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The Lake Cargo Rate Case of February 1928

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EDITORIALS

THE LAKE CARGO RATE CASE OF FEBRUARY 1928.—In the last issue of this quarterly we published a note summarizing the Lake Cargo Rate Case of August 1925.[1] Since that publication another decision in the lake cargo rate controversy has been handed down,[2] in which the voluntary reduction of lake cargo rates on coal offered by the Norfolk and Western and Chesapeake and Ohio and other southern railroads, was denied. From this last decision the southern coal operators are appealing. It is, therefore, not timely to discuss either the constitutionality of this decision or the legality of the Commission's interpretation. The economic effect of this decision in West Virginia is disastrous. The decision puts a handicap on West Virginia coal mines of from forty-five to sixty-three cents a ton, and there are grounds for believing that this handicap will cut away a part of the economic foundation on which the industries of the state rest. Comment, therefore, upon the policy of

[1] 34 W. VA. L. QUAR. 202 (1928).
[2] Lake Cargo Coal Rates, 127 I. C. C., Docket No. 2967 (Feb. 1928).

the decision, regardless of its legality, becomes of immediate public interest.

With the publication of the recent Lake Cargo decision, a full realization of the enormous power of the Interstate Commerce Commission has dawned on the people of West Virginia. The Commission has gradually acquired or usurped (depending upon the point of view) power to make or unmake cities, to favor or ruin great industries, and holds in its hands the economic salvation or ruin of millions. The source of that power is vague and difficult to define exactly. It is found, according to the Commission itself,[3] in three sections of the Interstate Commerce Act, sections 1, 3 and 15a.[4] The Lake Cargo decisions turn upon the necessarily vague words used in these sections, such as "just and reasonable," "unjust and unreasonable," "undue or unreasonable advantage," "fair return." The present interpretation of these sections as it appears in the Lake Cargo cases has a long history.

History of Lake Cargo Decision. The history of the Lake Cargo Cases is the history of competition between two great rival coal fields, one being the Ohio No. 8, Pittsburgh and Cambridge districts, located in Pennsylvania and eastern Ohio, the other the West Virginia, Virginia, Kentucky and Tennessee fields. The Pittsburgh fields are located closer to the lake cargo market.

Prior to 1912 railroad companies serving these respec-

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[3] "The power of this Commission to grant relief exists in many forms, as set out in Sections 1, 3 and 15a of the Act." Commissioner Taylor's concurring opinion, p. 33, *supra*, n. 2.

[4] The following quotations from these sections are applicable:

§ 1, subsection 5: "All changes made for any service rendered or to be rendered in the transportation of passengers or property * * * * shall be *just and reasonable*, and every *unjust and unreasonable charge* for such service or any part thereof is prohibited and declared to be unlawful * * * * ."

§ 3, subsection 1 provides: "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, in any respect whatsoever, or to subject 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."

§ 15a, subsection 2, provides: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates, so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economic management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net operating income equal, as nearly as may be, to a *fair return* upon the aggregate rate of the railway value of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be *unjust or unreasonable* and to prescribe different rates for different sections of the country."

§ 13, subsection 4 may also have a bearing but is not particularly mentioned in the Commission's report.

tive fields were permitted to establish their own rates. In comparison with the Pennsylvania coal fields it cost nine cents a ton more to haul coal from the Kanawha and Thacker districts of West Virginia, and twenty-four cents a ton more to ship from the other coal fields of West Virginia. The West Virginia fields at that time were contributing only a small volume of the traffic, which, according to Commissioner Taylor of the Interstate Commerce Commission, *"was not unwholesome or a material interference with the natural rights of location possessed by the northern mines."*[5] By 1912 however, the Pittsburgh operators began to feel West Virginia competition. They therefore asked, and succeeded in obtaining from the Interstate Commerce Commission an increase of the nine cent differential to 19c, and the twenty-four cent differential to 34c. This was done by reducing the Pittsburgh rates.[6]

In 1917, under war conditions, the Interstate Commerce Commission again increased the differential from the Kanawha and Thacker districts from 19c to 25c, and the differential from other West Virginia fields from 34c to 40c.[7]

In spite of the fact that after 1917 it cost from 25c to 40c a ton more to ship coal from West Virginia fields to the lake cargo market, the West Virginia and other southern operators, by improved machinery, good business management, through the absence of difficulties such as strikes and lock-outs, increased their participation in the lake cargo market until they dominated the market.[8]

To meet this competition of the southern coal fields, in 1925 the Pittsburgh producers again asked government aid. They demanded of the Interstate Commerce Commission the establishment of an even higher differential.[9] It is to be noted that they were not interested in the reasonableness of the rates so much as the relationship of the rates

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[5] P. 31, *supra*, n. 2.

