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I am submitting herewith a thesis written by Scott Holbrook Pope entitled "Public Trust and Antitrust: A Historical Discussion of the Passage of the Reed-Bulwinkle Act." I have examined the final copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in Economics.

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PUBLIC TRUST AND ANTITRUST:
A HISTORICAL DISCUSSION OF THE PASSAGE OF THE REED-BULWINKLE ACT

A Thesis

Presented for the

Master of Arts Degree

The University of Tennessee

Scott Holbrook Pope

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DEDICATION

This thesis is dedicated to my parents, Ron and Sydna, my sister, Aimee, and especially to my wife, Beth; all of who stuck with me through the last ten months to complete this document.

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LIST OF ABBREVIATIONS AND ACRONYMS

American Association of Railroads	AAR
Chicago, Burlington & Quincy	C. B. & Q.
Gross-Ton Miles	GTMs
Interstate Commerce Act	ICA
Interstate Commerce Commission	ICC
Northern Pacific	NP
Reed-Bulwinkle Act	RBA
United States	U.S.
Western Association of Railroad Executives	WARE

1.0 Introduction

In 1948 the controversial Reed-Bulwinkle Act, which removed railroad ratemaking powers from the control of the antitrust laws, was passed by Congress. The purpose of this thesis is to examine some of the issues surrounding its passage: why the railroad industry felt this act was important for the continued viable operation of the railroad system and why there was opposition to this act. It will explore how by moving toward deregulation, the act allowed the railroads to cooperate with one another and compete with the other modes of transportation; but in so doing, perpetuated discriminatory railroad ratemaking policies toward various areas in the U.S. This examination will include the events preceding the passage of, and the consequences of the Reed-Bulwinkle Act. Much of the information to be presented has been gathered from Congressional and independent organizations, such as the Ralph Nader Study Group, that have made in-depth studies on the economic effects of regulation.

The invention of the steam locomotive has been heralded as one of the key inventions of the last 200 years. It is generally agreed that without the railroads, the rapid expansion and agricultural revolution of the American Midwest could not have happened. However, in the 20th century and most notably in the United States, the rail industry has been pushed aside by the automobile, the bus, the truck, and the airplane. While the U.S. has the worlds' largest system of track miles, 167,593, it is hardly utilized when compared to that of other nations. For comparison, the former Soviet Union has 90,582 miles of track, and in 1990 had 225,671,310 passenger-miles and 2,256,077 ton-miles of use compared to just 11,075,680 passenger-miles and 853,903 ton-miles in the U.S. Even Japan with only 16,942 miles of track had 201,494,425 passenger-miles in 1990.[1]

It has also been alleged that the failure in the U.S. to fully utilize the railroads may be in part due to the effects of regulation of the transport industry, particularly the railroads. Regulation was applied to those industries whose smooth and efficient operation was part of the "public interest".

The rapid expansion that occurred in the later 1800s was made possible by the railroads. The railroads were later found to be indispensable during the two World Wars for the transport of needed war material and personnel. Thus, the smooth and efficient operation of the railroads was deemed to be in the "public interest".

Ostensibly, working in the best interests of the public, the Federal government passed laws with the goals of first fostering, and then regulating and overseeing the railroad industry. An industry which, though known for abuses and questionable

[1] World Atlas, Software Toolworks, 1991.

business practices, was struggling financially while providing broad benefits to the United States. Much of this regulation focused on the railroads' ratemaking powers.

Steam powered railroads had existed for fifty-seven years in the U.S. when the first federal regulations affecting railroads were passed by the government. In 1887 the Interstate Commerce Commission was established to regulate common carriers, including the railroad companies, and to oversee their ratemaking. At this same time there was a growing concern about the monopolistic powers of large industrial companies. There was fear that newly emerging large companies, including railroads, would be able to charge high prices, suppress competition, and wield great power. In response to this concern, the federal government passed the Sherman Antitrust Act in 1890. This act was intended to prevent large companies, including the rail industry, from abusing their power.

Between 1890 and 1950 the federal government successfully prosecuted a number of railroad companies under the Sherman Act, including the Union Pacific and the Northern Pacific railroads. While these cases concerned the use of stock holding companies to facilitate the control of many railroads, a number of indictments were filed in the early 1900s that focused on the railroads ratemaking practices. Particularly, these indictments were against the railroad rate bureaus, which by 1934, had complete control over the ratemaking powers of the individual railroads.

Two unsuccessful indictments, filed in 1944, were an attempt by the Federal government to bring these rate making powers under control. Evidence had been presented that the rate bureaus' policies were discriminatory to various regions of the U.S. The railroads and the rate bureaus countered by promoting the passage of legislation that would remove these ratemaking powers from the control under the antitrust laws; legislation in essence, that would make the rate bureaus into a legal monopoly. The interests backing this legislation contended that its passage would be in the public interest as it would stabilize the industry and promote cooperation between railroads; and that such cooperation would generate a more efficient transport system. This legislation, passed in 1948, was the Reed-Bulwinkle Act.

As the rail industry matured, railroad officials developed methods to increase the level of cooperation between their companies such that cut-throat competition no longer existed within the industry. Many of these methods circumvented regulations that were established to foster competition. In the mid 1900s, the railroad companies found themselves faced with a new form of competition, trucks. Railroad officials felt themselves unable to compete with the trucking industry, and many blamed heavy government regulation, particularly in the area of ratemaking, for this inability to compete. Thus, a campaign was started to pass legislation that would regulate trucking, thereby favoring railroads; and through which developed the campaign of the late 1940s that resulted in the passage of the Reed-Bulwinkle Act.

To fully understand the implication of the Reed-Bulwinkle Act, a history of the growth and development of the railroads is presented in section 2, as many of the arguments for and against the Act were based on this history.

Analysis of events surrounding the passage of the Act, and the events which followed, will then be summarized in section 3.

The conclusions of this thesis are found in section 4.

2.0
Historical Background of Railroads in the United States

Railroads played an important role in the expansion and economic growth of the United States. Without the railroads, it is generally believed, development of the Midwest would probably not have been so rapid during the late 1800s.[2] Pride in the important role played by the railroads in that expansion and development was diminished by public perception of abuses by the railroad owners and other railroad interests. Often times, it appears that railroad executives and organizations in the late 1800s and 1900s believed themselves to be above the law. To curb abuses and to protect the public interest, many federal regulations were passed.

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[2] A counter view has been presented by Robert Fogel. Through an extensive evaluation of the U.S. during the late 1800s, Fogel stated that railroads did not play as important a role in the development of the U.S. as previously accepted. He concludes that:

> Economic growth was a consequence of the knowledge acquired in the course of the scientific revolution of the seventeenth, eighteenth, and nineteenth centuries. This knowledge provided the basis for a multiplicity of innovations that were applied to a broad spectrum of economic processes. The effectiveness of the new innovations was facilitated by political, geographic and social rearrangements. *All of these developments began before the birth of the railroad and the railroad was not needed for the transformation in economic life that followed them.*

Despite this, it can be also be concluded that the railroads contributed to this expansion, even if they were not the driving force. [Robert W. Fogel, Railroads and American Economic Growth (Baltimore: The Johns Hopkins Press, 1964), p.235; emphasis added.]

The ratemaking powers of the railroads were a main focus of regulation. For the typical railroad, competitive ratemaking was disruptive. In those locations where there was more than one railroad company, such competitive ratemaking generally caused rates to be low. Railroad officials believed, because of high fixed costs and associated bonded indebtedness, that this disrupted the smooth operation of the railroads and that, in the public interest, cooperation in ratemaking was necessary.

The impression, given by railroad officials, that the railroad industry was highly competitive was not the general case. The railroad industry could more aptly be described as a natural monopoly. The two main characteristics that contributed to this were geography and economics. For many places in the U.S. the geography does not allow access for more than one rail line. Such was the case for the Denver and Rio Grade Western Railroad where it crosses the Rocky Mountains in Colorado.[3]

Economics also played a strong role in making the railroads a natural monopoly in some areas. Many of the cities and towns that railroads passed through could not generate enough traffic to support more than one railroad. Only larger urban centers, such as New York and Chicago, had sufficient traffic to support more than one railroad. It was in those towns with two or more railroads, and little traffic, that cut-throat competition between railroad companies was disruptive.

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[3] Economics of Transportation, p. 88.

However, a policy of cooperative ratemaking presented problems of its own, pooling and rebating to name two. While these two practices were made illegal under the Interstate Commerce Act and its amendments, the practice of making cooperative rate agreements was not.

In the early 1920s and 1930s, cooperative ratemaking was developed into a system of centrally controlled rate bureaus. At the head of this system was the American Association of Railroads, based in New York City. Under the guidance of this association, freight rates and other policies were set for the entire United States; and over the years its policies tended to favor the Eastern portion of the U. S. to the detriment of the South and the West. Evidence presented to Congress in the 1930s and 1940s, shows that this discriminatory behavior of rate bureaus was economically damaging to the South and West, and possibly to the East as well.

A general history of the regulation of the railroad industry, as well as the policies of the rate bureaus, will be examined in the following sections.

2.1 Growth and Development of the Railroads

The growth of the rail industry in the U.S. during its first sixty years (1830 to 1890), can only be described as extraordinary. In the mid 1800s a combination of the increased settlement of the states west of the Appalachian Mountains — such as Kentucky, Tennessee, and Illinois — and the competition between the major Eastern cities for trade with this area focused the need for a large scale, efficient transport system. For Eastern businesses, the west was seen as a rapidly growing market when compared to the South. Between 1810 and 1830 the percentage of the U.S. population living west of the Appalachians increased from 15% to 28%.[4] Initially, focus was placed on the construction of canals to provide the transportation systems for these cities, such as the Erie Canal and a system of canals in Pennsylvania.

Although cars had been drawn by horses on rails mainly made of wood, the first common carrier railroad company using iron rails was the Baltimore & Ohio (B&O), chartered in 1827. By

[4] Robert L. Frey, Encyclopedia of American Business History and Biography, Railroads in the Nineteenth Century (New York: Bruccoli Clark Layman, Inc., 1988), p. xiv.

1830, thirteen miles of iron track had been laid, from Baltimore to Ellicott's Mill in Maryland. This was also the same year that the first steam locomotive, the Tom Thumb, was introduced with its famous race against the horse cart. Extensive use of steam locomotives did not start until the next year, 1831, with the introduction of the York locomotive. Over the twelve year period, from 1830 to 1842, the B&O significantly expanded its rail line. By 1842 its tracks had reached the Appalachian mountains to the west and it had a branch line eastward to Washington D.C. Ten years later, in 1852, the B&O reached the Ohio river.[5]

By this time other railroads had also been chartered and had completed rail line. The Erie Railroad connected Albany to New York by 1851 and the Pennsylvania Railroad connected Philadelphia to Pittsburgh by 1852. Total track miles in the U.S. increased from the 23 miles of railroad operating in 1830, to over 9000 miles in 1850.

In 1853 Congress authorized money for a survey of different rail routes to the Pacific Ocean. With people continuing to spread westward, and the growth in California due to the gold rush of the late 1840s, there was great need for a transcontinental railroad. Before the Civil War, the South blocked any attempts by Congress to pass legislation concerning the actual construction of such a railroad. But with the removal of the South from Congress during the war, the needed bills were passed. Despite the fact

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[5] John F. Stover, American Railroads (Chicago: The University of Chicago Press, 1961), p. 14.

that most previous railroads had been built using private funds, Congress issued government bonds to the two railroad companies formed to build the transcontinental line. These companies were the Central Pacific and the Union Pacific. The Pacific Railroad Bill stated that for each mile of line built on flat ground the companies would receive $16,000 in bonds, on foothills or plateaus $32,000 in bonds, and in mountains $48,000 in bonds. These railroads were also to receive federal land grants in the amount of ten square miles for each mile of track built.[6] For the final railroad track constructed, this totals to 18,000 square miles in land grants. If computed for construction on only level ground, it provided a minimum of $28,800,000 in government bonds to the companies.

The first transcontinental railroad was completed in 1869. By 1893 four other transcontinental railroads had been constructed. These were the Northern Pacific, the Southern Pacific, and the Santa Fe, which were all completed in 1883; and the Great Northern, which was completed in 1893. For this, over 148 million acres had been given to the railroad companies in the form of federal or state land grants. For the railroads, these lands were a large source of revenue. While the government had paid a little over 23¢ for each acre, the railroads were selling the land from $3 to $14 an acre, for an estimated value to the railroads of over $500,000,000.[7]

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[6] Frey, Railroads in the Nineteenth Century, p. xx.
[7] Stover, American Railroads, p. 90.

However, it is noteworthy that one of the transcontinental railroads did not receive any federal land grants or government bonds. This railroad was the Great Northern Built by James Hill. With the completion of the first transcontinental rail lines, vast areas were opened up for the development of agriculture and settlement. By 1890 there were 163,597 miles of rail line owned by the various railroads, an eighteen fold increase in just 40 years. Together these railroads owned over 30 thousand locomotives, over 900 thousand passenger and freight cars, and had traffic exceeding more than 76 billion ton-miles annually. In 1920 rail line had increased to 252,844 miles (a 55% increase), and the amount of traffic shipped increased to 410,306,209,000 ton-miles (a 440% increase). By 1959 there was 217,565 miles of rail line, a slight decrease from 1920; but while the number of cars and locomotives had not even doubled, the level of traffic had increased over seven times, to over 588 billion ton-miles.

During the last part of the nineteenth century, the federal government began to regulate the railroads with the passage of the Interstate Commerce Act in 1887, and which created a regulatory body, the Interstate Commerce Commission. The purpose of this commission was to oversee specific aspects of the railroad operations. The main focus was on controlling certain ratemaking abuses, such as rebating and pooling of revenue and cargo. It was also to focus on safety. A number of amendments were passed through the 1950s that strengthened and broadened the commission's powers of regulation (see section 2.3).

Eventually the Interstate Commerce Commission regulated most areas of railroad operation. The only notable exception was the few regulations governing railroad labor relations.

Railroads also came under the provisions of the Sherman Antitrust Act, passed in 1890 (see section 2.3). The majority of suits against railroads were brought under the Sherman Act due to railroad mergers. The more significant of these, to be later discussed in detail in section 3.1, were the case against the Northern Securities Company, and the case against the Union Pacific. In both of these cases, the owners of the two railroads, James Hill and Edward Harriman respectively, had used stock holding companies to purchase and control other railroads. The government argued, successfully in both cases, that this constituted monopolistic control, was a restriction of trade and competition, and therefore, violated the Sherman Act. Both railroads were ordered to dissolve their holding companies.

Many of the subjects addressed above will be discussed in more detail in the subsequent sections.

2.2
Impact of Railroads on Agriculture

Introduction

In the late 1800s the first laws regulating the railroad industry were passed due, in part, to the lobbying efforts of the farmers key interest group, The National Grange of the Patrons of Husbandry (the Grange). The relationship between the railroad and agriculture at this time was one of mutual dependence and, at the same time, one of animosity and distrust on the part of agriculture. For without the railroads, the agricultural industry in the Midwest could not have achieved the vast expansion in output that occurred. For the railroads, the shipment of farm produce was a significant revenue generator, and in some cases the farmers purchased significant blocks of railroad stock to encourage railroad construction in their areas. Henry Poor, a railroad employee, stated in 1854 that:

> The pioneer, as he moves forward over the prairie of the west, carries with him the railway — as necessary to his life as are the axe and the plough. The railway keeps pace with the frontier line of settlement; so that the crop of this year of a

> frontier farm, in the great march of civilization, has only to be held to the next, to be sent whizzing to the Eastern market at a speed of thirty miles to the hour.[8]

Other products, such as coal, steel, and lumber, were greater revenue generators for the railroads, but for expansion in and across the Midwest, agriculture was a significant revenue source for the railroads.[9]

Agricultural Benefits

Literature on the relationship between the railroad and agricultural industries focuses primarily on the passage of the Granger Laws. These laws were the first to regulate the railroads. Alfred Chandler, on the other hand, examines the positive affects that the railroads and the farmers had on each other. His evidence demonstrates that the railroads, despite their sometimes unscrupulous business behavior, did much to promote agriculture. The agricultural revolution of the Midwest could not have taken place without the railroads since the railroads:

- gave farmers access to distant and foreign markets and allowed previously limited markets to expanded; and
- were able to hasten the settlement of the Midwest and gave to the farmers the opportunity to increase annual production.[10]

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8 Alfred D. Chandler, The Railroads, The Nation's First Big Business (New York: Harcourt, Brace & World, Inc., 1965), p.21-22.
9 ibid., p. 22-24
10 ibid., p. 25.

Chandler supports his conclusion by a comparison, for 1862, of the volume of goods transported on the railroads and the other major form of bulk transport, the canals. The railroads examined were the Baltimore & Ohio, the New York Central, the Erie, and the Pennsylvania; the canals were the Erie and the Champlain.[11] In 1862, over ten million tons of goods were shipped from the Midwest, and the railroads transported over six million tons of that.

Concerning this expansion in railroad transport, a U.S. Census Office report stated in 1863 that "the time is near when all that can be carried by water will be but a small proportion of the whole."[12] For the Midwest, this was particularly important in that there were few local markets available to the farmer. As expansion went further west of the Mississippi River there was increasingly inadequate water transport. If farmers wished to have their products reach distant markets in a reasonable amount of time, they had to deal with the railroads.

The railroads did give the farmers access to the Eastern and foreign markets where their goods were in high demand. Chandler states that:

> The older a country is, the more civic and the less rural it becomes; that is, the greater will be the demand for food and the less the production.... Hence, it is that New England and New York, continually filling up with manufacturers, artisans,

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[11] Chandler points out that the use of wagons to transport goods to market was no longer viable by this time due to the rapid spread of people throughout the Midwest, with the major markets remaining in the East.
[12] ibid., p. 26.

> and cities, must be supplied with increased quantities of food from the interior west...[13]

The markets available to the farmer locally were few, and thus by opening up large markets in the developed East, the farmers were able to increase production and enhance the probability for increased earnings. If transport costs fall, while the selling price remains the same, then farmers gain.

Rapid settlement of the west and the subsequent increased harvests were due to the availability of bulk shipment transport. It is logical to assume that farmers would not have increased production if most of the harvest could not have reached the market. The evidence presented by Chandler compares the growth of rail line and the harvest of five farm products, wheat, cattle, oats, corn, and potatoes between 1850 and 1860. During this ten year period the amount of rail line increased eight times, from over 1200 miles to over 9600. At the same time farm output of those five products almost doubled, from 255 million bushels in 1850 to over 400 million bushels in 1860.[14]

Another advantage brought by the railroads to the farmers was a reduction in the cost of transporting goods required by the farmers from the east coast. While the railroads enhanced the farmers' potential for increased earnings, the farmers were also probably paying less for goods at the local store then they would have had the goods been transported by wagon.

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[13] ibid., p. 27.
[14] ibid., p. 28.

Finally, farmers benefited from rapidly increasing land values as railroads made large scale farming possible. An examination of the value of farm land in five states during the ten year period, 1850 to 1860, shows a marked increase. The total value of farm land in Wisconsin, Ohio, Illinois, Michigan, and Indiana in 1850 was over $650 million. In 1860 the same land was valued at over $1.7 billion, an increase of a billion dollars in ten years.[15]

This evidence demonstrates that the farming industry and the railroads were interdependent. Without one another, the growth that each experienced during the late 1800s could not have happened. The vast growth of rail line throughout the Midwest promoted an agricultural revolution and vast increases in farm output. These increases in output were dependant on the farmers ability to get the harvest to market, which the railroads were able to accomplish. On the other hand, the railroads needed the revenues generated from the transport of these crops and the general support of the farmers to help pay construction costs. Farmers would frequently mortgage their farms to buy railroad stock in the hope of having a rail line built close by. For example, in Wisconsin alone, over 1000 farmers purchased $1.5 million of railroad stock with money gained from the mortgage of their farms.[16]

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[15] ibid., p 30.

[16] Stover, American Railroads, p. 121

Initially the farmers were enamored with the railroads, however this quickly transformed into discontent, based on real and illusionary railroad abuses. This discontent grew into a desire to bring the railroads under control so that such abuses could not continue. Thus, in the early 1870s, the Granger Laws began to be passed in the states of the Midwest.

