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Recent Trends in Transport Rate Regulation

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Leonard S. Goodman

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RECENT TRENDS IN TRANSPORT RATE REGULATION

Leonard S. Goodman*

I. INTRODUCTION

AT the close of the 1960's, the Interstate Commerce Commission was attacked from several quarters. One of the more lengthy studies of its work was performed by a group of students under the direction of Robert C. Fellmeth and Ralph Nader. Other regulatory agencies were visited by similar groups organized by Mr. Nader; and "Nader's Raiders" became a familiar newspaper phrase. The bulky *Study Group Report* resulting from their inquiry into the Commission's achievements was published in 1970 under the title *The Interstate Commerce Omission: The Public Interest and the ICC*.¹

The authors did not mince words in expressing their displeasure with the Commission's work. The chapter concerning freight rate regulation they entitled "The Rate Rape."² This chapter followed nearly 150 pages of invective. Within its pages, a reader would find no discussion of the Commission's accomplishments in the field of rate regulation. Ironically, the title of the book seemed to describe the authors' apparently conscious effort to publish with omissions.

The simplistic picture of rate regulation presented in the *Report* overlooked the complexity of the Commission's responsibilities. The prices for transportation service in interstate commerce are reflected in millions of rates, each of which applies for the carriage of particularized commodities between named points. These rates are on file with the ICC, but only a few were established, or prescribed, by the Commission. Furthermore, the railroads, the truckers, and other modes of transportation regulated by the ICC typically file 300,000 new tariffs each year. Few of these tariffs are contested, and but a handful become the subject of formal proceedings.³ Even so, there

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1. THE RALPH NADER STUDY GROUP REPORT ON THE INTERSTATE COMMERCE COMMISSION AND TRANSPORTATION, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* (1970) [hereinafter *STUDY GROUP REPORT*].

2. *Id.* at 136-90.

3. 85 ICC ANN. REP. 3 (1971). However, when general rate increases that may affect a large number of rates for many carriers are filed, the Commission normally will require formal proceedings.

were still approximately 1,000 rate proceedings before the Commission in fiscal 1971.⁴

What these statistics reflect is the often-forgotten fact that the interstate rate structure has always been basically a system of "carrier-made" rates. When regulation began, the Commission had no rate-fixing authority.⁵ Today such broad authority exists; but the basic duties under the Interstate Commerce Act remain those of the carriers: to file and thereby publicize the rates they hold out to the public, and to maintain just and reasonable rates.⁶

Despite this partial autonomy in the carriers, the trend in their rate structure has tended more and more to a cost orientation. This is illustrated by the comparison below of revenues and out-of-pocket costs of the different commodity groups:

RATIO OF RAILROAD REVENUES
TO OUT-OF-POCKET COSTS⁷

<i>Commodity Group</i>	<i>1939</i>	<i>1947</i>	<i>1961</i>
Products of agriculture	135	121	118
Animals and products	125	106	111
Products of mines	178	132	107
Products of forests	153	127	117
Mfg. and misc.	203	165	149
Total carloads	172	141	128

The movement followed the direction of cost-pricing for reasons quite apart from the ICC's regulation of rates. Increasing competition among the modes of transportation and new methods of packing determined the trend; the Commission, at most, molded its contours.

The object of this Article is to describe the trends in the Commission's work during the 1960's in some of the areas of rate regulation that could not be settled by mere reference to costs, and in other areas of changing rate policy. This was a prolific period for the Commission, one that involved many rate innovations and a sense of new direction in certain aspects of rate regulation. The present discussion of the Commission's rate work is in no sense complete; and there is no intention to make it so. By emphasizing the decisions of the recent decade, I hope to introduce the reader to the substance and

4. *Id.* Table 1, at 105.

5. See Interstate Commerce Act, ch. 104, 24 Stat. 379.

6. See 49 U.S.C. §§ 1(4), 1(5), 6, 316, 905, 906, 1004 (1970).

7. See ICC Bureau of Accounts, Distribution of the Rail Revenue Contribution By Commodity Groups-1961, Statement No. 6-64, at 3 (June 1964); ICC Bureau of Accounts, Distribution of the Rail Overhead Burden By Commodity Groups-1939 & 1947, Statement No. 2-49, at 9 (April 1949).

trend of the more controversial aspects of today's regulation of freight rates. There will be no discussion, of course, of matters still pending before the Commission. Nevertheless, the very substantial pending investigations of the railroad rate structure⁸ and of the railroad rate base⁹ further attest to the vitality of rate regulation today.

II. THE CONSIDERATION GIVEN VALUE OF SERVICE

The *Study Group Report* includes a particularly harsh vilification of the Commission's adherence to "value of service" rates and rate-making over the years. It finds this theory of rates, which calls for reduced rates on low-value commodities and correspondingly higher rates on high-value commodities, responsible for a host of weaknesses in the railroad industry and in the economy of the country.¹⁰ The *Report* suggests that value of service perhaps assisted in the development of the West, but that today a departure by the rate maker from "considerations of cost" is unfair and uneconomic.¹¹ Since the rate structure is largely the product of carrier-made rates, let us first turn to the factors impelling carrier management to employ value of service. The rate structure, it is true, includes elements of value-of-service pricing. However, can we assume, as the *Study Group Report* seems to do, that these elements are present only as a result of ICC policy? Or does the very nature of value-of-service pricing ensure that the rate structure will contain an irreducible minimum of such rates?

A. By Carrier Management

The value-of-service principle is basically a procedure for distributing elements of cost. It is derived from transport economics, not social policy.¹² Professor Sharfman wrote that value of service, when properly used, was the appropriate principle under which the "total costs" were apportioned to the various classes of traffic all "to the end that movement of tonnage may be promoted." He stated that "the problem is essentially one of apportioning the total cost burden," and only "maladjustments in the apportionment of transporta-

8. Investigation of Railroad Freight Rate Structure, *Ex parte* No. 270 (I.C.C., initiated Dec. 11, 1970).

9. Net Investment Railroad Rate Base, *Ex parte* No. 271 (I.C.C., initiated Dec. 11, 1970).

10. STUDY GROUP REPORT, *supra* note 1, at 146-54.

11. *Id.*

12. On the other hand, there is nothing inherently fair about charging the same rate per hundred pounds for high-valued cargo, which can readily afford a higher rate, and, let us say, scrap or fertilizer.

tion costs create the necessity for regulation.”¹³ Thus he recognized that although certain variable costs were assignable to specific traffic, there was no one obviously correct method for apportioning the constant or joint costs. As the staff of the Commission has written, “there is no justification from a ‘cost of service’ standpoint for apportioning any more of these joint costs to any one unit of output resulting from the joint operation than to any other unit of output from the same operation.”¹⁴ The staff therefore concluded that “the distribution of the constant and joint costs must take into consideration the value of the service or conditions of demand.”¹⁵

The railroads were of the same view as the Commission’s staff, but perhaps for different reasons. During the nineteenth century, they recognized the many choices available in apportioning the constant and joint costs. At the same time, they perceived an opportunity to maximize their profits by promoting the movement of traffic. As a result, by reducing some rates while at the same time retaining high rates on traffic willing to pay such rates, the railroads were able to attract traffic that would not otherwise move, at least not by rail.

Professor Daggett, therefore, defined value of service in terms of a theory of demand; that is, what would a shipper be “willing to pay.” He inferred a greater “utility” of transportation in the higher price any particular purchaser of transportation would pay.¹⁶ Similarly, Professor Locklin defines the phrase “value of service” as “the highest charge that can be levied without preventing a shipment from moving.”¹⁷

Criticizing this ability of the railroads to price their services differentially, the *Study Group Report* asserts that value-of-service pricing reflects only monopoly power; but it also concedes that the “railroads supported the structure because it maximized profits.”¹⁸ In its invective, the *Report* apparently overlooks the fact that profit-maximizing is rational decision-making behavior, and not necessarily a

13. III-B I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 440-42 (1936). See also R. WESTMEYER, *ECONOMICS OF TRANSPORTATION* 244-45 (1952). Sharfman pointed out that to apply properly value-of-service pricing there must be an independent determination of the desirable amount of transportation services. III-B I. SHARFMAN, *supra*, at 427-29.

14. ICG Bureau of Accounts, Cost Finding and Valuation Section, Explanation of the Development of Motor Carrier Costs with Statement as to Their Meaning and Significance, Statement No. 4-59, at 12 (Aug. 1959).

15. *Id.* at 14.

16. S. DAGGETT, *PRINCIPLES OF INLAND TRANSPORTATION* 363 (1928).

17. D. LOCKLIN, *ECONOMICS OF TRANSPORTATION* 146 (6th ed. 1966).

18. STUDY GROUP REPORT, *supra* note 1, at 148.

sign that monopoly profits are being made. Moreover, the *Report* fails to comprehend that in the presence of a regulated monopoly, value of service can make economic sense. In an article published in 1962, ten well-known economists strongly supported the railroads' system of differential pricing.¹⁹ Among their words of encouragement were the following:

Differential pricing is consistent with the public interest in the economical utilization of resources. It can yield significant benefits to the users of rail services by encouraging the retention of traffic and the development of greater traffic volumes and improved profits, thus fostering the adoption of improved technology and service, as well as lower rates.²⁰

Value-of-service pricing exists to the extent that it does essentially by consent. It exists under the rate agreements among the carriers. They recognize that by this means they are able to increase utilization and profits.²¹ The existence of value-of-service pricing, therefore, would possibly work less well in the absence of the price-fixing permitted by section 5a²² of the Interstate Commerce Act; but it would not disappear. The railroads surely would recognize that it is self-defeating, with respect to maximizing their profits and utilizing their facilities to the fullest, to drive all above-average rates down toward cost and all below-average rates up to a full-cost level.

The freight-rate structure today reflects less value of service than it did prior to World War II. Nevertheless, the concept is still highly relevant in the efforts of carrier management to maximize profits.

B. *By the ICC*

What we have seen is that there are sound economic reasons for carrier management to retain the value-of-service principle in the rate structure. What is more, the statute administered by the ICC also gives recognition to this principle. Section 6(1)²³ of the Inter-

19. Baumol, Bonbright, Brozen, Dean, Edwards, Hoover, Pegrum, Roberts, Williams & Behling, *The Role of Cost in the Minimum Pricing of Railroad Services*, 35 J. Bus. U. CH. 357 (1962).

20. *Id.* at 363.

21. Curiously, the *Report* recognizes that value-of-service pricing was a "highly beneficial" part of the nineteenth century rate structure, and yet concludes without citation that the railroads' failure to adhere to cost was the precise type of "discrimination" that the Commission was "originally formed to prevent." STUDY GROUP REPORT, *supra* note 1, at 147-48, 169.

22. 49 U.S.C. § 5b (1970).

23. 49 U.S.C. § 6(1) (1970).

state Commerce Act requires the railroads to file tariffs with the Commission that set forth not only the transportation rates, but also any rules and regulations affecting the value of service. The Act specifically requires the Commission to consider "the effect of rates on the movement of traffic" when it prescribes rates.²⁴ This seems to imply that some rates should be set lower than others on grounds other than cost considerations.

The references to value of service in the provisions of the statute governing motor carriers are more numerous. Both the tariff-filing section and a rate-making section of the statute include specific references to "value of service."²⁵ At the same time, the statute preserves the reference to the effect of rates on the movement of traffic.²⁶ The motor carrier provisions in Part II²⁷ of the Act in fact reflect the accumulated experience incurred under Part I,²⁸ which applies to railroads. In addition, both parts of the Act require railroads and motor carriers to establish and observe reasonable "classifications" of property;²⁹ this requirement is at least an oblique reference to the value of the service.

The *Study Group Report* implies that the Commission, through its approval of rates reflecting the value of the service, gives the railroads and other carriers a free rein to establish whatever rates the traffic will bear;³⁰ but the Commission early resolved that rates established under value-of-service principles would not be permitted to find their own level completely divorced from regulation. That is to say, the Commission did not equate "value of service" with "what the traffic would bear." Rather, it attempted to impose "governmental limitations . . . upon the unlimited and arbitrary discretion of traffic officials."³¹ A few illustrations of the Commission's work and of some of the criteria developed in bringing value-of-service pricing to bear would perhaps best illustrate this last point.

24. 49 U.S.C. § 15a(2) (1970).

25. 49 U.S.C. §§ 316(e), 317(c), 318(a) (1970).

26. 49 U.S.C. § 316(i). The water carrier and the freight forwarder sections of the Act also prohibit the carrier's extension of "any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff." 49 U.S.C. §§ 906(c), 1006(c) (1970).

27. 49 U.S.C. §§ 301-27 (1970).

28. 49 U.S.C. §§ 1-5, 5b-27 (1970).

29. 49 U.S.C. §§ 1(6), 316(b) (1970).

30. See STUDY GROUP REPORT, *supra* note 1, at 148-49.

31. *Railroad Commn. of Nevada v. Southern Pac. Co.*, 19 I.C.C. 238, 249 (1910). The Commission was governed by "what the traffic can reasonably be required to bear"; the Commission has "never recognized" that charging what the traffic *will* bear "has any place in public regulation." *Mountain-Pacific Oil Cases*, 192 I.C.C. 599, 636 (1933).

1. Cost Considerations

The issue of value of service has been raised explicitly in only a few cases. Thus it is easy to overemphasize the role of value of service, as the *Study Group Report* constantly does. Furthermore, the *Report* wholly fails to consider that when the Commission was presented with a value-of-service question and given a choice to follow cost or value-of-service considerations, it followed the rule that favored lower rates. For example, the value of one commodity might be higher than that of another related commodity; but, if the average loadings of the former were substantially higher, the Commission would not necessarily require a proportionately higher rate for the more valuable commodity.³²

2. Differential Between a Raw Material and Its Product

One area of controversy over the effects of value-of-service pricing has involved shippers of a particular raw material and those handling the final product. In 1932, the Commission prescribed a maximum rate on rough stone and a minimum rate on dressed stone, finding that a lesser differential between the two would unduly prejudice shippers of rough stone.³³ On the other hand, it refused to require a differential between wheat and flour,³⁴ and eventually prescribed equal rates for the two commodities.³⁵ In the Commission's view, flour-milling added relatively little value to the raw material.

3. Differential Between a Commodity and Its Related Scrap or Waste

In some of its early cases, the Commission held that the rates should not differentiate between new and used articles,³⁶ and, for

32. Official Classification Ratings, 37 I.C.C. 166, 183 (1915); Straw Rates from St. Louis, Mo. to Anderson, Ind., 36 I.C.C. 30 (1915). This course was not followed when the proposed rates were below out-of-pocket costs or undermined an inherent cost advantage of a competing mode of transportation. The Commission's regulation of intermodal competition in recent years has perhaps overshadowed other important work of the Commission. See pt. VIII *infra*.

33. O'Meara v. Baltimore & O.R.R., 183 I.C.C. 3 (1932). See also Builders' Assn. v. Chicago B. & Q.R.R., 190 I.C.C. 221 (1932). In Young v. Chicago I. & L. Ry., 89 I.C.C. 428 (1924), the Commission refused to prescribe a differential where the rates were apparently depressed on both commodities. Similarly, in Crown Willamette Paper Co. v. Director General, 78 I.C.C. 273 (1923), it refused to prescribe a differential where the manufactured item was subject to competition and the raw material was not.

34. Grain & Grain Products, 164 I.C.C. 619, 652-53 (1930).

35. Grain To, From & Within S. Territory, 259 I.C.C. 629, 783 (1945). See also George A. Hormel & Co. v. Atchison, T. & S.F. Ry., 263 I.C.C. 9, 39-40 (1945); Eastern Livestock Cases of 1926, 144 I.C.C. 731, 740-41 (1928).

36. Wiessbaum & Co. v. Director General, 53 I.C.C. 681 (1919); Cal Hirsch & Sons Iron & Rail Co. v. Washington, B. & A. Elec. R.R., 26 I.C.C. 480 (1913).

the most part, these precedents have been followed.³⁷ However, when a commodity, such as old burlap bags, was so worn that it was suitable only for conversion into fiber, then a lower rate has been required.³⁸ Furthermore, since the enactment of the National Environmental Policy Act of 1968,³⁹ new emphasis has been placed on the differentials properly to be accorded scrap and waste materials.⁴⁰

4. *Use to Which a Product Is Put Is Not Controlling*

The primary use to which a product is put often determines its character for transportation purposes no less than for nontransportation purposes. The carrier as rate maker may not be able to identify a product divorced from its use. In such a case, a product's primary use properly may provide the basis for a particular rate, rather than another rate, by comparison with the rates in effect on products similar to the primary use, rather than the rates in effect on products similar to a secondary use.⁴¹

However, the Commission has often struck down differentials between essentially the same products when the only distinction drawn by the carrier was in the use to which the product was put at that time. The article's use at any given moment might not remain the same, and might in any event have no relation to the transportation characteristics of a shipment of such articles.⁴² If,

37. *Condenser Serv. & Engr. Co. v. Atlantic Coast Line R.R.*, 296 I.C.C. 495 (1955); *Vacuum Cleaner Mfrs. Assn. v. Atchison, T. & S.F. Ry. Co.*, 276 I.C.C. 783 (1950).