[6] Advance in Coal Rates by C. & O. Ry. Co., 22 I. C. C. 604 (1912); Boileau v. P. & L. E. R. R. Co., 22 I. C. C. 640 (1912).

[7] Lake Cargo Rates, 46 I C. C. 159, 188 (1917). In this case the court intimated that distance and transportation conditions were not as important as commercial conditions and competition between railroads.

[8] "The percentage of the total lake-cargo tonnage shipped from the southern West Virginia and Kentucky districts has increased from 24 per cent in 1913, 40 per cent in 1921, and 57 per cent in 1924, to 71 per cent in 1926 and 74 per cent in the first nine months of 1927. * * * * The shift in tonnage to the southern districts appears to have been due, in a large measure, to lockouts, miners' strikes, and to higher costs of producing coal in the northern than in the southern districts, and these conditions, although in constantly lessening degree, still prevail in those districts. Advance Opinion of February 1928, p. 5a.

[9] Lake Cargo Coal Rates, 101 I. C. C. 513 (1925).

to the West Virginia fields. *In other words, it was an attempt to cut off the competition from the southern districts.*[10] After months of consideration, on July 16th, 1925, the majority of the Commission decided that the existing rates were not unduly preferential. The opinion was written by Commissioner Hall and concurred in by Commissioner Esch. A rehearing was asked and the case re-opened. The term of Commissioner Cox, who concurred in the opinion, expired; Commissioner Esch changed his mind. As a result, in February 1927, the former Lake Cargo Case of 1925 was reversed and differentials of 45c, 48c, 60c and 63c a ton were established in favor of the Pennsylvania districts and against the various West Virginia districts.[11]

After this decision the southern carriers were faced with the loss of the lake cargo traffic. To meet this situation they proposed to reduce their rates to an amount which would restore the differential in effect ever since 1917. This proposed reduction was suspended by the Commission by order of August 16th, 1927, and after further hearing, the southern carriers were ordered to cancel their proposed schedules on or before March 27th, 1928.[12] From this last decision the southern carriers appealed to the courts.

It is apparent from the above history that an industrial war, rather than a discussion of rates, has been in progress. The principal witness in the 1925 case testified:

> "Q. This case then is really a commercial fight by your districts against West Virginia and Kentucky, and is not a rate case, is it?
>
> "A. Any rate case I ever heard of was a commercial fight and this is just like the rest of them."[13]

Twice prior to 1925 the West Virginia fields have been put under a heavier handicap for the purpose of keeping them from competing with the Pennsylvania fields. Each time they have succeeded in spite of that handicap in obtaining more and more of that market, and finally dominating it, because of better management and better coal. The 1925 case was the third attempt to increase this handicap and was brought for the purpose not of fixing reasonable rates

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[10] *Ibid.*, 515.
[11] *Supra*, n. 2.
[12] Order of Interstate Commerce Commission, Docket 2967, Feb. 21, 1928.
[13] Quoted from Lake Cargo Coal Rates, 101 I. C. C. 513, 541 (1925).

but of putting the southern fields at a greater disadvantage.[14] The last handicap is probably greater than they can overcome and will remove them from the market. Their own carriers have tried to aid them with lower rates, but have been prevented from assisting them in their difficulties by a suspension of the order lowering those rates? What, then, are the reasons for this action? Under what theory or formulae has the Interstate Commerce Commission proceeded?

Theory and Reasons for Lake Cargo Decision. The theories and formulae adopted by the Commission in reaching their various decisions in this controversy are difficult to state for the following reasons. (1) The Commission has reversed itself once in two years. (2) The commissioners who concur in the result do not agree on their reasons.[15] (3) The decision is based on the interpretation of words which have no fixed meaning, such as "just and reasonable rates," "unjust and unreasonable rates," "undue and unreasonable advantage to any particular person * * * or locality," "fair return on Aggregate value."[16] To such words as these any number of theories or formulae, or even no theory at all, may be equally applicable. The following however seems fairly clear:

(1) The majority of the Commission claim that they are not concerned with what the witness above quoted[17] says is the crux of the controversy, i.e., the competition between the districts. Interests of mine owners, or of the localities where the mines are situate, is of concern only incidentally. The Commission with a steady eye looks beyond, through, over, or under these matters to what appears to them to be the real issue, the prosperity, reasonableness, and general uniformity of the transportation system. Railroads, and railroads only, are what they are concerned with. For example,

> "Clearly it is not within our power to adjust rates for the primary purpose of enabling competing shippers to

[14] "Complainants (the northern operators) make a determined attack upon the reasonableness of the rates from the Pittsburgh, Ohio and Cambridge districts, but confess that it would avail them little if anything for us to sustain their contention in full and reduce their rates if we do not also prevent corresponding reductions in rates from the districts alleged to be preferred." 101 I. C. C. 513, 541 (1925).

