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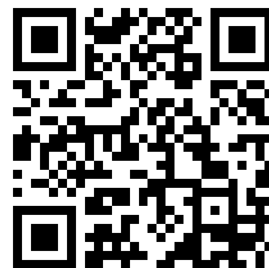

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AGRICULTURAL HISTORY SERIES No. 4

JULY 1942

The HOCH-SMITH RESOLUTION

A Study of a Congressional Mandate on Transportation

by

E. O. MALOTT

BUREAU OF AGRICULTURAL ECONOMICS

UNITED STATES DEPARTMENT OF AGRICULTURE

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This series is intended as a vehicle for presenting the results of research in agricultural history conducted throughout the Department of Agriculture. Edited in the Bureau of Agricultural Economics, with the aid of a Department advisory committee, the series will include monographs issued at irregular intervals as valuable materials and results of research become available.

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PREFACE

This research aimed to study the effectiveness of a legislative direction on rate making to a regulatory commission. In the course of the study many attitudes and opinions bearing upon the subject were noted and these are given as quotations to avoid, if possible, an incomplete statement of views. Consequently, much space is given to quotations from which the reader may make his own interpretation. It is necessary, however, to emphasize that the use of any quotation is not intended as a criticism of the source quoted. The research is directed toward the effectiveness of a principle and not toward any person or persons. Obviously, if the principle is defective, practical applications will lead to erratic results. These results reflect upon the principle and not upon individuals.

In a strict sense, the Hoch-Smith resolution may not be termed a legislative mandate, but most of those affected by it looked upon its directions as a mandate. Passed by Congress and signed by the President in 1925, the resolution, without amendment, remains in the statutes today. Its importance was substantially reduced in 1930 by the interpretation of the United States Supreme Court in the Deciduous Fruit Case. Since then the resolution has been moved into the background as a legal basis for seeking special consideration for rates on agricultural commodities or on commodities of depressed industries.

Undoubtedly, the fact that the resolution has not been repealed keeps it in the minds of the Interstate Commerce Commission, of shippers in depressed industries, and of shippers of agricultural commodities. Nevertheless, as an active force in rate-making the resolution dropped out with the Supreme Court interpretation. This report gives particular attention to the period before the 1930 adjudication and to the period following the adjudication and does not attempt to evaluate the present indirect influence. The question of the effectiveness of the principle may properly be resolved through the examination of these two periods.

William E. Carpenter, Associate Transportation Economist of this Bureau, materially assisted in the research and his work in connection with the subject matter of Chapters 2 and 3 was especially helpful.

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THE HOCH-SMITH RESOLUTION

A Study of a Congressional Mandate on Transportation

E. O. MALOTT
Principal Transportation Specialist[1]

INTRODUCTION

The Hoch-Smith Resolution; Agricultural Dependence on Transportation; Rate Structure (Classification; Equalization and Differentials; Effect of Horizontal Rate Increase upon Rate Structure; Wartime Horizontal Rate Increase); Rule of Rate Making—1920 (Horizontal Rate Increase of 1920); Agriculture in the Post-War Adjustment (Joint Commission of Agricultural Inquiry; United States Chamber of Commerce; Conflict of Railroad Earnings with Agricultural Welfare; Dislocated Rate Structure Causes Production Relocation); Section 15a a Stumbling Block in Readjustment (The Rate Reduction of 1922—Discussion of Rate Reductions Immediately after 1920 Increase, High Rates Defeat Carrier Interests); Presidential Call for Legislative Mandate; Interstate Commerce Commission Invitation for Legislative Mandate.

THE HOCH-SMITH RESOLUTION

In January 1925 Congress passed and the President signed a joint resolution known as the Hoch-Smith resolution. It was hailed as a transportation-relief measure for the agricultural and livestock industries particularly, and for all depressed industries generally. For more than a year the resolution, in one form or another, had been before Congress where its merits and faults had been aired. Its final approval was considered a boon to agricultural and other depressed industries and was condemned by the railroads as unsound legislation that conflicted with rate-making principles developed by the regulatory Interstate Commerce Commission and set forth in the Transportation Act of 1920.

AGRICULTURAL DEPENDENCE ON TRANSPORTATION

To understand the Hoch-Smith resolution and why it failed to fulfill the expectations of the agricultural groups, the causes of agricultural dissatisfaction with transportation must be explored. Farmers have always been sharply aware of transportation. They seldom grow their products at the market but must depend upon transportation to reach the consumer. Most of their crops are grown over large geographical areas and in the case of some commodities producer competition is world-wide. The areas that have the best transportation at the lowest cost have an advantage that brings a better

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[1] Dr. Malott is now Chief of the Transportation and Marketing Division of the Office of Agricultural War Relations.

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price return and a more stable market. Those areas that have inadequate, high-cost transportation may be unable to reach the market at all or only at a low price return. Indeed, agrarian dissatisfaction with transportation led, through the Granger movement, to the original Interstate Commerce Act of 1887 which established the Interstate Commerce Commission as a regulatory body for railroads.

This intensive study of an attempt to obtain rate concessions from the present transportation system suggests[2] that a more effective solution for agriculture may be to improve the efficiency of present methods of transportation and to experiment with and develop other means. Out of a recognition of the gravity of the rate-level problem may be developed a new kind of cooperation in transportation, including railroads, motor carriers, and water carriers, that will not be burdened by a rail-background heritage.

At the start, the Interstate Commerce Commission had little real control; rates were required merely to be "reasonable and just" and to be published. With the passage of the Hepburn Act in 1906, the Commission was empowered to prescribe maximum rates but not until 1920 could it set minimum rates which aided materially in preventing discrimination. By the time the Commission was established, the existing rate structure had developed primarily on the basis of expediency. With its limited powers, the Commission could remove some discrimination but could not remodel the rate structure or institute a more scientific method of rate fixing. Setting a maximum did not prevent a railroad from carrying shipments at a lower rate.

Although the rate structure that existed before the World War had been unscientifically constructed, shippers and commodities had been adjusted to it without too much friction. Rates had been modified piecemeal and the adaptation had been gradual. Undoubtedly discriminations and inequalities existed, but as a whole the rate structure seemed to be in workable balance.

The movement towards wholesale rate changes which were to destroy this balance started with the horizontal 5-percent rate increase of 1914.[3] The small increase involved prevented the unbalance from becoming noticeable. This was followed in 1917 by a request for a 15-percent horizontal increase. Full recognition of the disastrous consequences of such a policy caused the Commission to grant specific increases limited to class rates and to the eastern district. "Only a most urgent and extraordinary situation would justify permitting tariffs carrying a large percentage increase to become effective." Naturally the railroads also were fully aware of the disturbing effects of horizontal increases.

> All the carriers expressed their willingness to begin immediately upon a revision of the horizontally increased rates with a view to reestablishing existing relationships between competitive localities, commodities, and territories, thus recognizing the commercial disturbances which would certainly follow the proposed increases. It was generally admitted that a percentage increase would destroy existing rate relations, and in all cases where the amount of the charge is appreciably large and where the differences in distance between competitive localities are relatively great a 15 per cent increase would seriously affect competitors in a common market.[4]

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[2]See Ch. 7, p. 117.

[3]*Five Per Cent Case*, 31 I.C.C. 351 (1914); 32 I.C.C. 325 (1914).

[4]*Fifteen Per Cent Case*, 45 I.C.C. 303, 315-316 (1917). Certain increases were allowed on coal, coke, and iron ore in the several districts.

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Both of the foregoing general increases were confined to official territory so that any disturbing effects were geographically limited. There was also an increase of about 2 percent in the western territory in 1915 which was too small to upset the balance.[5] Rising prices and adequate markets diverted attention from the rate situation at this time.

RATE STRUCTURE

Inasmuch as rate structure has much to do with the problems of the railroads and their relations with industries, an explanation of rate making and rate structure is desirable at this point. Any attempt to explain in a limited space such complex subjects as rate making and rate structure tends to simplify them to the point of unreality. Nevertheless, some attempt must be made, although it may seem highly theoretical to the practical traffic man.

Two general principles govern rate making — value of service and cost of service. Value of service is said to determine the upper limit of any rate whereas cost of service is said to determine its lower limit. That is, a railroad could not presumably ask more than the shipper thinks the transportation service is worth to him, while at the same time it presumably would not offer the service at less than cost.

Such a statement of rate making is simple, but it is not a complete explanation. For instance, it is conceivable that the value of transportation service to the shipper of a particular commodity may be less than the full cost of the service performed by the railroad. With idle transportation capacity, a railroad has the option of carrying the commodity at any rate which equals or exceeds the estimated direct out-of-pocket costs involved or of not carrying the commodity at all. As any revenue received above the out-of-pocket costs will aid in covering overhead, and as transportation capacity incurs overhead costs whether in use or not, the railroad, if free to follow good business judgment, will normally take the business at the lower rate.

Classification. To avoid unfair discrimination by having a high and a low rate between the same two points, a railroad classifies the commodities it carries. Obviously, if a railroad is to receive, in addition to out-of-pocket costs, as large a contribution toward overhead costs as any particular commodity is able to pay, there must be a number of groups in the classification. The classification then becomes a means of discriminating between commodities on the legally fair basis of their ability to contribute to overhead costs. This ability is a measure of the value of the transportation service to both the shipper and the receiver of a commodity. In setting up a classification schedule, the classes are related to each other by making first class equal 100, with the other classes fixed as a percentage of first class. When a commodity is assigned to any class, its rate is then determined by the percentage relationship of that class to the first-class rate.

In many instances, a commodity may not be classified for legal rate discrimination but given a specific rate, usually without reference to the classification but sometimes related to it. These are called "commodity rates."

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[5] *Western Rate Advance Case*, 35 I.C.C. 497 (1915).

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Equalization and Differentials. A number of factors influence in varying degree the value of transportation service. The price that can be obtained for the commodity at the distant point is important. As this market price is substantially equal for all parts of the same commodity even though these parts come from differentplaces of origin, differences in transportation costs would give some shippers a greater net price. Shippers receiving a smaller return would become dissatisfied and seek another market where, because of lower transportation costs, they would receive a greater net price. These market places, in order to obtain an adequate supply of the particular commodity may seek and receive an equalization of transportation rates. Thus, the shipper finds himself at no greater disadvantage, due to difference in transportation rates, in one market than in another.

Not all markets are placed on an equal basis in regard to transportation rates. Some may be given a fixed "differential" above or below other markets. This differential is given on the theory that it tends to equalize certain advantages one market may have over another. Often similar commodities are linked together by a fixed price or percentage differential so that the rate determined for the basic commodity automatically determines the rate for the associated commodity. Sometimes one route—not necessarily one railroad—is given a fixed differential relationship to another route. Sometimes, too, the movement of a class of commodity in one direction is given a differential relationship to the movement of the same class of commodity in the opposite direction.

All of these relationships taken together form the rate structure which obviously is a complex and rather sensitive mechanism. It is the product of years of effort to adjust transportation charges so that commodities will move under competitive conditions among routes, markets, origins, and among the commodities themselves. Constant maintenance work is accomplished by current rate adjustments to maintain balance.

Effect of Horizontal Rate Increase upon Rate Structure. A simplified example will illustrate the disturbing effect of a horizontal rate increase upon the rate structure. Suppose the rate from A to C is 100 cents per hundred pounds of a certain commodity and that the corresponding rate from B to C is 104 cents. A and B have been in competition for the market in this commodity at C over a period of years. Gradually the rate differential between A to C and B to C of 4 cents per hundred pounds has been established under competitive conditions and is satisfactory to the shippers of both A and B. Their business practices have adjusted themselves to the 4-cent difference in the rate structure and the commodity moves freely under these conditions.

Then the carriers seek more revenue because of rising costs of operation and, because of an emergency, time does not permit the careful examination of the hundreds of thousands of rates to preserve competitive positions between communities and between different commodities. A horizontal rate increase of 25 percent is applied to all rates. The rate from A to C becomes 125 cents per hundred pounds while the rate from B to C becomes 130 cents. Consequently, A enjoys a rate differential of 5 cents, instead of the 4 cents existing prior to the increase. Accordingly, the shippers at B find themselves handicapped, to the extent of 1 cent per hundred pounds, in meeting the competition of shippers at A in the market at C. Insofar as the 1-cent increase in the differential restricts the movement of the commodity from B to A, the shippers at B will experience a "depression."

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Shippers at B now receive 1 cent per 100 pounds less than their competitors at A, and either their net income is correspondingly reduced, or they correspondingly reduce the price paid to the producers at B. In any event, there will be dissatisfaction which will be more or less directed against the railroads.

