Edward S. Robinson

We record with sorrow the death of Professor Edward S. Robinson, victim of a tragic accident at the age of forty-four. As a psychologist he made a stimulating and productive contribution to the intellectual life of the Yale Law School; as a friendly and sociable member of its faculty he was known, respected and liked by the entire student body. His criticism of ways of thinking about law was incisive and fruitful of good controversy. He gave much that cannot be replaced.

DIVISION OF JOINT RATES AND THE BALTIMORE & OHIO CASE

When two or more connecting carriers publish a single charge for the carriage of passengers or freight from an originating point on one line to a destination on another, a joint fare or rate is said to have been established for the through service in question. The joint rate may be put into effect by voluntary arrangement of the carriers or it may be prescribed by the Interstate Commerce Commission. The division or proportion which each

2. The power to establish joint rates was first conferred upon the Commission by §4 of the Hepburn Act. 34 Stat. 590 (1905). Today, under §15(3) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, it is made the duty of the Commission to establish through routes, joint rates, and the divisions of such rates, “when-
line receives for its share of the joint haul is normally determined by agreement among the participating carriers. But under a system of private bargaining, serious disputes may arise between the carriers, and strategically stronger roads are in a position to force unjust divisions upon weaker lines. Interstate Commerce Commission supervision of the divisions process was instituted by the Hepburn Act of 1906. The subsequent history of the Commission's control over rate divisions reveals an increase in the scope of the Commission's power and a change in emphasis as to objectives, reflecting a tendency to treat the problem as one affecting not only the individual carriers involved but also the public in general, because of the importance of rate apportionment to the statutory objective of maintaining an efficient national transportation system.

Under the authority conferred by the Hepburn Act of 1906, occasions for the exercise of the Commission's power were limited. It was not authorized to prescribe divisions on its own initiative; instead it could act only upon complaint of the interested carriers in the event of their antecedent failure to agree. Furthermore, as late as 1916, the statute was interpreted as restricting the Commission's power of intervention, even upon complaint of ever deemed by it to be necessary or desirable in the public interest.” The Commission is empowered to act on its own initiative as well as upon complaint, and to establish minimum as well as maximum charges. 41 Stat. 485 (1920), 49 U.S.C. §15(3) (1934).


4. “... Congress was aware of the fact that occasional irreconcilable disagreements arise over divisions. ... In our observation and experience such disagreements are of relatively infrequent occurrence; but when they do arise the power should be lodged somewhere to settle the controversy. ...” Morgantown & Kingwood Divisions, 49 I. C. C. 540, 544 (1918).

5. Larger lines were obviously in a position to negotiate a fair agreement. Shorter lines with more than one trunk line connection were also able to protect themselves by playing one connecting line against another. But a short line with only one outlet was often at the mercy of its powerful neighbor. See Morgantown & Kingwood Divisions, 49 I. C. C. 540, 543, 544 (1918). An officer of a trunk line, discussing the way in which prior divisions of certain rates were arrived at with a short line connection, stated before the Commission: “I think we rather told them [the short line], 'Here it is. We can't give you any more.' They were forced to take it. We are forced to take divisions right along we don't like. The Burlington and Union Pacific and other lines that have the whip hand wield it. We are a trunk line, and almost as big, but they say, 'If you don't want it, you stay out of the business.' The big lines fight like cats and dogs over divisions. The question of divisions is one where diamond cuts diamond, or, putting it the other way, a lump of coal cuts a lump of coal.” Wichita N. Ry. v. Chicago, R. I. & P. Ry., 81 I. C. C. 513, 514 (1923).

6. 34 Stat. 589, 590 (1906).

7. For a general discussion, see 1 Shafman, THE INTERSTATE COMMERCE COMMISSION (1931) 216-219; id., vol. 3-B, at 255 et seq.

the carriers, to cases where the joint rate in question had originally been established by its order, thus excluding situations where the carriers complained of divisions received under a voluntarily established joint rate. Even during this period, however, these restrictions upon the Commission’s jurisdiction were considered inoperative if rate divisions were utilized to effect discriminations forbidden by the Act; and the Commission intervened repeatedly in the absence of complaint and regardless of whether it had prescribed the joint rate to compel the removal of such discriminatory practices as the concession of a preferential division to one of similarly situated roads, or the granting of excessive divisions to an industrial line controlled by a shipping concern, amounting to a rebate to the shipper. Similarly, the Commission was active in eradicating the specialized phase of the latter situation where a carrier purchased fuel at a point on a connecting line and sought either to obtain a fraudulent division of the joint rate under which the fuel traveled by billing the shipments to a point on its own line beyond the actual destination, or to gain an excessive division simply by forcing the connecting line to accept an unduly small proportion of the joint rate in return for the business.

9. Morgantown & Kingwood Divisions, 40 I.C.C. 509 (1916). Carriers sometimes employed an indirect device to evade this interpretation of the Act. A tariff canceling the voluntary joint rate and proposing a higher rate was filed by the carrier with the expectation, sometimes frankly stated, that the Commission would suspend it. Upon hearing, no attempt was made to justify the proposed increased charges. The Commission would therefore condemn them and enter an order requiring the existing joint rate to be maintained. Since this order established the joint rate for the future, it was considered a sufficient basis for the Commission to exercise jurisdiction over the division upon complaint by a dissatisfied carrier. Coal from Toluca, Ill., 37 I.C.C. 230 (1915); Lake and Rail Rate Cancellations, 38 I.C.C. 201 (1916); cf. Morgantown & Kingwood Divisions, 49 I.C.C. 540, 542-543 (1918). Even this possibility was removed in 1917 when a temporary amendment to the Interstate Commerce Act was enacted, providing that no increased rate could be filed without the Commission’s approval. 40 Stat. 272 (1917).


12. In re Divisions of Joint Rates, 10 I.C.C. 385 (1904); In re Divisions of Joint Rates on Coal, 22 I.C.C. 51 (1911); Tap Line Case, 23 I.C.C. 277 (1912), rev’d on other grounds, 234 U. S. 1 (1914); Colonial Salt Co. v. Michigan, I. & I. Line, 23 I.C.C. 358 (1912); Industrial Railways Case, 29 I.C.C. 212 (1914); In re Marion & R. V. Ry., 42 I.C.C. 607 (1916); Wasteful Services by Tap Lines, 53 I.C.C. 656 (1919); see Comment (1936) 46 Yale L. J. 299.


