

1948

INTERSTATE COMMERCE-FREIGHT-RATE DISCRIMINATION-ACTION BY THE INTERSTATE COMMERCE COMMISSION AND THE SUPREME COURT

John F. Buchman, III
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#), [Commercial Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John F. Buchman, III, *INTERSTATE COMMERCE-FREIGHT-RATE DISCRIMINATION-ACTION BY THE INTERSTATE COMMERCE COMMISSION AND THE SUPREME COURT*, 46 MICH. L. REV. 532 (1948). Available at: <https://repository.law.umich.edu/mlr/vol46/iss4/6>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERSTATE COMMERCE—FREIGHT-RATE DISCRIMINATION—ACTION BY THE INTERSTATE COMMERCE COMMISSION AND THE SUPREME COURT—The attack upon alleged discrimination against industrial development of the South, Southwest, and West by the maintenance of higher freight-rates on shipments from those sections to the greater markets of the North and East¹ has followed two plans: (1) complaint to the Interstate Commerce Commission to remedy the discrimination by the exercise of its power over the rates themselves;² (2) anti-trust action against the agencies through which the rates are initiated.³ The

¹The background of this controversy is sketched briefly in Scott and Stone, "Discrimination in Freight Rates: The South Wins a Battle," 15 *TULANE L. REV.* 335 (1941). The authors, of course, present the case against the existing rates very strongly. An excellent study of the problem is made in "The Freight-Rate Battle," 30 *FORTUNE* 149 et seq. (Oct., 1944). On the most pressing post-war railroad problems bearing on the questions involved in this controversy, see generally, "Papers and Proceedings of the 58th Annual Meeting of the American Economic Association," 36 *AM. ECON. REV.* 451-519 (May, 1946), and particularly the article of Locklin, "Reorganization of the Railroad Rate Structure," *id.* 466 et seq.

²The Interstate Commerce Act, 49 U.S.C. (1940) § 3(1), makes it unlawful for any common carrier "to make, give or cause any undue or unreasonable preference or advantage to . . . or to subject . . . to any undue or unreasonable prejudice or disadvantage in any respect whatever . . . any particular persons, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic." Section 15(1) empowers the Interstate Commerce Commission, upon complaint, and following investigation and hearing and findings that an existing rate or classification is unlawful, to prescribe lawful rates or classifications. For a review of the development of the commission's powers, see 1 *SHARFMAN, THE INTERSTATE COMMERCE COMMISSION* 196 et seq. (1931).

³The Interstate Commerce Commission itself does not initially prescribe freight classifications and rates. 49 U.S.C. (1940) § 1(4); *Arizona Grocery Co. v. Atchison, T. & S. F. R.*, 284 U.S. 370 at 384, 52 S.Ct. 183 (1932). This function is performed by private agencies organized by the railroads themselves, generally known as rate bureaus. For rate-making purposes, the United States is divided into five territories: Official Territory, east of the Mississippi and north of the Ohio and Potomac rivers; Southern, south of Official Territory and east of the Mississippi; Southwestern, comprising four states just west of Southern Territory; Western Trunk-Line, north of these states and west of the Mississippi, to the Rocky Mountains; and Mountain-Pacific. The rate bureaus are organized on the basis of this territorial divi-

second plan of attack is illustrated by prosecutions brought by the Department of Justice Anti-Trust Division against forty-seven western railroads for illegal conspiracy to set unfair freight-rates,⁴ and by an original action, brought by the State of Georgia in the Supreme Court of the United States under the Clayton Act, to enjoin such illegal conspiracy through the use of sixty railroad rate bureaus.⁵

This assault upon established procedures for rate-making has met with bitter opposition, and with serious criticism even within the Supreme Court itself, on the ground that it fails to provide any affirmative solution to the complex rate problem, but would only destroy unified control of transportation by the Interstate Commerce Commission.⁶ An effort has been made to head off the threatened "chaos" which would result from the destruction of the only existing instrumentalities for co-ordinating the rate structures of the nation's rail system, by a bill legalizing the rate bureaus, exempting them from the operation of the anti-trust laws,⁷ and subjecting them to the supervision of the Inter-

sion and further subdivision. They assign all commodities to classifications, establish class rates, and determine other special rates. Interterritorial rates are established by a Consolidated Classification Committee. The rates established by these bureaus, but only these, are filed with the Interstate Commerce Commission, and are subject to review, though probably most of them are not actually reviewed. More complete explanation of this rate-making machinery is found in Creamer, "Regionalized Freight Rates," 18 *Rocky Mt. L. Rev.* 14 (1945); Tally, "The Supreme Court, the Interstate Commerce Commission, and the Freight-Rate Battle," 25 *N.C. L. Rev.* 172 (1947); Tally, "Railroad Rate Bureaus and the Anti-Trust Laws," 46 *Col. L. Rev.* 990 (1946); WIPRUD, *JUSTICE IN TRANSPORTATION* (1945); and DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* (1946).

