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ICC Jurisdiction of Great Lakes Rail-Water Competition

Arthur E. Miller*

THE DECLINE OF THE INDEPENDENT Great Lakes water carrier is of substantial importance to transportation users located in the midwest industrial region who depend on effective competition to insure non-discriminatory treatment in the commercial forum. Although the Interstate Commerce Commission has supervised the competitive arena, the age and condition of the Great Lakes fleet manifests water carrier inability to overcome railroad economic power. The viability and future existence of the Great Lakes water carrier could well be determined by a Commission decision^{1a} in a current coal case which represents the most serious in a long history of rail attacks on waterborne traffic.

The regulatory framework surrounding the transportation industry is complex and the absence of any easy resolution of contemporary problems fostered by competitive abuse can be appreciated only by viewing the development and application of administrative powers initiated by the Act to Regulate Commerce.¹

The Interstate Commerce Commission

The Interstate Commerce Commission was created in 1887 by The Act to Regulate Commerce and is charged with responsibility for enforcing policy and regulatory control in transportation. After the Supreme Court invalidated state efforts to control railroad monopoly power,² an impartial tribunal was needed to preserve a free competitive marketplace for small volume shippers and unfortunately situated communities who were deprived of equal economic growth because of rate concessions exacted by influential industrialists and politicians.³

The Act of 1887 did not provide the comprehensive power needed by the Commission to carry out Congressional intent. As a result, nu-

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^{1a} Lake Carriers Assoc. v. N. Y. Central R.R. et al., I.C.C. Docket 34822.

¹ 24 Stat. 379 (1887).

² Wabash, St. L. and P. Ry. v. Illinois, 118 U.S. 557 (1886).

³ Jaffe and Nathanson, Administrative Law 384 (2d. ed. 1961); Moore, What Limitations, If Any, Should There Be On The Power of Common Carriers to Publish Rates to Meet Intermodal Competition, Intramodal Competition, or Any Other Competition?, 30 ICC Prac. J. 10 (Oct., 1962).

merous statutes⁴ were subsequently enacted to broaden jurisdiction over the increasing transportation complexities and intense carrier competition stimulated by the expanding economy. The proprietary of the legislative delegation of these powers was repeatedly challenged, but justification was ultimately established through decisions of the courts.

Likewise, the wide range of administrative discretion and jurisdiction in deciding intermodal matters came as a result of judicial analysis. As early as 1907⁵ the Supreme Court placed issues of rate reasonableness within the exclusive primary jurisdiction of the Commission, thereby initiating the doctrine that exhaustion of administrative remedies is mandatory before judicial review is available.⁶ The logic of this judicial legislation⁷ was supported by the theory of administrative expertise.

⁴ To mention a few: The Elkins Act, 32 Stat. 847 (1903), was instigated by carriers who were forced to give rate concessions in return for the traffic of powerful shippers. Under this Act, shippers are subjected to liability for receiving rebates. In response to the Supreme Court decision in 1897, *ICC v. Cincinnati Ry.*, 167 U.S. 479 (1897), that the Commission's power to reject existing rates did not extend a right to set them for the future; the Hepburn Act of 1906, 34 Stat. 584 (1906), and the Transportation Act of 1920, 41 Stat. 488 (1920), were enacted and authorized the Commission to order maximum and minimum future rates, respectively. After the Supreme Court decided in 1945, *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), that inter-carrier ratemaking came within the monopolistic regulation of the Justice Department, The Reed-Bulwinkle Act was passed in 1948, 62 Stat. 472 (1948), and provided carriers anti-trust immunity for discussion of rates under Commission jurisdiction, Sec. 5a, Interstate Commerce Act.

The Transportation Acts of 1920, 1940 and 1958, 41 Stat. 488, 499 (1920), 54 Stat. 899 (1940), 72 Stat. 570 (1958), delegated to Commission jurisdiction the power to cure competitive abuse, administer transportation policy, strengthen railroad financial ills, develop water transportation and enforce rate-making guidelines in intermodal competition.

The commodities clause, Sec. 1(8), Interstate Commerce Act, and the Panama Canal Act, Sec. 5(14) (16), Interstate Commerce Act, empowered the Commission to regulate common ownership in transportation. The former clause sought to end railroad ownership of commodities it carried so that like goods of others would be accorded equal treatment. The latter Act prohibited railroads from owning a water carrier with whom it could compete, unless justified in the public interest. The need for this legislation came as a result of railroad operation of its water entity at depressed rates that made entry or continued existence of independent water carriers economically unfeasible. The shipping public was deprived of the benefits and service of genuine competition. *Lake Lines Applications Under the Panama Canal Act*, 33 I.C.C. 699, 700, 716 (1915); Nupp, *Regulatory Standards In Common Ownership In Transportation*, ICC Prac. J. 34:21 Nov.-Dec. '66.

