RATE-MAKING IN TRANSPORTATION—CONGRESSIONAL INTENT

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INTRODUCTION

THE LEGISLATIVE process from which issued the Transportation Act of 1958[1] saw a re-enactment of the ancient conflict[2] over the proper role of government in transportation pricing. Sometimes overshadowing this historic controversy, however, was a questioning of the fidelity of the Interstate Commerce Commission to the intent of Congress as stated in earlier legislation. The report of the Senate Interstate and Foreign Commerce Committee on the bill clearly intimated that the Commission had strayed from the objectives set down by Congress in the Transportation Act of 1940:[3]

> It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in *New Automobiles in Interstate Commerce* (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said: "As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 ICC at p. 538)."

The most strongly implied criticism of the Commission arose from former Senator Wheeler's testimony before the Senate Interstate and

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[1] 72 Stat. 568, 49 U.S.C. §§ 1231-1240 (1958).

[2] 2 & 3 W. & M., c. 12, § 24 (1691).

[3] Senate Comm. on Interstate and Foreign Commerce, *Transportation Act of 1958* S. REP. NO. 1647, 85th Cong., 2d Sess. 3 (1958), See 54 Stat. 898 (1940), 28 U.S.C. §§ 2101 (1952).

Foreign Commerce Committee. Senator Wheeler, who had been chairman of that committee in 1940, maintained that Congress had intended the inherent advantages of each form of transport to be recognized and preserved above all else. He testified further that he understood that the Commission had not consistently followed such a policy:[4]

> Now, I say that it wouldn't be necessary to have any legislation, provided that the Interstate Commerce Commission had followed the rule which they initiated, laid down, and which Congress intended.
>
> Since this clear recognition of the intent of the law, the Commission has from time to time departed from the policy we thought we had made plain in the Transportation Act of 1940 and the reports and debates thereon.

Senator Wheeler's views seem to have been endorsed by the Senate Committee of the Eighty-fifth Congress and to have led to a reaffirmation of the intent of Congress as set forth in the Act of 1940:[5]

> The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in the Automobile case thus assuring reasonable freedom in the making of competitive rates.

With due regard for the distinguished committee and its former chairman, however, and aside from an evaluation of the wisdom of the ICC's policy, there seems to be real uncertainty as to whether the Commission actually has misconstrued the sense of the Act of 1940 as indicated in legislative reports and in the prolonged debate on the law running through the three sessions of the Seventy-sixth Congress. It may be that there was a shift in congressional intent, unexpressed in law after 1940; and in that case, the ICC may hardly be considered at fault. Considering that Congress in 1958 chose to re-emphasize its transportation policy as propounded in 1940, it appears worthwhile to review the legislative process which produced the Transportation Act of 1940.

The principal criticism of the ICC's interpretation of its rate-making powers has been directed at its inclination to allocate traffic on a "fair share" basis, without regard to the relative operating costs of competing forms of transport. Senator Smathers, during the Senate committee hearing on the rate-making rule, voiced the feeling of the committee:[6]

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[4] *Hearings Before the Senate Committee on Interstate and Foreign Commerce on Ratemaking Rule—Interstate Commerce Act*, 85th Cong., 2d Sess. 13 (1958).

[5] Senate Comm. on Interstate and Foreign Commerce, *Transportation Act of 1958*, S. REP. No. 1647, 85th Cong., 2d Sess. 3 (1958).

[6] *Hearings*, *supra* note 4, at 170.

In other words, we have been reading—our feeling is that the Commission has been reading—into the national transportation policy, and the act, the desire to protect another mode of transportation irrespective of whether or not the lowered rate sought by the first mode of transportation was compensatory, or a reasonable rate to them, to the extent that all rates have been steadily going up and being fixed at what you might say is a false rate, and it is being done to protect all modes of transportation, but it is being done, we are afraid, at the disadvantage of the shippers and the general public.

In appearing before the Senate Committee on Interstate and Foreign Commerce, the chairman of the ICC, Commissioner Freas, contended that the Commission had consistently hewed to the policy of preserving the full cost advantages of each form of transport and that apparent evidences to the contrary were instances where the Commission was either faced with a lack of cost data, or where it had restrained rate reductions of a high-cost carrier that had lower out-of-pocket costs than its low-cost competitor.[7]

At that point, the Commissioner was confronted with several decisions by the Commission in which rates had been found to be fully compensatory, but yet where the Commission had not granted the filed rate reductions.[8] In explaining this aberration from the claimed policy, Commissioner Freas conceded that the Commission has tried to maintain a higher scale of rates on certain "high class" traffic in order to cover the general overhead and make possible the transport of other commodities at less than full cost.[9] This action was justified by the

[7] *Id.* at 166 *et seq.*

[8] *E.g.*, "The proposed rates which are lower than the rates maintained by tank-truck common carriers by more than 2 cents are lower than necessary to meet the competition and that their establishment would result in an unwarranted sacrifice of revenue and constitute an unfair competitive practice." *Id.* at 175.

