

COMMENT

FEDERAL SUPERVISION OF RAILROAD PASSENGER SERVICE: THE *SUNSET* CASE, DAWN OF A NEW ERA OR MONUMENT TO THE OLD?

Steady discontinuances of trains, reduction in patronage, and the absence of meaningful response from any governmental body foretell the imminent demise of railroad passenger service in the United States.¹ Despite contrary protestations, this result can be avoided by the application of presently existing laws if the agency concerned makes the policy choice to assert these laws. Attempts to isolate the source of the current railroad passenger problem are predictably circular. The railroads blame both the reduced patronage allegedly caused by public preference for airlines, buses, and private automobiles and the loss of mail transport contracts² for the elimination of passenger service.³ Public officials blame railroad management's preferences for freight traffic and resultant efforts to reduce passenger service for its deterioration.⁴ The Interstate Commerce Commission⁵ has played a major role in the decline of passenger service since the 1958 congressional action authorizing

1. See *Hearings on H.R. 12084, H.R. 744, H.R. 785, H.R. 3112, H.R. 521, H.R. 9168, H.R. 14170, H.R. 13347, H.R. 13352, H.R. 13832, H.R. 14661, and H.J. Res. 52 (and related bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-31, at 178 (1969)* [hereinafter cited as *Hearings*]; Lyon, *Is This Any Way to Ruin a Railroad?*, 19 AM. HERITAGE 52 (1968) [hereinafter cited as Lyon]. But see *Hearings* 267, 272, 285.

2. The circularity of the reduced rail passenger service problem is particularly accentuated by the process by which the Railway Post Office was eliminated. Before the reduction trend began, mail revenue had produced one-third of passenger train revenue; by the end of 1968 railroads had lost over \$100 million from the reduction in service. See *Hearings* 368, 372. Such a loss certainly seems ample justification for cutting back service, but it has been argued that reduced passenger service precipitated reduced mail service because of the loss of essential connections for mail delivery. See *Hearings* 153, 239, 309. But see *Hearings* 149, 322.

3. See *Hearings* 243, 272, 285, 288, 306, 456.

4. See Lyon 52-53, 57, 78-79, 83; Wright, *The Nuisance of Passengers*, 204 THE NATION 275-76 (1967).

5. The ICC has been the principal federal regulatory body concerned with railroad transportation since 1887. See Delisi & Bristline, *Coordinated Transport—Is a Single Federal Regulatory Commission Needed?* 36 ICC PRAC. J. 1326-27 (1969); Lyon 84.

interstate railroad carriers to circumvent recalcitrant state railroad commissions and go directly to the ICC to obtain permission for interstate service discontinuances.⁶ To create evidence in support of such discontinuance petitions before the ICC,⁷ railroads allegedly have intentionally downgraded service to decrease passenger patronage.

The ICC first sustained such an allegation in 1966, holding that discontinuance petitions would be denied where intentional downgrading was established.⁸ The Commission refused to accept the carrier's proof of decrease in revenue passengers as justification for service termination because of the railroad's practices of eliminating particular trains from published schedules and denying their existence to the public, closing ticket offices two and one-half hours before departure time, and providing one passenger coach per train and replacing such coach with a caboose as a passenger conveyance.⁹ Despite all these obstacles 12,000 passengers traveled the route in question during a twelve-month period in 1964-1965.¹⁰ The Commission ordered the service to be continued,¹¹ announcing that "[w]henver it appears . . . that a carrier has deliberately downgraded its service in order to justify discontinuance of a train irrespective of the actual or potential needs of the traveling public, the Commission will order the service to be continued."¹² But ordering continuance of downgraded, inadequate service is far from an adequate remedy for the passenger since the order merely preserves, for at most a year,¹³ grossly inadequate service for the consumer. The railroad may then return and reargue its case,

6. Interstate Commerce Act § 13a, 49 U.S.C. § 13a (1964), amending 49 U.S.C. § 13 (1952); see 1958 U.S. CODE CONG. & AD. NEWS 3457, 3467-69; Thoms & Laird, *Derailing the Passenger*, 36 ICC PRAC. J. 1121 (1968).

7. See Southern Pac. Co. Discontinuance of Trains Nos. 1 and 2 Between Los Angeles, Calif., and New Orleans, La., 333 I.C.C. 794 (1968); *Hearings* 147-48; Lyon 57, 79, 83; Wright, *supra* note 4.

8. Southern Pac. Co. Discontinuance of Trains Nos. 39 and 40 Between Tucumcari, N. Mex., and Phoenix, Ariz., 328 I.C.C. 360, 364-65 (1966).

9. *Id.* at 364.

10. *Id.*

11. *Id.* at 366.

12. *Id.* at 365. Although the Commission purported to follow an earlier case, Pennsylvania R.R. Discontinuance of Passenger Service, 320 I.C.C. 319 (1963), the later verbalization of the principle is considerably more liberal than the *Pennsylvania R.R.* pronouncement requiring that the intentional downgrading has deprived the public of "a necessary and well patronized service." *Id.* at 323.

13. Interstate Commerce Act § 13a(1), 49 U.S.C. § 13a(1) (1964).

bolstered by declining patronage caused by the maintained inadequate service. If the railroad has preserved the status quo and has not intentionally downgraded since the last discontinuance proceeding, the absence of the prohibited practices would presumably allow discontinuance based on the current statistics. It is the premise of this comment that the victim of such a practice clearly needs a remedy whereby a railroad can be compelled to provide adequate service on the trains that it must run.

This quest for a remedy for intentional downgrading of passenger service is a meaningful effort only if passenger service is worth saving. The subsequent analysis is based not only on such a presumption but on the views of many public officials, consumer representatives, and commentators that a sound national passenger transportation system, and in some instances a sound regional system, is dependent upon the continued presence of railroad passenger service.¹⁴ Two substantial reasons for the preservation of railroad passenger service are the reduction of highway and airport congestion, and the consequent noise and air pollution, and the prevention of further esthetic and ecological destruction caused by highway and airport construction. Such contributions to the preservation and enhancement of life go far in justifying the cost of maintaining and expanding rail transportation capabilities.

The search involves an analysis of the Interstate Commerce Act and ICC power therein since the Commission is the appropriate government instrumentality for analyzing and solving the problem of intentional downgrading. ICC jurisdiction can be traced from three basic facts. First, since all the major carriers move in interstate commerce, reliance upon state agencies would seem to be inappropriate under basic constitutional law concepts.¹⁶ Second, the

14. See, e.g., *Hearings* 1, 123, 128, 132, 137-38, 162-63, 178, 493-95. See generally 2 CENTER FOR STUDY OF RESPONSIVE LAW, SURFACE TRANSPORTATION, THE PUBLIC INTEREST AND THE ICC XI-9—XI-15 (preliminary draft, 1970) [hereinafter cited as TRANSPORTATION STUDY].

15. TRANSPORTATION STUDY XI-9-XI-15. The following additional reasons have been enunciated in support of the necessity for saving railroad passenger service: the promotion of regional economic development, the reduction of door-to-door travel time between certain major cities in "megalopolitan" areas, the reduction of national passenger transportation costs because of less expensive real estate investments vis-à-vis highways and airports, and the provision of transportation for those psychologically adverse to flying. *Id.*

16. State regulation of railroad passenger service standards is closely analogous to regulation of railroad passenger safety standards. Both, in general, create an undue burden on interstate commerce because of the need for national uniformity. Such service items as

ICC rather than the judiciary is the appropriate federal instrumentality because of its broad regulatory power in the railroad sphere¹⁷ and because of its theoretical capability of flexible, effective, and timely response to current transportation problems. Basic to this greater flexibility and timeliness is the Commission's authority to investigate the activities of common carriers subject to the Interstate Commerce Act, to institute inquiries on its own motion as if there had been a complaint or petition, and to seek criminal penalties, if necessary,¹⁸ rather than wait for the initiation of private actions. Moreover, agency enforcement on its own motion removes the burden of litigation from the private party. The quality of such enforcement is enhanced by the Commission's experience, expertise, and investigative and research capabilities.

Better policy should be produced by utilization of the Commission's quasi-legislative power to conduct hearings and investigations. Although ultimate resort for enforcement must be to the courts,¹⁹ the carriers are prone to accept Commission orders since good relations with the Commission are essential to their business. Unfortunately, a case by case analysis of the relative advantages of enforcement of applicable passenger service law through the Interstate Commerce Commission or solely by the courts is impossible since legal action in this area has been extremely

scheduling, the type of cars and number provided, and the operating condition of cars are not subject to effective state regulation because of potentially conflicting and mutually exclusive standards. Supreme Court hostility to state regulation of interstate railroad passenger safety was clearly evidenced in *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), where the Court held that Arizona's limits on the length of interstate trains operated to "[prevent] the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency." *Id.* at 779. Predictably, the Court would look with equal disfavor upon similar regulations in the service area. The absence of Supreme Court enthusiasm for state regulation of interstate railroads contrasts sharply with its views of state regulation of motor car traffic on its highways, described by the Court as "a legislative field over which the state has a far more extensive control than over interstate railroads," as an area "peculiarly of local concern," and as "akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce . . ." *Id.* at 783. A key distinction emphasized by the Court is that "[u]nlike the railroads local highways are built, owned and maintained by the state or its municipal subdivisions." *Id.*

17. See 1 I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 4-6 (1931) [hereinafter cited as SHARFMAN].

18. Interstate Commerce Act, §§ 12(1) & 13(2), 49 U.S.C. §§ 12(1) & 13(2) (1964). See 1 SHARFMAN 7.

19. See generally 1 SHARFMAN 285-87.

limited. The advent of organized consumer groups recognized as representatives of passenger interests should increase passenger litigation. It is, therefore, vital that the utility of the Commission in responding to such issues be publicized. Third, the question of adequate service is mooted if a train is discontinued. Therefore, since the Commission shares original jurisdiction over interstate discontinuances with state regulatory agencies,²⁰ a litigant would be expected to seek its aid in preserving service on trains not yet discontinued, particularly in light of the significance of intentional downgrading in the Commission's evaluation of a discontinuance petition.²¹ In light of these several considerations, it is the purpose of this comment to demonstrate that the ICC, not the judicial system, is the appropriate remedial agency and does have the requisite power. There will be no analysis of the recently created Federal Railroad Administration since that organization, subordinate to the Department of Transportation, is essentially a long range planning body for national railroad policy, and this comment will focus on more immediate remedies. If passenger service disappears now, future planning will be superfluous.

THE RAILROADS' COMMON LAW DUTY

Passenger railroads are generally subject to the duties of common carriers since they hold themselves out as ready to transport all persons properly presenting themselves to be carried.²² Based on their invitation to the public, common carriers and, therefore, passenger railroads have a duty imposed by law to provide

20. See Interstate Commerce Act § 13a, 49 U.S.C. § 13a (1964).

21. See note 12 *supra*. Even an unsuccessful attempt at blunting downgraded service might discourage future discontinuance petitions since the record would often reveal intentional downgrading which, as noted earlier, is fatal to a discontinuance petition.

22. See generally OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1969-1970 at 386-88 (1970). Since the Federal Railroad Administration was organized to supervise existing railroad programs transferred to the Department of Transportation and none of the potential passenger service provisions were transferred, Department of Transportation Act § 6(e), 49 U.S.C. § 1655(e) (Supp. IV, 1969), one can infer that Congress did not intend for the Administration to regulate passenger service standards. See generally 1966 U.S. CODE CONG. & AD. NEWS, 89th Cong., 2d Sess. 3397, 3416.

