THE RATE-MAKING PROCESS

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I

INTRODUCTION

Since 1943 a great deal has been said and written concerning the function of rate bureaus and conferences in the making of rates to be charged for common carrier transportation service. Defenders of the rate bureaus have frequently maintained that the present system of rate conferences must be preserved or chaos and confusion will reign in the making of transportation rates.

These claims are made in response to charges set forth in suits by the Federal Government and the State of Georgia that railroad rate bureaus were being operated in contravention of the Sherman Act.¹ In the Seventy-eighth, Seventy-ninth, and Eightieth Congresses bills were introduced to exempt interstate carriers regulated by the Interstate Commerce Commission from the application of the antitrust laws.² On occasion the Department of Justice has been vigorously criticized for bringing a suit to enforce the antitrust laws in an area in which it is urged that the Interstate Commerce Commission should have exclusive jurisdiction. The assertion is made that interference with the present method of operation of rate bureaus and conferences would be disastrous because the rate-bureau procedure is absolutely necessary and cannot be changed if the carriers are to comply with the Interstate Commerce Act.

The purpose of this paper is to examine the rate-making process as carried on through the rate-bureau mechanism to ascertain whether the activities are necessary for compliance with the Interstate Commerce Act, or whether such activities could be altered to meet the requirements of the antitrust laws without handicapping the carriers in their efforts to comply with the Interstate Commerce Act. The process is termed private rate-making, as opposed to the regulatory rate-making provided for by statute to be carried on by the Interstate Commerce Commission. While much of what is written here applies to rate bureaus for other forms of transportation, railroad rate bureaus will be the topic for discussion and analysis. To attempt to deal with

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the rate-making activities of bureaus in each form of transportation would entail a
discussion too lengthy to be practicable. The fundamental issues are the same and
can be covered by an examination of rail bureaus. The analysis will take into account
the operating regional rate bureaus as well as the appellate machinery superimposed
on them and forming an integral part of the private rate-making procedure.

II
EARLY COURT DECISIONS ON RATE BUREAUS AND THE SHERMAN ACT, AND SUBSEQUENT
ORGANIZATION OF RATE BUREAUS

Before taking up the private rate-making process a brief résumé of the experience
of rate bureaus under the Sherman Act will be given, followed by an account of
the organization of the present private rate-making machinery.

In 1889 many of the railroads operating west of the Mississippi River entered into
an organization known as the Trans-Missouri Freight Association. The preamble
to its articles of agreement announced that:

For the purpose of mutual protection by establishing and maintaining reasonable rates,
rules, and regulations on all freight traffic, both through and local, the subscribers do
hereby form an association to be known as the Trans-Missouri Freight Association, and
agree to be governed by the following provisions. . . .

Rates were established by a committee appointed pursuant to the agreement and
any member railroad violating the established schedule of rates was subject to a
penalty. A member railroad could withdraw from the association on giving thirty
days' notice, but while a member it was bound to charge the rates fixed, under a
penalty for not doing so.

The Sherman Act became law in 1890. In 1892 action was brought by the Federal
Government against the association alleging a combination for the purpose of
fixing rates, rules, and regulations for freight traffic. In 1897 the Supreme Court
held the Trans-Missouri Freight Association in violation of the Sherman Act and a
decree was entered dissolving the association and perpetually enjoining further opera-
tion of the combination.

The year 1896 saw the formation of the Joint Traffic Association, composed of
railroads operating between Chicago and the eastern seaboard. It was agreed that
the association should have jurisdiction to fix rates and fares and from time to time
to change them. Each railroad, however, reserved the right to change the rates
applicable over its own lines. In the same year the Government instituted proceed-
ings, again charging a combination for the purpose of fixing rates, rules, and
regulations for all rail traffic. This combination was declared unlawful in 1898 by
the Supreme Court and a decree was entered perpetually enjoining the practices
carried on by the association.

The articles of agreement are quoted and summarized in United States v. Trans-Missouri Freight
Ass'n, 166 U. S. 290, 292 et seq. (1897).
United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897).
Between 1898 and the early 1930's the railroads refrained from organizing any further combination openly to fix rates and fares or to establish rules and regulations. A number of national organizations in the nature of trade associations were maintained for various purposes. Among the most important of these were:

1. The American Railway Association, which was a loose national association having as members practically all railroads in the United States as well as railroads in Canada and Mexico. It was organized in 1891 for the purpose of handling certain questions of general interest arising for the most part in railroad operating departments. From the time of its organization until the decision of the Supreme Court in the Trans-Missouri case in 1897 it had jurisdiction over rates and charges; but after that decision its by-laws expressly prohibited it from taking jurisdiction over rates and charges. One of its most important early functions was to establish principles for the handling of the cars of one railroad by another. It also dealt with problems arising in connection with such matters as demurrage and standards applicable to equipment. Subsequently, it fostered research and experimentation in railroad transportation. It functioned largely through committees composed of railroad men expert in the specific problems with which it dealt. These committees made a number of valuable reports that were influential in standardizing methods of operation. This association was also responsible for the publication of periodic reports concerning condition of rolling stock, the amount of car loading, and similar statistical and trade-reporting activities characteristic of trade associations. It had a loose organization directed by a board chosen annually from among the presidents and vice-presidents of the member roads.

2. The Bureau of Railway Economics, which was an independent organization supported by the railroads, managed by a director, and having for its function the making of economic and statistical studies for use by the railroads in rate cases, valuation cases, public relations work, and the like. It was entirely independent of all other railroad trade associations and organizations.

3. The Railway Accounting Officers' Association, which consisted of accounting representatives of the principal railroads of the country working under the direction of an executive committee consisting of a comparatively small number of chief railroad accounting officers. It maintained a permanent secretary at Washington, D. C., for a great many years and studied methods for improving railroad accounting practices and for bringing them as far as possible to a uniform basis.

4. The Treasurers' Association, which was similar in organization to the Railway Accounting Officers' Association except that it did not maintain a permanent office nor a paid secretary. Its work was carried on through correspondence and through annual meetings and dealt with the treasury problems of the railroads.

