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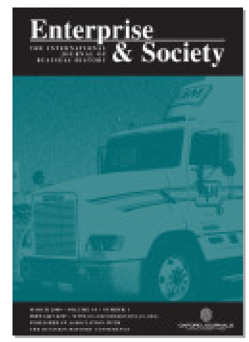

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During the first third of the twentieth century, U. S. railroad executives offered local collection and delivery trucking operations. Railroad managers claimed, with justification, that these services were necessary to reduce congestion at urban freight terminals, and to increase the operating efficiency. Yet, executives also employed collection and delivery practices to discriminate against shippers and communities, and to draw business away from rival carriers, in violation of the 1887 Interstate Commerce Act, the 1903 Elkins Act, and the Transportation Act of 1920. During

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the 1920s, as competition from independent truckers became more intense, railroad managers used their inherent advantage in line-haul service to cross-subsidize local delivery services, to the detriment of independent motor carriers—an issue of considerable concern to Interstate Commerce Commission (ICC) commissioners, following the passage of the 1935 Motor Carrier Act. The railroads' emphasis on the productive efficiency associated with local trucking operations conflicted with the allocative efficiency advocated by federal courts and by the ICC. Commissioner Joseph B. Eastman, in particular, emphasized both the potential benefits and the potential dangers associated with coordinated rail-truck service. More broadly, the status of that service, as one of the few forms of transportation that lay beyond the ICC's authority, stemmed from a complex interaction, over several decades, between all three branches of the federal government. By 1938, the ICC commissioners had concluded that the railroads' local delivery operations occupied a nebulous region between rail and truck regulation. While lawful, they did not serve as a model for post-1945 efforts to achieve integrated, multi-modal transportation services.

In April 1930, as the Great Depression deepened, the president of the nation's largest railroad addressed the annual meeting of the Associated Traffic Clubs of America. William Wallace Atterbury was confident that his company, the Pennsylvania Railroad (PRR), could increase its operating efficiency, and thus survive the economic crisis relatively unscathed. Motor trucks, he averred, were not a source of competition, but rather an opportunity to achieve that result while better serving the needs of the public. "My idea of the railroad," he announced, "is that it should be definitely coordinated with every sound economic agency of transportation." Prior to 1930, Atterbury continued, "The Pennsylvania has made great progress in coordinating these agencies with its own rail lines, in the belief that such action is an essential part of its duty to supply the public with the best available in transportation service."[1] Atterbury's comments would not have surprised his audience. Many of the other railroads represented at the meeting had already made tentative steps toward the interchangeable use of rail and truck transportation. In 1928,

1. Atterbury remarks, 24 Apr. 1930, reprinted in H. C. Oliver, "Co-Ordinated Transport: How it Represents The Trend of the Times," *Mutual Magazine*, Mar. 1934, 12.

Figure 1 Beginning in the early 1920s, the Pennsylvania Railroad and its competitors employed trucks and trailers for local deliveries in Manhattan and on Long Island, as in this scene from March of 1943. This type of intermodal service held the potential to alleviate terminal congestion, but also to disrupt the established rate structure of the railroad industry. John Vachon photograph, Farm Security Administration-Office of War Information, Library of Congress, American Memory Collection, LC-USW3-020258-E DLC.

the railroads operated nearly two thousand trucks, the vast majority of which—1,917—were engaged in local collection and delivery operations.[2]

During the 1920s, more than in any other decade, railroad managers were seemingly poised to create integrated transportation firms, capable of allocating freight traffic to whatever transport mode could move it most efficiently. In various forms, the local pick-up and delivery of freight in terminal areas (also known as constructive-station service, store-door service, and accessorial service) constituted the leading edge in the development of these integrated transportation systems.

2. *Motor Bus and Motor Truck Operation*, 140 ICC 685 (1928), at 720.

Yet, the potential for coordinated rail-truck operations went largely unrealized during the interwar period, with neither railroad nor motor carrier executives able to create integrated transportation firms. Historians have typically blamed either the intransigence of railway executives or the restrictive nature of the regulatory state for this impasse. In one view, railroaders were so conservative, so insular, and so hidebound by tradition that they failed to realize that their goal was to move merchandise, and not to run trains. Alternatively, Interstate Commerce Commission (ICC) officials were allegedly so determined to prevent abusive practices in the railroad industry, and so anxious to protect shippers, local communities, and the infant motor carrier industry, that they stifled innovative business practices. Neither explanation reflects the complex nature of rail-truck service prior to World War II, however. The first does not accommodate the comments of Atterbury and other perceptive railway managers. The second runs counter to the findings of historians, such as Keith Revell, who have asserted that, during the interwar period, the ICC was a well-managed, evenhanded, and highly competent organization.[3]

Far from restraining the railroads' efforts to implement ostensibly progressive coordinated transportation services, the ICC

3. The classic dichotomy between the ICC as a hostile regulatory environment or as an agency captured by the railroads is reflected in Albro Martin, *Enterprise Denied: Origins of the Decline of American Railroads, 1897–1917* (New York: Columbia University Press, 1971) and Gabriel Kolko, *Railroads and Regulation, 1876–1916* (Princeton: Princeton University Press, 1965). Kenneth R. Strawbridge, "The Transportation of L.C.L./L.T.L. Freight by Railroad," (MA thesis, Northwestern University, 1976) offers a critical assessment of the ICC's role in restricting the railroads' intermodal operations. Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: The Belknap Press of Harvard University Press, 1984), 1–56 and Herbert Hovenkamp, "Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem," *Yale Law Journal* 97 (May 1988): 1017–72, provide useful overviews of the evolving nature of the regulatory state. Gerald Berk, "Adversaries by Design: Railroads and the American State, 1887–1916," *Journal of Policy History* 5 (1993): 335–54 and Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865 to 1917* (Baltimore: Johns Hopkins University Press, 1997) and Keith Revell, "Cooperation, Capture, and Autonomy: The Interstate Commerce Commission and the Port Authority in the 1920s," *Journal of Policy History* 12 (2000): 177–214 offer a more nuanced assessment of the ICC's role, with Berk focusing on political conflict and Revell on the professional competence of the agency and its commissioners. Frank Dobbin and Timothy J. Dowd, "The Market that Antitrust Built: Public Policy, Private Coercion, and Railroad Acquisitions, 1825–1922," *American Sociological Review* 65 (October 2000): 631–57 and James W. Ely, Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001) provide useful insights into the role of the judiciary in shaping patterns of railroad competition. For the evolution of transportation policy in the United States, see Mark H. Rose, Bruce E. Seely, and Paul F. Barrett, *The Best Transportation System in the World: Railroads, Trucks, Airlines, and American Public Policy in the Twentieth Century* (Columbus: The Ohio State University Press, 2006).

commissioners unintentionally provided the impetus for their widespread application. Both the 1887 Interstate Commerce Act (ICA) and the 1903 Elkins Act prohibited railroad managers from employing rebates or other pricing strategies that unfairly discriminated against particular shippers or communities. Faced with the vigilance of a competent ICC, railroad managers skirted these antirebating provisions by offering heavily subsidized local delivery services. These de facto rebates enabled executives to adjust rates as they saw fit, in order to maximize the efficiency and profitability of their operations.

The history of rail-truck coordination during the interwar period thus has little to do with managerial failure or regulatory ineptitude, and everything to do with efficiency. In 1910, twenty years before President Atterbury addressed the Associated Traffic Clubs of America, shippers' attorney Louis D. Brandeis testified before the ICC that, in his opinion, more efficient operating practices would enable the railroads to earn a fair profit without rate increases.[4] In the years that followed, railroad executives and representatives from all three branches of government agreed on the importance of efficiency, yet attributed fundamentally different meanings to that word. Railroaders sought productive (or, operating) efficiency, which in turn depended upon their ability to adjust rates as they saw necessary, in order to maximize net income. Regulators instead emphasized allocative efficiency, endeavoring to provide the greatest good for the greatest number.

More than a conflict between business and the regulatory state, local delivery service embodied a collision between productive and allocative efficiency. Atterbury's disingenuous promise "to supply the public with the best available in transportation service" masked his efforts, and those of other railroad executives, to gain an advantage over rival firms in a competitive marketplace. They offered, withheld, and priced truck services in a manner that would optimize their operating efficiency and their profits, irrespective of any issues of discrimination or economic fairness. In a regulated industry, with rates constrained by the ICC, local delivery services offered one of the few remaining opportunities for price manipulation. Far from laying the foundation for the seamless rail–highway–water intermodal operations of the present, railroaders employed trucks as a legally defensible substitute for rebates, in an effort to best rival rail and motor carriers.

Regulators were justifiably suspicious of the railroads' motives, and perceived therein a serious danger to allocative efficiency and the politically constructed public good. The ICC commissioners, Joseph B. Eastman in particular, recognized that railroad-operated trucking

4. Martin, *Enterprise Denied*, 206–18.

services were in effect rebates, but could find scant legal justification for their abolition. In practice, both the ICC and the courts thus permitted collection and delivery services to continue in situations where they were necessary to maintain the free flow of commerce, even when discrimination resulted. The Transportation Act of 1920 (also known as the Esch–Cummins Act) protected financially weak railroads from unfair competition by their powerful rivals, providing ICC officials with another reason to evaluate critically the railroads' delivery operations. The 1935 Motor Carrier Act (MCA) created still greater complexity, in that it required the ICC to protect truckers from unfair railroad competition, without clearly indicating whether collection and delivery services were properly part of the railroad or the trucking industry.

The MCA also marked the beginning of regulatory segmentation, in which the ICC commissioners oversaw railroads, trucks, water carriers, and airlines separately from one another—a tendency that Congress enshrined in the Transportation Act of 1940. This compartmentalization might seem misguided, in light of the fact that some companies, such as the PRR, were already operating both trains and trucks, as well as buses and aircraft. Yet, it was the very presence of integrated services that helped to undermine the development of synthetic transportation regulation. ICC commissioners, and Eastman foremost among them, appreciated the allocative efficiencies that could result from the development of coordinated multimodal transportation systems. He also had ample historical precedent to suggest railroad executives might just as easily use their trucks to drive competitors out of business, and thus deny the public the benefits of competition.