23. See *Webster v. Fitchburg R.R.*, 161 Mass. 298, 299, 37 N.E. 165, 166 (1894); *B. WYMAN, PUBLIC SERVICE CORPORATIONS* § 188 & n.3 (1911) [hereinafter cited as *WYMAN*]; *Boring, Some Legal Aspects of Common Carriage*, 17 I.C.C. PRAC. J. 255 (1949) [hereinafter cited as *Boring*].

such services reasonably necessary for safe and comfortable transportation.²⁴ The imposition of such a duty is further justified by certain public advantages enjoyed by the railroad common carrier. First, railroads, as other quasi-public bodies, are protected from some competition and are often delegated the right to exercise eminent domain power in the specific manner directed by the appropriate state legislature.²⁵ This latter benefit has enabled railroads to obtain essential rights-of-way. Since railroads have been provided with this advantage, ostensibly for the public good, fundamental fairness dictates that they reciprocate by providing adequate and reasonable service. Second, since railroads at their inception received large federal and state land grants for rights-of-way, they arguably have a moral duty to provide the public reasonable and adequate service.²⁶ In light of the common law duty to provide adequate facilities, the presumed incorporation of that duty within the Interstate Commerce Act,²⁷ and the supposed broad statutory power to regulate railroads given the ICC,²⁸ the Commission predictably could and should require railroads to maintain adequate passenger facilities. But in the recent *Sunset-Adequacies* case,²⁹ the Commission proved again that the obvious response is not always the eventual conclusion when enforcement statutes are interpreted.

In that case, a number of state public utility commissions petitioned the ICC to institute an investigation under section 12(1)³⁰

24. See *Atlantic Coast R.R. v. Powell*, 127 Ga. 805, 809, 56 S.E. 1006, 1008 (1907); *Murray v. Lehigh Valley R.R.*, 66 Conn. 512, 519, 34 A. 506, 507 (1895); *Hardenberg v. St. Paul, M.&M. Ry.*, 39 Minn. 3, 4, 38 N.W. 625, 626 (1888).

25. Boring 256. See generally *Greenwood v. Freight Co.*, 105 U.S. 13, 14, 22 (1881); *Caldwell v. Richmond & Danville R.R.*, 89 Ga. 550, 15 S.E. 678 (1892); *Sandford v. Railroad Co.*, 24 Pa. 378, 380 (1855).

26. See *Hearings* 129-30; cf. *Hearings* 140. But see *Hearings* 246-47. A controversy exists as to whether railroads have not already paid the United States for the land by absorbing losses from special land grant rates for transporting United States government personnel and property. As noted in the *Hearings* above, the land grants may affect congressional propensity to subsidize railroads further.

27. See note 36 *infra* and notes 39-42 *infra* and accompanying text.

28. See SHARFMAN 4-6.

29. *Adequacies-Passenger Service-Southern Pac. Co. Between California and Louisiana*, 335 I.C.C. 415 (1969) [hereinafter referred to as *Sunset-Adequacies*]. See generally TRANSPORTATION STUDY XI-3 and Appendix XI-1; Laird & Thoms, *End of the Line*, 15 LOY. L. REV. 270-71, 275, 279 (1969).

30. "The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the

of the Interstate Commerce Act into the service provided by the Southern Pacific on its "Sunset" passenger train from Los Angeles to New Orleans.³¹ The state commissions contended that the carrier had consistently downgraded service as a part of a systematic plan to create evidence in support of discontinuance petitions before the ICC.³² The railroad argued that the Commission lacked jurisdiction over railroad passenger service;³³ the trial examiner believed that the Commission had jurisdiction and recommended that it be exercised.³⁴ The Commission recognized that the Interstate Commerce Act encompassed the duty to provide adequate passenger service but held that it lacked power to enforce that duty.³⁵ The meaning and correctness of the *Sunset-Adequacies* case and its present and future impact on the parties to the proceeding cannot be determined without an analysis of the statutory context of the decision. Many issues of statutory interpretation were raised in the case; others of critical importance were not. The two principal inquiries are the nature of the substantive duties imposed on interstate carriers and the enforcement of these duties.

THE INTERSTATE COMMERCE ACT: SUBSTANTIVE DUTIES

Duty to Provide Transportation

A cursory examination of the Interstate Commerce Act reveals numerous substantive provisions that might be utilized for the delineation of a duty to furnish adequate passenger service. Section 1(4),³⁶ providing that "[i]t shall be the duty of every common carrier subject to this Chapter to provide and furnish transportation upon reasonable request therefor . . ." was analyzed by all parties in the *Sunset-Adequacies* proceeding. The state and passenger groups

business of all common carriers subject to the provisions of this chapter . . ." Interstate Commerce Act § 12(1), 49 U.S.C. § 12(1) (1964).

31. See Trial Examiner's Report at 2-3, *Sunset-Adequacies*, 335 1.C.C. 415 (1969) [hereinafter cited as Trial Examiner's Report].

32. *Id.* at 2.

33. See note 105 *infra* and accompanying text.

34. See note 111 *infra* and accompanying text.

35. See note 114 *infra* and accompanying text.

36. Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor . . . It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes . . .

Interstate Commerce Act § 1(4), 49 U.S.C. § 1(4) (1964).

argued that it granted the ICC jurisdiction to regulate the quality of passenger service;³⁷ the railroads asserted that the section provided no enforcement power.³⁸ However, the railroads conceded that this section encompasses their common law duties to their passengers,³⁹ a proposition somewhat novel in light of the Act's own definition of "transportation":

The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, and refrigeration or icing, storage, and handling of *property transported*.⁴⁰

Although this definition could include the carriage of passengers, it apparently⁴¹ excludes *services* connected with passengers transported, yet elsewhere the Act expressly applies to the "transportation of persons or property."⁴² Since no direct precedent supported the

37. Brief for California Public Utilities Commission at 5, 47, *Sunset-Adequacies*, 335 I.C.C. 415 (1969); Brief in Reply to Exceptions for National Association of Railroad Passengers as Amicus Curiae at 4-9, *Sunset-Adequacies*, 335 I.C.C. 415 (1969).

38. Brief for Southern Pacific Company taking Exception to Examiner's Report and Recommended Order at 16, *Sunset-Adequacies*, 335 I.C.C. 415 (1969).

39. 335 I.C.C. at 433, 440-41.

40. Interstate Commerce Act § 1(3)(a), 49 U.S.C. § 1(3)(a) (1964). In analyzing section 1(4) in their study of the Interstate Commerce Commission, the Center for Study of Responsive Law, popularly called "Nader's Raiders," cited *Chicago v. Atchison, T.&S.F. Ry.*, 357 U.S. 77 (1958), as precedent for section 1(4) applicability to the transportation of persons as well as property. TRANSPORTATION STUDY appendix XI-1, introductory material, third textual note. Quoting directly from the case, the authors conclude that the "Supreme Court in 1958 ruled that Section 1(4) 'not only authorize(s) the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines, but imposes [impose in original] affirmative obligations on them in this respect.'" *Id.*, citing 357 U.S. 77, 86. The quoted material does not justify such an inference since the Court was stating its analysis of two other sections of the Interstate Commerce Act besides section 1(4), including a section applicable on its face to passenger service, and cited only two freight cases to support its conclusion. An inference drawn from three statutes is certainly not necessarily applicable to one of the statutes by itself. *Chicago v. Atchison, T. & S.F. Ry.* is weak precedent for the applicability of section 1(4) to passenger transportation.

41. Southern Pacific originally argued that "transportation" encompassed only the transportation of property, citing the fact that section 1(4) included the phrase "transportation of passengers or property" from 1920 until such language was deleted in a later amendment to the Interstate Commerce Act. See Brief for Respondent at 11, *Sunset-Adequacies*, 335 I.C.C. 415 (1969).

42. "Special rates and rebates prohibited.

This section forbids unequal charges for like and contemporaneous service in the 'transportation of passengers or property.'" Interstate Commerce Act § 2, 49 U.S.C. § 2 (1964).

application of section 1(4) to passenger service, the term "transportation" could easily have been interpreted to exclude the transportation of passengers. The concession by the railroads that their common law duties toward passengers were included in section 1(4) was most charitable since it supplied a vital link in any attempt to employ that section as a grant of power to the ICC to order adequate passenger service. All parties and the Commission agreed that the substantive law of section 1(4) was directly applicable to the intentional downgrading of passenger service and the resultant loss of comfort by passengers.⁴³

Duty to Provide Service Required by Public Convenience and Necessity

Section 13a authorizes carriers in certain situations to petition the ICC directly to allow the "discontinuance or change, in whole or in part, of the operation or service of any train . . ." ⁴⁴ The Commission must apply the standards of "public convenience and necessity" and "undue burden on interstate or foreign commerce" to the particular operation or service to determine whether it shall order continuance or restoration or acquiesce in the discontinuance.⁴⁵ The Commission will order a continuance if the carrier has intentionally downgraded service in seeking to justify a discontinuance.⁴⁶ Although section 13a is, therefore, effective in preventing ultimate success in the total elimination of passenger service through intentional downgrading, its positive value is limited because of the requirement that the railroad approach the Commission before its jurisdiction under 13a can be exercised.⁴⁷ Still, if a railroad that has intentionally downgraded seeks discontinuance of such a train and the ICC orders "restoration" or "continuance" of service, it is arguable that such an order compels the carrier to return to full and adequate service.⁴⁸ Moreover,

43. In *Sunset-Adequacies* the trial examiner found that the railroad had violated its section 1(4) duty by the failure to provide sleeping-car accommodations and appropriate eating facilities for first class passengers. Trial Examiner's Report 49. See text accompanying note 31 *supra*.

44. Interstate Commerce Act § 13a(1), 49 U.S.C. § 13a(1) (1964).

45. *Id.*

46. See note 12 *supra*.

47. See Interstate Commerce Act § 13a(1), 49 U.S.C. § 13a(1) (1964); Trial Examiner's Report 24. See generally Thoms & Laird, *supra* note 6, at 1132.

48. Cf. Thoms & Laird, *supra* note 6, at 1127-28.

elimination of pullman and diner service and the deletion of public schedules would seem to be a "discontinuance or change, in whole or in part, of the operation or service of any train."⁴⁹ Although a railroad would certainly not publish such acts in a petition for discontinuance, they are actual changes subject to a restoration order by the ICC.⁵⁰ Therefore, a restoration order would necessitate the return of such service to a reasonable level. Discontinuance jurisdiction logically includes coverage of such "partial discontinuances" as downgrading of service on a particular train since a whole—here the total discontinuance of a train—normally includes the sum of its parts—here the piecemeal elimination of particular services. Since 13a was designed to correct the inadequacies of the "complete abandonment" section,⁵¹ one would expect it to apply to partial discontinuances not reached by the abandonment proviso.⁵² If a restoration order would require a return to adequate service, a railroad desirous of full discontinuance would be risking the ability to continue inadequate, downgraded service by such applications. Discontinuances would be inhibited by such an all

49. Interstate Commerce Act § 13a(1), 49 U.S.C. § 13a(1) (1964).

50. See H.R. REP. NO. 1922, 85th Cong., 2d Sess. 12 (1958); S. REP. NO. 1647, 85th Cong., 2d Sess. 21-22 (1958). Both the Senate and House Reports indicated a desire to grant the Interstate Commerce Commission optional exclusive jurisdiction over interstate train service. Although specific power to regulate discontinuances of stations, depots, and other facilities was considered but excluded from the final bill, the House Report included schedule changes within Commission jurisdiction. Arguably, the Commission's optional exclusive power is applicable to all but the most local of railroad activities. Since the state commissions had a general power over operational train changes, the Commission inherited such power through 13a. Clearly, Congress did not desire simply to eliminate state regulation but to offer a federal procedural substitute for the state procedure, the substantive regulation remaining essentially the same apart from the extreme local situation.

51. "[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment. . . ." Interstate Commerce Act § 1(18), 49 U.S.C. § 1(18) (1964). Section 1(18) was of limited utility since it was only applicable to the "complete cessation of operations by a carrier over a given line." Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 179. Discontinuances and changes of train schedules were under exclusive state jurisdiction until the passage of 13a, which offered a federal alternative to the state procedure. H.R. REP. NO. 1922, 85th Cong., 2d Sess. 12 (1958). See 1958 U.S. CODE CONG. & AD. NEWS 3468.

52. See generally Public Convenience Application of Kansas City S. Ry., 94 I.C.C. 691, 691-92 (1925). Since 13a was drafted to provide an alternative to state regulation and state commissions could prohibit partial qualitative discontinuances, it is reasonable to infer that the federal alternative is applicable to such discontinuances. See, e.g., ARIZ. REV. STAT. ANN. § 40-321 (1956); CAL. PUB. UTIL. CODE §§ 556 & 761 (West 1956).

or nothing proposition. But 13a is only a negative remedy, dormant apart from a railroad's petition to the ICC,⁵³ and was not employed directly in *Sunset-Adequacies* since that case was not a discontinuance proceeding. Those desirous of preserving railroad passenger service need a positive, affirmative tool if their efforts are to be effective.

