July 15, 1930. This case was submitted after the argument in the Supreme Court upon the *Ann Arbor* case, and the Commission's decision followed that of the Supreme Court. The report was written by Commissioner Woodlock, known as less sympathetic than some others to shippers' arguments that carrier revenues should be reduced because shippers are in a depressed condition. His opinion had this to say regarding the Resolution:

"Since the submission of this proceeding the Supreme Court has construed the Hoch-Smith resolution. . . and found that it makes no substantial change in the existing law. Economic evidence bearing upon the question of depression in the cotton-growing industry. . . was confined to Oklahoma and Mississippi. . . From this evidence we conclude that no substantial depression was shown to exist at the time the hearings were closed. But even if our conclusions were otherwise we could not, in

³⁴*Ibid.* 661.

³⁵165 I. C. C. 595 (1930).

view of the decision of the Supreme Court above mentioned, accord cotton special treatment in the way of a lower level of rates than would have been possible prior to the adoption of the resolution."³⁶

If in future cases the Commission leans over backward in an effort to comply with the *Ann Arbor* decision, it may be that the Resolution as now interpreted will become a block in the pathway of further help by the Commission to farmers instead of the mandate to aid them which it originally appeared to be. Congress may be content to let the Resolution stand as its answer to agricultural demands, while as its "teeth" are so drawn, it is unlikely the carriers will push the movement for repeal that has been agitated in some quarters.

III.

The *Ann Arbor* decision contributes disappointingly little to the constitutional question as to how far federal authority, in fixing rates, may be empowered to take account of the needs of the shipper and the commercial conditions prevailing in his industry,³⁷ and to judge, partly on that basis, as between different geographical sections of the country. Obviously, it is a tremendous power, full of political dynamite. Every considerable rate change benefits some groups and injures others—that is why rate cases are fought. So long as the criteria are the cost of service and what the traffic will bear, a commission with a tradition of independence, ability, and industry may perhaps give reasonable satisfaction. When, however, the criterion becomes the need of the shipper to be benefited, or his ability to absorb injury, the pressure to depart from rational considerations is naturally much greater. During the *Lake Cargo* controversy, for example, the Senate's actions toward nominees to the Interstate Commerce Commission were such as seriously to challenge the Commission's powers.³⁸ A

³⁶*Ibid.* 598.

³⁷This question may soon be raised again before the Supreme Court in the present *Lake Cargo* case, *Western Pennsylvania Coal Traffic Bureau v. B. & O. R. R.*, Docket 23241, now still in the stage of hearings before the Commission, if the decision is appealed. *Supra* notes 3 and 9.

³⁸The rejection of Commr. Esch's renomination was by no means an isolated incident, though it attracted the widest public attention. Typical of much that went on during the whole 1928 session was the Robinson Resolution, S. Concurrent Res. 10, 70th Cong., 1st Sess., introduced Feb. 8, 1928, and passed the next day. 69 CONG. REC. 2791, 2865-2871 (1928). It directed the Commission to furnish the Senate with copies of all decisions during the previous five years "in which its decisions as to the reasonableness of any rate or rates was in any sense influenced by the competitive advantage or disadvantage of the producers in one state, district or section" as compared with another, and citations of

fear lest such bullying become inevitable and habitual may possibly have been another factor in the unanimity of the Supreme Court's decision of the *Ann Arbor* case.

The railroads themselves have, as a matter of course, given consideration to the conditions prevailing in an industry whenever it was advantageous from a traffic standpoint to do so. They have developed new sections—coal fields in West Virginia, for example—by "missionary" rates, and they have cut rates in order to get new business, or to save old business that otherwise would be lost. It is doubtless true, however, that the instances are few of rates cut from pure compassion for a depressed industry.³⁹ On the other hand, although perhaps it is less likely that the prosperous shipper will make a complaint, it has been held that the prosperity of a shipper does not of itself justify a carrier in raising a previously remunerative rate, simply because the shipper can stand the raise.⁴⁰