By 1938, Eastman and his fellow commissioners had established that the railroads' local delivery service was of unique construction, and that it could not be regulated as either a truck or a train. That conclusion should not be viewed as an indication that the state had failed to articulate a comprehensive regulatory policy. Rather, it represented the culmination of efforts by railroad executives to offer rebates in all but name, and thus to retain their ability to adjust rates in a competitive marketplace. That marketplace was conditioned by public policy, however, and the railroads' trucking operations arose in an environment shaped by the ICC.

Initial Experiments with Store-Door Service

Since their inception, during the antebellum years, American railroads have proved efficient at moving undifferentiated bulk commodities over long distances, in line-haul service. Much of that efficiency disappeared, however, as railroad employees coped with myriad small, high-value packages consigned to less-than-carload-lot (LCL) service. Merchants and manufacturers packed small shipments into a bewildering variety of boxes, crates, and barrels. Such packaging was extraordinarily wasteful, with the ICC in 1931 estimating that "Approximately one-seventh of the lumber produced in the United States goes into the manufacture of packing boxes and crates."[5] Shipments required frequent handling, generated a veritable mountain of paperwork, in the form of waybills and bills of lading, and resulted in numerous claims from shippers for loss and damage. Railroad executives thus chafed at the inefficiencies associated with terminal operations. Particularly in large cities, boxcars clogged freight yards while crews unloaded parcels and stored them in freight houses, awaiting collection by the consignee. Because the LCL rate structure included complimentary storage at the destination, typically for up to 48 hours, shippers collected freight at their convenience, employing railroad facilities as temporary warehouses.

Railroad executives nonetheless eagerly sought LCL traffic, primarily because it generated considerable net income. Since the 1860s, railroads had maintained low rates on the bulk commodities (such as grain, lumber, and coal) that were most susceptible to water carrier competition. In compensation, railroad managers and traffic bureaus established high LCL rates, set well above the cost of service, based on the assumption that shippers were willing to pay a premium for the rapid delivery of valuable merchandise. Shippers rarely complained about such high rates, because they constituted a small, and steadily declining percentage of the cost to the consumer. From a railroad accountant's perspective, a dollar of LCL revenue was highly valued, because it bought down a far larger proportion of a railroad's fixed costs than a dollar earned from the transportation of bulk commodities. Given the large spread between the marginal cost of LCL service and the rate established by the value of that service, railroad executives were particularly anxious to retain these small, high-value shipments, and to wrest additional LCL traffic from their competitors.[6]

5. *In the Matter of Container Service*, 173 ICC 377 (1932), at 388.

6. Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Belknap Press, 1977), 126, 137–38; D. T. Gilchrist, "Albert Fink and the Pooling System," *Business History Review* 34 (Spring 1960): 24–49, 33–34; Emory R. Johnson and Thurman W. Van Metre, *Principles of Railroad Transportation* (New York: D. Appleton, 1920), 299–301; Emory R. Johnson and Grover G. Huebner, *Railroad Traffic and Rates, Volume I: Freight Service* (New York: D. Appleton, 1911); William Z. Ripley, *Railway Problems: Selections and*

During the years immediately following the Civil War, railroad executives first employed local delivery services, as a mechanism for drawing business away from rival carriers. In 1867, executives of the Philadelphia, Wilmington & Baltimore Railroad (PW&B) authorized horse drayage delivery services in Baltimore, removing freight from terminals almost as quickly as it arrived. The PRR acquired the PW&B in 1881, continuing the service and, beginning in March 1883, offering it in Washington, DC as well. In 1886, when the Baltimore & Ohio (B&O) completed its competing route linking Washington, DC Baltimore, Philadelphia, and Jersey City, it too offered collection and delivery services in Baltimore. Shippers in New York and Philadelphia (cities served by water carriers, and where competition between the PRR and the B&O was the most intense) enjoyed free delivery on merchandise shipped to Baltimore or to Washington, DC while those in Pittsburgh, Cleveland, and Buffalo (cities which the B&O did not serve, or was at a competitive disadvantage against the PRR, or where water competition was immaterial) had to make their own arrangements.[7]

In 1887, the Interstate Commerce Act gave the federal government the power to regulate these established collection and delivery operations. ICC officials soon validated the railroads' value-of-service pricing strategies, concluding that the efficient functioning of industrial American depended on low transportation costs for basic commodities. They saw nothing unjust or unreasonable in efforts by all railroad managers to use high-rate LCL traffic to cross-subsidize bulk cargoes. In contrast, regulators refused to permit railroads to offer varying rates for comparable services—that is, by giving preferential treatment to certain shippers or communities. As ICC officials recognized, railroad executives had long authorized rebates for that purpose. Thus, Section 2 of the act prevented railroads from offering rebates, in order to undercut posted rates on a "service rendered."[8]

For half a century after 1887, the ICC commissioners struggled to determine whether the railroads' local delivery services constituted a lawful service rendered or an unlawful rebate. The commissioners concluded that pick-up and delivery, if offered, constituted a portion of customary terminal costs, such as switching, that they did not

Documents in Economics, (Boston: Ginn and Co., 1907), 314; Ripley, "Railway Rate Making in Practice," *Railroad Age Gazette*, 46 (18 June 1909): 1311–15.

7. *Merchants and Manufacturers Association v. Baltimore & Ohio Railroad Company et al.*, 30 ICC 388 (1914); *Judd & Detweiler, Incorporated v. Baltimore & Ohio Railroad Company et al.*, 30 ICC 455 (1914); *Pick-up and Delivery in Official Territory*, 218 ICC 441 (1936), 470; *Thirty-Third Annual Report of the Interstate Commerce Commission,* December 1, 1919 (Washington, DC: U.S. G.P.O., 1919).

8. An Act to Regulate Commerce, 24 Stat. 379 (2) (1887).

constitute an additional "service rendered," and could thus be included as part of the posted rate.[9] As the ICC ruled on numerous occasions, railroads were under no obligation to collect freight at the facilities of the consignor, nor deliver it directly to the consignee. Nor could the ICC issue a blanket prohibition against local delivery, or specify the rates or terms of drayage service.[10] The commissioners were, however, able to regulate the division of charges (that is, the portion of the rail rate that the railroads elected to allocate to delivery service). Railroads were also enjoined from discriminatory practices, such as offering delivery to favored shippers and communities, while withholding it from others.

By 1912, the complaints of Washington, DC and Baltimore shippers presented the commissioners with particularly egregious examples of the discriminatory potential of local delivery. Although PRR officials claimed that free drayage "originated in 1883 out of the desire to relieve the serious congestion which had developed in the Washington, DC freight terminal," ICC officials concluded that they had structured the service in a manner that would do more to meet competition than to expedite the flow of traffic.[11] "On the whole," the commissioners observed in 1914, "the record rather unconvincingly indicates that the service was first inaugurated and afterwards maintained as a means of relief to the carriers because of inadequate terminal facilities."[12]

The commissioners instead suggested that the selective application of local delivery operations was equivalent to a rebate, and "that the service as now rendered at both Washington, DC and Baltimore presents features which in the absence of further explanation appear to be grossly discriminatory."[13] In a series of cases, the commissioners ruled that such practices were in violation of the Interstate Commerce Act, and ordered the railroads to extend the service to all shippers within each city, or else to withdraw it entirely.[14] PRR and B&O

9. See note 7, supra.

10. The ICC deemed the maintenance of freight houses or team tracks in reasonable proximity to shippers to offer satisfactory service, and to meet the public interest. *Cary v. Eureka Springs Railway Company*, 7 ICC 286 (1897); *Transfer in St. Louis and East St. Louis by Dray and Truck*; *Trap or Ferry Car Service Charges*, 34 ICC 516 (1915); *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 ICC 539 (1924); *Jaloff v. Spokane, Portland & Seattle Railway Company*, 152 ICC 758 (1929); *Trucking Less-than-carload Freight in Lieu of Rail Service*, 185 ICC 71 (1932); *Absorption of Drayage and Trucking Charges*, 197 ICC 675 (1933); *Drayage and Unloading at Jefferson City, Missouri*, 206 ICC 436 (1935).

11. *Washington, D.C., Store-door Delivery*, 27 ICC 347 (1913), at 348.

12. *Merchants and Manufacturers Association*, at 392.

13. *Washington, D.C., Store-door Delivery*, at 351.

14. The ICC first ordered the suspension of discrimination associated with free drayage services in Washington, DC, inducing the PRR and the B&O to withdraw all service in that city. The Commission then ruled that the suspension of service at

officials chose the second option, effective September 1, 1913, and causing shippers to protest "that the action of the railroad companies in this matter is by way of retaliation against the above orders of the Commission and to avoid the extension of the delivery service to the sections specified by the orders."[15]

From Court to Agency: Essential Facilities Doctrine and Local Delivery in St. Louis and New York

Not long after the commissioners placed restrictions on collection and delivery operations in Baltimore and Washington, DC they permitted virtually identical services in St. Louis and New York. Serious impediments to efficient rail transportation, in the form of the Hudson River and the Mississippi River, burdened these two cities, and the commissioners were willing to countenance discriminatory collection and delivery practices in order to offset those inefficiencies. Both the courts and ICC officials recognized that this tolerance might benefit some shippers and some communities more than others, yet could see no way to avoid those abuses without seriously imperiling the railroads' operating efficiency and, ultimately, the free flow of commerce through two of the largest cities in the United States.