The Granger Laws

The farmers of the late 1800s did not readily perceive the advantages of the railroads that Chandler pointed out. Most of the farmers' problems were blamed on the railroads. They were angry at the lack of competition and high rates at some rail terminals. They were upset when the railroads charged them more for hauling goods a short distance than for a longer distance. The farmers were particularly angry at becoming non-self-sufficient as they became more and more dependent on the railroads and the facilities at rail terminals.

The use of the facilities at the local rail terminal was a cost that the farmer was not accustomed to, and generally felt, that what was charged was often too high. Such treatment increased the disillusionment of the farmers as they generally believed that the railroad companies and the associated railroad facilities (i.e. grain elevators and and other storage facilities) were 'clothed with the public interest' (see quote referenced by footnote 24).

This pent up anger of the farmers was focused through the local Grange offices resulting in the eventual passage of railroad regulatory laws. Established in 1867 by a farmer from Minnesota, the Grange was designed to be an organization that promoted agricultural technics through education. However, as the Grange's membership grew, the groups' vision became more political. The anger that most farmers felt toward their lot in life was shown by a poster that was placed in each Grange hall. This poster, which depicted eight men stated:

> ... "I pray for all", said the parson; "I trade for all", said the merchant; "I plead for all" said the lawyer; "I legislate for all", said the statesman; "I prescribe for all", said the physician; "I fight for all", said the soldier; "I carry for all", said the railroad owner; and in the center stood the farmer, who said, "And I pay for all."[17]

By the 1870s the farmers no longer desired to pay for all, so through the lobbying efforts of the Grange, laws were passed in various states to regulate the railroads.

This standard view of why the Granger Laws were passed has been questioned by some economic historians. Douglass North has argued that the farm protest movement, which culminated in the passage of the Granger Laws, was based on the farmers declining place in American life and culture.[18] In contrast, Anne Mayhew has argued that the Granger movement was:

> ... a response to commercialization. The argument is that farmers were objecting to the increased importance of prices; that they were protesting a system in which they had to pay for transport ... rather than the specific prices of transport ... the protest was a reaction to new, technologically superior inputs which replaced traditional inputs and which could be acquired only with money, and a reaction to

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[17] ibid., p. 127

[18] Douglass North, Growth and Welfare in the American Past (Englewood Cliffs: Prentice-Hall, Inc., 1966), p. 145.

> the new need for cash to buy consumer goods which could not be supplied on-the-farm in the Plains area.[19]

Traditionally, farmers were largely self sufficient. Prior to the rapid expansion in the Midwest, almost all that had been needed on the farm was supplied by the farmers themselves. In addition, the farmers were constrained to selling only in local markets. Thus, farms were generally small and labor was very often supplied by the farmer's family. Any equipment that was needed was typically built by the farmer himself. However, with the rapid expansion of the mid to late 1800s, the farmers found themselves in transition. This transition gave the farmer the ability to sell a marketable surplus, to expand the scope of his operations, but concurrently "found it increasingly difficult to be self-sufficient."[20]

Mayhew continues her argument by stating that farmers found themselves in the unfamiliar territory of business operation. For a farmer to be successful he had to compete for markets with the other farmers near him. "There was a new test by which the farmer had to judge himself — the test of business success."[21] The farmer found himself with a new burden, bills. For the first time, farmers had to pay money for the things they needed, and bill collectors are notorious for not listening to tales of failed crops from lack of rain, the harvest could not be brought

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[19] Anne Mayhew, "A Reappraisal of the Causes of Farm Protest in the United States, 1870-1900" The Journal of Economic History, XXXII, No. 2 (1972), p. 469.
[20] ibid., p. 473.
[21] ibid., p. 473.

in because the horse died, or that it was just a bad year.[22] Mayhew points out that anyone faced with such a situation will determine that he is being taken advantage of. It was this feeling of inadequacy that caused the farmers' anger to grow and to focus on one of the most obvious culprits, the railroads.

The majority of the Granger Laws were aimed at regulating railroad rates. The first Granger Law was passed in 1871 in Illinois. This law established rate maximas on passengers and freight, and also outlawed short haul/long haul discrimination. By the mid 1870s most of the Midwest states had passed similar laws. To administer these laws, state governments established commissions. The jobs of these commissions included overseeing railroad compliance with the regulations and investigating any reported railroad abuses. In some states the commissions were given the power to set rates for the railroads.

When faced with these new laws the railroads were outraged and immediately began to fight them in and out of court. Cases were filed on various grounds against the state's right to regulate the railroads. Despite the filing of these cases the railroads continued to ignore the new laws. In many cases the railroads continued to break the Granger Laws, even after having been convicted in court.[23]

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[22] ibid., p. 474.
[23] Steward H. Holbrook, The Story of American Railroads (New York: Crown Publishers, 1947), p. 240.

The railroads' most fundamental argument against regulation was that it was unconstitutional according to the Fourteenth Amendment. This Amendment states that a person cannot be deprived of property without due process of law. The issue was examined in the first of the court cases against the Granger Laws, Munn vs. Illinois. Munn, a grain elevator owner, contested the state's right to regulate the rates on storing grain. The Supreme Court found for the State of Illinois due to that:

> ...the business in question was clothed with a public interest and was, therefore, subject to control by the public for the common good, although the Court was not clear on just how it was determined that a business was clothed with a public interest. The Court did point out that the elevation and storage of grain in Chicago was an essential part of the movement of grain from producing areas to its ultimate destination. It also noted that the Chicago elevators were controlled by a few firms which got together each year to fix rates to be charged for their services. Although the Court did not say so, it [was] obvious that here was a situation involving monopolistic control of a business affected with a great public interest.[24]

Another strong argument against the Granger Laws was that states should not be allowed to regulate interstate commerce. This was particularly applicable to the railroads in Iowa and Wisconsin, where the state legislators had set the maximum rate levels extremely low. On this issue the Supreme Court ruled that until such time as Congress passed federal law regulating interstate commerce, the States had the right to pass local laws regulating that part of interstate commerce that occurred within the borders of that State.[25]

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[24] Russell E. Westmeyer, Economics of Transportation (New York: Prentice-Hall, Inc., 1952), p.105-106.
[25] ibid., p. 107.

The last attempt of the railroads to repeal the Granger Laws was made by questioning the legality of having an appointed commission to oversee the regulations. Railroad officials were unhappy with the concept of a regulatory commission, especially since many of the commissions established by the Granger Laws had the power to set rates. The main argument put forward by the railroads was that such legislative power, the power to set rates, should only be granted to those officials that had been elected. The Supreme Court disallowed such arguments since such regulatory and legislative commissions had been used by various state governments before the Granger Laws were passed. Many states had found that, by establishing a commission of appointed officials to oversee a particular program, the legislature's time in trying to administer the regulations could be reduced. In essence the state governments had authorized the commissions to administer the laws, but not to pass new ones. On this ground, the Supreme Court determined that the state governments had not violated their constitutions by establishing the commissions.

Conclusion

The key element from this discussion is not the circumstances surrounding the passage of the Granger Laws, but the fact that the first step in the evolving regulation of the railroads had been taken, albeit at the state and not the federal level. Despite the many beneficial effects the railroads had on the agricultural industry, the farmers perceived that the railroads needed to be regulated. What the farmers perceived to be a practice of setting rates as high as the market would bear was a continual thorn in the farmers side. This and the other abuses perpetuated by the railroads, real or perceived, demonstrated the necessity of the regulations.

The Granger laws would remain in effect until federal regulation was passed. After a number of Congressional Committee investigations, the need for such federal regulation became clear. Justice Hughes of the Supreme Court wrote:

> If the situation has become such, by reason of the interblending of the interstate and the intra-state operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intra-state rates which substantially affect the former, it is for Congress to determine within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply.[26]

The first federal regulation that was passed to supplant the Granger Laws was the 1887 Act to Regulate Commerce. The act, titled the Interstate Commerce Act, and the its many amendments will be discussed in detail in the next section.

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[26] Frank H. Dixon, Railroads and Government, Their Relations in the United States 1910-1921 (New York: The Scribner Press, 1922), p. 259-260.

2.3
Impact of Legislation and Regulation

Introduction

The Constitution of the United States of America, Article I, Section VIII, subsections 3 and 18 read:

> The Congress shall have power ...
>
> 3 To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
>
> 18 To make all laws which shall be necessary and proper for the carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department of officer thereof.

Until the time of the American industrial revolution, Congress had little involvement or interest in regulating interstate commerce. However, with the rise of big industrial businesses, the introduction of cheap transport between states, and the subsequent unscrupulous behavior of the owners of businesses — including the railroads — the Federal government was pressed to impose such regulation.

As described in the previous section, the first laws regulating the railroads were passed in the the states of the Midwest. The move toward federal regulation came when railroad lawyers were successfully able to switch court cases from the local to the federal court system. The reasoning behind these changes of jurisdiction was that as railroads operated in more than one state, these operations could not be regulated by a single state. Despite this argument, many court decisions of the 1870s — Munn vs. Illinois, Peik vs. Chicago & Northwestern R.R., and C. B. & Q. vs. Iowa — stated that, since there was no federal regulation of interstate commerce, these local laws applied.[27]

However, the growing consolidation within the railroad industry in the 1880s caused the lack of federal regulation to come under examination by Congress. In addition, the Supreme Court found in 1886 in the Wabash, St. Louis and Pacific Railway vs. Illinois case that the local regulation was unconstitutional.[28] That opinion was based on Section One of the Fourteenth Amendment to the Constitution of the United States which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without the due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.[29]

The Supreme Court felt that the state regulatory laws of the 1870s were depriving individuals of property without the due process of law. Of those previous state laws, the Supreme Court opinion was that: "When property is used in a manner to make it of public

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[27] Stover, American Railroads, p. 130.

[28] ibid., p. 131.

[29] "Constitution of the United States." New Illustrated Columbia Encyclopedia (New York: Columbia University Press, 1978), p. 1624, emphasis added, amendment adopted in 1868.

consequence, and affect the community at large ... it is clothed with a public interest and is subject to regulation by the Congress."[30]

The Evolution of the Interstate Commerce Commission

In response to the problems just noted, Congress passed the Interstate Commerce Act (ICA) in 1887, after numerous bills had been submitted to Congress for consideration. The ICA was followed by numerous amending acts.

The Interstate Commerce Act

In its original form, it would seem that the ICA was a powerful piece of legislation. However, the ICA was subsequently found to be weakly written, difficult to enforce, and did not contain strong penalties. It was therefore necessary to pass a number of amendments to strengthen the Act. The ICA was to be applied to all railroads and all other forms of transportation owned or controlled by a railroad. Generally, the "other forms of transportation" requirement was referring to different forms of water transport. The Act established that:

- unjust or unreasonable charge for the transport of freight or passengers was unlawful;
- the use of special rates or rebates to discriminate payment was unlawful;

[30] Frey, Railroads in the Nineteenth Century, p. 200.

- giving any special privileges to the advantage of anyone or any type of cargo was unlawful;
- the charging of a higher rate for a short haul, when such a haul was a part of a long haul going over the same track and in the same direction was unlawful;
- entering into agreements between competing railroads for the pooling of freight was unlawful;
- every railroad must publish and have available to the public a list of all destinations and their respective rates, that such rates could only be increased after ten days public notification, that rates could be decreased at any time, but that with any rate change new schedules must be printed;
- unnecessary breaking of bulk so as to increase rates was unlawful;
- a railroad was liable for committing any unlawful act stipulated within the Interstate Commerce Act;
- a commission of five members was established to oversee the management and enforcement of the Interstate Commerce Act;
- none of the members of the Commission was to have any interest, either personal or financial, in the rail industry;
- the enforcement of the Act, after the commission had established that a railroad has broken some portion of it, will come from the circuit court to which district the

offending railroad belonged, and which railroad must abide by the ruling of the circuit court; and

- the commission was authorized to demand an annual report, of such form as established by the commission, to be submitted by each railroad.[31]

In the above, "breaking of bulk" means the break up of large shipments into smaller ones. This implies that the railroads were able to generate more revenue as the number of shipments increased while the actual amount of freight to be shipped remained the same.

While it would seem that this was a powerful act of regulation, the ICA was based on two weak principles. The first of these was that the five member commission must have no financial interest in the rail industry. Section 11 of the ICA states:

> No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office.[32]

By establishing a regulatory body in such a manner, Congress hoped to remove any possible conflicts of interest that the Commission might have. Given this standard, many of the people allowed on such a commission would often be ignorant of how railroads were operated, managed, and could be kept operating at a reasonable rate of profit. For the first Commission, two of its

[31] The Second Annual Report of the Interstate Commerce Commission (Washington D.C.: Government Printing Office, 1888), p. 73-79.

[32] Second Annual Report of the Interstate Commerce Commission, Government Printing Office, Washington, 1988.

five members, Thomas Cooley and Aldace Walker, had previous experience with the railroads and its operation.[33]

It is generally believed that the regulatory nature of the Commission would keep it at odds with the railroads. Gabriel Kolko points out that this was not the case. For the first years of it operation, the ICC and the railroads were highly cooperative with one another. This cooperation was particularly fostered by Cooley, the first chairman of the Commission, who was sympathetic to the railroads. Kolko wrote that:

> ... for years the Commission had tried to work with the railroads informally, and it extended its sympathy to them when the [Supreme] Court left them helpless. The railroads, for their part, tried to enforce the law by voluntary measures, and advocated an extension of the Commission's power.... Cooperation and sympathy rather than hostility and conflict [were] the dominant themes in the relationship between the Commission and the railroads.[34]

The second weak principal of the ICA was the method of enforcement. Whether submitted by an irate businessman or an upset traveler, once an alleged violation was investigated and the facts documented, the case was then turned over to the district circuit court having jurisdiction. If the court found in favor of the complainant — which was not often — then the railroad was only liable for the amount that was in dispute. However, if the value of the dispute was greater than two thousand dollars, then either

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33 Gabriel Kolko, Railroads and Regulation 1877-1916 (Princeton: Princeton University Press, 1965), p. 47-49.
34 ibid., p. 84.

party could appeal the case to the Supreme Court.[35] Of this process it was written in 1922 that:

> Besides the inadequacy of the statute which the judicial decisions exposed, the Commission had to reckon with the jealousy and the ill-concealed suspicion of the judiciary itself. This novel administrative body was to assume functions that had theretofore been from time immemorial the exclusive possession of the courts. It was natural that the activities of the upstart should be resented.[36]

Even though it was believed in the late 1800s that the ICC would not last, over the next decades it was modified and evolved into a powerful regulatory body that eventually oversaw every aspect of railroad operation.

The Elkins Act

The first modification to the ICA was the Elkins Act of 1903. While the ICA made the use of rebating and the establishment of special rates illegal, the practice continued. Even more important, the original act allowed railroads to increase their rates only after giving public notice and publishing new schedules. Consequently, the years after the ICA was passed were marked by continuous fluctuations in rates for both passengers and freight. The Elkins Act solved this problem by making the published rate the legal rate. It stipulated that charging a rate that was less, or more, than that which was published on the railroad's schedule was a criminal misdemeanor, and increased the fine to $20,000 per violation.[37] The Elkins Act also strengthened the penalties against

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[35] The Second Annual Report of the Interstate Commerce Commission, p. 78.
[36] Dixon, Railroads and Government, p. 2.
[37] Sharfman, The Interstate Commerce Commission, p. 36.

special rate making, such as rebating and drawbacks. Not surprisingly, railroad companies in general supported this act, as it was believed that such regulation would curtail the use of rebates, secret rate agreements, and rate wars.

A major obstacle to the regulation of rates was the method used by the railroads to set their rates. It would seem reasonable that the railroads should set their rates following a cost formula, based on such things as distance, weight, and type of cargo. Actually however, the railroads were setting rates based in some part (how much is disputed) on how valuable the shipping agent thought the shipment was to the shipper. For example, if a rancher urgently needed to ship cattle to Chicago, the railroad shipping agent would charge the highest rate he felt the rancher would pay, whether the shipment was going to be 50 miles or 400 miles. Ratemaking practices were also complicated by the railroad's need to meet fixed costs, regardless of the number of cars operated each day. Therefore, if there was little traffic, the railroad would lower the rates in order to fill the empty cars. This method of operation also led to giving rebates to customers who provided large quantities of goods to be shipped over long periods of time.

Another problem, the short haul/long haul problem, resulted from a practice where the railroads charged a high price for cargo shipped over a short distance when the shipment was part of a longer haul. The railroads argued that the higher cost was necessary to cover the special needs of such a shipment, and the subsequent break in bulk. This practice continued even after being declared illegal in the ICA since the wording of the Act was not very specific. The passage of the Hepburn Amendments in 1906 and the Mann-Elkins Act of 1910 were directed toward rectifying these problems.

The Hepburn Amendments

The key factor of the Hepburn Amendments was the ability given to the Commission to set maximum rates. They also increased the length of time necessary to implement any rate change from ten days to thirty. In the past the Commission had only been granted the power to review past rates, upon the receipt of a complaint, and if the rate in question was found to be discriminatory then the Commission could order the rail company to pay damages. However, with the passage of these amendments, this was no longer the case. The responsibility of giving:

> rate-making power to the Commission involved a far-reaching delegation of legislative authority, but it was recognized as indispensable to the effective maintenance of equitable relationships between the carriers and the public.... The rate-making functions of the Commission assumed a positive character. They were designed to protect the public interest, through the maintenance of proper relationships between carriers and shippers, rather than merely to afford redress for private injury.[38]

The Hepburn Amendments broadened the industries regulated by the ICA to include pipe lines and expressly stated that the Commission regulated all types of rail cars and areas of

38 ibid., p. 46.

rail line, including terminals, switches, track, roadbed, spurs, depots, and all surrounding grounds owned by the rail companies. Furthermore, it increased the number of members on the Commission to seven individuals, increased their length of term to seven years, and increased their salary. The Amendments also required that along with rates, the railroads publish all charges for services available at the terminals.[39]

The Mann-Elkins Act

The Mann-Elkins Act introduced improvements in the ratemaking powers of the Commission. More importantly, it established the Commerce Court. This court was designed for:

> ... improving the procedure for the enforcement of the Commission's orders - by facilitating speedier settlement of contested issues, by rendering the expert findings of the Commission subject to review by an equally expert judicial body. To the Commerce Court ... was transferred the exclusive jurisdiction of the circuit courts and their judges over practically all suits instituted under the Act to Regulate Commerce (the Interstate Commerce Act) or the Elkins Act to enjoin or to enforce the orders of the Interstate Commerce Commission.[40]

Even though the establishment of a judicial body whose sole purpose was to deal with transportation cases was considered a bold idea, and supported by Congress and the President, it only functioned for roughly three years. The downfall of the Commerce Court was caused by a problem not anticipated by its founders. It considered itself superior to the Commission and began to take over the Commission's functions. Another complaint

[39] ibid., p. 42.
[40] ibid., p. 63-64.

was that not only was the Court establishing new policy, but it was overturning old Commission decisions. In the majority of cases brought before it, the Court found in favor of the railroads. Thus the Court was dissolved by an act of Congress in 1913. Many of the judgments of the Court, however, had an impact on the Commission, for as the Commerce Court was being dismantled, Congress passed one of its most far reaching pieces of rail legislation, the Valuation Act of 1913.

The Valuation Act

This act established The Board of Valuation. The sole purpose of the Board was to determine the value of each railroad. Congress, at the recommendation of the Commission, found it necessary for the value, or net worth, of the railroads to be determined so the government could levy taxes fairly and, in the ICA's ratemaking powers, could establish rates such that each railroad would be covering its costs. The foundation of this act can also be found in the same portion of the Constitution as the ICA. The Commission stated that:

> ... no tribunal upon which the duty may be imposed, whether legislative, administrative, or judicial, can pass a satisfactory judgement upon the reasonableness of railway rates without taking into account the value of the railway property. This is so not only because of the nature of the question involved, but especially for the reason that the courts have held in numerous cases that an enforced rate so low as to deprive the carrier of its property, that is, broadly speaking, the right to a reasonable return therefrom, is repugnant to the Constitution.[41]

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[41] ibid., p. 122.