Even before the Hoch-Smith Resolution the Commission, despite its disclaimer, had in a sense considered commercial conditions too.⁴¹ In 1912, in *Boileau v. P. & L. E. R. R.*, counsel for the coal-operator complainants called attention to the wages, standard of living, production costs, and conditions generally in the industry. Commissioner Meyer in his opinion said:

"Whatever weight it may be permissible under the statute to give to considerations of this kind in the determination of a question like that presented here, it would seem that wages of miners and their standard of living should be kept in view, and that great issues affecting them should not be decided without at least bringing their interests into the horizon of con-

any statute, "under which the commission claims and believes it was granted the power to equalize prosperity among the producers of commodities; and a statement of the clauses... of the Constitution under which it claims and believes that decisions of such a character and purport were authorized or were implied." See G. H. Robinson, *op. cit. supra* note 9, at 634 and n. 79.

³⁹Except in the emergency relief of a disaster, when the railroads are authorized and have on numerous occasions rendered effective assistance without charge, or at a reduced charge. A list of references to such instances covering the period 1906-1930 was compiled and issued by the Library of the Bureau of Railway Economics, October, 1930.

⁴⁰*Southern Ry. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709 (1907). "...the increased prosperity of the business... is no ground for an advance of the rate." *Tift v. Southern Ry.*, 10 I. C. C. 548, 582 (1905).

⁴¹This factor perhaps overlaps, but is not exactly coextensive with the "value of the service to the shipper," which allows a rate to vary roughly with the intrinsic value of the freight. *Kansas City Southern Ry. v. Carl*, 227 U. S. 639, 650, 33 Sup. Ct. 391, 394 (1913). It is closer to "what the traffic will bear," a phrase that was expounded by Commr. Lane in *Advance in Coal Rates* by the C. & O., 22 I. C. C. 604, 623 (1912).

sciousness... Whatever legal limitations may be imposed on this view by the act to regulate commerce as at present interpreted, from the point of view of public policy and humanity, considerations like those adverted to by counsel should most assuredly not be ignored."⁴²

It may also be remarked that a shipper is not disqualified from securing a lower rate by reason of his business being depressed, if he is otherwise entitled to it; and from his point of view the result is the same whether the reduction is granted because of his need or on other grounds. It answers his need in either event, and he will probably insist the more keenly on the other grounds if he feels also the pressure of need. It is clear therefore that a change in rates, for whatever reason, may often have the effect of equalizing prosperity or benefiting one section at the expense of another. In this sense, the Commission is already and inevitably an "economic arbiter of the country". Criticism of the Commission for what it cannot help being, therefore, seems beside the point.

A more fruitful inquiry is the extent to which the different purposes may confessedly be allowed to motivate the Commission's decisions. On this subject the Interstate Commerce Act gives no further directions than that rates which the Commission may require must be "just and reasonable", and that the carriers must refrain from undue preference or prejudice.

The Commission has previously found its control of several important similar situations inadequate under Section 3, because of its doctrine, evolved in the *Ashland Fire Brick*⁴³ case, that it could under Section 3 order a carrier to remove discrimination as between two localities only when the same carrier served, or at least shared in the traffic of, both localities, and could by its own act eliminate the discrimination. This doctrine was afterward approved by the Supreme Court in *Central R. R. of N. J. v. United States*,⁴⁴ where the discrimination involved was the granting of the privilege of creosoting lumber in transit. Later the strict rule was somewhat liberalized in the *Swift Lumber* case,⁴⁵ where a trunk line offering a preferred rate in order to build up its territory was held in fact able to control the

⁴²22 I. C. C. 640, 647 (1912).

⁴³22 I. C. C. 115 (1911).

⁴⁴257 U. S. 247, 42 Sup. Ct. 80 (1921), vacating the Commission's order in *American Creosoting Co. v. Director General*, 61 I. C. C. 145 (1921). Same case, 66 I. C. C. 54 (1921).