5. The Association of Railway Executives, which was established in 1914 to deal with matters of common interest to all the railroads. Originally its jurisdiction was very broad and included rate matters, but subsequently the articles of organization were amended to prohibit the association from considering rate cases, traffic prob-
lems, propaganda, advertising, and labor relations. Thereafter the association dealt primarily with federal legislation and general questions of policy relating to legislation. It was a loose organization having an executive committee, which in later years became almost obsolete, but no real directing body save an advisory committee of about fifteen members who met from time to time at the call of the chairman. It maintained a permanent office in Washington with a small staff consisting of the chairman, who devoted only part of his time to the work, a general counsel, a general solicitor, a secretary, a treasurer, and other lesser officers. The general counsel devoted all of his time to the work of the association and was its most important officer.6

In addition to these organizations the railroads maintained rate bureaus and conferences—operating organizations—in the various rate territories. Their jurisdiction ranged from single states or smaller units to entire sections of the country, such as the Southeast. It is quite probable that the activities of these rate bureaus resulted in the concerted fixing of freight rates in violation of the Sherman Act, but there was no organization to coordinate the activities of these rate conferences on a national scale until 1934, when the Association of American Railroads was formed.

There had been formed in 1932, however, among the railroads in the area west of the Mississippi River, the “Commissioner Plan, Western District,” under the so-called Western Agreement administered by an officer known as the Western Commissioner. According to the plan, which was superimposed on the rate bureaus operating in the West, the Western Commissioner considered controversies arising when a railroad party to the agreement desired to inaugurate better service, improved facilities, or lower rates, and any other party to the agreement protested against such changes. Under the terms of the Western Agreement the changes could not be put into effect until after notification to all parties to the agreement, and, in case of protest and reference of the matter to the commissioner, until after formulation of a proposed solution of the controversy by the Western Commissioner. In the event that the commissioner’s proposed solution was not accepted, the matter was referred to a committee of directors, composed of representatives of banking and financial interests.

Mr. W. A. Harriman, one of the organizers of the plan, has pointed out that its purpose was to subject western railway management decisions concerning rates and practices to review by the board of directors:

Railroad directors are charged with a duty of directing the affairs of their railroads. They do not run the railroads—that is the duty of management. But the directors do have the duty of formulating policies and of supervising the activities of management with respect thereto. Policies cannot be formulated without knowledge and management cannot be supervised without understanding.

The directors already supervised expenditures by management to a very close degree and yet large sums could be lost in unfortunate traffic experiments or improper traffic

policies without the matter coming to the notice of directors until after the damage was done. With the onset of depression conditions, directors made closer and closer scrutinies of expenditures, but were still powerless to exercise any effective supervision over policies of rates and practices involving substantial sums.

The directors' committee created by the Commissioner plan was designed to correct this situation. To them the Commissioner reported many of the problems which came to him—so as to give the directors the benefit of his investigations and research. All problems in which the recommendations of the Commissioner were not adopted came to the committee. . . . In this committee of directors all personality, prejudice, and suspicion of traffic officers was left behind, the necessity of management to uphold a subordinate did not exist, because no president, vice president, or trustee was eligible for membership. . . . The committee was merely a forum for consideration and discussion, for the impact and grinding of ideas.7

One example will show the potency of action taken by the committee of directors. The Western Commissioner's authority was invoked when the Chicago Great Western announced its intention to assert independent action and publish reduced rates on packinghouse products. After hearings the commissioner concluded that the reductions should not be made effective. This conclusion was unacceptable to the Great Western; so the commissioner promptly reported that railroad's insubordination to the committee of directors. A resolution was immediately adopted by the committee calling upon the Great Western to reconsider and recede from its proposed action. Shortly thereafter President Joyce of this recalcitrant railroad was summoned to New York to discuss with a group of the committee of directors his declination of the commissioner's decision. Later, in his annual summary, the Western Commissioner reported:8

. . . As a result of the conference with the subcommittee of the Committee of Directors, the Chicago Great Western Railroad Company indicated a willingness to abide by my conclusions under the Commissioner Agreement, and the proposal was withdrawn.

With the experience of effective action of this nature under the Western Commissioner Plan as a background, the Association of American Railroads was formed. In 1933 preliminary discussions among banking and investment groups led to formation of a steering committee of railroad directors (subsequently known as the Committee of Nine) to represent stock-holding and investment interests in creating a national organization for the collective control of railroad affairs, including, of course, freight rates.9

Concerning the need for unified authoritative control over rates, one of those interested in forming a national organization wrote:10

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7 *Hearings before the Senate Interstate Commerce Committee on S. 942, 78th Cong., 1st Sess. 974-975* (1943).
9 *See Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. Res. 71 of the 74th Cong., 75th Cong., 2nd Sess., Part 23, 10052 (1938).*
The necessity for a strong effective committee or organization representing the railroad industry as a whole as opposed to the interests of individual railroads is emphasized at the present time in connection with the weakness the railroads are showing in protecting their rate structure.

General Atterbury of the Pennsylvania Railroad took the lead in preparing a plan of organization to embrace all the railroads. The conception evolved by the Pennsylvania group was a direct and simple one. The proposal was that all existing trade associations and rate bureaus be merged into a single, integrated, pyramid-shaped structure with authority residing in a national organization located at the apex. Or, as it was expressed by Mr. R. V. Fletcher, Vice-President of the Association of American Railroads:

... In the spring of 1933, I found ... a number of independent organizations which it seemed to me might very profitably, in the interest of economy as well as of efficiency, be consolidated into a single organization. ...