⁴ *United States v. Association of American Railroads*, (D.C. Neb. 1945) 4 *F.R.D.* 510; *NEW YORK TIMES*, Nov. 17, 1945, 27: 2. A combination for the purpose of fixing prices, of course, is a violation per se of the Sherman Act, 15 *U.S.C.* (1940) § 1. *United States v. Socony-Vacuum Co., Inc.*, 310 *U.S.* 150, 60 *S.Ct.* 811 (1940); applied to railroads in *United States v. Trans-Missouri Freight Assn.*, 166 *U.S.* 290, 17 *S.Ct.* 540 (1897), and *United States v. Joint Traffic Assn.*, 171 *U.S.* 505, 19 *S.Ct.* 25 (1898). WIPRUD, *JUSTICE IN TRANSPORTATION* 76 (1945). The 1945 proceeding is still pending.

⁵ *Georgia v. Pennsylvania R. Co.*, 324 *U.S.* 439, 65 *S.Ct.* 716 (1945). This decision only sustained the jurisdiction of the Supreme Court to entertain such an action and the capacity of the state to bring it, and did not pass at all on the merits of the contentions. The action is still pending. It is discussed at length by Tally, "The Supreme Court, the Interstate Commerce Commission, and the Freight-Rate Battle," 25 *N.C. L. Rev.* 172 (1947).

⁶ DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 5, 17 (1946); 46 *Col. L. Rev.* 990 at 1004 (1946); *H.R. Rep.* 1212, 79th Cong., 1st sess., p. 5 (1945). In a dissenting opinion in *Georgia v. Pennsylvania R. Co.*, 324 *U.S.* 439 at 490, 65 *S.Ct.* 716 (1945), the late Chief Justice Stone objected, ". . . this Court cannot give any effective relief removing the threat of injury to the State resulting from a railroad rate conspiracy without breaking down the system of rate regulation by the Commission—a system which Congress has painstakingly built up. . . ."

⁷ *H.R.* 2536, 79th Cong., 1st sess. (1945); *S.* 942, 78th Cong., 1st sess. (1943);

state Commerce Commission.⁸ This proposal has been opposed by the Department of Justice and by some other critics because it would increase the already great degree of administrative control of transportation, contrary to the general scheme of free enterprise.⁹ The railroads themselves do not seem to be worried about the possibility of increased administrative control;¹⁰ and it has been suggested that for practical purposes there is no longer, and cannot be, any substantial freedom in the railroad industry.¹¹

Meanwhile, the Supreme Court announced its decision in *New York v. United States*,¹² upholding an order by the Interstate Commerce Commission which promises to make an effective start toward solving the bewildering freight-rate tangle. In 1939, the commission completed a comprehensive investigation of commodity classifications and class rates, which it had initiated in response to a complaint by the Committee of Southern Governors' Freight-Rate Conference. It found¹³ that higher class rates prevailed, generally, in the Southern, Southwestern, and Western Trunk-Line Territories than in the North-

WIPRUD, JUSTICE IN TRANSPORTATION 91 (1945). The former proposal, known as the Bulwinkle Bill, was passed by the House, 277 to 45. 91 CONG. REC. 11777 (1945). Action in the Senate was stopped by the threat of a filibuster. 92 CONG. REC. 10234-10270 (1946).

⁸ The Interstate Commerce Commission at present has no supervisory power over the rate bureaus, as distinguished from the rates themselves. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 65 S.Ct. 716 (1945); WIPRUD, JUSTICE IN TRANSPORTATION 85, 119 (1945). There is ample precedent for giving it such powers, for they are held by the Civil Aeronautics Board, 52 Stat. L. 1004 (1938), 49 U.S.C. (1940) § 494, and the Maritime Commission, 39 Stat. L. 734 (1916), 46 U.S.C. (1940) § 814, in their respective fields, and by the Interstate Commerce Commission itself as to railroad reorganizations, 54 Stat. L. 905 (1940), 49 U.S.C. § 5 (1940).