⁵ *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

⁶ *Ibid.*; *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956).

⁷ Critics of the exclusive primary jurisdiction doctrine charge that it is a judicial abandonment of duty, subverting congressional intent. The argument proceeds along the lines that a shipper had a right to damages, under common law, for unreasonable rates charged by a carrier. After the 1887 Act, he could still elect to bring his action before the Commission or a court.

The contention is not without merit since the common law right was never specifically repealed. Sec. 22, Interstate Commerce Act is in point:

. . . and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies. . . .

Texas and Pacific, *supra* n. 5. See generally, *Convisser, Primary Jurisdiction: The Rule and Its Rationalizations*, 65 *Yale L. J.* 315 (1956).

The rationale of Judge Brandeis is illustrative:

Preliminary resort to the Commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.⁸

Uniformity of rates could not be achieved if several courts exercised contemporaneous jurisdiction over a single movement through different states.⁹ The result would be inconsistency in scope of remedy and enforcement. Therefore, initial determination by one nonpartisan body, well-informed on the transportation system as a whole, affords a court the benefit of previous expert findings when time for recourse to judicial proceedings is ripe.¹⁰

From a practical standpoint, discretionary latitude and primary jurisdiction have lodged within the Commission a unique ability to function with a minimum of interference. Conversely, these doctrines have sometimes been the source of unwarranted hardship to carriers who present their matters for impartial resolution.

Rail-Water Competition

Early activity of the Commission centered on preserving an open market and insuring transportation development commensurate with economic growth. Intermodal competition was not predominant and disputes normally involved the railroads and shipping public.¹¹

The revitalization of the water carrier industry in the 1930's intensified carrier competition and shippers were then able to instigate cut-throat competition for their traffic in order to receive lower rates.¹²

Authority for many rail rate reductions aimed at capturing water traffic is sanctioned by relief from the long and short haul provisions under the Interstate Commerce Act.¹³ To satisfy the requirements, gen-

⁸ Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922).

⁹ *Ibid.*; Texas and Pacific, *supra* n. 5; Moore, *op. cit. supra* n. 3 at 11.

¹⁰ United States v. Western Pacific, *supra* n. 6; Eagle Cotton Oil Co. v. Southern Ry. Co., 51 F. 2d 443 (5th Cir. 1931).

¹¹ Moore, *op. cit. supra* n. 3 at 11.

¹² *Id.* at 13-17.

¹³ 49 U.S.C. 4; Sec. 4(1), Interstate Commerce Act, "It shall be unlawful for any common carrier . . . to charge . . . any greater compensation . . . for a shorter than for a longer distance . . . in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates . . . Provided, that . . . such carrier . . . may be authorized by the Commission to charge less for longer than for shorter distances . . .

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uine competition must exist and reductions can be no lower than necessary to meet the existing rate. In practice, reduced rail rates have often been granted with little regard for statutory prerequisites.¹⁴

Liberal railroad access to the rate relief provisions has also placed certain shippers at a competitive disadvantage. A landlocked shipper loses his ability to compete in the same market with a shipper located in the vicinity of rail-water competition.¹⁵ Rail rates are seldom equated in non-competitive areas because a high level of revenue from this traffic maintains the "war chest" to finance losses caused by selective rate cutting.¹⁶

Water carriers are not so fortunate. The large percentage of their traffic is capable of being carried exclusively by rail.

Public interest in low-cost water transportation, encouraged by statutory provisions for rail-water combination service under equitable rate divisions and reasonable differentials,¹⁷ has often been subverted

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and the Commission may prescribe the extent to which . . . carrier . . . may be relieved. . . . but . . . the Commission shall not permit . . . any charge . . . not reasonably compensatory . . . and no such authorizations shall be granted on account of merely potential water competition not *actually* in existence. . . ."

¹⁴ For one instance of rail reductions under the relief provisions, the proponents used the shipper's own private vessel as constituting the existence of "genuine" water competition. The shipper had never actually used his vessel to participate in the traffic but hoped to take advantage of lower rail rates, and asserted that reductions were necessary to obtain his traffic.