In the preceding example, the same product was considered as entering a competitive market from two communities. As the commodity could be supplied from a number of sources, upsetting the rate structure tended to throw the increase in differential back upon the producers as a reduction in the price they received. If, however, the commodity is a manufactured article so differentiated as to experience very limited competition, the increase in the freight rate or in the differential does not necessarily have to be assumed by the shipper-producer; it may be added to the selling price.

To go further in the analysis, if the first commodity is wheat and the manufactured articles are farm equipment, the wheat farmer is affected adversely by the rate increases in both cases. In the first instance his income is reduced, and in the second, the purchasing power of the lowered income is further reduced.

Wartime Horizontal Rate Increase. After the United States entered the World War, the railroads were placed under the control of the United States Railroad Administration in order to coordinate their wartime activity.[6] The Railroad Administration issued General Order No. 28 which applied a 25-percent horizontal increase to freight rates as of June 25, 1918. Although the increase was large enough to disturb seriously the rate-structure relationships, consequent maladjustments were overlooked in the war emergency and in the rapid rise of prices in a market where practically all sellers made satisfactory transactions.

RULE OF RATE MAKING – 1920

After the close of the war, Congress held extended hearings, in 1919 and 1920, to consider problems relating to the return of the railroads to private operation. As a result of these deliberations, the Transportation Act of 1920 gave a legislative solution to a number of the most-emphasized problems surrounding railroad regulation. One of the Act's most significant aspects was the "rule of rate making" which was one of the provisions which led the United States Supreme Court to say that Congress had placed the railroads under the "fostering guardianship and control of the Commission."[7]

The rule of rate making is important because it led to further disruption of the rate structure with consequent dislocation of traffic movements and discontent among shippers. While the railroads were losing both traffic and revenue, the shippers were finding new means of transportation in the revival of water carriers and in the encouraging development of paved highways and motortrucks.

Section 15a, which the Transportation Act inserted in the Interstate Commerce Act, provided in part, that

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from

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[6] Governmental control extended from December 28, 1917 to March 1, 1920.

[7] *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, 478 (1924).

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time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

It also provided that

The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5-1/2 per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.[8]

To meet a situation in which a carrier, operating under the blanket provisions of the rule of rate making, might earn more than the prescribed return, a recapture clause required any carrier earning in excess of 6 percent to pay one-half of the excess into a fund administered by the Commission for the assistance of weak carriers. The recapture clause was upheld by the Supreme Court,[9] but it was disappointing in its failure to obtain funds to assist weak carriers.

Horizontal Rate Increase of 1920. With this mandate from Congress to provide adequate revenue for the railroads, the Interstate Commerce Commission initiated proceedings to increase railroad rates.[10] After fixing 6 percent as the return to be allowed upon the estimated aggregate value of the properties of the carriers, the Commission found that this allowance would require horizontal rate increases of 40 percent in the eastern group of railroads; 35 percent in the western; 25 percent in the southern and mountain-Pacific groups; and 33-1/3 percent in through rates between groups.

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[8]41 Stat. 488.

[9]*Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456 (1924). The court's approval of the recapture clause was offset by the requirement that consideration must be given to the current prices in cost of reproduction in arriving at the valuation on which the rate of return is computed. *St. Louis & O'Fallon Ry. Co. v. U. S.*, 279 U. S. 461 (1929).

[10]*Increased Rates, 1920 (Ex parte 74)*. 58 I.C.C. 220. Decided July 29, 1920. "In this proceeding the carriers by railroad subject to our jurisdiction seek authority, pursuant to the provisions of section 15a of the interstate commerce act, to increase their freight revenues to a basis that will enable them to earn an aggregate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. The applications, which were filed in the latter part of April and the early part of May, 1920, were made at our suggestion to assist us in complying with the provisions of that section. Similar applications were filed on the part of certain carriers by water." (223-224).

"In establishing rates for the two-year period we have no discretion as to the amount of the fair return except that we may add to the 5-1/2 per centum provided by law 'a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account. Having determined the per cent, we are called upon to perform the administrative task of establishing rates that will yield in the aggregate as nearly as may be that per cent until March 1, 1922 [p. 226])."

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A section in the Commission's report is devoted to a discussion of percentage increases versus flat increases and to maintenance of differentials and relationships.

While established or 'differential' relationships of rates are not general, there are many such adjustments; some fixed by the carriers and others by us, and it is contended by some shippers that in such cases it is desirable in readjusting the rates to maintain the differentials. . . .

It is evident that there are many competitive situations where no recognized differentials have ever existed but where, nevertheless, the rates have been made to reflect competitive conditions. Such situations greatly outnumber those where 'fixed relationships' have been established. . . .

In favor of maintaining differentials, it is said that they have been fixed in most cases after careful investigation, and that they represent the proper measure of differences in the rates; that often they represent the maximum differences which will permit more distant shippers to compete with those in close proximity; that to increase rates by a percentage tends to decrease the radius in which goods are marketed, and thus by lessening competition prices are advanced; and that in all cases the margin of profit has not increased proportionately to prices.

Those who oppose maintaining differentials at this time contend that the value of the dollar expressed in terms of commodities shipped to-day is in reality but one-half its former value, and, therefore, a differential which was fixed at a given amount several years ago should, to have the same economic effect, be greater to-day; that there have been general increases in the prices of practically all commodities, in wages and in the charges for nearly all services, and that differentials should not be made an exception to the rule; and that as increased operating costs are the underlying reason for the proposed increased rates, the additional service represented by the differential, being more expensive than heretofore, should pay greater rates as well as other services.

The adoption of specific increases in cents per unit instead of percentage advances will, of course, maintain existing relationships. . . .

Without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it is evident that no general program of maintaining differentials can be made effective coincident with the increases here approved without materially delaying their effective date as definite testimony covering individual situations is before us in only a very few cases. . . .

After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable.[11]

In dealing with individual commodities, the Commission applied the percentage increases to lumber; petroleum and its products; fruits and vegetables; sand, gravel, rock, and slag; livestock and packing-house products; and ores other than iron ore. Carriers serving the coal fields of Pennsylvania, Ohio, and West Virginia proposed a continuance of the existing differentials which the Commission had approved, and advised other railroad groups to do the same. No advance was authorized on iron ore from the Minnesota and Michigan ranges to lake ports, although rates on other iron ores were increased on a percentage basis. Percentage increases were applied to grain and grain products, but upon the united representation of carriers and shippers to maintain the equalization of rates from important producing states to important consuming regions, the Commission recommended the restoration of equalization for grain markets formerly enjoying the privilege. Eastern port differentials were also maintained.

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[11] *Ibid.*, 244-245.

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AGRICULTURE IN THE POST-WAR ADJUSTMENT

Just before World War I American agriculture in general was enjoying moderate prosperity. During the war period, the demand for most farm products increased enormously and led to an expansion of agricultural activity. High prices for farm products brought high prices for farm land. Many farmers bought land at these prices, financing their purchases with mortgages. Additional land was brought under the plow, and the cultivation of existing farms was intensified. The agricultural group was endeavoring to meet the need for agricultural products as fully as the manufacturing, railroad, and other industries were meeting the need for their products and services.

Prices for farm products held up until the onset of the 1920 depression which marked the real beginning of the post-war readjustment. In contrast to the industries which could quickly cut production and so decrease supply, the production of agricultural products continued in substantially the same volume. The resultant large supply brought low prices which in turn led to defaults on mortgages, foreclosures on farms, failures of banking institutions in farming areas, and other difficulties.

Depression in industry, by its attendant financial readjustments, tends to force down the supply as well as the price of industry's products. But with agriculture, the sources of supply were too numerous. Moreover, some farmers increased their crops in an effort to obtain a larger income despite lower prices. Some crops were increased by the generosity of nature. Some supply was provided because the producer had no other means of livelihood.

The Government had given consideration to the post-war problems of overexpansion, inventory, and compensation for war use which confronted the manufacturing and transportation industries. Agriculture, however, possessed no outlet for its new capacity or for its inventory; neither was it compensated for the excess use given the land. Least able of all groups to work out its adjustment alone, the farmers were left unaided in finding a solution. Under these conditions, agriculture appealed to Congress which created the Joint Commission of Agricultural Inquiry[12] to investigate the situation and to recommend any plans which would lead to improvement.

Joint Commission of Agricultural Inquiry. The Joint Commission was directed to investigate, among other things, the causes of the condition of agriculture, the comparative condition of industries other than agriculture, and the marketing and transportation facilities of the country. The subject matter of the investigation was divided into four reports. The third report, which was on transportation, set forth the economic relationship of agriculture, industry, and transportation as follows:

> As farm products have value only if they can be consumed, their value is determined by the effective demand and supply at the various points of consumption. In the determination of the exact price which measures this value many factors must be considered.
>
> As a rule the farms of the United States which produce the food of the people and yield farm products for export are located at a distance from the populous districts where the demand centers. Transportation is, therefore, of vital importance to the farmer, for without it his products can not be placed upon the market. A proper basis of transportation charges and an adequate transportation service, allowing the producer to market his products at a remunerative price, will enable the consumer to square his cost of living with his standard of living. Both the farmer and the transportation interests must cooperate so that this consuming demand can be met.

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[12]By a joint resolution passed by the Senate May 31, 1921, and by the House June 7, 1921. *Congressional Record*, 67th Congress, 1st Session, 1901, p. 2207.

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The prices for farm products at the primary markets are generally fixed by factors other than costs of transportation, but these costs are reflected in the prices realized by the farmer. In the case of products of low value shipped long distances, they are a material proportion of the price obtained by the producer. It is manifest that the prosperity of the farmer is dependent to a marked degree upon the transportation charges of these farm products. Regardless of the distance involved, these transportation charges must enable both the carrier and the producer to realize a profit from his operations. Therefore, so far as possible, freight rates should be adjusted to permit a free movement of all the surplus produced on the farms to the markets where it can be absorbed.[13]

Among the 17 findings of the Joint Commission were several pertinent to the present study. These were:

1. That freight rates upon perishables normally take about one-third of the selling price, frequently running as high as two-thirds; that these rates in periods of low-price levels and slight demand constitute a very heavy burden upon this traffic. This is especially true, owing to the average length of haul of these commodities, which was shown to be more than 1,400 miles in a study of 9,476 shipments.

2. Prices of canned goods are practically back to pre-war levels. The existing freight cost per case is substantially lower in relationship to value of the product than the freight cost of the so-called basic commodities, including grains.

There is nothing in the Commission's investigation to show that rate reductions on canned goods should have preferential treatment while the rates on so many basic commodities remain at their existing levels.

4. That freight rates on highly fabricated articles of wearing apparel, such as boots, shoes, dry goods, men's and women's suits, etc., are not a material factor in increasing or reducing prices of these commodities. The freight rate is frequently absorbed by the merchant, and where it is not so absorbed, but is made a part of the cost basis upon which margins and profits are figured, represents so small a proportion of the final sales price as not to be a material factor in the increase or reduction of such prices.

10. That the revenue return to the railroads should be sufficient to enable them to sustain the value of their properties put to public use and to attract the capital required for the expansion and improvement of property, facilities, and service.

11. That sound railroad finance requires that a larger part of the capital necessary for railway development and equipment be secured by stock issues instead of by bond issues.[14]

Altogether the 31 recommendations of the Joint Commission covered both broad and specific matters. The first 3 are of particular interest as showing the foundation laid for the Hoch-Smith resolution.

1. That the transportation rates on many commodities, more especially the products of agriculture, bear a disproportionate relation to the prices of such commodities; that there should be immediate reductions in transportation rates applied to farm products and other basic commodities; and that reductions in rates upon the articles of higher value, or upon tonnage moving upon so-called "class rates," are not warranted, while the rates upon agricultural products and other basic commodities remain at their existing levels; that greater consideration should be given in the future by public rate-making authorities and by the railroads in the making of transportation rates to the relative value of commodities and existing and prospective economic conditions.

2. That the pyramided per cent advances in rates which have been authorized by the Interstate Commerce Commission or made by the United States Railroad Administration caused the dislocation of long-standing rate relationships between rates upon agricultural and industrial products between competitive enterprises and competitive sections of the country; that the railroads and the public rate-making bodies should seek to

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[13] U. S. Congress, 67th, 1st Session, *House Report 408*, Pt. 3, p. 9 (Washington, 1922).

[14] *Ibid.*, 6-7.

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readjust rates of the country so as to preserve so far as practicable the general relationship of rates existing prior to 1918, with due regard to present and future changes in economic conditions.