Duty to Furnish Safe and Adequate Car Service

Section 1(11) of the Act specifies that "[i]t shall be the duty of every carrier by railroad subject to this chapter⁵⁴ to furnish safe and adequate car service"⁵⁵ "Car service" is defined in section 1(10) to

include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of *property*, including special types of equipment, and the *supply of trains*, by any carrier by railroad subject to this chapter.⁵⁶

This provision was interpreted early in *Wisconsin v. Chicago & North Western Railway*⁵⁷ where it was the railroad, seeking to avoid state control, which claimed that the ICC had sole jurisdiction over interstate railroad passenger service because the "supply of trains" term, an amendment to the original section, conveyed such authority.⁵⁸ The ICC disagreed, holding that "[i]t seems clear that paragraph 10 of section 1 was enacted to enable us to facilitate and expedite the movement of property."⁵⁹ This position has been directly followed, or at least indirectly accepted, in a line of cases extending to one as recent as 1964⁶⁰ and was accepted by the Commission with no new analysis in *Sunset-Adequacies*.

53. Cf. 1970 DUKE L.J., *supra* note 51, at 179.

54. Title 49 of U.S.C. contains twenty-one separate chapters or primary divisions, and five of the chapters encompass specific "Parts" of the Interstate Commerce Act. Railroad regulations are contained in Part I of the Interstate Commerce Act, §§ 1-40, 49 U.S.C. §§ 1-40 (1964).

55. Interstate Commerce Act § 1(11), 49 U.S.C. § 1(11) (1964).

56. *Id.* § 1(10) (emphasis added).

57. 87 I.C.C. 195 (1924).

58. *Id.* at 195-96.

59. *Id.* The Commission recognized congressional authority to regulate passenger trains but found that such jurisdiction had not been vested in the ICC, the car service provision being no impediment to state regulation of interstate passenger service. *Id.* at 195-98.

60. Prevention of Rail-Highway-Grade-Crossing Accidents Involving Ry. Trains and Motor Vehicles, 322 I.C.C. 1, 48 (1964); Commutation Fares Between Washington and Virginia, 231 I.C.C. 397, 402 (1939). Train Service on Line of N. Pac. Ry., 112 I.C.C. 191, 193 (1926) (dictum). See generally 2 SHAREMAN 260.

However, contrary precedent does exist. In *Atchison, Topeka & Santa Fe Railway v. La Prade* the railroad argued that a state law limiting the length of both passenger and freight trains was in conflict with provisions of federal legislation, among which was the "car service" sections.⁶¹ The district court held that the Commission's power to regulate the supply of trains necessarily included the power to prescribe the number of interstate trains the carrier could operate and that the Arizona statute, regulating both passenger and freight trains, was an attempt to occupy the same field as that of the car service provisions.⁶²

Supportive of ICC power over passenger service under the car service provision is the conclusion of Professor I.L. Sharfman in his treatise *The Interstate Commerce Commission* that a primary governmental concern is that "just and reasonable rates and practices be maintained for the pullman service . . ." ⁶³ and that "towards this end ample authority has been expressly conferred upon the Commission."⁶⁴ Solid support for this position can be found in section 1(3)(a) where the term "common carrier" is defined to include "sleeping-car companies"⁶⁵ and the word "carrier" is equated with "common carrier." Thus, the definition of "car service" as the "supply of trains, by any *carrier* by railroad" would encompass "sleeping-car companies" and, therefore, the requirement of the car service provision, section 1(11), that "every carrier by railroad subject to [Part I shall] furnish safe and adequate car service . . ." ⁶⁶ could apparently be applied to pullman carriers. Unfortunately, for this analysis, case precedent for ICC regulation of pullman service is very limited. In a 1915 case the Commission did order a railroad to provide better service for pullman passengers but applied only broad generalizations as to what was just and reasonable, failing to cite any provisions of the Interstate Commerce Act.⁶⁷ In none of the other three cases cited by Sharfman as

61. 2 F. Supp. 855, 859-61 (D. Ariz.), *rev'd on other grounds sub nom. Ex parte La Prade*, 289 U.S. 444 (1933).

62. 2 F. Supp. at 857, 860. The Commission itself recognized such precedent in *Heflin v. Baltimore & O. R.R.*, 278 I.C.C. 737, 740 (1950), when section 1(10) was cited as authority for certain ICC service orders affecting railroad passenger service.

63. 2 SHARFMAN 86.

64. *Id.* referring to Interstate Commerce Act § 1(3)(a), 49 U.S.C. § 1(3)(a) (1964).

65. Interstate Commerce Act § 1(3)(a), 49 U.S.C. § 1(3)(a) (1964).

66. *Id.* § 1(10) (emphasis added).

67. Rules and Regulations Governing the Checking of Baggage on Combination of Tickets, 35 I.C.C. 157 (1915).

supporting jurisdiction over the adequacy of sleeping-car service⁶⁸ did the Commission affirmatively exercise jurisdiction,⁶⁹ and in one of them the Commission specifically reserved consideration of whether it had jurisdiction over a state utility commission's complaint demanding the restoration of certain pullman service.⁷⁰ It must be admitted that although the Commission's jurisdiction over adequate pullman service is supported in sections 1(3) and 1(11), there is no strong case precedent for it. Since precedent and statutory language are inconsistent as to the full breadth of the car service sections, the Commission in *Sunset-Adequacies* could have justified a broad interpretation including passenger service within the term "car service" as a form of "supply of trains." Passenger service proponents would have an effective remedy, if the Commission could enforce the duty to furnish safe and adequate car service.⁷¹ Such an interpretation, although arguably technically incorrect,⁷² would be consistent with a broad interpretation of declared congressional intent to preserve a national rail system adequate to meet the needs of commerce.⁷³ Such an application of interpretative flexibility is

68. See 2 SHARFMAN 88-89, n.165.

69. *Harden v. Pullman Co.*, 120 I.C.C. 359 (1926); *East Crosby v. St. Louis-San Francisco Ry.*, 112 I.C.C. 239 (1926); *Corporation Comm'n of Oklahoma v. Atchison, T., & S.F. Ry.*, 25 I.C.C. 120 (1912). In two of the above cases, involving racial discrimination in pullman service, it was implied that if adequate evidence of undue prejudice was provided the Commission could act under section 3(1), noted below, and possibly other provisions.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district . . . or any particular description of traffic, in any respect whatsoever; or to subject [such clauses] to any undue or unreasonable prejudice or disadvantage . . . Interstate Commerce Act § 3(1), 49 U.S.C. § 3(1) (1964).

70. *Corporation Comm'n of Okla. v. Atchison, T., & S. F. Ry.*, 25 I.C.C. 120, 122 (1912).

71. See notes 181-95 *infra* and accompanying text for a discussion of the Commission's power to enforce the car service sections.

72. Since "car service" is limited in section 1(10) of the Interstate Commerce Act, 49 U.S.C. § 1(10) (1964), to the "transportation of property" and "supply of trains" and evidence exists of congressional intent to restrict 1(10)'s applicability to property, a strong argument can be made that 1(10) is not applicable to passenger service. See *Railroad Comm'n. v. Chicago & N.W. Ry.*, 87 I.C.C. 195 (1924).

73. It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), shall be administered

appropriate and essential if an administrative agency is to remain effective in regulating a rapidly changing technological, social, and political milieu since regulatory statutes are a product of past compromise and, therefore, if applied strictly, will be of limited assistance in solving the novel problems of the future.⁷⁴

Duty to Avoid Unreasonable Preferential Treatment of Traffic

A carrier is forbidden by section 3(1)

to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port . . . or any *particular description of traffic*, in any respect whatsoever; or to subject . . . *any particular description of traffic* to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .⁷⁵

The term "traffic" is not defined in the Act,⁷⁶ but an expansive definition of "traffic" to include the movement of both persons and goods has been employed by the United States Supreme Court both before and after the passage of the Interstate Commerce Act.⁷⁷ The word "description" normally connotes "sort" or "kind."⁷⁸ Applying the above definitions to section 3(1), the statute must be interpreted to impede unreasonable preferences between different kinds of transportation of persons and property. Since passenger traffic and freight traffic would thus appear to be two "descriptions of traffic,"⁷⁹ and the intentional downgrading of passenger traffic in

and enforced with a view to carrying out the above declaration of policy. Interstate Commerce Act, 49 U.S.C. [introductory material before § 1] (1964).

See notes 84-88 *infra* and accompanying text.

74. See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 16-18, 50 (1965); Jaffe, Book Review, 76 HARV. L. REV. 858, 864 (1963).

75. Interstate Commerce Act § 3(1), 49 U.S.C. § 3(1) (1964) (emphasis added).

76. "Traffic" has been defined as the "subjects of transportation on a route, as persons or goods." BLACK'S LAW DICTIONARY 1667 (rev. 4th ed. 1968).

77. Hoke v. United States, 227 U.S. 308, 320 (1913); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 217 (1894); McCall v. California, 136 U.S. 104, 108 (1890); County of Mobile v. Kimball, 102 U.S. 691, 702 (1880). *But see* Gibbons v. Ogden, 22 (9 Wheat.) 1, 4 (1824). Pomeroy in his treatise on constitutional law broadly defined "traffic" as follows: "The subject-matter of intercourse or *traffic* may be either things—goods, chattels, merchandise—or *persons*." J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 378 (10th ed. 1888) (emphasis added).

78. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 390 (unabridged ed. 1967).

79. The Supreme Court has used the term "passenger traffic" to describe the movement of passengers by rail; traffic balances have been defined as the "balances of money collected in payment for the transportation of passengers and freight." McCall v. California, 136 U.S. 104, 109 (1890); Chicago & Alton R.R. v. United States & Mexican Trust Co., 225 F. 940, 946 (8th Cir. 1915).

favor of freight traffic would arguably constitute an “undue or unreasonable preference or advantage” for one over the other, particularly where a railroad’s discontinuance petition has been rejected, the section 3(1) duty directly applies to a situation such as the *Sunset-Adequacies* case. Strangely, this contention was not raised in the case by any of the parties nor considered by the Commission even though the section had been previously applied by the Commission and the courts to passenger service issues.⁸⁰

Miscellaneous Support for Commission Power to Require Adequate Passenger Service

Federal-State Division of Power. Section 1(17)(a) disclaims an intent to preempt state power to require “just and reasonable freight and passenger service for intrastate business.”⁸¹ Such a disclaimer would be superfluous unless the Commission was deemed to have the affirmative power to require reasonable *interstate* passenger service. Further indication of broad Commission power is provided by the subordination of state power over intrastate freight and passenger service to “any lawful order of the Commission made under the provisions of [Part 1].”⁸² Though the quoted portion of 1(17)(a) is primarily an exposition of states’ rights as to railroad regulation and not a direct source of authority, it clearly implies that such authority will be found elsewhere in the Act. One should also note that 1(17)(a) implicitly excludes the states from the regulation of interstate passenger service,⁸³ thus leaving a regulatory void unless the Commission can regulate such service.