This is one method that enables a railroad to achieve its real objective, i.e., instituting service on traffic that was previously handled exclusively by independent water carrier. See: Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 86th Congress, 2nd Session 121, 122 (1960).

The circumstances are similar to the abuse sought to be corrected under the Panama Canal Act, *supra* n. 4. The attitude of legislators at that time could be surmised by the following statement:

The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition.

H.R. Rep. No. 423, 62nd Congress, 2nd Session 12 (1912); Nupp, *op. cit. supra* n. 4 at 23.

¹⁵ Sec. 3(1), Interstate Commerce Act: prohibits undue preference or prejudice to any shipper or locality. Yet, this is exactly the result when rate reductions create preferential charges to a shipper or locality in the vicinity of intermodal competition. At the same time, the land-bound shipper continues to pay a high rate and suffers a market disadvantage. Shinn, Tightening The Law of Undue Prejudice, ICC Prac. J. 33:331-333 Ja. '66; There, the author points out the general rule that existence of carrier competition at one point, and absence of such at another point, creates a dissimilarity of transportation circumstances that nullifies the prohibition against undue prejudice within the meaning of Sec. 3(1). The landlocked shipper has no recourse under Sec. 3(1) for any market disadvantage created by competitive reductions if the defendant carrier successfully proves that its reduction is warranted by the dissimilar conditions.

¹⁶ Huntington, The Marasmus of the ICC, 61 Yale L. J. 467 (1952).

¹⁷ Sec. 1(4), Sec. 3(4), Interstate Commerce Act. These provisions impose a duty on the rail carriers to establish combination service with water carriers under non-discriminatory rate divisions. Sec. 305(b), Sec. 307(d), Interstate Commerce Act, impose a similar duty on water carriers.

because of the relative ease of rail rate manipulation to deny water transport participation in a given market.¹⁸

The discretionary latitude exercised by the Commission has not been the sole source of hardship. The nature of administrative proceedings under the primary jurisdiction doctrine adds to the problems.¹⁹

Initial lawfulness of a reduced rate filed with the Commission is determined by a suspension order.²⁰ Following the general rule,²¹ judicial review of the ruling on the suspension petition is not available since administrative remedies have not been exhausted. This is so because a complaint can be filed and hearing scheduled by the Commission after its suspension order.²²

The unavailability of judicial review from a suspension order is significant. A denial of suspension permits the rate to become effective immediately.²³ Even if suspended, a rate automatically becomes effective after seven months,²⁴ sometimes before the subsequent hearing to determine lawfulness is completed. In spite of an ultimately favorable decision, a customer may have been forced into permanent use of a competing mode because of substantial investment in material handling facilities to accommodate loading or unloading requirements by the time lethargic administrative procedure²⁵ has run its course.

¹⁸ Railroads have historically resisted opportunity to initiate combination service and often view established moves as the prime object of competitive attack. There are a number of variations, but two basic methods are employed:

(1) Traffic capable of being carried exclusively by rail, but presently moving rail-water. Railroad will reduce longer distance all-rail rate to the same level as its rate to shorter distance lake transfer point. Shorter distance rate not proportionately reduced and water carrier can no longer participate unless he carries tonnage for nothing.

(2) Traffic presently moving all-rail, but could take water transportation for at least part of the route. Railroad will maintain an inflated rate to the transfer point leaving the water carrier an uneconomical rate basis in any combination of charges that might attract a shipper using the all-rail method. Also see, Huntington, *op. cit. supra* n. 16.

¹⁹ See generally, Towle, Appeal of ICC Suspension Orders, 35 ICC Prac. J. 220 (Jan.-Feb. 1968).

²⁰ Sec. 15(7), Interstate Commerce Act.

²¹ Sec. 10, Administrative Procedure Act, 5 U.S.C.A. 1009; provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . (c) every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

Courts have usually interpreted this section to mean that judicial review of suspension orders is not available since it is a matter "by law committed to agency discretion." Towle, *op. cit. supra* n. 19 at 222, 224. However, judicial review will obtain if the suspension order manifests abuse of Commission discretion by arbitrary and capricious action. *Coastwise Line v. United States*, 157 F. Supp. 305, 306 (N.D. Cal. 1957).

²² Sec. 13(1), Interstate Commerce Act.

²³ Towle, *op. cit. supra* n. 19 at 220.

²⁴ Sec. 15(7), *supra* n. 20.