While this act was necessary for the just application of the Commission's judgements, the process of valuating each railroad was long and expensive. Even by 1930, not every railroad had been valuated, and the expenditures of the Commission had jumped from over a $1,000,000 in 1913 to over $6,000,000 in 1927.

The Transportation Act of 1920

During the First World War, the federal government took control of the railroads to better manage the transportation of widely dispersed war industries and military supplies. In considering the return of control of the railroads to their respective companies, Congress felt that it was an opportune time to strengthen old and pass new regulatory legislation. With the passage of the Transportation Act of 1920, the railroads returned to private control, were guaranteed a fair rate of return, and the Commission was given the power to establish minimum rates. It already had the power to establish maximum rates (see the discussion of the Hepburn Amendments).

The fair rate of return was established to be five-and-a-half percent of the railroad's value, which had been previously established by the Commission's Board of Valuation. One half of any income above this rate of return was to be paid into an account maintained by the railroad, and when the amount reached a certain level, it could then be used by the railroad for improvements and purchases of new equipment. This account was also to act as an emergency fund for the payment of stock dividends and interest on bonds when the railroad had earned less than its stipulated rate of return. The other half of the income above the rate of return was to be paid to the Commission for other purposes it designated, such as extending low interest loans to railroads for expansion. It is noteworthy that this specified rate of return was applicable only to railroad operations and the rates they charged for shipments, but not to other revenue generating activities, such as storage of goods at rail terminals.

Although the Act established a basis for a fair rate of return, another provision that was discussed, but did not make its way into the Act of 1920, was intended to establish minimum rates of return. This could have been disastrous as it:

> ... would have meant that independent of rates charged or traffic handled, independent of the showing of the income account, the corporation would have been assured of a definite return to be made up, if there were a deficit, from contributions by the government. No proposal could have been better calculated to destroy all incentive to efficiency and economy in operation.[42]

Even though this last portion was not included in the Act, the regulatory power of the Commission did eventually reach the point that it could force the continued operation of railroads that were losing money and which otherwise would have shut down.

The last important provision included in the Act of 1920 was the plan to consolidate all the railroads into large regional systems. This also included controls on issuing stocks and bonds

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42 Dixon, Railroads and Government, p. 229.

by the railroads to prevent overcapitalization. Any issuance of such securities needed to be approved by the Commission. This plan was never initiated, as most of the changes implemented in this legislation were nullified when it was repealed in 1933.

The Emergency Railroad Transportation Act

This act was passed in 1933 as a response to falling railroad revenues during the Great Depression. One of the short lived provisions of this act was the organization of the Federal Coordinator of Transportation . The job of the Coordinator was to oversee the economic recovery of the railroads. To accomplish this task, the railroad system was broken down into geographic committees with representatives from the owners and labor. After three years and little progress, the jobs of the Coordinator and the geographic committees were dissolved.

The more important provision of the act was the removal of the ratemaking rules of the Transportation Act of 1920 and the establishment of new rules. The system of setting a limit on rates of return, and the subsequent turnover of excess rates to the Commission, had not been well received by the railroads. The system created problems as the rules did not take into account general economic conditions. This was particularly evident during the Great Depression as railroads ran into serious problems. The railroad industry suffered particularly hard as there existed the need to pay the large fixed costs in conjunction with shrinking revenues. The Commission stated:

> Railroad earnings reflect general economic conditions very closely, and to the extent that such conditions fluctuate railroad earnings will fluctuate, and it is impracticable to avoid these fluctuations by moving railroad charges up and down. To attempt this would mean higher rates in times of depression and lower rates in time of prosperity. Perhaps it was assumed ... that we had reached an era of when economic conditions would remain stable; but if so, no such thought is any longer entertained. Another important factor which was then unanticipated or disregarded was the competition of other transportation agencies which has developed so rapidly in recent years to the detriment of railroad earnings.[43]

One of the most important provisions of the new ratemaking rules was that all excess earnings that had been turned over to the government be returned. The caps on maximum rates of return were also removed. The new rules of ratemaking were simple when compared to those of the 1920 Transportation Act. These rules stated that the purpose of the Commission was to set rates that would allow railroads to receive revenues sufficient to provide the necessary service for the transport of freight and passengers.[44]

The last major provision of the Emergency Transportation Act was the removal of the consolidation plan enacted in 1920. In its place the act stipulated that all consolidations, including those involving holding companies, must receive Commission approval before they could be consummated. The controls put in place in

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[43] Westmeyer, Economics of Transportation, p. 152.

[44] ibid., p. 152-153; The new rules stated that: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers under honest, economical, and efficient management, to provide such service."

1920 on the issuance of securities remained. This allowed the Commission to continue control over the amount of railroad capitalization.

The Transportation Act of 1940

The Transportation Act of 1940 is significant in that it set forth a national transportation policy. The Commission — under the auspices of the Motor Carrier Act of 1935 — was now responsible for the regulation of the railroad, trucking, and certain sectors of the water carrier industries. The national policy of the Government was stated as being "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation."[45] To this end there was to be no regulatory discrimination towards certain carriers by the Commission.

In particular, the Act stated that railroads could not discriminate in their ratemaking toward any individual, company,

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[45] ibid., p. 159; The full policy states: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and duly authorize officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

type of good, or geographic region. It was such geographic rate discrimination that ultimately led to the passage of the Reed-Bulwinkle Act in 1948. This act is analyzed in detail in section 3.0. In connection with the Commission's rules of ratemaking, the act stipulates that it could not set rates for one type of carrier so as to protect the business of another carrier. This provision is particularly crucial when carriers are in competition for a certain type of traffic. An example of this would be the Commission setting the rates of motor carrier hauling of steel higher than that of the railroads so as to protect, and provide, the railroads with business.

The last major provision of this Act was abolishing rate reductions on government traffic on those railroads that had received land grants except traffic which was necessary for the national defense and for those persons on official federal travel. These reductions had been put in place as a method of repayment by the railroads for the receipt of government land grants during their construction. However, this provision meant little to the railroads because the amount of traffic covered under the exceptions was enormous as the U.S. was gearing up to fight the Second World War.

The Transportation Act of 1958

The last legislative action considered here which was taken to improve the ICA was the Transportation Act of 1958. The Act empowered the Commission to approve rail abandonments and discontinuances, continuing the on-going process of the Commission's acquisition of regulatory control over all areas of rail operation. With this act, combined with the previous ones, the Commission now dictated to the railroads in all areas except their relations with labor.

There were instances when the Commission denied a railroad its request to discontinue service into an area that had other railroads servicing it, while allowing the only railroad into a particular area to stop service.[46] Thus, it appears that the approval of rail abandonments was, at least in some cases, put into effect in a haphazard fashion; and the Commission was attempting to continue some level of competition in areas serviced by many railroads, to the detriment to those rural areas with access to only one railroad.

Eventually this inconsistent application of the regulations prompted the federal government to establish the Department of Transportation in 1966. This was followed by the deregulation of the rail industry in the 1980s. While the Commission still operates today, many of its powers have been reduced and much of its authority removed.

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[46] George H. Drury, The Historical Guide to North American Railroads (Milwaukee: Kalmback K Books, 1985), p. 165.

Antitrust; The Sherman and Clayton Antitrust Acts

Most of the growing industries of the late 1800s attempted, some successfully, to exercise monopolistic powers to control competition in their particular areas. Prior to 1890, the tradition of free entry to markets in the United States was strong. However, this traditional business behavior was threatened by the industrial innovations introduced during the Industrial Revolution. While a single business may have been able to control trade and price in a small area, there were natural restrictions in place that prevented the acquisition of monopolistic powers, such as the lack of rapid transport from city to city and the inability to mass produce goods. The steam engine and the Industrial Revolution changed this. Not only were the number and size of industries growing, but there were breakthroughs in agriculture as well. By the latter half of the 1800s, a single farmer could plant and care for larger tracts of land than had been possible just a few decades previously. However, with this increase in agricultural and industrial production came the need to move the goods to market and the consequent dependence on the railroads.

In economic theory, monopolies are described as the sole producers, with control over pricing. The social costs involved include the tendency of monopolies to set their price high, thus ensuring excess profits while concurrently restricting outputs. While railroads could not be characterized as the sole provider of transportation within the U.S., they were the single-most significant mover of large quantities of goods. As previously described, railroads in many areas of the U.S. were aptly considered a natural monopoly. In addition, the social costs associated with monopolies can be witnessed in many of their business practices. Thus it is no wonder that farmers were the first and the loudest to protest the rate making practices of the railroads.

As the public outcry increased against the perceived abuses of large industry, the federal government passed its first antitrust legislation, the Sherman Antitrust Act of 1890. Like the Interstate Commerce Act, the Sherman Act was also based on the Fourteenth Amendment to the Constitution. In describing antitrust legislation, Marc Eisner has stated:

> *The legislative debates and subsequent court decisions explicitly associated antitrust with a complex of economic, political, and social goals.* By maintaining open markets and a deconcentration of economic power, antitrust could promote individual economic opportunities that might otherwise be foreclosed, preserve small business and local ownership, and protect individual property rights. As an expression of these goals, antitrust was often referred to as a constitution for the American economy, implying a system of legal restraints placed on the exercise of power.[47]

The Sherman Antitrust Act was followed by the Clayton Act.

The Sherman Antitrust Act

While the agricultural interests were the most vocal in pushing for some form of antitrust legislation, it was not their

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[47] Marc A. Eisner, Antitrust, and the Triumph of Economics (North Carolina: The University of North Carolina Press, 1991), p. 2 (emphasis added).

voices alone that pushed congress into the passage of the Sherman Act. If one looks at those who could possibly be affected by the passage of such an act, then those with the most to gain — and the one group with a high level of access to legislators — was the growing number of small businessmen. Small businessmen, when comparing themselves to such business empires as Standard Oil and U. S. Steel, were threatened by the power wielded by such companies, and envisioned themselves being destroyed by "big business".[48]

The intent of the Sherman Act is stated in its first two sections. They read as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a felony, and, on conviction thereof shall be punished by fine ... or by imprisonment ... or by both said punishments, in the discretion of the court.
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> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire to combine with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof shall be punished by fine ... or by imprisonment ... or by both said punishments, in the discretion of the court.[49]

Implicit to this act is the idea that many of the ratemaking policies of the railroads could be classified as possible restraints to

[48] Thomas E. Sullivan, The Political Economy of the Sherman Act, The First One Hundred Years (New York: Oxford University Press, 1991), p. 35.

[49] Roger D. Blair and David L. Kaserman, Antitrust Economics (Illinois: Richard D. Irwin Inc., 1985), p.52-53.

trade, and that in many areas of the U.S., particular railroads enjoyed monopolies in transportation.

The meaning of the Sherman Act and a specific definition of what is illegal are two different matters, and can be compared to the difference between the spirit and the letter of the law. Because of the vague wording of the Act, its translation and implementation was left to the federal courts. This has been described by Robert Bork as:

> Despite the obvious importance of the question to a statute as vaguely phrased as the Sherman Act, the federal courts in all the years since 1890 have never arrived at a definitive statement of the values or policies which control the law's application and evolution. The question of values, therefore, remains central to controversy about this basic law and its interpretation. Courts do not and should not, for example, attempt to administer any policy a legislature may seek to thrust upon them. Nevertheless, a starting point is the question of legislative intent.... Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth and or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.[50]

Given this weakness, it is understandable that the enforcement of the Act was not effective in its early years. In fact, a number of cases were put before the Supreme Court for review under the Sherman Act and found not to have violated it.[51] It was not until the Northern Securities Case of 1904,

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50 Thomas, The Political Economy of the Sherman Act, p. 39.

51 One of the precedent setting cases was the Knight Case of 1895. This case involved the exchange of stock for the formation of a holding company. The Supreme Court had stated that this exchange was not an act to restrict commerce, and therefore did not involve the Sherman Act.

politically promoted by President Roosevelt, that the public saw the Sherman Act as a strong and enforceable safeguard against businesses practicing monopolistic powers.[52]

However, the problem of interpretation was not recognized by Senator Sherman, the originator of the Sherman Act. He stated what he considered illegal, and the purpose of the act as:

> ... two classes of arrangements contracts, agreements, trusts, or combinations: (1) those made with a view, or which tend, to prevent full and free competition, and (2) those designed, or which tend, to advance the cost to consumer of articles of commerce ... that this bill sought only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.[53]

Even so, the problem of the broad language of the Sherman Act remained. In the justice system's attempts to enforce the Sherman Act, the courts necessarily had to define what types of actions violated it, and in this manner had thus narrowed the focus of the Sherman Act to such a point that it could only be applied to the most flagrant instances of price control, and market restriction. Due to these weaknesses, Congress felt that what was needed was an extension of the Sherman Act specifically stating what sort of business practices were considered illegal. This was finally passed in the form of the Clayton Act, in 1914.

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52 The Northern Securities Company was a stock holding company formed by James Hill and J. P. Morgan to facilitate the control of the Great Northern and Northern Pacific Railroads. Roosevelt, who strongly pushed for the case against the Northern Securities Company, later wrote:

> It was necessary to reverse the Knight case in the interest of the people against monopoly and privilege just as it had been necessary to reverse the Dred Scott case in the interest of the people against slavery and privilege (Winkler, Morgan the Magnificent, p. 221).

53 ibid., p. 47-48.

The Clayton Act

Where the Sherman Act was vague in the area of particular violations, the Clayton Act was specific. At the time of its passage, it was felt that this act strengthened the weaknesses of the Sherman Act by being more specific, while concurrently providing a feeling of justice by having the responsibility reside with the courts when it came to determining violations of the two Acts. The items declared illegal were the use of:

- intercorporate stock holding of two companies within the same industry, which includes the use of holding companies for the use of combining stock of two companies;
- predatory and discriminatory pricing policies for the same type of goods, including the use of rebated and cutthroat competition;
- combined directorates of two companies within the same industry; and
- contracts for the sale of goods that were exclusive between particular sellers.[54]

A number of these violations were of particular concern in regards to the railroads. The first is the illegality of one railroad holding the stock of another. Given the early history of the rail industry, it is easy to understand why this was specified. Many of the major railroads, including those owned by Hill and Harriman,

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[54] Eisner, Antitrust, and the Triumph of Economics, p. 22-23.

were able to gain control of competitors through the purchase of large blocks of the other railroad's stock. It was feared that this "hidden" method of removing competition would continue. However, this issue had been definitively solved under the Sherman Act with the successful case against the Northern Securities holding company. The Clayton Act specified that:

> The purchase of stock solely for investment (and not used "to bring about, or in attempting to bring about, the substantial lessening of competition"), and stock ownership resulting in the formation of subsidiaries for the actual conduct of "immediate lawful business, or the natural and legitimate branches or extensions thereof" were expressly excepted...[55]

The Clayton Act further stipulated that for railroads, it was legal to gain control of other railroads through the purchase of their stock as long as (1) it was for the purpose of either controlling branch lines of the previously owned mainline or acquisitions of mainline into new areas, and (2) there had been no previous competition between the two railroads.

The most important feature of this Act was the requirement that, by 1916, no railroad could have financial dealings with companies where any of the railroad officials had some manner of interest in the supplying company. Such financial dealings included the supply of construction and maintenance materials, or any other business that might supply some type of good or service to the railroad. The only way in which such companies could deal with each other was through a process of open and competitive bidding, with the winner and the contents of the contract then

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[55] Sharfman, The Interstate Commerce Commission, p. 112.

being published and reported to the Interstate Commerce Commission.

This requirement was intended to prevent the use of inside information in the obtaining of contracts. For example, Mr. Smith owns the Wabash Railway and also a forty percent interest in the Kennacot Company, a local steel foundry. Mr. Smith would be unable to receive steel rails for the maintenance of his railroad from Kennacot unless it were to participate in the bidding process and entered the most competitive bid. Mr. Smith would be prevented from telling the president of Kennacot what the amount of the winning bid should be, as all portions of the bidding process and subsequent contractual dealings would be reported to the ICC.

Conclusion

While the railroad industry was the first to be federally regulated, and for a time grew to be one of the most regulated industries in the nation, evidence supported the belief that there was a need for such heavy regulation. President Truman stated, that the cost of transportation affects the costs of a majority of goods, and thus, the competitiveness of other businesses.[56] Some form of legislation seemed to be necessary to protect the public interest. Unfortunately, neither the Interstate Commerce Act nor the Sherman Act were able to fulfill this need in their original forms. These acts only became effective after many years of trial,

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[56] John G, Shott, The Railroad Monopoly (Washington D.C.: The Dunne Press, 1950), p. 1.

error and weak enforcement. It took many amendments and changes to finally get these acts to the point of effectively regulating the rail industry, while at the same time attempting to improve the economic condition of the industry.

Experience had shown that the economic success or failure of a railroad hinged upon its ability to set rates according to current economic conditions. A number of the amendments to the ICA were passed to adjust ratemaking regulations to meet such economic fluctuations. However, with the increase in competition from other types of carriers and the steady decline in rail traffic volume during the 1930s and 1940s, the railroad industry continued to be in financial trouble. In addition, the declaration of the national transportation policy in 1940 did not dissuade the fears of railroad executives concerning their economic viability. To have stronger control over their ratemaking powers was seen as the only answer to the problem of disastrous internal rate wars and the seeming inability to match motor carrier competition; railroad companies might not have been able to raise rates indiscriminately, but they could lower them.

The advent of rate bureaus and the cooperation that these bureaus engendered was envisioned to be the railroad industry's answer. It is these bureaus and their ratemaking practices that will be examined in the next section.

2.4 Impact of Rates and Rate Bureaus

Introduction

The most important power that a railroad company holds, and has always held, was that of ratemaking. Many of the federal regulations, discussed in the previous section, had clauses that focused on this power. The purpose of these ratemaking regulations was not to define specific rates for the railroads, but to establish guidelines for the railroads to follow. The majority of the regulations specified maximum rates, time required for rate changes and, in some cases, minimum rates. Rate determination for the transport of freight and passengers was left up to the individual railroad.

These regulations were imposed to promote competition within the railroad industry and to provide an equitable basis for ratemaking. Of this competitive process it was said that:

> ... it would seem that in a domain equipped with thousands of miles of railroads, truck highways and pipeline, inland navigation and increased air facilities, competition both among the forms of transport and individual operators would be continuous and intensive. If this were so, we could reasonably expect

> measurable results. There would be a studied, incessant drive for increased efficiency. There would be a perceptible lowering of rates under pressure of the market. Constant effort would be made by all varieties of service to attract and hold patronage with the maximum quality and quantity of operation which the could sustain. The value of the service and the principle of what the traffic will bear would produce an ever widening and deepening market. Such competitive effects would be marked in those branches of transport in which alternative methods were available as, for instance, where the shipper has a choice between air and rail. Within each field, moreover, the public would at all times know that every carrier was prompted by competition to provide the best possible service at the lowest possible rates.[57]

The freedom to establish individual rates could be either a blessing or a curse for the railroads. For those railroads that enjoyed sole access to certain areas of the market, this policy could allow them to set rates as high as those markets would bear; thus being a blessing to these railroads. In contrast, in those locations where two or more railroads were in competition, rates would fluctuate, which could result in rate wars to drive out competition. For those railroads, such rate wars could prove to be a curse.

As a result, both the railroads and the ICC recognized that to provide a smoothly operating transport system, railroads needed to cooperate with one another in their ratemaking. To foster this cooperation, rate agreements were voluntarily made between railroads, which evolved in the 1930s into the rate bureau system. The evolution of these rate bureaus is discussed in this section. However, the rate bureaus also allowed abuse and discrimination

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57 Wendell Berge, Economic Freedom for the West (Lincoln: University of Nebraska press, 1946), p.98-99.

of the entire rail transport system by a small group of men, specifically the financial backers of the railroads who dominated the rate bureau system. Expressing the prevailing attitude toward the rate bureaus during the 1940s, Vice President Wallace stated:

> Private rate bureaus and rate-making conferences through which railroad bankers and railroad managers have been able to exact from the people unconscionable rates for rendering an indispensable service must be stripped of their power and their activities confined to legitimate practices in the public interest.[58]

The rate bureau system, its development, the rate setting method, and the discriminatory results of the rate bureau's practices will all be examined in this section.