38. *Coastal Bag & Bagging Corp. v. Texas & N.O.R.R.*, 277 I.C.C. 789 (1950); *Aaron Ferer & Sons v. Belt Ry.*, 151 I.C.C. 197 (1929).

39. P.L. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970)).

40. *See, e.g.*, *Increased Freight Rates, 1970 & 1971*, 339 I.C.C. 125, 201-09 (1971), *appeal docketed sub nom. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States*, No. 806-72, D.C. Cir. (environmental issues).

41. A single or unique use may determine the character of an article. A rate may be premised on this use if the article is thereby clearly distinguishable from competing commodities. *Ranger Joe, Inc. v. Biter's Transfer, Inc.*, 54 M.C.C. 587, 590 (1952); *Glenn L. Martin Co. v. W.T. Cowan, Inc.*, 44 M.C.C. 726, 728 (1945). The predominant use of an article determines its character for transportation purposes. *Classification Rating of De-icer Truck Spray*, 326 I.C.C. 389, 396 (1966), *affd. sub nom. Seaboard Air Line R.R. v. United States*, 387 F.2d 651 (Ct. Cl. 1967).

42. *Davis v. West Jersey Express Co.*, 16 I.C.C. 214, 216 (1909). Lower rates on coal for steam railroad use but not for use of electric railroads or for shippers generally were disapproved under sections 2 and 3 of the Interstate Commerce Act, 49 U.S.C. §§ 2-3 (1970), in *Restricted Rates*, 20 I.C.C. 426 (1911), *affd. sub nom. ICC v. Baltimore & O.R.R.*, 225 U.S. 326 (1912). *See also* *Apache Powder Co. v. Atchison, T. & S.F. Ry.*, 299 I.C.C. 649 (1957) (rates on low-grade nitrates used for explosives and on nitrates used for fertilizer); *Limestone Mixtures & Grits Within Official Territory*, 280 I.C.C. 367, 373 (1951) (rates on ground limestone put to different uses); *American Salpa Corp. v. Pennsylvania R.R.*, 179 I.C.C. 195 (1931) (rates on scrap leather used for fertilizer and other scrap leather).

on the other hand, the use to which the item is put drastically alters its value, a higher rate would be permitted on the product than on the ingredient, even though only the use has changed and not its nature or properties.⁴³

5. *Long-Term Depressed Conditions in an Industry*

During the Depression the Commission gave considerable weight to the prevailing low prices and distressed conditions in individual industries.⁴⁴ Nevertheless, rate increases were allowed in response to clearly proven revenue requirements.⁴⁵ The Commission also held that depressed conditions over the short term did not justify rate reductions,⁴⁶ and conversely that shipper prosperity was no basis for a rate increase.⁴⁷

6. *Applying Value-of-Service Principles*

The principles developed in these decisions only presented a partial solution to the Commission's problem of controlling arbitrary pricing by rate-making carriers. The more difficult problems were met when the Commission translated these criteria into distinct measures of value of service, and ultimately into rates for the future or damages for the past.

Since relatively few cases were presented for decision, the Commission could uniformly begin with some elementary rules. For example, if the considered commodity has a wide range in value, the average or prevailing value will be used to determine the rate.⁴⁸

43. See *C.B. Fleet Co. v. Aberdeen & R.R.R.*, 287 I.C.C. 89 (1952) (phosphate and soda sold as a laxative considered a medicine, rather than a chemical); *Laboratory Products Co. v. Michigan Cent. R.R.*, 168 I.C.C. 681 (1930) (condensed milk considered a prepared food); *Mead Johnson & Co. v. Atlantic Coast Line R.R.*, 168 I.C.C. 157 (1930) (maltose given a higher rate when used as a prepared food).

44. General Commodity Rate Increases, 1937, 223 I.C.C. 657, 679, 683-84, 740-46 (1937) (coal); Emergency Freight Charges, 1935, 215 I.C.C. 439, 464-65 (1936); Class Rates Within Ga., 209 I.C.C. 586, 589 (1935); *Thomas Keery Co., Inc. v. New York, O. & W. Ry.*, 206 I.C.C. 585, *affd.*, 211 I.C.C. 451, 455 (1935) (wood alcohol); Industrial Sand Cases, 1930, 204 I.C.C. 159, 164-65 (1934).

45. Fifteen Percent Case, 1937-38, 226 I.C.C. 41, 105-06 (1938).

46. *Livestock—Western Dist. Rates*, 190 I.C.C. 611, 629, 633, 643 (1933).

47. *Increased Ry. Rates, Fares & Charges*, 1942, 255 I.C.C. 357, 396-403 (1943) (concurring opinion); *Rubber Assn. of America v. Akron & B.B.R.R.*, 174 I.C.C. 79, 84 (1931). See also *Empire Steel Corp. v. Baltimore & O.R.R.*, 281 I.C.C. 512 (1951) (long-term increases in value of scrap prices).

48. *United States Potters' Assn. v. Akron, C. & Y. Ry.*, 172 I.C.C. 618 (1931); *Auto Specialties Mfg. Co. v. Chesapeake & O. Ry.*, 279 I.C.C. 245 (1950). Lower rates were, however, then prescribed where the value of the considered commodity was well below the average. *E.g.*, *Basic Refractories, Inc. v. Akron, C. & Y.R.R.*, 296 I.C.C. 345 (1955); *Hill & Griffith Co. v. Baltimore & O.R.R.*, 294 I.C.C. 619 (1955).

Value of service is typically measured by comparing the rates on the commodities under consideration with those charged for similar commodities moving between the same, or perhaps even different, points. Similarly, a customary relationship between the rates on the considered commodity and other rates is a particularly useful measure of the value of service.⁴⁹

While these general rules are useful in setting rates for newly shipped commodities, they leave unanswered a fundamental question. Each one of these measures presupposes that the existing rates have been created on a reasonable estimate of value of service; which, in conjunction with the fact that existing rates are largely carrier-made, presupposes a reasonable exercise of judgment by carrier management.

The uniform freight classifications,⁵⁰ for example, filed by the railroads and by the motor carriers, reflect an elaborate consideration of value of service, but the basis for these classifications does not necessarily lie in precise mathematical principles. The motor carrier industry appears to consider wholesale values in establishing freight classifications; but the weight given to any one factor will vary with transportation conditions.⁵¹ The Commission has described the problem of fixing class rates⁵² as one requiring it

to establish a sufficiently wide range of rates which may be assigned to the general run of commodities, i.e., those that are not affected by special and unusual transportation conditions, in some degree of harmony with the value of the service rendered.⁵³

The railroads, too, have not converted value of service into acceptable arithmetic terms. At the turn of the century, the chairman of the railroads' Western Classification Committee, J.T. Ripley, assigned ratings based upon "units." These units were functions of the value (in dollars) per 100 pounds and the volume (in cubic feet) per 100 pounds of a commodity. The formula was expressed in the

49. Livestock—Western Dist. Rates, 176 I.C.C. 1, 43-44, 68-69 (1931).

50. For a description of uniform freight classification and freight tariffs, see D. LOCKLIN, *supra* note 17, at 158-69.

51. See J. COLQUITT, *THE ART AND DEVELOPMENT OF FREIGHT CLASSIFICATION* 77, 247, 268 (1956).

52. Most freight traffic moves under "point to point" commodity rates. A relatively small percentage (perhaps 10% to 15%) moves under class rates, which are assigned to commodities of like description and which are applicable within wide regions of the country. Such rates are ordinarily the highest rates that may be considered reasonable for a commodity. *Westinghouse Elec. Corp. v. Pennsylvania R.R.*, 323 I.C.C. 503, 506-07 (1964); *Page Belting Co. v. Boston & M.R.R.*, 294 I.C.C. 307, 308-09 (1955).

53. *Southern Class Rate Investigation*, 100 I.C.C. 513, 646 (1925).

following terms: "Unit = $100 V + \frac{100}{W}$," where V is the value per

pound of a commodity (in dollars) and W the weight per cubic foot.⁵⁴ It was subsequently shown that the Ripley units were related to the ratings linearly, through the equation "Rating = $36.71 + 3.5104$ (Unit)."⁵⁵ Thus the rating increased in proportion to the increase in units, and units increased directly with value and inversely with the weight. The Commission, in an early period, referred to the Ripley units, which were "intended to express the relation to one another of weight, space, and value," as constituting "a basis for comparison with other articles" and an aid in establishing a fair classification system among articles.⁵⁶ But this method has long since been discarded.⁵⁷

The motor freight industry proposed its own classification formula for all carriers in *Class Rate Investigation, 1939*.⁵⁸ This scheme involved a "Value-Density" table and certain "mean rating factors."⁵⁹ Ratings were assigned as follows:⁶⁰

Commodity	Rating Percentage
Basic raw materials & unprocessed farm products	85
Processed farm products	90
Industrial materials	95
Basic necessities	100
Partial necessities	105
Industrial equipment	110
Luxuries and accessories	115

Despite this "Value-Density" scheme, the Commission found that the foregoing ratings "represent the judgment of proponents and are not derived from any test."⁶¹ The Commission adopted the rail carriers' position that no formula could be derived and that the classification committees of the railroads might act "on their opinion

54. B. Aitchison, *Weight Density and Value as Factors in Freight Classification*, ICC Bureau of Transport Economics & Statistics, Statement No. 469, at 34 (March 1946).

55. *Id.*

56. Suspension of W. Classification No. 51, I.C.C. No. 9, 25 I.C.C. 442, 452 (1912).

57. B. Aitchison, *supra* note 54, at 33.

58. 262 I.C.C. 447, 496-501 (1945).

59. 262 I.C.C. at 499.

60. 262 I.C.C. at 500.

61. 262 I.C.C. at 500. The Commission rejected the formula for use by rail carriers, whose ratings were in issue, upon finding that it was "designed for package freight only, but does not distinguish between the containers used or the manner of packing, and makes no real provision for articles of great weight density or high value, nor, of course, for bulk freight." 262 I.C.C. at 501.

that the importance of value and density in the classification of articles is not and cannot be determined by any fixed rule."⁶²

In view of the difficulties encountered by the carriers in measuring value of service, the Commission's refusal to establish or adopt a value-of-service formula is understandable. Moreover, shippers' complaint remedies remain intact as carrier rates remain carrier-made, consistent with the over-all plan of Congress in enacting the Interstate Commerce Act.

The value-of-service rates were still subject to limitations of public policy, and could be found detrimental to the public interest in individual cases. The *Study Group Report* urges that this position was not strong enough, and that the Commission somehow should have taken a more active role in removing value-of-service elements from the rate structure.⁶³ Was such a role advisable? It was, if we assume with the *Study Group Report* that any tolerance of value of service in the carrier-made rates rendered the Commission an accomplice to uneconomic practices and excessive rates. What then have been the practical effects of value-of-service pricing?

III. THE EFFECTS OF VALUE-OF-SERVICE RATES

The *Study Group Report* condemns value-of-service pricing with the observation that such a system of rates "involves the perpetuation of fundamental misallocations of resources, which a competitive industry would not allow."⁶⁴ Without competition, the *Report* suggests, there is no incentive for railroads to eliminate unneeded capacity. Thus value-of-service pricing, according to the *Report*, has the net effect of providing "more transportation, or more transportation cost, than is necessary."⁶⁵ The cost of this "transportation inefficiency" is passed on to the shippers, particularly long-distance shippers and the shippers of high-valued goods.⁶⁶ The *Report* notes:

One stated impact of the present value-of-service system has been rising overcapacity, particularly for the railroads. Since overcapacity means inefficiency and higher cost, the effects of this factor are reflected in across the board price increases and inefficiencies.⁶⁷

The *Report* apparently suggests that the ICC should end its policies

62. 262 I.C.C. at 487.

63. See STUDY GROUP REPORT, *supra* note 1, at 147-54.

64. *Id.* at 148.

65. *Id.* at 149.

66. *Id.*

67. *Id.* at 150.

of value-of-service pricing and "enforcement of excessive profits for certain commodities."⁶⁸

True enough, the Commission policy has long called for a reduction in the intramodal competition that the authors of the *Study Group Report* find desirable. This course has been followed because the Commission's experience demonstrates that gross inefficiencies would otherwise result. In the eyes of the Commission, the intramodal competition proposed by the Study Group would mean duplication of facilities and inefficient use of existing facilities, and would in no way help to alleviate the plight of railroads in financial trouble.⁶⁹ On the other hand, the policies behind the Interstate Commerce Act, which are complemented by value-of-service pricing, are intended to promote greater utilization of existing facilities by encouraging the unification of facilities.⁷⁰ The Commission's success in fulfilling these goals may to some extent be measured by the reduction in the amount of track mileage owned and operated by the railroads over the past fifty years, which is illustrated in the table below:⁷¹

Year	Miles of Road Owned	Mileage Operated	
		First Main Track	All Tracks
1910	240,293	240,831	351,767
1915	253,789	257,569	391,141
1920	252,845	259,941	406,579
1925	249,398	258,631	417,954
1930	249,052	260,440	429,883
1935	241,822	252,930	419,228
1940	233,670	245,740	405,975
1945	226,696	239,438	398,054
1950	223,779	236,857	396,380
1955	220,670	233,955	390,965
1960	217,552	230,169	381,745

As the table suggests, value-of-service pricing encouraged the use of existing facilities only; and the Commission's adherence to this

68. *Id.* at 153.

69. See 85 ICC ANN. REP. 72 (1971).

70. In the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, Congress created a Coordinator of Transportation to promote rail unification, especially at terminals. In the Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905, Congress amended section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (1970), to encourage voluntary rail unifications by permitting the Commission more easily to authorize them.

71. 44 ICC ANN. REP., *Table I*, at 131 (1930); 51 ICC ANN. REP., *Table I*, at 127 (1937); 64 ICC ANN. REP., *Table I*, at 141 (1950); 75 ICC ANN. REP., *Table I*, at 195 (1961). Mileage given is as of Dec. 31 of that year, and mileage operated includes track-age rights. The net total mileage continued to grow until 1930 due to the use of track agreements; but even this figure has steadily declined since then.

criterion did not *add* to the overcapacity, although the continued adherence to value of service by the railroads may have accelerated the need to reduce capacity as the motor carriers were given an opportunity to compete for high-value commodities that were charged high rates by the railroads. In any event, capacity has declined and continues to decline without any sharp breaches in available service.

The *Study Group Report* insists that value-of-service pricing can exist only in the presence of monopoly power. The *Report* finds "monopoly power" in high market share and inherent cost advantages.⁷² If there were more competition between the railroads and the other modes, the *Report* continues, such monopoly power could not exist, for rates would necessarily be cost-oriented. The *Report* writers apparently believe the Commission "allows" only "contrived and false" intermodal competition that "results in a discriminatory rate system . . . which misallocates transportation resources on a massive scale."⁷³

The errors contained in the *Study Group Report's* analysis of the railroad's economic power are threefold. First, the *Report* does not attempt to show that over-all railroad profits are excessive. Although revenue-to-cost ratios on some commodities are much higher than on others, the "monopoly power" of which the *Report* speaks is not shown to have resulted in a general level of rail rates that substantially exceeds average unit costs. Furthermore, the *Report* gives no authority for its pronouncements concerning what is or is not "allowed" by the Commission. Rates are initially established by the regulated carriers through the filing and posting of tariffs. If there were instances in which intrarailroad rate competition was stifled by the Commission, they should not be difficult to document; but they in fact do not exist.⁷⁴

The most important of the *Report's* mistakes is its understatement of the potential and actual effects of motor competition on railroad rates and earnings. A recurrent theme of many Commission

72. STUDY GROUP REPORT, *supra* note 1, at 157-81.

73. *Id.* at 181.