²⁵ As of November 30, 1966, the ICC had a backlog of 7200 cases, each averaging over eight months to process. Fourth Section applications average 11 months and Investi-

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Inherent Advantage

The Interstate Commerce Act does not delineate, nor has the Commission ever decided, what precise standard for intermodal ratemaking is proper for resolution of competitive disputes. The early stages of carrier competition prompted enactments directing the Commission to insure that rail rates make a sufficient revenue return,²⁶ that water transportation be encouraged,²⁷ that transportation charges must be just and reasonable to be lawful,²⁸ and that public interest continue to be served by economical and dependable transportation service.²⁹

The Transportation Act of 1940³⁰ contained what is known as the National Transportation Policy and, thereby, introduced the concept of "fair and impartial regulation of all modes . . . preserving the inherent advantages of each."³¹ The Commission was specifically directed to administer the provisions of the Interstate Commerce Act "with a view to carrying out" this policy.³²

The Transportation Act of 1958³³ added Section 15a(3),³⁴ the rule of intermodal rate-making, which was strongly sponsored by the railroad industry. Section 15a(3)³⁵ seems to present irreconcilable propositions by first stating that ". . . Rates of a carrier shall not be held up . . . to protect the traffic of any other mode," and then asserting that consideration be given to "the objectives of the national transportation policy

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gation and Suspension dockets on lawfulness of proposed rates, 11.1 months. Haskell, *Why the Regulatory Lag?*, 34 ICC Prac. J. 714, 719 (July-Aug. 1967).

²⁶ Sec. 15a(2), Interstate Commerce Act; was incorporated from the Transportation Act of 1920 and sought to end railroad financial deficits caused by cut-throat competition. Jaffe and Nathanson, *op. cit. supra* n. 3 at 385.

²⁷ Sec. 500, Transportation Act of 1920: "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, . . ."

²⁸ Sec. 1(5), Interstate Commerce Act. The Act contains five sections that deal with transportation charges as distinguished from rules of rate-making. Rates and charges must be just and reasonable, Sec. 1(5), non-discriminatory, Sec. 2, non-preferential, Sec. 3(1), not greater for shorter than for longer distances, Sec. 4(1); and be published and strictly observed, Sec. 6(1). Larwood, *Which Single Improvement Of The Interstate Commerce Act is Most Needed?*, 33 ICC Prac. J. 339, 347 (Jan. 1966).

²⁹ 54 Stat. 899 (1940), National Transportation Policy under the Transportation Act of 1940.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*; Known as the *Whittington Amendment*, this provision exemplified Congressional fear that the Commission would continue to be "railroad-minded" after water carriers were placed under its jurisdiction by the 1940 Act. Huntington, *op. cit. supra* n. 16.

³³ 72 Stat. 570 (1958).

³⁴ 72 Stat. 572 (1958), Sec. 15a(3), Interstate Commerce Act.

³⁵ For a railroad oriented, in-depth history of the legislative, administrative and judicial treatment of Section 15a(3), see Hilton, *The Transportation Act of 1958* (1969).

...," i.e., preservation of carrier inherent advantage through impartial regulation. The crux of the controversy in contemporary intermodal cases centers on the posture of transportation policy within the rule of rate-making; to be specific, what is inherent advantage, which carrier has this advantage on the movement at issue and what cost criteria should be used in this determination?

In most cases, a carrier has the inherent advantage if it proves that it incurs the lowest cost on a particular movement.³⁶ Cost of service has become the fundamental consideration and has engendered a prolific response of economic theory. The Commission has been inconsistent in deciding inherent advantage and what cost basis it might approve usually depends on the competitive circumstances presented for determination.³⁷

In 1963, interpretation of Section 15a(3) was placed before the Supreme Court for the first time in *Interstate Commerce Commission v. The New York, New Haven and Hartford Railroad Co., et al.*,³⁸ hereinafter referred to as the *New Haven Case*). There,³⁹ the ICC disallowed rail rates that were above out-of-pocket cost⁴⁰ and, for some of the movements involved, also above fully-distributed cost.⁴¹ The Commission made no determination of inherent cost advantage on the traffic at issue, but concluded that the rail rates would destroy the shipping industry involved and therefore were unlawful within the meaning of destructive competition. The Court, in reversing the ICC, said that unless a National Defense need is at stake, proposed rates may not be cancelled without first determining which carrier has the cost advantage. In other

³⁶ McGehee, *The Inherent Advantages of Carrier Modes Under The National Transportation Policy*, 34 ICC Prac. J. 722, 724, 725, 732 (July-Aug. 1967). The author examines the legislative history to determine Congressional intent under National Transportation Policy and Sec. 15a(3). He concludes that the sponsors of the *inherent advantage* provision felt more protection was needed for the low-cost water carrier and that full cost was the proper basis to determine advantage.