Rate Bureaus

To understand how rate bureaus could perpetuate the discriminatory policies that were followed, one must first examine the rate bureaus themselves. The lifeblood of the railroads was the revenue received from the transport of freight and passengers. To guarantee that the railroad was receiving a sufficient level of income to meet its large fixed costs and to promote competition, the railroads were allowed to set their own rates. However, the rates had to be set within the stipulated guidelines found in the ICA and its many amendments. The designers of the regulations hoped that the system would promote competition between the railroads. However, the railroad

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[58] Arne C. Wiprund, Justice in Transportation, An Expose of Monopoly Control (New York: Ziff-Davis Publishing Company, 1945), p. 95-96.

industry can not be thought of in the same manner as other industries. In other words, competition between railroads does not have the same effects as competition between members of other industries.

A general example of competition is that if Furniture Factory X sets his prices below cost in the attempt to drive Furniture Factory Z out of the market, then Furniture Factory Z does not necessarily have to lower prices. The factory only needs to stop producing furniture. As Factory Z's revenue falls, many of its costs (employee wages, cost of raw materials, etc.) also fall. Factory Z has only to wait for Factory X to accrue losses. Depending on the amount of these losses, Factory X will either raise prices or go out of business. Factory Z can then restart production, and is again in competition with Factory X.

Chandler has given a example of how competition works between railroads. He said:

> If Railroad A reduces charges on competitive business, Railroad B must follow. (1) It involves a great present [revenue] loss to stop [operations of the railroad]. If a railroad's business shrinks to almost nothing, a large part of its expenses run on just the same. Interest charges accumulate; office expenses cannot be suddenly contracted; repairs do not stop when traffic shrinks; for they are rendered necessary by weather as well as wear. (2) If B abandons the business, A's reduction of rates will prove no loss. The expense of a large business is proportionately less than that of a small one. A rate which was below cost on 100,000 tons may be a paying one on 200,000. (3) Profitable or not, A's competition may be kept up indefinitely. The property may go into bankruptcy, but the railroad stays were it is. It only becomes a more reckless and irresponsible competitor....
>
> There is one way to prevent these results. If competition is ruinous to all parties, all parties must stop competing. If it finds no natural limit, it must be

> artificially limited; it must end in combination. And the moment you have established an effective combination, you have introduced the principle of monopoly. You have determined prices not in the open market, but by agreement among all the sellers.[59]

For the railroads, the only answer to be found to the problems of open competition was the artificial limit, the rate bureaus.

During the late 1800s, many instances arose when open competition between two railroads was disastrous. Many times when rates were held at low levels for a lengthy period, competing railroads would go into bankruptcy. This was actually considered beneficial as these railroads could then reduce rates further as they were temporarily free of any interest payments.[60] However, the usual winner in these rate wars were the large railroads who could support reduced revenue in one area with revenue gained in another. While these wars were detrimental for the railroad industry, they had a strong impact on the financial backers of the railroads. Having a railroad go into receivership and suspend interest payments constituted a large loss of revenue for these bankers and financiers. Thus, over a period of decades, the rate bureau system was established to bring control and cooperation over the railroad industry and to reduce these losses.

Within the United States there were created three major freight-rate Territories, the Eastern, the Southern, and the Western. All of the Territories have some minor subdivisions, however, those of the Western Territory, the Western Trunk-Line,

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59 Chandler, The Railroads, The Nation's First Big Business, p. 163-164.
60 Stover, American Railroads, p. 115.

the Southwestern, and the Mountain-Pacific, are often considered along side the Eastern and Southern due to their size (see Appendix A). The first railroad association was set up in 1875, in the Southern Territory. Four important railroads, the Baltimore and Ohio, the Erie, the New York Central, and Pennsylvania, established an association in 1877 for the Eastern Territory.[61]

Large and small rate agreements continued to be made between railroads during the latter 1800s. In 1884 many agreements in the West were consolidated into a single large association, the Western Freight Association. This association was later replaced by the Western Association of Railroad Executives, which along with all the other Territorial rate bureaus was consolidated into the Association of American Railroads (AAR) when it was founded in 1934. Each freight-rate Territory, and their subdivisions, had their own ratemaking freight bureaus. If a certain rate was to be changed, the proposed change had to work its way up the ladder of subdivision and Territorial bureaus, until it reached the national bureau for final approval. This was the AAR (see Appendix B).

The AAR was set up to be a national rate bureau that had the ability to review and approved rate changes. If the members of the association did not agree with the proposed changes, then these changes were denied. Evidence supports the view that control of the ratemaking power of the railroads by this small group of men developed into discriminatory policies toward the

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[61] Chandler, The Railroads, The Nation's First Big Business, p. 173.

Southern and Western Territories. This evidence will be considered later in this section. However, two questions concerning the rate bureaus and their policies must first be considered. These are:

> *How, then, may we account for the persistence of excessive and discriminatory rates and rate bases? Why has not the natural forces of competition over a long period of time operated to equalize or at least to minimize rate differences?* The principal clue which leads us to answers to these questions is found in the existence of some sixty private rate associations and rate conferences throughout the United States which constitute the rate making machinery of the railroad industry. Before any rate is filed with the Interstate Commerce Commission and thereby becomes the "lawful rate", it must first find its way through the intricate series of committees maintained by the rate associations and conferences. In effect, this private rate making machinery is so geared that it has been able to exercise virtually complete control over the pricing of transportation services. This pyramid of private rate making agencies is headed by the Association of American Railroads which may be considered more or less the parent body of regional rate making groups, having jurisdiction over the East, the South, and the West.[62]

One of the complaints against the rate bureaus, was that the members of the ultimate approving body, the AAR, did not reside in the territories that they were setting rates for. The AAR met on Wall Street, in New York City. This was advantageous for the AAR's executives as they were mainly bankers and financiers whose offices were also in New York. From this, it was easy for many to believe that the policies of the AAR were favorable toward the Eastern Territory and discriminatory toward the Southern and Western Territories. In the 1940s two cases were filed, one by the Justice Department and one by the state of

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[62] Berge, Economic Freedom for the West, p. 112 (emphasis added).

Georgia (discussed in detail in section 3.1), indicting the rate bureaus for violating the Sherman Act by their use of "monopolistic" ratemaking powers. In particular, Georgia claimed that the polices of the AAR had severely damaged the Georgia economy. The purposes of these indictments was the abolition of the rate bureaus and their system of ratemaking.

Discriminatory Rates and Policies

The Federal and Georgia indictments were based on evidence gathered over a number of years. Early Congressional hearings on discriminating freight rates were held in 1937. In particular, the evidence demonstrated that the rates set by the AAR discriminated against the Western and Southern Territories. This discrimination was viewed as hampering the economic growth of the West and the South by setting rates in those Territories higher than in the East. In 1935 the Federal Coordinator of Transportation, Joseph Eastman, said of the rate bureaus and the ratemaking structure:

> The freight-rate structure of the railroads in particular is the complicated product of conditions of former days. Many of those conditions no longer exist or have been greatly modified. They have been superseded by new conditions created or influenced by the new means of transportation. Already this freight-rate structure shows signs of much disturbance on a new and, I hope, much simpler basis. The revision will have an important and, perhaps, profound effect on industrial conditions, but I am not yet clear what that effect will be.[63]

63 House Document No. 264, "The Interterritorial Freight Rate Problem of the United States", 75th Congress, 1st Session, p. 4.

The eventual effect on industrial conditions, at least as the Federal and the Georgia indictments stated, was the continued concentration of industry and manufacturing in the Eastern United States. This continued concentration was due to the interterritorial freight-rate discriminations of the railroad rate bureaus.

The evidence of the discriminations was as follows. The basic form of setting rates is the use of the class rate scale. The base of the scale is the Class 1 rate. This class is given a weight of 100%. Each of the five Territories has a different number of classes, with the Eastern having the fewest, seven, and the Southern having the most, twelve. Each subsequent class in the scale is given a lower weight. For example, Class 2 is weighted 80% and Class 3 is weighted 65%. A dollar amount is then applied as the rate determined by the distance to be traveled, and for each 100 pounds of cargo to be shipped.

For example, if a manufacturer desires to ship 100 pounds of Class 1 goods 100 miles, and the rate was $1 per 100 miles, then the manufacturer would be charged a total of $1. If a coal company wanted to ship 100 pounds of Class 3 cargo 100 miles, then it would be charged $0.65. This charge is 65% of the $1 rate.

One of the major determinants is the distance the cargo is to be shipped. As the distance increases, the rate per 100 pounds also increases, but the increases are not linear. This is shown in Table 1 (see Appendix C), which provides the actual freight rates for 1937.

The differences in the rates for the different Territories became more exaggerated as the distances increased. This becomes more evident when the data are graphed, as seen in Figure 1 (see Appendix C). The chart shows distinct differences between all of the Territories except the Southwestern and the Mountain-Pacific. The lowest rates were found in the Eastern and the next lowest in the Southern. However, the difference between the Eastern and the Southern at 1500 miles was almost $1 per 100 pounds (a 33% increase), and the difference between the Eastern and the Southwestern and the Mountain-Pacific at 1500 miles was almost $1.75 per 100 pounds (a 80% increase). To determine the rate of an interterritorial shipment, a rough average of the two rates, based on the distance traveled in each territory, was generally what was charged.

It must be noted that these were the lawful maximums that the railroads could have charged. However, the majority of cargo was not shipped under the class rate system as explained above. During the time in question, most cargo was shipped under "commodity rates", which in practice, were generally lower than the Class 1 rates. The principals of these commodity rates can be summed up as:

> First, they [commodity rates] tend to be offered only on kinds of freight that move in large quantities on more or less clearly defined routes; they often apply only between specific origins and destinations....

> Second, such rates are often no higher in the southern and western parts of the country and between these parts and [the Eastern] territory than they are within [the Eastern Territory].[64]

Despite this use of lower commodity rates for bulk goods, such as coal and lumber, shippers of most other goods had to pay the higher rates.

A further example of the discriminatory rate structure can be found by comparing the rates charged between cities. The discriminatory nature was particularly strong when the comparison is conducted with shipments within a territory and shipments between territories. This is shown in Table 2 (see Appendix C).

This table shows the extent to which the Southern Territory was at a disadvantage when compared to the Eastern Territory. Similar data could be shown to demonstrate the disadvantage incurred by the Western Territory. However, if the comparison was extended to also include international shipments from Canadian cities to U.S. cities with equal mileage as those in Table 2, it would show that the rates were approximately the same as those in the Eastern Territory.[65] From this it would appear that the eastern Canadian cities were considered important by the rate bureaus, and thus, were charged favorable rates for traffic shipped within the U.S.

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64 House Document No. 137, "Regional Freight Rates: Barrier to National Productiveness", 78th Congress, 1st Session, p. 6.
65 ibid., p. 8-9.

While equations have been developed to demonstrate how rates could be determined by being based on cost of service, the rates set by the bureaus had no such base. Chandler stated that "A difference in rates not based upon any corresponding difference in cost, constitutes a case of discrimination."[66] For most of the rates, the bureaus followed the policy of charging what the market would bear.

The effect of such discriminatory ratemaking can be devastating. The demographics of the United States in the early 1900s can be examined to define why the rate bureau executives were setting rates to the advantage of the Eastern Territory, as the evidence provides. It is found that the majority of the population lived in the Eastern Territory. The majority of the manufacturing facilities were also located in the East, while the majority of the raw materials were found in the West and South.

As explained above, most of the bulk raw materials could be shipped under commodity rates. Since these rates were relatively the same compared to those in the East, shippers of raw materials did not pay the high rates required of those shipping finished goods. For the producers of finished goods it was advantageous to be located in the East and ship goods to the other territories. This is because the interterritorial rates are a rough average of the two territories. Given that the Eastern's rates are so low, the average of shipping between the East and the West is still lower than shipping within the West.

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[66] Chandler, The Railroads, The Nation's First Big Business, p. 166.

The effects on the industrial conditions were the specific reasons that the Federal Government and Georgia filed indictments against the rate bureaus. What was found was that, due to the rate discriminations, industries were not moving out of the East. If a new factory was to be built, sites in the South or the West were not seriously considered. For the manufacturer, the raw materials could be obtained at low rates, but a penalty would be paid, in the form of higher rates, if the finished goods were produced outside the Eastern Territory. It may be seen that this was advantageous to those who wished to invest in industries and would thus be concerned about keeping costs down. For those bankers and industrialists who sat on the boards of the rate bureaus, using their power to set rates in favor of the Eastern market was good business.

Producers were also affected by other policies of the rate bureaus. In a number of instances the rate bureaus refused to lower rates on the shipment of certain farm products when there had been bumper crops. In 1933 a bumper crop of peaches in Utah and Colorado prompted farmers to request lower rates to facilitate the shipment of them. The rate bureau officials refused stating that "the proposed reductions ... would result in the dissipation of the railroad revenues and consequent *prejudice to the public interest*."[67] The rate bureaus were able to stop railroads from making their schedules more efficient and even prevented Western railroads from installing air conditioning on

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[67] Berge, Economic Freedom for the West, p. 116 (emphasis added).

the majority of their trains, as their counterparts in the East had done. All of these actions were harmful to the economies of the Territories other than the Eastern Territory. Of these actions, the Attorney General said in 1943:

> The complaint filed today charges that a combination of private financial, industrial and railroad interests have acted collusively to maintain non-competitive rates for transportation and to prevent and retard improvements in the services and facilities of railroads for the western part of the United States.[68]

The solution to the rate bureau problem was presented as three suggestions from the Justice Department and members of Congress. In the adoption of any further regulations to be amended to the ICA, Congress could consider any of them. These suggestions were that:

- all interterritorial rates and rates within the territories be equalized, being based on the same classification and distance of the shipment;
- the interterritorial rates would be revised and then absorbed into the intraterritorial rate structure of each territory; and
- legislation could be passed that would allow for the national control of the rate structure, thus assuring no regional discriminations.[69]

Whereas these suggestions were made in 1937, when the Federal and Georgia cases were filed in 1944 none of them were included.

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[68] ibid., p. 120.

[69] House Document No. 264, "The Interterritorial Freight Rate Problem of the United States", 75th Congress, 1st Session, p. 65-66.

The answer that was settled upon was the complete dissolution of the rate bureaus and the termination of the railroads' ability to cooperatively fix rates.

Conclusion

Unlike many industries, traditional theories of competition do not truly apply to the railroads. In many industries, open market competition generally ensures that the public is receiving the lowest prices while the businesses are still earning reasonable profits. Competition can ensure efficiency and innovation as businesses search for ways to cut costs and improve the goods or services. At times businesses can take action to remove their competition. This is generally done through lowering prices below the cost of production.

The railroads are unable to compete in this fashion. In fact, the railroad industry is special in that it can face many competitors in one city, and be the sole provider of transport services in another. Often times open competition can have ruinous results for the railroads. Faced with the high fixed costs that continually needed to be paid, railroads generally could not lower rates below the cost of production as these rate wars caused many railroads to enter bankruptcy.

To prevent such disastrous results from continuing to occur, railroad executives and their financial representatives began to meet and make agreements on rates. Over time, these conferences developed into the rate bureau system that, by the

1930s, had complete control over all the railroads rates and other areas railroad operation. Evidence was presented before Congress that supported the claim that these bureaus were using their ratemaking powers to set rates favorable to the East while discriminating against the West and the South. It was understood that this was monopolistic in nature, and therefore, a violation of the Sherman Antitrust Act.

The evidence that was presented demonstrated that the rates were discriminatory. It was also believed that the rate policies of the railroads had detrimental effects on the entire U.S. economy. Wendell Berge wrote in 1946 that:

> A free and competitive economy cannot operate if the chief arteries of trade and commerce are subject to the decision of private monopoly groups or if interregional discrimination places handicaps in the way of parallel development by the various sections of the country. What has been said here applies principally to the West and to the South, but it is nevertheless true that even though the East may seem temporarily favored by freight differentials, the long-run interests of all three areas coincide. All three have an important stake in transportation....
>
> The rail carriers are truly the arteries of American commerce. If areas which they serve are economically sick, they cannot function over any long period of time without also becoming affected. On the other hand, if by changes in present practices the railroads make possible the burgeoning of Western industry, they will increase the source from which they draw their own sustenance and will profit thereby.[70]

The actions of the rate bureau officials demonstrated that they did not totally understand the effects that their policies had on the economy, or they just didn't care. The statement issued by rate

[70] Berge, Economic Freedom for the West, p. 101, 121.

bureau officials at the time of the increased peach crop in Colorado and Utah supports this conclusion.

For many in Congress, the only answer to discriminatory rate setting was the forceful implementation of market competition and dissolution of the rate bureaus. The railroads understood this to mean the end of cooperation and stability in their industry. The financial backers of the railroads also did not want the "ruinous" forces of market competition to be reintroduced to the railroads either. For many of them, the consequences of the rate wars had been the suspension of bond and interest payments. Therefore, the rate bureaus and railroads began applying influence on Congress for the passage of legislation that would exempt their ratemaking powers from the Sherman Act.

This legislation came to be called the Reed-Bulwinkle Act. The history surrounding this act and methods that the rate bureaus and railroads used to ensure its passage are the focus of Section 3.

3.0 The Reed-Bulwinkle Act, A Turning Point

In addition to added regulation, the railroads ratemaking practices were placed under greater scrutiny in the 1930s and 1940s. This was a product of the discriminatory and restrictive practices of the railroad rate bureaus. During these decades a number of court indictments were filed that, if successful, would have restricted the joint ratemaking practices of the railroads and dissolved the rate bureaus. The charge in these indictments was that the joint rate agreements promulgated by the rate bureaus were in violation of the Sherman Antitrust Act.

In response, the railroads promoted the passage of legislation that would exempt ratemaking powers from the antitrust laws. Following efforts of the large railroad lobby to gain grass roots support and influence over elected officials, the Reed-Bulwinkle Act was passed in 1948. In the 1945 Congressional Record it is reported that:

> Among many hundreds of private organizations and governmental departments and agencies that, through representation at the hearing, by formal resolution or otherwise, placed themselves on record as favoring the bill are: The Office of Defense Transportation, the Interstate Commerce Commission, the National Association of Railroad and Utilities Commissioners, numerous State regulatory

> bodies, State legislatures, and departments of agriculture of many States; numerous shopper's traffic and transportation organizations, including the National Industrial Traffic League and the National Association of Shipper's Advisory Boards; numerous associations of farmers and livestock growers, including the American Farm Bureau Federation, the American National Live Stock Association, and the National Council of Farm Cooperatives; and chambers of commerce, and other business organizations of various cities, States, and regions.[71]

This wide support was accompanied by wide opposition, including that of President Truman. The view held by the opposition was that this act would be extremely detrimental to the nations economy and would, in effect, raise the railroads ratemaking powers above the law.

The history surrounding the passage of the Reed-Bulwinkle Act, how it was applied, and Congressional action taken against it since its passage in 1948 will be examined in this Section.

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[71] U.S. House of Representatives, Committee on Interstate and Foreign Commerce. "Report to Accompany H.R. 2536, Amending the Interstate Commerce Act With Respect to Certain Agreements Between Carriers." Report No. 1212, 79th Congress, 1st Session, p. 3

3.1
Legal Background of the Reed-Bulwinkle Act

Introduction

As discussed in section 2.4, concerns developed during the 1930s and 1940s over the detrimental effects that rate bureaus and the territorial rate discrimination perpetuated by these bureaus were having on the U.S. economy. The ratemaking system favored, it was believed, the Eastern markets to the detriment of the Western and Southern markets. In addition the rate bureaus that ran the system established monopolistic control. This absolute control over ratemaking for the entire nation, as well as over various other aspects of railroad operation, was brought to the attention of the Justice Department in the early 1940s.

After numerous congressional investigations and hearings, the Justice Department filed suit, in August of 1944, in the United States District Court of Lincoln, Nebraska. The suit alleged that the railroads and rate bureaus had violated the Sherman Antitrust Act. Five months earlier the state of Georgia filed suit in the Supreme Court against the rate bureaus on the same allegations. In this suit, it was specified that the economy of Georgia had been harmed due to the discriminatory rate structure. The railroads' answer to these court cases was the promotion of the Reed-Bulwinkle Act which, when passed, would remove the railroads ratemaking ability from the jurisdiction of the Sherman Act.