⁴⁵*United States v. Ill. Cent. R. R.*, 263 U. S. 515, 44 Sup. Ct. 189 (1924), upholding the Commission's orders in *Swift Lumber Co. v. Fernwood & G. R. R.*, 61 I. C. C. 485 (1921), and *Pioneer Lbr. Co. v. Director General*, 64 I. C. C. 485 (1921).

action of a branch line which it compelled to publish a discriminatory rate. The trunk line was therefore ordered to remove the discrimination. The general rule, however, prevented the Commission from equalizing port differentials in the *Sugar Cases of 1922*,⁴⁶ in response to a suggestion that commercial conditions demanded such a course. Likewise in the 1927 *Lake Cargo* case, although the Commission reduced the coal rate from Pittsburgh to the lake ports as unreasonable, it declined to take the additional step necessary to assure the Pittsburgh shippers the benefit of the reduction by finding also that their rate was unduly prejudicial as compared with the West Virginia rate. It based its refusal on the fact that the respondent carriers served the northern fields only. On the other hand, in the *Salt Cases of 1923*⁴⁷ the Commission freed itself from this limitation, and fixed rate relationships from various producing districts, although served by different carriers, to the principal consuming market, Chicago. The result was achieved by the use of the minimum rate power and was justified by the imminence of a rate war. There was also ground for believing that the Illinois Central, the principal carrier involved, was offering the low rate on salt in order to secure the freight traffic of salt shippers who had large interests in other businesses—that the low salt rate, in other words, was in effect a concealed rebate. A three-judge federal court sustained the decision on the ground that the minimum rate power was not subject to the limitations that restrict the Commission under Section 3.

The extent to which the Commission now may consider commercial conditions in judging a complaint of discrimination under Section 3, or, conversely, the extent to which it may use Section 3 in curbing the unrestricted dominance by the railroads of the economic development of competing localities, is illustrated in the *Gulf Port Differential* case,⁴⁸ now on its way to the Supreme Court. In this case the Commission, after changing its mind once or twice, fixed a differential in rates to the Texas ports under the New Orleans rate, which had previously been equalized despite its greater distance, on traffic from interior Texas, Oklahoma, etc. points. It concluded that discrimination existed against the Texas ports, on the basis of two sorts of

⁴⁶81 I. C. C. 448 (1923).

⁴⁷The Commission reports and the court decision on appeal are cited *supra* note 5.

⁴⁸*Galveston Commercial Ass'n. v. Galveston, H. & S. A. Ry.*, 100 I. C. C. 110 (1925), *rev'd*, in part and modified in 128 I. C. C. 349 (1927), further modified in 160 I. C. C. 345 (1929); the last of these was sustained in *Texas & P. Ry. v. United States*, 42 F. (2d) 281 (S. D. Tex. 1930), and an appeal is pending in the Supreme Court.

evidence, first the carriers' ignoring of transportation costs reflected in the greater distance to New Orleans, and second the overwhelming proportion of traffic going through New Orleans instead of the Texas ports under the equalized rates. The Commission said:

"Such an adjustment necessarily disregards distance and commercial, instead of natural advantages, control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."⁴⁹

Moreover the Commission included, among the carriers ordered to eliminate the discrimination, the Texas & Pacific Railway, which originates traffic both to New Orleans and the Texas ports, but reaches only New Orleans over its own rails. The carrier's originating and sharing in traffic to both ports was held sufficient ground for bringing it within the scope of Section 3. If this step in emancipation from the rule of the *Ashland Fire Brick* case is sustained in the Supreme Court as it has been in the lower court, the Commission would presumably be able, if it chooses to do so, to take similar action in the pending *Lake Cargo* case, and prescribe rate relationships from all producing fields.⁵⁰ It would then be less hampered in its dealings under Section 3 with large situations involving different carriers, growing out of conflicting sectional interests. Consideration of commercial conditions in discrimination cases might then be expected to play a somewhat more important part.

Under Section 1 the Commission's discretion in considering commercial conditions might seem to be broader.⁵¹ It was limited by the

⁴⁹100 I. C. C. 110, 121, 122 (1925).