It always seemed to me ... it would be advisable to consolidate all these various organizations into one. ... And they were consolidated together under one head [Association of American Railroads], under the direction and control of the board of directors.\(^{14}\)

Mr. Fletcher gave as a principal reason for the organization of the Association of American Railroads the recommendation by the Federal Coordinator of Transportation of the importance of a “more perfect union” among the railroads.\(^{12}\)

In an effort to attain the authority recognized as essential to the success of such an arrangement, early drafts of the plan for an authoritative national association contained a provision for penalizing any member who failed to follow the recommendation of the national organization or who refused to submit to compulsory arbitration of controversial questions. More judicious counsels prevailed, because it was realized that an express statement of compulsion was unnecessary and might attract undesirable attention. This was clearly indicated in an exchange of documents between J. L. Eysmans, assistant to General Atterbury, and John J. Pelley, who later became President of the Association of American Railroads. Pelley wrote to the Pennsylvania:

(2) I favor compulsory arbitration. Should like to see the plan changed so as to obligate a railroad joining the Institute to abide by the decisions of the majority of the board of directors, or arbitrate and abide by the decisions of the board of arbitration, with the understanding that the decisions of the board become effective immediately, adjustments, if any, to be made when arbitration is concluded. For fear that some roads may not be willing to obligate themselves for an indefinite period, the agreement might be limited to five years.\(^{13}\)

Mr. Eysmans replied:

In regard to your note to the General about the reorganization: ... As to No. 2: I think you must read Section 6(g) and 21(c) together to find the “teeth.” If any road

\(^{14}\)Hearings before the Senate Committee on Interstate Commerce on H. R. 2536, 79th Cong., 2nd Sess. 1371-1372 (1946). (Emphasis supplied.)

\(^{12}\)Id. at 1372.

\(^{13}\)Record before the Special Master, State of Georgia v. The Pennsylvania Railroad, et al., No. 11—Original, Supreme Court of the United States, October Term, 1945, State Exhibit 22. The proposed organization was generally referred to as “the Institute.”
does not carry along with arbitration and the decisions of the Board, it must get out of the Institute, and as there will no longer be any A. R. A. you can see it is practically impossible for a railroad to withdraw.

This change was made because Judge Fletcher believed it would avoid the danger of having the whole plan attacked as being a violation of the antitrust laws. This danger would be increased by a penalty clause of this kind, which would require the railroads to agree in advance to the imposition of fines and penalties. Furthermore, generally, the courts hold arbitration clauses cannot be enforced by legal proceedings since the courts are jealous of their jurisdiction and will not allow people to resort to their remedies at law. The Judge has felt that since the penalty of disregarding a decision of the Institute, and refusal to submit to arbitration is expulsion from the Institute, this would be sufficient punishment without incorporating in the plan a provision which may be difficult to enforce, and which would look bad if the United States Government should challenge the whole set-up as being possibly in conflict with the antitrust laws.

Even with the penalty clause omitted, the "teeth" in the form of compulsory arbitration caused some of the planners serious apprehension of public dissatisfaction and complaint. Mr. Fletcher, at the time Chief Counsel of the Association of Railway Executives, and one who was very active in organizing the Association of American Railroads, found it difficult to believe that a railroad which had agreed to all the terms of the plan would thereafter in violation of its agreement refuse to conform thereto or to arbitrate. Any railroad guilty of such a breach of "a gentleman's agreement" would, in Fletcher's opinion, "simply be outside the pale." Mr. Fletcher's advice prevailed and the plan in final form contained merely a statement that the members should recognize that policies announced by the new Association of American Railroads would be authoritative and would be supported.

On September 21, 1934, the plan was approved by a joint meeting of the member lines of the American Railway Association and the Association of Railway Executives. The cooperation of railroad directors was assured the association through direct liaison with the committee representing the financial interests, which stood ready to exert its influence and the influence of its associates among directors and substantial stockholders to compel the subordination of interests of individual railroads to the dictates of group interest.

President Williamson of the New York Central expected that the activities of the association would produce some unhappiness, but, as he observed to President Atterbury of the Pennsylvania, all must expect in the common good "to be pinched in places where it will hurt."

The smaller roads were somewhat dubious of the mutual benefits to flow from the pinching. At least two small roads, the Bangor & Aroostook and the Wheeling & Lake Erie, sought to join with specific provisions reserving a veto power over association decisions affecting their respective roads. Even this limited retention of individual initiative was rejected by the association, and Vice-President Cleveland
sought to reassure the doubtful by assuring them that as far as possible his policy would be "a cooperative one through leadership rather than through coercion."\(^7\)

Significantly, he did not disavow the power to coerce in the event his leadership should prove ineffectual. Ultimately, of course, the very power that produced their fears compelled the small roads to join.

There followed a brief period of felicitations on the part of those forming the new association, with the banking interests claiming a large measure of credit and stating to Mr. Pelley that, despite the evident spirit of cooperation, cases might well arise where divergent interests might make difficult of accomplishment measures for "the benefit of the industry as a whole," and that the interests of the individual roads must be subordinated to those of the whole industry. For effectuation of such a policy, Mr. Pelley was assured of "support" and "assistance" of the financial groups represented on the committee.\(^8\)

The background and purpose of the organization of the Association of American Railroads is given in order that it may be seen that the private rate-making function is merged into a single integrated structure resting at the bottom upon the regional bureaus and their committees and bound together at the top by an association having the authority and power to enforce its mandates by economic discipline of its members. Mr. Pelley has admitted that the Association of American Railroads exercises control over matters in the rate bureaus beneath it in the private rate-making structure.\(^9\)

The Association of American Railroads has gone so far as to exercise its power over rates even before the presentation of the request for a reduction to the railroads originating the traffic. In 1938, Mr. Cleveland, Vice-President-Traffic, upon learning that the Secretary of Agriculture contemplated asking for a reduction in citrus fruit rates in order to increase consumption of the large production of that fall, wrote southern and western railroads that "no commitments should be made by any single origin group but that when requests are received they should be handled collectively. . . ."\(^20\)

The result was that the matter was handled from the headquarters of the Association of American Railroads in Washington. There was no reduction in citrus fruit rates.

### III

**Regional Organization of Railroad Rate Bureaus**

There are three major freight classification territories in the United States, which may be delineated generally as follows: official territory, east of the Mississippi River, north of the Ohio and Potomac rivers, including most of Virginia; southern territory, east of the Mississippi River and south of official territory; and western territory, west of the Mississippi River. There are five major freight-rate territories. Official

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\(^7\) Id., State Exhibit 35.