The passage of the Reed-Bulwinkle Act was not the first time that the railroads had attempted to exempt some portion of their operation from the antitrust laws. Nor were the two suits filed in 1944 the first antitrust suits against the railroads. This will describe the background and the passage of this act.

Early Legal Action

The first major indictment against the railroads for violations of the antitrust laws was the Northern Securities Case. The government's success in this case was a landmark decision in its attempt to enforce antitrust law. While the case did not focus on a railroad's ability to set rates, the decision did set a precedent that the ownership of a rival railroad company's stock constituted a "trust" and was therefore illegal.

After James Hill had completed his northern transcontinental rail route, he was faced with the problem of expanding his rail line while competing with other railroads, specifically the Northern Pacific (NP). For many years the NP had competed with Hill's Great Northern and other railroads by building its track parallel to those of other companies. In 1901, Hill joined forces with the Morgan bank to gain control of the NP and thus remove it as a competing factor. Hill then tried to further expand his Midwest rail access through the acquisition of the C. B. & Q. This action precipitated a stock war with the Union Pacific and Southern Pacific Railroads. The owner of these railroads, E. H. Harriman, also desired control of the C. B. & Q as an extension of his rail system. Hill won the battle by purchasing over ninety percent of the C. B. & Q. stock. Harriman countered by attempting to corner the NP stock and thus take control of it. It was believed that without the NP, Hill would have to relinquish control of the C. B. & Q.

However, through the bylaws of the NP, it would have been impossible for Harriman to gain control as Hill and Morgan already owned the majority of the controlling stock. The attempt to corner the stock, however, did lead to widely fluctuating prices and some minor crises in the market. Once the dust had cleared, Morgan offered a peace settlement by naming Harriman to the board of directors of the NP. Morgan and Hill were able to retain control over the three railroads — the Great Northern, the NP, and the C. B. & Q. — by combining their stocks into a giant holding company, the Northern Securities Company. The formation of the holding company led to a test of the antitrust laws during the administration of President Theodore Roosevelt.

The announcement of the impending case came as a complete surprise to everyone involved. Newspapers read:

> The Government has decided to test the legality of the recent merger of the Northern Pacific and the Great Northern railroad companies. Under the Sherman

> Anti-trust Act of 1890 a bill of equity will soon be filed in the Federal courts. The Government will demand the dissolution of the Northern Securities Company.[72]

J. P. Morgan took the case as a personal attack, and he tried to make a deal with the President. When the President responded that no deal could be made that would discontinue the case, Morgan inquired if the Government was going to poke its nose into his other business dealings. Roosevelt responded "certainly not, unless we find out that in any case they have done something that we regard as wrong."[73]

The evidence given in the case was both extensive and comprehensive. By a vote of five to four, the Supreme Court ruled that the Northern Securities Company was to be dissolved. This ruling, although narrowly won, was considered by many to be the most significant effect of the Roosevelt presidency and the initiation of a strong antitrust policy in the Federal Government. On the decision of the majority, Justice Harlan wrote of the Northern Securities Company:

> No scheme or device could more certainly come within the words of the Act (Sherman) ... or more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the Act, a "trust;" but if it is not, it is a combination in restraint of interstate and international commerce; and that is enough to bring it under the condemnation of the Act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of

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[72] John K. Winkler, Morgan the Magnificent, The Life of J. Pierpont Morgan (New York: Garden Publishing Co., Inc., 1930), p. 219.
[73] ibid., p. 222.

> commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.[74]

The opinion of the dissenters was based on the principle that the buying, selling, or holding of stock did not constitute a restraint of "interstate commerce" as defined by the Sherman Act, but held that it was ownership of property. The dissenters held that interstate commerce could only be defined as the actual transport of goods or persons between states. This is a rather narrow view of the broadly written Sherman Act, but was a concept that had been upheld in the previous Knight Case.

Although it was recognized that the control of the stock of the three railroads could lead to restricting commerce, and was a definite block against full competition between the Great Northern and the NP, it was believed that this was too broad a judgement to be decided. The dissenting Justices believed the Court was attempting to condemn the Northern Securities Company for an illegal action prior to this action having occurred. Oliver Wendell Holmes, as the minority leader, agreed with the other dissenting justices that there was no direct effect on interstate commerce, but held that if a:

> ... remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between states that may not be made a crime by the finding of a jury or a court.[75]

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[74] Dominick T. Armentano, Antitrust and Monopoly, Anatomy of a Policy Failure (New York: Holmes & Meir, 1990), p. 54.
[75] ibid., p. 52.

In support of this view, and through an examination of the facts, one finds that Hill's Great Northern and Northern Pacific were not in competition with Harriman's Southern and Union Pacific. The question being asked was: "how could the establishment of the holding company degrade competition when there had been no previous competition?"

The probable fear held by all of the justices was only voiced by only one of them, Justice Brewer. While he voted in favor of the dissolution, he did not agree with the judgment. He viewed this case as setting a precedent for all future dealings that involved holding companies and what he saw as the possible control of an industry by a single company. He stated that:

> If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded in the argument of one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation.[76]

Based on this fearful view of the future, Brewer voted for dissolution.

Justice Brewer's vision of the future came true with the establishment of the national rate bureau, the Association of American Railroads (AAR) (see section 2.4). It was this association and its main focus on setting rates for the entire nation that focused the railroads' attention on the danger posed by the antitrust laws. The decision was made by the railroads to work to

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[76] Winkler, Morgan the Magnificent, p. 228.

remove their ratemaking powers from the jurisdiction of these laws.

The first such attempt had been made during the congressional deliberation of the Mann-Elkins Act of 1910. The proposal, which was removed from the final draft of the act, was to provide a legal base on which railroad companies could conclude rate agreements.

A stronger attempt to modify the antitrust laws occurred in 1914, with the passage of the Clayton Act. An amendment was proposed that would exclude the ratemaking powers of railroads from the act. This read:

> Nor shall anything herein contained be construed to forbid associations of traffic. operating, accounting, or other officers of common carriers for the purposes of conference and agreement among themselves as to any matter which is subject to the regulating or supervisory jurisdiction of the Interstate Commerce Commission but any such matter that shall be made the subject of agreement by any such association shall likewise continue to be subject to the regulating or supervisory jurisdiction of the commission.[77]

The Interstate Commerce Commission approved of this on the grounds that it would have promoted stability in the railroad industry and reduce the lengthy review process of proposed rate changes.

However, the amendment was later removed from the final version of the act based on arguments from the Senate. The Senate committee reviewing the Clayton Act said of the exclusion:

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[77] Hearings before House Committee on Judiciary on Trust Legislation, 63rd Congress, 2nd Session, Vol. 2, p. 1894.

> It is recommended that the last paragraph of this section be stricken out, because it is not believed that such agreements, as those named, should be made whether approved or not by the Interstate Commerce Commission, nor that such traffic and operating associations as those mentioned should be formed.[78]

Despite this conclusion from the Senate, such associations were quietly formed[79] (described in section 2.4) and operated successfully for many years before being discovered.

The first successful move by the railroads against antitrust occurred during World War II. Having been established in 1934, the AAR had been operating for almost a decade before coming to the attention of the federal government (see footnote 82). The particular aspect of the AAR's ratemaking machine that was eventually disclosed to the federal government was known as the Western Agreement and was headed by the eastern bankers who had financed the railroads. This agreement affected the three rate territories west of the Mississippi, the Western Trunk-Line Territory, the Southwestern Territory, and the Mountain-Pacific Territory (see Appendix A).

The three major provisions of the agreement were that, under the control of a Western Commissioner: (1) railroad policy was to be determined for the western territories as a whole, and not from the standpoint of individual railroad companies; (2) all aspects of railroad operation, including rates, schedules, and improvements, would be determined for all railroads operating in

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78 Senate Report 698, 63rd Congress, 2nd Session, p. 46, 60.

79 Ellis Arnall, a former Georgia governor referred to rate bureaus as "secret conspiracies"; "The Freight Rate Cartel," New Republic, April 16, 1945, p. 497.

the western territories; and (3) the Commissioner was to promote railroad interests above those of other competing forms of transportation.[80] Such an agreement was found necessary, in the view of the eastern financiers, to promote the economic well-being of the western railroads during the depressed times. It was believed by the bankers that the executives of the affected railroads were unable to make the correct policy decisions that would allow continued viable operation of those railroads.[81]

When the agreement was examined by the Justice Department, it was found that the Western Commissioner was responsible to the Traffic Advisory Committee of the Association of American Railroads, which in turn was responsible to the AAR (see Appendix B). It was particularly upsetting to Congress that the operational decisions of the western railroads were being dictated by an organization that met in New York. Many believed that this was a clear violation of the antitrust laws as it restricted trade and reduced competition in the West. The fact that the most prominent members of the AAR were not railroad executives, but bankers, did not help. The head of the Senate Committee on Interstate Commerce, Senator Wheeler, said at the time:

> I must confess that this agreement was a shock to me because it evidences quite clearly the control the powerful nonrailroad interests in the East have over transportation in the West. We have heard a great deal in recent months about discrimination against the West and South. It seems to me that this agreement,

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[80] Wiprund, Justice in Transportation, p. 81.
[81] Shott, The Railroad Monopoly, p. 16.

which has been in existence since 1932, may well be the instrument of control by which these discriminations have been perpetuated.[82]

After further investigation by the Justice Department, charges were filed in May,1943 against some of the members of the Western Agreement in Denver.

The AAR's response was to contact the federal officials in charge of production and transportation during war. Under provision of the Little Business Men's Act, passed by the 77th Congress, the Chairman of the War Production Board could stipulate, in the form of a certificate, that any action may be taken during war time that would normally violate the Sherman Act.[83] The AAR was able to convince the Attorney General that the continuance of the agreement was necessary, in the interest of the war movement, for continued smooth operation of the western railroads. The argument was that, if the operation of the railroads was disrupted for any reason, the U.S. war effort would suffer. Ultimately, the certificate was issued and the case in Denver was dropped.

Some of the arguments put forth to deter the issuance of the certificate presented by the Assistant Attorney General in charge of antitrust were:

1. Competing forms of transportation, notably through rate bureaus of the motor carriers and the railroads, are taking advantage of the war emergency to eliminate all competition in rates between these alternative forms of transportation,

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[82] Hearings before Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus, 78th Congress, 1st Session, p. 239.

[83] Wiprund, Justice in Transportation, p. 92.

thus increasing transportation costs both to the Government and to the civilian economy...

2. The united front among otherwise competing carriers created by the rate bureaus and the delays which are an inseparable part of their present scheme of operations have combined to withhold essential rate adjustments which have been requested by governmental agencies and to maintain rates at levels which are unrelated to the actual or reasonable cost of performing public transportation services.

3. The present organization and operation of many rate bureaus, under the dictatorship of the dominant carriers, are unduly restrictive of the freedom of action of the smaller and more efficient carriers, restricting the scope of their operations, preventing downward adjustments of rates, and eliminating competition which would be conductive to the elimination of wastes and the attainment of greater efficiency in wartime operations.[84]

The allegations of the Assistant Attorney General did not come true. Competition between the various forms of transport continued and the military was pleased with the railroads' efforts during the war. The opinion of the military as stated by General Gross after the war was:

...the rail system of the country [was] utterly indispensable to the war effort, and ... the success of the railroads in meeting the unparalleled demands of the war was due to cooperative action between them that closely approached unification.[85]

Despite the failure in Denver, the Justice Department continued to investigate the railroad rate bureaus and the ratemaking practices of these bureaus. By 1944 enough evidence had been gathered to file charges of violations of the Sherman Act

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84 Hearings before the Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus, 78th Congress, 1st Session, p. 262-263.

85 U.S. Senate, Committee on Interstate Commerce, Report to Accompany H.R. 2536 Amending the Interstate Commerce Act with Respect to Certain Agreements Between Carriers. Report No. 1511, 79th Congress, 2nd Session, 1946, p. 12.

by the AAR and the Western Association of Railroad Executives (WARE), a subsidiary rate bureau of the AAR, in the United States District Court of Lincoln, Nebraska. As a more comprehensive examination of rate bureaus and their policies was provided in section 2.4, only specific information concerning these two cases, as they relate to the Reed-Bulwinkle Act, will be included here.

The Antitrust Cases

Among the defendants listed in the Federal indictment of 1944 were J. P. Morgan and his banking house, Kuhn, Loeb and Company, individuals serving on the boards of the AAR and the WARE, and over forty railroads and their executive officers. A statement issued by the Attorney General at the time read:

> The complaint filed today charges that a combination of private financial, industrial and railroad interests have acted collusively to maintain non-competitive rates for transportation and to prevent and retard improvements in the services and facilities of railroads for the western part of the United States. It also charges that the defendants have retarded and suppressed the development and growth of the motor carriers and other forms of transportation competitive with the railroads in the Western area.[86]

In general, the people indicted were charged with the majority of practices perpetuated by the rate bureaus. These included such things as disapproving schedule changes that improved service and denying implementation of technical advancements to the equipment.

The case filed in the Supreme Court by Georgia was more specific. It alleged that through the discriminatory ratemaking

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86 Berge, Economic Freedom for the West, p. 120.

practices of the rate bureaus the economy of Georgia had been damaged. Evidence supporting this allegation, discussed in section 2.4, showed that the rate bureaus had established a practice by which the rates of the Southern Territory were higher compared to the Eastern Territory.

The difference in rates and the amount they added to the transport costs of goods shipped from the South to the East was said to discourage business growth in the South. This was particularly true of those businesses concerned with producing manufactured goods. Georgia also alleged that the rate discrimination discouraged business relocation to the South from the East. Even in those instances where a business might find favorable terms for relocation, it would not do so after it had considered the increase in transport costs it would bear. Specifically, Georgia's case states:

> The State of Georgia is hindered and harassed in the discharge of these powers, rights, and obligations of sovereignty by a conspiracy of persons of other States, in violation of the common law against conspiracy, and in violation of the antitrust laws of the United States.... The defendants, a group of common carriers, have conspired to establish and to maintain freight rates which are unjust, unfair, and harmful to the State and the people of Georgia. The rates as a result of the conspiracy are so fixed as
>
> (a) to deny to many of Georgia's products equal access with those of other States to the national market;
>
> (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping, and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of the people; and

(d) to hold the Georgia economy in a state of arrested development.[87]

The main supporter of the case, the former Georgia governor Ellis Arnall, firmly stated that the rate bureaus were formulating secret agreements to damage the Southern economy and to remove Georgia's goods from the nation's markets.[88] These two notions came from the fact that the rate bureaus met in New York, "Yankee" country, and that these agreements had not become part of the public record until nine years after they were established.

An example of the rate discrimination practiced by the bureaus on the South occurred in 1941. A new manufacturing plant was being built in South Carolina and needed chrome and manganese ore. The new company requested a reduced rate from three railroads, the Southern, the Seaboard, and the Atlantic Coast Line, of $4.25 a ton. If this rate could not be set, the company threatened to use barges.

Since the ore was coming from the port of Baltimore, in the Eastern Rate Territory, the rate bureau having jurisdiction would also have to agree to the special reduced rate. Over eight months and twenty-one committees later, the rate of $4.25 was refused. However, the Eastern Territory rate bureau did approve a rate of $5.06, which was also supported by the Southern rate bureau.[89]

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[87] Wiprund, Justice in Transportation, p. xvi.

[88] William H. Joubert, Southern Freight Rates in Transition (Gainsville: University of Florida Press, 1949), p. 380.

[89] ibid., p.382.

This was perhaps not surprising as all the rate bureaus were ultimately controlled by the AAR, located in the Eastern Territory (see Appendix B).

Conclusion

There was great concern, as demonstrated by the Georgia Case, of the discriminatory nature of ratemaking under the control of the rate bureaus, as well as concern about the men running these bureaus. The power of men, such as J. P. Morgan, was too great when their influence over the railroads was combined with their interests in other industries.

Morgan held substantial control over many of the biggest industries in the nation, which he could use in combination with the bureaus to control business activity and economic growth in many areas of the country. Evidence already established leans toward this interpretation. Arnall definitely believed that the rate bureaus had the power to control business activity and direct economic growth regionally.

Whether control over the nation's economy, or stability and cooperation in the railroad industry, was the purpose of the rate bureaus, the members of the AAR and WARE were quite disturbed when the 1944 Federal and Georgia cases were filed. A statement was issued, by the government, as to the serious nature of these cases and specifically mentioned the dissolution of the

AAR and WARE as necessary steps toward reestablishing competition in the railroad industry. Furthermore, it stated that:

> ... J. P. Morgan and Company, Kuhn, Loeb and Company, and others to be enjoined from participating in any similar organizations with the purpose and effect of establishing collusive transportation rates, eliminating competition in transportation services, preventing the competition and development of other forms of transportation, or of placing control of defendant railroads under a combination of financial, industrial, or railroad interests.
>
> The defendant to be perpetually enjoined from continuing, reviving or reinstating the agreements ... and from setting up any similar plan to restrain trade and commerce in violation of the Sherman Antitrust Act.[90]

This statement demonstrated to the men controlling the rate bureaus the extent to which the government believed they had violated the law. Thus, these men knew that if they were found guilty, it would mean the end of their careers and influence over the railroad industry. For the rate bureau executives, the end was near and they concluded that drastic measures were needed to guarantee their survival. These measures and their results will be discussed in the next section.

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90 Shott, The Railroad Monopoly, p. 161.

3.2
The Passage and Application of the Reed-Bulwinkle Act

Introduction

Beginning in the early 1940s, the Federal government was determined to dissolve the rate bureaus and remove the rate discriminations, economic obstructions, and competitive reductions perpetuated by these bureaus. Despite a number of attempts by the rate bureaus to ensure their ratemaking powers despite antitrust laws, the railroad companies and the rate bureaus were only able to negotiate a short reprieve during World War Two. Even then, the government was determined to remove the blight of the rate bureaus.

As previously described in section 3.1, two suits were filed in 1944 indicting the rate bureaus, individual railroads and their executives, and numerous financial figures for violations of the Sherman Antitrust Act. The potential threat of being convicted galvanized the railroads and the rate bureaus into action to prevent the government from winning. Having considerable practice at mobilizing lobbying forces to pass desired legislation, the railroad companies decided to once more attempt to get a law passed exempting their ratemaking powers from the antitrust acts.

The culmination of this lobby effort was the Reed-Bulwinkle Act (RBA) of 1948. Great influence would be required to guarantee the passage of the act as the President, Harry Truman, was a staunch supporter of the antitrust laws. The railroads and their supporters expected Truman to oppose the legislation and, if necessary, veto it. It was an uphill battle, but one that the railroads had experience at fighting.

The Lobby Effort

In the 1930s, the railroads developed a large lobby organization. The main purpose of this organization was to represent the railroad interests within local communities and to influence political officials to pass legislation favorable to the railroads. This organization was deemed a crucial part in the railroads' support of the RBA.

The railroad lobby focused on two areas: civic organizations, and what the railroads termed "influential men". Primary methods of influence were the use of railroad employees and the generation and propagation of propaganda. Most of this activity took place through local subsidiaries of the AAR, while being centrally managed by specific members of the AAR. These subsidiaries were called State Railroad Associations. However, the railroad lobby had received its start as an effort to combat increased competition from the trucking industry. It was from this effort that the railroad lobby gained the skills necessary to manipulate the political officials, civic organizations, business interests, and local communities to have the RBA passed.

Railroads vs. Trucks

After the many decades of being the major transport industry of the nation, the railroads were ill suited to face competition from the nascent trucking industry. The decrease in revenue due to inroads made by trucks was recognized by the AAR and the WARE as being serious. A statement issued by the WARE described that trucks were hauling goods that had traditionally been transported by the railroads and that every dollar made by trucking companies was a dollar stolen from the pockets of the railroads. This loss in revenue was estimated to be almost $2,000,000,000 by 1938.[91]

In the attempt to stop this change from railroads to trucks, the railroad interests contacted Mr. Joseph H. Hays, a former member of the Trucking Executives Association of America. The plan, developed by the railroad industry and primarily implemented by Mr. Hays to fight the trucks, was described in a report published by the Senate Committee on Interstate Commerce[92] as:

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[91] U.S. Senate, Committee on Interstate Commerce, Investigation of Railroads, Holding Companies and Affiliated Companies, pursuant to S. 71 (74th Congress). Additional Report No. 26, Part 2, Some Educational, Legislative, and Self-Regulatory Activities of United States Railroads, 77th Congress, 1st Session, 1941, p. 8.

