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Administrative Law - Powers of Agencies - The Interstate Commerce Commission and Discontinuance of Railroads Under the Transportation Act of 1958

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RECENT LEGISLATION

ADMINISTRATIVE LAW—POWERS OF AGENCIES—THE INTERSTATE COMMERCE COMMISSION AND DISCONTINUANCE OF RAILROADS UNDER THE TRANSPORTATION ACT OF 1958—The Transportation Act of 1958 amended the Interstate Commerce Act[1] by authorizing railroad discontinuance of interstate train or ferry operations by posting advance notices thereof.[2] The Interstate Commerce Commission can investigate such discontinuances either upon complaint or its own motion, and may require continuance of service if, after hearing, it finds such operation required by public convenience and necessity and not unduly burdensome to interstate commerce. *Public Law 85-625*, August 12, 1958, 72 Stat. 568.

The amendment attempts to help the railroads overcome their problem of acute financial distress[3] by facilitating discontinuance of unprofitable lines. Formerly the ICC had jurisdiction to authorize certain abandonments, but state public service commissions had jurisdiction to authorize intrastate abandonments and had exclusive jurisdiction to authorize all discontinuances.[4] The relatively few denials of authorization[5] were important because (1) as precedent they inhibited other applications, and (2) they usually involved the longest segments of railroad, which cause the greatest losses.[6] State agencies' strictness and delay in granting discontinuance approval was noted by the Presidential Advisory Committee

1 24 Stat. 383 (1887), 49 U.S.C. (1952) §1. The amendment is contained in a new section, §13a(1).

2 Other amendments to the ICA permit the ICC to guarantee loans made to railroads for financing additions or other capital expenditures.

3 See, generally, on the railroads' financial plight, Craven, "Pressure-Group Action and the Democratic Process: a Study of the Railroad Situation," 24 WASH. UNIV. L.Q. 463 at 465 (1939); S. Rep. 1647, 85th Cong., 2d sess., pp. 7-9 (1958). The "problem" has many fronts, including: difficulties in reorganization [see, generally, Will, "Railroad Reorganization—the Long and the Short of It," 41 ILL. L. REV. 608 (1947); Polatsek, "The Wreck of the Old 77," 34 CORN. L.Q. 532 (1949); Wren, "Feasibility and Fairness in Section 20b Reorganizations," 52 COL. L. REV. 715 (1952); Billyou, "Railroad Reorganization Under Section 20b of the Interstate Commerce Act," 39 VA. L. REV. 459 (1953)]; consolidation [see, generally, Payne, "History of the 'Consolidation' Provisions of the Interstate Commerce Act," 19 ICC PRAC. J. 453 (1952); Conant, "Railroad Consolidations and the Regulation of Abandonments," 32 LAND ECON. 318 (1956)]; and taxation [see, generally, Grotewohl, "The Railroads' Problems of Inequitable Property Taxes," 11 MIAMI L.Q. 206 (1957); Molloy, "Federal Income Tax Aspects of New Trends in Railroad Corporate Finance," 12 TAX L. REV. 113 (1957)].

4 41 Stat. 474 (1920), 49 U.S.C. (1952) §1(18); Marshall, "Railroad Certificates of Convenience and Necessity Issued under the ICA," 22 ORE. L. REV. 215 at 221-240, 331 (1943); Conant, "Railroad Service Discontinuances," 43 MINN. L. REV. 275 at 276 (1958).

5 State agencies deny about 7% of the applications. H. Rep. 1922, 85th Cong., 2d sess., pp. 20-22 (1958). The ICC denial rate is 6%. Conant, "Railroad Consolidations and the Regulation of Abandonments," 32 LAND ECON. 318 at 319 (1956).

6 Conant, "Railroad Consolidations and the Regulation of Abandonments," 32 LAND ECON. 318 at 319-320 (1956).

on Transport Policy and Organization.[7] Its resultant recommendation that the ICC be given jurisdiction over discontinuances[8] was effectuated by the amendment. The new legislation presents several interpretative questions. The first is whether there is a necessity for an investigation by the ICC prior to discontinuance of interstate operations.[9] Prior state law had required a hearing and approval before discontinuance. The text of the amendment says that the ICC ". . . shall have authority . . ." to hold an investigation, but does not ordain that an investigation be held. Thus the investigation appears to be discretionary, allowing a railroad to discontinue without agency review simply by posting notice. And it has recently been held that the investigation is discretionary rather than mandatory even in the instance of a complaint.[10] But while discontinuances *can* be accomplished without ICC investigations, in most cases the ICC probably will intervene.[11] The second interpretative question concerns the test for an ICC order of continuance of service. The act as originally drafted empowered the ICC to order continued service if such were (1) required by public convenience and necessity, (2) would not result in a net loss "therefrom," *and* (3) would not unduly burden interstate commerce.[12] Such language would have enabled a railroad to discontinue by simply proving a net loss for the *specific line sought to be discontinued,* which would have been a change of law[13] portending dras-

[7] See also Priest, "Discontinuances of Railroad Service," 61 PUB. UTIL. FORT. 656 (1958); 104 CONG. REC. 10843 (1958); S. Rep. 1647, 85th Cong., 2d sess., pp. 21-22 (1958); H. Rep. 1922, 85th Cong., 2d sess., p. 12 (1958).

