RATE-FIXING CONSPIRACIES IN REGULATED INDUSTRIES

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Largely because of the institution ¹ of two important antitrust suits against railroads,² considerable polemic literature has appeared of late, voicing the sentiments entertained by spokesmen for the railroad industry with respect to the applicability of the antitrust laws to that industry.³ These writers disapprove of the enforcement of the antitrust laws against carriers. They sometimes claim that the antitrust laws do not apply to regulated industries; in this connection they tend to ignore decisions of the United States Supreme Court, and to overemphasize the extent to which railroad rate-making is in fact subject to regulation by the Interstate Commerce Commission. They assert that the antitrust laws should not apply to railroad rate-making, and they favor legislative proposals seeking exemption and immunity from the antitrust laws.⁴

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The views herein expressed are those of the author, and do not necessarily reflect those of any governmental agency.

1. Certain abortive investigations which were terminated before institution of litigation likewise aroused interest in the question of antitrust enforcement against carriers. See *WIPRUD, JUSTICE IN TRANSPORTATION* 88 (1945); *Hearings before the Committee on Interstate Commerce, United States Senate on S. 942*, 78th Cong., 1st Sess., 228-237 (1943). (This document will hereafter be cited as "*S. 942, Hearings.*")

2. In *United States v. Association of American Railroads*, Civil No. 246 (D. Neb. 1944) the government filed its complaint on August 23, 1944. On September 27, 1945, the court denied defendants' motions to dismiss. 4 F. R. D. 510 (D. Neb. 1945).

In *Georgia v. The Pennsylvania R. R.*, 324 U. S. 439 (1945), the State of Georgia sought leave to file an amended bill of complaint dated September 15, 1944. On March 26, 1945, leave was granted by the court. On December 17, 1945, a master was appointed, who received evidence at hearings on March 18, 1946, and June 4-August 20, 1946.

3. A judicious statement of the carriers' views by an eminent lawyer, formerly Assistant Attorney General of the United States in charge of the Antitrust Division, now General Counsel of the Pennsylvania Railroad Company, is found in an address delivered on June 6, 1945: Dickinson, *Railroad Rates and the Antitrust Laws*, 12 I. C. C. PRAC. J. 936-951 (1945). A more extreme expression is given by the Illinois Central's Senior General Attorney: Smith, *Rate-Making and the Antitrust Law*, 119 RAILWAY AGE 208 (1945), reprinted in 12 I. C. C. PRAC. J. 1117 (1945). Mr. Smith later made the Supreme Court, as well as the Department of Justice, a target of his denunciation: Smith, *The Interstate Commerce Commission, the Department of Justice, and the Supreme Court*, 36 AMER. ECON. REV. 479-493 (May 1946). One of the defense counsel in the case at Lincoln has recently added his contribution to the subject: *DRAYTON, TRANSPORTATION UNDER TWO MASTERS* (1946).

4. For the recent proposals of that sort, see *S. 942, Hearings; Hearings before Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2d Sess. (1946). (This document will hereafter be cited as "*H. R. 2536, Hearings.*") As to similar unsuccessful attempts in 1910 and 1914, see *WIPRUD, op. cit. supra*, note 1, at 111-113.

It will be the purpose of this article to examine the validity of the claims made on behalf of the carriers. This examination will be made on the basis of respect for existing law as established by judicial decisions, and upon the basis of accepting as sound and desirable the economic policy of competition and free enterprise, as embodied for over half a century in the antitrust laws.⁵

I

RATE-FIXING AND THE ANTITRUST LAWS

Price-fixing combinations or conspiracies are prohibited as *per se* violations of the antitrust laws, without regard to the reasonableness of the prices fixed.⁶ Rate-fixing is obviously one species of price-fixing. Consequently, it is not surprising that the Supreme Court concluded in the *Georgia* case that "conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act."⁷ There was no novelty in this decision—the Court had long ago enunciated the doctrine in the *Freight Association* cases.⁸

Many arguments have been and still are being advanced by railroad spokesmen to escape the effect of the holding in the *Freight Association* cases. It is sometimes suggested that the authority of those cases has been weakened by the subsequent establishment of the "rule of reason" in the interpretation of the Sherman Act. This doctrine was enunciated in the *Standard Oil* case.⁹ Here the court construed the general words of the Sherman Act, which forbade *every* restraint of trade¹⁰ as meaning that Congress had intended to outlaw only those restraints of trade which were found to be unreasonable.¹¹ Thus it will be noted that the

5. The Sherman Antitrust Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940), prohibited restraint of trade and monopoly. The anti-pooling provisions of § 5 of the Act to Regulate Commerce, of February 4, 1887, 24 STAT. 379, 380, 49 U. S. C. § 1 (1940), may be regarded as the beginning of federal antitrust legislation. "The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well." SNYDER, *THE INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS* 122 (1904).

6. *United States v. Trenton Potteries Company*, 273 U. S. 392 (1927); *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150 (1940). Regarding *per se* violations see HODGES, *THE ANTITRUST ACT AND THE SUPREME COURT* 16 *et seq.* (St. Paul, Minn., 1941).

7. *Georgia v. The Pennsylvania R. R.*, 324 U. S. 439, 456 (1945).

8. *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 341 (1897) and *United States v. Joint Traffic Assoc.*, 171 U. S. 505, 565, 570, 577 (1898). *Accord*: *Northern Securities Co. v. United States*, 193 U. S. 197, 327 (1904); *United States v. Terminal Railroad Assoc. of St. Louis*, 224 U. S. 383, 394, 409 (1912); *United States v. Union Pacific R. R.*, 226 U. S. 61, 85 (1912); *United States v. Southern Pacific Co.*, 259 U. S. 214, 229-231 (1922).

