

LAW AND CONTEMPORARY PROBLEMS

VOLUME XII

SUMMER, 1947

NUMBER 3

FOREWORD

To the present generation the thesis has long been familiar that ". . . the South is our 'Economic Problem No. 1,' because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South."¹ More recently similar complaints have been advanced on behalf of the West. Few, however, have been in position to form an intelligent judgment on the merits of the question. Those who took their information from publicists on either side of the controversy were met with a welter of contradictory assertions and paradoxes; those who sought to inquire for themselves encountered a forbidding complex of railroad lore, transportation economics, cost accounting, and esoteric law impenetrable except by the rate specialist. Why should southern railroads resist rate adjustments which allegedly would stimulate industry along their lines, to their obvious advantage? Why should eastern railroads resist increases in their own rates, which would be to their apparent advantage? Why are some southern interests apathetic toward the whole agitation for rate reform? Why are some recognized leaders in the campaign for reform hostile to Governor Arnall's strategy of carrying the fight to the courts?

It is said that differences in the cost of transportation between North and South justify different rate levels; it is also said that there are no such differences, or, if there are, they are the other way around. It is said that differences in something called the "consist" of traffic, having to do with the "distribution of the transportation burden," justifies different rate levels; this is denied. It is said that the Interstate Commerce Commission should be left alone to regulate the affairs of the railroads, and that other government agencies, particularly the Department of Justice, should keep hands off; it is also said that railroad rates are fashioned in an atmosphere of monopoly which renders administrative regulation ineffective. It is said that only class rates are in issue, and that they are of trifling importance to the economy; it is also said that the class-rate structure operates as a tariff wall which keeps the South and West in a state of colonial subjection and concentrates industry, wealth, and population in the East. It is said that the South and West are attempting to hamstring the East, to attain equality by depriving that section of natural

¹The quoted language is that of the late Joseph B. Eastman, Chairman of the Interstate Commerce Commission, dissenting in the Southern Governors' Case (*Alabama v. New York Central R. R.*), 235 I.C.C. 255, 333 (1939).

advantages; it is said on the other side that the attempt is solely to remove artificial, man-made barriers. The relation between rate levels and wage levels in the different sections is a perplexing question of cause and effect: low wage levels in the South are justified as an enforced compensation for discriminatory rates; on the other hand there has been more than a suggestion that rate differentials have been maintained in the interest of eastern manufacturers as protection against unfair competition from low-wage industries in the South.²

As Professor Potter shows in his article in this symposium, complaints of rate discrimination against the South can be documented as far back as the turn of the century. It was not until after the First World War, however, that the subject received widespread attention. In the Twenties and Thirties, largely as the result of efforts of the Southern Traffic League and the Southern Governors' Conference, the Commission ordered various adjustments in interterritorial rates,³ changing the method of constructing them and altering relationships for specific commodity groups. In 1937 Mr. J. Haden Alldredge, then Principal Transportation Economist for the Tennessee Valley Authority, completed the first definitive analysis of the interterritorial rate problem⁴—a work which became and has remained the manifesto of the southern forces. Transmitting the Alldredge report to the President, Chairman Morgan of the TVA said:

This survey shows that the present territorial freight-rate boundaries, which are the outgrowth of tradition, constitute barriers against the free flow of commerce which are hampering and restricting the normal development of the Nation as a whole by preventing a full utilization of the varied natural resources that exist in the different regions of the country. It reveals that the existence of these barriers tends to retard substantially the commercial and economic development of the Tennessee River drainage basin and adjoining areas in the South. The report suggests that the establishment of a uniform principle of making interterritorial freight rates will aid the commercial development of such regions as the Tennessee Valley and redound to the benefit of the Nation as a whole.⁵

² In *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, 786 (1935), and again in the *Southern Governors' Case*, cited *supra*, note 1, at 320, northern interests offered evidence showing the disparity between wage scales in the North and in the South. In both cases the evidence was excluded, the Commission holding that costs of production of competing producers are not matters which may properly be considered in determining lawful transportation charges. It is possible that the enactment of the Fair Labor Standards Act in 1938 was facilitated by the progress which was being made by southern interests in the campaign to eliminate freight differentials (*cf.* Potter, *The Historical Development of Eastern-Southern Freight Rate Relationships*, *infra*, and the Commission's oblique reference to the Act in the *Southern Governors' Case*, at 320); and it may be significant that, following the Supreme Court's affirmance of the *Class Rate Decision*, a Republican Congress is showing interest in an upward revision of the minimum wage standards. Assuming that differentials in freight rates have been maintained, at least in part, to offset the competitive advantages which southern producers derive from lower wage scales, it must certainly be conceded that minimum wage legislation is the better approach to a solution of the problem.

