Declawing the ICC: Court Cases From the 1890s

Michael Landry, Northeastern State University, USA
Richard Stone, Shippensburg University, USA

The Act To Regulate Commerce of 1887 was intended to place the railroads under "regulation-in-detail" in response to many of their abuses of monopoly power. This regulation was to be administered by the newly created Interstate Commerce Commission (ICC). The following decade (1890's) saw the Supreme Court largely negate its power through a series of court cases. In the next decade (1900's), many of the ICC's powers were restored through several pieces of legislation. This paper traces some of the major sections of the Act To Regulate Commerce through their negating by the Supreme Court and finally to their restoration by further legislation.

Birth Pangs of a New Regulatory Agency

OSHA, EPA, DOT -- an alphabet of federal agencies affect American commerce. That governmental agencies are a major part of doing business is a fact of life. Marketers are not excepted, given their sometimes frequent dealings with agencies such as the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), the Federal Communications Commission (FCC).

It is easy to think of such agencies as long having been part of the American commercial landscape. However, the establishment of such government entities has a relatively recent history -- less than half of that of the nation itself. And the 1887 appearance of the first federal regulatory agency -- the Interstate Commerce Commission -- represented the development of a new governmental institution. Long recognized as having within them characteristics of the executive, legislative, and judicial branches of government, federal agencies lack full executive, legislative, and judicial powers. In addition, while they initially begin as creatures of Congress, they claim no specific government branch as their home. Such ambiguity surrounding the agencies is today taken for granted; however, this was not always the case. When Victorian students of public policy, general commerce, and marketing first faced the Interstate Commerce Commission, immediate questions arose regarding the agency's roles and powers. Coupled with the new (1890) Sherman anti-trust act, the ICC represented increased government involvement in the robust expansion of late 19th century business. The questions raised soon found their way to the judiciary, resulting in U. S. Supreme Court decisions in the 1890s which almost destroyed federal regulation before it began.

The purpose of this paper is to examine those early Supreme Court cases regarding the mission and responsibilities of the new ICC. Such examination will reveal then-current philosophies of judicial review, the adjustments of a maturing federal government to increased concentration of power in commercial interests, and the foundational years of the nation's first federal regulatory agency. Besides showing how the ICC lost power before it was barely established, the paper will also describe how the commission found its salvation in the first Roosevelt administration and will provide a thumbnail sketch of legislation which made it a true regulatory agency after which others were modeled.

The Engine of Commerce: Railroads

Although Standard Oil, interlocking trusts, and the growing power of financiers captured the attention of public policy makers in the late 19th and early 20th century, there was one industry that caused concern for Americans of all walks of life. It was the industry that made most of mass marketing and modern commercial development possible: the railroad. Its history was intimately tied to the early days of the Interstate Commerce Commission.

There is no way to overestimate the impact railroads have had on this country. Before their existence transportation was difficult, to understate the case. Travel from the east to west coasts was a once in a lifetime experience, with return trips being rare. The railroad technology was so superior to the previous transport forms, wagon roads, rivers, and canals, that wherever rails were laid, railroads quickly became the dominant mode. But the railroads' effect on the country was much greater than just improved transportation. They also determined the settlement patterns, especially west of the Appalachians. The country's economic growth without railroads would have been much slower and probably much different. For example, the coal and steel industries would most likely not have developed as they did. These industries, in turn, attracted great waves of immigration (Stone 1991, p. 1).

Railroad Abuses

The importance of the railroads and the fact that they possessed monopoly power, led to many abuses. Abuses tended to be worse west of the Mississippi River, where they often meant literally life or death for communities, depending upon where they built. To ensure the presence of the railroad the towns subscribed to stock that was often overpriced. Many a town spent itself into bankruptcy enticing a railroad to build a line that was thought to insure prosperity (Smith 1984, p. 101).

The farmers were the first group to object to the actions of the railroads. At the end of the era of railroad building, many smaller towns were left with one line serving them. While this was certainly preferable to no rail service at all, it did leave the railroads in a position to raise rates. In truth, this turn of events was often forced by the unbridled competition that existed between the more populous locations. Added to this problem was the necessity for the railroads to accept unfavorable terms from large corporations that would threaten to ship with another railroad or even build their own.