9. *Standard Oil Co. v. United States*, 221 U. S. 1 (1910).

10. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940).

11. In so holding the Court overrode not merely the language of the statute, but the clear intent of Congress and its own previous decisions as well. No less than

Standard Oil case impaired only that part of the *Freight Association* cases which dealt with the question whether *all* restraints of trade, or only those that were *unreasonable*, were prohibited by the Sherman Act. The question whether the antitrust laws apply to transportation (a question which was expressly raised and decided affirmatively in the *Freight Association* cases) was not involved in the *Standard Oil* case. Nor was the Court's decision in the *Freight Association* cases with respect to the illegality of price-fixing weakened by the "rule of reason."¹²

Another argument advanced is that the *Freight Association* cases were decided a long time ago (in 1897 and 1898), and that conditions then were wholly different from those existing today. In connection with this argument, those who advance it point out that the Interstate Commerce Commission did not then possess the extensive powers which it now has to prescribe rates.¹³ It is obvious that this type of speculation, as to what it may be imagined the Supreme Court would have held in the *Freight Association* cases if the Commission's powers at that date had been the same as those which it possesses today,¹⁴ completely disregards and ignores the actual holding and decision which the Court in fact rendered in those cases. Mr. Drayton's discussion in effect amounts to a reargument of the *Freight Association* cases. Similarly, his argument that the legislative history of the Sherman Act shows that it was not intended to apply to transportation¹⁵ is in essence merely an assertion that those cases were wrongly decided.

Another argument advanced to weaken the force of the decision in the *Freight Association* cases is that the agreements there held illegal contained stronger coercive sanctions against dissenting carriers than those in effect today.¹⁶ This contention rests upon an incorrect interpretation of the antitrust laws. An illegal price-fixing conspiracy may

three times the Supreme Court had refused to qualify the Sherman Act by adopting the "rule of reason." The doctrine was first rejected in *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290 (1897). After deliberation a rehearing of this case was denied, and its holding was followed in *United States v. Joint Traffic Assoc.*, 171 U. S. 505 (1898) and *Northern Securities Co. v. United States*, 193 U. S. 197 (1904). Congress likewise refused to adopt amendments inserting the word "reasonable" in the statute. Jackson and Dumbauld, *Monopolies and the Courts*, 86 U. OF PA. L. REV. 231, 244-5 (1938).

12. Twenty instances, prior to the *Georgia* case, in which the Supreme Court has cited the *Freight Association* cases are listed in WIEBUD, *op. cit. supra*, note 1 at 176-181.

13. Smith, *supra* note 3 in 12 I. C. C. PRAC. J. at 1119; DRAYTON, *op. cit. supra*, note 3, at 23 *et seq.* It was held in *Interstate Commerce Commission v. C. N. O. & T. P. R. R.*, 167 U. S. 479 (1897), that the Commission had no power to prescribe rates. Power to prescribe maximum rates was conferred by the Hepburn Act of June 29, 1906, 34 STAT. 584 (1906), 49 U. S. C. § 1 (1940).

14. See DRAYTON, *op. cit. supra*, note 3, at 29.

15. *Id.* at 13, 21. For a different interpretation of the legislative history of the Sherman Act see WIEBUD, *op. cit. supra* note 1, at 110-111.

16. DRAYTON, *op. cit. supra* note 3, at 26, 27, 50.

exist, even though no coercive powers are conferred upon the combination so as to enable it to enforce the price-fixing agreement against recalcitrant members. The mere fact that present-day methods are less crude and more subtle does not necessarily relieve them from the taint of illegality.¹⁷

II

THE SCOPE OF COMMISSION REGULATION

As the Supreme Court aptly observed in the *Georgia* case: "Regulated industries are not *per se* exempt from the Sherman Act."¹⁸ It is necessary to consider the scope and extent of the regulatory powers conferred by law upon the Commission.

It is of course undeniable that Congress in the exercise of its power to regulate commerce may depart from the general rule of competition which it has established in the antitrust laws,¹⁹ and may establish a different regime for particular segments of the national economy.²⁰ It is true that certain limitations upon completely free competition are embodied in the existing regulatory provisions of the Interstate Commerce Act. Thus before new operations may be instituted, a certificate of public convenience and necessity must be obtained from the Commission.²¹ Moreover, while it is the duty of each common carrier to initiate its own rates,²² the carrier's freedom of action is limited by the legal requirements that the rates established must be "just and reasonable,"²³ must not cause "unjust discrimination,"²⁴ or "undue or unreasonable preference or advantage" or "undue or unreasonable prejudice or dis-

17. The boundary between such concerted action as is permissible under the antitrust laws and that which is forbidden is usually determined by comparison and study of the following leading cases: *American Column and Lumber Company v. United States*, 257 U. S. 377 (1921); *United States v. American Linseed Oil Company*, 262 U. S. 371 (1923); *Maple Flooring Manufacturers' Association v. United States*, 268 U. S. 563 (1925); *Cement Manufacturers' Association v. United States*, 268 U. S. 588 (1925); *Sugar Institute v. United States*, 297 U. S. 553 (1936). See statement of Assistant Attorney General Berge in *H. R. 2536, Hearings*, 781, 784, 786. Railroad lawyers are as capable as counsel for any other industry to determine the scope of allowable collaboration. The alleged necessity of additional legislation to eliminate confusion is imaginary.

18. 324 U. S. at 456 (1945).

19. *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397 (1927); *Northern Securities Co. v. United States*, 193 U. S. 197, 337-8 (1904).

20. *Wickard v. Filburn*, 317 U. S. 111, 128 (1942); *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, 394-6 (1940); *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 226 (1940); *United States v. Rock Royal Co-operative*, 307 U. S. 533, 569-70 (1939).