³ *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925); *Rates from, to, and between Points in Southern Territory*, 191 I.C.C. 507 (1933); *Alabama v. New York Central R. R.*, 235 I.C.C. 255 (1939).

⁴ THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, H. R. Doc. No. 264, 75th Cong., 1st Sess. (1937). Mr. Alldredge is now a member of the Interstate Commerce Commission, having been appointed by President Roosevelt in 1939.

⁵ *Ibid.*

Two recent developments make the present symposium timely. First, the Interstate Commerce Commission, in May, 1945, as the climax of two comprehensive investigations which it had undertaken on its own initiative in 1939, ordered: (1) that a uniform national system of classification of freight for rate-making purposes be substituted for the several different territorial classifications; (2) that a uniform scale of intraterritorial and interterritorial class rates, prescribed by the Commission, be made effective simultaneously with the new classification; and (3) that, by way of mitigating the inequalities in the rate structure during the period which would be required to work out the rate adjustments and the uniform classification which had been prescribed, class rates in the East be increased 10 per cent, and those in the rest of the country east of the Rocky Mountains reduced by the same percentage, with corresponding changes in the interterritorial class rates.⁶ Second, efforts to attack the problem from a different angle, which had been in progress in the meanwhile,⁷ came to the fore at about the same time. In March, 1945, the State of Georgia was granted leave to file in the United States Supreme Court a suit charging some twenty eastern and southern railroads with conspiring, in violation of the Sherman Antitrust Act, to fix rates which discriminated against that state;⁸ and the United States, through the Department of Justice, filed suit in a district court at Lincoln, Nebraska, against the Association of American Railroads, the Western Association of Railway Executives, the western railroads generally, and two New York banking houses, charging, among other things, a conspiracy to impose upon the West the same kind of rate discriminations which were complained of by the State of Georgia.⁹ Notwithstanding the fact that the Commission's sweeping decision in the *Class Rate* case appeared to crown the efforts of southern and western interests with complete success, these antitrust suits have been pressed and are still pending, involving issues which appear to be of major importance to both sides.

The aim of this symposium is to find answers to as many as possible of the

⁶ *Class Rate Investigation*, 1939, 262 I.C.C. 447 (1945). The requirement of a uniform classification extended to the whole country; the rate adjustments ordered did not apply to mountain-Pacific territory, which is the area from the Rocky Mountains west. The Commission gave the railroads, and they accepted, the opportunity of working out the uniform classification by agreement among themselves. A group of eastern states and western railroads filed suit in a three-judge court to set aside the order as to the rate adjustments, and that court, while upholding the Commission's order, granted an injunction pending appeal. See Miller, *Corrective Action by the Interstate Commerce Commission*, *infra*. The effect was to suspend the Commission's order and leave the old rate relationships in effect until the case could be finally determined by the Supreme Court. The final determination came in May, 1947.

⁷ Proponents of rate reform had appealed to the antitrust laws, indirectly at least, as far back as 1939. In the Southern Governors' Case the Commission said: "Complainants . . . contend that the northern carriers, by cooperation and agreement among themselves and by absorption of roads in the North which otherwise would have been competitive in making rates from the South, restrain the freedom of action of the southern carriers in the establishment of interterritorial rates in violation of the antitrust laws, and that in view of this such rates must be presumed to be unreasonable and unlawful. They admit that we are without authority to enter orders requiring compliance with such laws, but they insist that we should give consideration to the presumption, above stated, which they contend arises from violation thereof. We shall make no findings herein with respect to the alleged violation of the antitrust laws." *Alabama v. New York Central R. R.*, 235 I.C.C. 255, 309-310 (1939).

⁸ *Georgia v. Pennsylvania R. R.*, 324 U. S. 439 (1945).

⁹ *United States v. Association of American Railroads*, 4 F. R. D. 510 (1945).

questions which confront one who seeks to be informed on these matters. To a substantial degree this aim has been attained in the group of articles which follows. Not that the contradictions mentioned have been dissipated: partisan viewpoints are represented, and disagreements are sharp. But the materials necessary for the formation of a critical judgment are here. To be sure, conclusions will not always be suspended ripe for the plucking. The discriminating reader, however, will find guides, familiar to triers of fact, in his appraisal of the interests involved, in the candor and completeness with which issue is joined,¹⁰ and in the inferences which can be drawn from undisputed facts.

The first question, of course, relates to understanding the problem. Professor Milton S. Heath, in his discussion of the rate structure, not only supplies the foundation necessary for an understanding of the articles which follow but, as an economic theorist, examines the transportation rate pattern as a species of price behavior.