3. That in establishing the general level of rates and commodity and class rates the Federal and State regulatory bodies give greater consideration to existing and prospective economic conditions and to the relationships existing between the price level of commodities and the level of transportation rates as well as the relationship existing between the price of different commodities, the weight of such commodities, and the space required for their transportation.[15]

United States Chamber of Commerce. After Congress had received the reports of the Joint Commission the agitation for lower rates on agricultural products was continued with a better factual basis. Farm organizations were not the only proponents of a readjustment of the rate structure. A special committee selected by the United States Chamber of Commerce made a report on November 14, 1923, entitled "Readjustment of Relative Freight Rate Schedules." This committee included representatives of agriculture and of railroad labor, of agricultural implement manufacturers, traffic managers, coal producers, terminal and milling executives, and the vice presidents of nine important railroads.

The first two conclusions of the committee were:

1. Viewed as a whole, railroad rates in the United States are not unreasonably high, either as compared with pre-war rates in relation to general price levels or as compared with foreign rates. They have afforded the railroads an average rate of return considerably below that which the Interstate Commerce Commission, acting in accordance with the law, has determined as fair. They do not as a whole hinder the processes of production or distribution. The present problem is one of a better adjustment of relative rates—not a general reduction of all rates.

2. It cannot be claimed that the railroad freight rate structure of the United States has ever been organized on a scientific basis, or that it has ever been systematically revised with the purpose of eliminating disparities. The great economic changes incident to and resulting from the war have created additional disparities resulting from horizontal rate changes, from the dislocation of relative price levels and from increases in labor costs and terminal expenses which have borne with greater weight on some classes of traffic than on others. This situation renders a readjustment of relative freight rates of great immediate importance.[16]

In other words the committee concluded that the rate level was not too high, but that the structure was maladjusted. However, reductions in some rates would require increases in others if the level was to be maintained.

Conflict of Railroad Earnings with Agricultural Welfare. While the Joint Commission was engaged in its labors, the Interstate Commerce Commission was investigating the "reasonableness and propriety" of interstate rates on certain agricultural products. These rates were based upon the 1920 percentage rate increase. One of these cases related to grain, grain products, and hay in the western and mountain-Pacific groups of railroads.[17]

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[15] *Ibid.*, 3.

[16] U. S. Chamber of Commerce, Special Committee III, *Readjustment of Relative Freight Schedules*, 5-6 (Washington, [n.d.]).

[17] 64 I.C.C. 85. Decided October 20, 1921.

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The Commission stated:

The facts disclosed in the record make it appear that grain and grain products and hay, on the whole, are bearing a share of transportation charges which is disproportionate [Italics supplied].[18]

On the other hand, neither during the calendar year 1920, nor during the 12 months following the increases, did the carriers, either in the country as a whole, or in the western or mountain-Pacific groups, earn an aggregate net railway operating income over about one-half of 5-1/2 percent of the value of their property as tentatively fixed by us.[19]

However,

Prices for [farm] products have decreased relatively more than the cost of production. The purchasing power of the farmer is restricted, with adverse effect on general business, and likewise, through reduction of inbound freight, on the revenues of the carriers. Farming, our chief industry, pays a huge freight bill on both outbound products and inbound freight.

Translating the purchasing power of the western farmers from dollars into bushels, it is clear that in most instances they must pay a far greater quantity of either corn or wheat than heretofore to secure the important commodities necessary for use in the production of their crops or for sustenance.[20]

The points of conflict were well stated.

While not contending that the distress of the grain, grain products, and hay producers is wholly attributable to the present level of freight rates, petitioners [agricultural groups] urge that a reduction in haulage charges would make it possible for consumers to buy hay, oats, corn, etc., and would result in increased movement and the saving of these commodities for society; that the producers would realize financial benefit and have increased purchasing power which would favorably react on the railroads through increased inbound freight. On the other hand, respondents [railroads] deny that such a reduction would stimulate demand, because, they say, it would probably not reduce prices to the consumer. If the movement were stimulated temporarily, it is contended that the downward trend of prices would be continued because of the surplus of certain grains, held without any visible demand. As prices are now at a low point, respondents doubt if a reduction in rates would increase feeding or consumption. They make the claim that the agricultural industry is in little different condition from other producing or manufacturing industries, and that the railroads themselves have not received during the last year within 50 percent of the rate of return prescribed by Congress.[21]

Dislocated Rate Structure Causes Production Relocation. There were indications that the high level of freight rates was causing a geographical shift in production of hay.

There is an abundance of hay in the west. A large part of it is neither going to market nor being used locally. A large portion of last year's crop is deteriorating, and there is testimony that much of this year's crop would not be cut. Transportation charges constitute a large proportion of the finally delivered price of hay, much of which customarily moves considerable distances. The character, value, volume, and use of this commodity are such as to require relatively low charges for its carriage. *National Hay Asso. v. L. S. & M. S. Ry. Co.*, 9 I.C.C., 264, 306. Receipts at the markets at Kansas City, Omaha, and other points this year have been unprecedentedly subnormal. There is evidence that eastern and southern dairy and stock men are substituting local and undesirable feeds, such as slough grass, straw, and cotton stalks, because of the high delivered costs of western hay. Hay and alfalfa meal dealers and producers insist that there is a potential demand but that the freight rates are now

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[18] *Ibid.*, 96.

[19] *Ibid.*

[20] *Ibid.*, 91.

[21] *Ibid.*, 94-95.

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past the point that their products will bear. Hay can be and often is moved in low-grade equipment that is unsuitable for grain hauling, without expedited or special service, and requires proportionately a small movement of empty equipment.[22]

In this case the Commission considered the railroads as a depressed industry similar to agriculture but with the advantage of a mandate from Congress prescribing a definite rate of return on investment.

Summarizing the situation before us, petitioners [agricultural interests] speak for a basic industry which the evidence shows is in a state of financial prostration, receiving for its products prices which approach and in some cases have fallen below prewar levels, but paying transportation costs many of which are still at the war-time peak. On the other hand, the evidence shows with equal clarity that respondents [the railroads] are likewise suffering from financial depression and that their net earnings have been far below the standard which has been fixed by the law, although the tendency is now upward. It becomes necessary to consider whether rate reductions may be made on grain, grain products, and hay in western and mountain-Pacific territory which will be fair and lawful so far as the carriers are concerned.[23]

SECTION 15A A STUMBLING BLOCK IN READJUSTMENT

Soon after the enactment of Section 15a, it was recognized that the railroads could not be given special treatment in the preservation of their rate of return when the rate of return collapsed or became negative for the industries whose products the railroads carried.

The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15a, to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment cannot with advantage be made dependent upon fluctuations in traffic.[24]

It apparently did not occur to the regulatory commission, the shippers, or the carriers that the mandate from Congress prescribing a definite rate of return for the carriers was the stumbling block in working out a readjustment of transportation problems. Actually, despite a Congressional directive to the Commission to fix rates so "that during the two years beginning March 1, 1920" the return to the railroads should

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[22] *Ibid.*, 89-90. The concurring opinion of Commissioner Lewis, joined by Commissioner Hall, stated the situation with clarity.

"The record in this case reveals that horizontal percentage increases in rates on grain, grain products, and hay, made necessary by the emergency conditions under which the Commission acted in Ex Parte 74, have greatly widened the spread between producers who are near and those who are far distant from markets. This widened spread was less felt during the period when prices were high and demand exceeded supply, but its continuance under present conditions will tend to the contraction of producing and marketing areas in the west, where much of the producing territory on which the nation must depend for commercial grains and hay is far removed from markets. We recognized similar conditions in *National Live Stock Shippers' League* v. *A., T. & S. F. Ry. Co., supra* and sought to place the far-distant producer on a more favorable basis. Our finding in that case applies with equal force here. The exaggerated spread between the long and short haul rates, under the conditions that face us, will be unjust and unreasonable and, in my opinion, the rate reduction should be so applied as to tend to restore better relationships between producers, as was done in the case cited." [p. 105-106].

[23] *Ibid.*, 98-99.

[24] *Ibid.*, 99.

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be "a sum equal to 5-1/2 per centum" of their aggregate property value, these three groups (carrier, shipper, and Commission) agreed to ignore the mandate in a case decided within the 2-year period.[25] The action in this case would indicate that a specific Congressional mandate on rate making is unsound as an economic policy.[26]

The decision in the case reduced rates on wheat and hay by one-half of the increases which had been authorized in *Increased Rates, 1920;*[27] set coarse grain rates 10 percent below wheat rates; and preserved existing relationships and differentials.

The Rate Reduction of 1922. In *Reduced Rates, 1922,* the question of the interpretation of Section 15a arose once more and the Commission approved a fair return of 5-3/4 percent which "would be approximately the equivalent of a fair return of 6 percent, out of which the Federal income tax was payable."[28]

> Since August, 1920, the carriers as a whole, or as a whole in their respective rate groups, have failed by a considerable margin to earn the authorized return. It is urged by some that under existing conditions the question of a fair return for the future is academic and that it is not necessary for us to determine a percentage of return at this time. We do not take this view. The operation of economic forces which have prevented, or which may hereafter prevent, carriers from earning a fair return under the adjustment of rates then prevailing does not constitute a bar to determination of what a fair return should be. By the qualifying words "as nearly as may be," Congress recognized that conditions during certain periods might prevent such realization under any adjustment of rates.
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> The provisions of section 15a in this respect have been framed in recognition of constitutional guaranties of fair return upon property devoted to public use. They also declare the policy of Congress — "in its control of its interstate commerce system . . . to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all of the work it does." *Railroad Commission of Wisconsin et al.* v. *C. B. & Q. R. R. Co.,* 66 L. ed (U.S. Sup. Ct.) 236, 42 Sup. Ct. Rep. 232, decided February 27, 1922.
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> The determination of what will constitute a fair return under paragraph (3) of section 15a is, in our judgment, a function distinct from that of initiating and adjusting rates under paragraph (2) of that section. Section 15a, reasonably construed, contemplates the determination of a return which the carriers, collectively or in rate groups, may attain over a period of time under rates adjusted from time to time with that object in view. *The phrase "from time to time" does not mean that we should adjust and readjust rates to meet business fluctuations.* Whether carriers may be able to earn an aggregate net railway operating income equal to a fair return must depend to a large extent upon business conditions. In the *Wisconsin case, supra,* the court said:
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> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill [Italics supplied]."[29]
>
> It is necessary to determine and make public, as required by section 15a, a percentage of fair return. Determination of the percentage implies, or carries with it, no guaranty. Read in connection with the provision for recapture of one-half of the excess above 6 per cent it is, instead, a limitation.[30]

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[25]The grain case was submitted September 3, 1921 and decided October 20, 1921.

The Commission could "in its discretion" add another 1/2 percent to the 5-1/2 percent and, in *Increased Rates, 1920,* 58 I.C.C. 220, decided July 29, 1920, the additional 1/2 percent was added to make the rate of return 6 percent — p. 246. In discussing paragraph (3) of Section 15a, the Commission said "*we have no discretion as to the amount of the fair return* except that we may add to the 5-1/2 per centum provided by law" the additional 1/2 percent to provide for items chargeable to capital account.— p. 226. Italics supplied.

[26]The section was rewritten and a new rule for rate-making substituted by amendments to the Interstate Commerce Act which were included in the Emergency Transportation Act of 1933.

[27]58 I.C.C. 220. For details of the ruling in the grain case see 64 I.C.C. 85, 100.

[28]68 I.C.C. 676, 683. Decided May 16, 1922.

[29]*Ibid.*, 680.

[30]*Ibid.*, 681.

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In this case the Commission discussed that phase of section 15a relating to honest, efficient, and economical management and stated:

> Manifestly one of the greatest problems confronting the carriers to-day is to provide efficient service at a reasonable cost. If the purpose of section 15a to afford carriers a reasonable return is to be attained, earnest efforts toward reduction of operating expenses in all possible ways consistent with good service must be continued.[31]

Discussion of rate reductions immediately after 1920 increase: A summary was given of the rate situation subsequent to the rate increase of 1920.