The farmers, further, watched not only the railroads, but also the banks, insurance companies, and liquor interests, prosper as they languished (Hicks 1931, pp. 54-95, 405). The stocks and bonds, mentioned above, that they bought to attract the railroads, often became worthless due to overcapitalization. Public officials were frequently bribed with free passes and stock options (Buck 1913, pp. 13-15).

While the very first efforts at regulating railroad abuses came in the northeast because that was where the railroads were first built, more widespread attempts came in the Midwest Granger states where the abuses were more blatant. The resultant Granger Laws were to be failures, but they led the way to federal regulatory legislation.

The Coming of Federal Regulation

There is disagreement among historians as to the genesis of federal rail regulation. Gabriel Kolko (1965) has made the case that the railroads themselves not only pushed for it, but even wrote the Act to Regulate Commerce in order to end ruinous competition that they were experiencing. Certainly, if regulation was inevitable, the railroads preferred the uniformity of federal regulation to that of the various states. Albro Martin has taken a very different view and is critical of those politicians who pushed for regulations that he feels strangled the railroads (Martin 1971, pp. 175-77). Whatever the truth is in the matter, the Act to Regulate Commerce was passed by Congress and signed into law by President Grover Cleveland on February 4, 1887 (Stone 1991, p. 6).

THE ACT TO REGULATE COMMERCE

The Act to Regulate Commerce, more popularly known as the Interstate Commerce Act, applied to all railroads engaged in interstate commerce, which was practically all railroads then in existence. The act consisted of six sections. Section 1 stated that all rates must be just and reasonable. Section 2 outlawed personal discrimination. Section 3 prohibited undue preference or prejudice. Section 4 prohibited charging higher rates for a shorter haul than a longer haul under substantially similar circumstances and conditions. Section 5 prohibited pooling agreements. And Section 6 stipulated that all rates were to be published and adhered to (Stone 1991, p. 6).

A five member Interstate Commerce Commission (ICC) was created to oversee the act. The Commission was to be independent and while the president appointed the commissioners with consent of the Senate, it was not a part of the executive branch. Congress desired to keep the ICC as apolitical as possible. No more than three members could be from the same political party and none was to have railroad connections (Miller 1930, p. 116).

The duty of the Interstate Commerce Commission was to oversee the provisions of the act by hearing complaints concerning alleged violations. If the accusations were found to be valid, the ICC was to order the practice stopped and to determine the amount of damages suffered by the aggrieved party. The commission also had the power to investigate the railroads' internal management practices and to require the carriers to submit annual reports. The ICC was, itself, to make an annual report to Congress. While the act specified penalties for the various violations, the commission was given no power to impose sanctions. Instead the ICC had to prosecute the cases before the federal courts, which would then impose the penalties, if they concurred (Stone 1991, pp. 6-7; Locklin 1972, pp. 224-28).

This paper is concerned with some of the court cases that resulted from this procedure and resulted in the weakening of the ICC. If it were not for subsequent legislation, also discussed in this paper, which strengthened the commission in many ways, very few people might have ever heard of the Interstate Commerce Commission.

THE ALABAMA MIDLAND CASE

From the beginning, the ICC found problems in enforcing Section 4, which prohibited charging higher rates for a shorter haul than a longer haul under substantially similar circumstances and conditions. In particular, the commission found it difficult to know when to allow exceptions, if at all. The most troubling part of the section was the phrase "under substantially similar circumstances and conditions."

The major question revolved around what constituted "similar circumstances and conditions." The reason for this section in the first place was to protect intermediate locations served by only one carrier from paying more than through locations that had competition between carriers. While it did exempt movements competing against unregulated carriers, the commission ruled that simply the existence of competition with regulated railroads at some

points did not constitute dissimilar circumstances and conditions when compared with other points. In all parts of the country except the southern territory (south of the Ohio and east of the Mississippi) this interpretation was accepted (Sharfman 1969, Vol. I, pp. 29-30). Eventually this came to a legal test in the case of the Interstate Commerce Commission v. Alabama Midland Ry. Co. et al [168 U.S. 144] November 8, 1897.

Troy, Alabama was located on the Alabama Midland Railway fifty-two miles east of Montgomery. Rates on the Alabama Midland for cotton and phosphate rock to and from points east of Troy were higher than rates to and from various other points, particularly Montgomery, even though shipments to and from the latter passed through Troy.