The second important question is, How did the rate structure come to be? In his study of this question Professor David M. Potter, a historian, makes a unique contribution to the literature and the understanding of this subject. Apart from the historical sketches embodied in various reports of the Commission, no account has been available of the forces and conditions which so molded the rate structure as to bring about the profound controversies of recent years.

It is essential, next, to know how railroad rates are made. A common lay mistake is to suppose that they are all prescribed by the Interstate Commerce Commission. Actually, of course, they are initiated by the railroads themselves and merely filed with the Commission, and the rate-fixing power of the regulatory agency is called into play only upon the complaint of some interested party, or in a general investigation of rate relationships (a few typical examples of which have been referred to), or in a "revenue" proceeding in which the adequacy of the return provided by the rate level is examined. In the third article Mr. Wendell Berge, formerly Assistant Attorney General in charge of the Antitrust Division, goes beyond these primary facts and discusses in detail the procedures, involving consultation with shippers and conferences with other carriers, by which the railroads arrive at the rates which they file—those rate conferences and appellate procedures which have been termed a "private system of judicature" and which have been bitterly assailed as the means by which sectional interests accomplish their discriminatory ends. In doing so Mr. Berge of course expresses the viewpoint of the Department of Justice and the State of Georgia—a viewpoint which is vigorously challenged by Mr. John Dickinson, General Counsel of the Pennsylvania Railroad, in his article defending the value, the function, and the necessity of the rate conferences, which follows. These two articles, together with Mr. Alderman's and Mr. Wiprud's, to be mentioned later, bring to light the whole conflict of philosophies which is involved in the antitrust approach to the rate question: the view, on the one hand, that the policy of free and

¹⁰ Remembering, however, that these contributors have had no opportunity to read other papers in the symposium prior to publication.

unhampered operation of competitive forces which underlies the Sherman Act cannot be applied to a regulated industry such as the railroads, and that the railroads have duties under the Interstate Commerce Act which can be discharged only by use of the conference method; the view, on the other hand, that the area of collaboration contemplated by the Interstate Commerce Act is a restricted one, and that the necessary functions of the rate conferences can be performed in such a way as not to run counter to the prohibitions of the antitrust laws. Now that the Supreme Court has upheld the order of the Commission looking toward uniformity of class rates, this is the great unresolved issue.

The next question is whether the regional differences in class-rate levels can be justified on the basis of differences in cost, differences in the consist of traffic, or other differences in transportation conditions—or on any ground of relevant economic policy. This question, which was of course the Commission's principal concern in the *Class Rate* case, is authoritatively discussed by Professor D. Philip Locklin, one of the country's foremost transportation economists.

Many people, generally familiar with the interterritorial rate controversy, have wondered whether the sound and fury is not out of all proportion to the real effects of rate differentials. Do the class rates (these being the only rates which are concededly on different sectional levels) affect a significant portion of the traffic? Are the differences really significant competitive factors, capable of influencing the location of industry and the concentration of population? Suppose the rate on overalls from a southern factory to an eastern market is 28 cents per hundred pounds higher than the rate to the same market from a competing factory in the East, the same distance from that market: what is 28 cents per hundred pounds, translated into the retail price of a pair of overalls?¹¹ Is it enough to change the face of a nation? These and other related questions are considered by Mr. Frank L. Barton, Chief Economist of the Department of Justice, in his analysis of the economic effects of regional rate differentials.

Since this question of economic effects is a crucial one, and since the affirmance of the *Class Rate* decision probably does not mark the end of the road to rate equalization,¹² the article which is included at this point should be of particular interest to those who will be concerned with future developments. Mr. James C. Nelson, Chief of the Transportation Division in the Office of Domestic Commerce,

¹¹ Perhaps the most succinct comment responsive to such questions is that of the Commission in the *Southern Governors' Case*: "When the important products of one producing section are subjected to a higher level of rates to [common] markets than are like products of adjacent competing producing sections less distant to such markets, it generally cannot develop unless, and then only to the extent that, the differences in transportation charges can be offset by lower production costs or absorbed by a reduction in profits. And even though differences in transportation charges can be thus offset or absorbed, this in itself generally tends to retard its growth and prosperity." *Alabama v. New York Central R. R.*, 235 I.C.C. 255, 319-320 (1939).

¹² The Commission's order increasing eastern rates by 10 per cent and reducing those in the rest of the country east of the Rockies by the same percentage was, it will be recalled, an interim order. It has been estimated that it may take years for the railroads to comply with the basic order of the Commission calling for a uniform classification and for uniform class rates. It will also be recalled that the rate order did not apply to that extensive and rapidly developing section known as mountain-Pacific territory.

outlines the information which should be obtained and the methods which should be followed in research for the purpose of determining statistically the economic effects of rate differences.