⁹ Letter of Attorney General Tom Clark, Hearings before the Subcommittee on Interstate and Foreign Commerce on H.R. 2536, 79th Cong., 1st sess. (1945); testimony of Arne C. Wiprud, Special Assistant to the Attorney General to investigate violations of the anti-trust law in transportation. Hearings before the Committee on Interstate Commerce on S. 942, 78th Cong., 1st sess. (1943); Langdon, "Should the Regulation of Railroad Rates Be 'Streamlined' Too?" 24 CORN. L. Q. 309 (1939).

¹⁰ Testimony of R. V. Fletcher, Vice President, Association of American Railroads, and others, Hearings before the Committee on Interstate Commerce of the U.S. Senate on S. 942, 78th Cong., 1st sess. (1943); DRAYTON, TRANSPORTATION UNDER TWO MASTERS 121 (1946).

¹¹ DRAYTON, TRANSPORTATION UNDER TWO MASTERS 15 (1946); SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 283 (1931); 46 COL. L. REV. 990 at 1004 (1946). Testimony of Clyde B. Aitchison, I.C.C. Commissioner, Hearings before the Subcommittee on Interstate and Foreign Commerce on H.R. 2536, 79th Cong., 1st sess. (1945).

¹² 331 U.S. 284, 67 S.Ct. 1207 (1947). Also included in this decision were the cases of *Hildreth v. United States*, and *Atchison, T. & S. F. R. Co. v. United States*.

¹³ *Alabama v. New York Central R.*, 235 I.C.C. 255 (1939), discussed in Scott and Stone, "Discrimination in Freight Rates: The South Wins a Battle," 15 TULANE L. REV. 335 (1941). This was a five to four decision.

east—the so-called Official Territory; that this differential impeded the development and movement of class-rate freight within these territories and from them to Official Territory; and that neither comparative costs nor variations in the volume and composition of traffic justified the differences in class rates.¹⁴ It concluded that the inter-territorial rate problem could be solved only by establishing substantial uniformity in classifications and rates in and among the territories, and invited the railroads to begin work toward those ends.

In 1940, Congress amended section 3(1) of the Interstate Commerce Act by adding the words, "regions, districts, and territories" to the list of persons and places not to be favored or discriminated against by transportation rates, and further authorized the commission to make investigations directed toward removing any such discrimination.¹⁵ The commission decided to make its investigations already undertaken the basis for action in compliance with this directive.¹⁶ In a subsequent report its findings were confirmed, and its order repeated.¹⁷ During the long period which would necessarily pass while the reclassification was being accomplished, the commission ordered, to be effective January 1, 1946, a 10 per cent increase in the class rates for Official Territory, and a 10 per cent reduction in rates for Southern, Southwestern, and Western Trunk-Line Territories.¹⁸

This order was hailed, especially in the South, as establishing at last its equality with the North and East in the competition for industrial markets.¹⁹ The states which would be adversely affected, however, and certain western railroads brought suit in the United States District Court for the Northern District of New York to enjoin enforcement of the order.²⁰ Interested parties intervened on both sides, so that the lines were drawn for a full-scale judicial battle on the discrimination issue.²¹ The district court sustained the commission's order, but an injunction was continued in effect pending appeal to the Su-

¹⁴ *Alabama v. New York Central R. Co.*, 235 I.C.C. 255 at 326 (1939).

¹⁵ 54 Stat. L. 899, 49 U.S.C. (1940) § 3(1) (1940). The authorization for the investigation was given by what is known as the Ramspeck Resolution, 54 Stat. L. 899 at 902 (1940).

¹⁶ *Class Rate Investigations*, 1939, No. 28300; *Consolidated Freight Classification*, No. 28310, 262 I.C.C. 447 at 689 (1945); *New York v. United States*, 331 U.S. 284 at 297, note 12, 67 S.Ct. 1207 (1947).

¹⁷ *Class Rate Investigations*, 1939, 262 I.C.C. 447 (1945); modified 264 I.C.C. 41 (1945).