74. The rate agreements approved by the Commission under section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b (1970), accord each carrier the right of independent action, which includes even the right to revoke or modify outstanding authorizations granted by carriers to tariff-publishing agents. See Rule 52 of Tariff Circular No. 20, 337 I.C.C. 274, 279-81 (1970).

The STUDY GROUP REPORT apparently relies only on Adams, *The Role of Competition in Regulated Industries*, 70 AM. ECON. ASSN. PAPERS & PROCEEDINGS 527, 533-34 (1958) (the *Report* miscites this article as 48 AM. ECON. REV. 533, see STUDY GROUP REPORT, *supra* note 1, at 137 n.3), a broadside attack on all regulation of interstate carriers and, in particular, the Commission's handling of one section 5a agreement.

decisions starting from the early 1940's is that motor transportation is or is becoming widespread and poses a serious threat to railroad earnings. This theme is repeated in major rate cases⁷⁵ and rail-merger hearings.⁷⁶

The steady growth of the motor carriers' participation in intercity traffic demonstrates the intense competition encountered by the railroads. The Commission's annual reports to Congress show the following distribution of intercity ton-miles between railroads and motor carriers:⁷⁷

Year	Railroads (including express and mail) (in billions)	Motor Vehicles (in billions)
1955	631.4	226.2
1956	655.9	253.8
1957	626.2	244.9
1958	558.7	255.5
1959	582.5	288.5
1960	579.1	297.7
1961	567.0	313.1
1962	600.0	331.3
1963	629.3	331.8
1964	666.2	349.8
1965	708.7	388.4
1966	750.8	380.9
1967	731.2	388.5
1968	756.8	396.3
1969	774.0	404.0
1970	768.0	412.0

The railroads' share of the intercity market declined from forty-five per cent of the total intercity traffic in 1959 to forty per cent in 1969.⁷⁸ This result in itself would suggest that intramodal competition is not necessary.

75. *E.g.*, *Midwest Emery Freight System, Inc. v. Baltimore & O.R.R.*, 321 I.C.C. 637, 658-59 (1964); *Paint & Related Articles in Official Territory*, 308 I.C.C. 439, 440-41 (1959); *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 488-92, *modified* 263 I.C.C. 771 (1945).

76. *E.g.*, *Pennsylvania R.R.—Merger—New York Cent. R.R.*, 327 I.C.C. 475, 514-20, *modified* 328 I.C.C. 304, *affd. sub nom. Erie-Lackawanna R.R. v. United States*, 259 F. Supp. 964 (1966), *revd. on other grounds sub nom. Baltimore & O.R.R. v. United States*, 362 U.S. 372 (1967); *Norfolk & W. Ry.—Merger*, 307 I.C.C. 401, 416, 440 (1959).

77. 71 ICC ANN. REP. 11 (1957); 72 ICC ANN. REP. 10 (1958); 73 ICC ANN. REP. 11 (1959); 74 ICC ANN. REP. 10 (1960); 75 ICC ANN. REP. 15 (1961); 76 ICC ANN. REP. 12 (1962); 77 ICC ANN. REP. 74 (1963); 78 ICC ANN. REP. 34 (1964); 79 ICC ANN. REP. 59 (1965); 80 ICC ANN. REP. 53 (1966); 81 ICC ANN. REP. 55 (1967); 82 ICC ANN. REP. 86 (1968); 83 ICC ANN. REP. 87 (1969); 84 ICC ANN. REP. 77 (1970); 85 ICC ANN. REP. 119 (1971). Data for 1970 are preliminary.

78. 75 ICC ANN. REP. 15 (1961); 85 ICC ANN. REP. 119 (1971). Modes included in the total of domestic intercity traffic are railroads (including express and mail), motor vehicles, inland waterways (including Great Lakes), oil pipelines, and airways (including express, mail, and excess baggage).

However, there is yet another factor indicating the importance of motor carrier competition when considering railroad profits. Besides the Commission's direct control over each general increase proposed by the railroads, it possesses the means to regulate railroad earnings indirectly through the regulation of motor carrier earnings. Therefore, the rate increases allowed the railroads may result in substantially lesser percentage increases than projected, because of motor carrier competition.

The Commission recognized in the 1960's that it was necessary to consider motor carrier earnings more closely than in prior years. For this reason, the Commission came to the realization that it had not developed techniques for deciding how much profit the various groups of motor carriers should earn, and that it needed to do so to implement over-all transportation policy.⁷⁹

Recently, the railroads, too, have begun to monitor motor carrier earnings more closely. They have responded to such competition with a new variety of volume rates that are designed to expand traffic and revenues. We next examine how the value-of-service standards, which are reflected in these volume rates, confronted the discrimination sections of the statute, and the work of the Commission in resolving the conflict.

IV. THE TREND IN VOLUME RATE REDUCTIONS

The Commission's contributions in the field of rate-making in the 1960's extended to many areas, not the least of which concerned the new varieties of volume rate reductions. Here, again, the questions before the Commission were resolved not strictly in terms of the cost of service, but instead on other and broader principles.

In the earliest period of federal railroad regulation, the Commission, seeking to protect small shippers, denied the existence of carload cost savings through its refusal to approve discounts for carload movements.⁸⁰ Its attitude changed, however, as new techniques of cost accounting were developed and better accounts were kept by the railroads. By 1939, the Commission had removed not only the regulatory restraints on the filing of reduced carload rates, but also those on the further-reduced multicar and unit-train rates.⁸¹

79. See pts. VI & VIII *infra*.

80. *Providence Coal Co. v. Providence & W.R.R.*, 1 I.C.C. 363 (1887); 1915 Western Rate Advance Case—Part II, 37 I.C.C. 114, 155 (1915). See III-B I. SHARFMAN, *supra* note 13, at 404-06.

81. See *Molasses from New Orleans, La. to Peoria & Pekin, Ill.*, 235 I.C.C. 485, 502 (1939).

Nevertheless, only in the 1960's—when the railroads filed a number of new volume rate reductions—did these carriers become fully aware of the increased profits obtainable through the use of greatly reduced volume rates.⁸² The resulting increased number of volume rate applications that occurred during that period raised for the Commission several knotty questions concerning discrimination.

In the first of the *Eastern Seaboard Coal* cases,⁸³ the Commission was faced with price discrimination among coal shippers. The proposed rate reduction of thirty-five cents per ton in this case was conditioned on the consignee's receiving at least 1.5 million tons of coal from one or more of the specified points of origin. The impetus for the reduced rate was the threatened construction by the consignee electric company of a generating plant at the mouth of the coal mine. Construction of the plant would have deprived the railroad of a substantial volume of coal traffic. In light of these facts, the Commission found that the reduced volume rate was not unjustly discriminatory.

The second of these cases⁸⁴ was similar to the first. There the railroads again faced a potential loss of coal traffic. Shippers were threatening to substitute less expensive imported residual fuel oil for coal. The railroads' response was to meet the competition with a specially tailored reduction of the coal rates. The reduction was conditioned on the shipment of a stated annual volume so that the reduced rate would apply only to the coal that would otherwise be replaced by oil. The Commission considered the possibility that the proposed schedules contravened the proscription against unjust discrimination among shippers of like goods found in section 2⁸⁵ of the Interstate Commerce Act, but decided that

[t]here is no evidence that the proposed rates are designed to create favoritism among shippers of like traffic, or that they are in fact creating or are likely to create favoritism. On the contrary, the only purpose of these rates is to prevent substantial traffic losses to the respondent railroads. As such, the discrimination resulting from

82. See generally P. MACAVOY & J. SLOSS, REGULATION OF TRANSPORT INNOVATION, THE ICC AND THE UNIT COAL TRAINS TO THE EAST COAST (1967). Unfortunately, the authors relied upon the railroads' brief in *Coal to New York Harbor*, 311 I.C.C. 355 (1960), for the proposition that the railroads believed that restraints continued after 1939. *Id.* at 77, citing Brief for Respondent Railroads at 34. In context, that brief merely said that the railroads would have to show competition existed at the eastern seaboard to avoid the requirement of the statute (49 U.S.C. § 4 (1970)) that inland points receive comparable discounts.

83. *Coal from Ky., Va., & W. Va. to Va.*, 308 I.C.C. 99 (1959).

84. *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960).

85. 49 U.S.C. § 2 (1970).

the reduced rates may be considered as justified by the circumstances and conditions attending the particular transportation service.⁸⁶

The Commission also considered the possibility that the proposed schedule was unduly preferential, a result that would be in contravention of section 3⁸⁷ of the Act. It concluded that the proposed rates did not violate this provision either, emphasizing that

[t]here is no objection to these rates by any coal shipper or receiver, nor is there any indication that injury or disadvantage might be sustained by any such shipper or receiver as a result of these rates. The utilities do not compete with any receivers of bituminous coal at the destinations specified in the tariffs. Without a showing of competition or disadvantage, there can be no finding of undue preference or prejudice.⁸⁸

Thus, after a consideration of the particular circumstances—but with no discussion of cost savings—the Commission concluded that the proposed schedule was lawful.

In the years that followed the *Eastern Seaboard Coal* cases, the Commission continued to approve volume rate tariffs without finding violations of section 2 and 3 of the Interstate Commerce Act. For example, multiple-car rates on grain were permitted to become effective in 1963, although final approval was not given until 1965.⁸⁹ And annual-volume rates on coal between two points in Indiana were approved in 1964 despite objections raised by a supplier of natural gas.⁹⁰ In 1965, certain carload rates on champagne, vermouth, and wine were allowed by the Commission so that railroads could effectively compete with unregulated water transportation. The rates in this latter case were also approved without reference to cost savings in a report of the entire Commission.⁹¹

Several other annual-volume rates were permitted to take effect during this period without the institution of formal investigations. These included rates on coal,⁹² soybean meal or cake for export,⁹³

86. 311 I.C.C. at 369.

87. 49 U.S.C. § 3 (1970).

88. 311 I.C.C. at 367.

89. *Grain in Multiple-Car Shipments—River Crossings to the South*, 325 I.C.C. 752 (1965), *following remand in* *Arrow Transp. Co. v. Cincinnati, N.O. & Tex. Pac. Ry.*, 379 U.S. 642 (1965).

90. *Natural Gas Pipeline Co. of America v. New York Cent. R.R.*, 323 I.C.C. 75 (1964).

91. *Wine, Pac. Coast to the East*, 329 I.C.C. 167 (1966), *affg.* 326 I.C.C. 119 (1965).

92. *Suspension Bd. Case No. 44247* (I.C.C., Nov. 16, 1966); *Suspension Bd. Case No. 45347* (I.C.C., May 8, 1967).

93. *Investigation & Suspension Docket No. 8353* (I.C.C., May 5, 1967).

corn and soybeans,⁹⁴ and raw cane sugar.⁹⁵ However, it is the *Rent-a-Train* case⁹⁶ that provides the best illustration of the trend of the Commission's policies regarding volume rate discounts. The novel tariff in this case involved a 700,000-dollars-per-year rate on shipments of oats, wheat, or corn, when the transportation was performed in shipper-furnished cars. To be eligible for this rate, shippers were required to tender shipments for a minimum number of trips each year, and for each trip the shipper was limited to 8,600 tons per 86-car train; if additional cars were needed, the tariff was correspondingly higher. In the Commission's eyes, this rate structure was analogous to multicar and unit-train rates, and it therefore rendered a favorable opinion on this plan, too.

Many of these and other similar rate cases involved exclusive dealing provisions, which at least one commentator would limit.⁹⁷ But as the Commission explained in *Rent-a-Train*, the exclusive dealing provisions would constitute destructive competitive practices only when the railroads were at the same time attempting to meet the competition of other modes of transportation subject to the Interstate Commerce Act. If the competition occurred between coal and residual oil, or involved other "market competition," an exclusive dealing arrangement would not be unlawful per se.⁹⁸

Despite the Commission's favorable attitude toward exclusive dealing arrangements for quantity rate shipping, an annual-volume rate, predicated upon a similar arrangement, would not be permissible in most cases. Such an arrangement could bind the shipper's traffic to one carrier, or a group of carriers, to the exclusion of other carriers, for an excessive period of time.⁹⁹ The shipper, in the Com-

94. Suspension Bd. Case No. 43803 (I.C.C., Sept. 9, 1966, *affd.* Sept. 13, 1966).

95. Suspension Bd. Case No. 41917 (I.C.C., Dec. 16, 1965, *affd.* Dec. 20, 1965).

96. Grain by Rent-a-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111 (1969), *affd.*, 339 I.C.C. 579 (1971).

97. Note, *Exclusive Dealing Provisions Under the Interstate Commerce Act: A Re-appraisal*, 82 HARV. L. REV. 1536 (1969).

98. 339 I.C.C. at 590-91.

99. It has been suggested that an exclusive dealing arrangement be allowed, (1) where the railroad would have to invest a considerable sum of money to inaugurate a new service, or (2) where the carrier competition was seasonal. Note, *supra* note 97, at 1547. Both examples might violate the Interstate Commerce Act in the presence of carrier competition, but not market competition.

Those who urge this view unduly minimize the "lock-in" effect of an exclusive dealing arrangement, arguing that the lock-in would last no more than one year, since "upon expiration of the tariff, the shipper's traffic would be open to bidding by all competing carriers." They also suggest that the shipper could withdraw from the agreement at least during the early part of the tariff period. *Id.* at 1544. The latter suggestion would not likely be feasible if a shipper had geared its operation for large-volume shipments by rail. The tariffs in question, of course, do not "expire" at the end of one year; and a "lock-in" effect of a full year could in fact do substantial harm to a competing carrier.

mission's view, should not be placed in a position that would make the acceptance of superior or equal transportation services from another regulated carrier prohibitively expensive. If the minimum tonnage required by the exclusive dealing condition were set so high that it removed a substantial portion of the traffic from the competitive arena, tying the traffic to one carrier, other carriers would be precluded merely by the form of the tariff from competing. Such a result would violate the National Transportation Policy.¹⁰⁰

On the other hand, annual-volume rates have been approved, or permitted to take effect without suspension¹⁰¹ of the effective date, whenever the reduced rates merely permitted a shipper to meet the competition of another shipper or group of shippers, or produced an indirect effect on shippers. In one case, for example, the reductions were filed on raw materials moving to a processing facility; the only carrier competition brought to the attention of the Commission here was that in the marketing of the finished product.¹⁰² In three other cases, the reduced annual-volume rates affected the market competition at the distribution points after the movements from the points of production occurred.¹⁰³ None of these rates involved carrier competition; therefore, none were suspended.

A basic question relating to volume rates that affect market competition remains unexplored on any formal record before the Commission. Should the Commission establish limits on the rate advantages accorded large shippers or ports, and, if so, what should those limits be?¹⁰⁴ On the one hand, there is Justice Holmes' admonition that the "law does not attempt to equalize fortune, opportunities, or abilities";¹⁰⁵ on the other, there might be a point beyond which a large shipper or an individual port would be "unduly preferred"

100. 49 U.S.C. preceding § 1 (1970). See *New York Cent. R.R. v. United States*, 368 U.S. 349 (1962), *affg. mem.* 194 F. Supp. 947 (S.D.N.Y. 1961), *affg.* Contract Rates on Rugs and Carpeting from Amsterdam, N.Y. to Chicago, 313 I.C.C. 247 (1961).

101. The Commission can suspend the operation of proposed rates for up to seven months. 49 U.S.C. § 15(7) (1970). For the history of the power, see *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 662-66 (1962). For a recent critical analysis of the exercise of the power, see Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39 (1971).

102. Suspension Bd. Case No. 41917 (I.C.C., Dec. 16, 1965, *affd.*, I.C.C. Div. 2, Dec. 20, 1965).

103. Suspension Bd. Case No. 45287 (I.C.C., April 26, 1967, *affd.*, I.C.C. Div. 2, April 27, 1967); Suspension Bd. Case No. 45060 (I.C.C., March 29, 1967, *affd.*, I.C.C. Div. 2, March 31, 1967); Suspension Bd. Case No. 41869 (I.C.C., Dec. 1, 1965).

104. The Secretary of Agriculture briefly raised the issue in *Soybean Cake or Meal for Export, Redfield, Iowa to Port Arthur, Tex.*, Investigation & Suspension Docket No. 8353 (I.C.C.), but the order of suspension was vacated without investigation on May 5, 1967.