In the next article Mr. Edward H. Miller, formerly Special Assistant to the Attorney General and counsel for the Government in the *Class Rate* case, discusses the corrective action taken by the Interstate Commerce Commission in that case, with particular reference to the legal questions involved. Written before the announcement of the Supreme Court's decision reviewing that case, this article nevertheless constitutes an informed commentary on that decision because of its detailed analysis of the issues later decided by the Supreme Court.

The next two articles return to the antitrust aspects of the rate problem, which have been mentioned in connection with Mr. Berge's analysis of the rate-making process and Mr. Dickinson's defense of the rate-conference procedure. Mr. Arne C. Wiprud, formerly Special Assistant to the Attorney General in the Antitrust Division, discusses specifically the *Georgia* case and the suit against the western railroads, while Mr. Sidney S. Alderman, General Counsel of the Southern Railway, contributes a spirited statement of the position of the southern carriers with particular reference to the issue of dual control.

It is natural that the emphasis, thus far, has been upon those interregional rate relationships which were the subject of the Commission's historic investigation in the *Class Rate* case; but the very omission from the order of rates in the Far West highlights the importance of that region for the future. The great distances which separate the Pacific Coast from the rest of the country, the mountain ranges which wall it off, the competition from water carriers, the burgeoning industrial economy of the western cities, the postwar economic problems which may result from the great wartime migration to the Coast, all make for fascinating transportation problems. Thus the article by Professor Stuart Daggett, another outstanding transportation economist and a student of California affairs, is of particular interest and value in the presentation of a well-rounded exposition of the national transportation problem.

Finally, a symposium such as this requires a summing up, a statement of the long view, a study relating the problem of regional rate differentials to the total problem of an efficient transportation system operating in the interests of the American people—a study, in short, of national transportation policy. There could hardly be a better choice for such a task than a railway executive who, while he has broken with tradition on many issues, is a passionate crusader for a sound transportation system. Mr. Robert R. Young, Chairman of the Board of the Chesapeake & Ohio, is well known for the battles he has fought in the name of progressive railroading. There is no doubt that he is the most invigorating force which has appeared in the

In addition, the order dealt only with class rates, on which, concededly, only a minor fraction of all rail traffic moves; it was not concerned with commodity rates, exception rates, and column rates, which move the rest. While the Commission's intentions are not known, it is a fair assumption that in due course some or all of these may come under investigation, to have any regional differences that may appear judged by the standards of uniformity in the light of territorial transportation conditions.

industry in a generation. Among other railroad men he is regarded both as an insurgent and as an effective champion. In his paper Mr. Young discusses *A National Transportation Policy*—not merely “the” National Transportation Policy, as if the declaration by Congress in 1940 were immutable. In addition to commenting forthrightly on both branches of the interterritorial rate struggle—the merits of the *Class Rate* decision and the resort to the antitrust laws—Mr. Young discusses conditions which he regards as defects in the National Transportation Policy, as causes contributing to discrimination, and as obstacles which must be overcome before disputes over discrimination can be effectively dealt with.

While this symposium was in preparation there were other important developments. Most prominent, of course, was the Supreme Court’s confirmation of the *Class Rate* decision, the operation of which had been suspended during two years of litigation. The Supreme Court’s decision, announced May 12, 1947,¹³ came after all except two of the papers in this symposium had been completed, and there was no opportunity for revisions which would permit the contributors to express their reactions. It therefore falls to the Editor to make some comment on the decision.

The vote was seven to two, and Justice Douglas wrote the opinion for the majority. Justice Frankfurter dissented; Justice Jackson wrote a separate dissenting opinion concurred in by Justice Frankfurter.

The principal holdings of the majority closely parallel the findings of the Commission and the analysis of the legal issues presented in Mr. Miller’s article:

1. The Commission did not misconceive its authority in its approach to the elimination of discrimination; it did not attempt to impose uniform freight rates, mile for mile, without regard to differing costs of service, but only to eliminate territorial rate differences which were not justified by differences in territorial conditions.

2. The Commission’s findings of discrimination in class rates in favor of eastern territory and against the other three territories were supported by substantial evidence.

3. The force of those findings is not impaired by the alleged absence of a finding that the discriminatory rates are actually charged to competing shippers in the several territories. There was some showing of actual discrimination against shippers; however, the issue was not discrimination against individual shippers located in a territory, but prejudice to a territory as a whole. Since the effect of discriminatory rates is not only to impede established industries but to prevent the establishment of new ones, an unlawful discrimination is not dependent on a showing of actual injury to individual shippers—otherwise a case could never be made out against completely effective discrimination, which would operate to shut out entirely shipments from the competing region.¹⁴

¹³ *New York v. United States*, 67 Sup. Ct. 1207 (1947).