⁵⁰This case, *supra* note 3, is purely a Section 3 case. In the 1927 case the Pittsburgh rates were found unreasonable but not unduly prejudicial. The view is being urged on the Commission in this case that Section 3 condemns *all* undue discrimination, and that although the *Ashland* rule was necessary in its time because of the limits of the remedies available to the Commission, the reason for the rule's existence has disappeared since the minimum rate power was given the Commission. It is, therefore, urged that the Commission is free to alter any rate relationships found discriminatory, and to enforce a proper relationship by setting a minimum rate, regardless of whether any one carrier can remove the discrimination. The Commission has not thus far accepted this view, in the absence of a rate war threat.

⁵¹Possibly a rate on the lower level of the "twilight zone" might be "reasonable" in the sense of not being confiscatory, and yet fail to be "just," if set to shift some of the burden of depression upon the carrier.

Supreme Court, however, in *Northern Pacific Ry. v. North Dakota*,⁵² and indeed the Commission had already virtually declared it to be nonexistent, in the other notable passage from the *Ashland Fire Brick* case previously quoted.⁵³ It was this view that, while the carrier might if it chose disregard cost in favor of the value of the service to the shipper, the Commission could not do so, which seemed to be altered by the Hoch-Smith Resolution. The Commission interpreted the Resolution as changing the previous law to the extent that it might now in fixing rates insist upon the value of the service to the shipper, within the limits of the "zone of reasonableness".

This penumbral "zone of reasonableness" may be taken to mean the difference between the "maximum reasonable rate" usually fixed by the Commission, beyond which a rate would be exorbitant, and the minimum required by *Northern Pacific Ry. v. North Dakota*. It is perhaps indicated concretely in the *Ann Arbor* case by the difference between the \$1.73 rate, which was upheld in 1923, and the \$1.60 rate set in 1926.⁵⁴ The phrase may also refer, more simply, to the margin of uncertainty that exists because so many of the factors involved are indeterminate.⁵⁵ Commonly it includes both notions. At any rate, in the earlier *Grain and Grain Products*⁵⁶ case and the *Live Stock* case,^{56a} the Commission took the view that by the Resolution Congress undertook to direct the exercise of their discretion so that instead of always fixing a maximum reasonable rate, the Commission

⁵²236 U. S. 585, 35 Sup. Ct. 429 (1915). The opinion is by Mr. Justice Hughes who resigned soon after, and returned to the Court in time to see its principles reaffirmed in the *Ann Arbor* case. He did not participate in the latter decision, since the case was argued on behalf of the United States by his son, Charles E. Hughes, Jr., as Solicitor General. The doctrine of the case, as later paraphrased by the Commission, is that: "Rates that we may lawfully require must in principle be high enough to cover all the cost that may fairly be allocated to the service, plus at least some margin of profit." *Amer. Nat. Live Stock Ass'n. v. Atchison, etc., Ry.*, 122 I. C. C. 609, 617 (1927). See *Grain and Grain Products*, 122 I. C. C. 235, 264 (1927).

⁵³*Supra* note 17.

⁵⁴*Supra* note 21.

⁵⁵In *Interstate Commerce Commission v. U. P. R. R.*, 222 U. S. 541, 550, 32 Sup. Ct. 108, 112 it was said: "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer."

And the Commission, in the *Live Stock* case, *supra* note 52: "Rates that we may lawfully require must in principle be high enough to cover all the cost that may be fairly allocated to the service, plus at least some margin of profit. . . we say 'in principle' because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates."

⁵⁶*Supra* note 52.

^{56a}*Ibid.*

must now set a minimum reasonable rate for a certain class, *i. e.*, shippers in depressed industries. Assuming that the classification itself is reasonable,⁵⁷ any rate which falls within the general limits of the zone may presumably be set without transgressing the Fifth Amendment. Carrier counsel in the *Ann Arbor* case objected that this was not within the commerce power of Congress, and it is mere conjecture whether this or the Fifth Amendment was the ground of the Court's intimation of its doubt of constitutionality.