105. *ICC v. Diffenbaugh*, 222 U.S. 42, 46 (1911).

and a smaller competitor "unduly prejudiced" by rate advantages accorded the larger entity merely for reasons of size. The only available legal standard helpful in answering this question lies in a broad statement of the Supreme Court made many years ago:

To bring a difference in rates within the prohibition of Sec. 3 [of the Interstate Commerce Act], it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective service, by their values, or by other transportation conditions.¹⁰⁶

The above issue has become more important with the appearance of the numerous volume discounts of the 1960's, and it is not likely to disappear without substantial litigation.¹⁰⁷

V. THE EXPANSION OF COMPETITION AMONG THE PORTS

The complex rate-making tasks performed by the Commission in the 1960's were not confined to the increasing role of volume discounts. One of its major undertakings was the enforcement of fair competition among the nation's ports, a task that concerned perhaps more conflicting interests than any other the Commission faced. The crux of this problem lies in the fact that the provisions of the Interstate Commerce Act that protect shippers and localities from the discrimination are not cost-oriented. When, for example, Congress amended the statute in 1935 to protect ports, it did not thereby seek to further the most efficient development of economic resources, except insofar as it might be consistent with its purpose to "encourage and promote the freedom of movement . . . through the ports of the country," so that commerce could "move freely through as many available ports as the governing circumstances will reasonably permit."¹⁰⁸ For this reason, the Commission has given controlling weight to considerations other than distance, which presumably measures certain costs, in requiring the railroads to equalize their rates between competing ports.¹⁰⁹ The Commission's position received new emphasis in several cases during the 1960's.

106. *United States v. Illinois Cent. Ry.*, 263 U.S. 515, 524 (1924).

107. The problem is particularly acute in cases involving a reduced rate that is conditioned upon a minimum *past* movement. Whenever annual-volume rates are conditioned upon minimum volumes shipped in a prior period, the annual-volume reduction may be more a reward for past patronage than an incentive to ship larger volumes. It is also unavailable to shippers first entering the field, and therefore might stifle shipper competition altogether.

108. H.R. REP. No. 1512, 74th Cong., 1st Sess. 2 (1935).

109. In the late 1940's and the 1950's the common practice was to give diminishing

A. *Texas Gulf Port Cases*

In a series of cases involving the Texas Gulf ports, the Commission at first did not have to look beyond the distance principle to promote port competition. Upon finding that the distance between Freeport and the territory in question was comparable to that between the "Houston group"¹¹⁰ and the same territory,¹¹¹ the Commission required equality of treatment for Freeport and the Houston group on export and other traffic to and from points exceeding 150 miles from the Houston group.¹¹² But distance alone would not fulfill the congressional mandate to promote traffic through all of the ports. Accordingly, the Commission also required that Corpus Christi, a port not as well situated as either Freeport or the Houston group, be equalized with the Houston group for grain traffic flowing from the same territory,¹¹³ and for cotton moving from an even wider territory of origin.¹¹⁴ In the latter case, the distances to Corpus Christi were from twenty per cent to sixty per cent greater than to the Houston group under the mileage standard on which the Commission most heavily relied.¹¹⁵ Despite this fact, a three-judge district court on appeal sustained the Commission's decision in the case involving cotton on the grounds that "there is more to natural advantage and location than geographic mileage differences, and shorter mileage to one port does not automatically give immunity from rate equalization."¹¹⁶ The district court gave its approval to the Commission's rejection of a "mechanical definition of a prejudice"¹¹⁷ and held that the Commission's equalization order was rationally based in light of the similarity of the terrain throughout

weight to distance and increasing weight to competition only as the length of the haul increased. See *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 590-91 (1949). See also *Baltimore & O.R.R. v. United States*, 151 F. Supp. 258, 275 (D. Md.), modified *per curiam sub nom. ICC v. Baltimore & O.R.R.*, 355 U.S. 175 (1957).

110. The Houston group includes the cities of Houston, Galveston, and Texas City.

111. *Brazos River Harbor Navigation Dist. v. Abilene & S. Ry.*, 319 I.C.C. 54, 67 (1963), *affd.* 322 I.C.C. 529 (1964), *affd. sub nom. Atchison, T. & S.F. Ry. v. United States*, 231 F. Supp. 422 (N.D. Ill. 1964).

112. 322 I.C.C. at 68.

113. *Export Grain from Tex. to Tex. Points*, 319 I.C.C. 16 (1963). *Nueces County Navigation Dist. No. 1 v. Atchison, T. & S.F. Ry.*, 315 I.C.C. 155 (1961).

114. *Nueces County Navigation Dist. No. 1 v. Atchison, T. & S.F. Ry.*, 325 I.C.C. 400 (1965), *affd. sub nom. City of Galveston v. United States*, 257 F. Supp. 243 (S.D. Tex. 1966), *affd. mem.*, 386 U.S. 269 (1967).

115. 325 I.C.C. at 408. The distance was much less under other mileage standards to which the Commission referred.

116. *City of Galveston v. United States*, 257 F. Supp. 243, 248 (S.D. Tex. 1966), *affd. mem.*, 386 U.S. 269 (1967).

117. 257 F. Supp. at 247.

southwestern Texas and the prior equalization of rates charged for other commodities flowing from these same origins to both Corpus Christi and the Houston group.

B. *South Atlantic Port Cases*

The problem of rate equalization also arose before the Commission in cases concerning the country's southeastern ports. By 1961, the Gulf ports were already on a parity with the South Atlantic ports for all export and import traffic to and from "Central Territory"—an area covering Illinois, Indiana, Ohio, Michigan's Lower Peninsula, and adjacent Mississippi and Great Lakes ports in certain bordering states. It was the Commission's opinion that similar parity should be granted to Tampa, Florida; consequently, it ordered parity for Tampa on traffic moving from those points of origin within the Territory, whose distances from Tampa fell within the range of distances from the same points to the Gulf and South Atlantic ports when the rates to those ports were equal.¹¹⁸ Furthermore, the Commission ordered parity from those same points between Tampa and the South Atlantic ports whenever the rates to the South Atlantic ports exceeded the rates to the Gulf ports.¹¹⁹ The relief thus granted Tampa entrance into competition with the range of ports extending from Wilmington, North Carolina and Morehead City, North Carolina to the Houston group and Corpus Christi on the Gulf.

In another Atlantic port proceeding, the question of prejudice between ports was again raised. Goods moving to Morehead City—as opposed to Wilmington—were charged higher freight rates when the point of origin was within the "Interior Southern Territory"—a region including points west of Danville, Virginia, to the Mississippi River.¹²⁰ The railroads had equalized the rates to these ports for goods shipped from origins that were more distant. The Commission concluded from this fact that there was no justification for the Interior Southern Territory price differential. It explained:

[W]e are satisfied that cost alone provides an inadequate basis upon which to determine the issues here before us. Moreover, it is clear . . . that such a basis might defeat its own purpose by encouraging the carriers to reduce their import and export rates . . . to the pre-

118. *Hillsborough County Port Auth. v. Ahnapee & W. Ry.*, 313 I.C.C. 691, 705-06 (1961), *affd. sub nom. Alabama, T. & N.R.R. v. United States*, 207 F. Supp. 638 (S.D. Ala. 1962).

119. 313 I.C.C. at 706.

120. *City of Wilmington v. Alabama Great S.R.R.*, 316 I.C.C. 709 (1962).

scribed minimum level, thus resulting in needless dissipation of carrier revenues.

....

The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public. Generally, such equalization has not been approved in areas close to the respective ports.¹²¹

For this reason, the Commission approved equalization of the export-import rates from the Interior Southern Territory to the two ports, except when the class-rate¹²² distances between such points and Morehead City exceeded those to Wilmington by more than twenty-five per cent. In these instances, the use of differentially higher rates to Morehead City was approved.¹²³

C. North Atlantic Port Cases

The Commission's effort to give credence to distance, and hence to cost of service, in the competition between the North Atlantic ports met only with court reversal during the 1960's.

From the period prior to federal regulation of the railroads, traffic moving through the southern-tier ports—Baltimore, Philadelphia, and Hampton Roads—had enjoyed export and import rates lower than those charged to the northern-tier ports, in New York and New England, from "Differential Territory"—an area west of the Buffalo-Pittsburgh line to the Mississippi River and north of the Ohio River. When the railroads serving the northern tier attempted to place that group of ports on a parity with the southern tier for rates to and from Differential Territory, the Commission refused to lend its approval to the newly reduced rates.¹²⁴ Its decision was reversed on appeal.¹²⁵ The district court held that the proximity of the southern-tier ports, especially Baltimore, to

121. 316 I.C.C. at 723, 725.

122. See note 52 *supra*.

123. 316 I.C.C. at 725-26.

124. Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689 (1969), *affd.*, 314 I.C.C. 185 (1961). At the same time the railroads serving the northern tier reduced their rates, those serving the southern tier reduced theirs to preserve the differential, and both sets of changes in the rates were suspended, investigated, and subsequently disapproved by the Commission.

125. *Boston and M.R.R. v. United States*, 202 F. Supp. 830 (D. Mass. 1962), *affd. by an equally divided court sub nom. Baltimore & O.R.R. v. Boston & M.R.R.*, 373 U.S. 372 (1963).

Differential Territory could not justify the Commission's action. It reasoned that the Commission's decision, "if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port."¹²⁶

The differential rates on imported iron ore were also the subject of numerous Commission and court opinions in the 1950's and 1960's. During this period, the Commission found the reduced rates on iron ore from New York to Differential Territory unlawful, but approved the reduced rates from Philadelphia.¹²⁷ Both aspects of its holding were reversed in two separate appeals.¹²⁸ On remand, the Commission approved the New York reduction, yet reaffirmed its approval of the Philadelphia reduction.¹²⁹ In reversing its previous position regarding New York, the Commission noted that carrier costs to and from New York were higher because of "the longer rail hauls involved from the port of New York," but held that "relative distances involved in railroad service to and from competing ports is only one factor to be considered in the equalization of rail rates to and from competing ports on export and import traffic"¹³⁰

These decisions of the 1960's effectively establish the principle that export and import rates strictly tailored to transportation costs are not permissible under existing law if they unduly restrict port competition. The factor of distance, and hence costs, is but one of several factors to be considered, as both the Commission and the courts indicated. Thus, the Commission was not alone in recognizing and enforcing these noncost considerations in the establishment of freight rates, an effort that must in the future expand further the competition among the nation's ports.

VI. MAXIMUM RATE REGULATION OF THE MOTOR CARRIERS

By the mid-1940's, the decline of railroad intercity traffic and the growth of interstate motor truck traffic had become an annual event.

126. 202 F. Supp. at 837. The court added that the sole function of the differential had been to offset the higher ocean rates to Philadelphia, a situation that no longer pertained. The Commission thereafter accepted the filing of reduced rates between New York and Differential Territory on export and import traffic, except for those on coal, coke, and iron ore. *See Iron Ore from E. Ports to Cent. Freight Assn. Points*, 321 I.C.C. 473, 489 (1964).

127. *Iron Ore from E. Ports to Cent. Freight Assn. Points*, 314 I.C.C. 149 (1961).

128. *Baltimore & O.R.R. v. United States*, 212 F. Supp. 13 (D. Md. 1962); *New York Cent. R.R. v. United States*, 207 F. Supp. 483 (S.D.N.Y. 1962).

129. *Iron Ore from E. Points to Cent. Freight Assn. Points*, 321 I.C.C. 473 (1964). By this time the iron ore traffic had been diverted from the North Atlantic ports to the St. Lawrence Seaway and the Great Lakes ports. 321 I.C.C. at 475.

130. 321 I.C.C. at 489.

For hauls up to 200 or 300 miles, the available evidence demonstrated that the motor carriers clearly held a cost advantage.¹³¹ The Commission's response to this development was to promote an orderly change so that the motor carriers could benefit from their "inherent advantage" while railroads adjusted to the decreased demand for their services.

The Commission therefore permitted general increases in motor carrier rates to assist the railroads to maintain their own increases without losing traffic. The Commission believed that in this manner both modes would fairly compete and yet maintain needed levels of service. The Commission in explaining its position noted:

Whether the railroads will be able to maintain the increases here sought will depend largely upon whether their principal competitors, the motor carriers, make similar increases in their freight rates and charges. The motor carriers are not parties to this proceeding, but obviously their entire rate structure and freight revenues will be indirectly affected by the decision in this case. . . .

Railroad executives who testified that total freight revenues would be increased rather than reduced by the proposed increases based their opinion, in part, upon the fact that, in the past, motor-carrier rates have been quickly increased after a general freight rate increase by the railroads. In most cases if the motor carriers do not increase their rates, the railroads will not be able to maintain the increases. This fact is of particular significance when it is realized that the total revenues of the motor carriers subject to our jurisdiction are now more than half as much as those of the railroads subject to our jurisdiction.¹³²

Or, as the Commission many years later said, the general increases allowed the motor carriers during the 1940's and 1950's "in certain ways supported the increases required by the railroads to maintain their service."¹³³

In 1962, the railroads' total intercity ton-miles, but not their relative participation in total intercity traffic, began increasing over the previous year. This trend continued throughout the 1960's, as the total intercity ton-miles of all modes increased.¹³⁴ The new eco-

131. See, e.g., *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 583 (1945).

132. *Increased Freight Rates, E., W. & S. Territories*, 1956, 300 I.C.C. 633, 667-68 (1957). See also *Increases, Transcontinental—Intermountain Coast*, 304 I.C.C. 15, 16-17 (1958); *Transcontinental & Western Increases*, 1952, 61 M.C.C. 755, 756 (1953); *Transcontinental & Rocky Mountain Increases*, 54 M.C.C. 377, 378 (1952); *Transcontinental Motor Rates—Increases*, 49 M.C.C. 211, 213 (1949).

133. *Increased Class & Commodity Rates, Transcontinental*, 329 I.C.C. 420, 422 (1967).

134. See table accompanying note 77 *supra*.

conomic activity in the nation during the early 1960's, which was responsible for this increase in rail traffic, also produced higher profits for the motor carrier industry.¹³⁵ Together, these events made the Commission more conscious of the importance of accurately measuring, and controlling, motor carrier earnings. As a result, the Commission set new standards for testing whether the proposed rate increases would indeed be "just and reasonable." In short, the "operating ratio"—formerly the Commission's fundamental tool in evaluating motor carrier performance—was no longer deemed sufficient.

The operating ratio lent itself nicely to the broad-brush regulatory policy followed by the Commission in the years preceding 1960. This ratio of expenses to revenues had originated with the railroads as a test of their year-to-year efficiency and stability of income.¹³⁶ A high operating ratio in one year might indicate instability, for the small profit margin could easily evaporate into a loss.¹³⁷

However, the operating ratio took on a different meaning in the regulation of the level of motor carrier rates. Without relating the ratio to any return on investment, the Commission adopted a ninety-three per cent operating ratio as the test of a fair and reasonable profit level for the regulated motor carriers.¹³⁸ In many of this period's rate hearings, the Commission stated that mass comparisons of costs and rates of hundreds of carriers could thereby be made more easily.¹³⁹

Certain state commissions also began to rely on the operating ratio as a test of fair earnings for local carriers, such as bus companies,¹⁴⁰ but most of these commissions did not stray very far from the rate-of-return-on-investment standard, which they used to check the results reached under an operating ratio.¹⁴¹ Nonetheless, it was

135. See 79 ICC ANN. REP. Table 35, at 162 (1965).

136. E. SALIERS, ACCOUNTANTS' HANDBOOK 838 (1923).

137. Studies were also done to determine to what extent this ratio reflected variations in volume of traffic, and hence reflected elements of constant costs. R. WESTMEYER, ECONOMICS OF TRANSPORTATION 75-77 (1952).

138. See, e.g., Increased Common Carrier Truck Rates in the East, 42 M.C.C. 633, 650 (1943).

139. Central Territory General Increases, 49 M.C.C. 4, 12 (1948); New England, 1946 Increased Rates, 47 M.C.C. 509, 518 (1947). In Middle West General Increases, 48 M.C.C. 541, 550 (1948), the Commission added that the ratio is useful in deciding upon appropriate differentials as between truckload and less-than-truckload rates.

140. E.g., Metropolitan Coach Lines, 10 P.U.R.3d 337, 344 (Cal. Pub. Util. Commn. 1955); Savannah Transit Co., 11 P.U.R.3d 380 (Ga. Pub. Serv. Commn. 1955); Pittsburgh Rys., 21 P.U.R.3d 170 (Pa. Pub. Util. Commn. 1957).