14. Rates on Railroad Fuel and Other Coal, 36 I.C.C. 1 (1915). In order to eliminate this type of discrimination, the Commission required carriers to file their
During this period, the Commission's conception of what factors it should consider in apportioning rates was also rather narrow. While the Act authorized the establishment of divisions which were "just and reasonable," this was thought to require merely that those factors should be emphasized which would lead to a fair division so far as the disputing carriers were concerned, and not to necessitate consideration of any special public interest in the apportionment of rates. Probably the most common technique for dividing joint rates was the mileage basis, a method whereby each carrier was awarded a share of the joint rate proportionate to the length of haul it contributed to the total distance of shipment. The Commission refused, however, to accept mileage as an exclusive standard of fairness, and acknowledged shortness of haul, terminal services, and empty car movements as burdensome operating conditions entitling the carrier so handicapped to a more generous share of the joint rate. It even held that strategic bargaining advantages possessed by a carrier should be reflected in the division awarded to that carrier. On the other hand, the Commission refused to recognize as an element relevant to the determination of fair divisions the prior measure of the divisions under consideration. But while the Commission attempted in this way to do justice as between the parties, the statutory view that this was its only function led it to overlook or disregard such factors as the financial needs and operating efficiency of the carriers and the public im-

divisions of joint rates applicable on railway fuel coal, and when changes were made, to file statements in justification of such changes. In re Filing with the Interstate Commerce Commission Divisions of Joint Rates on Railway Fuel Coal, 37 I. C. C. 265 (1915).

15. "This Commission has uniformly held that the division of a through rate was not a matter of concern to the public . . ." Board of Trade of Chicago v. Atlantic City R. R., 20 I. C. C. 504, 508 (1911).


importance of the transportation services rendered by them—factors which were later deemed by Congress and the Commission to be of primary importance to the proper apportionment of rates.

The first step towards broadening the Commission's power over rate apportionment was taken by the Commission itself in 1918 when it reversed its prior decision and held that it could adjust divisions upon complaint even though it had not originally prescribed the joint rate. A far more important enlargement of the Commission's authority over divisions took place with the passage of the Transportation Act of 1920. The provisions for rate apportionment embodied in that Act were designed not only to assure "just, reasonable and equitable divisions . . . as between the carriers," but also to effect constructive ends by providing a supplementary means for the distribution of carrier earnings to weaker roads considered essential to the transportation system. Under the Act, the Commission was empowered to prescribe divisions upon its own initiative as well as upon complaint.

27. The duty was imposed upon the carriers of establishing just and reasonable divisions as between themselves. 41 Stat. 475 (1920), 49 U.S.C. § 1(4) (1934).
29. Under § 15(6) of the Act, the Commission was also authorized to require, as reparation, retroactive adjustment of divisions which were found to be unfair, but only where the joint rates were established "pursuant to a finding or order of the Commission," and only for the period following the filing of the complaint. The Commission held that the former requirement was not satisfied where the joint rates were "established" as a result of a suspension order of the Commission prohibiting proposed increased rates from going into effect and requiring the maintenance of present rates. Petroleum Oil from Ark. to La., 95 I.C.C. 55 (1924). Compare note 9, supra. But the Commission held it had power to require retroactive adjustments of divisions where the joint rates had been established by the carriers as the result of a "cease or desist" order barring higher rates [Diamond Alkali Co. v. Fairport, P. & E. R. R., 62 I.C.C. 161 (1921)]; or where the joint rates in question had merely been effected by general increases or decreases in rates ordered by the Commission [Pittsburgh & W. Va. Ry. v. Pittsburgh & L. E. R. R., 61 I.C.C. 272 (1921); Divisions received by Brimstone R. R. & Canal Co., 88 I.C.C. 62 (1924), 104 I.C.C. 415 (1925); New York Dock Ry. v. Baltimore & O. R. R., 89 I.C.C. 695 (1924); Marion & E. R. R. v. Chicago & E. I. Ry., 96 I.C.C. 402 (1925)]. The Supreme Court, however, reversed the Brimstone case, supra, specifically disapproving the above cases and holding that the Commission was authorized to adjust divisions retroactively only when the joint rate was established by the Commission after a full hearing in respect to the specific rate. Brimstone R. R. v. United States, 276 U. S. 104 (1928).

Although the Commission is authorized to adjust divisions retroactively only for the period following the filing of the complaint, a court will order adjustment of divisions over the period between the Commission's establishment of the rate and filing of the complaint. Atlantic C. L. R. R. v. Baltimore & O. R. R., 12 F. Supp. 711 (D. Md. 1935).
30. 41 Stat. 486 (1920), 49 U.S.C. § 15(6) (1934). The Commission held that it was authorized to prescribe divisions "on complaint" under this Section, where a
thus extending its control to situations where weak roads might be compelled to accept unjust and unreasonable divisions without complaint through fear of antagonizing powerful outlet lines.\textsuperscript{31} This provision for intervention in the absence of disagreement among the carriers was in itself recognition of a public interest in the division of rates superior to private contractual rights.\textsuperscript{32} But even more important were the factors which the Commission was directed by the Act to consider in prescribing divisions. Section 15(6) stipulates that in determining the divisions of joint rates, fares, and charges, "the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."\textsuperscript{33} It is the enumeration of these guiding principles, rarely, if ever, operative in the establishment of divisions by private agreement,\textsuperscript{34} that most clearly reflects the shift of emphasis to furtherance of the public interest through the apportionment of rates.