The carrier justified this seeming violation of section 4 on the ground of dissimilarity of circumstances and conditions between Troy and Montgomery, because competition existed at Montgomery, but not at Troy. The ICC refused to accept the existence of competition at one point as making the situation dissimilar and voiding the section (Sharfman 1969, p.30).

The Circuit Court, hearing the appeal, invalidated the commission's decision on the grounds that railroad competition, as well as water competition, did make the circumstances dissimilar (Sharfman 1969, pp. 30-31).

The Supreme Court sustained the decision of the lower court. The court said: "We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them to do so [168 U.S. 144 (1897)]. The difficulty, then, was with the wording of the legislation. The Court decision, in effect, invalidated Section Four, giving the carriers free rein. Justice Harlan's dissent said as much. He stated that this decision goes far in rendering the Commission a useless body.

Thus, Section Four cases were non-existent for the decade. The Commission's power in long-and-short haul issues was reinstated by the Mann-Elkins Act of June 18, 1910 [36 Stat. 539]. While this was not the only provision of the act, it did reestablish the long-and-short-haul clause primarily through the elimination of the phrase "under substantially similar circumstances and conditions." Eliminating this phrase voided the finding of the Supreme Court in the Alabama Midland Case. As amended, the clause now prohibited the higher charges for the shorter haul than the longer haul, whether conditions were similar or not. That is, unless the commission authorized a departure from the rule, carriers could not charge more for a longer haul over the same line or route when the shorter portion was included in the longer haul (Tedrow 1951, p. 47; Sharfman 1969, Vol. I, pp. 54-55; Locklin 1972, pp. 499-500).

COUNSELMAN V. HITCHCOCK

Very early, the commission found difficulty in performing its duties because of unwilling witnesses especially in cases of alleged rebates where both the railroad and shipper could be punished by imprisonment as well as fine. In one famous case in 1890, Counselman, an interstate grain shipper, had made some shipments at less than published tariff rates. He was called before a grand jury to answer questions, but refused, citing the 5th Amendment to the Constitution that he could not be required to testify against himself (Sharfman 1969, Vol. I, p. 23).

The lower court ordered him to testify in that testimony given in such cases could not be used against him (Tedrow 1951, p. 46). But the Supreme Court held for Counselman and ordered him discharged, saying that the statute did not grant him full immunity. His testimony might lead to other evidence that could later be used against him [Counselman v. Hitchcock 142 U.S. 547 (1892)].

Unlike the acts to reinstate the ICC's powers in other cases, Congress wasted little time in passing legislation to rectify the situation. The Compulsory Testimony Act [27 Stat. 443] was enacted on February 11, 1893. This act provided that in any proceeding stemming from violations of the Act to Regulate Commerce or its amendments, no one shall be excused from testifying or producing evidence on the grounds that doing so would incriminate him. On the other hand, no one may be prosecuted based on the testimony in the proceeding (Sharfman 1969, Vol. 1, p. 23).

The Compulsory Testimony Act was challenged and it was not until 1896 that it was upheld by the Supreme Court in I.C.C. v. Brimson, [154 U.S. 447] and Brown v. Walker [161 U.S. 591].

Within a few years, the power of the new Interstate Commerce Commission and that of state railroad commissions began to rapidly erode. In 1890, the U. S. Supreme Court declared that railroad rate setting was a judicial matter and that attempts by the Minnesota railroad commission to set rates was a violation of the due process clause of the Fourteenth Amendment. ICC Commission Chairman Thomas Cooley vigorously advocated the concept of administrative and legislative rate setting, claiming due process was not limited to the judiciary. He believed in concepts of administrative law not only for the ICC, but also for future government agencies (Hoogenboom and Hoogenboom, 1976). The inability of the ICC to enforce its rules without judicial action had led to its embarrassment in 1889 in Kentucky and Indiana Bridge Co. v. Louisville and Nashville Railroad Co. [37 Federal Reporter 567]. In that case, the court treated an appeal from the ICC as de novo, meaning new facts could be presented. Subsequently, many ICC orders were reversed in court after all facts were presented. Also, ICC fact-finding ability was limited in 1893 because the Supreme Court ruled witnesses must have absolute, not just criminal, immunity from self-

incrimination [Counselman v. Hitchcock, 142 U. S. 547]. As a result, Congress amended the Interstate Commerce Act and in 1896 the Supreme Court allowed compelled testimony [Brown v. Walker, 161 U. S. 591] (Miller 1924).