\(^8\) Id., State Exhibit 39.

\(^9\) Id., vol. 17, p. 5813.

\(^20\) See *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536, 79th Cong., 2nd Sess. 1946* (1946), for the documents pertaining to handling of the citrus fruit adjustment.
Figure I
RAILROAD RATE COMMITTEES AND ASSOCIATIONS
IN THE UNITED STATES

WESTERN ASSOCIATION OF
RAILWAY EXECUTIVES

WESTERN
COMMISSIONER

WESTERN TRAFFIC
EXECUTIVE COMMITTEE

CHAIRMAN-
WESTERN TRAFFIC
EXECUTIVE COMMITTEE

CONFERENCE
COMMITTEE

NORTH PACIFIC COAST
PACIFIC FREIGHT
TRANSCONTINENTAL
MONTANA LINES
NORTHERN LINES
PACIFIC TARIFF BUREAU
PACIFIC FREIGHT
TARIFF BUREAU
MONTANA COMITTEE
TARIFF COMMITTEE

EXECUTIVE
EXECUTIVE
EXECUTIVE
COMMITTEE
COMMITTEE
COMMITTEE

CHAIRMAN

FREIGHT
TRAFFIC
MANAGERS
and southern rate territories are roughly coextensive with their respective classification territories, while western classification territory is divided into southwestern, western trunk-line, and mountain-Pacific rate territories.

The rate bureaus have generally adapted their organization to these rate territories and their subdivisions. Figure I shows the private rate-making machinery of the railroads and the relation of its various parts, from the lower committees in the operating rate bureaus at the bottom of the chart to the Association of American Railroads, at the top. Generally, the matters considered are introduced at the bottom and move upward, with authority for decision-making becoming progressively greater with progress toward the top of the structure—the final authority being vested in the Association of American Railroads.

To illustrate the railroad rate bureau procedure, the steps in the rate-making procedure on a proposal involving an intraterritorial rate revision applicable in southern territory will be traced through the Southern Freight Association. A proposal for a rate change may be initiated by member rail lines or by shippers and addressed to the chairman of the Southern Freight Association, who is also empowered to initiate proposals. Proposals are distributed to member lines and unless one unfavorable response is received within a stipulated time, the Southern Freight Association assumes the approval of the proposal by the membership.

Concurrently with submittal to the membership, the proposal is referred to the Standing Rate Committee for investigation and recommendation. This committee, composed of rate bureau employees and not railroad employees, is shown on Figure I at the bottom of the Southern Freight Association. Notification is given the public of the proposed change by a bulletin and through the medium of trade publications such as the Daily Traffic Bulletin. Upon reasonable request therefor, the chairman arranges for a public hearing if notice of the proposal has been published. Public hearings are usually conducted by the Standing Rate Committee once each week. Representatives of the public are allowed merely to present their views at these hearings but are not allowed to be present when discussions are held and decisions are made on proposals.

The articles of association provide that after the public hearing the recommendation of the Standing Rate Committee is made to the chairman of the Southern Freight Association. An objection by this committee has the same force as that of a member line. In practice the Standing Rate Committee may object before the public hearing is held. If this committee or a member line does not object, the proposal is held approved and a document called a disposition advice is issued. The chairman is empowered to fix the date upon which the change is to become effective. As there is no restriction on what date he may set, this power is very important. As will be shown, the chairman wields other great powers.

However, if there is an objection by either the Standing Rate Committee or by a member line, making up the General Freight Committee, regardless of whether the member line is in position to handle the traffic which is the subject of the pro-
Proposal to change the rates, the procedure for the disposition of the proposal is left to the Executive Committee of the Southern Freight Association, shown a step higher in the hierarchy on Figure I.

Although the articles of association are vague on the subject, apparently rate changes to which one or more objections are made are considered by the General Freight Committee, the action of which is by majority vote. The action of this committee is announced by the chairman. Again the chairman is given authority to fix the effective date of the change. A member line may appeal the action of the General Freight Committee to the Executive Committee. The chairman is charged with the duty of appealing to the Executive Committee actions of the General Freight Committee which he considers “inimical to the interests of the southern carriers as a whole.”

The Executive Committee’s decision upon the proposed rate change is determined by a majority of those members expressing views. A member may appeal the action to the Traffic Executive Association—Southern Territory, another notch up in the hierarchy. The chairman of the Southern Freight Association is charged with appealing from the actions of the Executive Committee when he considers the decision of that committee inimical to the interests of the southern carriers as a whole.

It should be kept in mind that the articles of association of the Southern Freight Association provide that pending consideration by these various groups no action shall be taken toward making the rate change effective and available for use by the shipping public.

Appeal lies from the decision of the Traffic Executive Association—Southern Territory to the Southeastern Presidents’ Conference, thence to the Association of American Railroads. In view of this maze of appellate machinery to which the member lines are bound, the right of independent action mentioned frequently in various articles of association of the rate bureaus is of questionable value to a member bound by the private rate-fixing system. Evidence is available that a single railroad wishing to make a downward adjustment of rates applying entirely on its own lines has, in the course of traversing the maze, been dissuaded from exercising its managerial discretion in lowering rates to meet the needs of shippers using that railroad. The following case is an example of such evidence.

On October 11, 1941, the Southern Railway submitted to the Southern Freight Association a proposal for a reduced rate on logs from certain stations in northwestern Alabama to Alta Vista, Virginia, the entire movement being over the lines of the Southern Railway. The Southern Railway in its proposal stated that it felt that the reduced rate was necessary in order to enable the logs to move from the Alabama points. When the proposal was submitted by the Southern Freight Association to its members, the principal rail objection was predicated upon the dangerous competitive influences that might be set in motion by the suggested arrangement.

21 The articles of association of the various rate bureaus are on file with the Interstate Commerce Commission and are available for inspection by the public.