21. 24 STAT. 379 (1887), as amended, 49 U. S. C. § 1 (18) (1940), so provides with respect to railroads. Similar provisions with respect to motor and water carriers are found in 49 U. S. C. §§ 306, 307, 909 (1940).

22. *Georgia v. The Pennsylvania R. R.*, 324 U. S. 439, 459 (1945); *United States v. Chicago, Milwaukee, St. Paul & Pacific R. R.*, 294 U. S. 499, 506 (1935); *Arizona Grocery Company v. Atchison, Topeka and Santa Fe Ry.*, 284 U. S. 370, 384 (1932).

23. 24 STAT. 379 (1887), as amended, 49 U. S. C. § 1 (5) (a) (1940).

24. *Ibid.* 49 U. S. C. at § 2.

advantage.”²⁵ If in an appropriate proceeding the Commission finds that an established or proposed rate violates these or other requirements of the Act, it may prescribe the maximum or minimum, or maximum and minimum, or the precise rate to be charged.²⁶ Furthermore, following the financial plight of the railroads after the first World War, Section 5 of the Interstate Commerce Act was amended with a view to encouraging mergers of rail carriers. Accordingly the Commission was empowered to approve and authorize pooling agreements and acquisitions of control found by it to be “in the public interest.” Transactions so approved are relieved from the operation of the antitrust laws.²⁷

But as the Supreme Court stated in the *Georgia* case with respect to the Commission’s authority:

“It has the power to lift the ban of the antitrust laws in favor of carriers who merge or consolidate . . . and the duty to give weight to the antitrust policy of the nation before approving mergers and consolidations. . . . But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws.

* * *

“The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate-making.”²⁸

25. *Id.* at 380, 49 U. S. C. at § 3. These requirements of the Act expressly bind the carriers; they are not merely admonitions addressed to the Commission to guide its administrative judgment. Hence there is no foundation for the assertion made by a railroad attorney before a section of the American Bar Association that the Antitrust Division “contends that the freight rates must be made by individual railroads . . . without regard to the standards of rate-making found in the Interstate Commerce Act.” Smith, *The Application of the Antitrust Laws to Regulated Industries*, 14 I. C. C. PRAC. J. 181, 188 (1946).

26. 24 STAT. 382, 384 (1887), as amended, 49 U. S. C. § 15 (1940). Only where such findings have been made does the Commission have any authority to prescribe rates. Pending consideration of the lawfulness of new rates, the Commission may suspend them for a period not exceeding seven months. Proceedings before the Commission are cumbersome, costly, and protracted. Shippers should not be deprived of the benefits of competition on the theory that the right to litigate before the Commission is an adequate substitute. An example will illustrate the effectiveness of such procedure. In 1937 the producers and shippers of anthracite coal, with the support of the Commonwealth of Pennsylvania and of the United Mine Workers of America, complained to the Commission that rates on that commodity were too high. On October 10, 1945, the Commission granted a reduction of 25 cents. Its order was contested by the carriers in court, and upheld on July 12, 1946 (*Gardner v. United States*, 67 F. Supp. 230 (D. N. J. 1946)). Meanwhile a general rate increase had been approved by the Commission. Of the 41 complainants, shipping approximately 70% of the total output of anthracite, 17 went out of business during the course of the litigation. See Dumbauld, Book Review, 34 GEO. L. J. 557-560 (1946).

27. 24 STAT. 380 (1887), as amended, 49 U. S. C. § 5 (1940). For the terms of § 5 as amended by the Transportation Act of 1920 (41 STAT. 456, 480 (1920)), as amended by the Emergency Railroad Transportation Act of 1933 (48 STAT. 211, 217), as amended by the Transportation Act of 1940 and now in effect (54 STAT. 898, 905 (1940)).

28. 324 U. S. 439, 456, 458-9 (1945).

Consequently it is clear that, subject to the foregoing limitations,²⁹ Congress did not contemplate that carriers should be relieved from the requirements of the antitrust laws merely because additional requirements were imposed by the Interstate Commerce Act, as amended. It is plain that the carriers are subject to and must obey both statutes. To complain that this places the carriers under two masters, or supercedes the regulatory functions of the Interstate Commerce Commission by "regulation by the Antitrust Division,"³⁰ is to ignore the terms of the pertinent legislative provisions and to indulge in a play upon words. One might as well argue that for the same reason, as a regulated industry subject to the Interstate Commerce Act, the railroads are relieved from the operation of the internal revenue laws.

A most astounding, and perhaps revealing, assertion or admission is made by Mr. Smith when he denies the existence of a "zone of reasonableness" and advances the claim that the railroads are entitled to rates that reflect a "reasonable maximum basis." He states that the Interstate Commerce Act furnishes "a complete protection of the public interest in the matter of rates. There are no gaps in that protection. . . . It is a paradox to state that there is need of protecting the public interest in cases where the rates do not exceed a reasonable maximum basis."³¹ Mr. Smith is unique in holding, or at least in admitting publicly, this view. His position entirely ignores the Supreme Court decisions which plainly recognize that under existing statutes there is a "zone of reasonableness," to use Mr. Justice Cardozo's expressive phrase, within which the carrier's initiative in making rates must be respected.³²

The Commission is powerless to order the reduction of a rate which is not in excess of a reasonable maximum.³³ However, com-

29. It should also be noted that the Interstate Commerce Act requires carriers to establish reasonable through routes and rates. An agreement among carriers for that purpose would not violate the antitrust laws, if within "the legitimate area in which that collaboration may operate." *Id.* at 457; *H. R. 2536, Hearings*, 781.