ICC authority was further undercut in the important "Social Circle Case" of 1896 [Cincinnati, New Orleans and Texas Pacific Railway Company v. Interstate Commerce Commission, 162 U. S. 184] (Hoogenboom and Hoogenboom 1976, p. 35-37). The following section will examine this case in detail.

SOCIAL CIRCLE CASE

In October 1889, James & Mayer Buggy Company of Cincinnati complained to the ICC about shipping rates to Social Circle, Georgia. James & Mayer was required to pay the same freight rates from Cincinnati to both Atlanta and Augusta, Georgia, even though Atlanta was 171 miles closer. In addition, James & Mayer's freight to Social Circle, located between Atlanta and Augusta, cost 28 percent more than its shipments to either of those cities. James & Mayer's Ohio-to-Georgia freight movements required the interline services of three railroads [16 SCR, pp. 700-701].

In response to the James & Mayer's complaint, the ICC on June 29, 1891, ordered the railroads to make freight rates from Cincinnati to Social Circle identical to those charged between Cincinnati and Augusta. In addition, the ICC set similar class freight rates between Cincinnati and Atlanta at no more than 1 dollar per hundred pounds [16 SCR, p. 701].

When the railroads refused to comply, the ICC petitioned the U. S. Circuit Court for the Northern District of Georgia to enforce the order. The court ruled against the ICC on June 5, 1893, the U. S. Circuit Court of Appeals reversed the decision to the ICC's favor on May 27, 1894. It ordered the railroads "to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta" [16 SCR, pp. 701-702].

In effect, the ICC had won in court the right to set rates. However, the case eventually made its way to the U. S. Supreme Court. While the Supreme Court affirmed many of the particulars in the court of appeals decision it undercut the ICC's assumption that it could set rates. The Supreme Court declared that the ICC only had the power to decide if rates were reasonable, not the power to set them.

> We do not find any provision of the [Interstate Commerce] act that expressly, or by necessary implication, confers such a power. It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight.[16 SCR, p.705].

In expressing its opinion regarding ICC rate regulation, the Supreme Court quoted an earlier circuit court case (Interstate Commerce Commission v. Baltimore & O. R. Co [43 Fed. 37] which the Supreme Court itself later affirmed [145 U. S. 263, 12 Sup. Ct. 844]:

> . . . the act to regulate commerce leaves common carriers as they were at the common law, -- free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits [16 SCR, p.705].

Nevertheless, the Supreme Court did not endorse every argument of the railroads. One of the railroads' positions was that the final carrier to receive the James & Mayer freight -- the Georgia Railroad -- operated only in one state and was not within the interstate commerce jurisdiction of the ICC. Therefore, it could charge what it would for freight _-port between Atlanta and Social Circle. The supreme court dismissed that claim since the Georgia Railroad was engaging in interstate commerce by receiving freight interlined from Cincinnati and was using a singlular bill of lading [16 SCR, p. 706].

Railroads were attempting other ways to thwart federal regulation, including the tactic of playing one law against another. While Social Circle indicated a lack of railroad enthusiasm for the ICC, some railroads claimed their regulation by the ICC gave them exemption from the new Sherman Antitrust Act of 1890. As will be seen in the next section concerning United States v. Trans-Missouri Freight Association [166 U. S. 290], the U. S. Supreme Court disagreed. That disagreement, however, was not without cost to the Interstate Commerce Commission.

TRANS-MISSOURI

Since the Interstate Commerce Act outlawed railroad pooling agreements, the carriers developed a new concept, the freight association or traffic bureau (Locklin 1972, p. 318). In March, 1889, railroads in the western United States developed the Trans-Missouri Freight Association, a type of syndicate in which they agreed to fix prices among themselves. This was on the eve of the July 2, 1890, passage of the landmark Sherman anti-trust act. In January 1892, the federal government filed suit against a group of railroads belonging to the Trans-Missouri Freight Association, [17 SCR, pp.540-543] accusing them of monopoly, restraint of trade and denial of "cheaper rates of freight that might be reasonably expected to flow from free competition...[17 SCR, p. 543]."