[92] The members of this committee were from every geographic region of the U.S. Senator Burton Wheeler, of Montana, was chairman and the

> … not a method designed to meet truck competition by improvement of railroad service. Nor is it a means for adjusting the railroad industry to the fact that there are certain functions for which motor vehicles are especially adapted. Rather, it is a program planned to impede truck and bus competition by the erection and enforcement of legal barriers.[93]

The natural focus of these legal barriers were the crossings of the Mississippi River. By enacting and enforcing strict legal limits on truck weights and trailer size, Mr. Hays hoped to severely limit the access of trucks to the bridges over the river.

Another aspect of the plan was the development of propaganda and publicity that would improve the image of the railroads. To accomplish this, newsletters, newspaper articles, investigative reports, and other such information items denigrating the trucking industry were supplied free to the public and the newspapers. However, the people receiving the majority of such items were never told that the railroads had paid for the studies or written the newsletters. These items were touted as having been published by impartial third parties. An example of such propaganda, the failure of concrete on a section of road, was presented before a Senate Subcommittee, without much effect.

> Mr. Hays. You see, many times railroad people will make the statement that the use of heavy trucks is destructive to roads, and then someone will say: Where and when? And the railroad people are pretty hard put to it to be able to cite specific instances. That [the failure of the concrete] was a graphic instance. Perhaps Senator Truman is familiar with that highway.

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committee also included Senator Harry Truman, of Missouri, and Senator Clyde Reed, of Kansas. The bias of the committee, and this report, can be argued. However, Senator Truman's comments throughout the report are extremely anti-railroad, while those of Senator Reed (one of the authors of the Reed-Bulwinkle Act) are pro-railroad.

93 ibid., p. 8.

> Senator Truman. Yes, I am familiar with it, and I know why it failed. The concrete mixture was not the proper one.[94]

It was in this operation against trucks that the railroads learned how to use their own employees and civic organizations for their own interests. Railroad employees were told to spy on trucking companies and verify that they were obeying the size and weight laws. Civic organizations, such as local chambers of commerce and shipping associations, were used to apply pressure on political officials while hiding the role of the railroads.

Despite the development and successful use of these tactics, the railroads were unable to substantially damage the trucking industry. These activities had required many hours of labor and millions of dollars and accomplished little that was favorable to the railroads. The president of a western railroad addressing the WARE in 1937 stated:

> The railroads have spent millions of dollars in fighting a form of evolution in transportation. The railroad companies, I think, in resisting and trying to hinder, have done more for the trucking business than they could ever have done for themselves. Railroad men have talked to the heads of industries against the truckers so much that they have opened his eyes to the fact that he could use them.[95]

Even though it appears that the railroads accomplished less than if they had focused on improving themselves, the members of the AAR, the WARE, and the railroad owners and executives did not forget the small successes that these tactics had wrought. It was to these tactics that they turned to when faced with the possible removal of their joint ratemaking powers.

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94 ibid., p. 15.
95 ibid., p. 21.

Influential Men

In the late 1940s, the fight for the RBA was led by the Vice President and General Counsel of the AAR, R. V. Fletcher. It was Fletcher's desire that a specific member of each local railroad association be responsible for the promotion of local and national legislation. One of the main duties of these association members to have access to influential men and to have these men represent railroad views. Of this plan, Fletcher stated:

> All of us have long recognized that the only effective way to influence Congressional action is to convince the influential men in each Congressional district that the public interest and the interest of the railroads coincide....
>
> I have the impression that most of the congressmen, particularly those living in the smaller states and in rural districts, depend for their support upon a comparatively few men in each county in their respective congressional districts. If we could reach the men upon whom a congressman depends for advise and assistance in his political campaign, we would go far toward having the problem solved.[96]

To help in the process of gaining the use of these men, the local railroad associations were charged with determining which men were the most influential. At the same time dossiers were prepared on all the members of Congress. The information typically included dealt with the members' family, friends, job, social life, and sponsors.[97]

The manner in which Fletcher envisioned his system working was that, at those times that the railroads needed Congressional influence, the key Congressmen would be selected.

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[96] U.S. v. The AAR, et al. Government Brief, Part II, Exhibit G. 207, p. 125.
[97] Shott, The Railroad Monopoly, p. 87.

From the information in each Congressmen's dossier, his friends and associates having the most influence on him would then be asked to contact to the Congressman and ask him for his support for the railroads view or proposition. From this activity, Fletcher believed that the selected Congressmen would see that their constituents wanted him to take the railroad position.

The use of these influential constituents also added support to Fletcher's view of the Congressional lawmaking process. He believed that most decisions on a particular law were made behind closed doors, in meetings between the Congressman and his closest advisors. He further believed that the time spent in committee was mainly for the public and held little importance for the passage of legislation. Fletcher preferred to bring people from a Congressman's district to speak with him in person, as such personal meetings were highly influential. Of Fletcher's view on Congressional committee, an executive of the Milwaukee, St. Paul & Pacific Railroad wrote:

> ... Fletcher contemplates asking the Executives to approve a plan of selecting a number of railroad men who have extensive personal acquaintance with members of Congress to be assigned to the work of following the progress of the various bills and more particularly to the work of anticipating action thereon by discussing the bills from the standpoint of railroad interest with members of Congress with whom they are personally acquainted, such conversations to be early enough to get the railroad point of view to the individual Congressman before they commit themselves to the proponents of the bills....
>
> In pointing out the necessity of the arrangement ... Fletcher said that hearings before the Committees are largely matters of scenery to satisfy the public and that

> the effective work cannot be accomplished in the appearances of members of his staff before Committees.[98]

Fletcher however, felt strongly against having an anti-railroad Congressman on a committee that dealt with railroad matters. While he believed that important work was not accomplished in committee, Fletcher still desired the entire committee membership to be pro-railroad to preclude negative reactions arising from the committee.

Civic Organizations

Another part of the plan to bring influence to bear on key legislators was the use of civic organizations, such as chambers of commerce. Often time railroad employees were frequently asked to go before local chambers of commerce or other such organizations, to represent the railroad viewpoint. This was desirable as these employees were dependant on the their respective companies for their pay and support.

The drawbacks were that if upper-level officials were used, an executive being more influential than a mechanic, they were already known to work for the railroads. This removed the impartiality of the information that the railroads wanted to present. Much of the information provided to these organizations to gain their support was paid for and prepared by the railroad companies or the rate bureaus. However, the railroads did not desire the people reading the information to know its source.

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98 U.S. Senate, Additional Report No. 26, Part 2, 77th Congress, 1st Session, 1941, p. 63.

To help influence these organizations as to the importance of the RBA, propaganda was developed that presented the facts concerning the 1944 Federal and Georgia cases in a more favorable light toward the railroad rate bureaus. While the official record stated that the evidence in the cases led to the conclusion that the AAR and the WARE had been practicing, among other things, price collusion for the restriction of commerce, the railroads turned it around. The railroad interests spread the rumor that the Supreme Court was looking at preventing any future collective agreements of any kind between railroads. The rail interests were so successful in rumor-mongering that they were able to convince many leaders of industry, members of Congress, and even members of the ICC that this was true. For example, a representative of the National Association of Shippers' Advisory Boards stated:

> The establishment of joint rates and through routes, which are necessary under the Interstate Commerce Act, could not be accomplished without consultation or arrangement among the carriers. The carriers could not possibly respond to the duties imposed upon them by law if each individual carrier were to act independently. The establishment of through routes and joint rates under any condition calls for consultation, conference, and for many acts of a joint or cooperative character....
>
> If the present system of establishing rates were abolished, rate making would fall into a chaotic state with severely disastrous results to both shippers and carriers.[99]

What the railroads were successful in doing was to extend the nature of the facts by implying that the Federal and Georgia cases

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[99] U.S. Senate, Hearings before the Committee on Interstate Commerce, 79th Congress, 2nd Session, on H.R. 2536. An act to amend the Interstate Commerce Act with respect to certain agreements between carriers., p. 236.

were designed to remove any joint activity. This was false. These cases were undertaken to remove joint ratemaking power from the hands of the railroad executives and bankers in New York who dominated the activities of the AAR and the WARE. The influential men received, and were convinced by, this propaganda as this was their major source of information.

The same excuse can not be extended to the members of Congress and the ICC who came to believe in it despite other sources of information. For example, in a report issued by the Senate Committee on Interstate Commerce it states:

> It is common knowledge that the many different railroads operating in this country join in through routes and through rates from every point in the country to every other point ... and that the general rate structure is made up of innumerable rates which must be properly related to each other.
>
> ... a large measure of cooperation and collective action by and among common carriers is necessary if the public is to be effectuated and if the public is to receive the kind of transportation service to which it is entitled and if the rates are to be reasonable and non-discriminatory.[100]

From the Interstate Commerce Commission came the following statement:

> It might be profitable to speculate what would happen if conference methods of rate making were discontinued. Each railroad and each carrier in other class[es] of transportation would become isolated and independent can could make rates only point to point...
>
> ...were we dealing with one shipper, only, and one destination and only two or three routes the complications even then would be prohibitive. Without conference rate, chaos would result and the national policy of transportation as written by the

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100 U.S. Senate, Committee on Interstate Commerce, 79th Congress, 2nd Session, <u>Report No. 1511</u>, p. 9.

> Congress of the United States would be a mockery; transportation such as we know in the United States would cease and terminate; and bedlam would result.[101]

These two well informed groups, Congress and the ICC, were duped by the railroad propaganda. Both the ICC and the Senate Committee on Interstate Commerce had heard testimony for years concerning the activities of the rate bureaus and most should have known that the railroads accusations were exaggerations.

In an attempt to rectify the situation, the Antitrust Division of the Justice Department issued a statement that declared the information provided by the railroads a "red herring."[102] Many did not believe this to be the case, if in fact they ever heard it. The rail interests were very successful in preaching their propaganda, and found many recruits to do so.

Concurrently with the spread of this propaganda to the civic organizations and others, the railroad lobby successfully employed another tactic to gain support. This was the use of "donations." Members of the rail lobby traveled around the nation addressing different organizations, chambers of commerce, or farmers associations, and eventually donated money to these organizations. In California alone, the Los Angeles Chamber of Commerce received over $300,000 dollars and the California State Chamber of Commerce received over $40,000 dollars from the

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[101] U.S. House of Representatives, Hearings before the Committee on Interstate and Foreign Commerce, 80th Congress, 1st Session on H.R. 221 and S. 110. A bill to amend the Interstate Commerce Act with respect to certain agreements between carriers and an act to amend the Interstate Commerce Act with respect to certain carriers, p. 219, 222.

[102] Shott, The Railroad Monopoly, p. 128.

railroad lobbyists. In Oregon, the Chamber of Commerce in Portland received over $15,000, and subsequently effect of the local newspapers published editorials in support of the RBA. The Chamber of Commerce in Seattle, Washington received $12,000 and the Salt Lake City Chamber of Commerce received over $21,000. Both of these organizations came out in support of the RBA following these "donations." The railroads also gained support in the Philadelphia Chamber of Commerce, the Pennsylvania State Chamber of Commerce, the Chicago Association of Commerce, and the Baltimore Association of Commerce. All of which came out in support of the RBA.[103]

All across the nation the railroad lobby was able to drum up support by practically buying it. It is also notable that the local newspapers in the areas that had received these donations failed to mention any story or information that was contrary to the railroad lobby's position.

In a Congressional subcommittee hearing, the frustration concerning the railroad lobby exploitation of these organizations is evident. The Chairman of the subcommittee stated:

> ... what we all ought to try to do, [is] to get the independent views of these chambers of commerce, not based on what the railroads think but what they themselves think. After all, you [the A.A.R.] maintain an office here and the railroads can get their views to the Coordinator or to the committees of Congress. But frequently what we would like to know is not just what the railroads think about it but what the general public thinks about it and what businessmen independently think about it. But we do not get that when the railroad attorneys in

[103] ibid., p. 102-105.

> the various communities just go to them and influence then to send in what the railroads want. They naturally write the answers for them.[104]

Through the use of these two tactics — influential men and civic organizations — the rail lobby was able to convince the public and Congress that there was a need to remove the ratemaking power of the railroad industry from the jurisdiction of the Sherman Act.

With this conviction the railroad lobby was able to gain the Congressional support to get the RBA passed into law in early 1948. President Truman, who had objected to the RBA since its introduction to Congress, immediately vetoed the act. However, the support gained by the railroad lobby was sufficient to have the RBA passed over the Presidential veto June of the same year.

The Reed-Bulwinkle Act

The railroads had learned to live with the clauses in the Sherman Act prohibiting such things as intercorporate stock holding and the avoidance of exclusive contracts. As matters were at the time, the railroads had found many ways to circumvent the regulations imposed by the Commission. A possible victory for the government in the Federal and Georgia cases filed in 1944 could have changed that. The passage of the RBA removed rate making from the jurisdiction of the Sherman Act and gave the Commission sole responsibility for the enforcement of fair, competitive rate making. The Congressional Record states that:

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104 U.S. Senate, Additional Report No. 26, Part 2, 77th Congress, 1st Session, 1941, p. 56.

> The broad purpose and objective of this bill, as reported, is to provide means for removing and avoiding conflict between the national transportation policy [written in 1940] and the policy of the antitrust laws, and in that way to bring an end to the confusion, uncertainties, and inconsistencies which now threaten serious harm to all interests, and particularly to shippers, who are concerned in an adequate transportation system capable of rending economical and efficient service to the public under reasonable and nondiscriminatory rates.[105]

The passage of the RBA added Section 5a to the ICA. It stated that any railroad making an agreement with another railroad that relates to rates, charges, compensation, divisions, allowances, etc., only had to apply to the ICC for approval of the agreement. If the ICC found that the agreement furthered the current policy established for transportation in the nation, then the agreement was approved; otherwise it would be denied.[106] The only real power denied railroads under this act was the pooling of freight.

The reasons given for the passage of the act, summarized in section 3.1, were that, based on the railroads' history, joint rate agreements were necessary for the continued supply of a reasonable transportation system and to meet the requirements of the National Transportation Policy as it was stipulated in the Transportation Act of 1940 (see section 2.3). In 1946, when the RBA was first considered, it was recognized by the Committee on Interstate Commerce that the practices of the rate bureaus were

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105 U.S. Senate, Committee on Interstate Commerce, 79th Congress, 2nd Session, Report No. 1511, p. 3.

106 Shott, The Railroad Monopoly, p. 169.

illegal under the antitrust laws.[107] This committee also recognized that for the railroads to remain a viable part of the nations transport system, the passage of a railroad antitrust exemption was needed. It appears that these decisions were highly influenced by the railroads through the use of their lobby efforts. It is difficult to understand how the members of Congress could view the discriminatory actions of the rate bureaus (see section 2.4) as a necessary part of railroad business.

Not all members of Congress were so influenced by the railroad interests. There was strong opposition to the RBA, including that of President Truman. The opposition felt that Congress should not look at the immediate influence of the RBA, but that the RBA should be examined for its more long reaching effects. These views were put into the official record in 1946. The Congressional Record states:

> This bill would give the railroad, motor carrier, water carrier, pipe line, and freight forwarder industries the opportunity of obtaining complete exemption from the antitrust laws. If enacted into law, the proposed legislation would cut the antitrust laws from the heart of our economy — the transportation industry....
>
> Under paragraph (9) —
>
> No agreement can be approved by the Commission under this section, and no conference or joint or concerted action pursuant to and in conformity with such agreement as the same may be conditioned by the Commission, shall be deemed to be a contract, combination, conspiracy, or monopoly in restraint of trade or commerce within the meaning of the antitrust laws.
>
> Thus, not only would combinations of carriers participating in agreements for joint and concerted action be immunized from the antitrust laws but their bankers

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[107] U.S. Senate, Committee on Interstate Commerce, 79th Congress, 2nd Session, Report No. 1511, p. 9.

> and financiers, manufacturers of railroad and other carrier equipment, and powerful shippers, taking "joint or concerted action pursuant to and in conformity with" the carriers' agreement, would be immunized from the antitrust laws.[108]

This view is quite emotionally charged, as it describes a society at the mercy of an industry that is above the law. In fact, by passing the RBA, the actions of these industries would be made exempt from the law.

Evidence from the first few years following the passage of the RBA does not support this view. In the annual report of 1948, published by the Interstate Commerce Commission, the Commission's comments on the new Act were:

> It is difficult now to estimate with any degree of accuracy the number of such agreements that will be submitted, but considering the number of existing rate bureaus, committees, conferences, et cetera, applications under this section may be expected to be numerous. To date no applications have been filed.[109]

The annual report from 1949 states:

> Thirteen applications by various groups of railroads, motor carriers, and water carriers have been submitted for our approval. Hearings have been held on several of these applications, one of which, submitted by the railroads in the western district, has been approved subject to certain terms and conditions. The decision upon that application sets forth fully our views regarding section 5a in relation to the national transportation policy and the joint-action procedures of carriers in dealing with rates and related matters.[110]

Thus, at least initially, it does not appear the concerns voiced by the minority Congressmen cited above (see footnote 108) were

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108 U.S. Senate, Committee on Interstate Commerce, 79th Congress, 2nd Session, Report No. 1511, part 2, p. 1,3.

109 62nd Annual Report of the Interstate Commerce Commission (Washington D.C.: Government Printing Office, 1948), p. 130.

110 63nd Annual Report of the Interstate Commerce Commission (Washington D.C.: Government Printing Office, 1949), p. 22.

valid. It cannot be said that the ICC was a strict enforcer, guaranteeing that the joint agreements reviewed by it would not discriminate for or against, or restrict, trade in any manner. The railroads still had to navigate the ICC review process for any desired agreements to be approved. However, the existence of this review process appears to have prevented, at least initially the railroads, rate bureaus, and other carriers from running slip-shod through the economy. The RBA did make what was formally illegal, legal.

Conclusion

When rate bureaus began to make joint rate agreements, the practice was a violation of the antitrust laws. Thus, the practice had to be kept out of the public view. However, after almost a decade of practicing joint ratemaking, the process was brought to light and the federal government began investigating. Despite a number of federal indictments, the railroads and rate bureaus were able to hold final judgment on their ratemaking until after World War II. Beginning in 1944, federal action became stronger and the railroads were faced with losing their joint ratemaking ability. Numerous railroads, rate bureaus, and their executives were indicted for violating the Sherman Antitrust Act.

Through the use of the large railroad lobby, influence was brought to bear, and legislation was introduced that would maintain the railroads' ability to make joint agreements on their rates. This was the Reed-Bulwinkle Act. Congressmen were influenced by their friends and associates. Civic organizations were brought to support the railroad view through the use of propaganda. Large sums of money were also "donated" to these organizations to win their support.

With the passage of the RBA, railroads had much of their ratemaking power returned to them. While many of the restrictions placed on the transportation industry were removed by the RBA, some level of oversight and control remained. This may not have prevented the railroads from abusing the system and damaging the economy, but many railroad executives and rate bureau members thought twice about any joint agreement that could be considered questionable by the ICC.

Furthermore, the passage of the RBA did not remove all of the railroads' activities from the jurisdiction of the Sherman Act. In some respects, this legislation was the first step in the deregulation of the railroads. For many years the regulatory noose had been tightening around the railroads. With the passage of the RBA, the noose had been loosened. The impact of the RBA and developments since 1948 concerning it will be examined in the next section.

3.3
Post Act Developments

Introduction

With the passage of the Reed-Bulwinkle Act in 1948, the ratemaking powers of all the carriers regulated by the ICC were exempted from the Sherman Antitrust Act. These carriers included not only the railroads, but trucks, water carriers, and pipe lines. The impact of the act was that these carriers could now jointly establish rates with disregard to possible government intervention.

The passage of the RBA can be considered the first step in deregulating the carriers. It removed, for the most part, an aspect of their operation from the oversight of the Federal government and the ICC. Deregulation is generally looked at as the removal of regulation, not the implementation of new law. The RBA was a different form of deregulation. Instead of the legislative bill revoking previous regulation, the RBA was a law exempting the carrier's rate bureaus from one aspect of the regulations, those pertaining to antitrust in ratemaking. The carriers (including the railroads) were still subject to the ICA and its amendments.