Also, "Considering these factors, the traffic would not bear its fair share of the transportation burden under the proposed rates, and therefore, such rates have not been shown to be just and reasonable." *Id.* at 176.

[9] "Commissioner FREAS. Now if we try to set the rates on all the competitive traffic to just bear out-of-pocket costs, or a shade above, the carriers cannot continue in business because the overhead burden, the revenue other than that which goes to pay out-of-pocket costs, the revenue for those expenses has to come from somewhere.

"So when we come to that high class traffic, of which these are instances, the Commission has tried to hold the scale on a somewhat higher level.

"Senator SMATHERS. You feel that by doing that, then other commodities are permitted to be carried at lower costs, and it probably all averages out to the benefit of the general public?

"Commissioner FREAS. That is right, the general overhead has to come from somewhere." *Ibid.*

Commissioner as being in the over-all public interest. He then went on to pose the question as to the extent to which, if at all,[10]

> . . . Congress desires to prohibit the maintenance of minimum rates on high value commodities at a level higher than would be justified by cost considerations alone.

implying, certainly, that the Commission in the past has held rates on such commodities above cost. Unfortunately, the Senate Committee did not answer the Commissioner's question directly.

From Commissioner Freas's testimony and the rest of the legislative record, it becomes reasonably clear that the difference between the intent of the Eighty-fifth Congress and the interpretations of the ICC reside in whether or not rates on high-value commodities should be maintained above cost in order to subsidize the transport of low-value commodities. There is little doubt that Congress has recorded itself in opposition to the encouragement of intramodal competition, to unfair and destructive competitive practices, and to intermodal competition at rates below full cost, as will be seen. However, it is not entirely evident that the Eighty-fifth Congress rejected value-of-service pricing as a general proposition, although appearing to have condemned it where intermodal competition is involved. If that is the case, the present ubiquity of such competition would seem to necessitate a concomitant application of full-cost pricing. But, in 1940, Congress specifically refused to adopt a full-cost rate-making policy.

The question, then, into which inquiry seems appropriate, is whether in 1940 Congress sanctioned the value-of-service brand of pricing (above or below full cost) for which it now criticizes the Commission; and more important, whether it seems likely that Congress has rejected that approach in the Transportation Act of 1958.

However, before entering upon an analysis of the intent of Congress in 1940, it seems desirable to review briefly the rate-making policy which preceded the Act of 1940.

I

Earlier Rate-Making Policy

In general, prior to 1920, the mission of the ICC was to restrain the most extreme exploitations of the railroads' monopoly power. The Commission was largely occupied with preventing individual carriers from raising rates to outrageous levels. It had no responsibility for the

[10] *Id.* at 179.

financial well-being of the railroads separately or as a whole; and, on occasion, when the Commission outlawed rates which were excessive for "strong" roads, it deprived competing "weak" roads of revenues presumably needed for their continued operation. Then, in areas served by the "weak" road alone, public interest might be damaged.[11]

In contemplation of the weak-and-strong-road problem, Congress decided in 1920 to abandon the attempt to force upon the carriers the equivalent of a competitive pricing result and to treat the railroads as a monopolistic aggregate. In the Transportation Act of 1920, it gave the Commission a full array of powers over rates and directed the Commission to set rail rates so as to make possible a fair return upon the fair value of rail property. Congress, in effect, bestowed its blessing upon monopoly pricing, subject to the restraints imposed by the antidiscrimination provisions of the Interstate Commerce Act and the public utility ceiling on over-all return. The railroads were to be permitted, and in some cases required, to refrain from competition with each other and to establish a rate system essentially based on monopolistic exploitation of demand.[12]

The transition from pre-1920, characterized by uneven patterns of competition-monopoly and sometimes acute discriminations, was achieved slowly. Actually, uniformity of classification and of class rate scales over the whole (almost) country did not come until 1952. Nevertheless, the carriers had by the early 1920's, with the urging of the Commission, set up three major classification territories, within each of which there was substantial uniformity, and throughout the 1920's and early 1930's, the ICC endeavored to establish uniform rate scales in rate territories.[13]

The adoption of monopoly pricing as a basic rate-making policy naturally did little to lessen the rail carriers' tendencies toward differential pricing. As might be supposed, much complaint continued to emanate from industries and regions possessing, for one reason or another, inelastic demands for transport. To placate these interests, which often carried their complaints to high political levels, the ICC began, through its powers to prevent "undue or prejudicial discrimination,"[14] to average out and isolate market demand relationships. This process was carried on under public pressures which at times reached an extreme pitch, such

[11] LOCKLIN, ECONOMICS OF TRANSPORTATION 239-41 (1954).