³⁷ Rose, *Regulation of Rates and Intermodal Transport Competition*, 33 ICC Prac. J. 11, 14, 15 (Oct. 1965); Williams, *The ICC and The Regulation of Intercarrier Competition*, 63 Harv. L. Rev. 1353 (1950).

"The broad discretion exercised by the Commission can be traced to the lack of precision in the Act which it is to enforce. While the Act will not tolerate an arbitrary administration, the lack of meaningful standards for effective regulatory control leaves the Commission free to exercise its discretion on a case-by-case basis without establishing cost guidelines," see Hosmer, *Twenty-five Years of the National Transportation Policy (NTP)*, 33 ICC Prac. J. 411 (Feb. 1966); Farris, *Definitional Inconsistencies In The National Transportation Policy*, 35 ICC Prac. J. 25 (Nov.-Dec. 1967); "Unfortunately, the meaning of the term "inherent advantage," which is what the Commission is supposed to protect, is nowhere spelled out in the statute." *American Commercial Lines, Inc., et al., v. Louisville and Nashville R.R. et al.*, 392 U.S. 571, 581 (1968).

³⁸ 372 U.S. 744 (1963).

³⁹ *Id.* at 749, 750, 758, 764.

⁴⁰ Out-of-pocket costs are generally those directly incurred by the movement at issue and do not include any allocation for pre-existing overhead expenses.

⁴¹ Fully distributed costs generally include out-of-pocket costs plus an allocation of some portion, or all, of the pre-existing overhead expenses, i.e., constant costs.

words, within the meaning of Section 15a(3), rates of one carrier should not be held to a high level in order to protect the established business of another carrier unless the latter is entitled to retain the traffic by proving its inherent advantage, i.e., lower cost, on the movement at issue.

While the Court offered constructive guidelines to determine "destructive competitive practices,"⁴² it significantly avoided any definition of the proper cost basis for inherent advantage by referring the matter back to the Commission:

It is not for us to make this determination at this stage, or to decide in advance precisely how either carrier's inherent advantages should be measured or protected. It may be, for example, that neither a comparison of "out-of-pocket" nor a comparison of "fully-distributed" costs as those terms are defined by the Commission, is the appropriate method of deciding which of two competing modes has the cost advantages on a given movement.⁴³

The *New Haven* decision resulted in greater rate-making freedom for the railroads.⁴⁴ Water carriers, unable to protect their traffic, remain especially vulnerable when the ICC sanctions out-of-pocket⁴⁵ rail rates. The Commission, geared to the type of competition involved, sometimes favors rail rates that merely cover out-of-pocket costs and almost always allows those that cover fully-distributed costs, regardless of the consequences on the other mode.⁴⁶ If a railroad is competing for regulated water traffic, the Commission will normally favor the carrier with a cost advantage.⁴⁷ However, where railroad reductions are made to attract unregulated water traffic, which, significantly, comprises close to 90 percent of its tonnage,⁴⁸ the Commission has usually felt it unnecessary to determine which mode has the inherent advantage.⁴⁹ In these instances,

⁴² An analysis of the case leads to the possible following conclusions: 1. Reduced rates may be lawful even though they threaten the existence of another mode. 2. A carrier with a cost advantage may reduce rates to any level above out-of-pocket, regardless of the consequences on the competing mode. 3. Rates covering fully-distributed costs are lawful no matter which mode has the inherent advantage, with only one exception which is— 4. The competing mode is vital to National Defense and its existence is threatened. 5. If the carrier reducing its rate does not have a cost advantage and the rate fails to return fully-distributed costs, it still may be lawful if the competing mode with a cost advantage does not have to reduce its own rate to an unremunerative level to retain the business. 6. A competitive rate, lower than necessary to meet competition, does not always constitute an unfair competitive practice, even though it creates a preference *contra* to Sec. 3(1). See Shinn, *op. cit. supra* n. 15 at 332; McGehee, *op. cit. supra* n. 36 at 727, 728; Rose, *op. cit. supra* n. 37 at 12-19; Levine, *The Railroad Industry's Experience Under Section 15a(3) of the Transportation Act of 1958*; 35 ICC Prac. J. 252, 256, 258 (Jan.-Feb. 1968).