141. See, e.g., cases cited in note 140 *supra*; Long Beach Motor Bus Co., 12 P.U.R.3d 198, 204 (Cal. Pub. Util. Commn. 1955); Duke Power Co., 12 P.U.R.3d 300 (N.C. Util.

the complete departure from rate-of-return concepts by one local commission that led to the famous opinion by the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, on the subject of operating ratios. The decision not only affected the local regulatory agencies, but influenced the Commission's regulatory policies as well.

In *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission (Third Bebachick)*,¹⁴² the court reviewed the propriety of the operating ratio as a test of fair earnings, and concluded that the use of this standard alone would not suffice. The court was aware of the fact that the Interstate Commerce Commission believed this standard "provide[d] a fairer test of revenue needs in an industry in which, characteristically, a carrier's capital investment is small in comparison to his total costs."¹⁴³ It noted:

The principal risk in such operations inheres in the cost of operation, not in the investment. Accordingly, the operating ratio method permits a carrier to earn an amount representing annual operating costs, plus an additional amount from which to pay interest to the creditors and dividends to the owners.¹⁴⁴

However, the court also observed that it had not been shown, either before the Interstate Commerce Commission or before any other tribunal, how the fair amount allowable for interest and dividends could be measured from a review of bare operating ratios. When annual operating costs greatly exceed investment, for example, a return of 6.5 per cent on revenues would allow the regulated company a considerably greater dollar profit than a 6.5 per cent return on investment. The court recognized that it was, perhaps, the "apparent excessiveness of adequate returns expressed in traditional return-on-rate base terms" that led to the adoption of the operating ratio;¹⁴⁵ but the court held the local commission must return to the fundamental rate-making standard established by the Supreme Court

Comm'n. 1956); Salt Lake City Lines, 2 P.U.R.3d 405 (Utah Pub. Serv. Comm'n. 1953); Milwaukee Elec. Ry. & Transp. Co., 91 P.U.R. (n.s.) 82, 94 (Wis. Pub. Serv. Comm'n. 1951).

142. 350 F.2d 753 (D.C. Cir. 1965). The case of *Bebchick v. Public Util. Comm'n.*, 287 F.2d 337 (D.C. Cir. 1961), involved questions of standing. The case of *Bebchick v. Public Util. Comm'n.*, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963), involved not only the merits of transit fares in the District of Columbia, but also the question of restitution of increases not shown to be reasonable, a matter discussed at text accompanying notes 213-14 *infra*. The fourth case of this group is entitled *Williams v. Washington Metro. Area Transit Comm'n.*, 415 F.2d 922 (D.C. Cir. 1968).

143. 350 F.2d at 759.

144. 350 F.2d at 759-60.

145. 350 F.2d at 760 n.9.

in *FPC v. Hope Natural Gas Co.*:¹⁴⁶ that a just and reasonable rate may be fixed only with "particularized reference" to the needs of the regulated company in servicing its debt and equity and in meeting its legitimate expenses.¹⁴⁷

In other words, *Third Bebachick* concluded that although it might not be possible or desirable to determine these needs in terms of a percentage of investment, a detailed inquiry into the needs of the company for earnings above operating expenses must nevertheless be made. In the court's view, an operating ratio, such as 95.13 per cent, suggests "only that the legitimate operating expenses found by the Commission . . . account for all but 4.87 per cent of the total revenues expected to be realized from the approved fare structure."¹⁴⁸ The gross revenues allowed are to cover expenses and "something more"; that is, the "sum of money needed to attract the capital, both debt and equity, required to insure financial stability and the resulting capacity of the utility to render the service upon which the public depends."¹⁴⁹

The Interstate Commerce Commission had expressed dissatisfaction with the operating ratio several years prior to 1965;¹⁵⁰ but after *Third Bebachick* was decided, it began disapproving general rate increases on the basis of that decision.¹⁵¹ In addition, it moved

146. 320 U.S. 591 (1944).

147. 350 F.2d at 778.

148. 350 F.2d at 778-79.

149. 350 F.2d at 779. The court added:

To determine that sum entails inquiries and findings—judgmental as the latter may often be because ratemakers must be prophets of the future as well as historians of the past—into such things as the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and the related matters which must be prayerfully explored by the conscientious regulator before he can begin to say why he fixed upon 4.87 rather than 6.5 or 3.2.

350 F.2d at 779.

150. General Increases—Transcontinental, 319 I.C.C. 792, 803 (1963): "In view of the recurring attacks on the use of operating ratios to justify revenue needs . . . the carriers are admonished that in the future, expense items of representative carriers should be shown in greater detail, and all pertinent information regarding carrier-affiliate relationships should be disclosed."; General Increase—Middle Atl. & New England Territories, 319 I.C.C. 168, 176 (1963): "The mere showing of present operating ratios of above 93 percent without a showing of the factors that make up such a ratio is not sufficient for our purposes."; General Increases—E. Cent. Territory, 316 I.C.C. 467, 481 (1962): "Although an operating ratio of 93 percent has been found reasonable in the past, we do not regard such an operating ratio as an immutable standard."

151. Increased Class & Commodity Rates, Transcontinental, 329 I.C.C. 420, 426 (1967), *revd. on other grounds sub nom. Ringsby Truck Lines, Inc. v. United States*, 263 F. Supp. 552 (D. Colo. 1963); General Increase, Between East & Territories West, 329 I.C.C. 626, 643 (1965).

rapidly to require more detailed financial information from motor carriers.

Previously, the Commission had required the submission of detailed cost and traffic studies solely on a case-by-case basis. But in 1967, the Commission adopted a new policy governing the quantum of evidence it expected from motor carriers seeking general rate increases.¹⁵² Now the Commission required such studies to be submitted in a uniform manner, as described in the Commission's policy statement; and for the first time it explicitly required carriers to state in detail the "amount of money needed by the carriers over and above their operating expenses to attract capital."¹⁵³

The carriers did not heed the requirements of the Commission's policy statement and the orders that incorporated its requirements. This inaction elicited, first, a strongly worded opinion of the entire Commission in February 1969, and, second, the initiation of a rule-making proceeding to codify and expand the reporting requirement for motor carrier earnings.

In the *Middle Atlantic and New England* proceeding,¹⁵⁴ the motor carriers, as the Commission stated, "made no attempt to respond to the 1967 Statement of Policy or the usual order for proofs with respect to the amount of money, in addition to operating expenses, needed to attract debt and equity capital"¹⁵⁵ The Commission had already disapproved of the increase on other grounds.¹⁵⁶ Thus there was no necessity to discuss further the carrier's failure to report fully; nevertheless, it proceeded to warn the motor carriers that it must be provided with such data before it would approve their general rate increases.

The Commission conceded in *Middle Atlantic* that a ratio of operating expenses to operating revenues might indicate the efficiency of management in controlling expenses as well as the relative profitability of different categories of traffic. However, in terms that left no doubt about its agreement with *Third Bebbick*, the Commission proclaimed "[n]o particular operating ratio can be used as the starting point to prove the existence of or to measure revenue needs."¹⁵⁷ The Commission emphasized that "[s]ome analysis of the capital costs of the carriers' business must be presented to establish

152. 32 Fed. Reg. 7002 (1967).

153. 32 Fed. Reg. at 7003.

154. General Increase, *Middle Atl. & New England*, 332 I.C.C. 820 (1969).

155. 332 I.C.C. at 831.

156. 332 I.C.C. at 836.

157. 332 I.C.C. at 820.

a need for additional revenue, and to measure such need."¹⁵⁸ Once that is done, the earnings element can be translated into an operating ratio or profit margin. The resulting revenue need can then be compared to the rate level; and profit margins on various shipments of less than 1,000 pounds, as distinguished, for example, from truck-load shipments, can be assessed to develop the amount of the increase and where it should be allocated. In the Commission's words, "[the] correct approach assures coverage of [the motor carriers'] capital costs to which they are entitled."¹⁵⁹

In 1970 the Commission responded to the motor carriers' failure to disclose needed information directly. It commenced a rule-making proceeding¹⁶⁰ that led to the adoption of the current rules for submission by motor carriers of data whenever general increases are filed. Among the new requirements was a prescribed data sheet that solicited information about the projected earnings on the traffic in issue.¹⁶¹ The carriers are now specifically required to submit "evidence of the sum of money, in addition to operating expenses, including that needed to attract debt and equity capital, which they require to insure financial stability and the capacity to render service."¹⁶²

In short, the past decade has marked a complete change in the Commission's regulation of motor carriers' earnings. But, while it is clear that the Commission will predicate its decisions upon this new access to earnings information, the standards the Commission will employ in sifting through this data and using it to determine a carrier's need for capital remain unresolved.

Numerous increases were disapproved by the Commission in the 1960's on the ground that the carriers had not presented representative cost and traffic data.¹⁶³ As a result, the Commission had few

158. 332 I.C.C. at 837-38.

159. 332 I.C.C. at 838.

160. Proposed New Procedures in Motor Carrier Revenue Proceedings, 339 I.C.C. 324, 340 I.C.C. 1 (1971). Petitions for reconsideration may yet be filed in this proceeding.

161. 36 Fed. Reg. 18309 (1971) (codified at 49 C.F.R. §§ 1104.1 to 1104.8 (1972)). For a base calendar year or for an accounting year the system's total revenue needs are gained by adding operating expenses and

1. Leasing costs

2. Miscellaneous deductions less other income

3. Income taxes on ordinary income

4. Net income (returns on debt and equity capital)

Only that portion of items 2, 3, and 4 related to transportation is included in the computation; the allocation between transportation and nontransportation business of the carriers is made on the basis of the percentage of net tangible property devoted to transportation activities.

162. 49 C.F.R. § 1104.4 (1972).

163. *E.g.*, Increased LTL Class & Commodity Rates, Pac. Northwest, 329 I.C.C. 1 (1966); Increased Rates Within Southwest & Between Colo. and Wyo. & Southwest, 326

occasions to reach questions relating to the level of motor carrier earnings. However, in the cases that have decided the issue, a trend can clearly be discerned. In one proceeding, the Commission approved a requested rate increase in part on the basis of an earned rate of return that was lower than the national average.¹⁰⁴ In another, the *Middlewest* case,¹⁰⁵ the Commission refused to approve a general increase that would have provided a return of more than twenty-five per cent on the motor carriers' rate base. The Commission found that these carriers had typically earned approximately fifteen per cent on equity and that no "convincing showing" was made "of a need for higher rates."¹⁰⁶

Although the evidence is admittedly sketchy, it seems evident from these cases that the Commission will proceed on a course leading to refined standards for motor carrier profitability. The precise form for the presentation of past and projected earnings by carriers seeking rate increases is now prescribed; therefore, in future cases the Commission and the parties will be able to make use of this data and, together with expert testimony, derive the proper levels of motor carrier earnings in accordance with the new standards for maximum motor carrier rates.

The new standards for motor carrier profitability will have an effect as well on the regulation of railroad rates. The railroads will not be able to assume, as they did in the 1940's, that a motor carrier increase will assist, as a matter of course, their own efforts to distribute a general increase to individual commodities. The railroads will now have to work harder to explain rate increases on individual commodities.

VII. NEW DEVELOPMENTS IN THE RESTITUTION OF UNJUSTIFIED RATE INCREASES

In the 1960's the Commission often permitted the proposed annual rate increases of the motor carrier industry to take effect pend-

I.C.C. 216 (1966); LTL COR Rates—Between East & Territories West, 326 I.C.C. 174 (1966); LTL Class Rates & Minimum Charges Between Midwest & Cent. Territories, 325 I.C.C. 106 (1965).

164. Increased LTL, AQ & TL Rates, To, From & Between New Eng. Territory, 335 I.C.C. 185, 190, 200 (1969).

165. Increased Rates & Charges, From, To & Between Middlewest Territory, 335 I.C.C. 142 (1969), *affd. sub nom.* Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (D. Colo.), *affd. mem.*, 404 U.S. 802 (1971).

This case resulted in a refund of the increase to shippers, because the Commission required that the carriers agree to refund the increase, if it were found unjustified, as a condition to granting the carriers an extension of time to prepare their evidence. 335 I.C.C. at 151.

166. 335 I.C.C. at 150.

ing an investigation of their lawfulness. After performing these investigations, which sometimes took up to two years to complete, the Commission found many of these increases unjustified and, as a consequence, ordered that rates be reduced. The *Study Group Report* found in this procedure a "simple but ludicrous"¹⁶⁷ pattern of permitting motor carriers to retain rate increases that were ultimately found to be completely unjustified. For this and other reasons,¹⁶⁸ the *Report* was highly critical of the Commission's regulation of motor rates.

To be sure, the Interstate Commerce Act gives the Commission the choice of suspending or not suspending the effectiveness of proposed increases pending their investigation.¹⁶⁹ But if the Commission had suspended the effectiveness of each rate increase and each of those increases in fact had been justified, then the motor carriers would have lost forever the needed amounts that they were unable to collect during the suspension period. The shippers and consumers, on the other hand, would have been no worse off if they could have obtained refunds, with interest, of the unjustified increases.

The problem, therefore, appears to lie in the fact that the Commission does not, for the most part, order the motor carrier industry to refund rate increases that it finds are unjustified.¹⁷⁰ Part I¹⁷¹ of the Interstate Commerce Act confers authority on the Commission to order railroads "to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified";¹⁷² but Part II¹⁷³ of the Act, which is applicable to motor carriers, contains no comparable provision. Thus, if the Commission decides that a general increase for a group¹⁷⁴ of motor carriers is not justified, it will hold that the rates have not been shown to be just and reasonable, and, accordingly, that the carriers have not borne their statutory

167. STUDY GROUP REPORT, *supra* note 1, at 183.

168. For example, the *Report* was highly critical of ICC regulation of trucking and intermodal competition. *Id.* at 170.

169. 49 U.S.C. §§ 15(7), 316(g), 907(g), 1006(e) (1970). For a recent study of the suspension practices of the Commission and other federal agencies, see Spritzer, *supra* note 101.

170. The exceptional *Middlewest* refund order is discussed in note 165 *supra*.

171. 49 U.S.C. §§ 1-5, 5b-27 (1970).

172. 49 U.S.C. § 15(7) (1970).

173. 49 U.S.C. §§ 301-27 (1970).

174. The general increases of the motor carrier industry were filed during the 1960's with the Commission principally by ten rate bureaus. The major rate bureaus each have 200 or more member carriers in the parent trade association. See generally *New Procedures in Motor Carrier Revenue Proceedings*, 339 I.C.C. 324, 326-47 (1971).

burden of proof.¹⁷⁵ Its order, however, will not require a refund of the excessive charges; instead, the Commission's decision will be accompanied, at most, by an order requiring the carriers to cancel the offending increase. And if other increases have intervened, even a cancellation is out of the question, for the rates in issue will have been superseded.¹⁷⁶

Apparently the *Study Group Report* inferred from the Interstate Commerce Act's dichotomy between railroads and motor carriers, and from the Commission's refusal to order refunds, that "under the statute there is no recovery for shippers who pay the increased rates if the Commission cancels the increase (for motor carriers),"¹⁷⁷ and therefore concluded, "unless the I.C.C. specifically so provides, the shippers who have been paying the higher rates . . . will simply have to swallow their past loss"¹⁷⁸ Certain developments in the law of restitution in the 1960's suggest that this conclusion is in error; the shippers may have a cause of action in common-law restitution.

The theory that can support a cause of action by shippers against a motor carrier is that under prevailing principles of equity, the carriers will be unjustly enriched if they are permitted to retain moneys to which they have not shown entitlement. This rationale seems particularly forceful since the Interstate Commerce Act imposes an affirmative duty on these carriers to prove this entitlement. In addition, since the rule of restitution is one of general application and has been held to apply to charges collected under agency orders, or, as here, under tariffs filed with the Commission,¹⁷⁹ there is further justification in arguing for a cause of action based upon restitution. But despite these arguments, the validity of restitution as a means of preventing motor carriers from being unjustly enriched has been

175. Section 216(g) of the Interstate Commerce Act, 49 U.S.C. § 316(g) (1970), provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable."

176. The tariff publishing requirement relates to "rates" and "charges" and not to increments thereof. 49 U.S.C. § 317 (1970). Similarly, the carriers' burden of proof relates to the "proposed changed rate" and not merely to the incremental increase. 49 U.S.C. § 316(g) (1970). When a second rate, therefore, becomes effective, it supersedes the first rate. However, since rates are constantly changed, it may be difficult to determine the precise date on which a general increase of all rates of a group of carriers was superseded. On the other hand, it has been assumed, quite properly, that a new general increase will surely have superseded a prior general increase. The shippers' maximum recovery, therefore, spans the period between the two general increases. The burden should be on the carriers to prove a lesser recovery is in order.