[12] 41 Stat. 456 (1920), 49 U.S.C. § 1 (1952).

[13] *E.g.*, Eastern Class-Rate Investigation, 164 I.C.C. 314 (1930); Southern Class-Rate Investigation, 100 I.C.C. 513 (1925), 128 I.C.C. 567 (1928).

[14] Interstate Commerce Act § 3, 24 Stat. 380 (1887), as amended, 41 Stat. 479 (1920), 49 U.S.C. § 2 (1952).

as in the *Lake Cargo*[15] and *Southern Governors*[16] cases.[17] Often, as in port relationships where public pressures were powerful and insistent, the Commission pragmatically worked out delicate adjustments that mollified the interests involved, or at least balanced them, and retained as much revenue for the carriers as possible.[18] Also, in removing offensive differentiation, the ICC sometimes required the raising of rates to preserve revenues to the carriers.[19]

Over time and under regional pressures, price differentiation tended to become tied primarily to the identity of a commodity, as contrasted with regional or local ties. It may be speculated that this tendency was in part due to the geographical distribution of political power in the United States. But probably more significant is the economic phenomenon that demands for the transport of individual commodities tend to be more discrete than demands for the transport of the same goods between different places. This is a matter of relative substitutability. Lumber from the Pacific Northwest is more substitutable for lumber from the Southeast than is butter for stovepipes. As a result, the Commission began to permit wide differentiation in commodity classification and strove for uniformity in rate scales.[20]

Although economic discrimination in large degree may have persisted within the uniform rate scales, so far as the public was concerned, "discrimination" had been eliminated when it became possible to ship "anywhere" on like rates. The Commission found, until the advent of intermodal competition, that it was not impossible to raise rates, so long as it was done uniformly and without affecting competitive relationships. The policy of rate-scale uniformity and commodity differentiation seemed to be accepted by the public and became deeply engrained as a "proper" procedure in rate-making, and even today, it is so cited by transportation experts.[21]

With the advent of the depression years, outcries against regional differentiation grew louder, simultaneously with the decline of rail revenues. This led the Commission to regard and cherish ever more highly those noble commodities that would uncomplainingly bear a

[15] 139 I.C.C. 367 (1928).
[16] 262 I.C.C. 447 (1945).
[17] See LOCKLIN, *op. cit. supra* note 11, at 300, 319.
[18] SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 656 *et seq.* (1936).
[19] *Id.* at 530-32.
[20] *Id.* at 541.
[21] See testimony of Commissioner Arpaia, *Hearings, supra* note 4, at 173; Ames, *The Transportation Act of 1958*, 26 ICC PRAC. J. 689-90 (1959).

heavy load of overhead and to deplore carrier actions—competitively inspired—that might endanger revenues.

The rising competition of other modes of transport, chiefly motor, imposed additional strains on the monopolistic rate structure. Instead of competing with the railroads on a broad front, the motor carriers aimed at the traffic to which the rails had allocated the highest burden of overhead cost. These forays shifted an even heavier burden to that traffic having inelastic demand; and as might be expected, often the inelasticity was shortlived, making ever smaller the captive traffic. The railroads, nailed to the cross of regulation, after a rather half-hearted effort at escaping, turned to a campaign to bring their free-enterprising rivals under the regulatory umbrella.[22] Their success is quite apparent. Both regulation of motor carriers and water carriers was argued on the floor of Congress as necessary to rescue the railroads from destitution (as was the Transportation Act of 1958).

In 1933, Congress repealed the invocation to the ICC that it should set rates so as to yield a fair return on the fair value of rail property.[23] The new rule of rate-making was to consider the effect of rates on the movement of traffic, the need of the carriers for revenue, and the need of the shippers for economical transportation. It appears, however, that Congress intended and the ICC understood that, in general, a monopoly pricing policy was to be continued. In the Motor Carrier Act, to assure motor carriers that their rates would not be "held up" to protect the rail carriers, a provision was added to the rule of rate-making instructing the ICC to consider the "inherent advantages of motor transportation."[24] But clearly, the ICC was to attempt to moderate the competition among the then voracious motor carriers,[25] and, later, the Commission offered no serious objection to the motor carriers' policy of tying motor rates to rail rates. Manifestly, the ICC considered among its regulatory obligations the prevention of the breakdown of the rail rate structure. In the light of its responsibilities for the financial well-

[22] Revealingly, Senator Wheeler, in debate on the Transportation Act of 1940, repeated several times the claim that he alone had forestalled the repeal of the long-and-short haul clause in the 1930's. Although repeal twice passed the House and would, he said, have passed the Senate, Senator Wheeler strongly opposed it and suggested to the rail carriers that instead they should support the regulation of their competitors. 84 CONG. REC. 5880 and *passim* (1939).