Congestion problems at St. Louis, second only to Chicago as a rail gateway between East and West, were a long time developing. In 1889, Jay Gould attempted to make St. Louis the hub of a transcontinental railroad empire, by controlling all of the rail lines through the city. With that goal beyond his means, Gould established the Terminal Railroad Association of St. Louis, to control the bridges, ferries, and transfer facilities that allowed each railroad to interchange cars with the others.[16]

The position of greater St. Louis astride the Mississippi River greatly increased the difficulties associated with the delivery of

Washington, DC and its retention at Baltimore constituted discrimination between those two cities, in turn causing the railroads to eliminate free collection and delivery services in Baltimore, as well. *Canassa v. Pennsylvania Railroad Company*, 24 ICC 629 (1912); *Anacostia Citizens Association v. Baltimore & Ohio Railroad Company*, 25 ICC 411 (1912); *Washington, D.C., Store-door Delivery*; *Chamber of Commerce of Washington, D.C., et al., v. Baltimore & Ohio Railroad Company, et al.*, 30 ICC 446 (1914); *Merchants and Manufacturers Association*; *Judd & Detweiler*, at 456.

15. *Washington, D.C., Store-door Delivery*, at 350.

16. David Reiffen and Andrew N. Kleit, "Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?," *Journal of Law and Economics* 33 (Oct. 1990): 419–38, 427–29; Richard T. Wallis, *The Pennsylvania Railroad at Bay: William Riley McKeen and the Terre Haute & Indianapolis Railroad* (Bloomington: Indiana University Press, 2001), 34–35.

local freight, but merchants and civic leaders were quick to blame the Terminal monopoly for the congestion. The eastern trunk line carriers were willing to quote rates only as far as the end of their tracks, in East St. Louis, Illinois, forcing merchants to employ independent drayage contractors, at considerable additional expense, to transport freight from east bank freight stations to destinations on the west side of the river. Of equal concern to St. Louis merchants, the Association's bridges and yard tracks were inadequate for rising traffic levels. "It is to be regretted that the [railroad] terminals afforded have not kept pace with the enormous growth of our business," observed J. C. Lincoln, the Traffic Bureau Commissioner of the St. Louis Merchants' Exchange, in 1907, "thus resulting ... in unusual delays by reason of inadequate facilities to take care of a surplus of business."[17] By the early years of the twentieth century, the mayor of St. Louis had established the Municipal Bridge and Terminal Commission, whose members worked with railroad officials in an attempt to reduce congestion and devise a more equitable rate structure.

The courts, rather than the ICC, forced the Terminal Railroad Association to increase the efficiency of its transportation facilities. In 1905, the U.S. Attorney General sued Terminal in the U.S. District Court for Missouri, alleging that its control of the St. Louis railroad network violated the antitrust provisions of the Sherman Act. When the district court judges divided evenly on the case, Justice Department attorneys appealed the issue to the U.S. Supreme Court. The previous year, the Court had ordered the dissolution of the Northern Securities Company, in effect asserting that allocative efficiency outweighed the productive efficiency associated with the cartel that James Jerome Hill had established among parallel railroads. Terminal Railroad officials had every reason to believe that the Justices might reach a similar opinion in their case, and order the breakup of the Association—a move that was certain to increase competition in the St. Louis area, but one that would also plunge into chaos the local delivery of freight.[18]

Facing the possibility of prolonged litigation, the Terminal Railroad Association and its member railroads adopted a far more conciliatory attitude toward commercial interests in St. Louis. In January 1906, under pressure from the Municipal Bridge and Terminal Commission, the eastern carriers established through rates to selected warehouses of independent drayage companies in St. Louis proper. Any traffic

17. George H. Morgan, *Annual Statement of the Trade and Commerce of St. Louis for the Year 1906*, (St. Louis: R. P. Studley, 1907), 84.

18. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); Reiffen and Kleit, "Terminal Railroad Revisited," 431–32.

crossing the river incurred a surcharge, known as a "bridge arbitrary," which, the ICC officials noted, "mitigated but did not remove the dissatisfaction of the St. Louis shippers."[19]

The Justice Department's suit against the Terminal Railroad Association went before the Supreme Court in October 1911. In April 1912, the Court concluded that Terminal was indeed a combination in restraint of trade. The Justices were reluctant to order its dissolution, however, in effect conceding that such a remedy would be unduly destructive of productive efficiency. "The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge," the Court noted, ensuring that some type of joint-use facility was required, and essential to commerce.[20] In the *Terminal Railroad* decision, the Court first articulated the essential facilities doctrine, holding that the public good that attached to the efficient operation associated with what amounted to a natural monopoly outweighed the presence of anticompetitive practices. In addition to requiring that all of the railroads serving St. Louis be permitted to join the Association, the Court ordered the eastern carriers to equalize rates between East St. Louis and St. Louis, eliminating the additional charges for service to the west side of the Mississippi.[21]

In compliance with the Supreme Court's 1912 ruling, the eastern carriers developed an unconventional mechanism for delivering freight to St. Louis. By using a bit of legal subterfuge known as the "constructive station," they fulfilled the Court's 1912 mandate and offered a bare minimum of service to St. Louis, while transferring to shippers a good portion of the haulage costs formerly covered by the bridge arbitrary. The constructive station was not a railroad facility, but rather an imaginary point established at the western edge of the Eads Bridge, fulfilling, albeit just barely, the railroad's commitment to deliver freight to St. Louis. When shipments arrived at a railroad's East St. Louis freight terminal, crews would load the merchandise into a

19. Given the large number of Mississippi River crossings to the north and the south of St. Louis, the members of the Association could hardly levy these charges on transcontinental traffic, which could flow along any one of a number of competing routes, bypassing the city entirely. Instead, the bridge arbitrary primarily affected the coal shipments that originated in the mines of southern Illinois and the LCL traffic that originated in eastern manufacturing centers. Reiffen and Kleit, "Terminal Railroad Revisited," 429–30; *Transfer of Freight within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads*, 155 ICC 129 (1929), at 130.

20. *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).

21. Mary L. Azcuenaga, "Essential Facilities and Regulation: Court or Agency Jurisdiction?" *Antitrust Law Journal* 58 (1989): 879–86; Abbott B. Lipsky, Jr., and J. Gregory Sidak, "Essential Facilities," *Stanford Law Review* 51 (May 1999): 1187–1249; Reiffen and Kleit, "Terminal Railroad Revisited," 419.

wagon or truck owned by a drayage firm employed by the railroad. As the cargo traveled out of the freight house, up the eastern approach to the Eads Bridge, and across the Mississippi River, it remained the contractual responsibility of the railroad. As the same vehicle, operated by the same teamster, passed without stopping onto the west bank of the river, the freight that it carried instantly became the legal responsibility of the drayage firm, while the shipper bore the additional cost of transporting it to its ultimate destination. Once the shipment passed through the constructive station, the railroad had fulfilled the service requirements embodied in the 1887 Interstate Commerce Act, and the ICC no longer had any authority over freight charges or conditions of service.[22]

In February 1915, the Supreme Court reexamined its earlier application of remedy in the 1912 *Terminal Railroad* case, and concluded that the Association had met the prescribed conditions. In its willingness "to recognize the right of the terminal company, as an accessory to its strictly terminal business, to carry on transportation," the Court also affirmed, in keeping with essential facilities doctrine, that operating efficiency could take precedence over the maintenance of fair competition.[23]

The Court's timing could not have been more momentous. By February 1915, the nations of Europe had been at war for more than six months. Railroad freight traffic destined for East Coast ports increased substantially, and surged again after the United States declared war on the Central Powers, on April 6, 1917. Aside from the New York Central (NYC) and the New York, New Haven and Hartford, the eastern carriers did not reach Manhattan directly. With their tracks ending at Jersey City, the PRR and other railways provided extensive lighterage and floatage operations to Manhattan and Long Island.[24] Since the 1860s, and largely in response to competition from the Erie Canal, the railroads had provided this service at no additional charge, so that a shipment consigned from Chicago to Manhattan traveled at the same rate as one from Chicago to Jersey City.[25]

In June 1917, New Jersey civic and commercial interests, represented by the New Jersey State Chamber of Commerce, challenged

22. *Transfer of Freight within St. Louis*, at 154.

23. *United States v. Terminal Railroad Association*, 236 U.S. 194 (1915); *Transfer of Freight within St. Louis*, at 134, 139, 157, 158, 159 (quote).

24. A lighter was a large enclosed barge that permitted the secure storage of small items. Car floats were decked barges laid with railroad tracks, which permitted crews to move entire freight cars across the harbor.

25. *The New York Harbor Case*, 47 ICC 643 (1917); Revell, "Cooperation," 186–87; Revell, *Building Gotham: Civic Culture and Public Policy in New York City, 1898–1938* (Baltimore: Johns Hopkins University Press, 2003), 58–97.

the rate structure of the railroads that funneled the floodtide of wartime traffic into the greater New York area. In filing a complaint with the ICC, New Jersey interests alleged that free cross-harbor delivery did not reflect differences in the cost of service, and therefore constituted unlawful price discrimination. In the 1917 *New York Harbor Case*, ICC officials considered many of the same issues that the Supreme Court had addressed in the 1912 and 1915 *Terminal Railroad* decisions. As in St. Louis, New York's terminal facilities were inarguably inadequate, and lighters and car floats (the waterborne equivalent of drays and trucks) were undeniably necessary to alleviate congestion. Free lighterage and floatage services, like local truck delivery at St. Louis, were necessary to efficient operations, the ICC ruled, asserting that operating efficiency took precedence over allocative efficiency and economic fairness. In rejecting the complaint by New Jersey interests, the commissioners nonetheless deplored "the fact that the terminal problem at the port of New York is due in no small measure to competition between the railroads," a situation that had emerged because, "with the same rates of freight applying over all the routes, practically the only field of competition left to the railroads is that provided by their separate terminal operations."[26]

The regulatory state had thus proved so effective at inducing line-haul rate stabilization that railroad executives could gain an advantage over their rivals only by exploiting local delivery operations—the last area of transportation linked to the railroads that remained free of direct ICC oversight. During the 1920s, that circumstance colored debates between railroaders and ICC officials, regarding the proper role of coordinated local rail-truck service.