¹⁸ *Class Rate Investigations*, 1939, 262 I.C.C. 447, 264 I.C.C. 41 (1945); *New York v. United States*, 331 U.S. 284 at 295, 67 S.Ct. 1207 (1947); 18 *Rocky Mt. L. Rev.* 14 at 22 (1945).

¹⁹ 30 *FORTUNE* 153 (1944); Scott and Stone, "Discrimination in Freight Rates: The South Wins a Battle," 15 *TULANE L. REV.* 335 (1941).

²⁰ *New York v. United States*, (D.C. N.Y. 1946) 65 F. Supp. 856.

²¹ *New York v. United States*, (D.C. N.Y. 1946) 65 F. Supp. 856 at 860, 861, notes 1, 2 and 3; 331 U.S. 284 at 296, note 10, 67 S.Ct. 1207 (1947).

preme Court.²² The Supreme Court made an extensive review of the order and the report and the evidence upon which it was based, and affirmed the ruling of the district court, Justices Frankfurter and Jackson dissenting.²³

An examination of the dissenting opinions provides a good starting point for consideration of the case, for they state the objections which the majority opinion had to overcome. First, these opinions express the reluctance which has been apparent both in the Interstate Commerce Commission and in the Supreme Court to assume the responsibility for decisive action on this problem.²⁴ There was also much doubt as to the justification for the order. Justice Jackson saw its effect as "really a surtax . . . added solely to increase shipping costs in the Northeastern part of the United States for the purpose of handicapping its economy and in order to make transportation cost as much there as it does in areas where there is less traffic to divide the cost."²⁵ This was "advocated by the Government" as "necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic, and perhaps its political life more nearly to its heart's desire."²⁶ While "a rigid rate structure based on mileage . . . may seem on its face to be equitable, its accomplishment would entail radical industrial and agricultural adjustments. I doubt if the country should be required to incur the expense of making them."²⁷ He voiced the further objection that the commission's report did not provide sufficiently persuasive evidence of the alleged discrimination to justify its action. This complaint is also made by Justice Frankfurter: "When the outcome of legal issues is bound to cut deeply into economic relations on such a scale it is not asking too much to ask the Commission to be explicit and definite in its findings on the elements that are indispensable to the validity of its order."²⁸ Courts . . . ought

²² *New York v. United States*, 328 U.S. 824, 66 S.Ct. 1355 (1946), denied a motion to vacate the injunction. 331 U.S. 284 at 296, 67 S.Ct. 1207 (1947).

²³ *New York v. United States*, 331 U.S. 284, 67 S.Ct. 1207 (1947).

²⁴ In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 65 S.Ct. 716 (1945), Stone, C. J., dissenting, called the discrimination controversy "a grievance of a section of the country against an existing federal system of rate-making, which should be addressed to Congress rather than to this Court." *Id.* p. 489. The late Chairman Eastman, dissenting in *Alabama v. New York Central R.*, 235 I.C.C. 255 at 333 (1939), expressed uneasiness at having to decide what had become a "political issue" through its description by President Roosevelt as "the Nation's No. 1 Economic Problem"; referred to by Justice Jackson, *New York v. United States*, 331 U.S. 284 at 365, 67 S.Ct. 1207 (1947).

²⁵ *New York v. United States*, 331 U.S. 284 at 357, 67 S.Ct. 1207 (1947).

²⁶ *Id.* at 359.

²⁷ *Id.* at 366, quoting dissenting Commissioner Mahaffie, *Class Rate Investigation*, 1939, 262 I.C.C. 447 at 708 (1945).

²⁸ *New York v. United States*, 331 U.S. 284 at 352, 67 S.Ct. 1207 (1947).

not to be asked to sustain such a mathematical coincidence [the 10 per cent increase and reduction of rates] as a matter of unilluminated faith in the conclusion of experts."²⁹

Of course, it is impossible to foresee whether the proposed alteration of the rate structure will have the momentous influence indicated by Justices Jackson and Frankfurter; but if the charges made by the critics of the old rate structure are true, and their hopes from this order justified, it cannot but have far-reaching consequences. With interests of such magnitude at stake, it is easy to understand the attitude the dissenting justices express.