177. *STUDY GROUP REPORT*, *supra* note 1, at 183.

178. *Id.* at 184. The *Report* does not give any source of authority for the Commission to "specifically so provide."

179. See generally *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935); *Baltimore & O.R.R. v. United States*, 279 U.S. 781, 786 (1928); *Arkadelphia Milling Co. v. St. Louis S. Ry.*, 249 U.S. 134, 145 (1919).

cast into doubt by three important cases, each involving a suit for reparations,¹⁸⁰ and one case now pending on appeal directly involving restitution.

In *T.I.M.E., Inc. v. United States*,¹⁸¹ the Supreme Court held that a common-law right to reparation against motor carriers to recover allegedly unreasonable past charges did not survive passage of the Interstate Commerce Act. The rationale used by the Court to reach this decision was that "because under the statutory scheme only the I.C.C. could decide in the first instance whether any filed rate was 'unreasonable' either as to the past or future, any common law right was necessarily extinguished as 'absolutely inconsistent' with recognition of the Commission's primary jurisdiction."¹⁸² The Court adopted this rationale from its 1907 decision in *Cotton Oil*,¹⁸³ a case holding that the passage of the Interstate Commerce Act extinguished the common-law right to reparations against railroads.¹⁸⁴ From these two decisions, it may be argued that restitution, a common-law remedy which would produce an outcome similar to that in a reparations suit, has also failed to survive the Act's passage.

This argument, however, fails to consider the limits placed by the Court on *Cotton Oil* and *T.I.M.E.* Unlike the right to reparation, the right to restitution has been held, after *Cotton Oil* was decided, to coexist with those rights established by the Interstate Commerce Act.¹⁸⁵ The Court made no suggestion to the contrary in *T.I.M.E.*; and in its subsequent *Hewitt-Robins*¹⁸⁶ decision—a case involving damages for misrouting—the Court expressly limited the

180. Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9 (1970), allows any person claiming to have been damaged by a railroad's violations of the Act either to make a complaint to the Commission or to bring suit in a district court. Section 16, 49 U.S.C. § 16 (1970), provides for enforcement of an ICC award of damages. The Supreme Court held at a very early stage that the Commission had primary jurisdiction over questions of the reasonableness of rates. Thus a shipper complaining of unreasonableness must litigate that issue before the ICC. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The other parts of the Act contain similar provisions on claims for reparations. *E.g.*, 49 U.S.C. § 304a (1970) (motor carriers).

181. 359 U.S. 464 (1959).

182. 359 U.S. at 473.

183. 359 U.S. at 473-74, *citing* *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

184. The shipper in *Cotton Oil* sought to assert the common-law right to reparation in a state court on account of allegedly excessive and unreasonable railroad rates. The Court held that the judicial exercise of such a power was "wholly inconsistent" with the Commission's administrative power "of seeing to it that the statutory requirement as to uniformity and equality of rates is observed," and with the Commission's own authority to award reparation. 204 U.S. at 441.

185. *See* *Baltimore & O.R.R. v. United States*, 279 U.S. 781, 786 (1929). In such cases, the "cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935).

186. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

T.I.M.E. holding. It emphatically noted in *Hewitt-Robins* that *T.I.M.E.* did not bar all common-law claims.¹⁸⁷

The limits on *T.I.M.E.* are perhaps more comprehensible when the procedural differences between restitution and reparation are analyzed. In a reparations case, the shipper must prove the unreasonableness of past rates, a task that may result in a potential attack on the current rate structure.¹⁸⁸ Restitution, on the other hand, is more similar to the cause of action for misrouting, allowed in *Hewitt-Robins*, than to a reparations claim; for it involves no attack on existing, presumably lawful, rates. The Interstate Commerce Act requires the carriers to prove the reasonableness of newly filed rates; and if they have failed in that proof, the cause of action for restitution only then comes into play.

In this respect, the Court's rationale for rejecting the continued existence of reparations—that reparations suits would limit the Commission's primary jurisdiction—would not seem to apply to restitution. Since section 216(j)¹⁸⁹ of the Act preserves any such remedy "not inconsistent" with the Act, and the primary test of whether a cause of action survived the Act's passage "depends on the effect of the exercise of the remedy upon the statutory scheme,"¹⁹⁰ restitution suits should be allowed. Restitution would complement the Commission's regulatory scheme, not interfere with it.

While *T.I.M.E.* can thereby be distinguished from the typical restitution case, a potentially more serious objection to restitution can be traced to another aspect of the Commission's reparation practice, as the *Feinstein* case¹⁹¹ illustrates. In 1956, the Commission held that certain railroads had not shown their separately published loading and unloading charges, which were applicable in the New York City area, to be just and reasonable.¹⁹² As a result, a shipper promptly sought both reparation under section 9¹⁹³ of the Interstate Commerce Act and relief under *indebitatus assumpsit* on

187. 371 U.S. at 86-87.

For a more detailed discussion of *T.I.M.E.*, see the court of appeals opinion in *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232-36 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

188. As a three-judge district court stated in *National Motor Freight Assn. v. United States*, 268 F. Supp. 90, 92 & n.1. (D.D.C. 1967), the Supreme Court in *T.I.M.E.* dealt with "past rates" or "reparations proceedings involving rates once effective under the regulatory laws administered by the Commission."

189. 49 U.S.C. § 316(j) (1970).

190. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 89 (1962).

191. *Feinstein v. New York Cent. R.R.*, 159 F. Supp. 460 (S.D.N.Y. 1958).

192. *Unloading Charges on Fruits & Vegetables at N.Y. & Phila.*, 298 I.C.C. 63 (1956).

193. 49 U.S.C. § 9 (1970).

the theory of unjust enrichment in an action brought before the United States District Court for the Southern District of New York.

Judge Learned Hand analogized the Commission's finding, that the railroads had not shown the unloading charges to be just and reasonable, to a decree for an injunction, which "speaks from the date of its entry."¹⁹⁴ He added that in an injunction suit, "before there can be an accounting for past profits or damages the court must find that the defendant had been guilty in the past of the same wrong."¹⁹⁵ The court was not satisfied that it was hearing a suit for damages that was "cognizable in all its aspects by the District Court."¹⁹⁶ Thus, Judge Hand denied the relief sought, but stayed dismissal of the section 9 claim pending application to the Commission for a finding of whether the rates charged and paid prior to the date of the Commission's findings were just and reasonable.¹⁹⁷ The court dismissed the claim for indebitatus assumpsit, holding that the Commission must "pass upon the invalidity of the charges before the claim becomes absolute and is actionable at law at all."¹⁹⁸ The shipper took no appeal, but proceeded to file a complaint with the Commission under section 13(1)¹⁹⁹ of the Interstate Commerce Act and to assume the burden of showing that the pre-1956 rates were unjust and unreasonable.²⁰⁰ The court's failure to grant restitution seemingly restricts the availability of that form of relief.

Yet when closely examined, the *Feinstein* court's opinion is clearly inconsistent with sections 15(7) and 216(g)²⁰¹ of the Interstate Commerce Act. A Commission finding under these sections, that rates have not been shown to be just and reasonable, speaks not from the date of entry, but from the date of the order instituting the investigation. This is most clearly shown in section 15(7), which expressly provides for a refund from the beginning of the proceeding. The final order under these sections, therefore, is not analogous to a decree for an injunction, but more to a grant or denial of relief requested by the carrier from its burden of proof. The final order either approves the rates and sets aside the order of investigation, or

194. 159 F. Supp. at 463.

195. 159 F. Supp. at 463.

196. 159 F. Supp. at 463.

197. 159 F. Supp. at 467.

198. 159 F. Supp. at 467. The court also noted it had no diversity jurisdiction over this claim, but because of this disposition did not discuss pendent jurisdiction. 159 F. Supp. at 467.

199. 49 U.S.C. § 13(1).

200. *William N. Feinstein & Co. v. New York Cent. R.R.*, 313 I.C.C. 783 (1961), *aff'd. sub nom. Feinstein v. United States*, 209 F. Supp. 613 (S.D.N.Y. 1962), *aff'd.*, 317 F.2d 509 (2d Cir. 1963).

201. 49 U.S.C. §§ 15(7), 316(g) (1970).

disapproves the rates and confirms the doubts expressed in the order of investigation.

There is a further fundamental error in *Feinstein* under sections 15(7) and 216(g). Both of these provisions treat the carrier's burden of proof as a matter of substantive law. The Commission's finding in 1956, that the carriers had not shown the rates and charges to be just and reasonable, should have been sufficient to render them unlawful from the date of their effectiveness; for under the Act the carriers' burden of proof was a substantive adjunct to the validity of those rates and charges.²⁰²

To be sure, there are several cases in which the Commission has found the same rates unlawful for the future but not for the past. Yet each of these cases involved no determination relating to the Commission's authority to have found those rates unlawful in the past.

The decision most often miscited as standing for some limitation on the Commission's authority is the *Baer Brothers* case.²⁰³ The portion of the opinion usually cited states:

That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. . . . But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its *quasi-judicial* capacity to measure past injuries sustained by a private shipper; the other, in its *quasi-legislative* capacity, to prevent future injury to the public.²⁰⁴

The sentence that follows the above quotation, however, is too often overlooked. "But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order."²⁰⁵ In *Baer Brothers*, the Supreme Court only held that the Commission's jurisdiction to award reparation is not limited to cases

202. In a different proceeding before a three-judge district court sitting in the Southern District of New York, the court per Judge Friendly held that it could not enjoin a rate that had become effective upon expiration of the suspension period, even though the carriers had not sustained their burden under section 216(g) of showing the tariff to be just and reasonable. He looked upon the shippers' request for an injunction as a request for the court to reinstate an expired suspension order. *National Small Shipments Traffic Conf., Inc. v. United States*, 321 F. Supp. 500 (1970). The court apparently believed the Commission's investigation was incomplete, its hearings were "not properly concluded," and the Commission should "resume" its investigation. 321 F. Supp. at 515-16. The court's final order and judgment of January 27, 1971, did in fact direct the Commission "to resume its investigation with all practicable speed."

203. *Baer Bros. Mercantile Co. v. Denver & R.G.R.R.*, 233 U.S. 479 (1914).

204. 233 U.S. at 486.

205. 233 U.S. at 486.

in which it also prescribes a future rate. The opinion in *Baer Brothers* suggested two reasons for distinguishing past rates from future rates, but neither precludes a restitutory remedy. First, the Commission may fix a future rate on application of nonshippers that have no interest in obtaining reparation.²⁰⁶ Additionally, the Court noted that the Commission should not deprive a shipper of an award of reparation because of its own omission or inability to decide the future rates; a shipper might be able "to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future."²⁰⁷

Many of the cases in which the Commission itself has distinguished between past and future periods by prescribing a rate or practice for the future, but refusing to award reparation, may be explained in terms of burden of proof. In effect, the Commission has held in those cases that if the burden was on the carrier, it must show the proposed rate to be lawful in all respects, and if unlawful in one respect it will be disapproved; and if the burden was on the shipper to show past unreasonableness, the Commission may rely on a ground for sustaining the past rate that is different from the ground it relied on to find the rate unlawful for the future.²⁰⁸

The remaining refusals of the Commission to apply a finding regarding a future period to a past period relate generally to the inapplicability of the future policy to the past period. When the order relating to the future resulted in a leveling of rate disparities, which increased some rates and reduced others, the Commission's refusal to award reparation (to those whose rates were decreased for the future) was sustained on appeal.²⁰⁹ And when the Commission required a general revision of the class rates, it refused reparation for a period of five years while the railroads revised their rates. Only after this period did it begin to order reparation in appropriate cases.²¹⁰

206. 233 U.S. at 487-88.

207. 233 U.S. at 488-89.

208. See, e.g., *Consolidated Rendering Co. v. Atchison, T. & S.F. Ry.*, 287 I.C.C. 673, 679-80, 684, 685 (1953); *Tri-State Packers' Assn. v. Pennsylvania R.R.*, 209 I.C.C. 192, 201 (1935). Similarly, when the Commission heard *Feinstein*, it refused to hold a separate charge by the railroads for unloading excessive because the shippers had assumed the burden of proof and new evidence was introduced concerning the reasonableness of the rates. *William N. Feinstein & Co. v. New York Cent. R.R.*, 313 I.C.C. 783 (1961), *affd. sub nom. Feinstein v. United States*, 209 F. Supp. 613 (S.D.N.Y. 1962), *affd.*, 317 F.2d 509 (2d Cir. 1963).

209. *ICC v. United States ex rel. Capital Grain & Feed Co.*, 35 F.2d 1012, 1013 (D.C. Cir. 1929) (beyond court's authority to grant mandamus ordering ICC to award reparation).

210. The problem is discussed and the cases are collected in *William Volker & Co. v. Atchison, T. & S.F. Ry.*, 318 I.C.C. 249 (1962).

From these examples, it would appear that the court in *Feinstein* incorrectly interpreted the Commission's failure to delineate the effect of its decision on the validity of past rates. Thus, when viewed in this light, *Feinstein*, like *T.I.M.E.*, creates no inference that a right of restitution for unreasonable charges paid pursuant to a rate increase subsequently cancelled by the Commission does not exist.

Recently, however, in *United States v. Associated Transport, Inc.*,²¹¹ now pending on appeal to the Court of Appeals for the District of Columbia Circuit, the district court denied the existence of a restitution remedy when the Commission had found that certain rates were not shown to be just and reasonable. The court acted on grounds similar to *Feinstein* without citing that opinion. It added to the *Feinstein* rationale its view that *T.I.M.E.* precludes all relief for the past except as expressly given shippers under section 204a,²¹² certainly giving that decision the broadest possible reading.

On the other hand, no cases have held that there is a right of restitution on general principles of equity. To find such a remedy, we must take note of the shippers' need for some method of recouping what they have paid in an unjustified rate increase, and the case law that has developed in the area.

In procedural settings not dissimilar to those present in ICC cases, there have been instances in which restitution has been granted. For example, the Court of Appeals for the District of Columbia Circuit has recognized that local utilities that were unable to justify rate increases might be required to return moneys collected from rate payers.²¹³ In each case, the court reversed decisions of the regulatory agencies, which had upheld the increases, and ordered the companies either to make restitution or to segregate amounts collected pending further hearings. The court found that no interference with any

211. 1972 FED. CARR. REP. (Carr. Cas.) ¶ 82,316 (D.D.C. May 12, 1972), *notice of appeal filed*, D.C. Cir., July 12, 1972.

212. 49 U.S.C. § 304a (1970).

213. In *Capital Transit Co. v. Public Util. Commn.*, 213 F.2d 176, 194-96 (D.C. Cir.) (order amending judgment), *cert. denied*, 348 U.S. 816 (1954), the court reversed an order that had permitted an electric power company to increase its rates, and directed the district court to order the company to segregate all amounts collected from the plaintiff customer by reason of the rate increase pending further hearings. In the *Second Bebachick* case (*Bebachick v. Public Util. Commn.*, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963)), the court en banc again reversed an order permitting an increase in transit fares of a local bus company and required that "the amount realized by Transit [the bus company] from the increase must be utilized for the benefit of the class who paid it, that is, those who use Transit." 318 F.2d at 203 (supplemental opinion). It required restitution of the amounts collected by the company through the creation of a special fund on the books of the company for the "purpose of benefiting Transit users in any rate proceedings pending or hereafter instituted." 318 F.2d at 204. See also *Williams v. Washington Metro. Area Transit Commn.*, 415 F.2d 900 (D.C. Cir. 1968) (a further application of the principle of restitution). The district court in *Associated Transport* did not mention these cases.

statutory rate scheme would result if the utilities made refunds.²¹⁴ Refunds of increases that are found unjustified by the Interstate Commerce Commission would seem even less to involve the question of potential interference of the courts with a statutory rate scheme. The Commission will already have found that the carriers have not justified their rate increases before the court acts.

Other courts have granted relief to shippers to avoid unjust enrichment in cases in which an intervening court order prevented rates from being reduced in compliance with an Interstate Commerce Commission order.²¹⁵ In one of these cases, the Court of Appeals for the Eighth Circuit stressed that a rate not shown to be just and reasonable is unlawful, since the burden of proof requirement of the statute is substantive in nature;²¹⁶ this rationale could support restitution in the complete absence of an interfering court order.