The Commission was quick to appreciate the significant enhancement of its power. In one of the first divisions cases decided after the passage of the 1920 legislation, the Commission, in rejecting the defendant's claim that certain strategic advantages justified the status quo, declared uncompromisingly that divisions were affected with a public interest.\textsuperscript{35} And in the New England Divisions case of 1922,\textsuperscript{36} the Commission gave weight to a factor to which its attention was first directed by the new legislation and unequivocally utilized its power to adjust divisions in the light of the varying financial needs of the carriers concerned. In a preliminary proceeding, the Commission, while admitting that the evidence supported the claims of the New England roads as to special operating handicaps and serious financial difficulties, had declined to assert the unprecedented exercise of power involved in granting them blanket increases of freight

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  \item Note 32. 1 SHARPFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 218.
  \item Note 34. See United States War Dep't v. Abilene & S. Ry., 155 I. C. C. 343, 347 (1929).
  \item Note 36. 66 I. C. C. 196 (1922).
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divisions with all connecting lines, without investigation as to the fairness of each division. Within a year, however, the Commission instituted a further proceeding, and adopting the approach requested by the New England lines, ultimately awarded them a 15% increase in their division of the joint rates under consideration. The grounds advanced for the decision were that the fundamental purpose of Congress under the Transportation Act had been to assure an effective transportation system for the nation, that the public interest required the carriers, as essential and mutually dependent parts of the transportation system, to be maintained in effective working condition, and that the relative amount and cost of service rendered, including "a due proportion of the burden of maintaining the financial integrity and credit of the carrier," was a prime factor in determining fair divisions. A horizontal increase was held justified in view of the fact that comprehensive revision of the individual rate divisions could be accomplished only after months of labor and would amount to denying the New England roads, during that period, the relief to which they were held entitled.

Upon appeal, this decision was affirmed in full by the Supreme Court, and thereafter, a number of rate division cases have followed the same pattern, recognizing the pertinence of relative financial needs to a determination of the propriety of a rate division.

37. Where the services of the carrier were not essential the Commission has declined to act. Krein v. Chicago, B. & Q. R. R., 87 I. C. C. 118 (1923); Christie & Eastern Ry. v. Kansas, C. S. Ry., 93 I. C. C. 675 (1924); Murray, Receiver v. Erie R. R., 95 I. C. C. 13 (1924).


Even under the 1920 Act, however, it still remains of primary importance to establish reasonable divisions between the carriers on the basis of the amount and cost of the service performed by each. Carriers and Commission concede that accurate ascertainment of the cost of any particular freight or passenger service as dissociated from the cost of a myriad of similar services is impossible, except in the extraordinary case. In attempting to surmount this difficulty, consideration is sometimes given to cost studies of various types usually based on system average figures in one form or another. A typical example of such a cost study appears in a recent divisions case in which certain carriers attempted to show the cost of transporting citrus fruit. Total operating expenses including taxes were allocated between freight and passenger service under a formula prescribed by the Commission. Deductions were made from total freight expenses for car repairs, depreciation, and retirements, to allow for the fact that citrus fruit was moved in rented refrigerator cars. These net freight expenses were then divided by total freight car miles, and to the quotient was added the cost per mile of renting refrigerator cars. It was urged by the carrier that the figure computed represented the cost per car mile of transporting this type of freight.

But cost studies of this character obviously involve the use of so many more or less arbitrary formulas as to be finally unpersuasive. Their utility as pertinent comparisons varies directly as the cost of the particular service approximates average system costs, a ratio which itself can be determined

The New England decision has also provided precedent for cases involving divisions between groups of carriers as distinguished from individual carriers. Divisions of Freight Rates, 148 I. C. C. 457 (1928), 156 I. C. C. 94 (1929), aff'd, Beaumont, S. L. & W. Ry. v. U. S., 282 U. S. 74 (1930); Divisions of Freight Rates, 203 I. C. C. 299 (1934); Short Lines' Divisions, 205 I. C. C. 61 (1934); Southwestern-Official Divisions, 216 I. C. C. 687 (March 9, 1936). There are pending two other related controversies concerning the division of rates of official territory carriers with western carriers and southern carriers (Docket No. 24160).

41. See New England Divisions, 66 I. C. C. 196, 198 (1922).
44. See Baltimore & O. R. R. v. United States, 56 Sup. Ct. 797, 810 (1936). This study, presented by carriers petitioning for an increase of previously determined divisions, was rejected after consideration by the Commission. Rehearing was denied. Id. at 816.
46. See Baltimore & O. R. R. v. United States, 56 Sup. Ct. 797, 812-813 (1936); Nevada-California-Oregon Divisions, 73 I. C. C. 330, 335 (1922); Salina N. R. R.
only by guesswork. In view of the general unreliability of comparisons of this character, the Commission does not depend upon them alone, but gives weight to numerous individual factors bearing upon the relative cost of service to the carriers. Thus, the fact that a carrier is an originating or delivering road, or a narrow gauge carrier, or that fuel supplies are located off the carrier's line, unfavorable climatic conditions, specialized services, shortness of haul, light loads, unfavorable physical terrain, a higher rate level, empty car movements, branch line movements, low density of traffic, and car rental charges are all factors normally indicating difficult operating conditions and high service costs. On the other hand, population increases, expanded agricultural, mineral or industrial produc-


56. Divisions of Freight Rates, 203 I. C. C. 299 (1934); Southwestern Official Divisions, 216 I. C. C. 687 (March 9, 1936).


tion\(^6\) in the territory served by the road, and the fact that the carrier is an intermediate line\(^6\) tend to show relatively advantageous operating conditions.

Once the Commission has weighed these numerous factors,\(^6\) various formulae for dividing rates are available to produce the desired result. The Commission recognizes that no single method of apportioning rates has yet been devised to allocate fair divisions in every case.\(^6\) The mileage basis, while still theoretically the starting-point for the adjustment of rate divisions, has been severely criticized by the Commission. Not only is it unsatisfactory where the operating conditions of participating carriers differ materially,\(^6\) but even where transportation conditions are similar, it is open to the criticism that it results in the same ton-mile revenue for each participating carrier regardless of length of haul, in violation of the principle that other things being equal, ton-mile yields should decrease as distance increases.\(^6\)

It therefore remains today, in the unmodified form, more a primary method of comparison than a reliable means of dividing rates. However, modifications of the mileage basis are sometimes employed. There is the block mileage plan, under which a convenient number of miles, for example 20, is selected as the "block" unit, and the joint rate is divided in the proportion the number of "blocks" in the line haul of one carrier bear to the number in the haul of the others, odd mileage over and above even twenties counting as a single "block."\(^6\)

Another method employed, usually where short lines are involved, is mileage proration with fixed minima percentages of the joint rates.\(^6\) Under this plan the rates are divided on the ordinary

\(^{62}\) See cases cited note 61, supra.