⁴³ *I.C.C. v. N.Y., N.H. and Hartford R.R. Co.*, *supra* n. 38, at 760. See also: McGehee, *op. cit. supra* n. 36 at 728.

⁴⁴ Levine, *op. cit. supra* n. 42 at 259.

⁴⁵ *Supra* n. 40.

⁴⁶ *Supra* n. 42.

⁴⁷ Rose, *op. cit. supra* n. 37 at 17.

⁴⁸ McGehee, *op. cit. supra* n. 36 at 722.

⁴⁹ Rose, *op. cit. supra* n. 37 at 22.

rail rates have been approved that slightly exceed out-of-pocket costs and, on occasion, were even below out-of-pocket costs.⁵⁰

The last expression of the Supreme Court came in 1968 in *American Commercial Lines, Inc. et al., v. Louisville & Nashville R. Co. et al.*,⁵¹ (hereinafter referred to as the *Ingot Molds* case). The *Ingot Molds*⁵² case involved regulated traffic where the railroads lowered their joint rate from \$11.86 to meet the combination barge-truck rate of \$5.11. It was shown that the railroads had the lower out-of-pocket cost but the barge-truck service had the lower fully-distributed cost for the movement.

In reversing the District Court and reinstating the Commission decision, which rejected the reduced rail rate, the Supreme Court referred to the *New Haven*⁵³ case and again emphasized that it was within Commission *expertise* to decide which cost basis should be used to determine inherent advantage.⁵⁴ The Supreme Court rejected the contention of the District Court and railroads that the *New Haven*⁵⁵ case and Section 15a(3)⁵⁶ commanded that the Commission use out-of-pocket cost to determine inherent advantage in every competitive situation.⁵⁷ The Supreme Court was satisfied with the Commission's action in prohibiting the reduced rail rates, since the barge-truck service had the cost advantage on a fully-distributed basis and would have had to lower its rates to retain the business, thereby undercutting the ability to exploit its inherent advantage.⁵⁸

Citing Commission decisions permitting out-of-pocket rail rates to attract unregulated traffic, the District Court challenged the Commission contention that it normally looked to fully-distributed cost to determine advantage.⁵⁹ The Supreme Court considered this question and its rationale is especially ominous to independent Great Lakes carriers whose principal traffic is unregulated and subject to constant rail attack:

⁵⁰ *Ibid.*

⁵¹ 392 U.S. 571 (1968).

⁵² *Ibid.*

⁵³ I.C.C. v. N.Y., etc., *supra* n. 38.

⁵⁴ The resolution of the appropriate basis for inherent advantage was again left for the informed judgment of the Commission. *American Commercial Lines, Inc., et al.*, *supra* note 51 at 591.

⁵⁵ I.C.C. v. N.Y., etc., *supra* n. 38.

⁵⁶ *Supra* n. 34.

⁵⁷ The Supreme Court concluded that it could not disregard legislative prohibition of uncompensatory pricing inasmuch as the history of Section 15a(3) reflected a congressional intent that railroads should not be permitted to price on an out-of-pocket basis to meet all competition. Any other interpretation would allow railroad allocation of overhead expenses to landlocked traffic in order to finance below cost rates and outlast competitors. *American Commercial Lines, Inc., et al.*, *supra* n. 51 at 578, 586, 589, 590.

⁵⁸ *Id.* at 593.

⁵⁹ *Id.* at 584.

The District Court also objected to the failure of the Commission to explain why it permitted out-of-pocket rate-making where the competing carrier was unregulated and not where the competition was regulated. The short answer to this is that Section 15a(3) by its own terms applies only to "modes of transportation subject to this act," which by definition means regulated carriers. As a result, any arbitrariness that may flow from the distinction recognized by the Commission between regulated and unregulated carriers in situations of intermodal competition is the creation of Congress, not of the Commission.⁶⁰

The Court also noted that the Commission is engaged in a pending rulemaking proceeding⁶¹ involving an in-depth examination to decide proper cost standards applicable to intermodal competition, which will hopefully resolve the inherent advantage issue.

The Bulk Exemption and the Great Lakes Water Carrier

When water carriers were placed under ICC jurisdiction in 1940,⁶² waterborne transportation of bulk commodities⁶³ was exempted from regulation.⁶⁴ The bulk exemptions⁶⁵ were justified to meet the threat of Canadian carriers and the belief that bulk traffic was not the subject of intermodal competition.

