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# THE TROUBLED BEGINNING OF THE INTERSTATE COMMERCE ACT

JAMES W. ELY, JR.\*

From the time of their origin, railroads had been subject to regulation by the states. By the 1880s, however, there was broad agreement that piecemeal and inconsistent state controls were inadequate to deal with perceived difficulties and abuses arising from the interstate operations of railroads. Yet there was little agreement about the nature of the “railway problem,” and still less any consensus as to how best to address the issue. Translating the amorphous public wish for rail regulation into concrete legislation was not an easy task. After years of inconclusive debate, Congress passed the Interstate Commerce Act in 1887.<sup>1</sup> Despite this important step, the early years reveal an Act that made little difference. Congress itself waited nearly two decades to strengthen the powers granted to the Interstate Commerce Commission (“Commission” or “ICC”).

An untidy compromise between quite different House and Senate bills, the Interstate Commerce Act was an amalgam of diverse and vague provisions.<sup>2</sup> It created the ICC, the first important federal administrative agency, to oversee the Act.<sup>3</sup> The five-member ICC had the authority to conduct hearings and issue orders to stop practices in violation of the statute.<sup>4</sup> The Act declared that charges for interstate rail transportation should be “reasonable and just,”<sup>5</sup> but did not define this term or give the ICC the power to set rates. In addition, the Act banned rebates or preferential treatment for any shipper, and outlawed the pooling of traffic or earnings among carriers.<sup>6</sup> The Act left unresolved a basic question: Was it intended to encourage competition among the carriers, or to stabilize the industry through cartelization? As with any

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1. Ch. 104, 24 Stat. 379 (1887). *See generally* ARI HOOGENBOOM & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACAEA TO PALLIATIVE 13–18 (1976).

2. *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 90–93 (2001).

3. Interstate Commerce Act § 11, 24 Stat. at 383.

4. *Id.* §§ 12, 15, 24 Stat. at 383, 384.

5. *Id.* § 1, 24 Stat. at 379.

6. *Id.* §§ 2–3, 5, 24 Stat. at 379–80.

novel measure, the effectiveness of the Act was open to question. Congress seemed primarily concerned to placate the public clamor to curb alleged railroad abuses, and was happy to leave unsettled policy issues to the ICC and the courts. “The entry of the national government into the realm of railroad regulation,” historian Morton Keller aptly explained, “was a leap in the dark.”<sup>7</sup>

The early years of the ICC present a tale of frustration. The sheer size and complexity of the rail industry presented daunting challenges to the fledgling agency with its small staff. Moreover, the states retained jurisdiction over intrastate transportation, and state regulation had the potential to undermine ICC policy. The skepticism of the federal courts about administrative regulation of the economy also greatly contributed to the feeble nature of ICC supervision. Both the Supreme Court and the lower federal courts consistently placed a narrow construction on the Commission’s authority. Two developments are particularly revealing.

First, the ICC had difficulty making its orders effective. Lacking the power to compel obedience to its orders, the agency was required to seek judicial enforcement of its mandates when railroad companies ignored adverse directives.<sup>8</sup> This step, of course, created opportunities for delay when carriers disobeyed the ICC. More troublesome, however, was that federal courts from the outset refused to defer to agency findings of fact. Instead, the federal courts decided that factual matters should be reviewed *de novo*, and permitted the introduction of further evidence by either party.<sup>9</sup> The findings by the ICC were treated as a sort of preliminary report. In *ICC v. Alabama Midland Railway*,<sup>10</sup> the Supreme Court affirmed this practice, ruling that the lower courts should give effect “to the findings of fact in the report of the Commission as *prima facie* evidence of the matters therein stated.”<sup>11</sup> It added that the courts “are not restricted to the evidence adduced before the Commission, [but] additional evidence may be put in by either party,

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7. MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 428 (1977).

8. *See* Interstate Commerce Act § 16, 24 Stat. at 384–85.

9. *See* ELY, *supra* note 2, at 93; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 F. 567, 614 (C.C.D. Ky. 1889) (first judicial test of an ICC order).