Many believed that the passage of the RBA would set up a private government within each of these carriers outside of the laws of the U.S. An article in the New Republic Magazine at that time stated "By freeing the $23 billion railroad industry from the anti-trust laws, the bill allows the railroads to set up a private government of their own completely outside federal authority."[111]

The belief of many, before and after the RBA was passed, was that it would extend the ratemaking abuses previously observed from the rate bureaus. It was for this reason, and also that the RBA went against his "anti-monopoly program," that President Truman vetoed the act.[112] However, the influence of the railroad lobby overcame the opposition. It is also notable that the carriers ratemaking powers were the only functions of the carriers that were exempted from the antitrust laws. All other aspects of the carrier's operations were still covered.

Following the passage of the RBA, the subject of the antitrust immunity for carriers remained an important topic with the Federal government. Indictments continued to be filed by the Federal government for antitrust violations against carriers regulated by the ICC for business behavior not exempted by the RBA. One example of such behavior, the use of contractual tying agreements, will be examined.

A report was issued by Ralph Nader in 1970 that questioned the validity of continuing the carriers' ratemaking antitrust immunity that had been established by the RBA. Ultimately, action by Congress, in 1979 and 1980, repealed the RBA from both

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[111] "Bad News for the Hinterland", New Republic, June, 1947 ,p. 8.
[112] Congressional Record — Senate, February 7, 1979, p. 2023.

the trucking and railroad industries. For such action to be taken, it appears Congress believed the RBA was detrimental to the economy.

Tying Agreements

Given the railroad industry's focus on pushing the RBA through Congress, it can be assumed that the protection of their ratemaking powers was of the utmost importance. Little effort was given to including other areas of railroad operation from the antitrust exemption. With the operations of the rate bureaus exempt from litigation, what else did the railroads need to fear from antitrust? A case that gave an answer to this question was filed in 1958 against the Northern Pacific Railroad

The Northern Securities Case of 1904 (see section 3.1) was not the only time that the Northern Pacific (NP) was prosecuted under the Sherman Act. In 1958 the Supreme Court indicted the NP, charging that a particular business practice — the use of tying agreements — constituted a violation of the Sherman Act as these agreements constituted a restraint of interstate trade. Under the theory of antitrust, such agreements:

> ... would inherently reduce competition and lead to a misallocation of resources. A seller with some degree of "market power" in one commodity - the tying good - might require users of that commodity to purchase a second commodity or service - the tied good - at unfavorable terms. Users are then said to be injured, since they would be required to make a less than optimal purchase in the tied-good market. Moreover, potential rival sellers of the tied good might be

foreclosed or excluded from the market, thereby lessening competition in that market.[113]

Like most other railroads built in the early years of the industry (during the late 1800s), when the NP was chartered it received large land grants from the government. These grants were supposed to help defray the cost of construction. For railroads such as the NP — those chartered to construct transcontinental rail lines — these land grants were very important. However, the NP received more land grants than either the Union Pacific or the Central Pacific, as the latter two also received monetary payments from the government and the NP did not.

It has been estimated that the land grants given to all of the railroads totaled more than 130 million acres. Of this vast area, the NP received over 35 million acres. Begun in 1870, the main line of the railroad was completed in 1883, and ran from Duluth, Minnesota, to the main western terminal at Tacoma, Washington.

Despite all of these land grants, the NP entered receivership many times in its early years. It was typical for most railroads to sell or lease most of the land they had been granted to strengthen their economic base, and the NP sold or leased its granted land generally with a tying agreement. This led to the indictment filed against them in 1958. The then existing conditions of agreements were that:

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113 Armentano, Antitrust and Monopoly, p. 198.

- the purchaser of the land agreed to ship all goods produced, either through manufacturing or through the extraction of resources from the land, on the NP; and
- the above condition held as long as the service and rates given by the NP were competitive with the other forms of transportation available.[114]

Given that these items were included as clauses of the sales and lease contracts issued by the NP, the government charged that this constituted a "tying agreement" used for the suppression of competition and the restraint of trade, and asked the court to rule that all such clauses be removed from all sales agreements, past, present, and future.

The Supreme Court ruled for the government. Concerning this decision, a justice of the Supreme court wrote:

> ... certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry.... They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.[115]

The attorney representing the NP argued that the NP was not restraining trade since the railroad had provided an escape clause in the sales and lease contracts. This clause was that the shippers only had to utilize the NP for transport as long as the

[114] ibid, p. 215.
[115] Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958), p. 5-6.

railroad's rates were competitive with the other available forms of transportation.[116] Another argument, in reference to those lands leased by the NP, was that the government had no jurisdiction over how a company administers the land it owns.

These arguments, however, break down once it is understood how the courts interpreted the Sherman Act. The purpose of the act was to disallow those actions that companies are tempted to employ for the purpose of improving their position at the expense of others. There is no legal precedent stating that companies can dictate to a leasing agent what can be produced on the land leased, let alone how the producer should ship it. This would be comparable to an apartment manager telling his tenants that they all have to be in bed by eight o'clock.

The court ruled that the very existence of the tying agreement in the purchase and leasing contracts applied pressure on the purchasers and the leasers, such that they felt obligated to ship their products on the NP. Therefore, the NP was guilty of restraint of trade and restriction of competition.

Evidence is also found that supports the Supreme Court's indictment against the NP. Prior to the 1958 decision, the NP had a relatively captive market of shippers. Through the moral and legal obligation that was felt by the purchasers and leasers of the railroad's land grants, the NP was guaranteed a relatively large supply of freight to ship. From the ruling set down by the Supreme Court, a fall in gross ton-miles (GTMs) might be expected.

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[116] Armentano, Antitrust and Monopoly, p. 215-216.

Through an examination of the ton-miles shipped for the five years prior to the decision as compared with the ton-miles shipped for the five years after, a fall in GTMs can be observed.

The total gross ton-miles shipped by the Northern Pacific for the five years prior to the decision on the case was 186,517,383 GTMs, and the total for the five years after was 172,045,200 GTMs. The difference in GTMs for the two periods is 14,472,183, a decrease of 8%. This decrease in freight shipped would have meant tens of millions of dollars in income for the Northern Pacific.

The Nader Report

In 1970, the Ralph Nader Study Group issued a report on the actions and policies of the ICC entitled "The Interstate Commerce Omission." This report examined the state of the United State's transportation system, particularly in relation to the railroad and trucking industries; and examined the ICC's record of upholding the public interest in regards to the regulation of these industries. It was the belief of the Nader study group that the role of the ICC was "the aggressive and independent representative of the general public interest."[117]

The report once again established that transportation policy has far reaching effects, and reaffirmed the issues put forward by the Federal and Georgia indictments of 1944. These were that the

[117] Robert C. Fellmeth, The Interstate Commerce Omission (New York: Grossman Publishers, 1970), p. xiv.

transportation industry's ratemaking policies have strong, nation wide, economic effects. The Nader group contended that despite the common belief that a railroad or trucking company's rate policy only affects costs to the shipper, it has been shown through government study that these ratemaking policies have strong effects on consumers and the U.S. economy. This contention was also put forth by Senator Kennedy in 1980. He stated in a Congressional hearing that the Congressional Budget Office estimated that if the transportation industries rates were controlled by market forces it could reduce the costs to consumers by between $5 and $8 billion annually, and decrease inflation between 0.3 and 0.45 percent.[118]

The Nader Report also raised the question of rate discrimination. The 1944 indictments against the rate bureaus had been, explicitly, based on rate bureau discrimination. To ensure the passage of the RBA, the railroad lobby side-stepped this issue by claiming that the use of rate bureaus in ratemaking promoted stability and cooperation between the carriers. This stability and cooperation was stated by the railroad lobby to be in the public interest. Nader's report, however, provided evidence that the discrimination instituted by the rate bureaus back in 1930s were still in operation. A portion of this evidence is presented in Table 3 (see Appendix C).

The data in this table demonstrate that the majority of goods being shipped in 1961 were still moving from the west and

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118 Congressional Record — Senate, April 15, 1980, p. 7837.

the south into the east, whereas, the revenue/cost (i.e., "profit" as defined in the source reference) was higher for the shipment of goods out of the east. As previously discussed in section 2.4, it can be assumed that the majority of the goods being shipped into the east are bulk goods, and those being shipped out of the east are the finished goods. This assumption is collaborated by the data given above.

These data further back up the contentions voiced by the 1944 indictments that the discriminatory policies of the rate bureaus affect the industrial conditions of the nation. This contention is further strengthened by Nader's evidence. The large amounts of bulk goods flowing into the east is accounted for by the large number of manufacturing facilities found there, in proportion to the rest of the nation.

Evidence was also given that showed strong rate discrimination in those areas where the railroads had captive shippers, particularly in those areas where shippers had no access to a water carrier. A captive shipper is one who only has access to the railroads to ship his goods. It was found that in a comparison between areas with and without access to water carriers, there was a 48% to 285% increase in rates in areas without access over those with.[119] Concerning this type of discrimination — that of captive shippers — Ann Friedlaender has stated:

> In addition to commodity price discrimination, the railroads practice extensive locational price discrimination. Since many small intermediate towns have more

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[119] ibid., p. 167.

> limited transport facilities than large consuming and producing centers, market pressures tend to make rates on shipments to these towns higher than rates on larger shipments between two major consuming centers. Although Section 4A of the Interstate Commerce Act is specifically supposed to limit this form of price discrimination, the ICC has generally permitted relatively higher rates between the major centers if the carrier can show the existence of competitive pressures. This is particularly true if the railroad faces water competition.
>
> Locational price discrimination is particularly evident on shipments of bulk commodities. Since the general elasticity of demand for transport on the part of bulk commodities is relatively high and the cross elasticity between modes is higher, the existence of water competition should push rates down toward marginal cost. Where competition does not exist, however, the railroads can exercise their monopoly power...[120]

When deregulation legislation was being introduced in Congress, the evidence presented in the Nader report, as well as its conclusions and recommendations were considered. Based on the evidence given in the report, the rate bureaus had practiced discriminatory ratemaking since before the passage of the RBA, up to the time the report was printed. The report concluded that through the ICC's poor enforcement of existing rate regulations — those outside the antitrust exemption — serious harm to the U.S. economy had occurred.

Nader's recommendations were that the ICC should be eliminated, and a new regulatory body established; and that the only answer to the rate bureaus, and the discriminatory practices that they promoted, was to outlaw them.[121]

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120 Ann Friedlaender, The Dilemma of Freight Transport Regulation, (Washington D.C., Brookings Institute, 1969), p. 61.
121 Fellmeth, The Interstate Commerce Omission, p.317, 318, 324.

Recent Federal Developments

In the last years of his presidency, President Carter supported three legislative bills that were to have strong impacts on the transportation systems of the United States. These bills were those deregulating the airline, trucking, and railroad industries. The airlines were deregulated in 1978, and thus acted as a test-bed for the deregulation of the other two. The trucking deregulation bill was signed into law by the president on July 1, 1980, while that relating to the railroads was passed by both houses of Congress on September 30, 1980, and signed into law on October 14, 1980.

The driving force behind the trucking and railroad bills was Senator Edward Kennedy. He reported on April 15, 1980 that the passage of these bills would be the culmination of three years of investigation and hard work. Of the provisions that he desired be included in the legislation, two pertained to ratemaking. These were:

- the development of a rate "zone" in which the carriers would be able to set rates without the changes being reviewed, and possibly disapproved, by the ICC; and
- removing the rate bureau immunity of the antitrust laws in regards to collective ratemaking.[122]

In support of deregulation and these provisions, Senator Kennedy reported to Congress that the repeal of the RBA had been proposed many times. Along with the Nader Report of 1970, the

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[122] Congressional Record — Senate, April 15, 1980, p. 7837.

list included a bill proposed by the Department of Transportation in 1971, and a proposal for the removal of the antitrust exemption supported by President Ford in 1976.

Strong opposition to deregulation was faced during the many months the trucking bill was discussed in Congress. There were many instances of trucker strikes and a call was made by the Teamsters Union for a national strike. This opposition was based largely on the possible repeal, at the time, of the RBA. For the carrier interests, both trucking and railroad, the removal of antitrust immunity would mean the end of joint ratemaking and the inflated rates found in many areas.

To demonstrate the general support for deregulation, numerous newspaper editorials from around the U.S. were read into the Congressional Record. For example, the Louisville Times reported on July 2, 1979 that:

> ... freight rates for trucks that come back empty ... or travel 1142 miles to go 512 miles, are set high enough to cover all the costs, plus pay a profit. The trucking industry, through 10 regional rate-making bureaus it finances, makes sure of it.
>
> In most other businesses, of course, that kind of thing violates anti-trust laws. But in 1948, the railroad and trucking lobbies pushed a law through Congress allowing those industries to set their own rates.
>
> ... the most important feature of the bill is to steer the industry into the free enterprise system. The anti-trust exemption for cartel ratemaking would be eliminated and the doors opened to qualified competitors.[123]

Many similar editorials from New Mexico, Florida, Kansas, Illinois, Idaho, Kentucky, New York, and other states were read in support

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[123] Congressional Record — Senate, July 31, 1979, p. 21566.

of the deregulation bill. The strongest support came for the success of the airline deregulation. It had been believed that such deregulation would not prove successful for airlines. However, in the two years following the passage of that bill, air-fares had dropped and revenues were up for most of the airlines.

Despite the fierce opposition put up by the trucking interests, the deregulation plan was passed, including those provisions sponsored by Senator Kennedy. Among the provisions of the bill was an amendment to the Clayton Act. This amendment specified that all agreements relating to ratemaking were once more within the jurisdiction of the antitrust laws.[124] For the trucking industry in particular, the deregulation bill basically dissolved the rate bureaus as it terminated all joint ratemaking.

Like the deregulation for the trucking industry, that of the railroads also formed a range of rate setting freedom. Until 1984, any railroad could increase its rates 6% per year without any prior approval from the ICC. After 1984, a railroad could only raise its rates, by 4%, but only if the railroad was not receiving a

[124] Congressional Record — Senate, March 21, 1979, p. 5717; It reads "Section 11 of the Clayton Act is amended by — (2) The antitrust laws as defined in section 1 of the Clayton Act shall apply to parties and other persons with respect to making or carrying out any agreement related to rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedure for join consideration, initiation or establishment."

reasonable rate of return. The bill also disallowed the seasonal increase of rates, such as in the autumn during harvest time.[125]

Most of the consideration for the deregulation bill of the railroad industry, referred to in the Congressional Record as the "Railroad Transportation Policy Act of 1980" came from the work done for that of the trucking industry. All of the evidence uncovered by the Congressional investigations and research pertaining to the continued abuses and discriminatory actions of the rate bureaus was applicable to the railroads. However, in contrast to the deregulation of the trucking industry, it was recognized that the railroads were a special case, and that the existence of rate bureaus was essential to the smooth operation of the transport system.

The railroads differed from trucks due to the need for setting rate agreements on joint line shipments. For unlike trucks, railroad tracks were fixed in place and trains could only travel freely over the rail owned by its particular company. The majority of freight shipped by the railroads was moved by more than one company, thus, many companies shared the revenue generated by a shipment. For this reason, the ability to discuss and set joint rates was essential for the railroads.

Although rate bureaus were retained, the legislation that was eventually passed at the end of 1980 pulled the teeth of the rate bureaus. While it removed the antitrust immunity of the rate bureaus in their ratemaking powers, it established new rules for

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[125] 1980 CQ Almanac, p. 248-249.

the negotiation of joint line rate agreements between railroads. Specifically, these rate conferences would take place within the rate bureaus, but only those railroads that were actually taking part in the shipment could vote on the rate agreement. Representatives from other railroads could sit in on the discussion and add comments, but they could not vote. Another provision was that all such meetings held within the rate bureaus would have to be recorded and that the transcripts of the meetings as well as the results of any voting be supplied to the ICC or any other Federal organization that requested them.[126] This was extremely different from the old rate bureau operations. Prior to deregulation, all meetings held within the rate bureaus were considered secret, and due to the antitrust immunity, the Federal government could not demand disclosure of the minutes of any meeting.

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[126] Congressional Record — Senate, April 1, 1980, p. 7297; The amendment reads: "(i) permit a rail carrier to participate in an agreement unless the terms of such agreement provide that transcripts of sound recordings shall be made of all meetings, that records of votes shall be made, and such transcripts or recordings and voting records shall be submitted to the Commission and made available to other Federal agencies in connection with their statutory responsibilities over rate bureaus...

... Notwithstanding clause (i) of this paragraph, a rail carrier may participate in discussions related to single-line rates proposed by another rail carrier or rates related to a particular interline movement. Such discussions may include such matters as whether the proposed rates are noncompensatory, would result in discrimination between shippers or localities, would adversely affect the movement of traffic, ... or would necessitate adjustments in other rates. Such discussions shall be limited to comments upon the proposal and shall exclude any agreement, express or implied, to approve, modify, disapprove or withdraw the proposals, ... such agreements may be made by a rail carrier that can practicably participate in that movement....

Conclusion

The transportation systems of the United States have enormous effects on the nations economy. For raw materials and finished goods to flow, a smoothly operating, efficient transport system is required. Having the nation's system governed by the rate bureaus made it anything but smooth and efficient.

The evidence gathered the Nader Study Group and the numerous Congressional investigations demonstrated that the abuses and discriminatory practices of the rate bureaus continued after the passage of the Reed-Bulwinkle Act. The example of the tying agreements perpetuated by the Northern Pacific demonstrated that railroads continued to use their monopolistic powers to artificially (outside of market forces) set and control rates. The cooperation and stability of the railroad industry, lauded as the desired outcome of the RBA, had occurred but it had not protected the railroads from bankruptcy. The antitrust exemption had only given immunity from prosecution to those who were abusing their ratemaking powers.

To remove the blight of the rate bureau's policies from the U.S. economy, the antitrust immunity needed to be dissolved. Such action had been recommended many times in the years following the passage of the RBA; but it finally occurred with the bills deregulating the railroad and trucking industries in 1980.

Trucking companies were no longer allowed to participate in joint ratemaking. With their antitrust exemption removed, the trucking rate bureaus served no purpose. The railroads were a different case. The need for a location to discuss joint-line shipment rates was needed, and rate bureaus fulfilled that function. However, only those railroads actually participating in the joint shipment were allowed to vote on what the joint rate would be, and then all transcripts and voting records would need to be made available to the ICC.

With the passage of the Railroad Transportation Policy Act of 1980, the ability of the railroad rate bureaus to perpetuate discriminatory practices ended. While the RBA was deregulating in nature, by removing an aspect of railroad operation from oversight, it had removed a major area of railroad operation that needed it. In 1980, the problem of unnecessary joint ratemaking was once again made an antitrust violation, and the majority of other regulations removed.

4.0
Conclusion

The threat of large, monopolistic, railroad empires in the late 19th century was seen by many people as an enemy to be defeated at all costs. Senator Sherman, the originator of the Sherman Act, voiced this opinion against monopolies when he said:

> The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and civil law, is null and void and just subject to restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of combination we have to deal with now.[127]

From an economic standpoint it is easy to agree with Senator Sherman. When monopolistic practices are conducted in a

[127] Sullivan, The Political Economy of the Sherman Act, p. 55.

malicious manner, such that the law of selfishness is the driving force, the consequences described by him do occur. The perfect examples of this law of selfishness are found in the actions of the railroad rate bureaus, specifically after their consolidation under the Association of American Railroads in the 1930s.

By their manipulations of the regional rate system, the rate bureaus had constructed a rate structure that appears to have favored the Eastern economy, even though this cooperation had brought considerable stability to the railroad industry. It has been postulated that the rate bureau officers were fostering Eastern businesses to the detriment of the rest of the nation. Evidence supporting this speculation was presented many times to the Interstate Commerce Commission and to Federal officials in the attempt to end the discrimination. Based on this evidence, two indictments were filed, in 1944, stating that the rate bureaus were in essence a monopoly, and thus, had violated the antitrust laws.