[23] 48 Stat. 211 (1933) 40 U.S.C. 413 (1952). This provision had proved to be unworkable both on legal and economic grounds.

[24] 49 Stat. 543 (1935), 49 U.S.C. §§ 301, 302 (1952).

[25] S. REP. No. 482, 74th Cong., 1st Sess. 2 (1938).

being of the carriers, it would appear that this was not an improper interpretation of its duties.

II

Debate on the Transportation Act of 1940

In the debate on the Act of 1940, the rate-making problem was thoroughly hashed out, resulting in an extended record of congressional intent. The unusually lengthy discussion developed because of a rate-making amendment attached to the bill on the floors of both the House and Senate.[26]

Although the record is a mixed one, it seems reasonably apparent that Congress did not intend that the ICC should venture greatly from the monopoly rate-making policy that it had been construing since 1920. Additionally, Congress made it clear in a statement of national policy that the ICC's responsibilities for promoting financial health were to extend to all the carriers subject to its supervision. As further emphasis of this responsibility, Congress went on record as disapproving "unfair or destructive competitive practices." On the other hand, Congress made as a national policy the preservation of the inherent advantages of each form of transport, and, in the rule of rate-making, it directed the ICC to consider the effect of rates on the movement of traffic by the mode to which the rates would apply.[27]

The congressional history of the Act of 1940 indicates that Congress wished to protect the traffic that each form of transport could handle most economically. It did not want the railroads, on an out-of-pocket cost basis, to take traffic from the water carriers, the motor carriers, or vice versa. This attitude is gleaned from the following quotes:

Mr. NORRIS. Suppose, however, this bill should become a law, and an article of freight were to be transported which admittedly could be carried by

[26] Senator Miller, of Arkansas, introduced the full-cost rate-making amendment in the Senate, and Representative Wadsworth, of New York, in the House: "In order that the public at large may enjoy the benefit and economy afforded by each type of transportation the Commission shall permit each type of carrier or carriers to reduce rates so long as such rates maintain a compensatory return to the carrier or carriers after taking into consideration overhead and all the elements entering into the cost to the carrier or carriers for the service rendered."

The amendment was passed by the Senate unanimously, 84 CONG. REC. 6074 (1939); and by the House, 147 to 119. *Id.* at 9977. In the 76th Congress, 3d Session, the bill was returned to the conference committee by the House, with instructions to insist on the Wadsworth amendment. 86 *id.* at 5886 (1940). Although the amendment passed the Senate once and the House twice, the conference committee refused to report it in the conference bill.

[27] 54 Stat. 788 (1940), 40 U.S.C. § 316 (1952).

water better than by railroad, and suppose the railroad should undertake to reduce its rate down to the water rate: Would there be anything in the law to prevent the railroad from doing that?

Mr. WHEELER. Of course there would be.

Mr. NORRIS. Disastrous rates can be brought about by reducing them just as well as by increasing them, as a matter of fact.

Mr. WHEELER. Exactly.

Mr. NORRIS. And the water carrier ought to be protected on the freight that ought to be carried by water rather than on the railroad.

Mr. WHEELER. It would be absolutely protected under this measure.

Mr. NORRIS. That is what I want to see done.

Mr. WHEELER. There is not any question about it. Under the rate-making provision and under the other provisions I have read, there is not any question about it.[28]

Mr. WHEELER. . . . I do say that if we want a coordinated national transportation system, that the bill will stop some of the practices which have been indulged in, such as temporarily cutting the rate on some commodities simply to take some business away from the railroads. That is not helping the general public in the long run.[29]

Mr. WHEELER. I suggested, the President of the United States suggested, the Interstate Commerce Commission suggested, that the thing to do was to place in an impartial body the right to regulate the rates of the water carriers, not so that they would throw business over to the railroads but so that they could not deliberately take out-of-pocket costs in order to break down the rates of the railroad carriers and take over their business.[30]

Mr. WHEELER. . . . they [the railroads] are entitled to have their competitors regulated not so as to enable them to raise their rates to give them business, but so their competitors may not put into effect out-of-pocket rates—rates upon which they lose money simply for the purpose of breaking down the railroad rates.[31]

Mr. WHEELER. One of the things we are seeking to do under the bill is to prevent cutthroat competition.[32]

Mr. WHEELER. . . . there is no man in this body who has fought harder to protect the waterways of the country from competition than I have. When the question as to the fourth section was pending the waterways interests hardly had a friend in this body or in the committee. I went to work and deliberately and personally held it up for 2 or 3 or 4 years in order to protect.

[28] 84 CONG. REC. 5874 (1939).
[29] *Id.* at 5880.
[30] *Id.* at 5949.
[31] *Ibid.*
[32] 86 CONG. REC. 11286 (1940).

the waterways, because I knew if the fourth section were repealed that action would destroy them, and I would not permit them to be destroyed.