> General reductions ranging from 10 to 22 per cent ordered by us with respect to carload rates on grain, grain products, and hay in the western and mountain-Pacific groups became effective during January, 1922, and upon our recommendation rates on live stock in the same groups in excess of 50 cents per 100 pounds had been reduced 20 per cent, but not below 50 cents, in October, 1921. Practically all other carload rates upon products of the farm, garden, orchard, and ranch throughout the country were reduced 10 per cent in January, 1922. All of these reduced rates, other than those on grain, grain products, and hay in the western and mountain-Pacific groups, expire by tariff limitation on June 30, 1922. Only in these three instances have reductions been made covering the entire country, or the whole of any one or more rate groups, since the increases of 1920 became effective.
>
> Many rate readjustments, resulting in reductions, have been made since the increases of 1920. Some affected a substantial volume of traffic such as export grain, bituminous coal to Lake Erie ports for the Northwest, sand and gravel in eastern territory, ore, lumber, and petroleum and its products. In some instances the volume of traffic after the reduction was less and in others more than before the reductions. Protests, usually alleging undue prejudice, have been filed by shippers against many of these readjustments, and in some cases have resulted in suspension proceedings. Some readjustments have been made hastily under pressure from particular shippers, or for the purpose of retaining traffic or deflecting it from one group of carriers to another.[32]

Among the views of shippers and carriers were the following:

> They [the carriers] do not, however, advocate rate increases as a means to increase net revenue. They admit that rates are too high and must come down, but they insist that rates can not be further reduced until the costs of transportation are further reduced.[33]
>
> Rates generally have been increased twice in the past four years, the increase of 1920 alone having been intended to produce more than one billion dollars additional revenue from the transportation of freight. As wages and cost of materials have been materially reduced since the increases of 1920, it is the position of shippers generally that the inability of the carriers to earn a fair return since these reductions were made is due largely to the failure of traffic to move in normal volume, and that the most important problem before us is to devise rates that will move more traffic and at the same time be compensatory to the carriers. It is generally recognized that existing high rates are a burden upon commerce, and many shippers insist that they are forcing movement to other forms of transportation, tend to restrict traffic, and in some instances to prevent particular movements. Many complaints are also made relative to the disturbance of relationships between producing or consuming districts due to the manner in which rates have been increased, and to partial readjustments which have subsequently taken place. The belief is general that traffic has been localized and the radius of distribution reduced.[34]
>
> The rate increases of 1918 and 1920 affected all commodities. These shippers say that prior to the general increases the differences between carload rates on low-grade basic commodities and rates on other commodities were as great as were justified by conditions then existing. Those differences have been widened by the percentage method of increasing rates, presumably in accord with changed conditions. . . . One of the needs of

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[31] *Ibid.*, 690.

[32] *Ibid.*, 703.

[33] *Ibid.*, 704.

[34] *Ibid.*, 705.

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commerce is the lessening of the spread in rates between commodities and localities created by the percentage increases of 1918 and 1920. This applies to commodities in general and not merely to basic commodities. . . .

Shippers of basic commodities submitted the same general character of evidence relative to the necessity of rate reductions as other shippers, but advocated large reductions upon the basic commodities even though as a result no reductions may now be made upon other commodities. They urged that generally these commodities constitute low-grade freight which moves in any class of equipment, loads heavily, is subject to little loss or damage in transit, and consequently is desirable traffic for the carriers and entitled to the lowest rates. They also urged that, since the existing rates were authorized, price declines on basic commodities had been more severe than on higher-grade commodities; that their industries as a whole were in a depressed condition; that in some cases the commodities were being sold at a loss; that many basic commodities are important raw materials used in manufacture; that rate reductions thereon will do much to reduce cost of production and to stimulate business; and that generally transportation charges thereon were and are out of proportion to the value of the property transported, and restrict production and movement.[35]

A number of commodities were examined with reference to the economic condition of the industries with which they were associated. Among these products were coal and coke; iron, steel, and ore; road and building materials; forest products; agricultural products and livestock; packing-house products; fertilizers and fertilizer materials; waste materials; petroleum and products; roofing slate; groceries; milk, cream, and dairy products; paper and paper products; cottonseed products, vegetable oil, and soap; and miscellaneous commodities. The Commission's comments were:

A number of readjustments resulting in reductions of rates on raw materials and finished products [iron, steel, and ore] have been made by the carriers since 1920. The reductions were not applied uniformly upon all the raw materials, and have resulted in complaints of unjust discrimination and undue prejudice. . . . They [producers of ores other than iron ores] contended that the increased rates were so out of proportion to the value of the commodities as greatly to restrict movement.[36]

Agriculture was the first industry to feel the depression in 1921. Prices of farm products fell in some instances even below those of 1913 and the general average of farm prices in one month of the summer of 1921 reached a point only 6 percent above that of 1913. The rapid and marked decline in prices without similar reduction in production costs created a serious situation and resulted in a heavy falling off in the purchase of manufactured articles of all kinds in rural sections. This impairment of purchasing power, combined with the falling off in foreign demand, contributed largely to the general business stagnation of 1921.[37]

Rail lines are not obtaining as great a proportion of the total movement [of petroleum and petroleum products] as they did in former years. This is due chiefly to the rapid development and increased use of other forms of transportation, notably pipe lines, motor trucks, tank vessels, and accessorial storage facilities. While transportation by these other forms of carriage is undoubtedly in many cases more economical than by rail, and while rail lines may not expect to retain the entire traffic, use of the other forms of transportation is enhanced by the existing level of rail rates. The increases in many short-haul rates over the 1917 basis are now from 5 to 6.5 cents per 100 pounds, which in themselves would be high rates in many cases. Many short-haul rates are materially higher than on other commodities of like transportation characteristics. The rail lines are losing some short-haul traffic which they might retain at lower but still remunerative rates. Self-interest would seem to dictate revision by them of their short-haul rates.[38]

The percentage increase of 1920, coupled with the subsequent reduction of 3.5 cents in central territory, has tended to lessen the rail movement of refined products and fuel oil from southwestern refineries to northern and eastern markets and to increase the movement of crude oil by pipe line from southwestern producing territory to northern refineries, and also to Gulf coast refineries from which the movement is by

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[35] *Ibid.*, 706-707.

[36] *Ibid.*, 711.

[37] *Ibid.*, 716.

[38] *Ibid.*, 722.

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water to North Atlantic ports and thence by short rail hauls into the interior. As a result the southwestern refineries are suffering while other refineries are operating more nearly to capacity.

This situation appears to clearly fall within the class of readjustments contemplated when the increases of 1920 were authorized. Carriers should promptly revise their rates from the Southwest to the eastern group in order to lessen the spread as compared with rates between points in central and trunk-line territories.[39]

High rates defeat carrier interests: In conclusion, the Commission states, "Shippers almost unanimously contend, and many representatives of the carriers agree, that freight rates are too high and must come down.' This indicates that *transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers 'to provide the people of the United States with adequate transportation'* [Italics supplied]."[40] The Commission then found 5-3/4 percent to be a fair return on the aggregate value of railway property as provided in Section 15a, prescribed a 10 percent horizontal reduction from the rate levels established in *Increased Rates, 1920*, and reduced the 1920 interterritorial rate from 33-1/3 to 20 percent.[41] Exceptions were made where rates and charges had been reduced for the purpose of removing all or part of the 1920 increase; where recognized rate relationships had been maintained or restored; and in certain instances which had resulted from proceedings before the Commission.

Separate comments of Commissioners included:

McChord, Chairman: I think that the times and conditions plainly demand reductions in rates on all materials and products that are basic in industry and in our existence as a people to a level that business interests will recognize as the lowest available for some time to come. Nothing less will quiet the prevalent unrest and agitation for lower transportation costs and encourage the needed healthy flow of traffic.[42]

Eastman: Prior to the passage of the transportation act, one of the great complaints of the railroads was that this commission, in the exercise of its control over rates, had been unduly repressive and had not permitted a level high enough to sustain the credit of the carriers and enable them to secure the capital necessary if an adequate transportation system were to be maintained. I think it clear, both from its history and from the internal evidence which it offers, that it was the intent of section 15a to quiet the apprehension of investors and provide a 'service-at-cost' system of regulation under which our duties with respect to general changes in rates would be reduced, as nearly as practicable, to a mathematical process.[43]

Potter: During the early stages of our deliberations, I was impressed with the notion that in making reductions we should give preferential consideration to a selected list of so-called basic commodities. Further consideration developed objections to this course which to my mind are convincing. It appears impossible at this time to select a list of so-called basic commodities to which reduction could consistently and lawfully be limited. We can not determine upon specific basic commodities which do not so relate in a competitive way to other commodities, as to make impossible a reduction of the rates on those selected and not on others.[44]

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[39] *Ibid.*, 723.

[40] *Ibid.*, 732-733.

[41] *Ibid.*, 735.

[42] *Ibid.*, 737-738.

[43] *Ibid.*, 739.

[44] *Ibid.*, 743.

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Lewis, dissenting: The decision of the commission that rates be reduced is unanimous. My dissent is limited to what appears to me to be unjustified economic waste. The times demand adjustments — even radical adjustments — rather than horizontal reductions, and the record in this case justifies such action.

The margin available for reductions or adjustments that may be required by us is not sufficient, if spread over the entire freight traffic, to give to the country the relief and to business and industry the stimulation that is urgently needed. . . .

It may be said that, measured by the standards of value or service, many commodities are not now bearing too great a share of the transportation burden. Rates in some instances, and on certain services, might be increased rather than lessened as the result of a more detailed study than is afforded in this investigation. The horizontal lowering of transportation charges in many instances will, so far as the public interest is concerned, mean nothing. . . .

On the other hand there are commodities and raw materials that are basic to existence, to industry, and to readjustment, on which transportation charges are relatively and absolutely too high. They are out of proper relationship to the selling prices of the commodities and constitute not only maladjustments at home but most unfavorably affect us in world competition. Making these commodities and materials more cheaply available to consumers and manufacturers would contribute to reduction of costs of living, relief in the housing situation, maintenance of productivity of the soil, increased employment, and stimulation of buying. The combined effect of such changes could reasonably be expected to increase traffic and speed an earlier adjustment of other or all transportation charges to proper relationships with new levels of values.

The fullest possible measure available for reductions should be applied in conformity with the guiding principles which were the foundation of our order in *Rates on Grain, Grain Products, and Hay*, 64 I.C.C. 85, and of our recommendations in *National Live Stock Shippers' League v. A., T. & S. F. Ry. Co.*, 63 I.C.C. 107, on which the carriers acted, and which the carriers accepted as their basis for their voluntary 10 per cent reduction in rates on products of the soil.[45]

Cox, dissenting: To the extent that a measure of relief has been granted to the public generally in the disposition of this case I fully concur, but I am not in full accord with the manner and measure of the reduction as set forth. . . . Nothing, perhaps, is more desirable at this time than a return to normalcy, and adjustments must be made which will tend to stimulate the agricultural and industrial situation which has been in a state of depression since the readjustment period began.

I do not concur in the views of the majority that rates on all commodities should be reduced at this time and it is a matter of record that many commodities at present rate levels are not bearing more than a just share of the transportation burden.

It is my judgment that the amount available for reduction at this time should be applied to agricultural products, raw materials and basic commodities which are essential to the reestablishment of industry, the reemployment of labor, and which could at once be reflected in reduced living costs.[46]

PRESIDENTIAL CALL FOR LEGISLATIVE MANDATE

With the Joint Commission on Agricultural Inquiry, the Interstate Commerce Commission, and the special committee of the United States Chamber of Commerce reporting a maladjusted rate structure owing to horizontal percentage rate changes, and with the continuous discussion among various shipping groups, further recognition of the dislocation was to be expected. In his message to Congress on December 6, 1923, President Coolidge said, "Competent authorities agree that an entire reorganization of the rate structure for freight is necessary. This should be ordered at once by the Congress."[47]

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[45] *Ibid.*, 744-745.

[46] *Ibid.*, 745-746.

[47] *Congressional Record*, 68th Congress, 1st Session, 98

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It is well to note that the President suggested that the reorganization of the rate structure for freight "should be ordered at once by the Congress." This was a definite call for a mandate. When the mandate was finally given in the second paragraph of the Hoch-Smith resolution, its fulfillment was undertaken by the Commission in Docket 17,000, *Rate Structure Investigation*.