¹⁴ Here is one of the choice paradoxes of the whole controversy. Both sides sought to make capital of the admitted fact that class rates move but a minor portion of the freight, and that most of that moves in official territory. The plaintiffs relied on the fact that class rates had become “paper” rates as showing that the discriminations supposed to flow from differences in regional levels were speculative and unreal; the Commission found, and the Court agreed, that their very obsolescence tended to establish their effectiveness as a trade barrier.

4. There was substantial evidence to support the Commission's finding that the class-rate structure had prejudiced the economic development of the South and the West.

5. The finding that rate differences between the East and the South were not justified by differences in cost nor by differences in the consist of traffic was amply supported by the evidence. As for differences between the East and the West, while the evidence showed slightly higher costs in the West, the Commission was justified in taking into account the probable level of costs in the postwar period, the rate of return on investment in the territories, the territorial freight operating ratios, the low level of intrastate rates in the West, and the probable increase in class traffic resulting from the reduction in interstate class rates, and in concluding that these considerations counterbalanced the disparity in costs. Here the Court emphasized the latitude accorded an expert administrative body in forming judgments on matters within its special competence.

6. A relatively minor aspect of the case gave the Court some difficulty. The Commission's rate reduction order had applied to less-than-carload as well as carload rates. The western roads maintained that as to this type of class rates the case of discrimination had not been made out, and also that the rates were confiscatory. The Court's treatment of this contention is interesting primarily because it involves some technicalities of administrative law. On the issue of confiscation the western railroads presented to the district court new evidence which had not been placed before the Commission, and the district court received and considered it. Pointing out that correct practice requires that all such evidence be considered in the first instance by the administrative agency, Justice Douglas said that but for the provisional character of the Commission's order it would be necessary to remand the case to the Commission for preliminary consideration of the new evidence. On the merits, the Court noted that the data on costs for less-than-carload traffic were out of date and not confined to traffic moving on class rates; that such costs are largely within the control of the railroads, depending largely on the efficiency of loading and related factors; that, even so, the Commission had calculated that the new rates would be compensatory if wartime loading practices were continued; and, above all, that the Commission's order on this point was extremely tentative, the railroads having been expressly admonished by the Commission to apply for a readjustment of less-than-carload rates promptly if experience should indicate the need. As to the argument that discrimination in these rates had not been established, it was held that the Commission, having found discrimination in the main features of the rate structure, was justified in modifying less-than-carload rates along with the rest to avoid upsetting competitive relations between those who ship in small quantities and those who ship by the carload.

7. The Commission's order was not defective because it failed to afford the carriers an opportunity to "abate the discrimination by raising one rate, lowering the

other, or altering both," nor because there might be no group of carriers which could be regarded as the "common source" of the discrimination.¹⁵

8. The Commission acted within the limits of its authority to remove discrimination in ordering an *increase* of 10 per cent in class rates in the East, on the basis of its finding that those rates were not only unduly preferential but also unreasonably low, despite the fact that there was no finding that those rates were noncompensatory, or that they otherwise threatened harmful effects upon the revenues and transportation efficiency of the eastern carriers or their competitors.

9. The Commission's order in the *Class Rate* case was not rendered obsolete by its later action granting a nationwide increase in freight rates, with greater increases in the East than in the rest of the country.¹⁶

Justice Frankfurter, invoking standards which the Court had applied in less momentous cases, complained of lack of definiteness, clarity, and explicitness in the Commission's findings, particularly as to the reasonableness of the new rates to be established by the interim order. To him the addition of 10 per cent in one territory and the "mathematical coincidence" of a reduction of the same amount in the others were an apparently mechanical and Procrustean procedure for getting rid of differences, which could be supported, if at all, only by digging out of the voluminous record "inexplicit, argumentative" bits.

It is, in fact, the method which the Commission employed to remove the discriminations which it found that presents the greatest difficulty to the commentator, as it did to the Court and, one may guess, to the Commission itself as its investigation went forward. The rulings of the Court on the other issues—those, for example, dealing with the findings of discrimination, of its effects upon the industrial development of the South and West, and of the lack of justification in different transportation conditions—are of the type to be expected as a matter of course when a court is called upon to review the painstaking exercise of administrative functions. One may disagree with the conclusions reached by the Commission on the basis of

¹⁵ The legal arguments to which this holding is addressed are discussed in Miller, *Corrective Action by the Interstate Commerce Commission, infra*.

¹⁶ *Ex parte* No. 162, 264 I.C.C. 695, 266 I.C.C. 537 (1946).