\(^{64}\) In addition to financial needs and factors relating to the cost question, other elements may affect the Commission's decision. Thus, where traffic was forced on a carrier under an emergency routing agreement, it was held entitled to larger divisions than usual. Western Md. Ry. v. Pennsylvania R. R., 69 I. C. C. 703 (1922). On the other hand, the fact that the carrier is operated inefficiently [Christie & E. Ry. v. Kansas C. S. Ry., 93 I. C. C. 675 (1924)], or has previously indulged in questionable practices [Krein v. Chicago B. & Q. R. R., 87 I. C. C. 118 (1923)], may be influential in defeating its claim.

\(^{65}\) See United States War Dep't v. Abilene & S. Ry., 77 I. C. C. 317, 353 (1923).

\(^{66}\) See Minnesota-Atlantic Transit Co. v. Chicago, M., St. P. & P. R. R., 194 I.C.C. 111, 116 (1933).

\(^{67}\) Divisions of Freight Rates, 148 I.C.C. 457 (1928).


mileage basis except that a minimum percentage of the joint rates is guaranteed to one or more of the carriers. Another device sometimes adopted is the constructive mileage prorate under which the line haul mileage of one of the carriers is weighted by multiplying it by an arbitrary figure such as 1½, 2, etc. In an attempt to find a more satisfactory method of dividing rates than mileage proration or its variants, the Commission has at times turned to the rate prorate. Under this method, the Commission selects a particular type of rate, for example, first class rates, and ascertains the amount each carrier acting independently would charge under this classification for the length of haul it contributes to the total distance covered under the joint rate; the respective first class rates are then used as proportional factors in dividing the total joint rate. The rate prorate formula has been favored by the Commission owing to the fact that relative transportation conditions find expression in such a measure, but even this method is unsatisfactory where the rates used as factors, although nominally of the same classification, i.e., first class rates, cover a relatively different type of traffic in the territory of each carrier. Other methods of rate apportionment recognized by the Commission include simply awarding each carrier fixed percentages or amounts ("specifics").

Abilene & S. Ry., 83 I.C.C. 742 (1923); Atlantic Coast Line R. R. v. Cape F. Rys., 197 I.C.C. 397 (1933).


71. Inland Waterways Corp. v. Northern P. Ry., 160 I.C.C. 794 (1930); see United States War Dep't v. Abilene & So. Ry., 77 I.C.C. 317, 357 (1923). Modifications of the rate prorate are sometimes employed, involving the use as proportional factors of assumed rates for one or all carriers. Divisions of Freight Rates, 148 I.C.C. 457 (1928), 156 I.C.C. 94 (1929); Application of Miss. Valley Barge Line Co., 183 I.C.C. 503 (1932).


73. See Revenues in Western District, 113 I.C.C. 3, 24 (1926); United States War Dep't v. Abilene & S. Ry., 151 I.C.C. 91, 95 (1929); Through Routes & Joint Rates, 174 I.C.C. 477, 484-485 (1931); cf. Short Lines' Divisions, 205 I.C.C. 61, 63 (1934).

74. Under another method recently adopted, distances of haul are classified; each carrier is assigned a set of numerical factors, one for each class, varying in amount according to the lengths of the hauls within the particular class; the joint rate is then divided according to the ratio between the factors of each carrier. Atlantic C. L. R. R. v. Arcade & A. R. R., 194 I.C.C. 729 (1933). The Commission has rejected the revenue prorate, a method by which newly established joint rates are divided in the proportions of the prior divisional arrangement. Ibid. Arbitraries, or fixed amounts to cover a particularly burdensome service, are sometimes deducted from the joint rate before prorating it. Alcolu R. R. v. Atlantic C. L. R. R., 140 I.C.C. 466 (1928); Atlantic C. L. R. R. v. Arcade & A. R. R., 194 I.C.C. 729 (1933).


of the joint rate or percentage advances on the existing divisions.\textsuperscript{77}

Despite the expansion of the Commission's jurisdiction over divisions of joint rates, certain limitations have been imposed under the Act of 1920 which deserve mention. In the first place, the Commission has held that it is powerless to prescribe divisions of a joint rate which covers a haul participated in by United States and foreign carriers, refusing to consider even the division among domestic carriers of that part of the joint rate charged for services performed entirely within the United States.\textsuperscript{78} Furthermore, the Commission has jurisdiction under the Act only over the division of joint rates as between common carriers engaged in interstate transportation by railroad, water, or motor vehicle;\textsuperscript{79} it has no power over the division of joint rates for the transportation of oil by pipe line carriers,\textsuperscript{80} nor over the division of joint intrastate rates.\textsuperscript{81} But the primary restriction upon the Commission's jurisdiction lies in the requirement that the rates to be divided must be joint, as distinguished from combination rates.\textsuperscript{82} The fundamental distinction is that a joint rate is a single rate for joint services established by mutual agreement of the carriers or by the Commission, while a combination rate is merely the sum of the rates charged by each carrier acting independently. In order to establish a joint rate which the Commission can apportion, the carriers must not only satisfy this definition, but must comply with certain statutory requirements, such as filing concurrences with the


\textsuperscript{78} New England Divisions, 126 I. C. C. 579 (1927). But prior to 1920 the Commission had held that, though it had no power to require foreign lines to enter into joint rates, when they voluntarily established joint rates with United States carriers, they subjected themselves to the Commission's jurisdiction over the divisions of such rates. Port Huron & Duluth S. S. Co. v. Pennsylvania R. R., 50 I. C. C. 157 (1918).


\textsuperscript{80} The fact of a practical pipe line monopoly by the Standard Oil Co. [see 2 Sharfman, op. cit. supra note 7, at 59, 97] might eliminate to a great extent the possibility of divisional controversies. There have been joint rates in effect, however, between pipe line carriers, so that the possibility is not non-existent. Crude Petroleum Oil from Kansas and Oklahoma, 59 I. C. C. 483 (1920); Brundred Bros. v. Prairie P. L. Co., 68 I. C. C. 458 (1922).