30. Smith, *supra* note 3, in 12 I. C. C. PRAC. J. at 1122; *DRAYTON, op. cit. supra* note 3, *passim*.

31. 12 I. C. C. PRAC. J. at 1123-4. But the Supreme Court stated in the *Georgia* case that "the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the antitrust laws." 324 U. S. 439, 460 (1945). An analogous violation of the antitrust laws would exist if competitors agreed to make an OPA "ceiling" a "floor."

32. *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 294 U. S. 499, 506 (1935); *Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railroad Co.*, 284 U. S. 370, 384 (1932); *Illinois Central Railroad v. United States*, 263 U. S. 515, 522 (1924). To these authorities may now be added the *Georgia* case.

33. As stated at p. 461 in the *Georgia* case: "Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone." Moreover, in any event, Mr. Smith errs in believing that resort to the Commission is a

petition among carriers might result in a rate, equally reasonable, but below the reasonable maximum. Under the antitrust laws, the public is entitled to the benefit of such rates, within the zone of reasonableness, as would result from the normal effect of economic conditions in the industry, without the intrusion of a rate-fixing combination resulting in collusive "interference with the free play of competitive forces."³⁴

If the views thus openly expressed by Mr. Smith, contrary to the uniform pronouncements of the Supreme Court, are in fact covertly entertained by railroad management generally, it may explain why they oppose the application of the antitrust laws to their industry. Enforcement of the prohibitions contained in the antitrust laws against rate-fixing combinations would prevent the carriers from exacting in every instance the maximum rate permissible under the requirement of the Interstate Commerce Act that rates must be reasonable. In the absence of a well organized hierarchy of rate-fixing combinations among carriers, almost constituting a "private government",³⁵ there would be the danger that some carrier might exercise the rate-making initiative conferred upon it by existing law and offer the public a lower reasonable rate than the permissible maximum.

III

THE PENDING ANTITRUST CASES

In the light of the foregoing review of applicable legal principles, the issues raised in the *Georgia* case in the Supreme Court and the anti-

complete substitute for the benefits of competition. The Commission, and other regulatory bodies, have recognized that while regulation is beneficial in obtaining compliance with certain minimum standards of service, it does not provide that stimulus and incentive to improving service which is obtained by vigorous competition within the industry. *Virginia Stage Lines v. United States*, 48 F. Supp. 79, 81 (W. D. Va. 1942); *Santa Fe Trail Stages, Inc., Common Carrier Application*, 21 M. C. C. 725, 747-749 (1940); *Colonial Airlines, Inc., Atlantic Seaboard Operation*, 4 C. A. B. 553 (1944); *Lake, Competition in the Public Utility Fields*, 10 Miss. L. J. 197, 204-206 (1938).

34. *United States v. Southeastern Underwriters Assoc.*, 322 U. S. 533, 536 (1944); *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 221 (1940). The need for competition, as well as regulation, in the railroad industry was forcefully expressed by Mr. Justice Brandeis: "No one has recognized more fully than members of the Interstate Commerce Commission the limitation of accomplishment through railroad regulation. No one recognizes better than they the continuing need of competition to secure satisfactory service. . . . To abandon competition in transportation, and rely upon regulation as a safeguard against the evils of monopoly would be like surrendering liberty and regulating despotism." *BRANDEIS, BUSINESS—A PROFESSION*, 295-299 (1933). See also *MASON, BRANDEIS: A FREE MAN'S LIFE* 181 (1946); *FRANKFURTER (ed.), MR. JUSTICE BRANDEIS* 134 (1932); *LIEF (ed.), THE BRANDEIS GUIDE TO THE MODERN WORLD* 179 (1941). Though Brandeis was at first ridiculed for lack of "business experience, particularly in railroading" when he ventured to differ with magnates of that industry (*MASON, op. cit. supra*, 186, 208), his outstanding ability in the field of railroad matters was later recognized by competent railroad spokesmen. See *Biklé, Mr. Justice Brandeis and the Regulation of Railroads*, 45 *HARV. L. REV.* 4 (1931).

35. *Fashion Originator's Guild v. Federal Trade Comm.*, 312 U. S. 457, 465 (1941).

trust case brought by the Government at Lincoln, Nebraska, may now be considered.

In the *Georgia* case in its amended bill of complaint, invoking the original jurisdiction of the Supreme Court under Article III, Section 2 of the Constitution of the United States, the State of Georgia alleged that the defendants (comprising some 20 railroad companies), through their private rate-fixing machinery, have established arbitrary and non-competitive rates which are detrimental to and discriminate against the State of Georgia and its people. The allegation was also made that manufacturers and shippers in the North are given an advantage over those located in Georgia, and that the southern railroads are dominated or coerced by the northern railroads. It is further charged that the rates as a result of the conspiracy are so fixed as

- (a) to deny to many of Georgia's products equal access with those of other States to the national market;
- (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;
- (c) to frustrate and counteract the measures taken by the state to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and
- (d) to hold the Georgia economy in a state of arrested development.

The United States as *amicus curiae* filed a brief in support of the State of Georgia, advancing two contentions: (1) that a case or controversy within the original jurisdiction of the Supreme Court was presented by the amended bill of complaint filed by Georgia; (2) that the antitrust acts support, and the Interstate Commerce Act does not preclude, the injunctive relief sought. The Supreme Court on March 26, 1945, rendered its decision, sustaining both of these propositions.³⁶

Regarding the question of jurisdiction, it is sufficient to say here that the Court followed previous decisions authorizing a state to sue as *parens patriae*. The dissenting minority thought that the Court in its discretion and in the interest of a more efficient administration of justice should have declined to exercise its jurisdiction, remitting the parties to a district court of proper venue.³⁷ They also believed that the National Government was exclusively authorized to represent the

36. A dissenting opinion was written by Mr. Chief Justice Stone, in which Mr. Justice Roberts, Mr. Justice Frankfurter, and Mr. Justice Jackson joined.