The majority opinion, written by Justice Douglas, was devoted largely to finding in the commission's report sufficient basis for its order. There was little doubt that the class rates for Southern, Southwestern, and Western Territories were substantially higher than those for the Northeast,³⁰ or that the former territories were less developed industrially.³¹ These facts in themselves might raise a strong inference of discrimination and of injury therefrom.³² It was also true, however, that these facts alone would not establish the ultimate fact of discrimination, for the rate differentials would be discriminatory, under the Interstate Commerce Act, only if not justified by relative costs and other transportation conditions.³³

The ultimate inquiry of the commission, therefore, was whether or not such justifications could be shown; and the principal point of conflict between majority and minority in the Supreme Court was whether the commission's report stated sufficient and clear findings on this question to support its order. The commission's inquiry required extremely complicated studies concerning unit costs, volume and density of traffic both present and expected, routes, equipment and service required, and the character of commodities carried.³⁴ The situation

Justice Frankfurter thought it was unreasonable to expect the Supreme Court to "dig out" of a 320-page report and 13,000 pages of evidence the findings essential to support the order.

²⁹ *Id.* at 357.

³⁰ Class rates in Southern Territory were 137 per cent of those in Official; in Western Trunk-Line, 146 per cent; in Southwestern, 161 per cent. These figures were obtained in two separate investigations by the Tennessee Valley Authority and by a Board of Investigation and Research established by Congress in 1940. 30 *FORTUNE* 150 (1944). *New York v. United States*, 331 U.S. 284 at 301, 67 S.Ct. 1207 (1947).

³¹ *New York v. United States*, 331 U.S. 284 at 311-315, 67 S.Ct. 1207 (1947); 30 *FORTUNE* 198 (1944).

³² *New York v. United States*, 331 U.S. 284 at 315, 67 S.Ct. 1207 (1947).

³³ *Id.* at 305, citing *United States v. Illinois Central R. Co.*, 263 U.S. 515, 44 S.Ct. 189 (1924).

³⁴ *New York v. United States*, 331 U.S. 284 at 331, 67 S.Ct. 1207 (1947). 3B *SHARFMAN, THE INTERSTATE COMMERCE COMMISSION* 542-572 (1931), dis-

was further complicated by the fact that a large proportion of the freight in the South and West is carried, not under class rates, but on "exception" or "commodity" rates.⁸⁵ To attempt here to appraise these various factors or to try to decide whether or not they do justify the rate differences would be beyond the scope of this comment. It is enough to say that on such a complex problem different men may reasonably reach different conclusions. The Interstate Commerce Commission itself had divided closely on the issue, the majority concluding that there was no justification shown for the differences in rates.⁸⁶ One of the dissenting commissioners objected on the ground that the evidence was "fragmentary and incomplete" and therefore did not support the findings of discrimination.⁸⁷

Presented with this division within the commission it might be expected that the Supreme Court would hesitate to adopt the commission's findings as conclusive: the extent to which the Court appears to have re-examined the factual evidence considered by the commission and included in its report indicates some caution in this respect. Nevertheless, the majority of the Court recognized that a thorough reappraisal of the evidence was beyond the scope of its review.⁸⁸ Moreover, the determination of the expert commission was entitled to great weight

cusses the various considerations in determining whether rates are actually discriminatory; also see 18 ROCKY MT. L. REV. 14 (1945).

⁸⁵ *New York v. United States*, 331 U.S. 284 at 343, 67 S.Ct. 1207 (1947). Weighing these variations from the class rates, the Board of Investigation and Research (see note 30) came to the conclusion that the effective rates for shipments from South to Northeast were practically level with those for shipments within the Northeast, 30 FORTUNE 150 (1944).

⁸⁶ *Alabama v. New York Central R. Co.*, 235 I.C.C. 255 at 326 (1939). *New York v. United States*, 331 U.S. 284 at 315, 67 S.Ct. 1207 (1947).

⁸⁷ *Alabama v. New York Central R. Co.*, 235 I.C.C. 255 at 348 (1939).