National Transportation Policy. In 1940 Congress amended the Interstate Commerce Act by inserting an introductory statement of “National Transportation Policy” which declared the broad goal of “developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States”⁸⁴

80. See notes 196-205 *infra* and accompanying text.

81. Interstate Commerce Act § 1(17)(a), 49 U.S.C. § 1(17)(a) (1964) (emphasis added).

82. *Id.*

83. See notes 146-60 *infra* and accompanying text.

84. Interstate Commerce Act, 49 U.S.C. [introductory material before § 1] (1964) (emphasis added). See generally TRANSPORTATION STUDY appendix XI-1 (text accompanying footnotes 16-17), citing *American Trucking Ass’ns v. Atchison, T.& S.F. Ry.*, 387 U.S. 397, 409-13 (1967) and *Schaffer Transp. Co. v. U.S.*, 355 U.S. 83, 87 (1957) which respectively apply the National Transportation Policy as the “yardstick” for measuring ICC actions and

Moreover, it specified that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."⁸⁵ The *Sunset-Adequacies*' hearing examiner inferred from the term "commerce," which has been defined to include the transportation of persons,⁸⁶ that Congress' intent "embraces all the means and instruments by and in which traffic is carried on, and that all these may, therefore, be regulated."⁸⁷ Since the Commission is ordered to enforce and administer the Act based on such a broad policy statement, its narrow, strict approach in the *Sunset-Adequacies* case appears inconsistent. Clearly, Congress desires that doubtful railroad issues be resolved in favor of broad action to "preserv[e] a national transportation system by . . . rail"⁸⁸

An Act to Regulate Commerce. The Supreme Court recognized the broad scope of the Interstate Commerce Act long before the passage of the statement of National Transportation Policy. From the simple title of the Act, "an act to regulate commerce,"⁸⁹ the Court concluded that "in advance of an examination of the text of the act, [it would] be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject."⁹⁰

Other courts and authorities have also found broad Commission power in the railroad transportation area derived from various statutory provisions in the Interstate Commerce Act and combinations thereof. A state supreme court, in a mandamus action to compel a railroad to construct an umbrella or canopy shed for the protection of passengers, concluded that the 1920 amendments to the Interstate Commerce Act "placed the transportation system of the country completely under the supervisory control of the Interstate Commerce Commission" and that the Commission ultimately defined adequate facilities.⁹¹ But, citing section 1(17),⁹² the

employ it to integrate specific Interstate Commerce Act sections to remedy a lack of express authority.

85. *Id.*

86. See cases cited note 77 *supra*.

87. Trial Examiner's Report 9.

88. Interstate Commerce Act, 49 U.S.C. [introductory material before § 1] (1964).

89. Interstate Commerce Act, 24 Stat. 379 (1887).

90. *Texas & Pac. Ry. v. ICC*, 162 U.S. 197, 211 (1896).

91. *State v. Seaboard Air Line Ry.*, 104 So. 602, 604 (Fla. 1925).

92. Interstate Commerce Act § 1(17)(a), 49 U.S.C. § 1(17)(a) (1964).

partial disclaimer of jurisdiction to regulate intrastate passenger service, the same court rejected the railroad's argument that the state could not require just and reasonable passenger service for intrastate business, recognizing such state power except as inconsistent with a lawful order of the Commission.⁹³ The court then supplied the dictum that the Commission could not require improved passenger stations.⁹⁴ Contradictory language is provided by the district court opinion in *United States v. Pennsylvania Railroad*,⁹⁵ involving railroad control over washroom facilities and the application of the Defense Production Act's⁹⁶ price levels to charges for such services. The court concluded that the Interstate Commerce Act

imposed an affirmative duty upon the Interstate Commerce Commission to provide adequate railway service for the people of the United States. Under the powers conferred by this Act the Commission was authorized to *require operation . . . at a loss* if those facilities were necessary in the overall requirement of an adequate railway service for the people of the United States.⁹⁷

The Court further concluded that:

the fact that the Interstate Commerce Commission has permitted local authorities, state and municipal, to regulate sanitary conveniences in station and terminal facilities is not in derogation of the powers conferred upon the Interstate Commerce Commission by Congress as affecting common carriers.⁹⁸

Though the broad statements of ICC power are certainly dicta, it is interesting that in determining that washroom facilities at passenger stations were an integral part of the railroad's operation and that rates charged for such services were then exempt under the Defense Production Act provision exempting "[r]ates charged by any common carrier . . ." the court cited 49 *Code of Federal Regulations*, section 10.227,⁹⁹ which specifies a carrier's proper accounting for station maintenance expenses as part of its overall operating expenses.¹⁰⁰ If the Commission can specify in its

93. See 104 So. at 604.

94. *Id.* at 605 (dictum). The court could find no authority in the Transportation Act of 1920 for the Commission to exercise such power. The weakness of this dictum is heightened by the fact that no party to the litigation had argued for such Commission power.

95. 105 F. Supp. 615 (E.D. Pa. 1952) (dictum).

96. Defense Production Act of 1950 §§ 409, 706, 50 U.S.C. §§ 2109, 2156 (1964) (terminated pursuant to 50 U.S.C. § 2166 (1964)).

97. 105 F. Supp. at 618 (emphasis added).

98. *Id.* at 619.

99. *Id.* at 616, 619.

100. 49 C.F.R. § 288 (1968).

regulations the proper accounting procedures for handling the "expenses, taxes, equipment rates and joint facility rents" for passenger service,¹⁰¹ it would not appear to be a major extension of power for the ICC to require adequate service to go along with adequate accounting for such service, and the district court obviously believed that the Commission had broad authority over railroad passenger service. In analyzing the jurisdiction over a junction between two railroad lines, the Supreme Court again recognized broad Commission power by commenting that "[i]n matters relating to the construction, equipment, adaptation and use of interstate railroad lines . . . Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."¹⁰² The Commission itself recognized its broad power in 1915 when, in response to a complaint by through-train passengers concerning the requirement to recheck baggage and secure pullman reservations in Washington, D.C., it ordered such practices stopped and described them as "obviously unjust and unreasonable" and "annoying and often prohibitory inconveniences."¹⁰³ Considering contemporary passenger problems, such an issue seems minor, but the ICC's comment that no carrier may "lawfully withhold provision for incidental services so constantly and universally in demand as those at which the proposed rules are directed"¹⁰⁴ is directly applicable to contemporary issues of adequate passenger service. There is substantial precedent for broad interpretation of the Act and the Commission's jurisdiction under it.

ENFORCEMENT OF THE CARRIERS' DUTIES TO PROVIDE ADEQUATE PASSENGER SERVICE

The foregoing analysis offers numerous examples of substantive law that would be applicable to the issue of adequate passenger service, but it leaves unanswered the vital question of the source of enforcement of such substantive law.

101. 49 C.F.R. § 1242.01 (1968).

102. *Alabama & Vicksburg Ry. v. Jackson & Eastern Ry.*, 271 U.S. 244, 250 (1926). A commentator has observed that the "powers now conferred upon the Commission are so broad as to embrace all of the traffic of interstate carriers." 2 SHARFMAN 221.

103. *Rules and Regulations Governing the Checking of Baggage on Combination of Tickets*, 35 I.C.C. 157, 159 (1915).

104. *Id.*

Enforcement of the Duty to Provide Transportation

The Southern Pacific in *Sunset-Adequacies* denied intentional downgrading and argued that the Commission lacked jurisdiction to institute the requested investigation,¹⁰⁵ asserting that Commission jurisdiction over passenger service existed *only* when the railroad had petitioned for discontinuance.¹⁰⁶ The trial examiner concluded not only that the ICC had jurisdiction under section 12(1) to institute the investigation and had authority under section 1(4)¹⁰⁷ to “exercise jurisdiction and control over passenger-car and passenger-train service operated in interstate commerce . . . ,”¹⁰⁸ but also that existing sub-standard passenger service¹⁰⁹ conditions justified the exercise of such jurisdiction on motion of the Commission or upon complaint by a member of the general public or by a state regulatory agency.¹¹⁰ Proclaiming the ICC to be the “guardian of the public interest in matters relating to interstate commerce,” the trial examiner recommended that the Commission exercise its authority under section 1(4) by requiring all interstate passenger trains to observe certain minimal standards within thirty days.¹¹¹ The specific findings made were that the railroad’s section 1(4) duty was violated by the failure to provide sleeping-car accommodations and appropriate eating facilities for first class passengers.¹¹²

The Commission’s action implies its rejection of the trial examiner’s fundamental principle that “[t]he Interstate Commerce Act, like the Constitution of the United States, is a vibrant organ which must readily respond to the stimulus of current need.”¹¹³ Though the ICC found a duty to provide adequate passenger service

105. Southern Pacific asserted that the investigation was improper because no violation of a provision of the Interstate Commerce Act had occurred, the Commission had no authority to conduct an adversary hearing under section 12(1), no carrier had filed a petition under 13a(1), and sections 1(4) and 1(11) were inapplicable to passenger service. Brief for Southern Pacific Co. at 4-13, *Sunset-Adequacies*, 335 I.C.C. 415 (1969).

106. Trial Examiner’s Report 3.

107. Interstate Commerce Act § 1(4), 49 U.S.C. § 1(4) (1964).

108. Trial Examiner’s Report 49.

109. The trial examiner commented in his report that, “[l]ike gold mining of bygone days, the sand and gravel have been washed from the pan in a rushing stream of discontinuances, infrequent service, broken connections, lack of service facilities, inconsiderateness, too slow transit time, and the options of air, bus and automobile travel.” Trial Examiner’s Report 49.

110. *Id.* at 11.

111. *Id.* at 41, 43.

112. *Id.* at 49.

113. *Id.* at 6.

under section 1(4) and a right in the passenger to have reasonable service, it found itself without jurisdiction to enforce such a duty and complementary right.¹¹⁴ It specifically rejected the provision of section 12(1) that the ICC has power to enforce the Act¹¹⁵ as authority for enforcement of the duty imposed by section 1(4), pointing out first that some sections of the Interstate Commerce Act¹¹⁶ are not enforceable under section 12(1) because of specific enforcement procedures detailed in other provisions of the Act. Moreover, it noted that the Supreme Court had already decided that the courts rather than the ICC had the authority to enforce the section 1(4) duty¹¹⁸ and that other regulatory agencies also lacked the authority to enforce rights and duties contained within their originating legislation.¹¹⁹ The Commission also emphasized state regulation of passenger service as justification for its narrow interpretation of Commission power under the Act.¹²⁰ The majority did proclaim its intention to seek legislation granting the ICC authority over the adequacy of rail passenger service,¹²¹ a pledge at least partially consummated by the introduction of H.R. 14170¹²² three weeks after the decision in *Sunset-Adequacies*.

Commissioner Tierney, in his vigorous dissent, argued that such congressional aid was unnecessary since the Commission had the requisite jurisdiction to require reasonable service.¹²³ He pointed out the carriers' admission that their common law responsibilities were incorporated into section 1(4) and attempted to distinguish the majority's case authority for court enforcement of section 1(4)¹²⁴ on the grounds that it concerned a lack of ICC power to compel additional equipment rather than to regulate the use of general equipment.¹²⁵ Tierney cited Commission enforcement of the comparable provision in the Motor Carrier Act and indicated that

114. 335 I.C.C. at 424, 437.

115. "The Commission is authorized and required to execute and enforce the provisions of this chapter . . ." Interstate Commerce Act § 12(1), 49 U.S.C. § 12(1) (1964).

116. *E.g., id.* § 1(18).

117. 335 I.C.C. at 421-22, *citing* *Powell v. United States*, 300 U.S. 276, 288-89 (1937).

118. 335 I.C.C. at 423-24, *citing* *United States v. Pennsylvania R.R.*, 242 U.S. 208 (1916).

119. 335 I.C.C. at 424-25.

120. *Id.* at 426-28.

121. *Id.* at 437.

122. H.R. 14170, 91st Cong., 1st Sess. (1969), discussed in note 211 *infra*.

123. *Sunset-Adequacies*, 335 I.C.C. at 440-51.

124. 242 U.S. 208 (1916).

125. 335 I.C.C. at 433, 440-41.

section 3(4),¹²⁶ the Interstate Commerce Act's prohibition against discrimination between connecting lines, had been enforced by the Commission though no express power of enforcement was contained in the statutes.¹²⁷

Tierney also relied upon several fundamental principles of administrative law to support his view that the ICC had the necessary jurisdiction. First, he asserted that "[t]he whole trend of decisional law has been towards confining the areas of transportation law in which the courts may act unaided by prior determinations of the Commission and enlarging the areas that under the *primary jurisdiction doctrine* must first come to the Commission for its determination."¹²⁸ He supported the trial examiner's broad interpretation of the Interstate Commerce Act rejecting the application of rigid *stare decisis* in administrative law because the "very purpose [administrative law] serves is to be able to flexibly respond to new and changing circumstances."¹²⁹ Tierney emphasized the Act's broad language that the national transportation policy is to preserve transportation by rail adequate to meet the needs of commerce,¹³⁰ and he acknowledged the competence of the Commission to determine the reasonableness of passenger service since it already had to apply such a general standard in ruling on discontinuances under section 13a(1)¹³¹ and in applying section 15¹³² of the Act.¹³³ In summary, it was inconceivable

126. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines . . . and shall not discriminate in their rate, fares, and charges between connecting lines . . . Interstate Commerce Act § 3(4), 49 U.S.C. § 3(4) (1964).