On July 7, 1947, petitions for rehearing in *New York v. United States* having been denied (67 Sup. Ct. 1527, 1528 (1947)), the Commission issued its Second Supplemental Report in Docket No. 28300, the *Class Rate* Investigation, instructing the railroads to proceed with the adjustments ordered in that investigation. The procedure prescribed by the Commission for accommodating those adjustments to the general increases permitted in *Ex parte* 162 was as follows: (1) The rates in effect at the time of the order in the *Class Rate* case, in 1945, are to be increased by 10 per cent in eastern territory and decreased by 10 per cent in the other affected territories and interterritorially, as provided in the interim order; (2) thereupon, the rates so adjusted may be increased uniformly by 22½ per cent in lieu of the varying percentages originally allowed (25 per cent in the East, 20 per cent in the South and West, and 22½ per cent interterritorially) in *Ex parte* 162. The effect is to adhere closely, percentage-wise, to the degree of equalization contemplated by the interim order. If the delayed equalizing adjustments had been superimposed on the rate structure resulting from *Ex parte* 162, or if the increase originally authorized in *Ex parte* 162 had been superimposed on the 1945 structure as modified by the interim order, the change in the percentage relationships between the regional levels would have been accentuated. However, the absolute competitive disadvantage to the average southern shipper will be greater than it would have been originally under the interim order or under either alternative method of accommodating the two adjustments.

the monumental record in the *Class Rate* case, but it would require an extraordinary projection of the courage of one's convictions to maintain that there was not enough there to support those conclusions as the judgments of reasonable men.

Justice Frankfurter's incredulity concerning the "mathematical coincidence" of the 10 per cent adjustments can probably be dismissed as resulting from failure to give sufficient recognition to the interim character of those adjustments. Primarily, the Commission ordered rate equality—a clear-cut concept dependent on no preconceived percentages—and prescribed the uniform rates which were ultimately to apply. Those rates could not be made effective, however, until the uniform classification was completed; and so the Commission, frankly to approximate the desired equality in the interim, ordered the 10 per cent adjustments. This, however, does not dispose of the fundamental point, which is that the Commission's method of eliminating the differentials which it found unlawful was essentially that of splitting the difference.

Consider the problem: The Commission had found differences in territorial rate levels which it regarded as discriminatory and as unjustified by differences in transportation conditions such as costs of service. It followed that there should be equality; but which set of rates was out of line, which required adjustment? To achieve equality by cutting southern and western rates down to the level of those in the East might have entailed serious revenue problems for the southern and western carriers. The Commission found *both* that rates in the South and West were too high and that those in the East were too low, and that there should be corresponding mutual adjustments. It is just at this point that the difficulty arises, for raising rates without a showing that they are inadequate for revenue purposes involves troublesome problems of construction of the Interstate Commerce Act. Any other method of equalization, except that of cutting all rates to the eastern level, would have involved the same problem in greater or less degree. If the order had been to cut southern and western rates by 11.6 per cent and raise eastern rates by 8.4 per cent the "mathematical coincidence" would have disappeared, but the essential problem would have remained: Was the increase in eastern rates defensible?

The Interstate Commerce Act prescribes standards, or ideals, for railroad rates which in the aggregate call for a perfection that few human institutions can attain. They must not be unjust or unreasonable or unlawful in any respect "in and of themselves or in their relation to each other"; they must not discriminate against any person, company, firm, corporation, locality, category of traffic, port, port district, gateway, transit point, region, district, or territory; they must produce enough revenue to permit adequate and efficient railway transportation service, but generally no more than is required to cover the lowest cost consistent with the furnishing of such service, plus a fair return on the property used in rendering it. The Commission was confronted with a difference in rates which it found unjustified by differences in transportation conditions, and which should therefore be eliminated as a

discrimination under the Act; yet there was no showing that eastern rates were too low by reference to the revenue standards of the Act.

The way out of this dilemma involves a concept which is not easy for the uninitiated in rate matters. There is probably no such thing as a railroad rate or group of rates which is just precisely right—which is both the maximum and the minimum from the standpoint of reasonableness for revenue purposes, and which cannot be raised a bit or lowered a bit without violating the Act. Such a rate would indeed be a mathematical coincidence, and an economic one as well. There is, in fact, as the majority of the Court recognized, a “zone of reasonableness” for revenue purposes within which rates can be adjusted down or up without depriving the affected carriers of a fair return, impairing the efficiency of their service, subjecting them or their competitors to ruinous competition, or imposing an excessive burden on shippers and consumers.¹⁷ Such a zone, such a play between parts of the statutory scheme which might be expected to mesh with precision, may be difficult to accept; there is, however, no way of avoiding it. It results from our inability to allocate joint costs without some margin of error, from our inability to foresee precisely the effects of rate adjustments on traffic in the future, and generally from the insurability of such concepts as those of which the revenue standards of the Act are compounded.