\textsuperscript{81} Sugar Land Ry., 126 I. C. C. 529 (1927).

\textsuperscript{82} Kanawha Black Band Coal Co. v. Chesapeake & O. Ry., 142 I. C. C. 433 (1928).
Commission, and publishing their names in the joint tariff as participating carriers. Thus, a railroad may pay the switching charges of a terminal carrier and "absorb" or include them in its own rates, so that the one charge, covering the services of two carriers, is, in effect, a joint rate to the shipping public; yet the failure to show in the published tariff that the terminal road is a participator deprives the Commission of jurisdiction to consider the fairness of the switching allowance.

But these jurisdictional limitations, operative in a comparatively small number of cases, do not seriously impair the Commission's power to control rate divisions in the public interest, and under the 1920 Act, that power has remained a significant expedient for dealing with the strong-and-weak road problem. Disregarding the principles of stare decisis, the Commission has determined each case upon its merits, keeping in mind the relation of its power over divisions to the rate policy of the Transportation Act. With the repeal of the recapture provision of the Act in 1933, it seems clear that the Commission's exercise of its authority over rate divisions is destined to become increasingly important as an instrument to divert a portion of aggregate earnings in the support of essential but financially distressed carriers, especially in cases where the traffic will not support an increase in the joint rate.

It was a controversy arising within this area of administrative regulation that occasioned the recent Supreme Court decision in *Baltimore & Ohio R. R. v. United States*. The proceeding was instituted by southern carriers who petitioned the Commission to prescribe just and reasonable divisions of joint citrus fruit rates between themselves and certain northern carriers. Following a hearing in which the northern carriers made no claim of confiscation, the Commission adjusted divisions in favor of the southern lines.

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86. Under the recapture clause, a carrier receiving a net operating income in excess of 6% of the value of its railway property was required to pay one half of the excess to the Commission to be used for loans to needy carriers or to purchase railroad equipment for lease to carriers. 41 Stat. 489 (1920). The provision was repealed by the Emergency Railroad Transportation Act of 1933. 48 Stat. 220 (1933), 49 U.S.C. 15a(1), (2) (1934).
87. Atlantic C. L. R. R. v. Arcade & A. R. R., 194 I. C. C. 729 (1933). The Commission held that the transportation costs of the southern carriers appeared higher than those of the northern lines, taking into consideration the costly service of originating citrus fruit traffic from widely spread production points, expensive reconsignment services, the necessity of using special refrigerator cars brought from the north, and the consequent heavy per diem costs, switching services and empty car movements. Higher rate levels and lower traffic density in the south than in the north, and the fact that the population of the northern states was three times that of the southern states also indicated less favorable operating conditions in the south. Finally, the Com-
affirming its order without basic modification after a further hearing. The northern lines subsequently petitioned for a second rehearing and presented evidence which they alleged substantiated their claim, now made for the first time, that the Commission's order gave them so small a share of the joint rates as to be confiscatory. Upon refusal of the Commission to reopen the proceeding, the northern carriers sued in the federal district court to enjoin enforcement of the Commission's order. Over the Commission's objection, the carriers were permitted to introduce additional evidence. The district court held, however, that confiscation was not shown with sufficient certainty, and dismissed the case. On appeal to the Supreme Court, the lower court's decree was affirmed. The majority of the Court, with Justices Brandeis, Stone, Roberts and Cardozo concurring specially, held that the issue of confiscation had been seasonably raised by the second petition for rehearing; that while the Commission's findings of fact as to whether the prescribed divisions fulfilled the statutory requirements of reasonableness and justness were, if based on the evidence, conclusive upon review, the Commission could not finally determine the constitutional question of whether prescribed divisions constituted just compensation; that the due process clause of the Fifth Amendment assures the carrier a full hearing before the court on this question, including "the right to introduce additional evidence and have judicial findings based upon it"; but that the lower court's decision on the merits was correct. The concurring opinion of Justice Brandeis agreed that the suit was without merit but held that the charge of confiscation was not seasonably made before the Commission, and that even if seasonably raised, confiscation could never be an ultimate issue in a divisions case.

mission found that the southern carriers' financial position was worse than that of the northern lines and that the citrus fruit traffic was of far greater importance to them. 88. Atlantic Coast Line R. R. v. Arcade & A. R. R., 198 I. C. C. 375 (1934). A further proceeding dealing with the retroactive adjustment of divisions previously required was also held. 210 I. C. C. 66 (1935).
92. Justice Brandeis urged that since no abuse of discretion was involved in the Commission's refusal to reopen the proceedings on evidence in no sense newly adduced [cf. Atchison, T. & S. F. R. R. v. United States, 284 U. S. 248 (1932)], the claim of confiscation had not been seasonably raised, on the analogy that an objection first presented in a petition for rehearing which has been denied by a lower court is not seasonably raised in a reviewing federal appellate court, unless in connection with the denial, the objection was specifically passed on by the lower court. Chesapeake & O. Ry. v. McDonald, 214 U. S. 191 (1909); Weinstein v. Laughlin, 21 F. (2d) 740 (C. C. A. 8th, 1927); Western Union Telegraph Co. v. Winland, 182 Fed. 493 (C. C. A. 8th, 1910). The Supreme Court, however, had already stated that a party was not barred from attacking an order on constitutional grounds because the claim was not made before the Commission. See Manufacturers' Ry. v. United States, 246 U. S. 457, 489 (1918).
Justice Brandeis' conclusion that the issue of confiscation was irrelevant seems highly persuasive. In substance, he contended that in considering a division of a joint rate between $A$ and $B$, it would never be safe to increase $A$'s share merely on proof that it was confiscatory without evidence that $B$ was receiving better treatment;\textsuperscript{3} for if the entire joint rate is non-compensatory, $B$'s share may be as confiscatory as $A$'s. In that event, to increase $A$'s share would be unfair to $B$; for in a divisions case, the Commission has no power to increase the entire joint rate, and any increase in $A$'s share would therefore have to be accompanied by a corresponding decrease in $B$'s share. The majority opinion purported to answer this argument by stating that, because the carriers had not contended otherwise, the entire joint rate would be assumed to be compensatory, and that it was therefore beyond the Commission's power to allot any carrier a confiscatory division.