127. 335 I.C.C. at 445-46.

128. *Id.* at 448 (emphasis added).

129. *Id.* at 449.

130. The National Transportation Policy is quoted in note 73 *supra*.

131. Interstate Commerce Act § 13a(1), 49 U.S.C. § 13a(1) (1964). This section authorizes interstate carriers whose rights to change or discontinue the operation of any train are subject to state regulation to file a notice of discontinuance or change with the Commission, make proper notice within each state, and then to make such discontinuance or change subject to Commission order. The Commission can thereupon order a hearing and, if it finds that continuance of service is required by public convenience and necessity, order continuance or restoration of service for a period not to exceed one year.

132. "Determination of rates, routes, etc.; routing of traffic; disclosures, etc." This section authorizes the Commission "to determine and prescribe what will be the just and reasonable" rates or fares. *Id.* § 15.

133. 335 I.C.C. at 450-51.

to Tierney that Congress intended the ICC to be impotent to enforce the duties encompassed within section 1(4).¹³⁴

The majority in *Sunset-Adequacies*—in finding that section 1(4) of the Act encompassed a duty to provide adequate passenger service while rejecting ICC jurisdiction to enforce that duty¹³⁵—relied heavily on *United States v. Pennsylvania Railroad*¹³⁶ wherein the ICC, pursuant to a shipper's request, had ordered the railroad to cease and desist from refusing to furnish tank cars. The complaint in the latter case having been brought under section 1(4) of the Act, the Supreme Court on appeal was required to interpret the 1906 amendments, which had added the provision concerning the "duty of every common carrier" to "provide and furnish transportation upon reasonable request therefor"¹³⁷ The Commission had previously recognized the existence of a common law duty to provide refrigerator cars, apparently based on the development of public reliance on the availability of such cars, but had denied any jurisdiction to order compliance with that duty and suggested that redress must be sought in the courts.¹³⁸ Thus it was argued that in the 1906 amendments Congress had enacted the duty in order to provide for ICC enforcement, but the Court rejected this argument after examining the legislative history and concluding that an identical duty to provide transportation existed before the amendments' passage.¹³⁹ Having erroneously concluded that both the original Act and the amendment encompassed the duty,¹⁴⁰ the Court could easily hold that in the absence of any change the ICC's previous denial of enforcement power prior to the amendments should not be disturbed. But since the ICC's pre-amendment decisions had lacked statutory support for the duty,¹⁴¹ such holdings are easily distinguishable from the post-amendment situation in the *Pennsylvania Railroad* case. Since the common law duty needed no

134. *Id.* at 457.

135. *Id.* at 424-37.

136. 242 U.S. 208 (1916).

137. Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584.

138. Charges for the Transportation and Refrigeration of Fruit, 10 I.C.C. 360, 373 (1904).

139. 242 U.S. at 222-24, 226-27.

140. The original Act contained no specific duty to furnish transportation. Such a duty was added in the 1906 amendments, Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584. Consequently, Justice McKenna's conclusion is inaccurate.

141. See Charges for the Transportation and Refrigeration of Fruit, 10 I.C.C. 360 (1904). See note 138 *supra* and accompanying text.

legislative enactment to be enforceable, congressional action in placing the common law duty to provide reasonable transportation within the Interstate Commerce Act would be totally superfluous and extremely odd unless Congress desired *the Commission* to enforce the duty under its power in section 12(1) to enforce the railroad provisions of the Interstate Commerce Act.¹⁴² But the majority concluded "that the remedy was in the courts and that the amendment of 1906 was not intended to and did not change the remedy."¹⁴³

Rejection of Commission jurisdiction has not been universal, however. Before the *Pennsylvania Railroad* decision the Supreme Court, invalidating on statutory preemption grounds a Minnesota statute imposing a duty to deliver cars for interstate commerce, proclaimed that remedies indeed existed under the Act for violating the duty to furnish transportation and that one could elect to complain before the ICC or bring his action in court.¹⁴⁴ If section

142. Interstate Commerce Act § 12(1), 49 U.S.C. § 12(1) (1964); cf. 242 U.S. at 214.

143. 242 U.S. at 227. In cases following *Pennsylvania R.R.* the Commission accepted the interpretation limiting enforcement of section 1(4) to the judiciary. In *Jacksonville Port Terminal Operators Ass'n v. Alabama, Tenn. & N. R.R.* it held that "[t]he enforcement of the duties imposed by section 1(4), except as entrusted to us by other provisions of statute, rests with the courts and not with us." 263 I.C.C. 111, 116 (1945). In *Oliver Manufacturing Supply Co. v. Reading Co.*, 297 I.C.C. 654 (1956), a shipper sought a cease and desist order from the Commission based on an alleged failure to maintain adequate and reasonable transportation schedules. Again, the Commission refused to enforce 1(4), following the *Jacksonville* case. *Id.* at 658. The incongruity of the concept that a duty "imposed" by the Interstate Commerce Act cannot be enforced by the Interstate Commerce Commission was argued in *Sunset-Adequacies*, where the Commission rejected the provision of section 12(1) that the ICC has power to enforce the Act, see note 30 *supra*, as authority for enforcement of the duty imposed by section 1(4). The Commission pointed out that some sections of the Interstate Commerce Act are not enforceable under 12(1) because of specific enforcement procedures detailed in other provisions of the Act, 335 I.C.C. at 421-22, citing *Powell v. United States*, 300 U.S. 276, 288-89 (1937), that the Supreme Court had already decided that the courts rather than the ICC had the authority to enforce the section 1(4) duty, *id.* at 423-24, citing *Pennsylvania R.R.*, and that other regulatory agencies also lacked the authority to enforce rights and duties contained within their originating legislation. *Id.* at 424-25. This viewpoint is unsatisfactory when the broad statement of Commission enforcement power in 12(1) is contrasted with the absence of specific direction in the Act for enforcement by other means. ICC enforcement authority is declared in broad, clear language in section 12(1): "The Commission is authorized and required to execute and enforce the provisions of [Part I] . . ." 49 U.S.C. § 12(1) (1964). Several provisions are not enforceable by the Commission, qualifying section 12(1), but these provisions for court enforcement are expressly indicated in the statute. 49 U.S.C. §§ 10(1)-(3) (1964). Since no such express qualification or authority for court enforcement of section 1(4) exists, the reasonable inference is that 12(1) provides for Commission enforcement of the 1(4) duty.

144. *Chicago, Rock Island, & Pac. Ry. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426,

1(4)'s expression of duty was merely reiteration of the common law duty and an affirmation of the common law remedy, it would be surprising if it preempted a state statute providing a remedy for the same act. This decision was certainly not adequately distinguished in *Pennsylvania Railroad* despite the Court's attempt to formulate a different question of law: Whether a Minnesota law requiring certain standards in furnishing transportation had been preempted by section 1(4)'s duty rather than whether the ICC had jurisdiction to enforce section 1(4)'s duty to provide reasonable transportation.¹⁴⁵ But both questions involved the determination of the full breadth and impact of section 1(4). Present reliance on this earlier decision is not destroyed by the attempt to distinguish it in the *Pennsylvania Railroad* opinion.

Of particular interest is the Commission's deference to state regulation in *Sunset-Adequacies*. Although both the states and the Commission agree that the states are unable to regulate interstate passenger service effectively,¹⁴⁶ the Commission still believes that new legislation granting the jurisdiction that it claims it lacks would "preempt . . . the field now occupied by the States."¹⁴⁷ One is immediately struck by the incongruity of a state presently "occupying" a field wherein it admittedly offers no effective regulation. But the Commission relied heavily in *Sunset-Adequacies* on its interpretation of congressional deference to state regulation, considering it

thus apparent that in its approach to Federal regulation of passenger train service, Congress recognized that the States have long occupied the field in considerable depth and it chose not to disturb the situation except to the minimal degree necessary to deal with specific problems considered to have become Federal in scope. For the most part, it has left intact the system of passenger train regulation by the States.¹⁴⁸

Such deference has received the blessing of the Supreme Court in a case where a trustee in bankruptcy had circumvented a state hearing on his proposal to abandon 88 passenger stations and obtained relief in a federal district court.¹⁴⁹ The Court denied the

434-35 (1913). The Court cited section 9 of the Act, which offers a party aggrieved by an action of a common carrier a choice between suing for damages in a federal district court or complaining to the Commission.

145. See 242 U.S. at 234.

146. See 335 I.C.C. at 415, 416, 418.

147. *Id.* at 418.

148. *Id.* at 427.

149. *Palmer v. Massachusetts*, 308 U.S. 79 (1939).

existence of such a federal court remedy apart from express statutory support, stating that "this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."¹⁵⁰ But the impact of this decision is limited by the fact that passenger stations are physically more "local" in nature than other aspects of interstate passenger service and the fact that the Court was definitely impressed by the expertise of the state agency versus the judgment of the single judge of the district court.¹⁵¹ It is extremely questionable whether the Court would defer to state regulation of other aspects of interstate passenger service such as adequate schedules, provision of dining cars, and adequate sleeping accommodations, particularly if the regulation was by an expert federal agency.

State regulation of such interstate subjects is directly negated by the Supreme Court's pronouncement in *Cooley v. Board of Wardens*¹⁵² that "[w]hatever subjects of [the Commerce Power] are in their nature national or admit only of one uniform system . . . may justly be said to be of such a nature as to require exclusive legislation by congress."¹⁵³ The Court contrasted such national subjects with those demanding diversity in regulation because of "local peculiarities."¹⁵⁴ Local peculiarities are hardly pertinent or dominant considerations vis-à-vis dining cars, pullman cars, general cleanliness of all cars, or adequate interstate scheduling, rendering *Cooley* strong precedent for exclusive federal power over interstate passenger service.

Subsequent to *Cooley*, the Supreme Court invalidated the application of a Louisiana antidiscrimination law to an interstate carrier by water, holding that the state law conflicted with the exclusive power of Congress.¹⁵⁵ The significant point was made that the state statute would influence the carrier's management decision throughout the interstate journey.¹⁵⁶ Uniformity in passenger service and freedom from conflicting state regulations were the factors

150. *Id.* at 84.

151. *Id.* at 86, 89.

152. 19 U.S. (12 How.) 143 (1851).

153. *Id.* at 152.

154. *Id.* at 153.

155. *Hall v. DeCuir*, 95 U.S. 485 (1877).

156. *Id.* at 489.

necessitating nonenforcement of the state statute and the finding of exclusive federal power over interstate passenger service.¹⁵⁷

The necessity for uniformity in the determination of the adequacy of interstate passenger service is manifest. Interstate commerce would be directly inhibited if railroads had to respond to different regulations and different concepts of adequacy each time a train crossed a state line.¹⁵⁸ In short, "commerce . . . between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."¹⁵⁹ Even if one could successfully argue that Congress has been silent as to federal regulation of passenger service and that such silence constitutes adoption of state regulation, state incapacity to regulate plus state desire for Commission action¹⁶⁰ negate any necessity or appropriateness in applying the concept of concurrent jurisdiction to the instant problem. Even the rail carriers, as exemplified by their support of the passage of section 132,¹⁶¹ would not be expected to opt for state regulation, which would only place them in the constant dilemma of responding to numerous disparate and potentially conflicting standards. ICC reliance in *Sunset-Adequacies* on the traditional congressional deference to state regulation cannot withstand close analysis, the tradition itself being extremely suspect constitutionally. Such a traditional regulatory pattern should not have inhibited the Commission in broadly and flexibly interpreting its statutory authority.

157. *Id.* The broadest statement supporting the exclusion of state regulation is found in *Railroad Co. v. Heusen* where the Supreme Court stated in an action involving the transportation of cattle into a state: "This court has heretofore said that inter-state transportation of passengers is beyond the reach of a State legislature," 95 U.S. 465, 470 (dictum); accord, *Case of the State Freight Tax*, 82 U.S. 232, 281 (1872) (dictum), and concluded that a state "may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." 95 U.S. at 472.