Let me say that the Senator from Kansas has done everything in his power to protect from competition the water carriers all the way through, and I submit that today this bill does protect them.[33]

Mr. LEA. If this question relates purely to the cost of carrying a specific item, then it does not bear an average return which is necessary to the carrier. If you figure the carrier's full expense, including overhead, it is an entirely different matter from simply providing the cost to the carrier for carrying a specific item.

The gentleman who just spoke [Rep. Wadsworth] said that the burden would be on the Commission in determining the question to find out what it cost the carrier for a specific item. That is the old destructive method of figuring costs that has been used to put a competitor out of business.

The only way out for the carrier on this basis is to have unduly high rates in noncompetitive territory. If we permit a carrier to use this destructive rate with large volume cheap commerce, then it means in noncompetitive territory you have an unduly high rate. That is one of the great troubles in this country at the present time.

On the other hand, suppose this means the average cost of all expenses to the carrier. The language says, [Wadsworth amendment] "so long as such rates maintain a compensatory return to the carrier or carriers after taking into consideration overhead and all other elements entering into the cost to the carrier or carriers for the service rendered." For what service? For the service of that specific article, and that tends to put it on the destructive out-of-pocket cost basis.[34]

Mr. HALLECK. This bill seeks to take out of our system cutthroat competition which is destructive of the interests of our people and of all the carriers combined. . . . But when a representative of those interests tells me that in this cutthroat competition they have cut their rates down to where they are losing money, and the railroads followed, then I say somebody got hurt.[35]

Mr. HALLECK. My question is prompted by my understanding that the term "compensatory" is frequently interpreted to mean the out-of-pocket costs, and of course if the rate reflected the out-of-pocket cost, then [the] operation would not be at a loss, but the railroads have been continuously attacked by their competitors because they have sought, on occasion, to carry

[33] *Id.* at 11616.

[34] 84 CONG. REC. 9964 (1939). Mr. Lea was Chairman of the House Interstate Commerce Committee.

[35] *Id.* at 9712. Mr. Halleck was a member of the House Interstate Commerce Committee.

freight at the out-of-pocket cost, and it is pointed out in Mr. Secretary Wallace's letter that that is unfair competitive practice, and is destructive of the competitors of the railroads; that they should not be permitted to carry freight at that low rate.[36]

Mr. WOLVERTON. The truth is that substantial water carriers, almost without exception, are anxious and willing for regulation that will stabilize an industry that is sorely depressed by the present cutthroat practices of the chiselers within the industry.[37]

Legitimate regulation must look to the protection of the economic advantage of each type of carrier against destructive competition of the other.[38]

It seems, however, that if Congress' primary intent had been to protect to each carrier the traffic in which it was most efficient on a full-cost basis, the full-cost rate-making rule could have been adopted. But Congress evidently believed that a rule of rate-making predicated on the determination of full cost would have been extremely difficult to administer, and, more important, would have resulted in the increase of rates on a large number of basic industrial and agricultural commodities:

This proposed amendment [full cost rate-making], if enacted, would impose numerous administrative difficulties; for instance, establishment of a permissible rate on a given product would require the production of evidence to show from the whole income and expense accounts of the carrier what rate would be required to meet the standard of rate-making this amendment would establish.[39]

Mr. LEA. In that event the objection to it [full cost rate-making], a very serious one, is the administrative difficulty. If that is the meaning of this language, the Commission is to take into consideration the full cost of carriage. Every little rate case involving a 10-cent reduction in rates would cast upon the Commission the burden of determining the full cost of carriage on an average basis, including the high cost freight and the low cost traffic.

That is the reason why this amendment is objectionable from an administrative standpoint and from the standpoint of the carrier or shipper.[40]

Mr. WHEELER. As I have said, there are certain movements of freight traffic on the railroads, or anywhere else for that matter, that will not move unless it has a cheap rate. Much of that includes agricultural products. The

[36] *Id.* at 9962.

[37] *Id.* at 10106. Mr. Wolverton was ranking minority member of the House Interstate Commerce Committee.

[38] H.R. REP. No. 2832, 76th Cong., 3d Sess. 88 (1940).

[39] *Id.* at 87.