INTERSTATE COMMERCE COMMISSION INVITATION FOR LEGISLATIVE MANDATE

The Commission itself invited Congressional action in a case currently before it, in which the depressed condition of agriculture was stressed.[48] Although the dissenting commissioners thought the rates unreasonable, they recognized the legal restraint imposed on rate making by Section 15a of the Transportation Act of 1920. The majority, while denying the reductions and employing in its decision the usual tests of reasonable rates, viewed the current existing structure as a whole, and took notice of the efforts being made for rate structure revision. The majority opinion was, in part, as follows:

> In reaching our conclusion we are mindful of the opinions held by many that there should be a general revision of the rate structure of the country to give basic commodities more consideration. All we here decide is that under the facts and conditions shown by this record and viewing the present structure as a whole, the existing rates on grain, grain products, and hay are not unreasonable when the *usual tests* are applied. . . .
>
> The present rate structure is largely the result of commercial and transportation conditions, and under it the trade and commerce of the country have grown up. . . . *A revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal* [Italics supplied].[49]

Commissioner Potter, joined by Commissioner Cox, said in concurring,

> I am willing to go far in recognizing that changes in the rules of rate making were affected [*sic*] by the transportation act [of 1920]. *Under that act* where a fair return is assured *we are not so limited as formerly to a consideration of the relation between cost of handling of particular commodities and the returns from the application to them of existing rates*. We may fairly apportion the aggregate in fixing rates on different commodities. To some extent we are at liberty to distribute the burden where, from the public standpoint, it can best be borne. *We have a duty, unperformed, to iron out the rate structure*. It may be that a broader consideration of the general adjustment would lead to a reduction of rates on products of agriculture. . . . *Perhaps we have fallen short in the performance of our duty in not studying more thoroughly the general subject. Such study is essential before sound action can be taken*. Up to the point where operations show a surplus above a fair return earnings under rates free from undue discrimination or prejudice belong absolutely to the carriers. They may not be taken away from the carriers except through exercise of the taxing power. This is the essence of property right applicable everywhere at all times to all persons under all circumstances and conditions. The producers of agricultural products would be the ones to suffer most from a violation of this right. There may be thought, or lack of it, that would jeopardize this principle. *The air even in high places may be tainted with confiscation, but it is not for us. The Congress has not commanded us to violate the fundamental law* [Italics supplied].[50]

Commissioner Eastman, dissenting, said:

> The majority have, I feel, given insufficient weight in their comparisons of car-mile and ton-mile earnings to the principle, generally accepted in rate making, that such earnings should decrease as the length of haul increases. . . . *When proper allowances are made, it seems to me that they support the conclusion that the rates on grain and grain products are unreasonable*. . . .

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[48] *Rates and Charges on Grain and Grain Products*, 91 I.C.C. 105. Submitted March 22, 1924; decided July 10, 1924.

[49] *Ibid.*, 164-165.

[50] *Ibid.*, 168.

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But having reached the conclusion that the rates on grain and grain products are unreasonable, we at once run afoul of another part of the law, namely, the provisions of section 15a which require us to maintain rates, so far as practicable, at a level which will produce aggregate revenues yielding a certain return upon the value of the railroad properties. Using the value which the commission has found, the carriers in the western district plainly have not been and are not now earning such a return. . . . Employing this standard, then, there is now a deficiency in the western district, measured by the provisions of section 15a, and this deficiency will be increased if the rates on grain and grain products are reduced.

Nor would the situation be greatly different if section 15a did not exist. . . .

Under the law, then, it follows that if we reduce the rates on grain we must afford the railroads every practicable opportunity to make good the deficiency by raising rates on other traffic. *This brings us to a theory which has gained great vogue of late, namely, that the rates on grain and other so-called basic commodities can and should be reduced at the expense of rates on other commodities of less basic importance and of higher value.* This theory has been accepted by so conservative a body of business men as the United States Chamber of Commerce and has become a part of the platform creed of both of the great political parties. It has the advantage of being a theory under which it is possible to be for the railroads and for the farmers at one and the same time.

Continuing to speak frankly, such knowledge of the railroad rate structure as I have does not inspire me with confidence in the practicability of this theory; but it is quite possible that I am too near to the subject for proper perspective and over-impressed with its complexities and difficulties. *Clearly it is highly desirable and in the public interest that the country should know as soon as possible whether this theory, which has gained such impressive support, is really sound and constructive or whether it is no more than a bit of political hypocrisy, of which we have a surfeit.* There is no better way of ascertaining this fact than by putting the theory to the test, and no easier test could be found than this case offers. Compared with the aggregate of freight revenues in the western district the reductions which are sought in the grain rates would not bulk large, and in such a situation the theory should work if it will work at all. I am sorry that we are not going to try it out [Italics supplied].[51]

Commissioner Campbell, joined by Commissioners McChord and McManamy, said in dissenting,

The majority find that these conditions [financial failures among farmers] are in large part due to the recession since 1920 in the price of the farmers' products, but the knowledge of that fact will bring little comfort to the farmer, who must have help until his slowly improving economic condition enables him to meet his obligations without further borrowing. The argument of the carriers that we can not extend this help because the carriers, as a whole, in the western district are not making their fair return is not at all persuasive. *If, as contended by the carriers, the commission's hands are bound so tightly by the provisions of section 15a of the interstate commerce act that it can not grant any general reduction of this nature, no matter how much proof of the unreasonableness of the rates assailed, unless and until the interested carriers as a whole in their respective groups make a fair return, then that section of the act is a hindrance instead of a help to the economic welfare of the general public.*

I am persuaded that the economic condition of a particular industry, more especially that of farming, which I consider the basic industry of the country, should be given considerable weight in determining under section 1 of the act whether the transportation costs which that industry has to bear are unreasonable. . . . This record establishes, to my mind, that the rates on grain, its products, and hay are bearing more than their share of the transportation burden and are unreasonable. I think they should be reduced so as to relieve the complaining shippers of the full amount of the 1920 increases. . . . If the multitude of so-called depressed rates now maintained by the carriers which do not bear their fair share of the transportation burden were increased to a reasonable level and the uneconomic, inefficient, and wasteful transportation under such rates, particularly over unduly circuitous routes, were stopped, the resulting additional revenue to the carriers would equal many times the reduction contemplated in this dissent [Italics supplied].[52]

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[51] *Ibid.*, 175-177.

[52] *Ibid.*, 177-180.

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Commissioner Lewis, dissenting, said,

The record reveals that in the new era of prices and values into which we have passed since the war, *the freight rates on grain*, and particularly on western wheat, *have been thrown out of proper relationship with other rates*. We recognized this three years ago when the new levels had hardly begun to be established, and when the carriers had hardly begun to see net earnings. We applied lower rates to grain and hay, but *this readjustment was wiped out* to a very great extent *when, two years ago, we applied the 10 per cent reduction to all other traffic*. The present record affords proof that the existing rates on grain and grain products, but not hay, are unreasonable in the western and eastern districts, and on this showing I favor the removal of the remainder of the *Ex parte 74* [1920 case] increases in the West, and a 10 per cent reduction in the East . . .

We, however, have duties under section 15a as well as under section 1, and are faced by the fact that the carriers' net return has not been and is not now as great as is contemplated by law or is necessary for the maintenance of an adequate system of transportation. *Therefore, what is called for in this instance is readjustment of rates rather than reduction of revenues*. . . . There is no reason to believe that the railroad executives would not favor a readjustment of grain rates, provided their revenues were protected. Accepting their declarations we have reason to expect quite the contrary. There is before us recognition of the "urgent need for extensive adjustments of this character." It is in the report of the transportation conference called by the Chamber of Commerce of the United States. Both carriers and shippers there represented—the carriers, east and west, by some of their ablest executives—declared that—"great economic changes incident to and resulting from the war have added to previous disparities, which render a readjustment of relative freight rates of great importance. . . . The public interest demands that this task should be discharged by existing agencies in pursuance of established methods, but that it should be prosecuted with the greatest possible dispatch."

There is also prevalent a general recognition of the fact that in the new world era in which we are living there must be such readjustments. The commission should not close its eyes to these realities. If there is any place where this readjustment should begin it is with grain rates, and particularly with western grain rates. It so happens, as developed by an analysis of this record, that there is no place where needed readjustments would so little affect general business conditions, except ultimately to improve them. Likewise it also happens that there is no place where proper readjustments would do more to meet a resentment borne of a sense of injustice that is not only disturbing to business but a menace to transportation [Italics supplied].[53]

There is no formula for the fixing of reasonable rates. . . .

The usual standards employed in the determination of just and reasonable rates are transportation conditions, cost of service, value of service, earnings, comparison with other rates, and what the traffic will bear. *Judged by almost all these standards, I find that grain rates are high and should be adjusted downward* [Italics supplied].[54]

There are in existence rates depressed by conditions that no longer exist, notwithstanding the fact that numerous readjustments have been made in recent years. . . .

I do not think that such a shift in rates as here proposed, reducing existing high rates on grain that can not bear such charges and correspondingly increasing rates on other traffic which can easily bear higher charges, is in any way incompatible with section 15a, as the majority report would indicate. *Opposition to section 15a will certainly increase if it can be construed in such a manner as in effect to freeze the rate structure and prevent changes that are necessary to meet changed conditions* [Italics supplied].[55]

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[53]*Ibid.*, 180-181.

[54]*Ibid.*, 182.

[55]*Ibid.*, 185.

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LEGISLATIVE HISTORY OF HOCH-SMITH RESOLUTION

Hoch Bills Introduced in House; Smith Bill introduced in Senate (Explanation of Smith Resolution); Differences Between Hoch Resolution and Smith Resolution; House Committee Hearings (Commission's Attitude Appears Antagonistic — amount of work involved, time required and cost, legal conflict of resolution with Section 15a, theory of rate making, Commission's power to change rates, index numbers show that rates parallel commodity prices except in the case of agricultural products, summary of the Commission's attitude toward the resolution; Testimony of the Secretary of Commerce — change in rate relations causes industrial shifts, investigatien to aid theory of rate making, rate structure adjustment interlocked with railroad consolidation, use of railway rates for economic relief; Statement of Congressman Homer Hoch — no new authority for Commission but direction to act, principle of rate making unchanged, summary of Hoch testimony; Testimony of Agricultural Interests; Summary of House Hearings); Congressional Wedding of the Hoch to the Smith Resolution; Debate on Hoch-Smith Resolution (Conflict with Section 15a Observed); Passage of the Hoch-Smith Resolution.

HOCH BILLS INTRODUCED IN HOUSE

In response to the developing situation, a resolution was introduced in the House of Representatives on December 17, 1923 by the Hon. Homer Hoch of Kansas. This resolution *(H. J. Res. 94)* acknowledged President Coolidge's message and directed the Interstate Commerce Commission to take action relative to adjustments in the railroad freight-rate structure, giving "due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, and to the natural and proper development of the country as a whole." While "economic and industrial changes and other developments affecting the various parts of the country" were recognized, agriculture was not singled out for special treatment.

Subsequently, on January 16, 1924, a more carefully drawn resolution *(H. J. Res. 141)* was introduced by Mr. Hoch. This resolution directed the Commission "to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act" and substantially covered the ground of the previous resolution. In addition, the Commission was instructed, "as expeditiously as possible," to make appropriate decisions and rulings during the progress of its investigation and to give due regard to similar pending proceedings. Agriculture was not specifically mentioned.

SMITH BILL INTRODUCED IN SENATE

No action seems to have been taken in the Senate on the rate-structure problem until March 24, 1924, when Ellison D. Smith, of South Carolina, introduced a resolution *(S. J. Res. 107)* declaring "agriculture to be the basic industry of the country" which "it is the policy of Congress to promote, encourage, and foster" and directing the Interstate Commerce Commission to readjust the rate structure so that the "products of agriculture, including livestock" would move "at the lowest possible rate." The sole

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purpose of this resolution, as introduced, was to obtain the lowest possible rates for agricultural products; it did not contemplate aid to other industries. The lowest possible rate seems to have been thought of as a rate which would "promote the freedom of movement by common carriers," but, as explained in its report, the committee interpreted the lowest possible rate to be the "lowest rate in the rate structure."

The resolution was referred to the Committee on Interstate Commerce on March 24 and 4 days later was reported favorably with amendments and a recommendation for passage.[1] The report stated:

> This Joint Resolution is for the purpose of declaring the policy of the Congress as to freight rates on agricultural products and directing the Interstate Commerce Commission to carry this policy into effect. Congress having delegated to the Interstate Commerce Commission the power to make rates, it was thought unwise to attempt to dictate any specific rate, but to *direct the Commission* that in the exercise of its rate-making power *that the products of agriculture should carry the lowest rate in the rate structure*. This is because the products of agriculture are the prime essentials in the economic structure of organized society. These products are produced under circumstances that do not permit the producer to pass the charges incident to their marketing to the consumer. The agriculturist pays the freight upon what he buys and sells. It seems, therefore, but just that provision should be made to make his burden as light as possible, especially upon the things he produces [Italics supplied].