⁸⁸ *New York v. United States*, 331 U.S. 284 at 331, 67 S.Ct. 1207 (1947). It has frequently been held that the weight of evidence is to be decided by the Interstate Commerce Commission, not by the courts, and that the courts are not to re-examine or appraise the evidence or inquire into the soundness of the reasons for the commission's findings. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 32 S.Ct. 108 (1912); *Merchants' Warehouse Co. v. United States*, 283 U.S. 501, 51 S.Ct. 505 (1931). Assuming that the commission had authority to make the order, it is only essential that there be evidence to support the findings on which the order is based. *Pennsylvania Co. v. United States*, 236 U.S. 351, 35 S.Ct. 370 (1915); *Manufacturers' Ry. Co. v. United States*, 246 U.S. 457, 38 S.Ct. 383 (1918). The commission's finding that certain rates or classifications result in discrimination is particularly conclusive on the courts. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U.S. 235, 31 S.Ct. 392 (1911). 2 SHAFERMAN, THE INTERSTATE COMMERCE COMMISSION 384-489 (1931), discussing the general scope of judicial review of the commission's orders, attributes to the courts a "dominantly self-denying attitude" in this regard. *Id.* 385.

in this regard.³⁹ The disagreement between majority and minority really came on the issue of how much weight should be given.

These statements are indicative of the majority attitude: "The problems of transportation economics are complicated and involved . . . [They] involve the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. . . ."⁴⁰ "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic."⁴¹ "We could not disturb its findings on the facts of this record without invading the province reserved for the expert administrative body."⁴²

This attitude might be condemned as tending to turn over to the administrative departments of government unbridled control over transportation, giving the commission freedom to shape its policies in almost any way it saw fit, without effective judicial review.⁴³ On the other hand, insistence by the Supreme Court on a right to examine de novo the evidence considered by the commission would impose upon its members a task for which they have insufficient time, and for which they can hardly be expected to possess the expert knowledge required.⁴⁴ If the Court confines itself to determining whether the

³⁹ *New York v. United States*, 331 U.S. 284 at 328, 67 S.Ct. 1207 (1947). Tollefson, "Judicial Review of Decisions of the Interstate Commerce Commission," 11 MINN. L. REV. 389, 504 (1927) and 5 GEO. WASH. L. REV. 503 (1937), reviews the decisions of the Supreme Court as to its attitude toward the findings and orders of the commission, and concludes, in the latter article, at p. 540, "the courts have always shown a great deal of respect toward the decisions of this tribunal," predicting "that the findings of the Commission will stand as conclusive on the courts unless clear and outstanding errors of law have been committed."

⁴⁰ *New York v. United States*, 331 U.S. 284 at 335, 67 S.Ct. 1207 (1947). See I SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 287 (1931).

⁴¹ *New York v. United States*, 331 U.S. 284 at 347, 67 S.Ct. 1207 (1947). See similar statement of Brandeis, J., in *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285 at 291, 42 S.Ct. 477 (1922); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 55 S.Ct. 713 (1935). ". . . the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." *United States v. Louisville & N. R. Co.*, 235 U.S. 314 at 320, 35 S.Ct. 113 (1914).

⁴² *New York v. United States*, 331 U.S. 284 at 326, 67 S.Ct. 1207 (1947).

⁴³ Compare the dissenting opinion of Justice Jackson in *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194 at 209, 67 S.Ct. 1575, dissent published separately at 1760 (1947).

⁴⁴ The magnitude of the task involved is indicated by the fact that in the principal case the commission had taken 13,000 pages of evidence and had made its re-

finding of the commission is based on sufficient evidence to keep it from being arbitrary and gives the case a genuine review on this issue, there should still be adequate protection from unchecked administrative control.⁴⁶ Even then there is some chance for the Court "to pass upon the record independently and thus to render their judgment of the evidence controlling."⁴⁶

That the commission could remove discrimination on a nationwide basis does not seem to have been doubted, despite the fact that only once before had it essayed to change rates on this scale.⁴⁷ This matter had been considered at some length in the district court which came to the conclusion that the 1940 amendment to the Interstate Commerce Act and the accompanying resolution had clearly confirmed the commission's power to make this order.⁴⁸ The Supreme Court refers only briefly to these changes in the law, mentioning the question mainly to state what the commission could not do, and what the Court felt it had not done in this case, namely, to attempt by adjustment of trans-

port in 320 pages. *New York v. United States*, 331 U.S. 284 at 353, 67 S.Ct. 1207 (1947).