[40] 84 CONG. REC. 9964 (1939).

rates on these articles are not fixed on a full allocated cost which would include overhead and profit and all the other things, but they figure what the out-of-pocket cost is to move that freight and add something to it on the theory that it is better to make a little profit than not to move the freight at all. There are rates like that all over the country. There are rates made on a basis other than the full allocated cost which have been made effective simply to equalize the competitive advantages of different communities trying to get into a consumer market. The Wadsworth amendment means that a rail carrier could not reduce a rate below the full allocated cost in order to move the traffic that otherwise would not be moved. It seems to me the effect of this would be to raise the rates over the country, particularly on agricultural commodities. I do not believe anyone wants that done. There is no sound economic reason why it should be necessary for each rate to pay its share of all costs and at the same time contribute something to profit. If rates were made on this theory the classification of goods and commodities for rate-making purposes would be next to impossible and as a consequence rates on many commodities, particularly farm products, would be greatly increased.[41]

Mr. LEA. There is much freight at the present time that is carried as low as 80, under 100, [full cost] because of competitive conditions or because it will not move at a higher freight rate. Cheap freight—low grade freight like grain, fertilizer, sand and gravel, and building materials—must move at that lower level on a narrow margin or they do not move at all. Therefore the effect of the Wadsworth amendment would be to require this 100-per cent instead of 80-per cent floor on which the freight rate structure is founded.

The effect of this amendment, if put into practical effect and enforced, would be to raise the freight rates on a large portion of the heavy commerce of the United States. There is nothing unusual about that practice. In this country there is the greatest need of cheap transportation of any place in this world because of the wide spread of the country and the great productive centers we have scattered throughout the Nation.[42]

Mr. WOLVERTON. There are countless freight rates which are not on the full cost basis—rates that were made so that traffic which could not move on the higher rate levels could move at the prevailing rates. On such a basis, America has developed industrially and agriculturally, and also on this basis business is now established and adjusted.

Imagine, if you can, what would happen were this rate structure to be destroyed. Much of the traffic now moving could move no longer. Many industrial centers and agricultural regions which depend on low-cost transportation to get their products to market would suffer immeasurably. Rates

[41] 86 CONG. REC. 11290 (1940).

[42] *Id.* at 10179.

on other commodities would necessarily increase, thereby placing an added burden on the shippers of these commodities and the eventual consumers.[43]

Senator Wheeler and other supporters of the bill thus found themselves in a position of condoning out-of-pocket cost rates when necessary to move traffic, but of condemning them when used against or in response to other carrier competition.

Mr. WHEELER. The shipping industry is in a bad way in any instance. It has been stated that the shipping industry has been put out of business in many places because someone would go into business temporarily and cut rates and the established industry would have to come down in its rates. Such practices destroy the economic order of the industry.

Mr. CLARK. What I was fearful about was that if permitted the thing would happen again which has happened so often—that the railroads with their vast capital, would cut their rates in order to put the water competitors out of business. That is the game which the railroads have played for many years.

Mr. WHEELER. Let me say to the Senator that there was not a member of the conference committee who did not want to take care of that very thing. As I pointed out, we provided not only in the policymaking provision of the bill but in the rate-making provision of the bill, that in considering water rates the Commission should look at the water rates from the standpoint of water carriers, recognizing the inherent advantages of water transportation; and when it came to considering the rates charged by busses and trucks, the Commission should do the same thing: and when the Commission came to consider railroad rates, it should do the same thing.[44]

Mr. LEA. If you consider this as an out-of-pocket cost, then it is a destructive rate. It is the means by which railroads have driven boats off the rivers, in times gone by. It is not legitimate competition if you permit one carrier to carry it without profit in order to prevent the other fellow from making something out of carrying it.[45]

Mr. LEA. Mr. Chairman, during the consideration of this bill the subcommittee seriously considered whether or not we should not adopt an amendment equivalent to this. We desired that some fixed standard be established at which the low-cost carrier would not be encroached upon by the higher-cost carrier in fixing a rate.[46]

Mr. WOLVERTON. The bill, as it stands, also fully protects one type of common carrier from unfair rate-cutting competition by another having

[43] *Id.* at 10191.
[44] *Id.* at 11624.
[45] 84 CONG. REC. 9964 (1939).
[46] *Ibid.*

higher costs. In the light of its provisions, the Interstate Commerce Commission could not permit such unfair or destructive competitive practices.[47]

The inconsistency here was forced on the bill's sponsors by those who feared that the ICC would "hold up" water rates to the level of rail, or would permit the railroads to drive the water carriers out of business. For example, Senator Miller, who introduced the full-cost amendment in the Senate, commented as follows:[48]

Mr. MILLER. I am fearful, however, that when the water carriers are put under the control of the Interstate Commerce Commission it will not result in leveling rates, but it will result in freezing rates at the highest points now in existence, and that instead of permitting the water carriers to have the effect upon rates that they now have in some instances, the rates will be raised by the Interstate Commerce Commission. That is the fear I have.
Mr. WHEELER. Of course that is the fear that some persons have; but if they take that position they have to say that they do not trust the Interstate Commerce Commission.
Mr. MILLER. To be perfectly frank, I do not. (Laughter)

Since this seemed to be the reaction of a substantial number of congressmen, especially from the South and West, it was incumbent upon the bill's sponsors to allay their apprehensions. Hence the strongly stated intent "to preserve the inherent advantages of each form":[49]

Mr. WHEELER. (Quoting from the legislative committee of the Interstate Commerce Commission) "In our judgment, the provision in question [Miller amendment] is not necessary in order that the public at large may enjoy the benefit and economy afforded by each type of transportation. The requirement in the ratemaking rule that the Commission give due consideration to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed and also to the need in the public interest, of adequate and efficient transportation by such carrier or carriers at the lowest cost consistent with the furnishing of such service, coupled with the admonition in the declaration of policy in section 1 that the provisions of the act be so administered as to recognize and preserve the inherent advantages of each mode of transportation, will afford adequate protection in this respect. If experience should show that further protection is needed, contrary to our expectations, Congress can then amend the Act, but such restriction as is now proposed is, we believe, both unnecessary and undesirable."