Trucks and Trains in the Interwar Period

As ICC officials recognized, local delivery operations were potentially discriminatory, and thus threatened communities such as Jersey City. Prior to 1920, however, collection and delivery services did not threaten the railroad industry itself. In the thirteen years that followed the Panic of 1907, economic malaise, rising labor and raw materials costs, parsimonious rate increases, wartime congestion, and temporary nationalization under the U.S. Railroad Administration imperiled the health of even the strongest carriers. In this context, regulators increasingly suspected that railroads financially able to field trucking

26. *The New York Harbor Case*, 732–33.

operations might cripple their impoverished competitors. During the 1920s, some railroads priced their local delivery services in order to reduce rail rates below ICC-sanctioned minimums, thus drawing business away from other, weaker carriers. Yet, the refusal of railroad executives to make public the costs incurred by their drayage contractors ensured that the commissioners would experience considerable difficulty in proving that such unlawful rebating was taking place.

In 1920, Congress gave notice that the ICC would henceforth be responsible for protecting the health of the entire railroad industry. The Transportation Act of 1920 embodied Congressional concern that powerful railroad systems (most notably the PRR and the NYC) were in a position to dominate and perhaps destroy other, less well located or less well financed carriers—what contemporaries often referred to as the "strong road–weak road" problem. To protect the weak carriers, the authors of the act endeavored to prevent the unnecessary duplication of resources, empowering the ICC to mandate the consolidation or joint use of terminal facilities, and to issue certificates of convenience and necessity, prior to the construction of new lines. In addition to setting a target rate of return for the entire industry, Congress authorized the ICC to set minimum rates, in order to prevent destructive rate wars, and, as economist Anthony Patrick O'Brien has noted, "resulted . . . in the Commission acting in a manner that greatly resembled the operation of a cartel being run in the interest of the railroads."[27] The authors of the act thus instructed the ICC to ensure both the operating efficiency of the entire railroad industry and the allocative efficiency within that industry.[28]

In the regulatory environment created by the Transportation Act of 1920, local delivery services promised to enhance the operating efficiency of powerful railroads, but at the expense of the ICC's mandate to achieve equity, hence allocative efficiency, within the railroad industry. By the early 1920s, railroad managers boasted of their efforts to employ trucks in local collection and delivery services, in order to improve the efficiency of their terminal operations—an application

27. Anthony Patrick O'Brien, "The ICC, Freight Rates, and the Great Depression," *Explorations in Economic History* 26 (1989): 73–98, quote at 74.

28. The recapture clause of the 1920 Transportation Act ostensibly provided for revenue sharing, by confiscating any returns greater than 6 percent. Half of the surplus went into an ICC-managed fund, for railroads earning less than a 4.5 percent return. Exceptionally profitable railroads kept the other half of the excess amount, however, which they deposited in a reserve fund. Executives representing powerful railroads thus continued to have ample incentive to outperform their rivals. K. Austin Kerr, *American Railroad Politics, 1914–1920: Rates, Wages, and Efficiency* (Pittsburgh: University of Pittsburgh Press, 1968), 43–71, 204–27; Richard Saunders, Jr., *Merging Lines: American Railroads, 1900–1970* (DeKalb: Northern Illinois University Press, 2001), 38–46.

that was ostensibly very much in keeping with the Transportation Act's mandate to promote the financial health of the railroad industry. In 1923, for example, the members of the Standing Committee for Conducting Transportation of the PRR's Association of Transportation Officers called the truck a "very modern and remarkably efficient machine," that could serve as "an adjunct to the railroads as an agency of transportation."[29] Inasmuch as "Little or no marked progress has been accomplished for a number of years in the handling of the transportation of less [than] carload freight in this country," the committee's members came to the "conclusion that in the public interest it was essential to work out a scheme of transportation wherein the truck could be coordinated in a practical and economical way with rail service."[30]

Railroad managers were being more than a little disingenuous, when they emphasized the operating efficiencies associated with local delivery service. ICC officials suspected, correctly, that executives representing strong carriers like the PRR were less interested in efficiency than in employing trucks to take business away from weaker railroads—a clear violation of the Transportation Act of 1920. That issue came before the ICC in two hearings that, once again, involved St. Louis and New York. In the two virtually contemporaneous cases—*Transfer of Freight within St. Louis and East St. Louis* (decided on May 13, 1929) and *Constructive and Off-track Railroad Freight Stations on Manhattan Island* (decided on July 13, 1929)—the commissioners sought to determine whether local trucking services generated the efficiencies that railroad executives had claimed.

In the St. Louis case, regulators were deeply suspicious of the railroad's assertions that they were using trucks solely to increase operating efficiency. Rather, the willingness of some railroads to offer allowances to merchants who provided their own drayage bore all of the hallmarks of an attempt to undermine the antirebating provisions of the Interstate Commerce Act and the Elkins Act. As a hypothetical example, the ICC might sanction a rate of $1 per hundredweight for all railroads moving a particular commodity between Point A and

29. Association of Transportation Officers (ATO), "Report of the Committee on Conducting Transportation on 'Effect on steam railroads by motor truck and motor bus competition. How to meet it?'," Pennsylvania Railroad Collection (R.G. 1810), Hagley Museum and Library, Wilmington, Del., hereafter referred to as "HML," Box 803, folder 5.

30. ATO, "Subjects which were assigned to, considered and reported on by the various Standing Committees for 1923;" PRR press release, 1 Apr. 1925; both in HML, Box 803, folder 5; PRR response to ICC questionnaire, "In the Matter of Container Service," 11 Jan. 1929, HML, Box 374, folder 9 (quote); *Railway Age* 95:22 (25 Nov. 1933), 765–68.

Point B. That rate could lawfully include collection and delivery services, as a component of the railroads' customary terminal costs. A traffic department official on one railroad might calculate his optimal, profit-maximizing rate on that shipment to be 90 cents per hundredweight, well below the cartel price. To achieve that rate, the traffic manager could simply add the true cost of local delivery (5 cents per hundredweight, perhaps) to the 10-cent differential between the cartel price and the optimal price. Thus, by offering merchants who provided their own drayage an allowance of 15 cents per hundredweight, the executives of one railroad could set the effective transportation rate at 90 cents. From the perspective of shippers using their own wagons or trucks, the initial cost would be $1.05 per hundredweight, reflecting the posted rail rate plus the true cost of delivery. However, each shipper would receive an allowance of 15 cents, two-thirds of which represented a rebate in all but name.

ICC officials were nonplussed at the efforts by railroad officials to camouflage the true cost of delivery services. Representatives from the PRR and the other carriers offering allowances naturally disavowed any intent to obtain a competitive advantage over their rivals. Yet, those attorneys, whose companies had pioneered modern cost accounting methods, professed complete ignorance as to the expense associated with their pick-up and delivery operations. Thus, despite their efforts to stress the efficiencies associated with coordinated rail-truck service, the railroads did not furnish the ICC with any data illustrating precisely how the constructive-station system had affected either their costs or their revenues. Nor could the ICC demand this information, because the railroads did not actually collect or deliver freight. Rather, they assigned those services to established independent contract carriers, ensuring that cost data would remain proprietary, and free from ICC oversight. Under the circumstances, the commissioners noted, and "in spite of the comparative ease with which such a study could have been made, we find that the allowances proposed for off-track station service represent nothing more than a vague sort of compromise."[31]

Even though the railroads serving St. Louis were undoubtedly offering delivery services in lieu of a rebate, the commissioners lacked the cost data necessary to prove that rebating was taking place. As the commissioners recognized, railroads that offered local delivery, with allowances, threatened to draw traffic away from those that did not.

31. Shippers likewise had little incentive to inform the ICC as to the actual cost of local delivery. *Transfer of Freight within St. Louis*, at 157, 162, 171 (quote); *Transfer of Freight within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads*, 177 ICC 316 (1931), at 332.

"A constructive-station service operated purely as a convenient, expeditious, and economical means of completing a contract of carriage merits approval," the commissioners asserted, but warned: "The same service, if operated solely as a competitive measure to secure business from a rival carrier more favorably located in respect of certain traffic, may become burdensome to the carriers and to commerce as a whole."[32] The commissioners did not order a halt to local delivery or to the provision of allowances, however. Echoing the Supreme Court's ruling in the 1912 and 1915 *Terminal Railroad* cases, they cited the alleviation of congestion as a compelling rationale that excused the railroads' practices. Because "the physical situation at St. Louis lends itself particularly to the constructive station plan," the commissioners argued, the railroads had little choice other than to offer local delivery, if they were to maintain their ICA mandate to provide a reasonable level of service to the public.[33]

During the 1920s, most of the railroads serving the greater New York area implemented local collection and delivery services. In 1920, construction had begun on the Holland Tunnel, which would soon offer independent truckers direct access to Manhattan. On November 10, 1921, the Erie Railroad established delivery service in New York, owing, its representatives claimed, to "great congestion and lack of adequate terminal facilities," but the imminent danger of increased truck competition must have been a factor, as well.[34] When freight cars arrived at the Erie's terminal in Jersey City, crews transferred the cargo to lighters, which then floated across the Hudson River to piers at Twenty-eighth Street. At that point, the shipper assumed responsibility for the cargo, which was transferred to trucks for delivery.[35]

One after another, the railroads terminating on the New Jersey side of the Hudson River established similar services, not for reasons of efficiency but solely, managers acknowledged, to meet competition from other carriers. When the Holland Tunnel opened, on November 13, 1927, the Erie, the Lehigh Valley, the Delaware, Lackawanna & Western, the Baltimore & Ohio, and the PRR were well positioned to employ trucks to deliver freight directly to Manhattan merchants, with the east portal of the tunnel set as a constructive station.[36]

32. *Transfer of Freight within St. Louis*, at 153.
33. Loc. cit.
34. *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, at 542.
35. *Constructive and Off-track Railroad Freight Stations on Manhattan Island, N.Y.*, 156 ICC 205 (1929).
36. Ibid., at 212.