[15] Commissioners Eastman and Taylor concur in the result but on theories differing not only from the majority report, but with each other. They file separate concurring opinions in the 1927 report and also in the 1928 report.

[16] See provisions of Interstate Commerce Act set out in n. 4, *supra*.

[17] See n. 13, *supra*.

market their products. The rates which we find in proceedings before us to be lawful may have that effect, but fundamentally they must be based upon conditions surrounding the transportation, including the cost and value of the service.[18]

"These commercial and economic conditions are alleged to create a public interest in these proposed rates which in itself is said to be sufficient for their justification * * * * *. Obviously however the public interest can not prevail if the proposed rates would violate any of the provisions of the interstate commerce act which we administer.[19]

"When the standards are applied the necessary and immediate effect may be to interject into an existing commercial situation new factors important to those who produce or distribute, buy or sell and to their competitors, but such a result is neither the cause nor end which has motivated our action."[20]

These statements are difficult to reconcile with the facts of the situation. The Pittsburgh producers who brought the complaint are not seeking to improve the uniformity and prosperity of railroad systems. And how, with these statements in mind, can the commission logically give substantial weight in their opinion to the Hoch-Smith Resolution which seeks to have rates made for the sole purpose of aiding farmers?[21] In considering the Hoch-Smith Resolution is not the Commission violating these very canons which they say they start out with? And finally, can an intelligent or useful decision be made on a bitterly controverted question when the most important element in the whole controversy is ignored? We will not pause to argue this because we are seeking the theory of the decision and that foundation seems to be that *public interest, changes in economic situation,* caused by the rates, and similar matters will not be primarily considered.[22] The Commission appears to believe that it is possible to separate the interest of the railroads from

[18] Advance Opinion of February 1928, p. 5a.
[19] *Ibid.*, p. 5b.
[20] *Ibid.*, p. 20.
[21] "To accord a carrier the right to transport a substantial portion of its tonnage at rates upon the obviously low level here proposed, while giving no relief to the agricultural industry, including livestock, which Congress has declared to be in a depressed condition and entitled to the lowest possible lawful rates consistent with the maintenance of an adequate transportation system, is contrary to that mandate." Advance Opinion of February 1928, p. 23.
[22] In other cases these interests have been more than incidental. *Cf.* Andy's Ridge Coal Co. *v.* Southern Ry. Co., 118 I. C. C. 405 (1927), where the Commission said, "In determining the differentials we must consider the interest of the consumer as well as the producer. Rates should be so adjusted as to permit the widest possible competition."

the communities which they serve. Having made that separation, they claim to be concerned only with railroads.

(2) Since economic conditions of competing districts are, by express declaration of the Commission, eliminated, the positive side of the theory under which the Commission acts may, we believe, be stated as follows:

(a) A railroad will not be permitted to develop additional traffic at rates making a minimum contribution above "out of pocket" expenses even where such rates are necessary to retain the business, and even where no rate war is impending, if those rates do not fit in to a vague scheme of related rates called a rate structure, which exists in the mind of the Commission.

(b) The details of this rate structure may be changed by the Commission from time to time without notice to the economic interests of the localities involved, or without the interests of the localities involved being considered other than incidentally.