The availability of restitution after a Commission finding that a general increase by motor carriers was unjustified has been before three federal district courts. Only the court in *American Transport* faced the issue directly, and its denial of recovery is being appealed. In two other cases, the courts granted relief to the shippers, albeit on narrower grounds.²¹⁷ Nevertheless, the rudiments of a cause of action

214. *Bebchick v. Public Util. Commn.*, 318 F.2d at 204 (supplemental opinion). See *Capital Transit Co. v. Public Util. Commn.*, 213 F.2d at 194-96 (order amending judgment).

215. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *Accelerated Transport-Pony Express, Inc. v. United States*, unreported decision discussed in *Middlewest*, 433 F.2d at 228-29 (ordering restitution of amounts collected in excess of ICC rate order during existence of temporary restraining order, after dismissal of the carrier's complaint in 227 F. Supp. 815 (D. Vt.), *affd. mem.*, 379 U.S. 4 (1964)).

216. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d at 220-21. The motor carriers relied on *T.J.M.E.* in their unsuccessful effort to bar any claim for restitution. 433 F.2d at 232-40. The court did not decide whether the increased rates were unlawful from the date of their effectiveness. It expressly limited its holding to the period following the cancellation order entered by the Commission since no broader relief was requested by the parties. The only relief sought in the case was for a refund of the amounts charged during the very brief period (Sept. 13-29, 1965) of the district court's temporary restraining order. See 433 F.2d at 222. The *Associated Transport* court apparently did not notice the limited relief requested in *Middlewest*, and read that case as somehow recognizing "that the basic rate regulatory authority of the ICC is prospective and not retrospective." 1972 FED. CARR. REP. (Carr. Cas.) ¶ 82,316, at 55,477.

217. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D. Colo. 1970), *affd.*, 404 U.S. 802 (1971); *Aluminum Co. of America v. Admiral-Merchants Motor Freight, Inc.*, 337 F. Supp. 674 (N.D. Ill. 1971). Both of these cases arose out of a refund order of the Commission that was entered as a condition to the grant of a postponement of time for the carriers to prepare their evidence in *Increased Rates & Charges, From, To & Between Midwest Territory*, 335 I.C.C. 142 (1969). However, as the Commission and the Solicitor General stated before the Supreme Court in *Admiral-Merchants Motor Freight, Inc. v. United States*, "Had there been no refund order, the Commission's finding that the carriers had not met their burden of proof would have supported a shipper's cause of action for restitution." Government's Motion To Dismiss or Affirm, at 7 n.6.

for restitution are available in the decisions involving Commission orders and in the precedents of the District of Columbia Circuit and the Eighth Circuit. The signs thus point to the existence of the restitution remedy.

VIII. PRESERVATION OF INHERENT SERVICE ADVANTAGES OF COMPETING MODES OF TRANSPORTATION

The omission within the provisions of the Interstate Commerce Act of any statement concerning refunds of unjustified rate increases by motor carriers is but one illustration of the problems encountered by the Commission. The National Transportation Policy²¹⁸ creates an equally perplexing challenge for the Commission in determining the regulatory standard to be followed.

The Policy requires the Commission to "preserve the inherent advantages" of all modes of transportation subject to the Interstate Commerce Act, but fails to give clues to the meaning of this phrase. In fact, the other provisions of the Act only further complicate the situation. The Janus-like section 15a(3)²¹⁹ prohibits the Commission from holding up rates to protect the traffic of any mode of transportation, yet also requires that "due consideration" be given "to the objectives of the national transportation policy" under which it may be necessary to hold up rates.

During the 1960's the Commission received the aid of judicial interpretation in its quest to define "inherent advantage." In *Ingot Molds*,²²⁰ the Supreme Court sustained the Commission's disapproval of certain railroad rate reductions, which the ICC had rejected to protect the inherent cost advantages of certain bargeline carriers. Obviously, more is yet to be said by the Commission concerning the appropriate measure of the cost advantages of the various modes.²²¹ Relatively unexplored in the past decade has been the noncost comparisons among the modes. A few cases suggest the direction that transportation law may take in this area, and what the continuing role of the Commission will be.

A. Pre-1958 Cases

When the Director General was in charge of railroad operations during the First World War, he began the Mississippi-Warrior River

218. 49 U.S.C. preceding § 1 (1970).

219. 49 U.S.C. § 15a(3) (1970).

220. *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1971).

221. The matter is now pending in *Cost Standards in Intermodal Rate Proceedings*, No. 34013 (Sub-No. 1) (I.C.C., initiated Feb. 5, 1969). See also Rose, *Regulation of Intermodal Rate Competition in Transportation*, 69 MICH. L. REV. 1011 (1971).

Barge Service and established many port-to-port rates at levels that were eighty per cent of the all-rail rates between the ports.²²² The establishment of such differentials received congressional support in 1928 in the enactment of the Denison Act,²²³ which the Transportation Act of 1940 codified in its essential respects in section 307(d)²²⁴ of the Interstate Commerce Act.

In *Alabama Great Southern R.R. v. United States*,²²⁵ this policy of intermodal rate differentials received judicial approval from the Supreme Court as well. The more important aspect of the case, however, can be found in the Court's approval of the criteria used by the Commission in sustaining the differential. The Commission had held that the joint rail-barge and rail-barge-rail rates in issue should be lower than the corresponding all-rail rates although differences in costs did not justify the differentials.²²⁶ The Court agreed that the ICC was not required to base differentials solely on the relative costs of service of the competing modes. It stated:

Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. . . . The Commission is not bound to require a rate as high for the inferior as for the superior service.²²⁷

The Court also noted that the inherent advantage of rail carriers shown here is superiority of service, and fixing a lower price for the lesser service did not destroy the superior service.²²⁸

B. Post-1958 Cases

In *Paint & Related Articles in Official Territory*,²²⁹ the Commission gave further recognition to the concept of service advantages. It remarked that competition between the modes of transportation includes competition in both rates and service and that the record before it indicated certain unenumerated service advantages

222. See generally Harbeson, *Transport Coordination and the Rail Barge Question*, 19 ICC PRAC. J. 765 (1952).

223. Ch. 891, 45 Stat. 978.

224. Ch. 722, tit. II, § 201, 54 Stat. 937 (codified at 49 U.S.C. § 907(d) (1970)). The second sentence of this section provides: "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

225. 340 U.S. 216 (1951).

226. Rail & Barge Joint Rates, 270 I.C.C. 591 (1948). The differential was to be absorbed by the bargeline in its division of the joint rail-barge rate.

227. 340 U.S. at 223.

228. 340 U.S. at 227.

229. 308 I.C.C. 439 (1959).

in the protesting motor carriers that might enable them to compete against the railroads' rate reductions without any reduction in their own rates.²³⁰ In the reopened *Gasoline and Fuel Oil* proceeding,²³¹ the Commission put this observation into practice by approving a one-cent differential between rail and motor rates to points seventy-five miles or more from given rail origins. The differential was to be effected by increasing motor rates. In *Tobacco from North Carolina to Central Territory*,²³² the Commission similarly found that the motor carriers provide "faster and more flexible service," something which is "of some importance" in the marketing of tobacco products.²³³ It noted that as a result of superior motor service, motor movements may exceed rail movements despite a rail pricing advantage of seven cents. The Commission, however, reached the conclusion that both the rail and motor rate reductions should be disapproved to avert a "destructive rate war."²³⁴

In two of the several *Newsprint* cases²³⁵ decided in the early 1960's, the Commission approved successive reductions in the rail rates that at first narrowed, then eliminated, the ten per cent differential between the rail and barge rates. The Commission considered the shipper's investment in barge-related facilities to be sufficient to offset any service disadvantage over the barge route, and thus found no justification for the differential.²³⁶ In another *Newsprint* case,²³⁷ the Commission—without discussion of inherent advantages—prescribed a differential of ten per cent between rail and barge rates to permit the barge lines to compete for traffic between Tennessee and Texas. But when the Commission, again without a discussion of inherent advantages, set a six per cent differential in piggyback rates over sea-land rates, its decision was reversed in the *New Haven* case.²³⁸

In the *New Haven* litigation, the district court criticized both the Commission's disregard of inherent advantages and the Com-

230. 308 I.C.C. at 450.

231. *Gasoline & Fuel Oil from Friendship, N.C. to Va. & W. Va.*, 305 I.C.C. 673 (1959). For other cases in these years, see Harbeson, *The Regulation of Interagency Rate Competition Under the Transportation Act of 1958*, 30 ICC PRAC. J. 287 (1962).

232. 309 I.C.C. 347 (1960).

233. 309 I.C.C. at 360.

234. 309 I.C.C. at 361.

235. *Newsprint Paper from Tenn. & Ala. to Baton Rouge, La.*, 315 I.C.C. 117 (1961), *affd. sub nom. Igert v. United States*, 211 F. Supp. 42 (N.D. Ala. 1962); *Newsprint Paper from Calhoun, Tenn. to Baton Rouge, La.*, 310 I.C.C. 171 (1960).

236. 315 I.C.C. at 122-23; 310 I.C.C. at 179-80.

237. *Newsprint Paper from Tenn. & Ala. to Houston, Tex.*, 313 I.C.C. 669 (1961).

238. *ICC v. New York, N.H. & H.R.R.*, 372 U.S. 744 (1963), *vacating and remanding on other grounds* 199 F. Supp. 635 (D. Conn. 1961), *reversing* *Commodities—Pan-Atlantic S.S. Corp.*, 313 I.C.C. 23 (1960).

mission's apparent reliance on value-of-service pricing.²³⁹ The Supreme Court, on the other hand, limited its discussion solely to the Commission's disregard of inherent advantages. The Commission's broad reliance on the effects of the rates on the national defense and the country's commerce bore the brunt of the Court's criticism. The Court, quoting from a congressional committee report, noted that each mode should be permitted to assert its "inherent advantages, whether they be of service or cost."²⁴⁰ The Court stated that the railroads are permitted "to respond to competition by asserting whatever inherent advantages of cost and service they possessed."²⁴¹ The Court added: "If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service."²⁴² The Court's opinion carried the implication that a carrier should be permitted to *reduce* its rates to assert an inherent service advantage.

For the water carriers, the *New Haven* decision suggested that inherent service advantages of all-rail service must be described in explicit terms, not inferentially, if rate reductions for the railroads were to be denied. In the *Aluminum* case,²⁴³ a water carrier thus listed the all-rail advantages with which it had to compete in attempting to justify the rate differential it then enjoyed.²⁴⁴ The disabilities inherent in water transportation, which necessitated a rate differential between the all-rail and rail-water-rail carriers competing for aluminum traffic, were noted by the district court to include

perils of the sea, infrequency of sailings, longer time in transit, lack of diversion and stop-off privileges in transit, bunching of cars at the interchanges, restrictions on size of cars handled, labor difficulties and strikes affecting coastwise shipping, and an embargo requiring shippers to obtain a permit before cars are supplied for movement in [water carrier] service.²⁴⁵

The district court found these factors to be convincing evidence of disabilities that would require the water carrier to maintain rates lower than those for all-rail service.

239. 199 F. Supp. at 641, 642-43.

240. 372 U.S. at 756, quoting S. REP. NO. 1647, 85th Cong., 2d Sess. 3 (1958).

241. 372 U.S. at 757.

242. 372 U.S. at 759.

243. *Seatrains Lines, Inc. v. United States*, 233 F. Supp. 199 (D.N.J. 1964).

244. 233 F. Supp. at 208. The railroads had attempted to narrow the differential by reducing the all-rail through rate while continuing to maintain higher local rates on routes to and from the ports involved in rail-water-rail transportation.

245. 233 F. Supp. at 208.

That *New Haven's* statement concerning a service advantage was not to be taken literally can be inferred from the Court's decision in *Ingot Molds*.²⁴⁶ There the railroads sought unsuccessfully to reduce their rates on iron ingots moving from Pittsburgh to Steelton, Kentucky to the level of rates charged by a competing barge-truck operation. The case turned on the Commission's adherence to a fully distributed, rather than out-of-pocket, cost comparison between the modes in determining which had the inherent cost advantage; but in sustaining the Commission, the Supreme Court specifically reversed the district court's reliance on the railroads' efforts to match the barge-truck rate. The Court suggested that the lower court had overlooked "the uncontroverted evidence that given equal rates all traffic would move by train," and added, "[g]iven a service advantage, it seems somewhat unrealistic to suggest that rate parity does not result in undercutting the competitor that does not possess the service advantage."²⁴⁷

In this regard, it is also interesting to note the stand taken by the Department of Justice, which in this case served as the Commission's antagonist. The Department argued that *New Haven* stood for the proposition that a carrier may reduce its own rates to any level that was compensatory in terms of its own revenue requirements unless "competing modes show that their inherent cost and service advantages will be unduly impaired or destroyed."²⁴⁸ The remark was not relevant to the facts before the Court, for the carriers reducing their rates possessed the service advantage, but not the cost advantage. But the Department did seem to recognize, unlike the *New Haven* opinion, that the possession of a service advantage does not measure ability to reduce rates, but rather to hold them up.²⁴⁹

Although the railroads have been reluctant to admit, especially in cases concerning motor transportation competition, that a service advantage requires higher rates, there is at least one area of intermodal competition—that involving common carrier pipelines—in which they readily take this position.

As early as 1922, the service advantages possessed by the pipelines became apparent to the Commission. At that time the Commission held that a pipeline carrier might require of shippers a minimum

246. *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968).

247. 392 U.S. at 593.

248. Brief for the United States at 7, *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968). The Department parted with the Commission over whether out-of-pocket costs or full costs should determine which mode had an inherent cost advantage over the other.

249. Conceivably, if the Commission had decided the *New Haven* case in terms of inherent service advantages, the Supreme Court might have written an entirely different opinion and perhaps have sustained the Commission.

tender of 10,000 barrels at any one time, but that a minimum-tender requirement exceeding 10,000 barrels, except in special circumstances, would be unreasonable.²⁵⁰ The pipelines in these early proceedings asked for minimums of up to 100,000 barrels, arguing that the efficient operation of their lines, particularly in view of the heavy initial capital costs, required a promise of minimum tenders from their shippers.

In more recent years, many pipelines have alleviated their published minimums by allowing shippers to aggregate their tenders, either from a number of shippers or from a number of plants of one shipper. When one pipeline sought to reduce the effect of the minimum even further by allowing one week to complete the minimum shipment, the railroads protested, arguing:

The inherent advantage of pipeline operation is the transportation of liquids in large volume. This advantage is lost when shipments are received for transportation in small quantities. . . . Dissipation by Mid-America [a carrier by pipeline] of its inherent advantage in the handling of volume quantities unfairly exposes the railroads to loss of competitive traffic which they are best equipped to handle.²⁵¹

However, the Commission approved the pipeline's proposed change so that shippers, "especially the smaller ones," would benefit, and thereby dismissed the railroads' effort to thwart a tariff rule "peculiarly adapted" to the pipeline's operating methods merely on grounds of "competitive disadvantage."²⁵²

C. *The Continuing Role of the Commission*

The *Ingot Molds* opinion corrected the faulty language of *New Haven* and returned the law of inherent service advantages to the stream of precedents that has developed since the early years of regulation. The congressional choice to "preserve" service advantages between competing modes of transportation reflects in part a decision that competition between the modes should not rest solely on their relative costs of operation.

Broadly speaking, the preservation of a service advantage today means that the carrier possessing the advantage should not be permitted to reduce its rates below the level necessary to attract the

250. *Brundred Bros. v. Prairie Pipe Line Co.*, 68 I.C.C. 458 (1922) (decided by a division of three members of the Commission). The 10,000 barrel rule was later adopted by the entire Commission in *Reduced Pipe Line Rates & Gathering Charges*, 243 I.C.C. 115, 136 (1940), *affd.*, 272 I.C.C. 375, 382-83 (1948).

251. Brief for Southwestern & Western Trunk Line Rail Carriers at 43, *Pipeline Demurrage & Minimum Shipment Rules on Propane*, 315 I.C.C. 443 (1962).

252. *Pipeline Demurrage & Minimum Shipment Rules on Propane*, 315 I.C.C. 443, 448 (1962).

traffic. Unlike a cost advantage, a service advantage is preserved by keeping up the rates of the carrier possessing the advantage. Such a carrier would only dissipate the advantage if it charged rates that were equal to or less than those of the carrier that lacked the advantage. It might be argued that the preservation of service advantages by keeping rates up also, unfortunately, preserves the service disadvantages of the disadvantaged carrier. The proponents of such an argument assume that the disadvantaged carrier should be permitted to go out of business. The more accurate characterization of the result reached by the statute is that the preservation of service advantages preserves the disadvantaged carrier along with its service disadvantages, a result that Congress intends under the National Transportation Policy.