The amendments proposed by the Committee directed the Commission, "with the least practicable delay," to effect "lawful" changes in the rate structure and provided "that no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and the policy herein stated shall be applied in such determination as soon as possible." When the resolution was considered by the Senate on May 12, the amendments were agreed to.[2]

At this point, Senator Smith offered an amendment to the Joint Resolution "in the nature of a substitute, which has been agreed to by the members of the committee. It was prepared jointly by the Senator from Iowa [Mr. Cummins] and myself, and I think it is in perhaps a little better shape than the Joint Resolution." This substitute, although specifically mentioning agriculture, extended the benefits of the proposed joint resolution to other depressed industries. It was "declared to be the true policy in rate making . . . that the conditions which at any given time prevail in our several industries should be considered," but only "in so far as it is legally possible to do so . . . " As regards agriculture, "it is the policy of Congress to promote, encourage, and foster that industry, and especially in rate making during the existing depression in agriculture." The remainder of the substitute duplicated the Senate Joint Resolution which had just been amended.

Explanation of Smith Resolution. In the discussion that followed the introduction of the substitute, the intentions of the legislators were placed on record.[3] Senator Smith explained, "It is simply a direction to the Interstate Commerce Commission that whenever there is a depression in any of the basic industries of the United States, as there has been in agriculture, the commission should take cognizance thereof, and regulate the rates so as to facilitate the movement of the products of that industry."

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[1] U. S. Congress, 68th, 1st Session, *Senate Report 313* (Washington [1924]).

[2] *Congressional Record*, 68th Congress, 1st Session, 8336.

[3] *Ibid.*, 8336-8337.

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Senator Cummins acknowledged his collaboration with Senator Smith and said: "I believe the substitute announces a sound principle of rate making. I think it is applicable not only to the agricultural situation as we now find it, but it is applicable as well to the movement of every other great commodity . . . " Senator Fletcher, of Florida, asked: "May I inquire of the Senator whether or not the Interstate Commerce Commission have not this authority and power now, whether presumably they do not do just what is indicated? We are merely giving emphasis to the policy?" Senator Cummins replied, "Undoubtedly the Interstate Commerce Commission has complete and adequate power to reduce freight rates in exact accordance with the declaration made by this joint resolution, and while the Interstate Commerce Commission has, since the 1st of September, 1920, reduced rates upon agricultural products very markedly, yet I think it is wise again to call the attention of the commission and of the country to the principle which should underlie rate making in basic commodities." Senator Bruce, of Maryland, who was a member of the Committee on Interstate Commerce, added, "It is true that the Interstate Commerce Commission has the full power now to regulate railway rates on agricultural products, but the tendency of this resolution would be to strengthen its hands and to make it just a little quicker than it would otherwise be to give some sort of lawful reasonable preference at this conjuncture to agricultural products when in course of transportation."

After the discussion, the "amendment in the nature of a substitute" was agreed to and passed by the Senate. On the next day, May 13, *Senate Joint Resolution 107* was referred to the House Committee on Interstate and Foreign Commerce which had been considering *House Joint Resolution 141*, upon which it had made a favorable report.[4]

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[4]*Ibid.*, 8456, 8497; U. S. Congress, 68th, 1st Session, *House Report 735* (Washington [1924]).

The following explanatory statements were given in the Report:

This resolution is based upon the proposition that the present freight structure is out of adjustment, and that certain commodities, particularly agricultural products, are, in general, bearing an unfair proportion of the freight burden.

The resolution does not propose that Congress enter upon the technical job of rate making, but directs the Interstate Commerce Commission to proceed upon the inquiry and to remove as far as possible the injustices and maladjustments that now exist. Two of the principal features of the resolution are, first, that the commission is directed in making the revision to give regard to the general and comparative levels in the market value of the various classes and kinds of commodities as indicated over a reasonable period of years, and, second, to make such adjustments as will give regard to a natural and proper development of the country as a whole.

The present freight structure, which has grown up piecemeal and is a result of all sorts of local considerations, has long been out of adjustment. This maladjustment has been greatly increased by the flat, horizontal percentage increases in freight rates which have been made in recent years. These flat, horizontal increases were not scientific. The method used was grounded on expediency and the need for prompt action. . . .

This improper distribution of the freight burden has borne particularly heavily on the products of the farm owing to the price deflation in those products. The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of the service to the carriers is not the only factor that must be considered but the value of the service to the shipper as well.

It is realized that freight rates can not be constantly changed in order to meet fluctuations in the market price of commodities. The resolution does not propose that that be done. It simply proposes that regard shall be given to these changes in price as indicated over a reasonable period of years.

In addition to equalizing the burden as between commodities, the resolution also directs that rates be fixed as far as practicable so that the natural and proper development of the country as a whole may be promoted rather than obstructed.

The resolution provides further that the general inquiry shall not interfere with any proceedings now pending before the commission. It is not contemplated that the commission shall wait until the whole inquiry is completed before making adjustments, but the resolution directs that from time to time they shall make such changes in rates as justice and fairness require in view of the facts already produced [p. 2-3].

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DIFFERENCES BETWEEN HOCH RESOLUTION AND SMITH RESOLUTION

These two resolutions had different outlooks. The Senate proposal was originated to obtain the lowest possible rates in the rate structure for agricultural products and was later amended to provide relief for all depressed "basic industries," retaining, however, primary solicitude for agriculture. On the other hand, the two House resolutions were originated to readjust the rate structure so as to remove "injustices, inequalities, and discriminations" while giving regard to "the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years." The House had agricultural products in mind but did not single them out for special treatment. In the early part of April 1924 it held six hearings on the carefully drafted *House Joint Resolution 141*[5] to obtain information and public reaction toward the proposal. Yet, in the end, the Senate resolution, with certain amendments from the language of the House version, was the legislation passed by Congress.

HOUSE COMMITTEE HEARINGS

In the hearings before the House Committee the Interstate Commerce Commission, the Department of Commerce, the American Short Line Railroad Association, and a number of agricultural organizations were represented.

Commission's Attitude Appears Antagonistic. The testimony of its representatives,[6] indicates that the Interstate Commerce Commission was not favorably disposed toward the measures, although the Hoch resolution was preferred to the Smith resolution.[7] In fact, the first appearance of Commissioner Esch gave an impression which he endeavored to remove by a prepared statement on the following day. The statement, in part, read:

> In order to avoid possible misunderstanding of the testimony given yesterday, I want to say that it was intended to convey three important ideas:
>
> First. That with the possible exception of agriculture, the commission's practical experience . . . in the past two years does not indicate any general demand or necessity for a general important or sweeping readjustment of rates, either as between the various commodities or classes of traffic, or as between sections or communities.
>
> Second. That a general investigation of all rates along lines suggested by the resolution would be a collosal [sic] task, involving hearings lasting many months, requiring several years to complete, and involving considerable expenditure beyond that currently being disbursed.

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[5]April 3, 4, 5, 9, 12 and 14, 1924. U. S. Congress, 68th, 1st Session, House Committee on Interstate and Foreign Commerce, *Railroad Rate Structure Survey, Supplement to Railroad Rate Structure Survey* (Washington, 1924).

[6]Commissioner John J. Esch and Director W. V. Hardie.

[7]Mr. Hardie, "Therefore, my answer to the question is that, in my opinion, the resolution in its present form [the Hoch resolution] — if the Congress thinks it desirable to have an investigation of freight rates made, it would be better to pass it in its present form. The resolution shows very earnest consideration of the problem that has to be dealt with, and the various factors that have to be considered, and latitude is given in the wording of the resolution to consider those various factors. As I have said, it would be very difficult to omit consideration of them even if you limited the resolution. So that, in my judgment — and as I remember it, Commissioner Esch expressed the same opinion — it is desirable to adopt that form of resolution, if any is to [be] passed." — *Supplement to Railroad Rate Structure Survey*, 18.

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Third. That while the present rate structure has the appearance of being more or less haphazard, and to some extent is haphazard, existing rates are in fact nearly all based upon the practical judgment of trained traffic men of the railroads, regulated to some extent by State and national authorities . . .

The statement made yesterday was not intended to indicate that there are not thousands of rates which are in one way or another improperly adjusted. . . . The problem for the committee to determine . . . is whether sufficient necessity exists for a systematic, wholesale revision of rates, having in mind the three factors already mentioned, to justify departure from the commission's past policy of dealing with rates by particular situations—gradually—generally only where sufficient injury results to cause the filing of a formal complaint or where informal complaints have been so numerous or apparently well founded as to give reasonable ground to believe that necessity for revision exists, in which cases the commission has used its power to institute investigations upon its own motion.

The statement was not intended to express a definite opinion one way or the other as to whether the pending resolution should be adopted, though it is my opinion that if Congress believes that a general investigation of rates should be undertaken, the resolution in its present form [the Hoch resolution] probably meets the situation as well or better than any other that could be devised. I recognize that Congress has problems and policies with which to deal which do not directly fall within the scope of the commission's activities, at least until Congress has declared its policies and directed the commission in the premises. As I said yesterday, if Congress considers that it should adopt this resolution or any other declaration of policy, the commission will earnestly endeavor to carry out such declaration to the best of its ability. The commission has been represented before the committee only because requested to do so by it and the statement presented yesterday was offered only because I wanted to be sure that the Congress did not overlook the various factors presented, to which attention was called for whatever weight the Congress may think they are entitled. In closing, I may say that it is true that the process which the commission has been following of dealing with complaints as they arise and instituting investigations upon its own motion only where there has appeared to be considerable demand or necessity therefor, unquestionably in the long run is a slower process of arriving at the goal of a more satisfactory general rate adjustment than now esixts, [*sic*] than would result from the adoption of the resolution, provided the commission is furnished with the funds and facilities to proceed under it with reasonable dispatch. Indeed, in the long run, the plan suggested in the resolution might actually cost less. As noted above, it is largely a question of policy for Congress to decide as to which method should be followed, after considering all possible angles of the situation.[8]

After hearing the statement, Congressman Sam Rayburn, of Texas, said, "I understand, Mr. Esch, that the commission occupies the same position with regard to this resolution that it does to all resolutions of Congress with regard to policy; the commission, as such, does not argue for or against this resolution stating a policy of Congress." Commissioner Esch replied, "No, sir; it does not."[9]

The change in Commissioner Esch's attitude is also indicated in his statements regarding the horizontal percentage freight increases. On the first day he said:

It therefore appears that we *find little in the percentage increases* which have been made *to indicate the necessity of shifting the level of rates on "basic" commodities as compared with other rates*, and except where rates were improperly apportioned in 1913, or where conditions have since changed, there is no reason to believe that a general readjustment is needed to-day. This is not to say that all rates were properly apportioned in 1913, that they are all properly apportioned to-day, or that there should be no progress in the regulation of rates. It is only intended to indicate that *the existing rate situation*, built up as a result of commercial and transportation conditions and based upon the best judgment of the carriers and the commission, *on the whole fairly well meets the needs of commerce*, and that particularly at this time when any *unnecessary disturbances may tend to check the industrial prosperity*, there *should be no general attempt to radically revise the rate structure*, but that moves toward important changes should be undertaken only where in particular situations sound ground and necessity for change exists [Italics supplied].[10]

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[8] *Railroad Rate Structure Survey*, 29-30.

[9] *Ibid.*, 30.

[10] *Ibid.*, 6.

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On his second appearance he said:

There has been a suggestion made that many of the inequities and injustices and discriminations now existing arose out of the horizontal increases in rates. *That is true*, but the commission can say in justification that it seemed to be the only practical way in which to meet the emergency at the time [Italics supplied].[11]

Referring to *Ex parte 74*, he continued,

After weeks of hearings and weeks of consideration in conference the commission issued that order of August 26, 1920. You can readily understand how utterly impossible it would have been for the commission to have held hearings on all the industries that were involved in order to get their exact allotment of the increase. So the horizontal plan was adopted. *It did result*, as Congressman Hoch has said, *in maladjustments*, because the same percentage of increase applied to the low as well as to the high priced articles, and the low-priced articles were less able to sustain that increase than were the high-priced articles.

Ever since that decision was made the commission has been considering complaints asking for these readjustments, and I do not suppose that we will end that work for some time to come [Italics supplied].[12]

Amount of work involved: Although acquiescing in the Congressional proposal for an investigation of the rate structure, the Commission's representatives warned of the amount of work involved, the time that would be required, and the cost to both the Commission and the railroads.

Thus Mr. Esch said,

The resolution therefore involves all rates, and all commodities and involves the interrelationship of these rates one to another. It also involves in a certain degree the relationship of rates as between groups and territories. So, it is countrywide in extent and covers practically all traffic.