22 Record before the Special Master, supra, note 13, State Exhibit 194 et seq.
The proposal was disapproved initially by the General Freight Committee by majority vote. It was then appealed to the Executive Committee where it was again disapproved by majority vote. Finally an appeal was taken to the Traffic Executive Association—Southern Territory. On July 20, 1943, twenty-two months after the proposal was first filed, it was stricken from the docket of the Traffic Executive Association.

This illustration demonstrates that the power of the rate-bureau organization to coerce, prevent, hinder, and delay the filing of rate proposals is not limited to situations where the railroads confer upon the formation of joint rates. Here the entire movement was over the lines of the proponent railroad; even so, its managerial judgment was subjected to the concerted judgment of the other members of the Southern Freight Association, none of whom were parties to the rate proposed.

Another important aspect of railroad rate-bureau procedure is the handling of a revision in an interterritorial rate, that is, one applicable for the movement from one rate-bureau jurisdiction into another. This may be illustrated by tracing the major steps required by rate-bureau procedure when the proposed change involves a rate change applying from southern territory to trunk-line territory, one of the subdivisions of official territory.

The proposal is submitted for approval to the Southern Freight Association by a rail carrier in southern territory that wishes to obtain rates for a southern producer to allow him to ship to trunk-line territory on a basis lower than the existing rates, which are in many cases too high to allow producers to enter the official territory profitably. The rate-bureau procedure does not allow the rail carrier in southern territory to negotiate directly with the official-territory lines necessary to make complete routes for movement of the traffic. The proposal must conform to the rate-bureau procedure, which requires obtaining approval of other members of the Southern Freight Association as a first step. At the same time that the proposal is referred to members of the Southern Freight Association, it is submitted to all three jurisdictions in official territory—the New England, Trunk-Line, and Central Freight Associations—for consideration, despite the fact that the rates proposed are to apply to only one of these territories, trunk-line territory.28 By this procedure official-territory railroads that do not handle the traffic vote upon the measure.

Assume that one of the three private rate-making groups, the New England Freight Association, disapproves the proposal. The procedure of the Traffic Executive Association—Eastern Territory for handling interterritorial proposals provides that:

Propositions shall not be considered disposed of unless action by the CFA [Central Freight Association], TLA [Trunk-Line Association], and NEFA [New England Freight

28 The rate-making subdivisions of official territory and their approximate boundaries are: New England territory, embracing the six states generally understood to constitute New England; trunk-line territory, the area west of New England to the so-called Buffalo-Pittsburgh line, a line drawn from Buffalo to Pittsburgh and thence following the Ohio River along the western boundary of West Virginia; and central territory, the area west of trunk-line territory to the Mississippi River.
Association], is uniform. When the action of the separate Official Territory jurisdictions is otherwise, the proposition will be docketed for consideration and disposition by Joint Conference of Official Territory lines [composed of representatives of the three official territory rate bureaus].

The procedure of the Joint Conference of official-territory lines provides much the same:

No general basis [of rates] shall be established in any territory unless concurred in by the three territorial committees, and, in the event of negative action taken on a proposal for such basis by one or more of the committees, it may be referred to the Joint Conference for disposition. (Italics supplied.)

To obtain approval in the Joint Conference for this reduction in rates from southern territory to trunk-line territory it is necessary that an affirmative vote of three-fourths of the members present of two of the official-territory rate bureaus be obtained. Under this procedure the determination of rates paid on the goods of the southern producer is in the hands of representatives of rate territories to which the rates are not proposed to apply. Appeal may be made to the Traffic Executive Association—Eastern Territory from the decisions of the Joint Conference of official-territory lines, not by the shipper, but by railroads members of the official-territory bureaus. The shipper has no right of appeal in the private rate-making system.

It is quite probable that one or more of the official-territory bureaus would object to a rate from the South reduced to something near the level available to the producers shipping within official territory, because the official lines have announced the policy of keeping goods from the South and West competitive with those produced on their lines from moving into official territory.24

In interterritorial rate matters similar to this proposal to adjust rates from southern territory to a subdivision of official territory, negotiations to bring the decisions of the two territories into harmony may be carried on in the Joint Conference of Contact Committees. On rate proposals affecting official, southern, southwestern, and western trunk-line territories, the action of the territorial committees may be followed by reference of the proposed change to the Joint Conference of Contact Committees, made up of representatives of seven private rate-making organizations: three from the official-territory associations, and one each from Southern Freight Association, Western Trunk-Line Committee, Southwestern Freight Bureau, and Illinois Freight Association. From the decision of the Joint Conference of Contact Committees, which is by majority vote, the representatives of a group may appeal to their Traffic Executive Association. Negotiations may then take place between the traffic executive associations.

Here is a typical example of the handling of a proposed change in an interterritorial rate.25

24 *Ex parte* 116—Interterritorial Rate Bases. Before the Interstate Commerce Commission, memorandum brief for carriers operating in official territory, named in appendix thereof: M. B. Pierce and others, counsel. (Washington, 1935.)

25 Record before the Special Master, *supra*, note 13, State Exhibit 237 et seq.
On January 7, 1943, the Southern Railway requested that an emergency proposal be issued to the membership of the Southern Freight Association to establish rates on wine from Atlanta, Georgia, to points in official territory, including Illinois Freight Association territory, on the same level as that prevailing within official territory, stating that an Atlanta shipper was unable to market his wines in official territory on the existing rates. The shipper complained of the fact that for minimum weights on shipments of 50,000 and 60,000 pounds the rates from California terminals to New York City were 99 cents whereas the rates from Atlanta to those same terminals for approximately one-third of the distance were, roughly, $1.13 and $1.12.

The Southern Freight Association promptly approved the emergency proposal and on February 5, 1943, forwarded it to the official lines. On April 14, 1944, the emergency proposal, having consumed fourteen months pursuing the usual course through the official-territory appellate mechanisms, met the usual fate; it was rejected, and this despite the fact that:

... the present shipments from Atlanta to the North and East are difficult of satisfactory explanation. ... While unfortified wines produced in Atlanta are not directly competitive with fortified wines produced in California, the politicians constantly refer to the fact that to New York the rates from California are less than from Atlanta. ...