While the grounds given by the Commissioners in support of the lake cargo decision vary, nevertheless it seems clear that the above is what they have in mind, i.e., some vague and complicated structure of rates which is determined upon factors of (1) quantity (or volume of traffic), (2) quality (or considerations relating to care and expedition of traffic), and (3) relativity between localities and between commodities. (Relativity between localities contains the idea that no district shall be deprived of its geographical advantages. Relativity between commodities is a matter of freight classification, figured so that one commodity should not bear more than its share.) These vague factors are given varying weights, according to circumstances and are set up as the abstract ideals which the Commission is trying to follow in arriving at a harmonious, logical and uniform rate structure. This rate structure appears to be the primarily important thing. Other interests affected are only incidental.[23]

If we assume that this ideal rate structure toward which the Commission is striving is a worthy object *per se*, then

[23] *Supra*, n. 18, 19 and 20. "To the extent that managerial discretion on the part of a prosperous carrier may have the effect of lowering rates below the general level, it runs counter to the expressed policy of Congress as to uniformity and nullifies the intent to impress a trust upon any excessive returns for important National purposes." Advance Opinion of February 1928, p. 23.

we are forced to admit that the proposed rates, while profitable in the sense that they exceed out of pocket costs, nevertheless, may not be uniform with other rates charged by the southern carriers. But what of it? Is a uniform rate structure either a possible or a desirable thing? Should it be imposed as a primary object with the interests of the public, the producer, and the consumer only incidental? It is true that there are cases where the Commission is forced to interfere but can it be said that this is one of them? Our statement that the Commission has ignored actualities in favor of an academic ideal rate structure which is of doubtful utility may be criticized. However, we believe that the following distinctions between this and other cases where the Commission might act with practical advantage indicate that that statement is correct.

(1) *Proposed rates are compensatory.* This is not a case where the southern carriers are offering rates which are not compensatory. It is admitted that the rates proposed will increase the net profits of the southern carriers. As has been said by Mr. Vanderblue, joint author of "Railroads Rate Service Management," "it is good business to take traffic at rates making a minimum contribution above out of pocket expenses rather than to lose the traffic to a competitor, whether the latter be a rail route or a water route, or a rail and water line."[24] This is not denied by the Commission.

(2) *No rate war is imminent.* This is not a case where the Commission is acting to avoid a rate war which will have a tendency to disturb the financial balance of transportation system. No rate war between the southern and northern carriers is imminent.[25]

(3) *Action not necessary to protect weak railroads.* This is not a case where the Commission is protecting weak carriers which otherwise would not earn a fair return on their investment. It is true that the Commission has in mind the ultimate profits and prosperity of the northern carriers[26] but no claim is made that the northern carriers would be unable at present to earn a fair return on their systems

[24] Quoted from "The Long and Short Haul Clause Since 1910" by Homer Vanderblue, 36 HARV. L. REV. 429.

[25] "This might be the opening gun of a rate war, and if such a war transpired we would have ample ground under the law for interfering. But in my judgment there are not yet plain enough indications of such development to warrant condemnation of the suspended rates on that ground." Advance Opinion of February 1928, p. 26. Commissioner Eastman's concurring opinion.

[26] Advance Opinion of February 1928, p. 21.

without the protection of the Commission in this case.

(4) *Rates do not threaten to divert an already established traffic.* It is not a case where a carrier by a proposed rate threatens to divert an established traffic from a competing railroad which is now carrying it. Rather it is the opposite, where the Commission by its ruling diverts an established traffic from a carrier which has acquired it to another carrier which desires it. Indeed, it is a case where traffic which has been built up in reliance upon former rulings of the Commission is being violently disturbed without warning.

(5) *Proposed rates do not nullify geographical location.* This is not a case where proposed rates will nullify the advantage of geographical location. The proposed rates do actually give the northern carriers a distinct advantage because of their location. The claim of the Commission is that not enough advantage is given by the proposed rates to geographical location. The test is whether the more distant locality is actually able to compete. Evidence of successful competition may be even admitted to show that not sufficient advantage has been given.[27]

(6) *Not a case of rate discrimination between shippers on one railroad.* This is not a case where a single carrier or carriers are discriminating between localities or commodities on their lines. The carriers involved in this case serve different localities.[28] Shippers of other commodities on southern lines are not complaining because lake cargo rates are relatively low. Nor will they be benefitted by this decision.

(7) *Not a case of unfair division of rates.* This is not a case where the lower rate proposed by the southern carriers will necessarily result in an unfair division of rates between them and northern participating carriers. It is true that a certain proportion of the lake cargo coal from

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[27] "The record in this case, as in the previous cases which dealt with these lake cargo rates, is replete with testimony in respect of the mining conditions in the northern and southern districts and the ability or inability of the producers to market their coal under the rates in effect or proposed. * * * * In the original cases which concerned these lake-cargo rates evidence with respect to the movement of coal under the rates in issue was admissible for the purpose of showing that the complaining parties had been injured by prejudice alleged by them in the rate adjustment, and to enable us to appraise at true weight the rate comparisons before us. * * * Except in its relation to these particular points we have no concern with this evidence, and for any other purpose we shall give it no consideration." Advance Opinion of February 1928, p. 5a.