The defendant railroads claimed that the Trans-Missouri Freight Association was designed to maintain reasonable rates and that its agreement had been filed with the ICC in accordance with Section 6 of the Interstate Commerce Act. The U. S. circuit court ruled in favor of the railroads and its ruling was upheld in appeal. This resulted in further government appeal to the U. S. Supreme Court [17 SCR, p. 545].

At issue before the Supreme Court in Trans-Missouri, was whether or not the Sherman Antitrust Act covered common carriers and if so, were the defendant railroads in violation of it? [17 SCR, p. 545]. One of the railroads' arguments of exemption was that Sherman was designed only for trusts and restraint of trade related to manufactured goods. In addition, the railroads claimed an interpretation of the Interstate Commerce Act that permitted the Trans-Missouri Freight Association and that since the Interstate Commerce Act authorized the association, there could not be a prohibition of it under Sherman [17 SCR, p. 547-548].

In writing for the court, Justice Rufus Peckham, made short order of the railroads' arguments. Regarding application of Sherman to railroads, Justice Peckham wrote:

> The language of the [Sherman] act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...A contract, therefore that is restraint of trade or commerce is, by the strict language of the act, prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates...If such an agreement restrain trade or commerce, it is prohibited by the statute.[17 SCR, pp. 547-548].

In addition, the court, in the words of Justice Peckham, denied that Sherman only covered manufactured goods [17 SCR, p. 548]. Regarding the defendants' claim of inferred exemption from Sherman as a result of regulation by the Interstate Commerce Act, the court said the commerce act was irrelevant regarding the Trans-Missouri agreement: "If the agreement be legal, it does not owe its validity to any provision of the commerce act; and, if illegal, it is not made so by that act [17 SCR, p. 549]." The court said both Sherman and the Interstate Commerce Act were not inconsistent with each other and that neither deserved repeal. Also, Justice Peckham wrote that the Interstate Commerce Act was not the only law applicable to railroads and indicated that they were subject to other legislation such as that contained in Sherman [17 SCR, p. 549]: "...we are still unable to see that the railroads were not intended to be included in this legislation [17 SCR, p. 550]." This opinion contradicted the argument of the "public character" of the railroad as a common carrier [17SCR, p. 550] and the unique relationship of enterprises such as railroads and utilities to the public interest ([17 SCR, p. 550-556]; Kopp and Landry, 2000). Also, despite the unique dependence other members of the business community may have upon them, the railroads deserve no special exemption allowing the fixing of prices to avoid ruinous rate wars [17 SCR, p.555-558].

Although Trans-Missouri outlawed cooperative efforts like rate bureaus, in practice they continued, although in an altered form in attempts to meet the letter of the law. Given the necessity of railroads developing joint rates on interline traffic, it was essentially impossible to avoid at least some price cooperation (Locklin 1972, p. 319). In its 1901 annual report, the ICC stated that it had no duty to enforce Sherman, that it could not judge the legality of railroad rate bureaus, and that the railroads probably could not operate without such arrangements. The pressure of rate cooperation enhanced railroad consolidation beginning in the late 1890s. Unlike earlier consolidation efforts aimed at bringing more trackage under control of a single management, the 1890s-era consolidations were specifically aimed at developing monopolies and eliminating competition (Sharfman 1969, p. 34). In its 1900 annual report, the ICC stated that such consolidations and monopolizations were of some benefit (Sharfman 1969, p. 80). Rate bureaus continued for decades without legal challenge until the U. S. Justice Department moved on them in 1944. As a result, Congress developed legislation declaring them legal in the Reed-Bulwinkle Act of 1948 (Locklin 1972, p.320).

Meanwhile, the role of the ICC in rate regulation faced a serious challenge in the U. S. Supreme Court case described in the following section.

ICC V. CINCINNATI, N. O. & T. P. RY. CO. ET AL.

The Supreme Court challenged the ICC's rate-making authority in ICC v. Cincinnati, N. O. & T. P. Ry. Co. et al. [167 U. S. 479]. In the case, the court declared:

> The powers of the interstate commerce commission are judicial and administrative, but not legislative; and it has no power, after it has determined judicially that an existing rate of tariff charged by a carrier is unreasonable, to prescribe a rate to control in the future, and to enforce its order by proceedings in mandamus [17 SCR, p. 896].