10. 168 U.S. 144 (1897).

11. *Id.* at 175.

and . . . the duty of the court is to decide, as a court of equity, upon the entire body of evidence.”<sup>12</sup>

Second, the ICC had difficulty establishing just and reasonable rates. The regulation of railroad rates was one of the most vexing, contested, and misunderstood issues facing lawmakers in the late nineteenth century. As common carriers, railroads had long been under an obligation to charge reasonable and nondiscriminatory prices. But the common law also allowed the carriers considerable latitude in setting rates. In the 1870s some states enacted so-called Granger laws, which empowered state commissions to prescribe maximum charges.<sup>13</sup> Congress, however, stopped short of giving the ICC such authority. Under the 1887 Act, the agency could review rates and set aside those deemed unreasonable, but not fix rates. In time, however, the ICC asserted that the power to impose rates should be implied from the power to bar unreasonable rates.

In *ICC v. Cincinnati, New Orleans and Texas Pacific Railway*,<sup>14</sup> the Supreme Court, in an opinion by Justice David Brewer, rejected this contention.<sup>15</sup> It determined that, subject to the requirement that charges be reasonable and not discriminatory, the Interstate Commerce Act left the carriers free to adjust their rates to meet business conditions.<sup>16</sup> In reaching this conclusion, the Court stressed the heavy investment in railroads and that rail transportation was carried on under diverse conditions in different parts of the country.<sup>17</sup> Pointing out that administrative regulation of railroads was not new, the Court compared the language of the Act with that of state regulatory measures. A number of state laws clearly granted railroad commissions the power to fix rates, but such authority was not expressly given by Congress to the ICC. The authority to prescribe rates, the Court insisted, was “a power of supreme delicacy and importance,” and could not be implied from “doubtful or uncertain” language.<sup>18</sup> The Court disapproved of what it saw as an agency grab for power. The justices observed that “it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to

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12. *Id.*

13. See ELY, *supra* note 2, at 86–87.

14. 167 U.S. 479 (1897).

15. *Id.* at 493.

16. *Id.*

17. *Id.* at 494.

18. *Id.* at 505.

it.”<sup>19</sup> The Court left open, however, the possibility that Congress might confer ratemaking power on the ICC. Until that happened with the Hepburn Act of 1906,<sup>20</sup> the ICC was compelled to abandon its efforts to set rates for the carriers.

By the early twentieth century, the ICC was largely toothless and spent much of its energy gathering statistics about the rail industry. In 1903 the ICC explained: “At present this Commission can investigate and report. It has no power to determine what rate is reasonable, and such orders as it can make have no binding effect.”<sup>21</sup> Nonetheless, the ICC served a vital political purpose. It satisfied the popular clamor for governmental control of railroads, even if the supervision was largely nominal.<sup>22</sup>

Although the Interstate Commerce Act was important as the prototype for subsequent regulatory measures by Congress, the early history of the Act is a study in unresolved problems. Clearly the federal courts were dubious about an administrative body that was an uncertain fit in the constitutional system as traditionally understood. The modern norm of a deferential attitude toward administrative bodies was not the prevailing judicial view in the late nineteenth century. Indeed, implicit in the Supreme Court decisions narrowly construing the authority of the ICC was the premise that Congress, not the Commission, was the proper policymaking body. The Supreme Court of the 1890s was disposed toward private economic ordering, but the responsibility for the feeble power of the ICC rests ultimately with Congress, not the Court. It is far from clear that Congress was very serious about regulating the carriers. Revealingly, Congress appeared untroubled about Court rulings adverse to the ICC, and made no move to strengthen the agency for years. In fact, the ICC remained passive for a decade after the 1897 decisions.

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19. *Id.* at 510.

20. Ch. 3591, § 4, 34 Stat. 584, 589–90 (1906) (amending section 15 of the 1887 Act).

21. 17 ICC ANN. REP. 17 (1903).

22. *Cf.* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 339 (3d ed. 2005) (“Congress was only half-serious about taming the railroads; it was in deadly earnest only about public opinion.”).