This congressional mandate has not led to the protection of carriers disadvantaged by poor management or inferior equipment.²⁵³ The essential ingredients of the disadvantage have generally been factors and circumstances beyond the control of the disadvantaged carrier. The disadvantaged carrier must also have qualified as a member of a class entitled to the protection of the National Transportation Policy.²⁵⁴ Keeping these factors in mind, the Commission continues its important function in appropriate cases of prescribing differentials to preserve inherent service advantages between competing modes of transportation.

IX. THE EXPANSION OF INTERMODAL JOINT RATES

From the earliest years of the Interstate Commerce Act, the Commission accepted for filing in the public tariffs joint rates in which railroads in the United States and those in the adjacent foreign countries of Canada and Mexico participated. For example, as early as 1888, the Commission recognized that tariffs might be filed by railroads "jointly with one or more other carriers" on foreign-bound shipments.²⁵⁵ Its jurisdiction under the Interstate Commerce Act over such rates was later sustained in the courts.²⁵⁶

For three quarters of a century, however, the Commission would not accept joint tariffs filed by railroads and ocean carriers; from the

253. See *Excursion Fares Between Chicago, Ill. & Minneapolis, St. Paul & Rochester, Minn.*, 178 I.C.C. 742, 745 (1931).

254. See *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571, 593 (1968).

255. *In re Publication of Export Tariffs*, 1 I.C.C. 658 (1888).

256. See *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182 (1966); *H. K. Porter Co. v. Central Vermont Ry.*, 366 U.S. 272 (1961). Section 1(1)(a) of the Act, 49 U.S.C. § 1(1)(a) (1970), gives the Commission jurisdiction over rail transportation "from or to any place in the United States to or from a foreign country, but only insofar as such transportation . . . takes place within the United States."

outset, it required that whenever a "gross sum" was agreed upon between railroads and ocean carriers for transportation of a shipment to a foreign country, "in every case" the railroad tariff filed with the Commission must show that portion of the charge applicable to the land transportation.²⁵⁷ Similarly, the Commission would not accept joint tariffs filed by railroads and motor carriers exempt from federal economic regulation. The Commission changed these practices in the 1960's and began to accept both types of rates for filing. In so doing, it encouraged new forms of intermodal cooperation.

A. *The 1920 Amendment of Section 1(1)(a)*

As originally enacted in 1887, the Interstate Commerce Act conferred jurisdiction over transportation "from any place in the United States to an adjacent foreign country," when the traffic originated in the United States.²⁵⁸ Senator Cullom explained that to regulate interstate commerce "fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and adjacent countries by railroad"²⁵⁹

The subject of transportation was again before the Congress in 1920. The Transportation Act of 1920 amended the Act to read: "from or to any place in the United States to or from a foreign country, but only in so far as such transportation . . . takes place within the United States."²⁶⁰

There was no legislative history to explain the removal of the word "adjacent." The Commission had only requested that the Congress amend the statute so that it would include transportation both "to and from" an adjacent country.²⁶¹ As a result, the Commission continued to read the statute as if "adjacent" were still present. The Commission apparently did not question whether the congressional reasons for originally limiting its jurisdiction over foreign commerce remained pertinent.

The Commission's position suited both the railroads and the ocean carriers, neither of which seemed at all interested in establishing joint rates. Under the Commission's interpretation, the railroads

257. 1 I.C.C. at 659.

258. Ch. 104, § 1, 24 Stat. 379. See *Pacific Mail S.S. Co. v. Western Pac. R.R.*, 251 F. 218 (9th Cir. 1918); *Lykes S.S. Co. v. Commercial Union*, 13 I.C.C. 310 (1908); *Ullman v. Adams Express Co.*, 14 I.C.C. 340 (1908).

259. 17 CONG. REC. 3472 (1886).

260. Ch. 91, § 400, 41 Stat. 474 (codified at 49 U.S.C. § 1(1) (1970)).

261. *Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess., vol. I, at 10 (1919).

could still remain parties to voluntary arrangements that provided for continuous carriage of goods between an interior point within the United States and a nonadjacent foreign country; and the ocean carriers, freed from regulation, could change their rates at will.²⁶²

The limitation the Commission placed upon its jurisdiction extended beyond rail-ocean joint rates. Using its rail-ocean policy as a model for determining the extent of its authority, the Commission explained in 1935 that "upon this line of reasoning it has been our ruling that joint rates cannot be made between carriers subject to the act and those not subject to the act."²⁶³ With such a narrow interpretation of its authority, the Commission effectively foreclosed the possibility of joint rates between railroads and the numerous exempt motor carriers.

B. *The Re-examination of the 1920 Amendment*

The re-examination of the Commission's position, however, was triggered more by the potential growth in rail-ocean container movements and the wholly new interest of the Department of Transportation in what it called "trade simplification"²⁶⁴ than by the limitation on joint rates between railroads and exempt motor carriers. Since there had been no relevant legislative history surrounding the 1920 amendment to section 1(1), with these new developments staff of the Commission began to question Congress' purpose in removing the word "adjacent." One clue to the meaning of this change seemed now to lie in the proper interpretation of a forty-year old decision of the Supreme Court, which had been virtually forgotten.

In *Missouri Pacific R.R. v. United States*,²⁶⁵ the Supreme Court held that the Commission possessed jurisdiction to prescribe the form of a railroad's bill of lading issued in connection with a shipment that would later be transported by a foreign-flag ocean carrier. It

262. See *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I.C.C. 266, 279-80 (1908).

263. *Drayage & Unloading at Jefferson City, Mo.*, 206 I.C.C. 436, 440-41, citing *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I.C.C. 266 (1908). The Commission stated that in such a joint arrangement it could not "control" the rates and practices of both parties. It added, a few years later, "that the absence of power to regulate all carriers parties to joint rates would in effect, render void our power to regulate such joint rates." *Interchange of Traffic at Point of Origin*, 46 M.C.C. 623, 626 (1946).

264. In 1968, bills entitled "The Trade Simplification Act of 1968" were introduced providing for the filing of joint rates by surface, water, and air carriers. S. 3235, 90th Cong., 2d Sess. (1968); H.R. 16023, 90th Cong., 2d Sess. (1968). A representative of the Administration said that the Commission had refused to accept joint rates filed by railroads in which ocean carriers had joined. See *Hearings on S. 3235 Before the Senate Comm. on Commerce*, 90th Cong., 2d Sess., ser. 90-78, at 18 (1968).

265. 273 U.S. 341 (1927).

read the Commission's power to prescribe bills of lading²⁶⁶ to be "a general rule" that must be enforced against all carriers subject to the Interstate Commerce Act, even if a portion of the through movement in which the railroad voluntarily participated was not subject to the Act.²⁶⁷ *Missouri Pacific* thus suggested that the Act also could be extended to cover voluntary joint rates of railroads and ocean carriers.

In addition to the innuendoes of *Missouri Pacific*, the Commission found a repealed section of the Interstate Commerce Act relevant in deciding whether its continued use of the "adjacent" limitation was proper. Congress had required in the Transportation Act of 1920 that the domestic-flag ocean carriers file schedules and routes with the Commission; list the rates that applied from a given port, upon request from a railroad; and reserve space if the railroad accepted the rate.²⁶⁸ It further authorized railroads to issue through bills of lading. The new section was given little use²⁶⁹ and was repealed in 1940;²⁷⁰ but even then the Commission's jurisdiction over foreign commerce authorized it to compel railroads that chose to enter into through arrangements with one or a selected few ocean carriers²⁷¹ to enter into "similar arrangements" with other ocean carriers.

On the basis of these statutory changes, and the Supreme Court's holding in *Missouri Pacific*, the Commission concluded in the 1960's that not only had Congress removed the word "adjacent" from section 1(1)(a) for the purpose of promoting intermodal arrangements that would be subject to Commission regulation, but it had also for a twenty-year period made some of these arrangements mandatory and subject to the close supervision of the Commission. By 1940, the Congress had returned to a policy of encouraging voluntary intermodal arrangements subject to the Commission's supervision. The

266. Under § 1(6) of the Act, 49 U.S.C. § 1(6) (1970).

267. 273 U.S. at 345.

268. Section 25 of the Interstate Commerce Act, which was added by the Transportation Act of 1920, ch. 91, § 441, 41 Stat. 497, was drafted by Senator Cummins, who explained that it was "an effort to coordinate land and ocean traffic" by requiring railroads to distribute sailing information throughout the country and to issue through bills of lading in a form prescribed by the Commission, "thus affording the inland shipper who desires to export an opportunity properly to route and ship his freight." 59 CONG. REC. 140, 143 (1919).

269. The section was described as "unnecessary" (H.R. REP. NO. 2832, 76th Cong., 3d Sess. (1940)), and a section that had "never been of much value" (S. REP. NO. 433, 76th Cong., 1st Sess. 39 (1939)).

270. Transportation Act of 1940, ch. 722, § 14, 54 Stat. 919.

271. Transportation Act of 1940, ch. 722, § 8(d), 54 Stat. 910 (codified at 49 U.S.C. § 6(12) (1970)).

Commission's awareness of this policy in the 1960's led to new efforts by the Commission to promote intermodal traffic.

C. *The New Intermodal Joint Rates*

In April 1969, the Commission advised Congress that it possessed authority under existing law to accept tariffs establishing joint rates in which common carriers subject to its jurisdiction and ocean carriers outside its jurisdiction would participate.²⁷² On July 31, 1969, it initiated a proceeding to determine whether such rates should be permitted and, if so, what changes would be necessary in the Commission's rules to permit these tariffs to be filed. The proceeding resulted in a report of the entire Commission, which was issued on September 4, 1970.²⁷³

The Commission stated in this proceeding that, notwithstanding the 1920 amendment of the statute, which removed the word "adjacent," it had continued to read the statute "as if that word were still present."²⁷⁴ It confessed "that this self-imposed restriction on jurisdiction over tariffs of joint rates was unfounded," and declared that it would now accept such rates for filing in the public tariffs.²⁷⁵ If such rates were filed, the Commission stated, it would enter such orders as might be necessary only against the domestic carriers subject to its authority, and not against, for example, ocean carriers.²⁷⁶

Since the Commission's refusal to approve rail-exempt-motor-carrier joint rates was predicated upon the Commission's former attitude toward joint ocean-rail rates, its new decision logically led to a re-examination of its stand on such rail-motor tariffs. Thus, when the Chicago, Rock Island, and Pacific Railroad Company proposed to publish tariff provisions that temporarily authorized it to substitute motor carrier service for rail service on grain shipments from various points in Oklahoma to Enid, Oklahoma, the Commission, permitting a departure from its long-standing practice,²⁷⁷ stated that the Act

272. Tariffs Containing Joint Rates & Through Routes for the Transportation of Property Between Points in the United States & Points in Foreign Countries, 337 I.C.C. 625, 625-26 (1970).

273. 337 I.C.C. 625.

274. 337 I.C.C. at 628.

275. 337 I.C.C. at 629.

276. 337 I.C.C. at 629. Orders may be issued only against domestic carriers since 49 U.S.C. § 1(1) (1970) limits the Commission's jurisdiction over foreign commerce only "insofar as such transportation takes place within the United States."

277. In *Substituted Freight Service*, 232 I.C.C. 683, 688 (1939), and *Substituted Service—Charges & Practices of For-Hire Carriers & Freight Forwarders (Piggyback Serv.)*, 322 I.C.C. 301, 354 (1964), the Commission had said that railroads may not enter into through-route, joint-rate arrangements with exempt motor carriers, and that

authorizes the filing of substituted service tariffs contemplating an arrangement voluntarily entered into between railroads and partially exempt motor carriers where the shipments will move on rail billing and the railroad remains responsible for the entire through movement.²⁷⁸

Consequently, the Commission approved the railroad's proposal to use whatever exempt motor carriers it could find to perform the transportation, to issue its own bill of lading for the transportation, and to omit the motor carriers' names in the applicable tariff.

In another recent proceeding, the Commission has approved the filing of through-route, joint-rate arrangements between railroads and exempt motor carriers, this time on a broader scale and for longer or relatively permanent periods. The Commission has found that such joint rates are in the interest of the shipping public and are "consistent with the purposes of the act and our now-established jurisdiction to entertain such rates so long as they are filed by regulated carriers and the exempt carriers are named in the tariff."²⁷⁹ From this, it would appear that there is every indication that the Commission will condone the increased intermodal use of joint-rate tariffs in the future.

X. CONCLUSION

The regulation of transport rates has never rested on formulas, rules of thumb, or simplistic phrases, such as "cost-based rates." The "process of rate-making is essentially empiric"; the Interstate Commerce Act charges the agency with "the duty of being responsive to the dynamic character of transportation problems."²⁸⁰ The decade of the 1960's was indeed a period of many rapid changes in transportation rates, and the task of fulfilling this mandate was complex.

The railroad industry in particular experienced the effect of the Commission's activity. There were marked changes in its rate structure as the tendency of the rail rate structure continued to move

all motor carriers employed in substituted service must be named in the applicable tariff.

When the Commission had held at the beginning of the decade that it lacked jurisdiction to accept the joint rates filed by motor carriers in cooperation with ocean carriers subject to the jurisdiction of the Federal Maritime Commission (Motor Carrier Operation in Hawaii, 84 M.C.C. 5, 31 (1960)), Congress had obliged by following the ICC recommendation and enacting clarifying legislation in 1962 to permit the filing of such rates. Act of Aug. 24, 1962, Pub. L. No. 87-595, 76 Stat. 397 (codified at 49 U.S.C. § 216(c)(1970)).

278. Substitution of Motor Carrier Service for Rail Service—Grain, Special Permission No. 69-4969 (I.C.C. June 3, 1969).

279. Substitution of Motor For Rail Serv. & Publication of Joint Motor-Rail Rates on Grains, 341 I.C.C. 88, 101 (1972).

280. Board of Trade v. United States, 314 U.S. 534, 546 (1942).

away from value-oriented rates and more toward cost-oriented rates²⁸¹ and volume rate reductions. In addition, the railroads suffered a noticeable reduction in capacity, which was reflected in the purchase of specially equipped and large-capacity railroad cars which were largely unavailable for general service. When the Commission has been dissatisfied with these tendencies, it has adopted regulations to change their course.²⁸²

The Commission's activity was evident also in the development of general transportation policy. The Interstate Commerce Act requires that rates be "just" and "reasonable," that the discriminations not be "undue," and that the "inherent advantages" of different modes be preserved. These policies are not precisely defined; rather, their meaning has been developed by the Commission over years of regulatory effort. It has often been necessary for the Commission to reconcile many conflicting interests in developing these policies, something which could not be achieved with strict adherence to cost. Furthermore, a policy of strict adherence to cost would have destroyed the policies relating to maximizing traffic through the various ports and would not have settled questions related to the preservation of the inherent service advantages of the various modes. The cost of transportation, therefore, was neither an automatic nor a complete answer to the problem of providing transportation to the shippers of the country at reasonable rates.

As for motor carriers, the trend in this industry now tends toward the closer regulation of profits, and there has also been the appearance of a new potential avenue of relief from unjust interim payment of rate increases. The former is the work of the Commission; the latter can only be accomplished by the courts. In addition, there is new hope for greater intermodal cooperation, which should result in new rate reductions.

I would hope that in view of the Commission's diligent work in rate regulation, if I have not shown that the Commission must be acquitted of the crime charged by the *Study Group Report*, at least I have shown that the case is for the jury.

281. A study prepared for the Department of Commerce concluded in 1966 that the Commission's regulatory trend was "strongly in the direction of cost-based rates" and that future public policy could reasonably result in "less, the same, or more intensity of regulation, freedom for pricing initiative, and the use of costs in pricing." SYSTEMS ANALYSIS AND RESEARCH CORPORATION, COST-BASED FREIGHT-RATES: DESIRABILITY AND FEASIBILITY 103, 128 (1966).

282. See, e.g., Incentive Per Diem Charges—1968, 337 I.C.C. 217 (1970), *modified*, 339 I.C.C. 627 (1971), *affd. sub nom.* Long Island R.R. v. United States, 318 F. Supp. 490 (E.D.N.Y. 1970), *revd. in part sub nom.* Florida East Coast Ry. v. United States, 322 F. Supp. 725 (M.D. Fla. 1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. June 12, 1972) (No. 70-279).