I do not know whether you have a definite notion as to the number of rates, now in effect. They literally run into the billions. To illustrate: The State of Oklahoma has 1,000 railroad stations. One rate from one town to the other thousand towns would make a thousand rates on that one commodity. There are hundreds of commodities that enter into interstate commerce. This one town in Oklahoma, has rates to all other stations or towns in the United States. There are approximately 50,000 stations in the United States. By multiplication into the number of commodities that move in interstate commerce and the rates under the different classifications and the commodity rates, and it is literally true that there are billions of rates.[13]

Time required and cost: The two other considerations mentioned by the Commission's representatives – the time required and the cost – were coupled in the discussion. On his first appearance, Commissioner Esch had said:

There are some practical questions that this resolution involves. The resolution, I think, wisely does not prescribe a limit of time. To carry out the resolution means months, and I have no doubt years, to carry into effect, because of its widespread import and the complexity of the problems that are connected therewith. To carry out the resolution the commission would have to assign a considerable portion of its staff, and a division of the commission no doubt would have to devote itself to the consideration of the things it prescribes. To the extent that we have to do this, to that extent, of course, we will have to infringe upon the routine work of the commission.

[11] *Ibid.*, 27.

[12] *Ibid.*, 28.

[13] *Supplement to Railroad Rate Structure Survey*, 2-3.

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> In a matter of such wide scope I think we would feel justified in calling in some experts to aid the commission in making a most thorough-going study of the basic principles covered by the resolution.[14]

Substantially the same sentiments were voiced by Commissioner Esch in the prepared statement which he read into the record on the second day of his testimony.[15] Nearly 2 weeks later the Committee held two further hearings with Commissioner Esch and Director Hardie on the time, expense, and scope of the proposed investigation. After testimony concerning costs incurred by the railroads in cases before the Commission, Mr. Esch said,

> It must be remembered that the cost to the Government of making investigations such as contemplated by the resolution will be only a fraction of the total cost. The cost to the carriers and to the shippers would be much greater than to the Government, because in these investigations the burden of proof is upon the shipper or the carrier, or both. They must produce the schedules and they must prepare the exhibits and these oftentimes require much time and the employment of high-grade experts.
>
> All this is with reference to the matter of cost. As to the matter of time, it is a most difficult thing to give you any concrete idea. . . .
>
> I can not but believe that this investigation under the resolution would cover several years. I can not believe that it could be done as thoroughly and comprehensively as contemplated by the resolution short of four or five years.
>
> What do you think about that, Mr. Hardie?
>
> Mr. Hardie. My opinion is it will not be finished in five years if carried out to the final analysis. It will be nearer 10 years, in my opinion.[16]

In addition to what would be used out of the Commission's general funds, Esch suggested a supplementary appropriation of $100,000 for the first fiscal year, "to organize the work, plan it, secure necessary experts, and get under headway."[17] He indicated that further annual appropriations could then be called for as needed.

Director Hardie testified that Congress might confine the investigation to commodities by eliminating the relationship of communities or localities in one of the following ways:

> First, a general direction on the part of the Congress to the commission to investigate the effect of general rate changes upon commodities, to determine whether the rates on any of such commodities as a whole are unreasonable, actually or in relation to other commodities.
>
> Second, to name certain commodities and direct the commission to investigate the rates thereon, to see if the rates are unreasonable or otherwise unlawful, with the proviso that if the necessity for reductions be found, such increases, if any, as may be needed to keep the revenues of the carriers adequate under the principles of section 15a should be obtained from such other traffic as the commission might think best.[18]

Mr. Hardie felt that the time and expense involved could be lessened by either course.[19]

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[14] *Railroad Rate Structure Survey*, 15.

[15] See text, p. 24-25.

[16] *Supplement to Railroad Rate Structure Survey*, 4. As a matter of fact, the Rate Structure Investigation, started on March 12, 1925, was discontinued on October 2, 1933 except for unfinished cases and supplementary or ancillary proceedings. This was a period of more than 8-1/2 years for the general investigation, although, even today after 16 years, supplementary proceedings still appear before the Commission.

[17] *Ibid.*, 5.

[18] *Ibid.*, 14.

[19] *Ibid.*, 16-17.

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In reply to a question by the Hon. William J. Graham, of Illinois, as to whether or not a time limit of 3 years would be practical, Mr. Hardie answered in the negative, but felt that sufficient progress might be made in that time to indicate what could be accomplished by the proposed investigation.[20]

Legal conflict of resolution with Section 15a: A more serious difficulty was the conflict between the proposed resolution and Section 15a, of the Transportation Act of 1920. The first part of Section 15a, usually referred to as the "rule of rate making," required the Commission to establish rates under which the carriers, as a whole or in rate groups, would earn an aggregate net railway operating income equal to a fair return upon the aggregate value of their transportation property. For the first 2 years, Congress had fixed the rate of fair return at 5-1/2 percent, granting authority to the Commission to increase this rate by an additional 1/2 of 1 percent. Up to the time of the hearings on the Hoch resolution, the railroads had failed to earn the allowed return.[21] Since the Hoch resolution was interpreted as intended to reduce rates on agricultural and other "basic" commodities, the Commission's representatives felt that they were obligated to increase rates on other commodities to compensate for the reductions.[22]

Section 15a was considered in a discussion of rate-making theories. Mr. Esch's statement at the first hearing had included a section on "the increases necessary to compensate for rate reductions on agricultural products." There was further consideration of the problem at the later hearings, at one of which the following statements were made:

Mr. Esch. The chairman [of the Committee] I think asked whether or not in the carrying out of this resolution any difficulties would arise in our administration of section 15a. I can not see that there would be any difficulty.

Under 15a we are now authorized to adjust rates by groups or territories, and that could be done under this resolution also. . . .

The Chairman. I think the idea was that in laying out rates for the country as a whole it would be rather difficult to consider the necessary earnings for the railroads under the zoning plan, and you have already referred to it in a general way. But with reference to this particular language, do you think there is any particular need for modification there in case the interest of 15a would not be maintained as now?

Mr. Esch. Of course, Mr. Chairman, very few of the carriers provide statistics of the revenue received on different commodities. A few of them do.

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[20]*Ibid.*, 20. Hardie: "after the end of a couple of years, or three years, if you thought sufficient progress had been made to in the main carry out the purposes that you had in mind in adopting it, you could then rescind it, and the commission could then discontinue further work upon it. I only mentioned the other day the possible 10-year tenure, having in mind that under the resolution the commission would have to consider the reasonableness of all the rates, which can not well be avoided if you are going to adopt a resolution that is workable; but if you had in mind that possibly you yourselves would cause it to be discontinued after a period of, say, three years, it seems to me that work could be speeded up and important progress made under it in that period."

[21]In fact, the carriers never earned this rate of return. In recognition of this failure, the rate-of-return section was revised in 1933 and the fixed percentage of return repealed.

[22]However, the Hoch resolution of the House was primarily a rate-structure investigation while the Smith resolution of the Senate was intended to direct the lowering of rates on agricultural or basic commodities. The Smith resolution was not under consideration in the hearings.

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Some time ago we sought to secure that information from the carriers, but they stated that to prepare such statistics might involve an expenditure of over a million dollars. . . .

In carrying out the provision to which the chairman has called attention, it will be necessary for us to have the carriers provide such statistics—that is, revenue returns by commodities. That may take some time, but I do not see how it would create any difficulty, in view of the provisions of section 15a.[23]

Mr. Graham. Mr. Esch, I want to ask you one or two questions. I rather have the opinion—I do not know whether it is based on any sound foundation or not—that under the new rule of rate making which seems to have followed the transportation act your commission is under the impression that it is the judgment of Congress that these rates shall be established over the country by zones or districts so that as a result of the rates that are imposed by order of the commission there shall be a reasonable earning on the invested values or intrinsic values of the railroad properties. When this bill goes into law, if it does, do you believe there are any new elements which will change that rule?

Mr. Esch. I do not think so, unless it be the emphasis that is laid upon the comparative levels in market values of the various classes of commodities.

Mr. Graham. That is just exactly the line to which I was going to call your attention. Just what do you think that means?

Mr. Esch. We have never ignored the value of the commodity in the determination of rates. But we do not make that the determinative factor. . . .

Mr. Graham. And do you give it any importance now in rate fixing? For instance, just now, is there anything being done by the commission in the way of rate graduation to take care of the apparent slump in agricultural products?

Mr. Esch. In 1922 we decided the western livestock case, complaint having come to us that the rates were prohibitive, especially on long-haul traffic.

After a thorough investigation we decided to reduce the rates, all rates which were in excess of 50 cents per hundred pounds. That, of course, brought relief to that extent to those producers or raisers who were farthest distant from the market.

The livestock market was low at the time, and that was one of the points raised why the rates were out of relation to the price. The same line of argument was presented in the grain, grain products, and hay case, which is now pending and not yet decided.[24]

Congressman Graham followed up this discussion of Section 15a by asking similar questions of Director Hardie:

Mr. Graham. Mr. Hardie, under the provisions of paragraph 2, section 15a of the interstate commerce act, your commission is obliged to make such rates, so that the carriers as a whole in a certain part of the country will earn an aggregate annual net operating income equal to a fair return, and so on, as classified in that subsection.

Now, let us assume that you have ascertained what will be a fair and adequate return to that particular section of the country or zone, or whatever you call it. Then you proceed under this resolution to make changes and adjustments—and I understand this resolution not only authorizes an inquiry but directs the commission to make changes as it goes along and finds from the result of its inquiry that certain inequalities exist. You are making your readjustments, and let us assume that you are proceeding under this part of the resolution that says that in making such change or adjustment you shall give due regard to the general and comparative levels in market value of the

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[23] *Supplement to Railroad Rate Structure Survey*, 5-6.

[24] *Ibid.*, 7-8.

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various classes and kinds of commodities. Now, assume that in making that readjustment you find that throughout the country the farm products, for instance, are at a very low level and other products are at a higher level, manufactured articles of various kinds, and you make a readjustment or redistribution of rates. You will have to assume, will you not, that still your direction under 15a continues; that you must produce an adequate return from that particular territory?

Mr. Hardie. That would be my understanding; yes, sir.

Mr. Graham. Then you have to, if you find that the comparative level of farm products is low, you will have to decrease their rates and add it to other things that are higher, in order to readjust or redistribute that adequate return.

Mr. Hardie. Yes, sir.[25]

The conflict of 15a with the proposed resolution was further examined by the Hon. Clarence F. Lea, of California:

Mr. Lea. Suppose there was an amendment of the transportation act, say, two years from now, which would change the rule of rate making back to what it was originally, on the basis of reasonable rates, or suppose that the group system of rate making were eliminated with return to the old system, to what extent would that affect an effort like this to revamp the rates? To what extent would that nullify the usefulness of this attempt or this investigation?

Mr. Hardie. I do not think it would nullify it. As Commissioner Esch pointed out the other day, there is not any necessary conflict between an investigation of this kind and section 15a. The commission could not very well, in my opinion, ignore most of the principles of section 15a, even if it were not on the books. We understand – at least I do – that the carriers have a constitutional right to not be forced to accept rates which will be confiscatory, and that is substantially the same principle as is covered by section 15a, except that it lays down somewhat of a plan for doing it. It is a constructive method of carrying out the very principles that really have to be followed in any event.

So I do not think that this investigation would be nullified or made futile by such a thing as that, because the two are not necessarily dependent one upon the other.[26]

The Hon. George Huddleston, of Alabama, was not satisfied with the explanations of the problem and questioned Director Hardie.

Mr. Huddleston. In this resolution there are three factors mentioned for the fixing of rates . . . and it is quite important, to me at least, to understand whether it changes the present system or practice or whether it does not. As yet I have been unable to learn.

Mr. Hardie. Well, I can only see two changes in the existing practice, one of which is, we would have to deal with the problem more as a whole at one time than we have heretofore. Heretofore we have dealt with it more from individual angles as they were presented. The other change is the additional weight, the additional emphasis to this matter of the market value of the commodities. . . .[27]

Mr. Huddleston. The question of discretion and opinion enters to a very great degree there. Some might think that building an entire new system was "necessary to maintain an adequate system of transportation." I think the clause is susceptible of that mean[ing.] . . . Are we to fix rates which will afford large profits to railroad owners so as to encourage others to go into the business of building railroads?

Mr. Hardie. Of course that is a question of policy for the Congress to decide. But so far as Congress has stated it, it has stated its policy in general terms in section 15a. As I understand it, an adequate system of transportation is one of the

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[25] *Ibid.*, 18-19.

[26] *Ibid.*, 23.

[27] *Ibid.*, 34.

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things that is to be taken into consideration in fixing rates, but I do not think Congress ever directed the commission to give that sole and paramount consideration. It must take into consideration the public interest, the needs of the people who ship goods, and many other things.