Simple acceptance of the fact that there is such a zone is all that is necessary to render the Commission’s method understandable. Let it be conceded that eastern rates were not below the bottom of the range of reasonableness for revenue purposes, and that southern and western rates were not above the top; nevertheless the disparity between them as they were disposed within the range, being unjustified by differences in transportation conditions, was found by the Commission to be unlawful and subject to correction. For such adjustments within the zone no standard would appear to be available except that of equality; and in this light the Commission’s decision as an interim expedient to move each group equally toward the midpoint, rather than to employ some elaborate formula which might result in a different point nearby, takes on the aspect of practical statesmanship.

It was this matter of raising eastern rates which troubled Justice Jackson, although the warmth of his feeling led him also to express other, much less tenable, objections to the Commission’s order. His dissenting opinion, which begins, “I find it impossible to agree with this extraordinary decision,” is itself remarkable. He refers to the eastern rate increase as a “surtax,” or “surcharge,” not needed by the eastern roads for revenue purposes but added for the purpose of handicapping the economy of that region.¹⁸ We have seen that such a reaction is not unnatural in view of the

¹⁷ *United States v. Illinois Cent. R. R.*, 263 U. S. 515, 524 (1924); *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, 479 (1935); *Jefferson Island Salt Mining Co. v. United States*, 6 F. 2d 315 (N. D. Ohio 1925); *Scandrett v. United States*, 32 F. Supp. 995 (Ore. 1940), *aff’d* 312 U. S. 661 (1941). Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585 (1941); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1943); Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 *COL. L. REV.* 488, 521 (1944).

¹⁸ According to newspaper accounts of the session of Court at which the opinions were read, Justice

competing standards of the Act. But Justice Jackson does not join issue with the solution of the dilemma which the Commission and the majority of the Court adopted; instead, although he expressly confines himself to the eighth ruling of the majority, he bolsters his argument against the eastern rate increase by the implicit rejection of some of the other points on which that ruling rests. Thus he says that the eastern rate increase was designed to make transportation as expensive in the East as it is in other areas "where there is less traffic to divide the cost." This is an obvious reliance upon the argument that the greater density of traffic in the East results in lower costs for railroad service there—an argument which was rejected in the Edwards report and by the Commission. Of course, one may be unpersuaded by the Edwards report, as were two members of the Commission;¹⁹ but the question is whether that report provided a reasonable basis for the finding of the majority of the Commission. Justice Jackson nowhere says that it did not. Similarly he speaks of taking away from the East "one of the advantages inherent in its density of population." Again, he attributes the Commission's order to "a new theory of 'discrimination,'" saying:

It has never been thought to be an unlawful discrimination to charge more for a service *which it cost more to render*. . . . But now it is held to be an unlawful discrimination if railroads of the Northeast do not make the same charge as other railroads in the South or West, for a different transportation *under different cost conditions*. [Italics supplied.]

No explanation is given for this repeated refusal to recognize the Commission's findings as to differences in transportation conditions and the Court's ruling that those findings had substantial support in the evidence.

The Government, says Justice Jackson, "frankly advocates this new concept of discrimination as necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic and perhaps its political life more nearly to its heart's desire." This interpretation is apparently based on a statement quoted from the Government's brief which, to many readers, will appear to say just the opposite. It seems reasonably clear, at least, that the Government lawyers did not wish to be understood as advocating any such concept;²⁰ and the Commission itself specifically disclaimed any such intention.²¹

This decision of the Supreme Court was, as a matter of fact, generally expected. Some of the contributors to this symposium confidently predicted that the Commission's findings would be upheld, and those contributors who express the point of view of the railroads have concentrated their attention on the other branch of the

Jackson departed from his text to interject that "this majority opinion is on the same theory as when you put a lead on a fast horse to slow it down." N. Y. Times, May 13, 1947, p. 18, col. 5. According to the same account, Justice Frankfurter likened the Commission's solution to "burning down the barn to roast a pig"—an Elianic allusion which does not appear in the official opinion.

¹⁹ Commissioners Porter and Barnard, dissenting, in *Class Rate Investigation*, 262 I.C.C. 447, 709, 717, 725 (1945).

²⁰ See Miller, *Corrective Action by the Interstate Commerce Commission*, *infra*, division II B.

²¹ *Class Rate Investigation*, 262 I.C.C. 447, 692 (1945).

problem—the resort to the antitrust laws by some proponents of rate reform. Here, too, there has been a recent development. The Reed-Bulwinkle Bill,²² which exempts from the antitrust laws certain agreements entered into by railroads with the approval of the Interstate Commerce Commission, was passed by the Senate on June 18, 1947, after the adoption of an amendment of questionable effect, proposed by Senator Russell of Georgia, providing that the bill should not deprive the Supreme Court of jurisdiction in the case of *Georgia v. Pennsylvania Railroad*,²³ nor change any principle of law applicable in the determination of that case, nor deprive any party to that case of relief to which he would otherwise be entitled, nor render lawful any act found unlawful in that case.²⁴ No reference was made to the anti-trust proceeding by the United States against the western railroads.