The bulk exemptions have generated problems unforeseen by its sponsors. The American water carrier has never been competitive with its Canadian counterpart who enjoys modest operating and construction costs through lower wage scales and government-sponsored ship subsidies. Furthermore, bulk water traffic is currently the object of intense rail competition in spite of sizable railroad investment in shoreside facilities to coordinate rail-lake movements.

The bulk exemptions have also enabled private carriers to engage in for-hire⁶⁶ transportation, offering unneeded capacity or backhaul space

⁶⁰ *Id.* at 593.

⁶¹ Rules Governing the Assembling and Presenting of Cost Evidence, ICC Docket No. 34013.

⁶² 54 Stat. 929 (1940); Part III, Interstate Commerce Act.

⁶³ "The term 'commodities in bulk' is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains." John J. Mulqueen Contract Carrier Application, 250 I.C.C. 436, 439 (1942).

⁶⁴ 49 U.S.C. 903; Sec. 303(b), 303(c), Interstate Commerce Act.

⁶⁵ *Ibid.*

⁶⁶ "For-hire" normally refers to water transportation by a common carrier who holds itself out to service the general public for compensation, Sec. 302(d), Interstate Commerce Act. A certificate of public convenience and necessity, issued by the Commission, is a prerequisite, Sec. 309(a), Interstate Commerce Act. The status of the common carrier by water is most often confused when it transports exempt commodities. In such instances, it does not become an unregulated carrier because the bulk exemp-

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at depressed rates covering bare costs. Rate stability is absent because bulk exempt traffic is not controlled by tariffs publicly⁶⁷ filed with the Commission.

Coming under Commission jurisdiction some 50 years after its land based competitor, water carriers stood a distinct disadvantage to the partisan relationships previously cultivated. While there is some merit in the contention that the Commission has been "railroad-minded,"⁶⁸ the water carrier could do little to enhance its position when the majority of its traffic⁶⁹ was excluded from Commission supervision.

The consequences have been serious when railroads are competing for unregulated water traffic. The rationale⁷⁰ of the *Ingot Molds* case serves to fortify Commission policy of refusing to consider inherent advantage and tolerating open discrimination when out-of-pocket rates are aimed at exempt water tonnage over which it has no control.⁷¹ The

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tions specifically refer to the transportation and not the carrier. Therefore, in situations where transportation of bulk commodities is exempted under Part III, a common carrier by water is still controlled by regulatory provisions elsewhere in the Act.

⁶⁷ Sec. 306, Interstate Commerce Act.

⁶⁸ *Supra* note 32; Huntington, *op. cit. supra* n. 16; McGehee, *op. cit. supra* n. 36 at 724.

⁶⁹ McGehee, *op. cit. supra* n. 36 at 722.

⁷⁰ *Supra* n. 60; There were some positive aspects of the case however, such as judicial awareness of the continued need for a strong water carrier industry to deter railroad abuse, as was evidenced by the Supreme Court rationale on economic arguments offered by railroad witnesses. Economic support for railroad predatory practices was justified as follows: Railroads should be permitted to selectively price their services on a slightly above out-of-pocket basis because a shipper benefits from lower rates and the new traffic makes some contribution to railroad overhead, i.e., constant costs. Other shippers also benefit because the new traffic will begin to pay a portion of the constant costs previously being charged entirely to them. The overall shipper benefit outweighs the harm caused to the other mode and the discriminatory preference afforded the competitively located shipper who pays a disproportionately low amount of railroad overhead.

The Supreme Court was not impressed with the railroad logic. It pointed out that the existence of a competing mode is the sole reason for initiating below cost rate reductions. If the competing mode is driven out of business because of its economic inability to match out-of-pocket rates, then there is no justification for maintaining low rates. A railroad could then raise these rates and initiate out-of-pocket rates in a different competitive area. Eventually, a railroad would be able to eliminate all its competition and then justify repricing all services on a fully distributed basis in order to remove customer discrimination. At this point, certain shippers have permanently lost low cost benefits that existed under competitive circumstances.

The Court inquired if public interest in low cost service would be better served by insuring the continued existence of railroad competitors, while railroads attempt to increase traffic and revenue through more economical charges for landlocked customers who, but for excessive rates, would be able to maximize their volume of shipments to the marketplace. American Commercial Lines, Inc., et al., *supra* n. 51 at U.S. 586-589.