Despite the refusal of the official lines to concur in eliminating this gross discrimination, the southern lines independently effectuated the desired rates to Chicago by virtue of the fact that the line of the Illinois Central served both Chicago and the South. However, the official lines persisted in their discriminatory policy and during the proceedings in the Class Rate case the Atlanta shipper was still complaining about the rate wall between him and the consuming markets in official territory.

This attitude on the part of the official lines was aptly described by a prominent traffic man when he stated that a similar proposal "... met the usual fate of all interterritorial problems that come from the little man. It was non-concurred in very promptly by the Official Territorial [sic] lines. ..."

IV

PRIVATE RATE-MAKING PROCEDURE NOT IN CONFORMITY WITH THE LAW

There is no question that the railroads, in the establishment of their rates, are subject to the Sherman Act. As has been pointed out, conspiracies among railroads to fix freight rates have been held illegal under the Sherman Act. Congress has not given the Interstate Commerce Commission, nor any other group, power to remove the making of freight rates from the prohibitions embodied in the antitrust
It is also true that regulated industries are not ipso facto exempt from the antitrust laws.\textsuperscript{31} In the case of \textit{Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway}\textsuperscript{33} the Supreme Court went into the history of regulation in some detail. After noting that the exaction of unreasonable rates by public carriers was forbidden by the common law, the court said:

But we are here specially concerned with the Interstate Commerce Act of 1887 and with some of the changes or supplements adopted since its original enactment. That act did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or to reduce them. \textit{Skinner \& Eddy Corp. v. United States} (249 U. S. 557, 564); \textit{Cincinnati, N. O. \& T. P. R. Co. v. Interstate Commerce Comm.} (162 U. S. 184, 197).\textsuperscript{34}

In \textit{Texas \& Pacific Railway v. United States},\textsuperscript{35} the court said:

As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. \textit{(Interstate Commerce Commission v. Alabama Midland Ry. Co.} (74 Fed. 715, 723-4; 168 U. S. 144, 172-3; \textit{Skinner \& Eddy Corp. v. United States} (249 U. S. 557, 564); \textit{United States v. Illinois Central R. Co.} (263 U. S. 515, 522).)\textsuperscript{36}

Since 1943 Congress has several times considered legislation proposed to exempt the railroads from the antitrust laws in the making of rates, but has refused to enact these proposals into law.\textsuperscript{37} As lately as 1945 the Supreme Court has held, after review of the decisions concerning railroad rate-making combinations, that "... we can only conclude that they have no immunity from the antitrust laws."\textsuperscript{38}

These decisions do not mean that railroads are entirely barred from conferring in the making of rates. The writer, however, construes the law to mean that in the making of local rates—those rates which apply on the lines of a single carrier—each railroad is allowed and required to exercise its own managerial discretion free from collaboration with, or interference by, its competitors. The Supreme Court has held that "a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise."\textsuperscript{39} In initiating its local rates it would seem that each carrier should file the rates which it considers proper with the Interstate Commerce Commission without being forced to submit these rates to the consideration or approval of other railroads in the private rate-making organizations.

If for some reason the rates are not in conformity with the provisions of the Interstate Commerce Act, proper action can be taken before the Interstate Commerce Commission, the regulatory body authorized by law to handle such matters. To

\textsuperscript{32} \textit{United States v. Borden Co.}, 308 U. S. 188, 198 (1939).
\textsuperscript{33} 284 U. S. 370 (1932).
\textsuperscript{34} Id. at 383-384.
\textsuperscript{35} 289 U. S. 627 (1933).
\textsuperscript{36} Id. at 636.
allow a private group to interfere with an individual railroad in the making of its local rates, as was done in the matter of the rate on logs proposed by the Southern Railway to apply on its own lines, is not within the contemplation of the law.

Although defenders of the present system of making rates claim that the collective judgment of a group of railroads as to the proper rates under the Interstate Commerce Act is better than that of a single railroad, it has been admitted that the single line's judgment is often superior to that of the group. It is somewhat unusual in business relations for one's competitors to be so solicitous concerning one's compliance with the law, and to be allowed a voice in matters for which the individual business is legally responsible. The law apparently requires each railroad to establish its own rates. Free from rate-bureau interference, this should be done. Such freedom of action is further bolstered by the Supreme Court's holding that "a zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." Within that zone the Interstate Commerce Commission is powerless to grant relief even though freight rates are raised to the maxima by a conspiracy among rail carriers. Unless competition prevails in this zone, the public is powerless to overcome rates pushed to the upper limits of the zone by combinations of carriers acting through the private rate-making organizations.

One of the principal contentions of defenders of the status quo in private rate making is that it is absolutely essential that railroads participate in the private rate-making process in order to establish joint rates, that is, rates that apply to traffic moving over more than one railroad between origin and destination. Further, these advocates contend that the Department of Justice would abolish rate bureaus and require each railroad to make its rates in a "vacuum." Such is not the position of the Department of Justice. There is no more desire to eradicate the rate bureaus by antitrust action than there was to put out of business, for instance, the Aluminum Company of America when it was named defendant in an antitrust suit a few years ago. The Federal Government merely wants the rate bureaus to conform to the law just as other forms of business are required to do.

In other words, it is not the rate bureaus as such that the Department is opposing. The objection is to a number of the features of the operations of the private rate-making groups. The writer believes that the rate bureaus can change and simplify their operations to eliminate antitrust violations without in any way hindering or jeopardizing conformity with the Interstate Commerce Act by the carriers. The ways in which this can be done will be pointed out in the final section of this paper.

Under section 1(4) of the Interstate Commerce Act it is "the duty of every common carrier [railroad] . . . to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto." Agreement among carriers is provided for in the establishment of joint

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40 Record before the Special Master, supra, note 13, at 4759.
rates by section 6. In the words of the Supreme Court, “... it would be a perversion of those sections to hold that they legalize a rate fixing combination. ... The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature.”

The railroads themselves suspect that the continued operation of the private rate-making organizations along the lines that are now being followed do not conform to the “legitimate area in which that collaboration may operate.” At least some of the things that are prohibited in the process of establishing joint rates were indicated by the court’s holding that:

... we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.