[47] 86 CONG. REC. 10191 (1940).
[48] 84 CONG. REC. 5881 (1939).
[49] 86 CONG. REC. 11290 (1940).

If the bill's sponsors had gone no further, it might have been said that congressional intent was to impose a full-cost standard on intermodal competition and to permit the established monopolistic pricing policy to hold sway in circumstances where such competition was absent. Aside from the administrative difficulties involved in such a policy, which were recognized by Congress,[50] gradually but eventually as competition came to permeate transport markets, the full-cost standard would apply to all rates. This was foreseen by Representative Wadsworth in urging the passage of his amendment:[51]

Mr. WADSWORTH. There may be some technical difficulty about arriving at the compensatory rate, but, after all, Mr. Speaker, we have ceased now to attempt to regulate monopolies. The railroads are no longer monopolies. We have turned a complete somersault in this legislation, and we are now attempting to regulate competition between types of carriers. You cannot regulate competition between types of carriers unless your commission learns through experience what the compensatory line is. They have to come to it if they are going to regulate competition.

But Congress was not ready to embark on this approach to ratemaking except where insisted upon by the politically powerful competitors of the railroads. It was evident that too many important industrial and agricultural commodities would encounter substantial rate increases. It seems that persuasive testimony exists in the *Congressional Record* that Congress intended that even in circumstances of intermodal competition where a high value commodity was involved (*i.e.*, inelastic demand for transport), competition should be curbed in order to retain needed revenues for the subsidy of low grade commodities (elastic demand for transport).

Mr. WHEELER. This amendment [Wadsworth] had the most vigorous objection of the legislative committee of the Interstate Commerce Commission headed by Commissioner Eastman. The Commission pointed out that there are two kinds of costs, out-of-pocket costs and full allocated costs, which are quite different. The amendment is not clear as to what manner of cost

[50] 84 CONG. REC. 9966 (1939): "Mr. HINSHAW. Mr. Chairman, I hesitate to oppose the esteemed gentleman from New York with his amendment to this section of the bill, but I should like to call your attention to a few things that I believe some of you do not recognize.

"The making of rates by any commission on transportation is one of the most difficult and one of the most complex tasks that can possibly be conceived of. We in our committee [Interstate Commerce] have tried to devise some better kind of formula for ratemaking, but have utterly failed."

[51] 86 CONG. REC. 5867 (1940).

is meant, and it is also uncertain what is meant by a compensatory return. In stating why the amendment was objectionable, the Commission said: "In the past, the freight rates of railroads, and also of other carriers have taken into consideration, not only costs of service but value of service or "what the traffic would bear." This had the result of putting a somewhat disproportionate burden on the higher-valued commodities, particularly those capable of a comparatively high car loading, but in general was approved by public opinion. The intense transportation competition of the present day, including the ability of many shippers to provide their own transportation, is tending rapidly to break down this method of construing rates, and it may be that eventually it will be impossible to give much, if any, weight to the so-called value of the service.

Let us suppose, for example, a situation where competing railroads, coastwise steamship lines, and trucks are all maintaining, to their own and the shippers' satisfaction in general, a comparatively high level of freight rates on various packaged goods of high value, and some carrier, for the sake of a temporary advantage, undertakes to cut these rates. If this must be allowed, ultimately all the competing rates will be reduced and a hole created in carrier revenues which may make it necessary to increase rates on traffic less able to stand the burden. We think that it should not be allowed, and that the Commission should be in a position to prevent such a train of events by exercise of its authority over the minimum rates."[52]

Mr. LEA. [Discussing the full-cost amendment] The amendment would deprive the Commission of the discretion it ordinarily has in making rates. Ordinarily the Commission considers the value of the freight, the value of the service, the high or low cost of the freight, the conditions under which it must be transported, the effect on the movement of traffic, and so forth.[53]

Mr. LEA. The high-cost freight, the high-priced freight, makes possible the low-cost freight in the United States.[54]