⁷¹ Rose, *op. cit. supra* n. 37 at 22; "The Commission will not concern itself with unregulated water traffic subjected to rail competition because there is no way to ascertain adequate knowledge of rate pricing and cost comparisons of traffic not under regulatory control." Morgan, A Critique of "The Marasmus," 62 Yale L. J. 171 (1953); The Supreme Court noted the Commission preference for fully distributed cost com-

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Commission may justify its attitude on the premise that railroads should not be restrained from competing for exempt tonnage which the water carrier transports with complete freedom to adjust rates. The fallacy of this argument is the water carrier inability to use its rate freedom to any advantage, since it has neither the competitively isolated traffic used by railroads to finance below cost rate wars nor the financial resources to sustain unremunerative levels.

Even more acute is the status of regulated lake transportation. Regulated water tonnage is usually moved in low volume shipments by small vessels utilizing expensive specialized equipment. As a result, the traffic bears a higher cost-per-ton ratio than large volume bulk moves, and, in many instances, water costs approximate railroad costs. Since the *New Haven*⁷² decision granted legality to rail rates if the railroad can prove a cost advantage, the future of the higher cost segment of the lakes water industry is not promising.

Conclusion

Substantially all waterborne tonnage is unregulated and a prime competitive target. Because the Commission will not usually consider required differentials or inherent cost advantages on traffic exempt from its control,⁷³ the water carrier has become a dependent customer of the railroads who are able to control the amount of their water competition.⁷⁴ This is especially true when water traffic takes a prior or subsequent rail haul.

An important current case in point is *Lake Carriers' Association et al. v. New York Central R.R. et al.*⁷⁵ This controversy involves the movement of coal from mine origins to generating plant destinations. Before unit train rate reductions, coal moved by rail from mines to a lake transfer point and then to ultimate destination by vessel. Because destination as well as origin points can be served by land, the railroads lowered rates on the longer distance, all-rail routes to the approximate levels charged for the shorter distance route to lake transfer points. The result was termination of water participation in the movement unless the water carrier performed its service at a loss. The water carriers have

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parisons in situations involving intermodal competition for regulated traffic and out-of-pocket cost comparisons for ascertaining inherent advantage where one of the competing modes is unregulated. *American Commercial Lines, Inc., et al., supra* n. 51 at U.S. 584, 593.

⁷² *ICC v. N.Y., etc., supra* n. 38; *supra* n. 42.

⁷³ *Supra* n. 71.

⁷⁴ Testimony of Jesse J. Friedman before the Interstate Commerce Commission, Docket No. 34822. (January 31, 1969).

⁷⁵ ICC Docket 34822.

petitioned that the railroads make comparable reductions over the lake transfer route in order to preserve the combination service.

Lake shipping interests expect to lose about 30 percent of their coal business if the rail reductions are maintained.⁷⁶ Significantly, the water tonnage is bulk exempt and presents circumstances where the ICC has offered little protection to the water carrier.⁷⁷

The competitive and regulatory surroundings are similar to those presented in the celebrated *Corn Products*⁷⁸ case inasmuch as the water carrier is a competitor as well as a customer of the railroad, dependent on fair economic treatment for survival.⁷⁹ The predicament was cogently depicted by one shipping executive in a recent speech:

Lake transportation of coal is being forced out of existence simply because railroads have the economic power to stand on the oxygen hose the lake industry requires for survival.⁸⁰

An impartial climate under Commission jurisdiction is mandatory for the survival of the independent water carrier. Effective ICC regulation of competition through minimum rate control and preservation of inherent low cost water transportation must be achieved by legislative amendment which will modify or repeal the exemption⁸¹ provisions.

Remedial measures are long overdue, as is evidenced by the deterioration of the Great Lakes fleet. About 10 vessels per year have been retired since 1960.⁸² The same industry that kept 90% of the nation's steel plants supplied with iron ore during World War II has withdrawn over 130 ships from service since 1953 and at least 60% of its present fleet is over 40 years old.⁸³

⁷⁶ *Ibid.*

⁷⁷ *Supra* n. 71.

⁷⁸ *U.S. v. Corn Products Refining Co.*, 234 Fed. 964 (S.D. N.Y. 1916).

⁷⁹ Testimony of Jesse J. Friedman, *supra* n. 74.

⁸⁰ Remarks of John J. Dwyer, Executive Vice-President, Oglebay-Norton Co., before The Toledo Chamber of Commerce (June 25, 1969).

⁸¹ *Supra* n. 64.

⁸² *Marine News*, *The Cleveland Plain Dealer* (August 5, 1969), p. 2-C.

⁸³ *Miller*, *Punitive Damages Against Shipowners*, 18 *Clev. St. L. Rev.* 564, 573 (1969).