[28] "What Congress sought to prevent by that section (referring to § 3) as originally enacted was in differences between localities in transportation rates, facilities and privileges by unjust discrimination against them by the same carrier or carriers." Central R. R. Co. of N. J. *v.* U. S., 257 U. S. 247, 260 (1921).

southern fields is carried through Ohio by northern carriers, but not all of it.[29] At least one of the concurring commissioners does not consider this of sufficient importance on which to base the decision.[30]

With these distinctions in mind, it appears that the effect of what the Commission has done is to set up an ideal standard of a uniform rate structure. Rates must not only be reasonable *per se*, but they must be relatively reasonable in conformance to that structure. To maintain that vague structure the commission does not hesitate to fetter railroad competition, to ignore present economic conditions in favor of what they term ultimate desired results, to prevent any assured reliance upon present existing rates and to put whole sections of the country in danger of a sudden shift of all their economic resources.

Whether such a power has actually been granted by the act under the sections which we have set out in this article, or whether such a power, if granted, is constitutional, it would be improper for us to discuss at this time, in view of the pending case in court. It might be said that the Interstate Commerce Act can conceivably bear the construction put upon it by the Commission,[31] yet the policy of such legislation, if this be a proper interpretation of it, is always open to discussion. We believe it can fairly be said that if the Commission were given the power to prevent rate wars, to prevent railroads from charging non-compensatory rates, to prevent railroads from discriminating between shippers on its lines, etc., to protect financially weak railroads, such a power would take care of every conceivable economic purpose for which the act was passed. The power to set up and to compel carriers to conform to some ideally conceived uniform rate structure is one which has no definite boundaries and no limits. If this be a correct interpretation of the act the Commission will be supreme, because the Su-

[29] The B. & O., New York Central and Pennsylvania railroads participate in considerable percentage of the lake cargo haul. This however does not amount to half of the coal hauled. The Commission makes its ruling however, apply equally to coal hauled over these participating carriers and coal hauled entirely over the carriers who propose the rates. Advance Opinion of February 1928, pp. 5 and 6.

[30] Commissioner Taylor who concurs with the majority says, with respect to basing a decision on the fact that protesting carriers to some extent participate in the haul, "It seems unjust and unreasonable that the fundamental rights of the northern field, shall depend upon the determination of such inconsequential questions as these. To do so would be like attempting to stand a pyramid on its point."

[31] An able argument against the conclusions here arrived at is supplied by Henry Wolf Bikle of the University of Pennsylvania Law School in 36 HARV. L. REV. 5, 25, where the author says: "A rate may be unduly low if, considering the relative service of two carriers it tends to an unfair diversion of traffic."

preme Court does not review the reasons of the Commission in determining whether a rate is discriminatory, provided there is no illegality in their action.[32] To lodge such a power in the hands of a commission has the following overwhelming objections:

(1) The results are unpredictable. In the present case the Commission has reversed itself once on practically the same data. A number of vague and indeterminate factors are balanced in making the rate structure. No human being can tell to which will be given the most weight.

(2) The managerial discretion of railroads will be limited to the operating department. They have no discretion within which they can seek to develop new traffic, if that traffic has a possibility of competing with other sections of the country.

(3) Cities and states are dependent upon the reactions of a group of men who are politically appointed and who are required to follow no rule which can be reduced to any more definite test than the familiar reasonable man test in negligence cases. Vast industries are staked upon a jury verdict given by a jury of experts to be sure,—but nevertheless a jury verdict.

(4) Such a policy has and will create a bitter and continuing fight as to the appointment of members of the Interstate Commerce Commission. In self-protection views of newly appointed commissioners must be determined in advance before they are confirmed by senators from districts affected. Such a power will strip the Commission of all the attributes of a judicial body and transform it into a bureau exercising a vast and unnecessary power.

For years the Interstate Commerce Commission has been regarded as a judicial body, the equal of the courts in general esteem, their decisions being accepted as based on law and fact alone. The power exercised in the Lake Cargo Case has suddenly made them parties to an industrial war. Appointments to the Commission are now being determined by local motives. We submit that no body can assume such powers of economic salvation or ruin over vast sections of the country and remain a judicial body, in any real sense of the word. —T. W. ARNOLD.

[32] Virginia Ry. Co. *v.* U. S., 272 U. S. 658 (1926).