Mr. WOLVERTON. Under the amendment [Wadsworth] Congress would prescribe a rigid rule to control the Interstate Commerce Commission's judgment concerning minimum rates. It has long been recognized that making freight rates by statute cannot be successful. Neither can regulation by arbitrary and inflexible ratemaking rules be successful. Flexibility and elasticity are as important to transportation pricemaking as they are to pricemaking in other industries, and rates cannot be made by formula, but must be regulated by the sound judgment of an administrative body.[55]

Everywhere in the world transportation rates take into consideration the class of traffic carried and at what rate it will move. Raw materials such as

[52] *Id.* at 11290.
[53] *Id.* at 10178.
[54] *Id.* at 10179.
[55] *Id.* at 10191.

grains, farm products, coal, and other heavy materials frequently move at a rate less than required by this provision [Wadsworth amendment]. Low-profit freight compensates for its carriage, but ordinarily the carrier could not successfully continue in business on low-cost freight alone. It is the greater profit made on the high-class freight that makes the maintenance of our low-cost transportation system possible.[56]

Many low competitive rates have been secured by artificial reasons, not based upon economic justification.

Many of these reductions are manifestly cutthroat rates. They are not required by any economic duty to the shipper. They force the retention of individual high rates. They are not confined to cases where reductions are necessary in order for the traffic to move, or to cases where the value of the product moved requires their reduction.[57]

This expression of intent, combined with the responsibility for the economic health of the carriers[58] delegated by Congress to the ICC, would seem to provide all the grounds needed for the Commission to embrace the views for which it now is being roundly criticized. Undoubtedly Commissioner Freas's question as to whether "Congress wishes to prohibit the maintenance of minimum rates on high value commodities at a level higher than would be justified by cost considerations alone" was answered in 1940 in the negative.

If a fundamental change in rate-making policy is to be made, it seems fair to say that it must be initiated by Congress. It may be that such a change has been brought about by the Transportation Act of 1958. If the Senate Interstate Commerce Committee had not reiterated the familiar strictures on "unfair or destructive competitive practices,"[59] the

[56] H.R. REP. No. 2832, 76th Cong., 3d Sess. 87 (1940).

[57] H.R. REP. No. 1217, 76th Cong., 1st Sess. 3 (1939).

[58] 84 CONG. REC. 5874 (1939); "Mr. WHEELER. In the 1920 Transportation Act, what did the Congress of the United States do? The courts construed that act as a mandate from Congress to the Commission to foster and to guard the railroads. The Congress said to the Interstate Commerce Commission, 'It is your duty to protect the railroads of the country.' One or two members of the Interstate Commerce Commission have said to me that, as a matter of fact, the passage of the pending bill would benefit the water carriers for exactly the same reasons. . . ."

[59] Senate Comm. on Interstate and Foreign Commerce, *Transportation Act of 1958*, S. REP. No. 1647, 85th Cong., 2d Sess. (1958): "The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such rate-making being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not

amendment might have been more convincing. Nowhere is there indication that the 1940 significance of this term—namely, competition rendered dissipations of revenue—has been abandoned. If that is the case, and considering that intramodal value of service pricing is by no means banned, it may be conjectured that the Commission would not be unjustified in continuing to uphold rates on cigarettes, liquor, hardware, etc. that qualify as high-value commodities.[60] For it is difficult to come to any other conclusion than that destructive competition in transportation, as Congress has defined it, is simply normal competitive practice in other industries.[61]

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the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies."

[60] In 1939, Senator Wheeler spoke as follows: "It was the Congress of the United States which in 1920 passed the Transportation Act and said to the Interstate Commerce Commission in effect, 'Fix rates so as to protect the railroads.' We should not condemn the Interstate Commerce Commission. We should take the responsibility and say, 'The responsibility rests upon the Congress of the United States and not upon the Interstate Commerce Commission.' We do not like to do it, of course. If there is one thing that the Senator or Representative likes to do, it is to find someone he can condemn and say, 'I am not responsible for what has been done,' but we are to blame in this instance because of the fact that we passed the law; and in my judgment, the Interstate Commerce Commission has operated honestly and efficiently under it." 84 CONG. REC. 5881-82 (1939).

[61] This was perceived by one of the opponents of the Act of 1940: "Mr. SOUTH. I do not want to appear harsh toward railroad management. They have had their difficulties. So have the steel companies of this country and various other industries, including the automobile manufacturers. What do you think a Ford, a Chevrolet, a Plymouth, or a Buick automobile would cost if the government regulated the automobile companies to prevent so-called cutthroat competition, about which we are hearing so much in this debate? Cutthroat competition. What is cutthroat competition? Does Henry Ford have cutthroat competition in the manufacture of his automobiles? Does Walter Chrysler have cutthroat competition in the manufacture of his automobiles? They certainly do; and yet because they have not been regulated, because we have not stifled the initiative and the resourcefulness of the men who are in charge of this great industry, but have permitted and encouraged keen competition, they have furnished us cheap automobiles." *Id.* at 9716.