The new delivery services threatened to erode the longstanding advantage of the NYC and the New York, New Haven & Hartford, the only two railroads that could offer all-rail service into Manhattan. The NYC responded by devising a variant of the constructive-station system, known as constructive lighterage. After leaving the NYC's rail yards, located north of West 60th Street between 11th Avenue and the Hudson River, teamsters "touched" (i.e., drove past) a pier-side lighterage point, and it was at that location that the shipper assumed responsibility for the cargo, and incurred additional charges for delivery to its destination. The fundamental difference between constructive-station and constructive-lighterage service was that under the former, the consignee's responsibility began at a single point, at the westernmost extremity of Manhattan (either the pier head or, after 1927, the east portal of the Holland Tunnel), while under the latter, the consignee accepted responsibility at any one of dozens of lighterage points within the borough of Manhattan, typically the one closest to the store door. Constructive lighterage thus afforded the railroads a powerful weapon with which to compete against one another, enabling them to maximize the distance that they transported shipments under the base rail rate, while minimizing the shipment distance paid for by the supplemental delivery charges billed to the consignee.[37]

Railroad executives, under ICC scrutiny, brought to a close these experiments with constructive-station and constructive-lighterage operations. New York merchants in areas outside the local delivery zone demanded those services for themselves—requests that, if fulfilled, would have greatly increased each railroad's costs, even in areas where they did not face significant competition. Railroad managers also suspected that the provision of local delivery services to an entire city (such as the greater New York metropolitan area) would cause merchants in other cities to demand equal treatment. "The railroads have generally stated that they should give pick-up and delivery service only at points where truck competition necessitates doing so," noted the Commission, "and fear that provision of such service at only defined points would give rise to charges of discrimination with the possibility that the service would have to be extended to entire systems."[38] Accordingly, in August 1929, all of the carriers serving New York, save the New Haven, informed the ICC of their intent to voluntarily suspend constructive-station and constructive-lighterage

37. Loc. cit.; Carl W. Condit, *The Port of New York: A History of the Rail and Terminal System from the Beginnings to Penn Station* (Chicago: University of Chicago Press, 1980), 110–11.

38. *Coordination of Motor Transportation*, 182 ICC 263 (1932), at 339.

delivery, rather than risk an ICC mandate for universal rail-truck service.[39]

The commissioners concluded that the railroads had been able to maintain an adequate level of service at New York through the use of lighters and car floats, and thus need not have resorted to local trucking services. Because existing facilities were adequate (which was not the case in St. Louis) truck-based delivery was not a legitimate mechanism for alleviating terminal congestion. Instead, constructive-station and especially constructive-lighterage practices offered new, additional services to shippers (in the form of free unloading and free haulage to a point nearer the store door than had previously been the case), and thus, the commissioners ruled, represented nothing more than an effort by each carrier to attain an undue competitive advantage over its rivals, in violation of Section 15a of the Transportation Act of 1920. Furthermore, what little cost data that the ICC was able to accumulate indicated that delivery services actually *reduced* terminal efficiency, largely because it led to additional freight cars being crammed onto the New Jersey piers, rather than parked at inland freight yards. The multiplicity of constructive-station and constructive-lighterage points in Manhattan, moreover, represented to the ICC "competition of the most destructive sort because it produces no new traffic."[40] An executive for the NYC had in fact admitted that constructive delivery had little value, other than to draw business away from rival carriers, noting "if this thing continues long enough, we will have it all [i.e., all the traffic], and that, of course, would not be in harmony with the purposes of the [1920] Transportation Act, which prescribes a fair rate for all roads as a group."[41]

Rail-Truck Coordination during the Great Depression

During the 1930s, in response to the depression and to the growing threat posed by motor carriers, railroad executives expanded dramatically their collection and delivery services. They claimed that both

39. "Regulation by the Interstate Commerce Commission of Railroad Terminal Trucking Facilities," 1376; Condit, *The Port of New York*, 1–15; *Railway Age* 76:5 (2 Feb. 1924), 319–23, 95:22 (25 Nov. 1933), 765–68; Edward S. Lynch, "Railroad Pick-Up and Delivery," *Journal of Land & Public Utility Economics* 14 (May 1938): 120–132, 122, 126–27; "Regulation by the Interstate Commerce Commission of Railroad Terminal Trucking Facilities," 1378; *Discontinuance of Inland or Off-track Stations in New York City*, 173 ICC 727 (1931).

40. *Constructive and Off-track*, at 229.

41. Ibid., at 227–28.

forces required them to pare costs by increasing their operating efficiency. ICC officials, particularly Joseph B. Eastman, acknowledged that coordinated rail-truck services held the potential to protect the financial health of the railroad industry. Yet, they also recognized that railroad managers, faced with excess capacity and declining revenues, were using trucks to draw business away from their competitors. The depression thus amplified the concern of regulators that executives from the strong carriers were acting more forcefully than ever in their efforts to exploit weaker railroads. Following the passage of the 1935 Motor Carrier Act, ICC officials shouldered a new responsibility, by endeavoring to prevent railroad managers from using local delivery services to compete unfairly against independent motor carriers.

By the late 1920s, the meteoric rise of long-haul trucking jolted railway executives into a realization that their companies and their industry could be in mortal peril. In 1927, officials in the PRR Traffic Department completed a comprehensive study of the effects of truck competition, concluding that the PRR was losing some $27 million a year to its rubber-tired rivals. Trucks operated more efficiently than railroads over short distances, largely because they enjoyed far lower terminal costs. As highways and trucks improved, route lengths increased steadily, eroding the railroads' advantage in line-haul costs, as well. Although the Transportation Act of 1920 mandated minimum railroad rates, the ICC lacked the authority, prior to the passage of the Motor Carrier Act of 1935, to prevent "gypsy" truckers from undercutting rail tariffs.[42]

Railway executives responded to the threat of independent motor carriers by reestablishing coordinated rail-truck service in terminal zones where truck competition was most intense. By late 1931, most of the railroads in the Southwest had begun to offer some form of collection and delivery service. In May 1932, the Maine Central became the first eastern railroad to reestablish pick-up and delivery operations, followed quickly by all of the other New England carriers, save the New Haven and the Boston & Albany. During 1932, executives on the PRR and the subsidiary Long Island Rail Road proposed store-door service throughout most of the New York metropolitan area. In October, the PRR, the Erie, the Grand Trunk Western, the Chicago, Indianapolis & Louisville Railway, the New York, Chicago & St. Louis Railroad (the Nickel Plate), the Pere Marquette Railway, and

42. National Transportation Committee, *The American Transportation Problem* (Washington, D.C.: Harold G. Moulton and Associates, 1933), 524; PRR press release, 1 Apr. 1925, HML, Box 803, folder 5; PRR response to ICC questionnaire, "In the Matter of Container Service;" *In the Matter of Container Service*, at 387; *Pick-Up and Delivery in Official Territory*, at 447; *Motor Bus and Motor Truck Operation*, at 722.

the Chesapeake & Ohio Railway filed a joint application with the ICC for store-door tariffs, on an experimental basis, to become effective on December 1, 1933.[43]

The railroads' proposed pick-up and delivery service was outwardly similar to the constructive-station systems employed with grudging ICC acquiescence at St. Louis and voluntarily suspended in light of ICC disapproval at New York. In both instances, railroad crews loaded trucks at railroad freight houses or team tracks, and dispatched them to the consignee. Under the new methods, however, the railroads abolished the constructive station and accepted complete responsibility for the shipment, for its entire journey from store door to store door. To avoid the possibility of discrimination, the service was available to all shippers within the legally recognized boundaries of all communities served by each railroad, and, in areas outside of town limits, up to a mile from any freight station. The service was free for all LCL shipments that moved in excess of 260 miles by rail and truck. For longer distances, the railroads sought to add "plus charges" of up to 6 cents per hundredweight.[44]

Some railroad executives, particularly those representing the NYC, opposed the new store-door tariffs, however. NYC President Frederick E. Williamson complained that even though "store-door collection and delivery service, once put forth as a panacea for terminal troubles, now is being advanced as an answer to the motor truck problem, at the same time it is one of the most powerful weapons by which one carrier can penetrate another's territory"—specifically, *his* territory. Unwilling to accept such an aggressive attack on his railroad's traffic, Williamson noted, rather ominously that "such action on the part of the Pennsylvania must necessarily force the other carriers to protect themselves."[45] He was not alone in his criticism of expanded store-door service. Attorneys representing seventeen eastern railroads filed protests with the ICC. Stripped of all legal niceties, the protests essentially maintained that, while it was indeed unfortunate that carriers such as the PRR were burdened with poor access to the New York metropolitan area, their efforts to redress the imbalance might destabilize the entire northeastern railway network.

43. *Railway Age* 93:13 (24 Sept. 1932), 443–44; Lynch, "Railroad Pick-Up and Delivery," 123; *Motor Truck Club of Massachusetts, Inc., v. Boston & Maine Railroad*, 206 ICC 18 (1934); *Pick-up and Delivery in Official Territory*, at 444; *Railway Age* 94:16 (22 Apr. 1933), 597–98; 95:15 (7 Oct. 1933), 507–508; Lynch, "Railroad Pick-up and Delivery," 123.

44. *Pick-up and Delivery in Official Territory*, at 445.

45. Williamson to Joseph Eastman, quoted in *Railway Age* 95:15 (7 Oct. 1933), 495–97; 95:22 (25 Nov. 1933), 765–68; 95:21 (18 Nov. 1933), 738–39.

The Transportation Act of 1920 required the ICC to prevent such destructive competition, but the law also provided the commissioners with a broad mandate to protect the railroad industry. At the beginning of the 1920s, strong railroads had sought to utilize local delivery as a mechanism for extracting traffic from their weaker rivals—although, as such practices would hardly pass ICC muster, they pointedly told regulators, politicians, and the press that they were attempting to increase their operating efficiency. By decade's end, however, with as-yet unregulated trucks seizing an ever-larger share of the transportation market, and with the nation spiraling into the Great Depression, the railroads finally lived up to their rhetoric. Executives from strong and weak roads alike embraced local delivery operations, informing understandably dubious ICC commissioners that, this time, their enemies were the truckers, and not each other.