⁴⁶ 2 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 385 (1931), says that there is a "broad and significant zone in which the commission's determinations are clothed with finality, while ample judicial safeguards are provided against unconstitutional assertion of power, against usurpation of statutory authority, and against arbitrary performance of administrative duty." Tollefson, "Judicial Review of Decisions of the Interstate Commerce Commission," 11 *MINN. L. REV.* 389, 504 at 515-523 (1927), says that for findings and orders of the commission to be conclusive the acts giving it authority must be valid, the commission must act within its authority, and there must be due process of law. The last requires a hearing, *Atchison, T. & S. F. R. Co. v. United States*, 284 U.S. 248, 52 S.Ct. 146 (1932), and that there be evidence to support the order of the commission, so that its action will not be arbitrary, *Chicago, R. I. & P. Ry. Co. v. United States*, 274 U.S. 29, 47 S.Ct. 486 (1927).

⁴⁶ 2 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 437 (1931).

⁴⁷ This was an order under the Transportation Act of 1920, 41 Stat. L. 488, 49 U.S.C. (1940) § 15a, raising rates throughout the country, to insure a fair return on capital to the railroads. *Ex Parte* 74, *Increased Rates*, 1920, 58 I.C.C. 220 (1920). As late as 1933, it was held that there was no discrimination against a locality, within the meaning of the Interstate Commerce Act, unless the *same carrier*, without justification, maintained different rates for two different communities. *Texas & P. Ry. v. United States*, 289 U.S. 627, 53 S.Ct. 768 (1933). This marked a retreat from a broader view of the commission's powers in *United States v. Illinois Central R. Co.*, 263 U.S. 515, 44 S.Ct. 189 (1924).

⁴⁸ *New York v. United States*, (D.C. N.Y. 1946) 65 F. Supp. 856 at 870-872. The court referred to a statement by Senator Wheeler, in charge of the amendment on the floor of the Senate, 84 *CONG. REC.* 5889 (1940). The Supreme Court, also referring to this, said: "For whatever doubt may have existed before was removed by the 1940 amendment, which made abundantly clear that Congress thought that the problem of regional discriminations had been neglected, and that, if any such discriminations were found to be present, they should be eradicated." *New York v. United States*, 331 U.S. 284 at 300, 67 S.Ct. 1207 (1947).

portation rates to equalize the competitive positions of regions which were subject to natural or other economic disadvantages not connected with those rates.⁴⁹

Whatever conclusion may be reached as to the actual existence of discrimination and its effects on southern and western industry, it seems, at least, that the commission and the Court have taken a necessary step in the direction of solving the difficult problem. With the rate structure complicated by varying classifications and by exception and commodity rates,⁵⁰ it is almost impossible to determine with any degree of certainty whether practical discrimination does exist. Only when this maze is eliminated can any real judgment be passed on this issue. While Congress has never specifically directed the commission to sweep away the entire existing system of rates, and to establish new, uniform classifications and class-rates, it has more than once indicated, as strongly as can be expected from a body subject to political influences, a general policy against intersectional discrimination in transportation matters.⁵¹ The commission cannot reasonably carry out this mandate of Congress so long as a surer basis for its investigations does not exist in the form of standardized classifications in all territories. The order for reclassification will thus provide the first essential for action by the commission on this problem.

Indeed, to this part of the order alone the objection would probably have been much less strenuous. The principal complaint was directed at the interim order for 10 per cent changes in rates, downward in the South, Southwest, and West (excluding the Mountain-Pacific region),

⁴⁹ *New York v. United States*, 331 U.S. 284 at 331, 332, 67 S.Ct. 1207 (1947). This rule was established in *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42, 32 S.Ct. 22 (1911). But see note in 82 *UNIV. PA. L. REV.* 253 (1933) advocating such power for the commission for the purposes of developing natural resources and equalizing population distribution. See notes 27 and 28, *supra*, and quotations from dissenting opinion of Justice Jackson there cited.

⁵⁰ *New York v. United States*, 331 U.S. 284 at 343, 67 S.Ct. 1207 (1947), refers to the "small percentages of traffic" moving on class rates, and the commission's opinion that until most traffic did move on such rates, the discrimination question could not be attacked effectively.