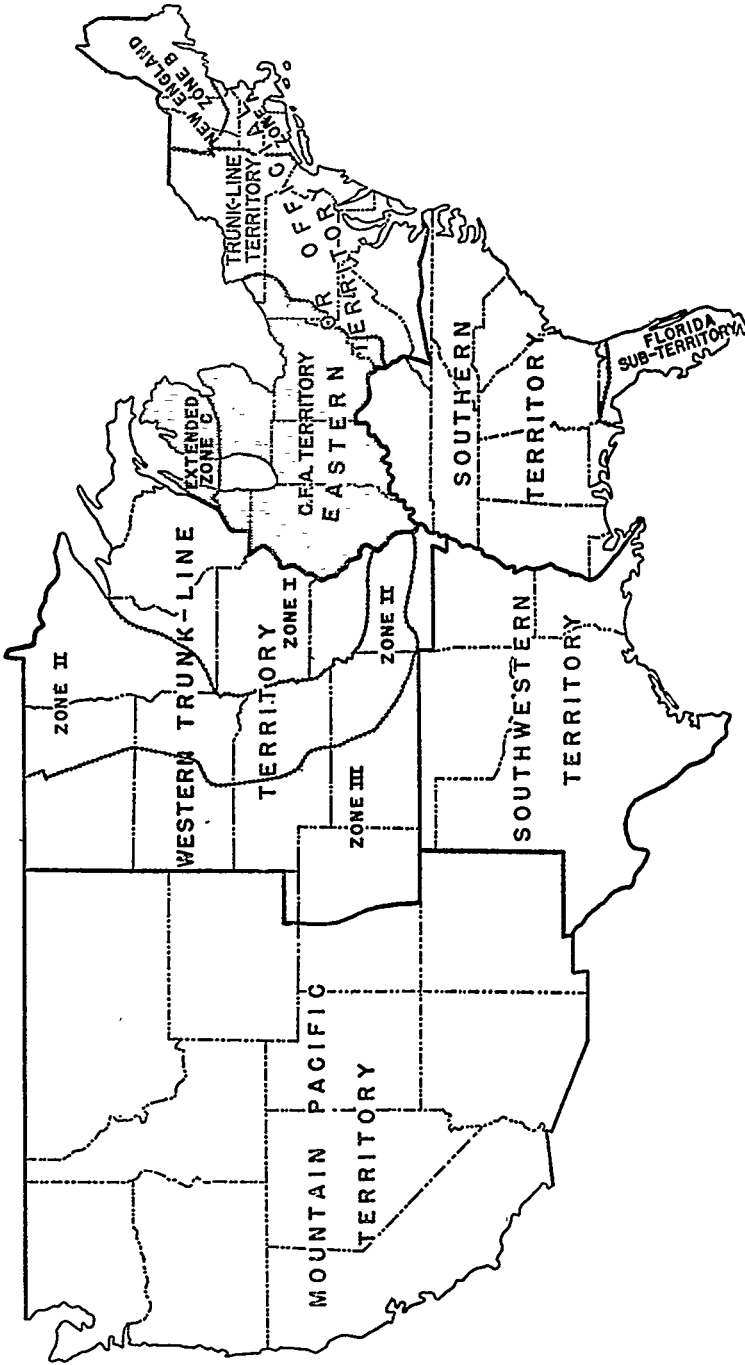
Thus, as this symposium enters the final stages of publication, final legal approval has been given to the Interstate Commerce Commission's approach to the correction of rate inequalities, and the struggle over the attempt to use the antitrust laws as an approach to the same end is about to reach its climax. Whatever the outcome of the antitrust struggle may be, it will be interesting to watch the effect of the new rate relationships on the development of the South and the West. Someone, not an adherent of the cause of rate equalization, once said that he wished the rate demands of the South and West could be fully met without further ado; it would then become apparent that the rate structure had not been a primary factor in the retarded industrial development of those sections, and a great deal of energy could be released for application to the removal of more important obstacles. The conditions for such a test are now imminent.

BRAINERD CURRIE.

²² S. 110, 80th Cong., 1st Sess. (1947).

²³ *Supra*, note 8.

²⁴ 93 CONG. REC. 7345-7363 (June 18, 1947). In the Seventy-ninth Congress the House passed the Bulwinkle Bill on December 10, 1946.



MAP OF RAILROAD FREIGHT RATE TERRITORIES