This statement implies that proof as to the nature of the entire joint rate might have been introduced, in the first instance, in the divisions proceeding. A strong argument can be made that in the interests of administrative efficiency and orderly procedure, this question should first be determined in a rate order proceeding where the joint rate could be increased if found confiscatory; and that if the joint rate were there found to be compensatory, the carrier complaining of a confiscatory division could rely on that determination in a subsequent divisions case without encumbering the latter action by the introduction of proof as to the nature of the joint rate.

But even if it be conceded that such evidence might properly have been introduced in the case under discussion, the Court's argument is open to criticism because of its assumption in the absence of a contention to the contrary that the joint rate was compensatory. If it had clearly been shown that the joint rate was compensatory, it would perhaps have been reasonable to deny the Commission power to divide the joint rate in such a way as to make one carrier's share confiscatory, for the carrier could presumably get no relief in a rate order proceeding.\textsuperscript{4} On the other hand, if the entire joint rate had been clearly shown to be confiscatory, the only solution would apparently have been to approve the Commission's apportionment, unless arbitrary, and leave the carriers to their remedy in a rate order proceeding, a solution which the majority opinion seems to imply would be proper. The most difficult problem is presented where, as in the case under consideration, there is no evidence as to whether the joint rate is compensatory. In such a situation, it would seem fair to refuse to consider the confiscation issue unless the complaining carrier sustained the burden of proving that the entire joint rate was compensatory; this would not only accord with the usual practice of placing the burden of proof on the complainant, but would appear most likely


\textsuperscript{94} This of course assumes that a carrier is entitled to a compensatory return from each rate as distinguished from total operations. But see infra, pp. 826-827.
to achieve the proper result, since it is probable that if one carrier's share is confiscatory, the other carriers' shares, which have presumably been allotted equitably according to a variety of factors, are also non-compensatory. There would be little wisdom in upsetting an apportionment of this character which is otherwise fair on the mere chance that the whole joint rate might be compensatory.

The Baltimore & Ohio case presents a second issue of broader significance relating to the entire problem of rate regulation: for implicit in the discussion of the appropriateness of the confiscation issue by both the majority and concurring opinions is the assumption that the constitutional protection of the Fifth Amendment assures the carrier of a non-confiscatory return from each rate. Upon this question, the decisions of the Supreme Court reveal opposing authority. The earlier cases indicate that the carrier is not necessarily entitled to earn a fair return upon every service, due process of law requiring merely that the earnings of the entire line be compensatory. A more numerous group of cases holds that the carrier may not be compelled to perform a particular service without compensation even though the return from its entire business is adequate. While this view now appears to have prevailed, a rather tenuous distinction is sometimes drawn to the effect that although a confiscatory rate may not be imposed, the carrier cannot refuse to perform a particular service merely because it will not earn a compensatory return, since the furnishing of adequate facilities to the public is an incident of the carrier's fictional undertaking. The explanation of these apparently inconsistent propositions may be that the courts will not allow a carrier to refuse to perform an unprofitable service, because the possibility remains of permitting it to charge a higher rate for the service, on a showing of confiscation, a privilege which will be small comfort to the carrier if it is already charging a rate that will produce optimum revenues.

The rule that the carrier is entitled to earn a fair return on every service seems unfortunate in several respects. In the first place, the requirement


assumes ability on the part of the courts to separate the cost of some particular service from the total expenses of the road, involving general overheads and the carrying of passengers and a thousand varying types of freight, usually in mixed train or car-loads; it likewise requires the ascertainment of that proportion of the total property investment peculiarly attributable to the service in question. Faced with such problems, it is obviously impossible for the courts, except in the extraordinary case, to determine with any degree of accuracy whether or not a particular rate is confiscatory. The confiscation doctrine as applied to individual rates involves the further assumption that the rate structure of railroads can be adjusted in the light of the valuation determined for the road. The extent to which this assumption is true is open to question.

In the case of the monopolistic public utility operating in a single municipality, rates can be adjusted to yield the required rate of return on property value, however computed. But this is largely impossible in the case of railroads where 85 per cent of the traffic is competitive. The rates of competing carriers must obviously be on the same level. It is patently useless for the courts to hold rates applicable over the lines of a weak carrier confiscatory, where the carrier cannot put a higher rate into effect without diverting traffic to its more efficient competitors. Therefore, the concept is of possible utility only in the minority of cases where competitive rates are not in effect. And even in this situation, since a fair rate of return upon total operations is undoubtedly guaranteed, the particular rate claimed to be confiscatory could at best produce but a small part of the carrier's total revenue. A safeguard of such minor importance does not appear essential enough to overbalance the practical difficulties inherent in the attempt to allocate costs to a particular service.

The most significant feature of the Baltimore & Ohio case is the light it casts upon the present attitude of the Supreme Court toward the scope of

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100. The difficulties of railroad valuation are almost insurmountable. See Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases (1930) 43 Harv. L. Rev. 1249, 1278-1280. The additional problem of determining the proportion of total value attributable to any particular service may be resolved only by the use of an obviously arbitrary formula. See Atlantic C. L. R. R. v. Arcade & A. R. R., 198 I.C.C. 375, 377-378 (1934).

101. See 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 213, n. 75; Moore, Railroad Rates and Revenues (1930) 16 Va. L. Rev. 243, 245-246; Beutel, supra note 100, at 1275-1276.