From the stand point of the railroad executives and the rate bureau officers, continued regulation, especially the removal of their joint ratemaking powers, would be bad for business and bad for the railroads as a whole. This opinion was based on previous occurrences before the cooperation of the rate bureaus had been introduced. There had been many instances where joint ratemaking would have prevented rate wars and the eventual bankruptcies that followed such wars. From the point of view of the railroad and rate bureau interests, the continuation of joint ratemaking was in their and the publics best interest.

Thus, after a concerted effort by the railroad lobby, legislation was passed that gave the rate bureaus antitrust immunity. This legislation was the Reed-Bulwinkle Act of 1948. In essence, the Federal government made the rate bureaus a legal monopoly.

There are times when monopolies may be desirable, as long as there is sufficient control over their operations so that improper behavior does not arise. For the railroad rate bureaus, assurances needed to be given and enforced that the past discriminatory behavior would not be continued. However, this did not occur. While the ICC still regulated the majority of the railroad operations, the Commission became a rubber stamp authority for the approval for any of the rate bureau's ratemaking changes; and the discriminatory ratemaking practices continued.

Pressure by members of Congress and other watchdog groups, such as the Ralph Nader Study Group, continued to be applied for the repeal of the RBA. Investigations by Congress and these groups showed that the carrier industries, including the railroads, were in need of deregulation. Despite the cooperation within the industry fostered by the rate bureaus, the railroads were in financial trouble as more and more cargo transport continued to be changed from rail to truck.

From the standpoint of the railroads, the passage of the RBA had provided some measure of relief from government regulation.

It had allowed them to cooperate and compete as a group with the other modes of transportation. The move toward deregulation was the spirit of the RBA. However, with the passage of the RBA, the rate bureaus were given immunity from the antitrust laws, despite the fact that their policies had proven to be discriminatory to various areas of the U.S. and harmful to the economy. The RBA allowed these policies to perpetuate.

In 1980, legislation was passed that deregulated the railroad industry. Most of the ratemaking regulations that had been implemented by the Interstate Commerce Act, and its many amendments, were removed. At the same time, the antitrust immunity of the rate bureaus was also removed. Cooperation was still allowed under the new regulations, but only among those railroads that were actually participating in a joint shipment.

But was all of this activity in the best interests of the public? Was the deregulation of 1980 successful in establishing a more efficient and cost effective railroad industry? These are questions that can not be answered with certainty here.

Deregulation in 1980 was perhaps as essential as the initial regulations of the late 1800s. While the Reed-Bulwinkle Act was passed under the guise of further regulation, it in fact deregulated a key area of the railroad industry, its ratemaking powers. This act, however, allowed the discriminatory policies of the railroad rate bureaus to continue. Through actions of bodies such as the Nader Study Group and Congress, the weaknesses of the RBA were recognized, and corrected through the Railroad Transportation

Policy Act of 1980. Although the number of large rail companies has declined since that time, primarily through mergers and buy-outs, the extent of track and quality of service has not, and the furor over discriminatory rates has ceased.

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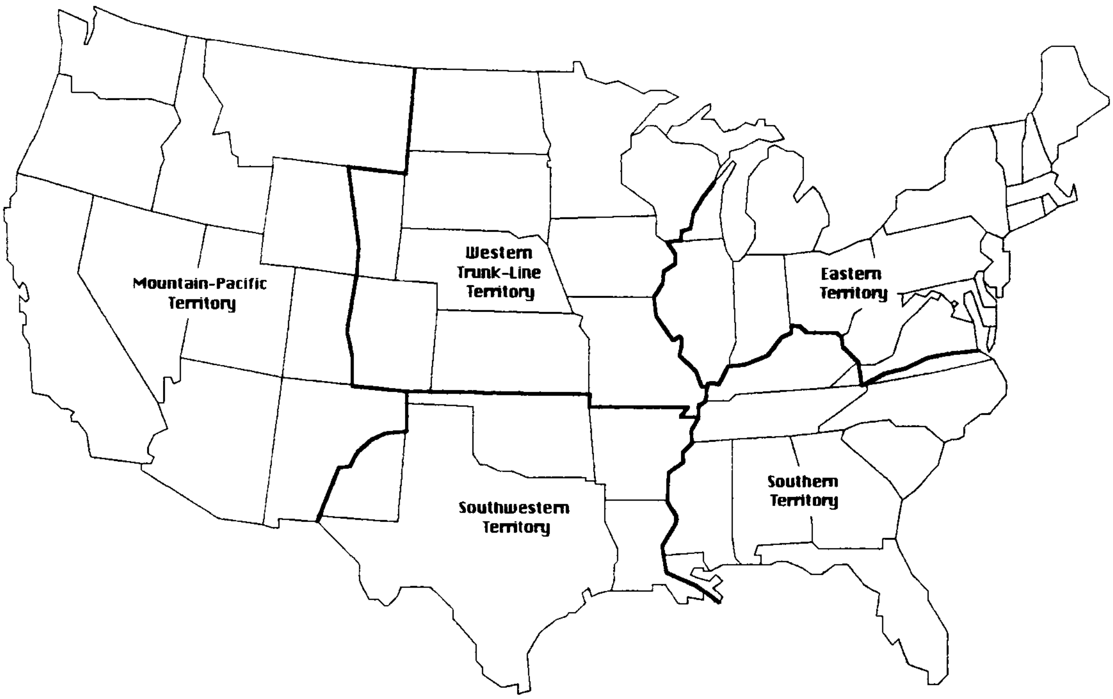
Appendices

Appendix A

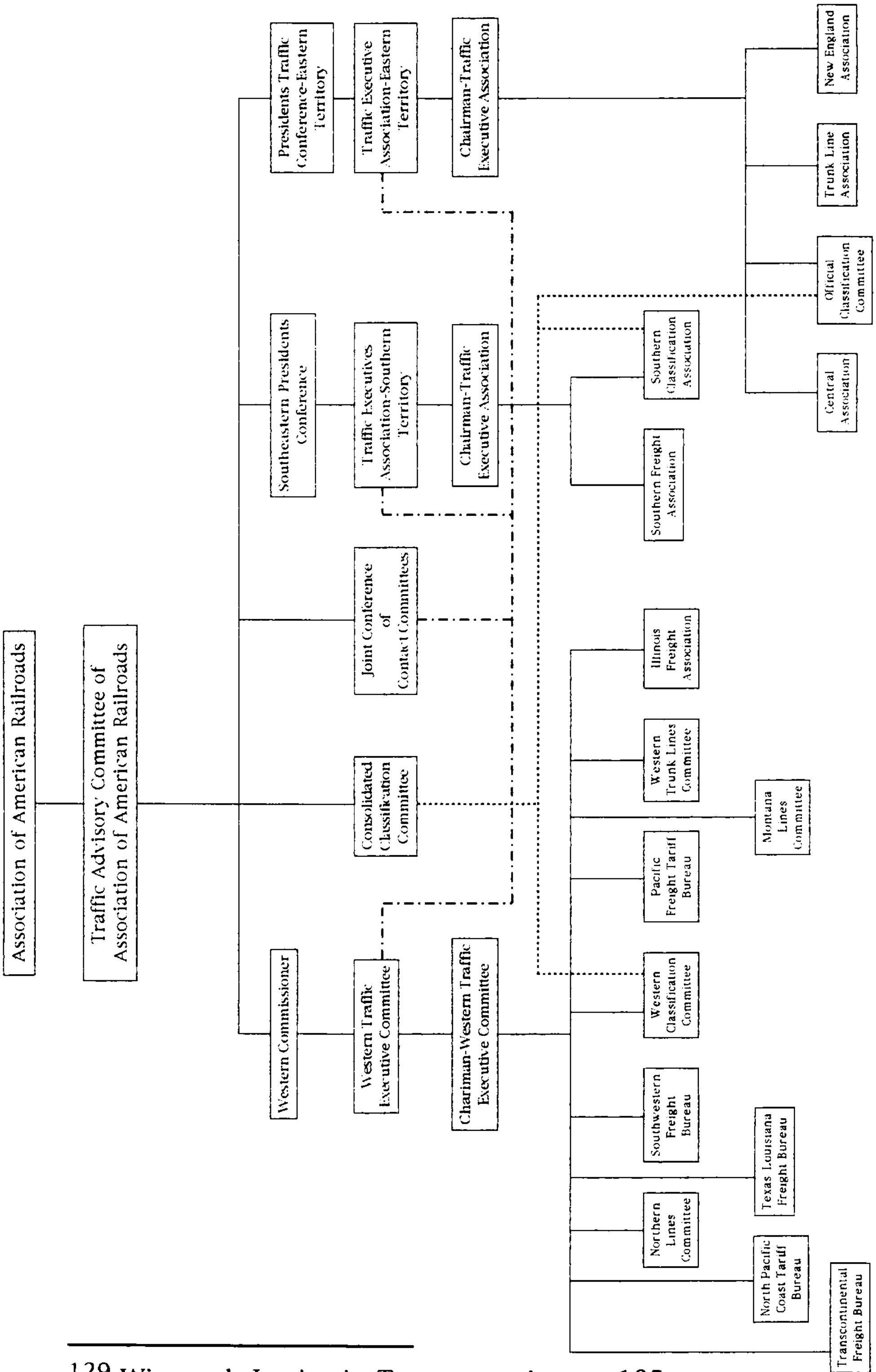
The Official Rate Territories of the United States[128]



128 Wiprund, Justice in Transportation, p. 183.

Appendix B

Railroad Rate Bureaus of the U.S.[129]



129 Wiprund, Justice in Transportation, p. 185.

Appendix C

Table 1[130]
Class 1 Rates in cents per 100 pounds for 1937

Distance in Miles	Southern	Southwestern	Western Trunk-Line	Eastern	Mountain -Pacific
25	44	48	42	36	35
100	76	88	74	56	70
200	102	120	100	73	101
300	122	144	121	87	128
400	142	168	141	99	155
500	157	192	161	111	182
600	172	215	181	123	207
700	187	239	201	135	231
800	202	257	216	145	255
900	214	275	231	155	279
1000	226	294	246	165	303
1100	238	312	262	175	320
1200	250	330	277	185	337
1300	262	348	293	195	354
1400	274	367	308	205	371
1500	286	385	323	215	388

130 ibid., p. 11.

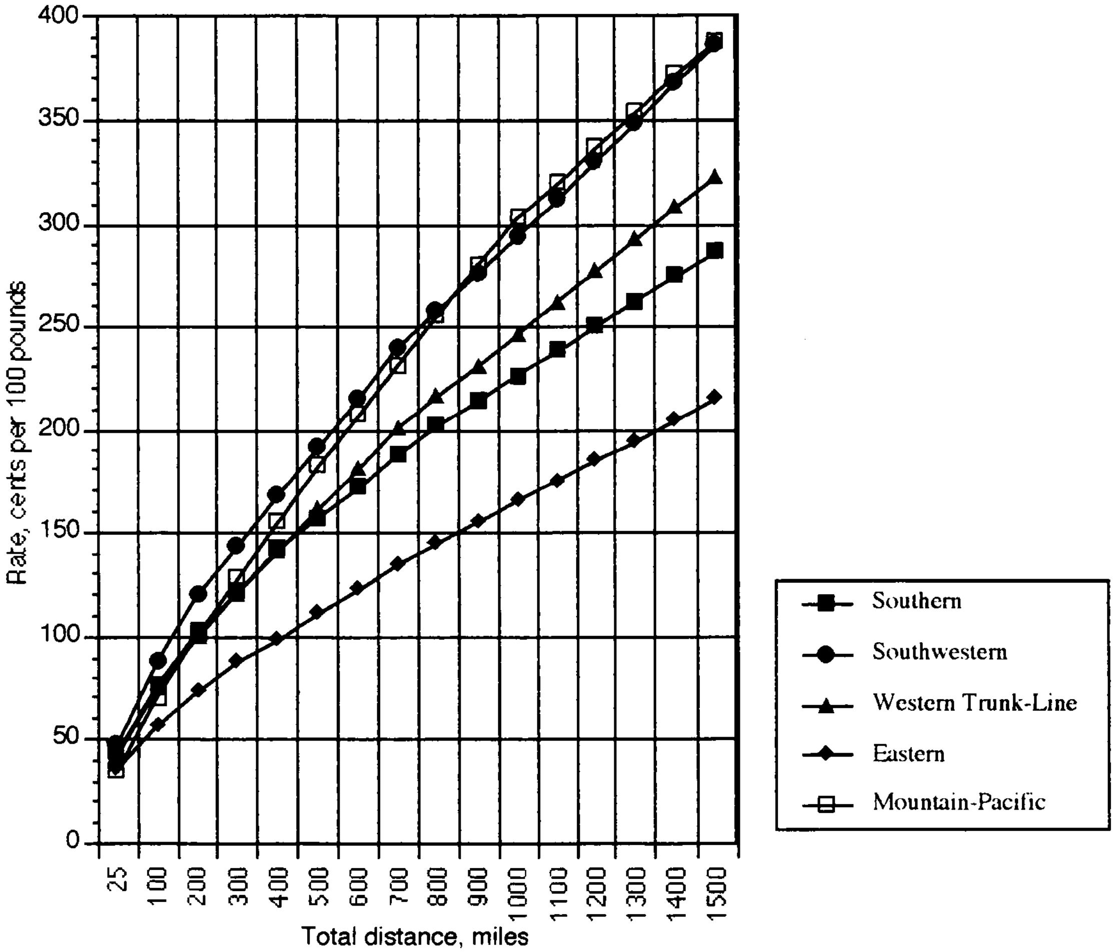


Figure 1
Relation of Territorial Class 1 Rates for 1937

Table 2[131]

Comparison of Typical Interterritorial Class 1 freight rates, in cents per 100 pounds, from Southern Territory to Eastern Territory and within Eastern Territory for approximately equal distances

From	To	Miles	Class 1 Rate	Territories
Nashville. TN	Columbus. OH	411	153	E/S
St. Louis. MO	Columbus. OH	418	111	E
Knoxville. TN	Cleveland. OH	521	173	E/S
St. Louis. MO	Cleveland. OH	522	128	E
Montgomery. AL	Springfield. OH	657	202	E/S
New York. NY	Springfield. OH	657	141	E
Montgomery. AL	Toledo. OH	775	217	E/S
Taunton. MA	Toledo. OH	777	143	E
Birmingham. AL	Reading. PA	879	229	E/S
Chicago. IL	Newark. NJ	873	167	E
Atlanta. GA	Chicago. IL	931	235	E/S
Chicago. IL	Worcester. MA	933	169	E
Charleston. SC	Peoria. IL	1000	251	E/S
Springfield. MA	Peoria. IL	1002	178	E

131 House Document 271, "Supplemental Phases of the Interterritorial Freight Problem", 76th Congress, 1st Session, p. 8.

Table 3[132]
Discrimination by Direction and Region
All Commodities, 1961

Direction	Ton-Miles	Tons	(revenue/cost)
East to South	113,400,000	180,418	152
South to East	238,080,000	371,582	134
East to West	229,162,000	149,118	161
West to East	511,700,000	300,876	115
South to West	96,744,000	83,411	156
West to South	169,740,000	137,950	134

[132] Fellmeth, The Interstate Commerce Omission, p. 176.

Appendix D

AN ACT to regulate commerce.[133]

(The Interstate Commerce Act)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia,* or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly

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[133] Second Annual Report of the Interstate Commerce Commission, Government Printing Office, Washington, 1988 (emphesis added).

within one State, and not shipped to or from a foreign country from or to any State or Territory, as aforesaid.

The term "railroad" as used in the act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring and such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the [provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; Provided, however, That upon application to the Commission appointed under the provisions of the act such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the *terminal charges and any rules or regulations which in any wise change, affect, ar determine any part or the aggregate of such aforesaid rates and fares and charges.* Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fare, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days public notice, which shall plainly state the changes proposed to be made in the schedule then in *force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.*

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, that is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or *arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party.* And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariff's of rates or fares or charges for such continuous lines or routes, copies of such joint tariff's shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgement of the Commission, be deemed practicable; and said Commission shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariff's of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offense may be committed, and is such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to retrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to *the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.*

Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec.9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. That any common carrier subject to this provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee. lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, an act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.

SEC. 11. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five and six years respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. *No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment.* No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Sec. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall *keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which is was created;* and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motions in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. *That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party of parties who may be found to have been injured*; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facia evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Sec. 15. That is any case in which an investigation shall be made by said Commission, it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party of parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its offices, agents, or servants, in such manner as the court shall direct and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgement in the matter of such petition; and on such hearing the report of said Commission shall be prima facie evidence of the matters therein stated: *and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission,* and enjoining obedience to the same; *and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to* *obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the Treasury;* and payment thereof may without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the AttorneyGeneral of the United States to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Sec. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations.

Sec. 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United

States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the Commission and the Secretary of the Interior.

Sec. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Sec. 20. *That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information.* Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same the dividends paid, the surplus fund, if any, and number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the

Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 21. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary.

Sec. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in the act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statue, but the provisions of this act are in addition to such remedies. Provided, That no pending litigation shall in any way be affected by this act.

Sec. 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto.

Sec. 24. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

Approved, February 4, 1887

Appendix E
Important Excerpts from the Sherman and Clayton Antitrust Acts[134]

SHERMAN ACT, 1890

Sec. 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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[134] Irwin M. Seltzer and Howard P. Kitt, Selected Antitrust Cases, Landmark Decisions (Ontario: Richard D, Irwin, Inc., 1981), p. 518-522.

ANTITRUST PROCEDURES AND PENALTIES ACT, 1974, AMENDING SECTIONS 1 AND 2 OF THE SHERMAN ACT

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $1 million if a corporation, or, if any other person, $100,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $1 million if a corporation, or, if any other person, $100,000 or by imprisonment not exceeding three year, or by both said punishments, in the discretion of the court.

CLAYTON ACT, 1914

Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lesson competition or tend to create a monopoly in any line of commerce: Provide, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

ROBINSON-PATMAN ACT, 1936, AMENDING SECTION 2 OF THE CLAYTON ACT

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provides further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale of purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or in behalf, or is subject to the direct or indirect control, of any party to such transactions other than the person by whom such compensation is so granted or paid.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products of commodities, sold, or offered for sale by such person unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contribution to the furnishing of, any services or of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

CLAYTON ACT, 1914

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity of competitor or competitors of the lessor seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or ten to create a monopoly in any line of commerce.

FEDERAL TRADE COMISSION ACT, 1914

Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

CLAYTON ACT, 1914

Sec 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition or to restrain such commerce in any section of community or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition or the use of such stock by the voting or granting of proxies or otherwise may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.

Appendix F

THE REED-BULWINKLE ACT[135]

[PUBLIC LAW 662 - 30TH CONGRESS]

[CHAPTER 491 - 2D SESSION]

[S. 110]

AN ACT

To amend the Interstate Commerce Act with respect to certain agreements between carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act, as amended, is amended by adding after section 5 thereof a new section as follows:

"Sec. 5a. (1) For purposes of this section -

"(A) The term 'carrier' means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

"(B) The term 'antitrust laws' has the meaning assigned to such term in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914.

135 Shott, The Railroad Monopoly, p. 169-170.

"(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall be order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6)), if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

"(3) East conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

"(4) The Commission shall not approve under this section any agreement between or among carriers or different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicles are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

"(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

"(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through join consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

"(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

"(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

"(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

"(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9)."

Vita

Scott Holbrook Pope was born in Campbell, California, June 3, 1965. He attended elementary schools in Albuquerque, New Mexico and Mesa, Arizona; and public junior high, the Albuquerque Academy (a private college-preparatory school), and a public high school — all in Albuquerque, New Mexico. He entered the University of Utah, Salt Lake City, Utah, in January, 1984. In November, 1985 he entered upon voluntary service for his church, learned the Portuguese language, and lived for 16 months in northern Brazil. He re-entered the University of Utah in January, 1987, and obtained a Bachelor of Arts degree in Economics with a minor in Geography. For periods of time preceding and during his undergraduate education, he also lived with his parents in Vienna, Austria. he is fluent in the Portuguese language, and has a working knowledge of the German and Spanish languages. He entered the University of Tennessee, Knoxville, in September, 1990, and received his Master of Arts degree in Economics in December, 1992.