The decision stemmed from complaints by Chicago and Cincinnati shippers against a group of railroads regarding freight rates from their respective cities. As a result, the ICC in May 1894, issued an order limiting the rates the railroads could charge. The railroads refused to comply with the ICC order, which resulted in the commission suing them in the U. S. Circuit Court for the Southern District of Ohio [17 SCR, pp. 897-898]. The ICC lost and appealed. As a result, the court of appeals asked the U. S. Supreme Court to rule on whether or not the ICC

had the power to set freight rates. In denying such authority to the ICC, the Supreme Court said Congress never had any intention of the ICC setting rates and that "the grant of such power is never to be implied [17 SCA p. 898]." The court justified its opinion by citing explicit language of state legislation authorizing their railroad commissions to set rates (including California commissioners: ". . . it shall be their duty, to establish rates . . .;" Florida commissioners: "Make and fix reasonable and just rates of freights and passenger tariffs. . .;" Minnesota and North Dakota commissioners: "...directed to compel any common carrier to...adopt such rate, fare, charge or classification as said commission [commissioners] shall declare to be equal and reasonable [17 SCA p. 899 citing California constitution Article 12, January 1, 1880; Florida Sess. Laws 1887, p. 119 cited in Railroad Com'rs v. Pensacola & A. R. Co., 24 Fla. 417, 5 South. 129; Minnesota Laws 1887, c. 10, p. 55 cited in State v. Chicago, St. P., M. & O. Ry. Co., 40 Min. 267, 41 N. W. 1047, and North Dakota Laws 1890, p. 355]."

The interstate commerce act contained no such explicit language and the supreme court justices wrote: "It is one thing to inquire whether the rates which have been charged and collected are reasonable – that is a judicial act; but an entirely different think [sic] to prescribe rates which shall be charged in the future – that is a legislative act [17 SCR, p. 900]. The court cited the common law precedence of judicial authority to determine if rates are "reasonable and just, [17 SCR, p. 900]," but in no case have courts been allowed to set rates. The ICC, the court ruled, is under the same restrictions.

Born of the political forces stemming from the Grangers and the Populists, by the end of the century the ICC was a toothless lion. It did little more than conduct investigations and collect statistics (Miller 1924, p. 754) and administer the federal Safety Appliance Act (Hoogenboom and Hoogenboom, p. 34).

STRENGTHENING THE ICC

Upon becoming President after the assassination of William McKinley in 1901, Theodore Roosevelt worked to strengthen the ICC (Stone 1991, pp. 9). Although a Republican, Roosevelt had established a reputation while governor of New York as anti-business and as a trust-buster. In 1902 Roosevelt targeted the Northern Securities Company, a holding company, which, backed by J. P. Morgan and by Kuhn Loeb and Company, controlled three major railroads in the West and Midwest (Hoogenboom and Hoogenboom 1976, p.46). Northern Securities represented the acme of the hated consolidation movement (Saunders 1978, p. 32).

Two commissioners of the ICC, Martin Knapp, chairman beginning in 1898, and Charles Prouty, commissioner from 1896 to 1914, were proponents of concepts that helped elevate the ICC to a major regulatory agency. Knapp believed in ICC-controlled legalized pools, Prouty advocated valuation of railroad assets in order to determine the fairness of rates (Stone 1991, pp. 9-10).

The Elkins Act

For years the railroads had given substantial rebates to large shippers. Not only were small businesses opposed to the rebates, but the railroads themselves disliked having to discount their published rates. As a result, the railroads embraced the Elkins Act of 1903 which prohibited rate discrimination (Stone 1991, p. 10). In fact, passage of the act may not have occurred without railroad support (Miller 1924, p. 761). Under the Elkins Act, failure to adhere to published rates was considered the only test of discriminatory action. Individual railroad employees or agents were also liable to be fined under the act; however, earlier federal regulatory penalties which included imprisonment were abolished. It was believed that removal of the threat of prison would allow for more effective enforcement since evidence demands would be lowered (Sharfman 1915, pp. 201-202).