Defenders of private rate making point to the provision in the articles of association of the rate bureaus which purports to guarantee each carrier the right of independent action in the making of rates as assurance that there is no infringement on the freedom of individual rail lines. This, of course, is an illusory right when other provisions of the same articles to which the members subscribe provide that the individual railroads will act, or refrain from acting, subject to the will of the majority of the members, or the chairman, of the organization. Until the individual railroads are allowed to act, and do in fact act, independently, private rate making will not be free of violations of the Sherman Act.

Concerning voluntary cooperation, the alleged basis of private rate making, the Supreme Court said, in holding the Agricultural Adjustment Act unconstitutional:

The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. ... This is coercion by economic pressure. The asserted power of choice is illusory.

This “coercion by economic pressure” is well illustrated by the action of President Joyce, of the Chicago Great Western, receding from a position leading to a rate reduction on packinghouse products, after a “conference” with members of the committee of directors of the Western Commissioner Plan.

Another source of economic pressure available to bring recalcitrant railroads into
line was testified to before a Senate committee by Mr. Sargent, President of the Chicago & Northwestern Railway Company. He stated that the matter of divisions (apportionments of revenue accruing to each of the carriers participating in a joint haul) was a delicate matter for a single railroad to take to the Interstate Commerce Commission for adjudication because "there is a tendency for a diversion of traffic" away from lines bringing such a complaint. As freight traffic is the life blood of the railroads, this particular kind of economic pressure is extremely effective.

V

SUGGESTIONS FOR BRINGING RATE-BUREAU PROCEDURE INTO LINE WITH THE ANTITRUST LAWS

Suggestions for changing the procedures of the private rate-making organizations in order that their operations will comply with the antitrust laws should be of special interest to those who maintain that the features of the present system are essential if the railroads are to comply with the Interstate Commerce Act. If the desire to observe the provisions of that Act is the sole motivation for maintaining the present elaborate system of private rate-making machinery, the suggestions made here could be acted upon without impairing observance of the Act by the carriers.

In the establishment of local rates, it has already been indicated that each railroad should exercise its managerial discretion free from rate-bureau participation. If individual railroads are to be free from the influence of competitors, these rates should be filed directly with the Interstate Commerce Commission. Submitting such rates to the rate bureaus for consideration is obviously unnecessary if each carrier is to exercise the right given it under the law to initiate its own rates. Consequently, no local rates should be handled in the rate bureaus. The service of a tariff-publishing agent could be used for publishing these rates, but since such an agent would merely publish rates as directed by the individual lines his function should be strictly a ministerial one.

Notice of the action of an individual road upon filing a change in its local rates with the Interstate Commerce Commission could be given at the time of the filing, thereby informing other railroads and shippers of the action. Notice to the rate bureau prior to filing would be unnecessary. Under this arrangement anyone having a complaint against the proposed rate could, within the time allowed for such complaints to be made, file with the Interstate Commerce Commission a request for investigation and suspension of the rate. The Commission, under the authority vested in it by law, could grant or deny the request for investigation and suspension. If the request were denied, the rate would go into effect upon expiration of the statutory period after filing unless the Commission saw fit to shorten the period as provided by statute. If the request were granted, the matter would be set down for hearing on the merits. This is in accordance with the regulatory process and is

40 Hearings before Senate Committee on Interstate Commerce on S. Res. 71 of the 74th Cong., 75th Cong., 2nd Sess. Part 3, 9966, at 9970 (1938). Mr. Joyce of the Chicago Great Western concurred in this testimony.
preferable, as a practical matter, to dragging the decision through committee after committee in the private rate-making groups. The Interstate Commerce Commission should exercise its regulatory power; that power should not be delegated to private groups.

In the making of joint rates, as pointed out, a degree of collaboration among railroads is permissible. No one would gainsay this right. Common sense dictates it, the Interstate Commerce Act provides for it, and the Sherman Act does not forbid it. But it must be remembered that, in the words of the Supreme Court, "the collaboration contemplated in the fixing of through and joint rates is of a restrictive nature."50

The suggestions given here comprise the writer's conception of what might be done under this ruling of the Supreme Court in rate bureaus in the formulation of joint rates. Local rates, of course, would not be handled in rate bureaus.

In the first place, it would be necessary to eliminate all appellate functions from the private rate-making procedure. Using the Southern Freight Association as an example and referring to Figure I, the executive committee would be abolished, as would the Traffic Executive Association—Southern Territory and the Southeastern Presidents' Conference. The rate-making functions of the Association of American Railroads would be done away with entirely. The law does not require that any sort of rate organization be maintained there.

The cutting away of these groups, which have been shown to be at least conducive to delay, and, in many instances, to coercion of individual railroads, would leave two functions in the regional rate bureaus. First, the function of giving technical advice on the legality of proposed rates under the Interstate Commerce Act. Such advice would be limited to technical matters and not to matters of policy concerning the desirability of a proposed rate. Second, the bureau would be a meeting place for discussions concerning the establishment of joint rates, either intraterritorial or interterritorial. These discussion groups should be limited to the railroads actually participating in the traffic movement on which the joint rates are proposed to apply. They should be further limited to exchange of information on joint rate proposals, with no coercion or pressure being exerted upon any railroad. After discussion has been terminated, a representative of each railroad should be free to indicate to the publishing agent whether his railroad wishes to be included among those railroads participating in the joint rate proposals discussed in the meeting.

These meetings for the discussion of matters pertaining to joint rates should be open to the public, and a stenographic transcript should be made of the proceedings. This transcript should be available for public inspection at reasonable times in the offices of the rate bureau. Shippers, representatives of shipper groups, representatives of regulatory and other state or Federal Government agencies, and anyone else who might be interested in any action on joint rates handled by that bureau, would find a complete record available for their use.