One commentator concluded as early as 1935 that "[i]n large measure the problem of dual control has been solved by giving to the federal government a virtually complete occupancy of the fields of rate, finance, and service regulation of interstate railways." Lindahl, *Cooperation Between the Interstate Commerce Commission and the State Commissions in Railroad Regulation*, 33 MICH. L. REV. 338 (1935) (emphasis added). Although the commentator may have been equating "service" with "car service" under the Act, his general conclusion is required by the commerce clause. State regulation of interstate rail carriers is inconsistent with the commerce clause mandate and with any effective regulation.

158. See *Hall v. DeCuir*, 95 U.S. 485 (1877).

159. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 204 (1885).

160. 335 I.C.C. at 416.

161. See note 50 *supra*.

Additional Support for Commission Enforcement of Section 1(4)

Motor Carrier Act. The Motor Carrier Act has a provision, analogous to section 1(4), establishing a duty to provide just and reasonable rates and services¹⁶² which has been held as to rates to be a criterion for administrative application, not a justiciable legal right.¹⁶³ Rejecting an attack on ICC power under the Motor Carrier Act in an earlier case,¹⁶⁴ the Supreme Court refused to accept the argument that an express delegation of power was always required for agency action, holding instead that it would be unreasonable for draftsmen of agency acts to consider every specific evil that might arise. In fact, the Court felt that agencies were created to apply expert knowledge to industry conditions "which members of the delegating legislatures [could] not be expected to possess."¹⁶⁵ If the Court's evaluation of administrative knowledge is accurate, it would appear unreasonable to expect courts to possess the knowledge necessary for the enforcement of adequate standards for railroad passenger service.

Federal Aviation Act. On numerous occasions the Civil Aeronautics Board has found airline passenger service inadequate and ordered the carriers to provide adequate service under a provision declaring it "the duty of every air carrier to provide and furnish interstate and overseas air transportation . . . upon reasonable request therefor and to provide . . . safe and adequate service, equipment, and facilities in connection with such transportation," language strikingly similar to section 1(4) of the Interstate Commerce Act.¹⁶⁶ Of course, air passenger carriers are significantly stronger financially than their rail counterparts because of generally higher passenger patronage and the power of the CAB to subsidize airmail compensation for carriers in "need" beyond

162. "It shall be the duty of every [such] common carrier . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto . . ." Motor Carrier Act § 316, 49 U.S.C. § 316 (1964).

163. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

164. *American Trucking Ass'n v. United States*, 344 U.S. 298, 309 (1953).

165. *Id.* at 310.

166. Federal Aviation Act § 404(a), 49 U.S.C. § 1374(a) (1964); *see, e.g.*, *National Airlines, Inc. v. CAB*, 300 F.2d 711 (D.C. Cir. 1962); *Capital Airlines, Inc. v. CAB*, 281 F.2d 48 (D.C. Cir. 1960); *Fort Worth Investigation*, 31 C.A.B. 803 (1960); *Flint-Grand Rapids Adequacy-of-Service Investigation*, 30 C.A.B. 1120 (1960). The second portion of § 1374(a) contains language similar to the "car service" provisions of the Interstate Commerce Act.

payments by the Postmaster General.¹⁶⁷ CAB willingness to enforce the Federal Aviation Act duty to provide transportation may be a direct function of carrier capability to respond to such directives.¹⁶⁸ Otherwise, such an inconsistent response by two agencies, the ICC and the FAA, lacks a definite rationale.

Primary Jurisdiction of Administrative Agencies. In addition to the Interstate Commerce Act's language as interpreted by the Commission and the Court and the analogy of administratively enforceable duties in other statutes, the doctrine of "primary administrative jurisdiction" and its policy of uniform application of expertise to complex regulatory issues call for a finding of ICC jurisdiction to enforce the section 1(4) duty. Precedent exists that administrative statutes should be interpreted and applied by their respective commissions and agencies, not by the courts, even in the absence of express authority to do so. The Supreme Court has rejected court enforcement of the Federal Power Act provision requiring reasonable rates, holding that the concept of "reasonableness" can be made specific only by the Commission's judgment, and that the "prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no rights which courts may enforce."¹⁶⁹ Of course, the Commission endorsed direct judicial enforcement of section 1(4) in *Sunset-Adequacies*. Considering the complexities of modern transportation problems, the "reasonableness" of transportation services could be better determined by the Commission than by the courts because of the agency's experience, expertise, and information-gathering capabilities.¹⁷⁰ A district court expressed a similar view when it commented that "[t]he [Interstate Commerce] Commission was given power to consider specified violations of the statutes and technical questions requiring expert knowledge and skill."¹⁷¹ This desire to apply expertise to administrative problems

167. Federal Aviation Act § 406, 49 U.S.C. § 1376 (Supp. IV, 1969), amending 49 U.S.C. § 1376 (1964). See generally Hall, *The Civil Aeronautics Board Policy Favoring Subsidy Reduction to Local Service Carriers: Its Role and Implementation in the Decisional Process*, 34 J. AIR L. & COM. 577-84 (1968).

168. See *Hearings* 213, 239-40; Brief for Southern Pac. Co. at 99, *Sunset-Adequacies*, 335 I.C.C. 415 (1969). See note 212 *infra* and accompanying text.

169. *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

170. See notes 18-19 *supra* and accompanying text.

171. *Montgomery Ward & Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475, 497 (D. Ore. 1953).

and the concomitant aim of uniformity have contributed to the development of the so-called "doctrine of primary jurisdiction," applied by the Supreme Court in *United States v. Western Pacific Railroad*¹⁷² as the basis for its affirmative response to the Government's argument that a suit concerning reasonable tariff rates should be suspended pending ICC resolution of the reasonable tariff issue. The Court fully recognized that the "maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy was of continuing public concern"¹⁷³ The Court connected the applicability of the doctrine to a situation where a claim was originally cognizable in a court, but where enforcement required the resolution of issues within the special competence of an administrative body and suggested that the standards for application would simply be uniformity and need for expertise.¹⁷⁴ Such an interpretation of the doctrine should be applied to the situation exemplified by *Sunset-Adequacies* to require Commission determination of the issue of adequacy of passenger service. In light of modern transportation complexities, court enforcement of the ICC interpretation should often be automatic¹⁷⁵ since ICC expertise on complex transportation matters cannot easily be ignored.

The Seventh Circuit Court of Appeals has applied the *primary jurisdiction doctrine* to a section 1(4) action in *Spence v. Baltimore & Ohio Railroad*,¹⁷⁶ where an elevator company attempted to compel a railroad to furnish box cars. The district court had enforced by a mandatory injunction the duty to provide transportation upon reasonable notice, but the court of appeals held that the ICC must be given an opportunity to fulfill its administrative functions before the duty could be judicially enforced and consequently ruled that the district court lacked jurisdiction to issue the injunction.¹⁷⁷ If *Spence* and *Sunset-Adequacies* are both correctly decided, one desiring to enforce the railroad's duty under section 1(4) is left in a rather awkward procedural posture. He cannot go directly to the Commission nor can he obtain direct action from the courts, but he

172. 352 U.S. 59 (1956).

173. *Id.* at 63.

174. *Id.* at 63-64.

175. *See generally* 2 SHARFMAN 385-93.

176. 360 F.2d 887 (7th Cir. 1966).

177. *Id.* at 888, 890-91.

must reach the Commission through the courts and in turn pray for court enforcement of the Commission decision. The excessive delay inherent in such a circuitous process is intolerable in a situation demanding reasonably quick response to a rapidly changing transportation environment.

This inefficiency should be avoidable, for the applicability of the *primary jurisdiction doctrine* to the Interstate Commerce Act is well-established.¹⁷⁸ In *Elgin Coal Co. v. Louisville & Nashville Railroad*¹⁷⁹ a district court applied the doctrine to an attempt to obtain a mandatory injunction enforcing the general car service provision and noted that the doctrine had originally developed under the Interstate Commerce Act. Therefore, the court refused to assume jurisdiction over the controversy prior to a decision by the Commission, considering the reasonableness of rail service as a question demanding administrative experience, knowledge, and discretion.¹⁸⁰ It seems clear that the Commission at least has the jurisdiction to determine the adequacy of passenger service. Though the *doctrine of primary jurisdiction* as previously applied is inapplicable to the issue of ultimate enforcement by the Commission, it certainly negates the Commission's pronouncements in *Sunset-Adequacies* that it lacked all jurisdiction over the issue of adequacy of railroad passenger service.

Enforcement of the Duty to Provide Safe and Adequate Car Service

Section 1(21). The duty placed upon carriers in section 1(11) to furnish "safe and adequate car service" is expressly made subject to Commission enforcement in section 1(21), giving the ICC power after a hearing upon a complaint or its own initiative to "require by order any carrier by railroad . . . to provide itself with safe and adequate facilities for performing as a common carrier its car service . . ." ¹⁸¹ The Commission has acknowledged its power to enforce section 1(11) under sections 1(14) and 1(15) of the Act.¹⁸² Of

178. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907). See generally 2 SHAREFMAN 393-406.

179. 277 F. Supp. 247 (E.D. Tenn.), *aff'd*, 411 F.2d 1043 (6th Cir. 1967). See note 55 *supra* and accompanying text.

180. *Id.*

181. Interstate Commerce Act § 1(21), 49 U.S.C. § 1(21) (1964).

182. *Train Service on Line of N. Pac. Ry.*, 112 I.C.C. 191, 193 (1926).

course, the utility of this clear-cut enforcement power for railroad passenger interests is dependent upon the term "car service" including passenger facilities, a position as previously noted, which is far from fanciful or untenable.¹⁸³

Emergency Enforcement of the Car Service Duty. Section 1(15) gives the Commission broad power upon determination that an "emergency" exists to act unilaterally and "suspend the operation of any or all rules, regulations, or practices then established with respect to car service" and "make such just and reasonable directions with respect to car service . . . as in its opinion will best promote the service in the interest of the public and the commerce of the people"¹⁸⁴ This section was used to curtail passenger service in *Heflin v. Baltimore & Ohio Railroad*¹⁸⁵ where the Commission had found an emergency to exist as to the availability of locomotive-fuel coal and ordered carriers without a dependable source of supply to reduce their passenger service by 25 percent.¹⁸⁶ A consumer adversely affected by the reduced commuter service challenged the ICC's authority to issue that order because it dealt directly with the use of passenger trains or services, activity allegedly not within the car service provisions.¹⁸⁷ The Commission disagreed, citing, *inter alia*, section 1(15)'s emergency powers and section 1(10)'s definition of car service as the bases for such a regulation.¹⁸⁸ Although the Commission did not hold that "car service" includes passenger service, one can infer from the opinion¹⁸⁹ that whenever passenger service has a "direct bearing" on freight service, at least during an emergency, the Commission can regulate it. Since such a direct freight-passenger relationship is almost always present, especially where financial expenditures are involved, the ICC can regulate passenger service under 1(15) when appropriate.

But does the present railroad passenger situation constitute an emergency which would authorize the ICC to promulgate directions

183. See notes 61-70 *supra* and accompanying text.

184. Interstate Commerce Act § 1(15), 49 U.S.C. § 1(15) (1964).

185. 278 I.C.C. 737 (1950).

186. *Id.* at 740.

187. *Id.*

188. *Id.*

189. Since the service orders complained of concerned the supply of locomotives and the regulation of defendant's practices as to the use of coal-burning passenger service locomotive mileage, and had a *direct bearing on the ability of the defendant to carry property during a national emergency*, we conclude that they were fully authorized by the [Interstate Commerce Act]. *Id.* at 741 (emphasis added).

concerning passenger service? It has been held that since the ICC derives its authority to determine the existence of an emergency from Congress, the term "emergency" must be viewed in its legislative sense to include "those situations where the common good or public interest is legislatively declared to be paramount to individual interests."¹⁹⁰ A shortage of freight cars for the lumber industry has been held to constitute an "emergency"¹⁹¹; since the Commission has admitted that the passenger transportation problem "should be brought under federal regulation"¹⁹² and has conceded that the problem "appears to have passed beyond the regulatory capabilities of the individual States,"¹⁹³ grounds for declaring an emergency seem present. Such a determination is "not subject to judicial review upon its merits," but only upon a showing of motivation by "fraud, wrong doing or capriciousness"¹⁹⁴ so that an ICC determination that the present railroad passenger service situation is an emergency would be both final and appropriate.