37. 324 U. S. at 470 (1945).

people as *parens patriae* in the vindication of their rights under the antitrust laws.³⁸

The Court held that while Georgia could not recover damages even if the conspiracy alleged were shown to exist,³⁹ nevertheless injunctive relief was not precluded.⁴⁰

The basis of this decision was that Georgia was not seeking to upset any existing tariff but simply to free the rate-making process from "practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act." This would restore to the industry "that degree of competition envisaged by Congress." Any injunction which might be issued against the alleged rate-fixing combination would thus provide relief of the very sort which is customarily granted in antitrust suits. Such relief was the only adequate remedy available since the alleged combination was outside the scope of administrative control—in fact without such relief effective regulation would be stultified.⁴¹ Thus the *Georgia* case is a clear decision that the anti-trust laws apply to rate-fixing combinations in the railroad industry even though the industry is also subject to regulation in certain respects by the Interstate Commerce Commission.

In the complaint filed by the Government at Lincoln, Nebraska, on August 23, 1944, against numerous western railroads, the Western Association of Railway Executives, the Association of American Railroads, two railroad banking firms (J. P. Morgan & Co., Inc., Kuhn, Loeb & Co.), and sundry individual defendants, violations of Sections 1 and 2 of the Sherman Act were charged, having the effect of vesting in eastern financial interests control of transportation in the western part of the United States. It was alleged that such control is exercised through the railroads' private rate-fixing machinery and other organizations for collusive action in such manner as to maintain collusive and noncompetitive rates, as well as to prevent and retard im-

38. *Id.* at 474.

39. *Id.* at 453, citing *Keogh v. Chicago & Northwestern Railroad Company*, 260 U. S. 156 (1922).

40. Since the relief sought by Georgia against the alleged rate-fixing combination and conspiracy is not a matter subject to the jurisdiction of the Commission, § 16 of the Clayton Act is not a bar to injunctive relief. That section provides that no one but the United States may obtain injunctive relief against common carriers subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction" of the Commission. 38 STAT. 737 (1914), 15 U. S. C. § 26 (1940). Cf. *Terminal Warehouse Co. v. Pennsylvania Railroad Company*, 297 U. S. 500, 513 (1936); *Central Transfer Company v. Terminal Railroad Association*, 288 U. S. 469, 473-5 (1933); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474 (1932).

41. 324 U. S. at 455, 459-60, 461-62. The dissenting opinion regarded the distinction between the alleged conspiracy and the rates resulting therefrom as a futile "verbal maneuver" for the reason that the state could not show injury without showing that the conspiracy would result in unlawful rates, or that without the conspiracy lawful rates other than those now in force would prevail. *Id.* at 481-2. Hence judicial relief by injunction would be a "futility" or "idle gesture." *Id.* at 487.

provements in service and facilities. By depriving the public of the benefits of low-cost competitive transportation rates and facilities, it was alleged that "the functioning of the national economy as a whole" was impaired "by preventing the full utilization of the Nation's natural resources, productive capacity, and purchasing power." The scope of the conspiracy charged was specified in twenty enumerated practices whereby collective control over the rates and services furnished by individual railroads was effectuated. Among the instrumentalities used to impose this control were the Association of American Railroads, the Western Association of Railroad Executives, and an arrangement known as the "Commissioner Plan, Western District," established under the so-called Western Agreement which became effective on December 1, 1932.⁴²

The complaint alleged that under the Western Agreement any railroad desiring to make a change in its rates or services, in the event of protest by any other party to the agreement, was prevented from putting such change into effect until after reference of the dispute to the Western Commissioner. In the event that his proposed solution was not accepted by parties to the controversy, the matter was then referred to the Committee of Directors established under the plan. This committee was composed of representatives of financial interests connected with the respective railroads, as distinguished from the operating managements, and held its meetings in the Board Room of the Bank of The Manhattan Company at 40 Wall Street, New York City. The defendant banking firms, it was alleged, controlled and handled substantially all financing operations and security issues of the defendant railroads (except to the extent that competitive bidding is now required by law), and defendant J. P. Morgan & Company, Inc., or its predecessor, participated in the organization of the defendant Association of American Railroads.

The complaint recited instances of interference by the alleged combination with the management of western railroads. It is stated that in 1938, when farmers and grain men in Texas, Oklahoma, and Kansas proposed to donate a shipload of wheat to the people of China and requested the defendant railroads to transport such wheat to ocean

42. The complaint alleged that after the existence of the Western Agreement was brought to the attention of the Department of Justice and a copy thereof was requested on April 9, 1943, the Agreement was filed with the Interstate Commerce Commission on April 14, 1943, and the parties to the Agreement stated that they had adopted an amendment thereto purporting to cancel the Agreement as of April 23, 1943. The complaint charged that notwithstanding said purported cancellation, the unlawful practices inaugurated under the Agreement had not been abandoned, and the defendants had made public statements asserting their intention to continue operation in the future under the same or a similar plan; and that the defendant Charles E. Johnston, who was serving as Western Commissioner under the plan, had continued to act in the capacity of Chairman of the Western Association of Railroad Executives.

ports at rates lower than those then in force, such reduction in rates was prevented by the action of defendant Western Association of Railroad Executives, in adopting a resolution providing that "no reduction from normal tariff rates be authorized in Western Territory for movement of wheat to ports for charitable distribution to the common people of China." Slow-down agreements, to prevent prompt delivery of perishables by carriers who might have been able to furnish more rapid service than other parties to the agreement, establishing uniformity of delivery time, are described in the complaint, as well as the efforts of the railroads to retard the growth of motor transportation. Agreements between railroad interests and pipe line owners with respect to the transportation of oil are also set forth as well as arrangements for maintaining high rates on iron and steel from the plant at Geneva, Utah, erected by the Defense Plant Corporation.