[8] Presidential Advisory Committee, REVISION OF FEDERAL TRANSPORTATION POLICY at 19 (1955).

[9] Intrastate operations are governed by a new §13a(2), which requires that a railroad petition the ICC for discontinuance, and that the ICC conduct an investigation before approving the petition. See 104 CONG. REC. 12524 (1958). Compare 104 CONG. REC. 12523 (1958).

[10] New Jersey v. United States, (D.C. N.J. 1958) 168 F. Supp. 324 at 332-334, affd. 359 U.S. 27 (1959). This seems to be the intent of Congress. 104 CONG. REC. 10843 (1958) (statement that the ICC *would* have jurisdiction and *could* make investigation); id. at 10863 (statement by Senator Russell: "Unless the Interstate Commerce Commission takes affirmative action . . . the notification by the railroad is effective."); id. at 15648 (statement by the Managers of the House on the conference bill: "The Commission is given authority . . . to commence an investigation. . . ."). The ICC has so interpreted the amendment. Freas, "Some Aspects of Transportation Regulation," 26 ICC PRAC. J. 6 at 9 (1958); 27 U.S. LAW WEEK 2405 at 2406 (1959).

[11] See New York Central R. Co. Ferry Abandonment, 295 I.C.C. 385 (1956), affd. on reconsideration 295 I.C.C. 519 (1957). See also Erie R. Co. Ferry Abandonment, 295 I.C.C. 549 (1957), affd. on reconsideration 295 I.C.C. 599 (1957). The commission's order permitting the abandonment was set aside by Board of Public Utility Commissioners of New Jersey v. United States, (D.C. N.J. 1957) 158 F. Supp. 98, on a jurisdictional ground and not on the merits.

[12] 104 CONG. REC. 10838, 10847 (1958). Use of the conjunctive would indicate that all three conditions would have to be met for the ICC to order continuance of service.

[13] Under pre-existing law, only those railroads having net losses on their *entire operations* had a constitutional right to discontinue specific loss services. A railroad

tic consequences for commuters.[14] As the amendment was finally enacted, however, all reference to net loss was deleted; continuance can now be ordered if (1) required by public convenience and necessity and (2) not unduly burdensome to interstate commerce. This language seems to preserve the balancing test formerly used by the states, absent a net loss on total operations.[15]

There remains a question of the act's validity. It has been argued that the amendment, by permitting discontinuance without an investigation by the ICC, deprived somebody—the state through which the train ran, its public service commission, or users of the train—of property without due process of law. This argument has been rejected, however.[16] The real reason it was put forth was the fear that no investigation would be held, the railroads thus being able to discontinue on their own *ipse dixit.* In practice this fear seems to be groundless. If soundly administered, the statute will not be a ". . . strange, dismaying law . . ." that will ". . . write an end to . . . transportation . . . ,"[17] but rather a statesmanlike response to the railroads' unfortunate poverty.

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showing a net loss on the specific service but earning a net profit as a whole could not discontinue as of right. State agency approval, which was essential, depended upon various other factors, such as character of the territory, other available transportation in the area, and the public need for continued operation. Conant, "Railroad Service Discontinuances," 43 MINN. L. REV. 275 (1958).

14 104 CONG. REC. (1958). Senator Javits remarked: ". . . practically all passenger service in the congested northeast area of the United States . . . could be shut down under the provision, because almost all such service is operated at a net loss."

15 See note 13 supra.

16 State of New Jersey v. United States, note 10 supra, at 334. The state, or its agency, can assert nothing; they are not "persons" within the Fifth Amendment's protection. The customers of the railroad have no property interest therein and no vested right to its continued service. *Accord:* United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co., (2d Cir. 1931) 47 F. (2d) 567, cert. den. 283 U.S. 864 (1931); O'Sullivan v. Feinberg, 201 Misc. 658, 114 N.Y.S. (2d) 515 (1951); and Ten Ten Lincoln Place v. Consolidated Edison Co. of New York, 190 Misc. 174, 73 N.Y.S. (2d) 2 (1947), affd. 273 App. Div. 903, 77 N.Y.S. (2d) 168 (1948), holding that the right of a consumer to utility service is not a vested property right and not protected by the due process clause.

17 This was the dissenting judge's characterization of the statute in New Jersey v. United States, note 10 supra, at 341.