Roosevelt Fights the Railroads

In 1904 the Roosevelt Justice Department won a showdown with the Northern Securities Company when the U. S. Supreme Court sent railroaders and their backers a message: voluntarily break up the big rail systems or the courts would do it (Saunders 1978, p.32). That same year, Roosevelt asked Congress to allow the ICC to regulate rail rates if shippers complained. Although railroads had favored the outlawing of rebating, they were against rate regulation. Roosevelt, who had been elected to his own presidency in 1904, used his "bully pulpit" to castigate railroads. He claimed they were opposing their own interests by fighting rate regulation and that such a recalcitrant position would hasten government ownership. Against the backdrop of popular hatred for the railroads, the House in 1904 passed a measure even more stringent than that advocated by Roosevelt. By a 326-to-17 vote, the House called for the ICC to be able to fix rates, rather than merely police exorbitant charges. Cooler heads prevailed in the Senate, however, where the bill died early in 1905. Instead, federal ceilings on rates were incorporated into the Hepburn Act of 1906 (Hoogenboom and Hoogenboom 1976, pp. 47-51).

The Hepburn Act

Besides rate legislation, the Hepburn Act, in effect, rejuvenated the ICC that had been decimated in the 1890's (Sharfman 1915, pp. 202-203). While the Hepburn Act had been under debate, several senators sought broad judicial powers that would put rate-making in the lap of the courts. On the other hand, narrow judicial review would keep rate-making jurisdiction in the ICC, thus making it an independent regulatory commission possessing quasi-legislative, executive and judicial powers. The final version of the bill left judicial review undefined. It allowed the ICC to set rates initiated by complaints, and gave circuit courts jurisdiction and the ability to define the scope of their

review as they determined. While courts could enjoin ICC orders, the commission had access to quick appeal to the Supreme Court (Hoogenboom and Hoogenboom 1976, pp. 51-52).

THE POST-HEPBURN INTERSTATE COMMERCE COMMISSION

Besides encapsulating all three branches of government in the ICC, the Hepburn Act transformed the commission into an unprecedented far-reaching transportation regulatory agency. In addition to railroad companies, the ICC now regulated essentially every dimension of railroad properties, including terminals and rolling stock. Also, the ICC was empowered to regulate express companies, sleeping-car companies, and non-gas and non-water pipelines, (Sharfman 1915, p. 203).

Mann-Elkins Act

ICC power expanded even more following the Mann-Elkins Act of 1910. Parties involved in "transportation of intelligence by electricity" were declared to be common carriers and the ICC was authorized to regulate interstate and international telephone, telegraph, and wireless service (Sharfman 1915, p. 216-217). The ICC also received greater powers of rate-making, placing the burden of proof for proposed rate increases upon the common carrier (Sharfman 1915, p. 217). Railroads were hard-pressed to justify rate increases because of the difficulties of estimating appropriate prices and because of the primitive methods of cost-accounting of that era (Hoogenboom and Hoogenboom 1976, p. 62-63). The Mann-Elkins Act also reinstated prohibitions against long-short-haul discriminations, dormant since 1897 (Sharfman 1915, p. 218).

Some ICC commissioners later acted as though the agency was a court, rather than a policy-setting body. However, Congressional debate leading up to the Mann-Elkins Act defined the ICC as neither a court, nor a part of the executive branch; rather, it was to be considered a committee or arm of Congress (Hoogenboom and Hoogenboom 1976, p. 61,).

CONCLUSIONS

There were other skirmishes involving the railroads and the federal government, notably federal control of the railroads during World War I. Also, by the time of the landmark Transportation Act of 1920, the ICC had evolved into a major force in federal regulation. The Motor Carrier Act of 1935 and the Transportation Act of 1940 effectively brought all transport modes except aviation under the ICC's control, but these are outside the scope of this paper.

Also, outside the paper's scope is the eventual sunsetting of the ICC at midnight, December 31, 1995, with ICC Termination Act of 1995. While this act did not completely eliminate rail regulation, it did replace the ICC with the Surface Transportation Board, whose powers mirror in some ways those of the ICC in its early years. For example, rail mergers come under the jurisdiction of the Surface Transportation Board but are reviewed by the court system as was seen in the recent ruling upholding the STB moratorium on railroad mergers (Wilner, 2000).

Rather, the purpose of this research has been to demonstrate the early days of the Interstate Commerce Commission. Specifically, the goal has been to discuss difficulties the Commission faced in having its role judicially defined and how later White House support helped bring about legislation through which the ICC realized its mission in American commerce. Of course, the ICC provided the model for other federal regulatory agencies. The philosophical, political, and legal wrestlings in the decade or so before and after the turn of the 20th Century resulted in institutions which cast long shadows upon the work of all marketers in and out of the distribution function.

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