If federal legislation is needed, apart from the emergency provision, the interim before passage of such legislation would seem to be as much an "emergency" as the shortage of freight cars to carry lumber. This would be an ideal remedy since the ICC could act immediately to preserve passenger service while the requisite legislative procedures were being performed by Congress. Admittedly, the utility of this section for the present problem depends upon a broad definition of "car service" to include passenger service but, as stated previously, precedent exists in both the "car service" and emergency provision cases for such application.¹⁹⁵

Enforcement of the Duty to Avoid Undue or Unreasonable Preferential Treatment of Particular Descriptions of Traffic

Section 3(I), forbidding the giving of any "undue or unreasonable preference or advantage to any particular person, company . . . or . . . particular description of traffic,"¹⁹⁶ has been recognized as applicable to passenger service and within the primary

190. *Daugherty Lumber Co. v. United States*; 141 F. Supp. 576, 581 (D. Ore. 1956).

191. *Id.* at 576.

192. 335 I.C.C. 432.

193. *Id.*

194. 141 F. Supp. at 581.

195. See notes 185-89 *supra* and accompanying text.

196. See note 75 *supra* and accompanying text.

jurisdiction of the Commission. In 1956 the Commission declared that it had "assumed authority also over matters of preference and prejudice in passenger service under the provisions of *section 3* of the act."¹⁹⁷ Historically, the provision has been used by Negro plaintiffs in segregation-in-transportation cases.¹⁹⁸ For example, the Supreme Court has recognized that section 3(1) forbids dividing dining cars by race with a disparate number of seats for whites.¹⁹⁹ The analogous Motor Carrier Act provision²⁰⁰ has been used by the Supreme Court to invalidate segregation in an interstate bus terminal,²⁰¹ and the Court, mentioning that section 3(1) was equivalent to the Motor Carrier Act provision for the purpose of that particular case, commented that "[t]he Interstate Commerce Act . . . uses language of the broadest type to bar discriminations of all kinds."²⁰² The Illinois Supreme Court, citing a long line of precedent,²⁰³ has concluded that "the determination of whether or not a rule or practice of an interstate carrier is discriminatory or unduly preferential lies exclusively with the Interstate Commerce Commission"²⁰⁴ Such strong precedent for ICC primary jurisdiction makes section 3(1) a viable vehicle for a party seeking a remedy through Commission action. Since a carrier under section 3(1) is forbidden to give a "preference or advantage to any particular . . . description of traffic" and since freight and passenger service are two particular descriptions of traffic,²⁰⁵ section 3(1) is a most appropriate remedy for passenger representatives

197. *New Jersey & N.Y. R.R. Operation of Passenger Train in New Jersey*, 299 I.C.C. 41, 46 (1956) (emphasis added).

198. *See, e.g., Henderson v. United States*, 339 U.S. 816 (1950); *Mitchell v. United States*, 313 U.S. 80 (1941); *East Crosby v. St. L.-S.F. Ry.*, 112 I.C.C. 239 (1926).

199. *Henderson v. United States*, 339 U.S. 816 (1950).

200. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . or description of traffic, in any respect whatsoever; or to subject any particular person . . . or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever Motor Carrier Act § 216(d), 49 U.S.C. § 316(d) (1964).

201. *Boynton v. Virginia*, 364 U.S. 454 (1960).

202. *Id.* at 457.

203. *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Morrisdale Coal Co. v. Pennsylvania R.R.*, 230 U.S. 304 (1913); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913); *Robinson v. Baltimore & O.R.R.*, 222 U.S. 506 (1912); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

204. *Illinois Cent. Ry. v. Illinois Commerce Comm.* 2 Ill. 2d 382, 391, 118 N.E.2d 435, 439, *cert. denied*, 348 U.S. 823 (1954).

205. *See notes 77-80 supra* and accompanying text.

desiring to challenge the downgrading of passenger service in favor of freight traffic.²⁰⁶

BEYOND *Sunset-Adequacies*

A Lost Opportunity to Enforce Section 1(4)

Among the many alternative sources of ICC enforcement power in the area of passenger service standards, the most readily applicable is section 1(4). Significant precedent exists for ICC enforcement of section 1(4)'s duty to provide transportation. The least that can be said is that the precedent for non-enforcement is limited and weak. Since the ICC's investigation into the adequacy of Southern Pacific passenger service in *Sunset-Adequacies* was procedurally novel,²⁰⁷ it was an appropriate time for the Commission, if it sincerely recognized today's serious rail passenger problems, to exercise its inherent flexibility and substantial freedom from the stricture of *res judicata* and *stare decisis*.²⁰⁸ A commentator has emphasized the Commission's practice of independent examination of each controversy before it and general reluctance to foreclose analysis because of prior determinations.²⁰⁹ If the ICC had applied such a philosophy in *Sunset-Adequacies*, mechanical reliance on *Pennsylvania Railroad*²¹⁰ would have been impossible. In *Sunset-Adequacies* the Commission showed little, if any, dynamism by rejecting jurisdiction to enforce adequate passenger service. Since it ostensibly recognized the problem and subsequently reaffirmed its earlier request for congressional action,²¹¹ the Commission either

206. Section 12(1) could be employed to enforce 3(1) since it authorizes the ICC to enforce the railroad provisions of the Interstate Commerce Act by seeking the aid of a United States attorney to prosecute in an appropriate court. 49 U.S.C. § 12(1) (1964). Section 8 could be utilized by aggrieved passengers to obtain damages in court. 49 U.S.C. § 8 (1964).

207. Cf. Brief for California Public Utility Commission at 4, *Sunset-Adequacies*, 335 I.C.C. 415 (1969). Apparently, this is the first case where the Commission has acted on its own motion in the passenger service area. See note 18 *supra* and accompanying text.

208. 2 SHARFMAN 367.

209. *Id.*

210. See notes 136-45 *supra* and accompanying text.

211. 335 I.C.C. at 437; H.R. 14170, 91st Cong., 1st Sess. (1969); *Hearings* 49, 330, 338. The bill by no means gives the ICC jurisdiction to determine the adequacy of intercity rail passenger service since the only new service power in the bill is limited to two years following the passage of the bill and is only applicable to the last remaining passenger train on a line. It is identical to a bill introduced in 1968 based on Commission recommendations. For discussion of another bill substantially identical see note 213 *infra* and accompanying text. The fact that the ICC had sought remedial legislation, however weak, before *Sunset-Adequacies* supports an inference that the agency was precommitted to reject the state commissions' arguments.

must consider itself totally bound to whatever fragile balance of precedent it perceives or must have some ulterior motive in delaying a meaningful response to the passenger problem. If the Commission is indeed such a child of precedent, its utility as a quasi-legislative body is questionable. If Commission action is the product of some ulterior motive it could only be one in favor of railroad management interests since further delay in applying remedial measures and prolongation of the passenger agony can only contribute to the ultimate extinction of the passenger train. A possible third explanation of the decision is that the Commission declined jurisdiction not because of legal precedent and analysis, but because of a genuine belief that the carriers would be subjected to financial disaster if required to provide adequate passenger service. In *Sunset-Adequacies* the Southern Pacific claimed passenger losses ranging from \$54 million in 1954 to \$16 million in 1966.²¹² The Commission may have relied on the vagueness and imprecision of the Interstate Commerce Act to avoid ordering the carriers into financial ruin and precipitating a national economic disruption. If so, the ICC's implicit financial analysis should be revealed in order to attract expert criticism from all sides of the passenger service problem. The statutory grant of jurisdiction to the ICC to require adequate passenger service will provide little help if the problem is essentially financial.

Proposed Federal Legislation

Perhaps *Sunset-Adequacies*, even if legally incorrect, was a good decision, for it has emphasized the need for legislative action. Renewed congressional interest is evident in the introduction of new legislation and more serious consideration of bills previously introduced.

Financial Assistance for the Carriers. Even if one agrees that good passenger service would be utilized by the public and be profitable for the railroads, as shown by examples in Japan and other countries,²¹³ the problem still exists of providing adequate service *now* with presently inadequate passenger revenues. A number of possible solutions for this financial dilemma exist. First, the federal government could make long-term, low-interest government

212. Brief for Southern Pacific Co. at 99, *Sunset-Adequacies*, 335 I.C.C. 415 (1969). See generally *Hearings* 213, 239-40.

213. See generally *Hearings* 199, 229.

loans for the purchase of necessary equipment. Second, tax incentives for the purchase of passenger equipment might be authorized. The Tax Reform Act of 1969's grant to railroads of the privilege of taking accelerated depreciation on certain qualified rolling stock²¹⁴ should be extremely beneficial in acquiring new passenger equipment, and other tax benefits, such as investment credits, could be formulated.

A third possibility overwhelmingly passed the Senate recently in the form of a bill, substitute amendment 618 to S. 3706,²¹⁵ authorizing the establishment of a National Railroad Passenger Corporation as a profit-making enterprise owned by railroads as original common shareholders and members of the general public as preferred shareholders.²¹⁶ The corporation's purpose would be to take over all intercity passenger service, defined as "all rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride, and commutation tickets and by morning and evening peak period operations"²¹⁷ This purpose would be consummated by contracting with the railroads to relieve them of their entire passenger responsibilities and to obtain use of existing tracks and other facilities.²¹⁸ Though the railroads would not be required to purchase stock or contract with the new corporation, failure to do so would automatically deny them any passenger discontinuances until 1975,²¹⁹ prohibit them from competing against the corporation,²²⁰ and possibly subject them to an ICC order requiring them to make services and facilities available to the corporation.²²¹ Both common stock, initially issued only to railroads, and preferred, which will be held by the general public exclusive of any railroads, carry voting rights and dividend eligibility.²²² Forty million dollars will be contributed directly by the federal government for initial organization and operation, improved reservations and

214. Tax Reform Act of 1969 § 705, 26 U.S.C.A. § 184 (West Supp. Pamphlet, March, 1970).

215. S. 3706, 91st Cong., 1st Sess., 116 CONG. REC. 6697-6701 (daily ed. May 6, 1970); Washington Post, May 7, 1970, at G-1, col. 1.

216. 116 CONG. REC. 6697-6701 (1970) § 301.

217. *Id.* § 101.

218. *Id.* §§ 401(a)(1) & 402(a).

219. *Id.* § 404(a).

220. *Id.* § 401(c).

221. *Id.* § 402.

222. *Id.* § 304(a).

advertising, maintenance of equipment, research and development, and essential fixed facilities.²²³ Private loans to the corporation will be guaranteed by the federal government to a maximum of \$60 million,²²⁴ and federal loans and loan guarantees to a ceiling of \$75 million will be provided.²²⁵ With the advice and consent of the Senate, the President would choose eight members of the 15-man board of directors, including the Secretary of Transportation and one consumer representative, while three members would be elected by common stockholders and four by the preferred stockholders.²²⁶ Corporate management would be appointed by the board.²²⁷ The corporation would be exempt from all state regulation of rates, routes, or service, but would be subject to ICC directives concerning the comfort and health of passengers on trains operating under the direction of the corporation, such directives being supported by a maximum civil penalty of \$500 per violation per day.²²⁸ Such legislation offers a possibility for the immediate protection that the railroad passenger consumer needs, but whether such an organization would ultimately provide adequate service is still dependent upon the standards which the ICC is willing to set. Although the difficulty of coordinating a national railroad system would be extensive, the ICC should be willing to exercise its direct authority to demand adequate passenger service under legislation providing both adequate federal financing and a clear congressional mandate to correct present inadequacies. This recognition of both the financial and legal portions of the rail passenger problem in one bill offers the most comprehensive solution and for that reason, if none other, appears to offer the best remedy.

A fourth alternative would be nationalization of the railroads, which arguably would be the inevitable result if the ICC should exercise the power which it presently has to require large expenditures by refusing to discontinue certain service. Though no current proposals seek to legislate such a solution to the problem, both S. 2750²²⁹ and H.R. 14661²³⁰ would relieve the necessity for such

223. *Id.* § 601.

224. *Id.* § 602.

225. *Id.* § 701.