In the light of the foregoing summary of the complaint,⁴³ it is clear that the restraints charged by the Government constitute much more than an attack upon the rate bureau or conference technique as such,⁴⁴ and hence the District Court appropriately held that it stated a cause of action notwithstanding the temporary immunity afforded to joint action through rate bureaus under Certificate No. 44, issued by the Chairman of the War Production Board on March 20, 1943, pursuant to Section 12 of the Small Business Mobilization Act of June 11, 1942.⁴⁵ Accordingly, the Court on September 27, 1945, denied defendants' motions to dismiss the suit. At the same time certain of defendants' requests for a bill of particulars were granted.⁴⁶ There would seem to be little doubt regarding the correctness of the Court's conclusion that the allegations contained in the complaint, if proved, would constitute a clear violation of the antitrust laws.

IV

NON-LEGAL FACTORS IN RATE-MAKING

In commenting on the *Georgia* case and the case at Lincoln, Mr. Dickinson, in the address above referred to, states:

"While the pending proceeding at Lincoln, Nebraska, and the suit of the State of Georgia in the United States Supreme Court

43. A more detailed summary of the complaint is given in Judge Delehant's opinion in *United States v. Association of American Railroads*, 4 F. R. D. 510, 515-516 (D. Neb. 1945).

44. *Id.* at 523.

45. 56 STAT. 357 (1942), 50 U. S. C. APP. § 1112 (Supp. II, 1942). The terms of that section and of Certificate No. 44 are set forth in 4 F. R. D. at 519-20. Certificate No. 44 remained in force until October 1, 1946. In the *Georgia* case the Supreme Court commented in a footnote upon the effect of that certificate, finding "that in no respect would it be a bar to the present action." 324 U. S. at 459.

46. 4 F. R. D. 510, 534 (1945).

raise interesting and important legal questions with respect to the anti-trust laws and their application to a regulated industry like the railroads, it does not seem to me that the strictly anti-trust feature of the campaign of the Department is the most important or significant one from a practical standpoint. The pending anti-trust suits are the instrument and vehicle for promoting far-reaching and drastic changes in the existing structure of railroad rates in this country.”⁴⁷

While of course from the standpoint of railroad management questions arising under the antitrust laws may be an unimportant factor in the overall problems of operation, the “strictly antitrust feature” of the pending litigation is of fundamental importance from the standpoint of antitrust enforcement. From this standpoint, the application of the antitrust laws in the field of railroad transportation is just as vital as in any other segment of American industry. It is the duty of the Department of Justice to enforce the antitrust laws, and it is in the public interest that those laws should be enforced, even though some inconvenience is thereby caused to the corporations concerned in the conduct of their affairs and business.

Whether as a practical result of these suits any “far-reaching and drastic changes in the existing structure of railroad rates in this country” would come about depends upon the extent to which the existing rates are maintained as the result of practices violative of the antitrust laws. No change in the rates could come about as the effect of the anti-trust suits except such changes as would be caused by the elimination of the illegal practices condemned by those laws. The scope and magnitude of the changes would depend upon the degree to which the present rates are the result of unlawful manipulation.

To the extent that existing rates reflect legitimate economic considerations such as the cost of service, wages and other proper operating expenses, etc., they would not be affected by the results of a victory for the Government in an antitrust suit. Only that portion of existing rates which represents the result of successful conspiracy among the carriers to maintain rates different from those which would otherwise be maintained in the absence of illegal practices would be affected by the elimination of such practices. Apart from action taken in order to eliminate the effect of violations of the antitrust laws upon the rate-making process, the Antitrust Division has no function with respect to rates. It has no voice in determining what rates shall be established, or what principles of rate-making shall be utilized in establishing them. Consequently, Mr. Dickinson is in error when he assumes that the

· 47. Dickinson, *supra* note 3, in 12 I. C. C. PRAC. J. at 936.

Department of Justice is espousing any particular theory of rate-making.⁴⁸

The remainder of Mr. Dickinson's discussion is devoted to a defense of rate bureaus. In so far as he advances the argument of convenience, it may be replied that it would doubtless also be convenient to companies engaged in other lines of business than railroading to be permitted to establish bureaus and associations to pass upon proposed price changes by companies in the industry. The mere fact that railroads are subject to regulation (*i.e.* to legal obligations to which other businesses are not subject) does not relieve them from the legal obligations which they share in common with all businesses.

Mr. Dickinson points out that the railroads have employed the practice of conference and consultation between competitors "ever since their rates have been controlled by the Interstate Commerce Commission, for the purpose of giving preliminary consideration to proposed rate changes and to the bearing of those changes on the rate structure as approved or ordered by the Commission."⁴⁹ In this connection it should be noted that, in fact, organizations for discussion and agreement upon rates among competing carriers were employed and in existence long before the enactment of the Interstate Commerce Act in 1887. Public sentiment against such rate associations and pooling agreements led to the restrictive provisions embodied in the Interstate Commerce Act as originally adopted.⁵⁰

It should also be observed that it is pure subterfuge to say that the rate bureaus examine proposed rate changes merely to determine whether they are in conformity with the Interstate Commerce Act and with the decisions of the Interstate Commerce Commission. The power of the rate bureaus extends to the consideration of all proposed rate changes, and the grounds upon which they are approved or disapproved

48. Starting with the assumption that the Department is advocating in the *Georgia* case the "distance" principle of rate-making, or the "industrial development" principle, it becomes easy for Mr. Dickinson to point out that these principles are valid only within limits and can become mutually contradictory and self-destructive, and that other principles, such as cost of service, must also be considered. But nowhere in the Government's *amicus* brief in the *Georgia* case is there any language urging adoption of any particular rule of rate-making.