In all probability, no regulator was more suspicious of the railroads' motives than Joseph B. Eastman. At the suggestion of Louis Brandeis, President Woodrow Wilson had appointed Eastman to the ICC in 1919, two years after the *New York Harbor Case* and a year prior to the Transportation Act of 1920. As a proponent of political pragmatism and consensus, Eastman established a reputation as a hardworking, fair-minded individual who transcended interest-group politics. While not overtly hostile to railroad executives, per se, he was nonetheless deeply suspicious of managerial claims that industry self-regulation, with its attendant emphasis on corporate productive efficiency, would produce socially optimal allocative efficiency. Yet, Eastman was less interested in controlling the railroads than he was in incorporating them into a sound national transportation policy. On June 16, 1933, as the ICC was considering the railroads' proposed store-door rates, President Franklin Delano Roosevelt signed the Emergency Railroad Transportation Act, creating the Federal Coordinator of Transportation and providing Eastman with his best opportunity for implementing an efficient, integrated transportation system.[46]

Eastman's vision of efficient and coordinated transportation, and his desire to protect the regulated railroads from unregulated truckers, initially conditioned the ICC's policies regarding collection and

46. William R. Childs, *Trucking and the Public Interest: The Emergence of Federal Regulation, 1914–1940* (Knoxville, TN: University of Tennessee Press, 1985), 118–24; Claude Moore Fuess, *Joseph B. Eastman: Servant of the People* (New York: Columbia University Press, 1952), 180–210. For a comprehensive overview of the Emergency Railroad Transportation Act, see Earl Latham, *The Politics of Railroad Coordination, 1933–1936* (Cambridge: Harvard University Press, 1959). For an analysis of the difficulties associated with the development of a coordinated transportation policy, see Rose, et. al., *The Best Transportation System*, 30–75.

delivery services. On November 27, 1933 the Commission gave its assent to store-door rates, noting that they were "clearly an experiment." Eastman, as the newly appointed Transportation Coordinator, felt "that he would not be justified in forbidding the experiment without evidence pointing unmistakably to the conclusion that it will result in waste," and concluded "that there is no better way to add knowledge on this subject than by actual tests."[47]

In November 1933, when the commissioners permitted the carriers to establish free delivery service, they were concerned solely with the effect that such operations might have on shippers and, to a greater extent, the structure of the railroad industry. Within two years, however, trucks had also come under the ICC's jurisdiction. In several instances, most notably *Motor Bus and Motor Truck Operations* (1928) and *Coordination of Motor Transportation* (1932) ICC officials had deplored their inability to regulate motor carriers—a problem that had emerged after the Supreme Court's 1925 rulings, in *Buck* v. *Kuykendall* and *Bush* v. *Maloy*, that states lacked the authority to regulate interstate operations by truck and bus lines. The owners of trucking firms generally supported regulation, as a mechanism for controlling gypsy operators. Railroad executives likewise applauded the imposition of regulatory restraints on the trucking industry.[48]

In August 1935, when President Roosevelt signed the Motor Carrier Act, the ICC gained the authority to issue certificates of public convenience and necessity for common-carrier truckers, as well as operating permits for contract carriers. Section 206(a) of the MCA contained a grandfather clause that allowed existing common carrier truckers to obtain certificates of public convenience and necessity without ICC approval. Congress also permitted railroads to retain any motor carrier subsidiary that they had controlled prior to June 1, 1935, and to operate them without ICC certification.[49]

To a greater extent than ever before, the authors of the 1935 act permitted the legislative branch to join with the ICC and the

47. *Railway Age* 95:23 (2 Dec. 1933), 800–804; 100:235 (8 Feb. 1936); Fred Carpi, "Collection and Delivery: A Short Sketch on a Growing Service and Its Salesmanship," *The Mutual Magazine*, Dec. 1934: 20–21; Latham, *The Politics of Railroad Coordination*, 202.

48. *Buck v. Kuykendall*, 267 U.S. 307 (1925); *George W. Bush & Sons Co. v. Maloy*, 267 U.S. 317 (1925); *Motor Bus and Motor Truck Operation*, at 696.

49. Childs, *Trucking and the Public Interest*, 136–141; Lawrence S. Rothenberg, *Regulation, Organizations, and Politics: Motor Freight Policy at the Interstate Commerce Commission* (Ann Arbor: University of Michigan Press, 2004), 47–57; Richard D. Stone, *The Interstate Commerce Commission and the Railroad Industry: A History of Regulatory Policy* (New York: Praeger, 1991), 39; W. H. Wagner, *A Legislative History of the Motor Carrier Act*, 1935 (Denton, Md.: Rue Publishing, 1935); P. McCollester and F. J. Clarke, *Federal Motor Carrier Regulation* (New York: The Traffic Publishing Company, 1935).

judiciary in defining the contours of the railroads' trucking operations. The process was not a smooth one, however. In drafting the Motor Carrier Act, members of Congress had not indicated whether railroad-operated local trucking services fell under the original 1887 Interstate Commerce Act (referred to as Part I) or the Motor Carrier Act (Part II of the ICA). The distinction was crucial to the ongoing debates among the commissioners as to whether the agency possessed the authority to regulate local collection and delivery services.

ICC officials assumed, plausibly, but perhaps incorrectly, that members of Congress had been aware of earlier judicial precedents pertaining to the railroads' operation of trucks.[50] In 1933, two years before the Motor Carrier Act, PRR officials sought to establish store-door delivery in New York City, under the rates that the ICC had approved on an experimental basis. The PRR service threatened the New York Dock Railway, a company engaged in the direct transfer of cargoes from ships to railroad cars, and its executives requested an injunction to halt the practice. The U.S. Circuit Court of Appeals for the Third Circuit declined to issue an injunction, ruling that "that the proposed accessorial terminal service by trucks is not a railroad," and that "a service for terminal receipt and delivery of freight by motor truck, [is] a facility of transportation, not an extension of a railroad line."[51] As such, the PRR would not be required to secure a certificate of convenience and necessity, as would have been required (under the terms of the Transportation Act of 1920) for the construction of a new line of railroad track. More broadly, when the Supreme Court declined to review the case on appeal, the judiciary acknowledged that the ICC lacked any direct authority to approve or disallow the railroads' trucking operations.[52] In a 1935 case, the U.S. District Court for the Southern District of New York ruled that, under the 1887 Interstate Commerce Act, "both the line haul and store-door delivery are part of the same transportation"—in other words, the railroads' trucking operations, like the railroads themselves, would be covered under Part I of the ICA.[53]

In spite of these judicial precedents, members of Congress had been neither clear nor concise on the issue of whether the ICC was to

50. In *National Lead Company v. United States*, 252 U.S. 140 (1920), at 147, in making reference to a precedent established by an earlier case (*United States v. Bailey*, 9 Pet. 238 (1835), at 256), the Supreme Court established that "Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government."

51. *New York Dock Railway v. Pennsylvania Railroad Company*, 3 Cir., 62 F.2d, 1010 (1933).

52. *Pick-up and Delivery in Official Territory*, at 472.

53. *Merchant Truckmen's Bureau of New York v. Reardon*, 10 Fed. Supp. 358 (1935), at 362.

regulate collection and delivery operations in tandem with or separately from rail service—that is, whether they fell under Part I or Part II of the Interstate Commerce Act. On April 15, 1935, Sen. Burton K. Wheeler (Dem., Mt.), a populist who was deeply suspicious of big business, and one of the leading drafters of the Motor Carrier Act, addressed the issue. He informed his fellow Senators that "The term 'common carrier by motor vehicle' includes both regular and irregular route operators and embraces the motor vehicle operations of rail, water, express and forwarding companies except to the extent that these operations are subject to the provisions of part I."[54] The Motor Carrier Act embodied almost precisely the same language, particularly the key phrase "except to the extent that these operations are subject to the provisions of part I."[55] Another section of the act, designed to exempt local truck operators from ICC regulation, even when they handled shipments that at some point crossed state lines, further complicated the situation by including a provision that would prohibit interstate carriers from stringing together a series of short-haul routes, thus maintaining the fiction that they were engaged solely in intrastate commerce. Thus, the "common control" clause, an exemption to the local carrier exemption, held that the ICC would retain jurisdiction "when such transportation is under common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone."[56]

In November 1935, three months after the MCA became law, officials representing the Association of American Railroads, the leading industry trade group, resolved that their members should adopt local service as soon as possible. In response, the carriers filed tariffs for a modified form of pick-up and delivery operations, slated to take effect on April 1, 1936. The proposed new rates eliminated the plus charges for all shipments and offered an allowance of 5 cents per hundredweight to shippers employing their own equipment in pick-up and

54. 79 Cong. Record, 5651, quoted in *Pick-up and Delivery in Official Territory*, at 473.

55. Motor Carrier Act of 1935, 49 Stat. 544, Sec. 206(a) (14). Wheeler also noted that "we specifically wrote into the bill ... that the peculiar features of transportation by bus and truck should be taken into consideration at all times by the Interstate Commerce Commission," an apparent indication that he regarded trucks and trains as fundamentally different transportation entities and, as such, subject two different parts of the Interstate Commerce Act. 79 Cong. Rec. 5650 (1935); "Federal Motor Carrier Act," *Columbia Law Review* 36 (Jun. 1936): 945–73, 952.

56. 49 Stat. 544, Sec. 203(b) (8); "Regulation of Pick-Up and Delivery Service," *Yale Law Journal* 46 (Jun. 1937): 1420–23, 1421; Childs, *Trucking and the Public Interest*, 136–38.

delivery—an amount that reflected little better than half, and in some cases less than a third, of the railroads' true cost of providing the service.[57]

With virtually every carrier now willing to employ motor trucks, it could hardly be argued that collection and delivery services benefited some railroads at the expense of others. Railroads proposed to establish local delivery service to virtually every on-line community, and therefore geographic discrimination was no longer at issue. By 1936, however, with substantially all railroads offering pick-up and delivery, any additional business stood to come from the motor carriers, an industry that had now come under the ICC's jurisdiction and protection.