226. *Id.* § 303(a).

227. *Id.* § 303(d).

228. *Id.* §§ 305-06, 404, § 801.

229. S. 2750, 91st Cong., 1st Sess. (1969).

230. H.R. 14661, 91st Cong., 1st Sess. § 13a(2) (1969). The bill also authorizes the

an extreme measure by reimbursing a carrier for any costs over direct passenger revenues during a period of required continuance of a particular train. Although such a measure would help avoid nationalization, without some provision for enforcement of adequate service it would offer the passenger only minimal assistance.

Although nationalization has not been suggested recently, "regionalization" has. S. 924²³¹ endorses and encourages interstate compacts for the creation of regional state-owned and operated railroad passenger systems. Regional "authorities" could enter into agreements with railroads and government agencies for the provision of passenger services. Financing would be borne by the states on a pro-rata passenger mileage basis and by the issuance of a maximum of \$1 billion in bonds guaranteed by the federal government at the discretion of the Secretary of Transportation upon consultation with the ICC. This bill, if enacted, could impede a strong national transportation system since it fails to delineate any clear mechanism for coordinating the separate regional authorities or any source of authority for the enforcement of adequate service. A milder regional proposal²³² simply encourages major geographic and economic regions of the United States designated by the Secretary of Transportation with the concurrence of local officials to coordinate transportation planning within and among themselves and to engage in research programs and demonstration projects. Federal funds would be appropriated to support the regional efforts. But without effective means for enforcing adequate service such regional programs offer little more than current inadequate state efforts.

Limited Power To Enforce Passenger Service Standards. One proposal is directed at the dilemma created when the Commission refuses to discontinue trains because they are required by public convenience and necessity, and the carriers respond by providing inadequate service in hopes of eventually convincing the Commission

Secretary of Transportation to acquire passenger equipment with funds appropriated by Congress and rent such equipment to carriers if needed by them to comply with an ICC continuance order. *Id.* & 13a(4)(a) & (b). See also S. 2939 and H.R. 13352, 91st Cong., 1st Sess. (1969). S. 674, H.R. 744, and H.R. 785, 91st Cong., 1st Sess. (1969), simply require the ICC, in responding to a discontinuance petition, to consider the possibility of government financial aid under existing programs. Consideration of financial aid is essential to retard the carriers' desires to promote discontinuances and allow downgraded service.

231. S. 924, 91st Cong., 1st Sess. (1969).

232. S. 2425, 91st Cong., 1st Sess. (1969). See also S. Con. Res. 32, 91st Cong., 1st Sess. (1969).

that the particular train is not required. When the ICC denies the discontinuance of the last remaining train on a line, it would be authorized by H.R. 12084 to

attach such recommendations to its order, requiring the continuance of the operations or service in question, as it deems just and reasonable to assure the preservation of a reasonable level of service for the passenger trains . . . required, to be continued²³³

But this remedy is of limited utility since it is applicable only to the last remaining train on a line, is nascent until a carrier discontinuance petition and negative response by the Commission, and is drafted to expire after two years. As a negative, stop-gap measure to delay the ultimate extinction of passenger service, H.R. 12084-S. 2887 might suffice, but it offers the Commission no general affirmative power to respond to consumer demands for adequate service.

Furthermore, the recommendation and requirement portions of H.R. 12084 contrast sharply. The ICC could require only the continued operation of the particular train while adequate service on such trains would be permissive rather than mandatory.²³⁴ Therefore, the "level of service" provision is meaningless since it would lack the "teeth of an enforceable condition" ²³⁵ The companion bill, S. 2887,²³⁶ is properly responsive to this deficiency, for it replaces "recommendations" in the House bill with "conditions," apparently making the ICC directions mandatory.

These bills would also authorize the Secretary of Transportation, in cooperation with the ICC and other federal agencies, to prepare a study concerning the potential for railroad passenger service. H.R. 12084, which requires the study to be submitted to both the House and Senate Commerce Committees within one year, directs the Secretary to focus on six areas: general resources within the United States for meeting passenger transportation needs; anticipated expansion of those resources by 1975; expected passenger needs from 1975 to 1985; ability of existing resources expanded by current programs to meet needs until 1975; ability of improved railroad passenger service to meet anticipated needs until 1975; and carrier-

233. H.R. 12084, 91st Cong., 1st Sess. (1969); see *Hearings* 6-7.

234. The ICC interprets the bill simply to authorize recommendations for adequate service, a position commensurate with the view that only the continuation of operations would be mandatory. *Hearings* at 118.

235. *Id.*

236. S. 2887, 91st Cong., 1st Sess. (1969)

government cooperation, particularly financial, in developing adequate service.²³⁷ Such a study would be helpful, if not essential, for long-range planning but offers no aid in facing the immediate threat of extinction of railroad passenger service.

Direct Authority to Promulgate Standards for Adequate Passenger Service. H.R. 3112 and H.R. 9168 would authorize the Federal Railroad Administrator under the Department of Transportation, rather than the ICC, to set "standards for the comfort, safety, and convenience of railroad passengers."²³⁸ Such rules and regulations would take effect ninety days after publication in the *Federal Register*. The Administrator is directed to employ the necessary personnel to assure compliance with the rules issued, with carriers who fail to comply subject to maximum fines of \$1,000 per day per offense. This bill certainly provides the affirmative power necessary to assure adequate service; however, it is questionable whether such power should be lodged with the Department of Transportation and not with the ICC. Since the discontinuance and adequate service powers are complementary, both should be applied by the same agency to assure consistent responses to similar problems. Moreover, the Commission's considerable experience in the discontinuance field warrants its exercise of the adequate service power. Only if it proves unwilling to exercise such function should the authority be removed.

Another proposal, H.R. 14572, and its companion bill, S. 2951, pronounces a direct statement of the carriers' duty "to provide and furnish reasonably adequate passenger service on any [interstate train]"²³⁹ and directs that in determining whether service is "reasonably adequate," consideration be given to the operating condition of equipment, the provision of pullman and dining cars

237. *Id.* at 9-10. See also *id.* at 20-22, 23-25, 32-34, 35-38, 39-43, 60, and 103-05 for another proposed study.

238. H.R. 3112, 91st Cong., 1st Sess. 1 (1969); H.R. 9168, 91st Cong., 1st Sess. 1 (1969). See note 22 *supra* and accompanying text. Since the Federal Railroad Administration is an executive branch planning body, it is doubtful that it has the expertise to determine the proper internal management of a passenger railroad. It also lacks the power to provide any direct enforcement of its policies. Section 201 of S. 3706, before its recent amendment and Senate passage, note 221 and accompanying text *supra*, had authorized the Secretary of Transportation, presumably with the advice of the Federal Railroad Administration, to establish and enforce adequate passenger service standards. But the amended bill, section 801, lodged such power with the ICC. One can infer that the Senate deemed the Commission better equipped to handle such a legislative-judicial function.

239. H.R. 14572, S. 2951, 91st Cong., 1st Sess. § 1 (1969).

where appropriate, the maintenance of adequate comfort, the availability of sufficient equipment to accommodate normal demands, and the provision of adequate schedule information.²⁴⁰ The Commission could investigate passenger service adequacy upon complaint or at its own initiative and after hearings could establish standards and enforce them. This bill obviously is a direct response to *Sunset-Adequacies* and provides the ICC the affirmative power said lacking. The “reasonably adequate” standard seems a little weak since anything less than adequate should be unacceptable, but the statement of factors to consider and the separate use of the term “adequate” to describe both comfort and schedule information are strong indicators that the standard would essentially be one of adequacy. An apparent criticism of this bill is that trains primarily performing local commuter service would be exempt from ICC regulation,²⁴¹ but since such exception is limited to local commuter service, the Commission would still have authority over non-local, interstate commuter trains. Unfortunately, “local” is not defined in the bill, thereby raising the question as to how long a distance an interstate commuter train must travel to be non-local. Since Congress could exercise its plenary power under the Commerce Clause and regulate all aspects of commuter service as an “appropriate means to the attainment of a legitimate end . . . to regulate interstate commerce”²⁴² and produce an effective national transportation policy, such an indefinite limited use of congressional power is unjustified and only offers an additional defense to ICC action.

Another bill, instead of promulgating a new duty to provide adequate service, would simply amend section 1(4)²⁴³ by deleting “transportation” and substituting “adequate transportation for both property and passengers,”²⁴⁴ an action necessary since Commission acceptance of 1(4)’s applicability to passenger service in *Sunset-Adequacies* might not be accepted by the courts or affirmed by the Commission in a proceeding where the point was not

240. *Id.* § 2.

241. *Id.* § 3.

242. *United States v. Darby*, 312 U.S. 100, 118 (1941). Financial assistance to provide adequate local commuter service has been considered by Congress. S. 676, S. 1032, S. 2821, 91st Cong., 1st Sess. (1969). S. 2656, 91st Cong., 1st Sess. (1969), authorizes the creation of an urban mass transportation trust fund for the assistance of state and local agencies.

243. See notes 36-43 & 135-45 *supra* and accompanying text.

244. H.R. 13832, 91st Cong., 1st Sess. § 1(a) (1969).

conceded. The bill also directly enlarges the definition of car service to include the transportation of passengers.²⁴⁵ Furthermore, an effort is made to assure Commission enforcement of 1(4) by including in section 12(1) the direct power to enforce "all obligations and duties imposed upon carriers under this part."²⁴⁶ Actually, the car service change would be sufficient to give the Commission the power to enforce adequate passenger service. It is questionable whether the 12(1) change would enlarge the ICC's power to enforce 1(4) since the Commission held 12(1) to be inapplicable in *Sunset-Adequacies*.²⁴⁷ A similar bill specifically directs the ICC to prescribe minimum standards but offers no additional enforcement powers.²⁴⁸

As discussed above,²⁴⁹ the amended version of S. 3706 authorizes the ICC to prescribe passenger standards and offers a civil penalty for their breach. This provision would fill the alleged enforcement void recognized in *Sunset-Adequacies*. The Commission would have the necessary authority it says it lacks to respond to the passenger problem. The above bills collectively offer an effective remedial apparatus to attempt to solve the present railroad passenger problem, but, of course, much of the effort would have been unnecessary if the Commission had responded, as it could have, with affirmative action in *Sunset-Adequacies*. Still, some of the legislation, particularly the financial assistance, would be valuable in preserving railroad passenger service even if the Commission had taken the opposite position in *Sunset-Adequacies*. If the case stimulates such legislation, it will have had a significant impact.

CONCLUSION

As stated earlier, it has been a basic assumption of this analysis that railroad passenger service is worth saving. If so, the legal tools for such salvation are presently available. The Commission could have acted upon authority at least as substantial as that which they

245. *Id.* § 2.

246. *Id.* § 5. Title IV of S. 3706, 91st Cong., 1st Sess. (1970), is substantially identical to H.R. 13832, adding only a broad class of potential demandants of adequate transportation under section 1(4) to include persons, associations, municipalities, regulatory agencies, states, state agencies, and the Secretary of Transportation and specifying that any member of such class requesting adequate transportation will reimburse the carrier for avoidable costs above the revenues derived from supplying the service. *Id.* § 401.

247. See notes 30, 35 *supra* and accompanying text.

248. H.R. 13938, 91st Cong., 1st Sess. (1969).

249. See note 227 *supra* and accompanying text.

adopted and enforced section 1(4). A successful action probably could be brought under section 3(1) by passenger interests against an obvious discrimination between descriptions of traffic. The "car service" provisions could be interpreted to apply to passenger service. Congress may act soon to moot the controversy and assure remedial power in the ICC. But even if the public and the Congress should decide that railroad passenger service is simply not worth salvage, until present laws are modified the intentional downgrading of passenger service in violation of present law should not be either acquiesced in or tolerated. If railroads are a realistic alternative to airplanes, buses, and automobiles in high congestion urban corridors, their propensity for reducing congestion and pollution should not be ignored. The ICC, not the courts, has the expertise to analyze railroad passenger potentialities and to apply the Interstate Commerce Act in the most reasonable manner to promote the best national transportation policy. The Commission should act, with or without new legislation, to preserve the remnants of railroad passenger service, at least until a proper analysis of the anticipated costs and benefits of such service can be made.