49. 12 I. C. C. PRAC. J. at 944.

50. As early as 1858 the presidents of the trunk lines united in New York "in a conference to effect a restoration of harmonious relations, just principles of action, and a remunerative tariff," and in 1870 an important pool was organized by the lines between Chicago and Omaha. MCPHERSON, RAILROAD FREIGHT RATES IN RELATION TO THE INDUSTRY AND COMMERCE OF THE UNITED STATES 166, 170-71, 248, 251 (1909). The Cullom Committee in its report of January 18, 1886, did not recommend either the prohibition or the legalization of pooling. SEN. REP. No. 46, 49th Cong., 1st Sess., Part I, 201 (1886). § 5 of the Act as passed prohibiting pooling. Albert Fink, Commissioner of the Trunk Line Association, and George R. Blanchard, head of the Central Freight Association territory pool, were witnesses before the Committee. Other pooling agreements were discussed during debate. 17 CONG. REC. 7282 (1886).

are not confined to considerations of legality. Business policy and expediency undoubtedly enter into the determinations made by rate bureaus. Mr. Dickinson himself does not claim that the function of the bureaus is limited to such tasks. He states only that a part of their work consists in testing proposed rate changes by Commission standards, and says "*insofar as they do this, they perform preliminary work which would otherwise fall upon the Commission.*"⁵¹

"Insofar as they do this," however, the rate bureaus are performing work which ought to be performed by the traffic and law departments of the several railroads. The mandates of the Interstate Commerce Act prescribing legal standards with which rates must comply are directed to the individual carriers. A carrier violating such provisions of the Interstate Commerce Act is responsible for its own shortcomings, and cannot hide behind the skirts of its competitors. It is the customary function of a railroad's law department to advise the carrier regarding the legal requirements with which it must comply in order to avoid running afoul of the law. Collection of pertinent factual data regarding rates and rate proposals is a normal function of a railroad's traffic department. There is, therefore, no justification for the establishment of a private government by the carriers collectively to pass upon the lawfulness of proposed rate changes under the pertinent provisions of the Interstate Commerce Act and the standards established by decisions of the Commission.

When Congress, in response to an overwhelming popular demand to curb the abuses of railroads, established the Interstate Commerce Commission, it did not authorize that body to delegate its duties to any private group. Much less may such a private group usurp the Commission's duties by their own action. Had the people been contented with the functioning of the private organizations of competing railroads to fix rates, they would not have clamored for legislation resulting in the establishment of the Commission. There is a clear distinction between public authority and public officers on the one hand, and private organizations and executives on the other, even when the same individuals occupy dual capacities, as was the case when during the war the railroads were taken over for a short time following a strike and high railroad officials were commissioned as officers in the Army.

Thus, Mr. Dickinson makes an unwarranted assumption when he says: "There is, therefore, no ground for supposing that the rates which result from bureau action are different from those which the Commission itself would prescribe."⁵² Congress and the public expect the Commission, and not a private organization of railroad execu-

51. 12 I. C. C. PRAC. J. at 950.

52. *Ibid.*

tives, to perform the public trusts which have been committed to the Commission. This is true even if the volume of business which the Commission would have to handle would be increased by the abolition of rate bureaus.

Mr. Dickinson repeatedly refers to the fact that if rate bureaus were abolished "the resulting increase in the work of the Commission would be so enormous as to clog the channels of Commission action and possibly delay the process of rate changes to the point where the Commission might well be brought into serious disrepute"; that the elimination of rate bureaus "would completely clog the Commission and utterly hamstring its effectiveness"; and that "the bureaus are indispensable auxiliaries of the Commission in the performance of its regulatory task."⁵³ Even if all this were so, the remedy should be sought in improved administrative efficiency and increase of personnel in the Commission, rather than by the Commission's abdicating its functions in favor of a private government composed of railroad executives and established by agreement of ostensibly competing corporations.

Mr. Dickinson dilates at length upon the evils and abuses of unrestricted competition, which existed prior to passage of the Interstate Commerce Act, and resulted in unstable and discriminatory rates, rebates, favoritism between shippers and localities, and other evils. But, as he concedes,⁵⁴ those who favor enforcement of the antitrust laws do not thereby call for abandonment of the benefits of regulation. It is generally agreed that competition is not sufficient as the sole means of protecting the public from the railroads. Competition is of little benefit to shippers and localities situated at points having access only to a single railroad.⁵⁵ Regulation is necessary and desirable in the public interest. No one disputes this. The fact that such regulation is provided by law, however, is no justification for the assumption that thereby the desirability of competition is eliminated.

Mr. Dickinson believes that there are "three complete and conclusive arguments" against the enforcement of the antitrust laws against rate bureaus if the Department is sincere in its views that the

53. *Id.* at 945, 948, 949.

54. Mr. Dickinson says: "Doubtless the Department takes the position that all of these undesirable results will be satisfactorily prevented by the action of the Commission, and that in relieving competition from the regulatory influence of the Bureaus it is not proposing to emancipate it from the Commission's regulatory power." *Id.* at 948. It is gratifying to note that one spokesman of the railroads at least recognizes that the enforcement of the antitrust laws does not mean the repeal of the Interstate Commerce Act or the abolition of the regulatory functions of the Interstate Commerce Commission. Mr. Drayton and Mr. Smith either do not realize this or will not admit it. See DRAYTON, *op. cit. supra*, note 3, and SMITH, *supra*, note 3, in 12 I. C. C. PRAC. J. at 1117, 1129.