Such a procedure would be in marked contrast to the present one in which shippers are limited to appearing and expressing their views on a rate adjustment in which they are interested. At present the decision on the granting of a proposed rate is made in secret by the railroads. Unless the rules of secrecy of the rate bureau are violated by some railroad representative present, the interested shipper does not know why the proposal was turned down, who opposed granting it, or any of the other matters discussed in the secret meeting.

Defenders of the status quo in rate-bureau operation argue that these secret meetings are necessary to protect the small shippers because the large shippers would, if the meetings were open, learn the identity of carriers opposing their proposals and would be able, by controlling the routing of large volumes of traffic, to obtain favorable rates for themselves. On the other hand, it is argued, small shippers have no club of large amounts of traffic to hold over the heads of the carriers and would be denied rates as favorable as those granted large shippers.

It is no secret in traffic circles that large shippers have no trouble at present in obtaining favorable rates. If the publicity emanating from open discussions of joint rates should adversely affect small shippers, the Interstate Commerce Commission could take appropriate action to correct such abuses.

At present the chairmen of organizations such as the Southern Freight Association exercise great powers, such as the power to appeal to a higher committee from a decision “inimical to the interests of the carriers as a whole” and the power to establish the effective date of any rate published by the carriers in the organization. These powers should be taken away entirely, thereby removing this threat to freedom of action and free exercise of managerial discretion by railroads in the establishment of their rates.

Expressed in a few words, the changes set forth would allow carriers participating in a proposed joint rate to discuss freely the various aspects of the legality of the rate. After full and free discussion each carrier would be free in fact to determine whether, in the exercise of its managerial discretion, it wishes to participate in the joint rate, or take some other course of action. There would be no appeals, either by railroads or by the chairmen. After receiving instructions from the carriers, the tariff-publishing agent would publish the joint rate, excluding from participation those carriers that wish to be excluded.

A free exchange of information in regard to each joint rate proposal handled would be allowed and encouraged. If there should be difference in opinion as to whether a proposal contravenes the Interstate Commerce Act, the Interstate Commerce Commission could be called upon to adjudicate the points of disagreement. The Commission is established to make such decisions. Its decision, everyone will agree, is of more value than that of any series of committees part and parcel of the present private rate-making process.
VI

PROPOSED LEGISLATION TO EXEMPT COMMON CARRIERS FROM THE ANTI TRUST LAWS

Pending in the Eightieth Congress are S. 110, introduced by Senator Reed of Kansas, and H. R. 221, introduced by Representative Bulwinkle of North Carolina. These bills authorize all common carriers, and freight forwarders, to apply to the Interstate Commerce Commission for approval of agreements concerning transportation services and charges and practices related thereto. Upon approval of an agreement by the Interstate Commerce Commission, the carriers involved would be exempt from the application of the antitrust laws. Not only the agreements under which the rate bureaus operate would be subject to exemption from the antitrust laws, but also any other agreements incidental to the conduct of common-carrier transportation service.

The legislation provides, in effect, that only the agreements under which private rate-making is carried on need be approved by the Interstate Commerce Commission; acts performed under the agreements do not require Commission approval. Thus, if the carriers, after approval of the agreements by the Commission giving exemption from the antitrust laws, choose to act to hold rates to the upper level of the zone of reasonableness, they may do so. The proposed legislation if enacted into law "would cut the antitrust laws from the heart of our economy—the transportation industry."61

As Professor Sharfman has pointed out, the regulatory pattern chosen by Congress for the railroad industry provided for competition and freedom of action for individual railroads in the making of rates.52 The preservation of competition in rate making is essential to conform to the long-established legislative scheme inherent in the Interstate Commerce Act. To depart from this basic scheme by delegating to private groups power to fix transportation rates would completely reverse the purpose of the Interstate Commerce Act that rates be made through the operation of competitive factors within the zone of reasonableness, which is bounded at the top by the Commission's power to establish maximum rates and at the bottom by the power to establish minimum rates.

No one acquainted with the situation can effectively deny that the purpose of the proposed legislation is to deprive the courts of jurisdiction in the pending cases instituted by the Department of Justice and the State of Georgia. The Department, in the suit in the United States District Court at Lincoln, Nebraska, is endeavoring to enjoin combinations of railroads, railroad organizations, and bankers from violating the Sherman Act. Among the offenses charged are the fixing of discriminatory freight rates, suppressing improvements in railroad service, limiting improvement in rail equipment and facilities, and hindering the development of forms of transportation that compete with railroads.

The suit of the State of Georgia, now being heard before Special Master Lloyd


K. Garrison, appointed by the Supreme Court, seeks to enjoin the principal northern and southern railroads from fixing discriminatory and non-competitive freight rates harmful to the economy of Georgia. In taking jurisdiction of this case, the Supreme Court referred to the permissible area of collaboration in the making of joint rates and stated that "we do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate."

Obviously, the Supreme Court will define the permissible area of collaboration in handing down its decision in the Georgia case unless the case is rendered moot by the passage of legislation. To say that transportation agencies will be unable to establish rates in accordance with the Interstate Commerce Act if this case, or the Government's case at Lincoln, is carried to a conclusion, is utter nonsense. There is time enough after the Supreme Court has acted to make such assertions—if then there is ground for such assertions to be made. If Congress sets out to amend the antitrust laws each time a powerful group is haled into court because the defendants anticipate that an unpalatable decision will be rendered, the legislative mill will have available plenty of grist. For the same reason it seems a little forehanded to reverse completely the direction of transportation policy in the United States because the transportation industries anticipate that some restriction on their illegal activities may result from a decision of the Supreme Court.

If either the Reed Bill or the Bulwinkle Bill should become law, a dangerous precedent would be established. Other industries that are now seeking exemption from the antitrust laws would be encouraged to increase their efforts. Other powerful groups would be invited to seek legislation immunizing them from established laws and the power of the courts to enforce them.

Monopoly in the transportation field cannot be isolated from the operation of the national economy, because the power to control the cost of transportation is a power that may be used to dictate whether a business shall prosper or shall be stifled. The proposed legislation sets a pattern for supplanting the American system of competitive enterprise by a cartelization of the Nation's entire economy. The proposed legislation should not become law.

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