102. See Moore, supra note 101, at 245.

103. In Minnesota Rate Cases, 230 U S. 352 (1913), the successful carrier was unable to charge higher rates where the rates enjoined were enforceable against one of its competitors. See Moore, supra note 101, at 247.
judicial review of administrative orders.\textsuperscript{104} The selection of a technique for passing upon administrative orders involves two problems. First, the court must decide whether an order will be reversed only if the administrative body acts arbitrarily or unreasonably, or whether it will be set aside if the court itself would have decided the case differently. Second, the court must choose between considering only the evidence presented to the administrative body, and allowing a trial \textit{de novo} in the judicial proceedings.\textsuperscript{105}

The history of judicial review of the Interstate Commerce Commission’s orders reveals considerable wavering between these techniques. Under the original Interstate Commerce Act, the courts adopted the approach which gave them the broadest possible latitude. They invariably substituted their opinion on the merits of the case for that of the Commission,\textsuperscript{106} treating the latter’s findings of fact only as \textit{prima facie} evidence;\textsuperscript{107} and the Act was construed as requiring a trial \textit{de novo} in the judicial proceedings,\textsuperscript{108} an attitude which effectively limited the usefulness of the Commission’s activities.\textsuperscript{109} The only significance of the investigation and determination by the Commission was to shift the burden of proof in court; and because the courts reviewed on the facts and accepted additional evidence, they often decided an entirely different case than that considered by the Commission.\textsuperscript{110}

In 1906, the Hepburn Act was passed to overcome the evident defects of the former legislation.\textsuperscript{111} The substantive powers of the Commission were greatly increased, and although the extent of judicial review was not spelled

\textsuperscript{104} For general discussions of judicial review of administrative orders, see Dickinson, \textsc{Administrative Justice and the Supremacy of the Law} (1927); Freund, \textsc{Administrative Powers over Persons and Property} (1928); McFarland, \textsc{Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission} (1933).

\textsuperscript{105} If the court decides that it will reverse an administrative order only where the Commission acted unreasonably, it seems rather illogical to permit the introduction of new evidence at the trial as a basis for judging the Commission’s reasonableness. But \textit{cf.} Missouri, K. & T. R. R. v. I. C. C., 164 Fed. 645 (C. C. E. D. Mo. 1908). \textit{Contra:} Louisville & N. R. R. v. United States, 218 Fed. 89 (W. D. Va. 1914).


\textsuperscript{107} The Interstate Commerce Act of 1887 stipulated that the report of the Commission was to be \textit{prima facie} evidence of the matters therein stated. 24 \textsc{Stat.} 385 (1887).


\textsuperscript{109} See \textsc{Ann. Rep., I.C.C.} (1897) 27-37; Bernhardt, \textsc{The Interstate Commerce Commission} (1923) 16.

\textsuperscript{110} See \textsc{Ann. Rep., I.C.C.} (1891) 20-21; McFarland, \textit{supra} note 104, at 106.

\textsuperscript{111} 34 \textsc{Stat.} 584 (1906).
out, the "prima facie evidence" rule was eliminated. In passing on administr-
ative orders under this Act, at least in cases involving statutory rather than
constitutional questions, the courts have exhibited some tendency to adopt
a self-limiting attitude. In the first place, they have shown an inclination to
examine only the reasonableness of the Commission's orders. The early cases
laid down rather ambiguous rules to the general effect that reviewing courts
should not usurp merely administrative functions by setting aside an order
because of their conceptions of its wisdom and expediency.112 Certain matters
were classified as "administrative questions,"113 peculiarly within the province
of the administrative body, upon which the courts refused to substitute their
judgment for that of the Commission.114 The trend apparently was to con-
sider the Commission a fact-finding body somewhat similar in function to a
jury,115 so that the principal inquiry of the courts was directed to the suf-
ficiency of the evidence upon which the administrative findings of fact were
based.116 In the cases dealing with the propriety of a trial de novo, the at-

(1910); Interstate Commerce Commission v. P. R. R., 222 U. S. 541, 547 (1912);
113. Findings of the commission as to the reasonableness or unreasonableness of
a rate or divisions are conclusive upon the courts if supported by the evidence. I. C. C.
v. Chicago, R. I. & P. Ry., 218 U. S. 88 (1910); I. C. C. v. Louisville & N. R. R.,
227 U. S. 88 (1913); New England Divisions, 261 U. S. 184 (1923); Western Paper
Makers' Chemical Co. v. United States, 271 U. S. 268 (1926); Chicago, R. I. &
P. Ry. v. United States, 274 U. S. 29 (1927); Mississippi Valley Barge Line Co. v.
United States, 292 U. S. 282 (1934). And as to whether rates or practices result in
discrimination or preferences, I. C. C. v. Delaware, L. & W. R. R., 220 U. S. 235
(1911); United States v. Louisville & N. R. R., 235 U. S. 314 (1914); Virginian Ry.
v. United States, 272 U. S. 658 (1926); Merchants' Warehouse Co. v. United States
(1931); Illinois Commerce Comm. v. United States, 292 U. S. 474 (1934). Rules of
car distribution, [I. C. C. v. Illinois C. R. R., 215 U. S. 452 (1910); Assigned Car
134 (1932); Atlanta, E. & C. R. R. v. United States, 296 U. S. 33 (1935)] are final.
See 2 SHABMAN, op. cit. supra note 7, at 387-393, 423 et seq. But in separation cases,
the Commission's orders are enforceable only through court action and are only "prima
facie" evidence of "the facts therein stated." 36 STAT. 554 (1910), 49 U.S.C. 16(2)
(1934).

The doctrine of "negative orders" and the Commission's primary jurisdiction was
also developed by the courts as a further expression of self-limitation. See 2 SHAB-
MAN, supra, at 393-417; Miller, The Necessity for Preliminary Resort to the Interstate
Commerce Commission (1932) 1 GEO. WASH. L. REV. 49.
114. See HENDERSON, THE FEDERAL TRADE COMMISSION (1924) 97-98; Tollefson,
MINN. L. REV. 504, 510 et seq.
115. See DICKINSON, op. cit. supra note 104, at 159-159, 167-170, 312.
116. See McFarland, op. cit. supra note 104, at 121. The Commission was reversed
Chicago Junction Case, 264 U. S. 258 (1924). It was also reversed for error of law.
titude of judicial self-denial was not so uniform, two lower courts dividing
sharply on this issue.\textsuperscript{117} But the Supreme Court expressly approved a trial
court’s action in restricting review to the evidence before the Commission.\textsuperscript{118}