55. On this point see the testimony of the late Joseph B. Eastman in S. 942, *Hearings*, 820-21.

undesirable results of unrestricted competition will be satisfactorily prevented by the action of the Interstate Commerce Commission.⁵⁶

The first of these three arguments is that if unregulated competition would admittedly result in abuses which would have to be corrected by the Commission, then there is no reason for seeking to bring competition of that kind into existence in order that it may be restrained. This argument is sophistry, because, unless the Interstate Commerce Act were repealed and the Commission abolished, which admittedly no one is advocating, it would not be "unregulated competition" which would result from the enforcement of the antitrust laws and the elimination of illegal restraints upon competition by carriers.

The second argument is that "if, in the end, the Department proposes to rely upon the Commission to establish and enforce a sound rate policy, then it stultifies itself in its contention that its present campaign is necessitated and justified by the alleged unsoundness of the present rate structure which has admittedly been shaped in conformity with the Commission's policy."⁵⁷ The fallacy of this argument is the assumption that the rates resulting from the operation of private rate bureaus are the same as those which would result from the operation of competition, free from restraints imposed in violation of the anti-trust laws, and subject to regulation by the action of the Commission in accordance with the Interstate Commerce Act. As has been pointed out above, it is specious to argue that rate bureaus are merely a means of applying the standards set forth in the Interstate Commerce Act and in Commission decisions. Rate bureaus are free to, and do, make determinations in accordance with business policy and economic expediency. Rate bureaus are a unilateral instrumentality, even when shippers are permitted to be heard before the secret decision is reached; and this method of determining rates is subject to practically the same complaint which led the Cullom Committee in 1886 to recommend the enactment of the Interstate Commerce Act upon the ground that "The public interest demands regulation of the business of transportation because, in the absence of such regulation, the carrier is practically and actually the sole and final arbiter upon all disputed questions that arise between shipper and carrier as to whether rates are reasonable or unjust discrimination has been practiced."⁵⁸

Mr. Dickinson's third argument is that if the Department relies upon the Commission to prevent the evils requiring regulation, there is no excuse for increasing the difficulties and lessening the effectiveness

56. 12 I. C. C. PRAC. J. at 948.

57. *Ibid.*

58. SEN. REP. NO. 46, 49th Cong., 1st Sess., Part I, 176 (1886).

of Commission action "which would inevitably be the result of abolishing and destroying the rate bureaus."⁵⁹ As has been stated above, even if the increase in the volume of business which Mr. Dickinson anticipates were actually to result, the remedy should be sought elsewhere than in private usurpation of public regulatory functions entrusted by Congress to the Commission. But if carriers were free to initiate rates without the unlawful restraints imposed by rate bureaus, is it likely that the vast volume of business which is feared would actually result? If lower rates were put into effect, satisfying the shippers, the anticipated increase in litigation before the Commission could only result if vexatious proceedings were instituted by other carriers. Even if the volume of litigation did increase, the Commission in disposing of such litigation would be performing one of the functions for which it was established. Mr. Dickinson's argument is of the same sort as the one that private feuds and vendettas should be encouraged, in accordance with ancient Kentucky custom, in order to prevent the courts from being clogged with criminal cases.

The undesirable consequences which Mr. Dickinson anticipates from the elimination of rate bureaus are quite different from the calamities which Mr. Smith expects to occur. Mr. Smith states that if rate bureaus were abolished "rates in all probability would be 'frozen', and no carrier would be willing on its own initiative to change any rate of real importance." On the other hand, Mr. Dickinson anticipates violent fluctuations and "chaotic oscillations."⁶⁰ In view of this divergence of opinions, it is perhaps permissible to believe that the effect of the abolition of rate bureaus would in fact be less revolutionary than either of these spokesmen expect.⁶¹ As stated previously, the enforcement of the antitrust laws would eliminate only such rate inflation as results from artificial manipulation of rates in violation of the antitrust laws. Upon the re-establishment of normal competition between carriers, a stable level based upon legitimate economic considerations would doubtless be achieved.

59. 12 I. C. C. PRAC. J. at 948.

60. Dickinson, *supra*, note 3, in 12 I. C. C. PRAC. J. at 950; Smith, *supra*, note 3, in 12 I. C. C. PRAC. J. at 1128.

61. To avoid misunderstanding it may be well to emphasize that, besides their questionable practices as private rate-fixing instrumentalities, rate bureaus may perform useful and legitimate functions in connection with conveniently handling the mechanics of tariff publication and facilitating negotiations between carriers and shippers. An allowable area of collaboration between carriers in the establishment of through rates is also recognized. *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 457 (1945). Since no one advocates any interference with the performance of such lawful functions, there is little reason to anticipate the *abolition* of rate bureaus. As the matter was put by a representative of the Department of Justice: "We do not complain of rate bureaus as such, but of rate bureaus as is—if I may use that expression." *H. R. 2536, Hearings*, 981.

CONCLUSION

From the foregoing discussion of the applicable statutes and Supreme Court decisions, and analysis of the issues involved in the two pending major antitrust cases against rail carriers, the writer of this article concludes that the antitrust laws clearly do apply to common carriers subject to regulation under the Interstate Commerce Act, notwithstanding the extensive regulatory powers conferred upon the Interstate Commerce Commission by that act in its present form. The belief is also justified that the antitrust laws should continue to apply to the railroad industry, thus regulated. The public should receive the benefit and protection furnished by both the antitrust act and the Interstate Commerce Act; there is no reason why the public should be required to rely upon only one of those statutes. Insofar as the antitrust laws are concerned, there is no greater difficulty in interpreting and applying them in the case of carriers than in the case of any other industry. There exists no confusion or uncertainty which would warrant any legislation granting carriers immunity or exemption from the operation of the antitrust laws. Such legislation would, without adequate ground therefor, confer upon carriers a status of special privilege.