The railroads were again using allowances, not to improve efficiency, but to enhance their competitive position. Six years earlier, in *Transfer of Freight within St. Louis*, the commissioners had been concerned that the allowances had been set too high, and thus served as a type of rebate that enabled strong carriers to draw freight from their weaker rivals. In 1935, however, the railroads were attempting to undercut newly regulated truckers, not each other. By setting artificially low allowances, railroad officials hoped to discourage shippers from performing their own local drayage. With improvements in truck technology and the growth of the all-weather highway network, railroaders feared that trucks owned by or contracted to shippers, once loaded, would simply keep going, entirely bypassing the rail line haul.

Furthermore, the exceedingly low delivery allowances represented a disproportionately high subsidization of that service, within the overall tariff, and thus helped to keep rail rates artificially low, compared to rates charged by ICC-regulated common-carrier truckers. To use another hypothetical example, the railroads might charge an ICC-sanctioned rate of $2 per hundredweight for a commodity moving between Point C and Point D. The railroads' true local delivery charges might be as high as 15 cents per hundredweight, representing three times the allowance. Yet, with the allowance set at 5 cents, the railroads could claim that they were earning $1.95 per hundredweight on the rail portion of the shipment (that is, the posted rate less what the railroads insisted that local delivery cost). In reality, however, the

57. In all probability, most shippers could not provide local transportation for less than 5 cents per hundredweight, as indicated by the ICC's conclusion that "The majority of shippers attach only secondary importance to the question whether allowances should be paid to them when they make their own arrangements for pick-up and delivery," a situation that also suggested that, in testimony before the ICC, the railroads seriously underrepresented the true cost of store-door service. *Pick-up and Delivery in Official Territory*, at 446, 458 (quote); Lynch, "Railroad Pick-Up and Delivery," 123.

railroads would actually be earning only $1.85 for the rail haulage. Thus, had railroad executives admitted the true cost of these local delivery services, the ICC would likely have required an increase in the posted tariff of 10 cents per hundredweight, from $2.00 to $2.10, reducing the railroads' ability to compete against motor carriers.

Attorneys representing independent common-carrier truckers were quick to spot the subterfuge. They argued before the ICC that the "common control" clause reflected Congressional intent to link the railroads' local delivery services to interstate commerce as common carriers, and not contract carriers. The distinction was crucial, because the ICC required common carriers to adhere to posted tariffs—which would have instantly revealed the true costs of the railroads' delivery services. Independent truckers also pointed out that the ICC had always exercised jurisdiction over railroad trucking as a component of potentially discriminatory rail-based rate and service practices, and never as a stand-alone entity. In that context, they continued, railroad trucking had never been subject to Part I regulation, and therefore could not be exempted from the requirements of Part II regulation. Railroad representatives, however, insisted that delivery operations were a natural extension of the existing rail routes, and thereby covered under Part I, the original 1887 Interstate Commerce Act. The "common control" clause was irrelevant, they argued, because it applied solely to the actions of interstate trucking firms, and not the railroads (which clearly fell under Part I of the ICA).[58]

On October 13, 1936, when the ICC issued its ruling in *Pick-up and Delivery in Official Territory*, the commissioners for the first time confronted the possible effect of railroad trucking services on the motor carrier industry.[59] Eastman, in particular, questioned the railroads' assertion that the allowances represented the true cost of local delivery. He observed that, of all of the railroads petitioning for the establishment of store-door rates, only the PRR had undertaken any cost studies to indicate whether the service would increase or decrease net income. Even the PRR could offer little more than vague and largely unsubstantiated claims that delivery services lowered overhead costs at freight terminals—an assertion, incidentally, that was contradictory to the ICC's findings in the 1929 *Constructive and Off-track Railroad*

58. *Pick-up and Delivery in Official Territory*, at 472; "Regulation of Pick-Up and Delivery Service," 1420–21.

59. "In the past," Eastman observed, "the Pennsylvania and other respondents which have given limited pick-up and delivery service have had the advantage that many competing railroads did not offer such service. This made it possible to draw traffic from such competitors as well as from the trucks, and it is a fair deduction from the record that much of the added traffic was taken from other railroads." *Pick-up and Delivery in Official Territory*, at 496.

Freight Stations on Manhattan Island. Eastman likewise found it difficult to believe that "the added traffic was transported without a cent of additional cost . . . [N]ever before to my knowledge have we been faced with so violent an assumption as this, or anything approaching it."[60]

As ICC officials such as Eastman concluded, the railroads' store-door pricing structure, set well below the cost of service, bore all the signs of an effort to drive independent motor carriers out of business. They agreed with the contention of the truckers' representatives, who asserted that the railroads were endeavoring to use their greater efficiency in line-haul service to cross-subsidize terminal operations, thus negating one of the principal advantages that trucks held over trains.[61] A few years earlier, this type of destructive intermodal competition would not have been of little concern to ICC officials. After 1935, however, the commissioners had little choice but to follow the new Congressional mandate, and to conclude that "the performance of rail service at less than cost necessarily throws an unfair competitive burden on motor carriers and is not in harmony with the spirit of the Motor Carrier Act."[62] "We now have duties and responsibilities with respect to the motor carriers like those which we have with respect to railroads," Eastman noted.[63]

Eastman, joined by Commissioner Marion M. Caskie, further suggested that the railroads' efforts to employ delivery service as a weapon against motor carriers threatened the entire value-of-service pricing structure of the transportation sector of the economy. The incorporation of free delivery into LCL rates would render such traffic profitless, Eastman emphasized, requiring railroads to reverse their earlier ratemaking policies. Particularly in light of the railroads' cavalier attitude toward the cost of store-door service, Eastman suggested that LCL traffic could do no better than cover out-of-pocket expenses (i.e., variable costs, sometimes referred to as above-the-rail costs), and Eastman was not certain that it could even do that.[64] The free delivery of LCL traffic, Eastman concluded, might generate additional

60. Ibid., at 495.

61. *Pick-up and Delivery in Official Territory*, at 443, 451, 459–60, 462, quote at 460; Childs, *Trucking and the Public Interest*, 151.

62. *Pick-up and Delivery in Official Territory,* at 480.

63. Ibid., at 489. The commissioners were sympathetic to the protests by the truckers, that the proposed store-door rates did not cover the full cost of service, and accordingly required the railroads to levy a minimum tariff of 45 cents per hundredweight for such operations.

64. During the early decades of the twentieth century, as Gregory L. Thompson has suggested, "railroads made little progress toward accurate product costing during this era not because no dire consequences resulted from ignoring specific costs, but because management feared the effects of accurate cost data on railroads' relations with shippers, regulatory agencies, and the general public." Thompson,

business, but it would not "pay its share of the full costs of operation, to say nothing of taxes, fixed charges, and profit."[65] Should the ICC allow free local trucking service, Eastman asserted, railroad managers would have little choice other than to raise rates on bulk commodities, held captive to the rails, in order to cross-subsidize LCL traffic—thus depriving truckers of revenues to which they were entitled, under the terms of the Motor Carrier Act, and precluding the efficient operation of the transportation sector of the economy. It is "my personal view," Eastman asserted, that unremunerative local delivery services constituted "the greatest present threat to the establishment and maintenance in this country of a sound, stable, and well-coordinated system of national transportation, which will use each type of transportation agency to the best economic advantage."[66] Now that Congress had afforded regulatory protection to the trucking industry, Eastman suggested that the railroads' competitive practices threatened both the health of the railroad industry and the ICC's ability to promote allocative efficiency within the transportation sector of the economy.

In October 1936, when the commissioners issued their ruling in *Pick-up and Delivery in Official Territory*, they concluded that local delivery services fell under Part I (i.e., the railroad portion) of the Interstate Commerce Act. Over the next two years, in the *Scott Brothers* cases, the members of the ICC's newly constituted Division 5, in charge of motor carrier regulation, twice revisited that issue, but from the perspective of trucking rather than railroad regulation. Although some commissioners, such as Caskie and William E. Lee, insisted that railroad-owned trucks fell under the authority of the MCA, Eastman's view ultimately prevailed. By 1938, thanks in large measure to Eastman's interpretation of commerce law, and his determination to promote allocative efficiency, ICC officials had concluded that local delivery services were subsumed under Part I of the ICA. In so doing, the commissioners concluded that neither the Motor Carrier Act nor any other legislation authorized them to regulate railroad-operated local trucking services as stand-alone entities, separately from the railroads themselves.

The debate among the members of Division 5 began less than six months after the signing of the Motor Carrier Act. On January 4, 1936,

"Misused Product Costing in the American Railroad Industry: Southern Pacific Passenger Service between the Wars," *Business History Review* 63 (Autumn 1989): 510–54, 513. See also, Thompson, "How Cost Misunderstanding Derailed the Pennsylvania Railroad's Efforts to Save its Passenger Service," *Journal of Transport History* 16 (Sept. 1995): 134–158.

65. *Pick-up and Delivery in Official Territory*, at 490.

66. Ibid., at 492.

representatives from Scott Brothers, the PRR's trucking subsidiary, applied for an operating permit, as a Part II contract motor carrier, for an expansion of their existing free local pick-up and delivery service to include all five New York boroughs, as well as Jersey City.[67] A majority of Scott Brothers stock was owned by the American Contract & Trust Company, a wholly owned subsidiary of the PRR. Even though it was clearly a part of the PRR System and an adjunct to the PRR's rail operations it was not owned by a railroad, but rather by a railroad-owned holding company. Thus, prior to 1935, the ICC had lacked any authority to regulate Scott Brothers. Following the passage of the Motor Carrier Act, the general consensus among railroad attorneys, including those working for the PRR, was that the new law did not apply to local delivery services, which, they thought, would continue to be a part of Part I common-carrier railroad regulation. In the absence of advance advice from the ICC, however, they could not exclude the possibility that the commissioners might use Part II motor carrier regulation to exercise jurisdiction over local collection and delivery. Prudence dictated, therefore, that the PRR apply for a contract-carrier operating permit, in order to ensure uninterrupted service. More importantly, PRR executives wished to establish a precedent that railroad-owned trucks were contract, and not common carriers. If so, then they could logically argue that, in future, they be allowed to operate scheduled long-distance intercity truck routes with contract carriers, in competition with independent motor carriers, and exempt from adherence to a posted tariff schedule.