Here, however, as in other areas of administrative activity, it had been
indicated that a different attitude would prevail in respect to the review of
constitutional issues. Before the \textit{Baltimore & Ohio} case, the question was
perhaps not entirely foreclosed as to whether the courts should consider
anything more than the reasonableness of the Commission’s action. There
were few cases in which the Commission’s orders were challenged upon
grounds of unconstitutionality as distinguished from the statutory grounds
of unfairness or unreasonableness, and in those cases, the constitutional claim
involved practices rather than rates. The Supreme Court dealt with these
cases simply by denying that any basis for the constitutional objection existed
and then proceeding to settle the controversy by applying the usual standards
of review, reiterating its refusal to reverse findings of fact supported by the
evidence.\textsuperscript{119} But while there were no direct expressions by the Court as to
how far, in a proper case, it would accept the Commission’s determinations of
subsidiary questions of fact bearing upon the issue of constitutionality, there
were dicta in which the Court intimated that in such cases the Commission
would be held to a stricter accountability.\textsuperscript{120} In the \textit{Manufacturers Railway}
case, the Court stated that so long as the Commission proceeds in accordance
with the requirements of the Commerce Act, its administrative orders, if
made after due hearing and supported by the evidence, are not subject to
attack in the courts. But it also recognized that “matters of constitutional
right are not to be conclusively determined by the Commission.”\textsuperscript{121} In several
cases, however, the Commission’s findings of fact were held conclusive even
though they seemingly determined constitutional rights, properly urged to
the Court.\textsuperscript{122} It can at least be said that there were no precedents requiring
the Court to ignore the Commission’s determination, and scrutinize the evi-
dence for itself on questions of “constitutional fact.”

\footnotesize{United States v. Penn. R. R., 242 U. S. 208 (1916); Central R. R. of N. J. v. United
States, 257 U. S. 247 (1921); Peoria & P. U. Ry. v. United States, 263 U. S. 528 (1924); Ann.

\textsuperscript{117} An early case held that review should be by trial \textit{de novo}. Missouri, K. &

\textsuperscript{118} Louisville & N. R. R. v. United States, 245 U. S. 463 (1918).

\textsuperscript{119} Pennsylvania Co. v. United States, 236 U. S. 351 (1915); United States v.
American Ry. Express Co., 265 U. S. 425 (1924); Chicago, I. & L. Ry. v. United
States, 270 U. S. 287 (1926).

\textsuperscript{120} See Louisville & N. R. R. v. United States, 238 U. S. 1, 16 (1915).

\textsuperscript{121} 246 U. S. 457, 488, 489 (1918).

\textsuperscript{122} Los Angeles Switching Case, 234 U. S. 294 (1914); I. C. C. v. Southern P.
Ry., 234 U. S. 315 (1914); see Brown, \textit{The Function of Courts and Commissions in
Public Utility Rate Regulation} (1924) 38 Harv. L. Rev. 141, 165.
In regard to the evidence which the Court should consider in reviewing the Commission's order, the *Baltimore & Ohio* decision had been more clearly foreshadowed, for the Supreme Court had held in the *Manufacturers Ry.* case that where a constitutional claim was made, judicial review might be had by trial *de novo.* The Court stated, however, that it would be more appropriate practice to introduce all pertinent evidence before the Commission, and that where the Commission had set aside a given rate, a clear case was required to justify the court, on evidence not newly discovered, in annulling the Commission's order as confiscatory.

The decision in the *Baltimore & Ohio* case, definitely declaring that facts decisive in the adjudication of constitutional rights must be investigated independently by the courts, and reaffirming the view that in such cases a trial *de novo* is proper, is a development perhaps consistent with the body of doctrine recently clarified in related fields, but, however orthodox this view may be as a matter of doctrine, it makes for an all-inclusive judicial supervision of administrative processes strikingly inconsistent with considerations of practicality and efficiency long urged to support a policy of limiting the scope of judicial review.

It has been pointed out that the theory sometimes adopted in justifying full judicial review—namely, that the action of the administrative body was a legislative act open to judicial examination to the same extent as other such acts—is by its own terms inapplicable in the case of an administrative body which performs quasi-judicial functions. It has been reiterated that in dealing with highly complex questions such as valuation and cost

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123. 246 U. S. 457 (1918).
124. *Id.* at 489.
128. *When the courts are dealing with a small utility, the task of determining value is almost impossible.* Beutel, *Due Process in Valuation of Local Utilities* (1929) 13 Minn. L. Rev. 409, 423 et seq. *See factors listed by Justice Brandeis as entering into the ascertainment of value.* Southwestern Bell Telephone Co. v. Pub. Service Comm., 262 U. S. 276, 293–295 (1923). *But the problem attains metaphysical proportions in the case of a railroad.* *See Beutel, supra* note 100, at 1278 et seq.
allocation, it is impractical to ask over-burdened courts\textsuperscript{129} to substitute their judgment for that of an administrative body which is much better equipped to handle the problem,\textsuperscript{180} to the detriment of the administrative body's prestige and future effectiveness. And the evils of the trial \textit{de novo} have often been emphasized: not only does it involve delay, wasted time and expense, and a duplication of efforts, but an obvious opportunity is afforded for "holding off" pertinent evidence before the administrative body and presenting it for the first time in court.\textsuperscript{131} Nor is the force of these objections greatly lessened by an attempt to limit review of statutory, as distinguished from constitutional questions, since a skillful pleader may often be able to obliterate the distinction.\textsuperscript{132} These considerations are all particularly pertinent in the case of the Interstate Commerce Commission. Indeed, they have been recognized by the Court in respect to questions of statutory interpretation arising before that body, and no reason appears why they are not equally apposite in connection with questions of fact subsidiary to the determination of constitutional issues.\textsuperscript{133} The Supreme Court's refusal to acknowledge their cogency in the \textit{Baltimore & Ohio} case is further evidence of its purpose not to limit the judicial control of administrative activity which it has already established in the name of constitutional right.


\textsuperscript{131} Dickinson, \textit{supra} note 127, at 1051-1062; Comment (1932) 41 YALE L. J. 1037.

\textsuperscript{132} See Dickinson, \textit{supra} note 127, at 1072, 1077-1078.

\textsuperscript{133} See Freund, \textit{The Right to a Judicial Review in Rate Controversies} (1921) 27 W. VA. L. Q. 207, 210-211.