The result of the Commission's interpretation of the Resolution led it in the fruit case to do frankly what it had been unable in previous cases to avoid or ignore wholly, but could not do explicitly under the previous statutes. By its frankness it drew upon its collective head, as a result of the *Lake Cargo* decisions particularly, a storm of political abuse. In the *Ann Arbor* case the Commission argued that an added definition had been given to "reasonable"; that it had done nothing it *could* not have done under the basic Act; but it admitted that what *had* been done was largely in response to the Resolution. The Court was of opinion that "the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, . . . but on the contrary leaves the validity of the rate to be tested by that law."^{57a} This seems to take no account of a "zone of reasonableness"; and to the long-argued question, concerning the extent to which the Commission can give weight to the needs and condition of the shipper, it answers only, "No more than at present."

⁵⁷The equal protection clause, of course, is a part of the Fourteenth amendment only, not of the Fifth. The power of Congress under the Fifth Amendment "admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary." *Second Employers Liability Cases*, 223 U. S. 1, 53, 32 Sup. Ct. 169, 176 (1912). The general rule against class legislation is more honored in the breach than in the observance as regards railroad rate-fixing. For example, in *Northern Pacific Ry. v. North Dakota*, *supra* note 52, at 598, 599, 35 Sup. Ct. at 434: "The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. There are many factors to be considered, differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." And in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 416, 29 Sup. Ct. 527, 539 (1909), upholding the constitutionality of the "commodities clause," the Court said: "We know of no constitutional limitation requiring that such a regulation (the commodities clause) when adopted should be applied to all commodities alike."

^{57a}*Ann Arbor R. R. v. United States*, *supra* note 12, at 668, 50 Sup. Ct. at 446.

IV.

In conclusion these statements may be ventured: 1. The systematic revision of the entire rate structure in progress under Docket 17,000 will continue undisturbed by the *Ann Arbor* decision. It may be noted that the Commission itself, in an oral statement made public on December 4, 1929, indicated that it regarded its work along this line as of more importance than its efforts in fostering the consolidation of railroads.

2. The decision may be helpful in tending to prevent a recurrence of such political interference with the Commission as the Senate's action on the reappointment of Commissioner Esch, but it is doubtful that it can eliminate it entirely. So long as the result of a rate decision, whatever its grounds, may make or break the industrial prosperity of one section as compared with another, political pressures will exist, and occasionally result in explosions.⁵⁸

3. It is problematical what further help there may be for farmers in the Resolution, but it would seem that the carriers need fear little more from it. The general rate revision under Docket 17,000 may be expected to proceed with due concern for the preservation of railroad revenues and the "maintenance of an adequate system of transportation."⁵⁹

4. In any event, consideration of commercial conditions, in fixing rates, will continue to some extent because the Commission cannot ignore those conditions so long as the carriers voluntarily pay attention to them. But the Commission may have to proceed more cautiously lest its fingers be burned in political fires—and there will be further pressure against frank and frequent reversals in decisions. To those who approve the Commission's present emancipation from the strict rule of *stare decisis*, tendencies of this sort are regrettable. Meanwhile, in considering rate complaints from depressed shippers, the Commission will attempt to adjust its interpretation of the Hoch-Smith Resolution to accord with the words of Mr. Justice Van Devanter's opinion: "Of course, they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act."⁶⁰

⁵⁸Witness the Senate's attitude towards the appointment to the Commission, later withdrawn at the appointee's request, of Mr. R. M. Jones of Knoxville, Tennessee, in December, 1929.

⁵⁹In its latest annual report the Commission displays rather more than its usual concern for the financial condition and prospects of the railroads. 1930 ANN. REP. I. C. C., 77-78.

⁶⁰*Ann. Arbor R. R. v. United States*, *supra* note 12, at 669, 50 Sup. Ct. at 446, 447.