Commissioners Eastman, Caskie, and Lee heard the Scott Brothers' application, but only the latter two supported it. Congress, Caskie and Lee reasoned, *must* have intended to regulate all motor carriers, under the 1935 Act. "We can see no justification for subjecting some motor carriers to obligations and responsibilities under the Motor Carrier Act and relieving others, similarly situated and performing identical functions, merely because the latter may operate under arrangements with rail carriers," they noted.[68] Caskie and Lee thus asserted that the Motor Carrier Act had compelled them to issue either an operating permit or a certificate of convenience and necessity for all trucking operations. Because the ICC had never been able to issue such certification to railroad-operated truck firms under Part I of the ICA, Caskie and Lee logically construed that such functions must fall under Part II. However, inasmuch as the authors of the Motor Carrier Act had specifically exempted railroad-owned common-carrier services from

67. *Scott Brothers, Incorporated, Collection and Delivery Service*, 2 MCC 155 (1937).

68. Ibid., at 160.

Part II regulation, the only remaining possibility was to assign them contract-carrier status, precisely as representatives from the PRR and Scott Brothers had requested.[69]

Eastman had little patience with this legalistic prestidigitation. Less than a year earlier, in *Pick-up and Delivery in Official Territory*, both Eastman and Caskie had asserted that companies such as Scott Brothers "contract with the railroads, not the shippers, to perform service for the railroads which the latter have undertaken to furnish," and therefore should be treated as common, not contract, carriers.[70] "Beyond question," Eastman insisted, the authors of the Transportation Act of 1920 had affirmed that "the motor-vehicle operations of railroads in collection and delivery service within terminal districts, although not conducted on rails, are an integral part of railroad service subject to part I."[71]

Although he was outvoted two-to-one in the initial *Scott Brothers* case, Eastman prevailed in his assertion that local delivery services be regulated in tandem with the railroad industry. In February 1938, hearing the case on appeal, the full Commission voted by a narrow majority to overturn the 1937 ruling. In the second *Scott Brothers* case, the commissioners denied the company, and thus the PRR, a contract-carrier operating permit, owing to lack of jurisdiction. They had determined that the authors of the Motor Carrier Act had not given the ICC any additional authority over railroad-operated local collection and delivery trucking services. Railroads were free to continue their existing practices of instituting or abolishing local trucking operations at will, provided that they did not discriminate against certain shippers or communities, under the terms of Part I of the ICA.[72]

The *Scott Brothers* case thus had no effect on the local trucking services operated by the PRR, the NYC, and other railroads, other than allowing them to continue unabated. PRR executives strongly considered the abolition of local collection and delivery, but as a result of competitive pressures, and not ICC regulations. Company managers acknowledged that by 1944 Scott Brothers was deeply in debt, with little attention to operating costs or revenues, and dependent on periodic infusions of cash from the PRR. By the early 1950s, new executive

69. Ibid., at 164–65.

70. *Pick-up and Delivery in Official Territory*, at 483.

71. Eastman was unconcerned that his regulatory philosophy would allow some trucking services to operate without benefit of either a certificate of convenience and necessity or an operating permit. Should abuses develop, he suggested, Congress could remedy them through appropriate legislation. *Scott Brothers* (1937), at 170.

72. *Scott Brothers, Incorporated, Collection and Delivery Service*, 4 MCC 551 (1938).

talent had restored order to Scott Brothers, but the declining fortunes of the PRR, and the railroad industry in general, ultimately caused the suspension of local delivery services.[73] After the second *Scott Brothers* case, however, the ICC had withdrawn from the fray, and paid scant attention to the gradual suspension of the local trucking services operated by the railroads.[74]

Efficiency and Competition, in Retrospect

In the aftermath of Louis Brandeis's riveting assertion that the railroads could save a million dollars a day through better management, railroads and regulators alike were quick to support the concept of efficiency. The word efficiency meant different things to different people, however. Railroad managers strove to maximize operating efficiency, soliciting the most lucrative traffic and transporting it at the lowest possible cost, thus maximizing net income. They established a rate structure based on the value, rather than the cost, of their transportation services, using LCL freight to cross-subsidize less remunerative bulk traffic. ICC officials instead sought allocative efficiency, while protecting the rights of shippers, communities, and all of the companies in the railroad industry. While they were willing to accept the price discrimination inherent in value-of-service ratemaking, the commissioners did not countenance without good cause discriminatory practices within that rate structure, whether directed at shippers or communities. During the early years of the twentieth century, the courts tended to favor allocative efficiency as well, yet leavened that view with considerable pragmatism, and a determination to avoid interruptions to the free flow of commerce.

In both St. Louis and New York, the ICC commissioners initially seconded the pragmatism of the judiciary, concluding that there was just cause for the presence of discrimination. In the aftermath of

73. John L. Webb, "'Then Came the Motor Truck': The Story of Trucking on the Pennsylvania," unpublished mss., ca. 1957, archived at http://prr.railfan.net/documents, 14–19; *Long Island Rail Road Company, et. al., v. New York Central Railroad Company*, 281 F. 2d 379 (1960).

74. The railroads' line-haul trucking services (which clearly fell under Part II of the ICA) were a quite different matter, however. Beginning with the November 1938 *Kansas City Southern* case, the ICC placed severe restrictions on railroad-operated parallel and off-route truck operations between terminal points. *Kansas City Southern Transport Company, Incorporated, Common Carrier Application*, 10 MCC 221 (1938); *Scott Brothers, Incorporated – Control – W. G. Corporation*, 15 MCC 419 (1938); *Kansas City Southern Transport Company, Incorporated, Common Carrier Application*, 28 MCC 5 (1941); *Scott Brothers, Incorporated, Contract Carrier Application*, 32 MCC 253 (1942); *Scott Brothers, Incorporated, Extension of Operations – Jersey City*, 34 MCC 163 (1942); "Railroad Operation of Trucks," *Stanford Law Review* 4 (Dec. 1951): 89–100.

the Supreme Court ruling in the 1912 *St. Louis Terminal* case, the agency tolerated unique railroad-operated local delivery services in two cities, St. Louis and New York, adjudging them the only practicable method of alleviating terminal congestion. The railroads' efforts to achieve operating efficiency in those two cities violated principles of economic fairness and impeded allocative efficiency, but if such an outcome was regrettable, it was also unavoidable. By the 1920s, however, congestion was less of an issue, particularly in New York. At the same time, as historian Keith Revell has observed, the ICC had evolved into a mature, well-governed regulatory agency, possessing the enhanced authority and prestige bestowed by the authors of the Transportation Act of 1920. In this context, the railroads' dire warnings regarding the loss of operating efficiency seemed less compelling and the industry's willingness to selectively employ constructive-station and constructive-lighterage services in New York appeared more discriminatory.

Although railroad executives responded to the ICC's interest in the allocative efficiency of rail-truck operations by intimating that this was an example of social engineering run amok, they privately acknowledged that the commissioners had ample reason to be suspicious of industry motives. Efficiency played well to Congress, the media, and the public, but by the 1920s railroaders were increasingly employing that phrase as code for discriminatory pricing practices. The ICC had indeed established a government-sanctioned cartel, as Anthony O'Brien has noted, but the regulators were far more committed to the maintenance of the cartel than were the railroads. Even before World War I, railroad executives offered free local delivery to select customers in Baltimore and Washington, DC in order to establish an advantage over competing carriers, until the ICC ruled such practices to be discriminatory. During the 1920s, delivery services, in tandem with overly generous allowances for shippers who furnished their own drayage, enabled strong carriers to draw business away from weak ones. By the early 1930s, in recognition of the danger posed by independent truckers, railroaders set allowances well below the cost of service, in an attempt to capture business from motor carriers by offering rail rates lower than those sanctioned by the ICC. With the railroads unable or unwilling to furnish the ICC with the cost data accumulated by their drayage contractors, the commissioners could do little more than suspect that this type of cross-subsidization was taking place.

The 1935 Motor Carrier Act ended whatever sympathy ICC regulators might have maintained for the railroads' efforts to fend off the truckers. The railroads' use of local delivery services in lieu of rebates, in order to undermine motor carriers, became as serious an offense as earlier attacks by the strong roads against the weak. Unfortunately for the ICC, neither Congress nor the courts had been particularly clear as to whether the railroads' local delivery services fell under Part I (railroads) or Part II (motor carriers) of the Interstate Commerce Act. By 1938, the commissioners had determined that the best they could achieve was weak regulation under Part I. Thus, they could do no more than determine the division of charges within the rail rate, between rail haulage and local truck delivery, while prohibiting the selective, and thus discriminatory, provision of pick-up and delivery. The railroads' refusal to provide accurate cost data rendered the former provision meaningless, while railroad solidarity in the face of motor carrier competition made service discrimination irrelevant.

The railroads that offered local delivery services touted their efforts to better serve their customers, in lieu of additional regulatory oversight. It would be a mistake to take that rhetoric at face value, however, and it would likewise be erroneous to portray those services as the precursors to the intermodal services of today. In a regulatory regime where rebates were illegal, trucks served as a useful proxy, one to which the ICC commissioners generally gave their assent, albeit reluctantly. William Wallace Atterbury's comments notwithstanding, railroad executives prior to World War II did not seek the creation of a seamless intermodal transportation system. Rather, they offered collection and delivery as a mechanism to gain a competitive advantage over motor carriers and other railroads. Despite the efforts of the ICC commissioners to achieve allocative efficiency, the efforts of railway executives to practice rate discrimination kept squeezing out around the margins. By the 1920s, the ICC had become so effective at maintaining a railroad cartel that carriers could do little to undercut each other's prices. The trains that thundered across a continent, over Raton Pass, through the Great Plains, and around the Horseshoe Curve, carried freight at tariffs fixed by law. Only in the last few miles of the journey, from the rail yard to the customer's door, could railroad executives exercise flexibility in the manipulation of rates. It was hardly surprising, then, that those managers fought so vigorously to retain control over the wagons and trucks that trundled those final miles through city streets.

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