⁵¹ In 1925 Congress had passed a resolution somewhat similar to that of 1940, authorizing an investigation into discriminatory freight rates, especially as to agricultural products. Hoch-Smith Resolution, 43 Stat. L. 801 (1925), 49 U.S.C. (1940) § 55. I SHARFMAN, *INTERSTATE COMMERCE COMMISSION* 234 (1931), says that this resolution was rather weak in its language. In *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 50 S.Ct. 444 (1930), the Supreme Court held that it had added nothing to the commission's power in this regard. Concerning the Ramspeck Resolution and the amendment of 1940, to the Interstate Commerce Act, see notes 16 and 48, *supra*. Even of the original act it has been said that the principal evil aimed at was discrimination. *Louisville & N. R. Co.*, 282 U.S. 740 at 749, 51 S.Ct. 297 (1931); *New York v. United States*, 331 U.S. 284 at 296, 67 S.Ct. 1207 (1947).

upward in the Northeast.⁵² The majority justified this as a "temporary adjustment only," and pointed out that "where the result of a rate order is not clearly shown to be confiscatory but the precise effect must await operation under it, the Court has refused to set it aside despite grave doubts as to its consequences."⁵³ From this it appears that the Court is countenancing an experiment with freight-rate adjustments although it is uncertain whether they are necessary to prevent discrimination or whether they may have injurious effects on the finances of the affected railroads. Justice Jackson's criticism of this seems justified. While such experimenting may be desirable in order to observe the results, it might better be the province of Congress to direct it. The financial condition of railroads generally in this country has been none too strong.⁵⁴ To require a reduction of 10 per cent in the rates charged by many of them may seriously affect this condition.⁵⁵ The commission pointed to the higher rates of return realized by the Southern and Western roads during 1939-1943, in comparison with those in the East;⁵⁶ but it is far from certain that post-war conditions will bring the same returns.⁵⁷ Besides, the 10 per cent increase in rates in the Northeast, where there was no apparent need for higher rates,⁵⁸ provides another boost in prices already forced too high by the general inflation; this might well have been considered before making the order. Experimentation by Congress might have avoided these dangers, perhaps by a grant of subsidies on rail shipments from South and West into Official Territory to equalize the rates on the same scale as that accomplished by the commission's order. It is highly doubtful, however, whether any such Congressional action could ever have been secured.

The delegation of authority to the commission to carry out the policy of Congress against discrimination in freight-rates, so defined, is consistent with the general doctrine of permissible delegation of

⁵² *New York v. United States*, 331 U.S. 284 at 290, 67 S.Ct. 1207 (1947).

⁵³ *Id.* at 340.

⁵⁴ 52d Annual Report, Interstate Commerce Commission 1-37 (1938); DRAYTON, *TRANSPORTATION UNDER TWO MASTERS 193-195* (1946); 30 *FORTUNE* 151, 152 (Oct., 1944).

⁵⁵ Justice Jackson says that the 10 per cent figure was chosen because it was the maximum reduction which the Southern and Western railroads could bear. *New York v. United States*, 331 U.S. 284 at 358, 67 S.Ct. 1207 (1947).

⁵⁶ *New York v. United States*, 331 U.S. 284 at 329, 67 S.Ct. 1207 (1947). These figures showed that the Southern railroads had realized returns on investment of 4.24 per cent, 6.51 per cent, and 5.73 per cent in 1941, 1942, and 1943 respectively, and the Western roads 3.36 per cent, 5.8 per cent, and 5.22 per cent, as against 3.62 per cent, 4.9 per cent, and 4.32 per cent for the Eastern roads.

⁵⁷ 30 *FORTUNE* 151 (1944).

⁵⁸ *New York v. United States*, 331 U.S. 284 at 358, 67 S.Ct. 1207 (1947).

powers that has been accepted by the Supreme Court.⁵⁹ The decision upholding the commission's exercise of that power may provide a break in the vicious circle of higher rates justified by the lower volume of traffic in the South and West, and impossibility of increasing that volume because of the higher rates.⁶⁰ Industrial interests, sensing a leveling of the rate-structure, may feel that this is an advantageous time to expand their investments and developments in the South, thereby providing the greater volume of traffic to test the validity of the contentions of the South and West. This, perhaps, is all that the advocates of the order hoped for. The order may even give Georgia all the relief she needs and end any real necessity for carrying on the anti-trust suits.

John F. Buchman, III

⁵⁹ *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348 (1928); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 at 214, 32 S.Ct. 436 (1912): "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular manner within the rules laid down by Congress."

⁶⁰ Scott and Stone, "Discrimination in Freight Rates: The South Wins a Battle," 15 *TULANE L. REV.* 335 at 370, 371 (1941).