Mr. Hoch. If it will be of any value to Mr. Huddleston or any one else, I will state what my purpose was in connection with those words "adequate system of transportation." They were inserted simply to alleviate any fears that anyone might have as to the maintaining of an adequate system of transportation. I am sure no one has in mind disrupting the system in any way. But I realize that some one reading this resolution, in the absence of those words, might draw the conclusion that this was a very radical proposal that did not take into consideration at all the maintenance of an adequate system of transportation. I do not think, as a matter of fact, that the phrase really needs to be in there, in view of the law as it is at present.

Mr. Huddleston. Would it not be better, then, to refer to existing law, instead of enacting something which may be an addition to the law?

Mr. Hoch. Personally I do not think there is any harm in those words, and that they are helpful for the reason stated.

Mr. Huddleston. My objection to them is that they afford an opportunity for construction as practically clothing the commission with the authority and discretion to do whatever they want to do.[28]

Theory of rate making: On the theory of rate making in regard to the relative weights to be given to the elements of value of service and cost of service, there were several discussions.

Mr. Huddleston. Now I want to refer you to the portion of the resolution . . . which instructs that the commission shall give due regard, among other factors, "to the general and comparative levels in market value of the various classes and kinds of commodities," etc. Is that the present practice?

Mr. Esch. That has reference to the fixing of a rate based upon the value of the commodity.

Mr. Huddleston. Is it lawful to do that now?

Mr. Esch. We consider value as an element in rate making, but not as the controlling factor.

Mr. Huddleston. How do you interpret this clause? Would it change your present practice in any way?

Mr. Esch. I think it would increase the weight which we ordinarily give to value in determining the rate.

Mr. Huddleston. Then it would be a change in existing law and practice?

Mr. Esch. Well, so far as the resolution goes it would make the commission feel that we should perhaps give more weight in determining the justness and reasonableness of a rate to the market value of the commodity.

Mr. Huddleston. Mr. Hoch in his statement used the expression "value of the service performed by the railroad" as a factor in rate making.

Mr. Esch. Yes, it is.

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[28] *Ibid.*, 36.

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Mr. Huddleston. You consider that correct?

Mr. Esch. Yes; the value of the service is an element and the cost of the service is an element.

Mr. Huddleston. I speak of the "value of the service" only. What clause of the interstate commerce act authorizes the commission to consider the "value of the service?"

Mr. Esch. I do not think there is any specific provision.

Mr. Huddleston. So far as the cost of the service is concerned, of course the act seems to be based wholly upon that principle; that is to say, the cost to the carrier of the service seems to be the criterion.

Mr. Esch. It is only one, because the carrier under the law and under the decisions of the courts would be entitled to more than the cost of the service to it, namely, to the carrier, because it would be entitled to some return.

Mr. Huddleston. Well, of course, after all the cost of the service is the basis. In other words, the carrier is authorized to receive a certain net return, which means that return plus the cost of the service, therefore the cost of the service is the basis of the rate. But I do not see just where there is authority to consider the "value of the service" to the shipper or person who receives the service. . . .

Mr. Esch. As more fully answering Mr. Huddleston's questions with respect to cost and value of the service, I wish to say that I agree with him that in dealing with rates in the aggregate, or at least in the aggregate by rate groups, they should be and are under the practice of the commission based upon the cost of the service performed plus an amount intended to produce a fair return as contemplated by the transportation act, 1920. However, the commission has never construed the law as requiring the application of such a principle to individual rates, and in actual practice this would be impossible for two reasons; first, there are no means of ascertaining the cost of handling particular shipments with even approximate accuracy; and second, because to do so would undoubtedly in many instances throw too heavy a burden upon low-grade commodities and too little upon high-grade articles, the very opposite of the principles explained by Mr. Hoch as underlying his resolution. For example, hay and livestock can not pay rates which will produce as much profit to the carrier over and above the cost of service as manufactured articles such as dry goods, notions, furniture, or even iron and steel articles, sugar, and similar commodities. If cost of service were the only factor to be considered in fixing individual rates, probably heavy increases would be necessary upon livestock, hay, and many other articles to which comparatively low rates have been assigned because of the nature of the traffic and the necessities of the producers and shippers thereof.[29]

In a preliminary statement Mr. Hardie said:

Now, in regulating rates to determine whether they are or are not in compliance with the law, the commission has, through practice starting way back in 1887 and gradually going forward as its experience broadened out, developed certain standards for determining these very difficult and complicated questions that arise, and a good many of those standards have subsequently been reviewed by the courts, and in some cases the commission has been required to change its standards, and in others the courts have sustained the commission, but through all that process of experience by the commission and review by the courts certain standards have been more or less built up. Now, I will mention a few of the factors that the commission has, as a result of that experience, been using in determining these questions.

One of them is the value of the commodity, a thing that has been so much stressed here.

Second, is the likelihood of that commodity to loss and damage in transit.

Third, and very important, is the weight per cubic foot, or any other unit of space occupied in the car.

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[29] *Railroad Rate Structure Survey*, 35-36.

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Then there is the earning per ton-mile and the earning per car-mile. Also the relation to other comparable rates.

There is the principle of "what the traffic will bear"; also the element of public interest, and the necessity of the carriers for adequate revenue, that corresponds with the principles of section 15a.

Now, I do not know that I have covered quite all the factors, but I am merely giving you those to illustrate the point that there are many things that have to be taken into consideration besides the value or price. If you were to attempt to revise rates based solely on the shifts of the market prices, you would be disregarding all those factors except that one of "what the traffic will bear." You would be disregarding the cost of service and all those other features which are illustrated by the standards I have mentioned.[30]

Later, Mr. Hardie made the following comment:

There is one thing that everyone does not seem to realize, and that is that the rates on primary commodities are in a great many cases quite low now, because of the influence of this factor of "what the traffic will bear." It has been found as a matter of practical experience that you can not charge a very high rate on sand and gravel, for example, and have it moved at all, but when you stop to think of it from a strictly cost-of-service standpoint, it costs the railroad just about as much to haul a car of sand as it does to haul a car of high-grade commodities of the same weight. The liability of loss and damage, so far as the railroad is concerned, is about the only difference.[31]

Continuing the examination of value of service and cost of service in theories of rate making, Mr. Huddleston questioned Director Hardie.

Mr. Huddleston. Now, I am interested by your discussion with Mr. Graham as to the weight that will be given to the factor of value of the product shipped in making rates, which you said it [*sic*] would be given under this resolution more weight than heretofore. That seems to imply that the various factors considered in making rates were given definite weights. Now, that is not correct?

Mr. Hardie. No, sir; it is not correct, and I do not intend to leave such an impression. Each case is a matter of the best judgment the commission can apply to it' after obtaining the facts of the various kinds I have described, and the commission does not give exactly the same weight to each factor in each case. It depends upon the aggregate of all.

Mr. Huddleston. How are these weights given effect? Your reply conveys a rather vague idea to my mind.

Mr. Hardie. The whole proposition is that the fixing of rates is such a complicated process that I do not think, as a result of my 20 years' experience in it, that it would be possible to have a fixed rule that you could apply to every case. It would not be just if you did, and what the commission is looking for is justice, and you know justice is rather—

Mr. Huddleston. (Interposing). A very elastic thing, depending, as the old saying is, "on the length of the chancellor's foot." What might seem to be just to one man might not seem to be just to some other man.

I am impressed that *in the work of the commission in connection with valuation they recite all the factors considered more for the purpose of defending the result than for the purpose of helping to get at the result*, because it seems in many instances they do not give any weight to certain factors.

It is easy enough to say, "In reaching this conclusion I have considered this and that and the other factor." That makes very nice reading, but I am anxious to know how

[30] *Supplement to Railroad Rate Structure Survey*, 16.

[31] *Ibid.*, 21.

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anyone can reach a decision considering a number of various factors when uncertain, varying, and elastic weights are given to the various factors [Italics supplied].

Mr. Hardie. There is an elastic weight, but there is not any fixed weight.

Mr. Huddleston. It seems to be merely a matter of conscience and general impression, general knowledge of the facts developed in each case. . . .

Mr. Huddleston. Of course, there is one rigid factor in fixing these rates, and that is the return.

Mr. Hardie. Yes; but that is not necessarily true in fixing any one rate. You can reduce one rate, if you want to, without any regard to the main result, but when you come to reducing a large number of them at any one time then you have to have the main result in mind.[32]

Commission's power to change rates: Concerning the Commission's power to change rates, Mr. Hardie testified:

Now, the problem for the commission in fixing freight rates is by no means as simple a one as to merely ascertain the price and then act on that factor alone. The commission under the interstate commerce act, which is its only authority for regulating commerce, as passed by this Congress is charged with the duty and with the right to change rates only when they violate some section of that act. In other words, when they are unreasonable or unduly prejudicial.

Mr. Huddleston. I did not quite understand you there Mr. Hardie.

Mr. Hardie. I say, the commission only has the right to force carriers to change rates either up or down, as the case may be, when those rates are in violation of some section of the interstate commerce act. In other words, we can not just decide in our own minds that it would be a good thing to change some rate up and another one down. There has got to be found something unlawful about the rate that we order to be changed.

Mr. Huddleston. That is under the present law?

Mr. Hardie. Yes, sir; under the interstate commerce act as it has existed for years. And Mr. Brown calls to my attention that it can only be done, of course, after we have had a full hearing and developed the facts.

Mr. Graham. In other words, every rate that is charged by a carrier is assumed to be correct until the contrary is established?

Mr. Hardie. That is my understanding of the whole principle underlying the interstate commerce act, Mr. Congressman.[33]

Subsequently, this explanation was amplified.

Mr. [Clarence F.] Lea [California]. What, in a general way, would you expect to find as the result of this investigation, as to maladjustment of rates?

Mr. Hardie. Well, there are, of course, a great many maladjustments of rates as between points. I consider those of much more importance than those between commodities. . . .

Mr. Lea. Well, assuming that the commission recognizes these unsatisfactory conditions, what is it doing to meet the situation?

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[32] *Ibid.*, 33.

[33] *Ibid.*, 15-16.

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Mr. Hardie. Of course, I want to point out that the commission to some extent is, or at least considers itself to be, in the same category as a court. The court may know of a great many evils and things that are extant, but it, to a large measure, considers those that are brought before it in the form of suits, and to a considerable extent that is the way the commission has felt that Congress intended it to function under the interstate commerce act — that anybody who felt that the rates were unreasonable or otherwise in violation of that law was given a court to come to and present his troubles and try to have them corrected, and the commission has been dealing with approximately 1,100 formal cases, as well as a great many others that are adjusted through negotiation — that is my speciality, to do that — the commission has been dealing with those as people have complained about them, and naturally it has felt, and, I think, with a good deal of justice, that the ones the people complain about are the ones that must be hurting the worst. Those are the ones we have been directing our attention to primarily.

Mr. Lea. If the public's need of a better rate structure is to be secured only by efforts of selfish interest to correct it, isn't that a very inadequate way of meeting the situation? Doesn't it require initiative by somebody whose primary concern is the public welfare rather than any interested group of shippers?

Mr. Hardie. I certainly recognize that to take up the rate structure in a general sort of way, at least in a given territory, having in mind every one, those who may not have complained as well as those who have, certainly has its advantages over the more or less piecemeal process that the commission has been following of dealing primarily with the complaints brought to it. There is no question at all about there being a great deal of merit in approaching the situation in a general way, such as is contemplated by this resolution. You will remember that Commissioner Esch said the other day that he felt there was strong prospect of the commission, under a scheme of investigation of this kind, reaching the desired goal of a more satisfactory rate adjustment quicker and possibly at less expense in the long run than through the way it is being done now, although in the first instance it would be a big undertaking and would cost quite a little money. . . . [34]

Mr. Huddleston. Mr. Hardie, in reply to Mr. Graham's question, I understood you to state that the commission has no power at present to change a rate except upon hearing and finding that the rate is unlawful?

Mr. Hardie. That is my understanding.

Mr. Huddleston. By "unlawful" you mean a finding that the rate is not "just and reasonable" or not unduly preferential or unjustly discriminatory?

Mr. Hardie. Well, you should have omitted the second "not." You mean by finding that the rate is either unjust or unreasonable or is unduly preferential or prejudicial. Of course there are some other features of the law, too, such as the fourth section, but the rate must be in violation of some section of the act, of which those are the principal ones. [35]

Index numbers show that rates parallel commodity prices except in the case of agricultural products: The Commission's representatives referred to index numbers of commodity prices and of freight rates to show that the rates were not generally out of line except "perhaps, in regard to agricultural products." The failure of agricultural prices to remain at a higher level was urged as a function of the market and not of the rate structure.

Mr. Esch. The average of freight rates throughout the country, as compared with 1913, is 150, which is practically the same as the present index number for all commodities January 1, 1924, when the average index number was 150.

So that the present rate levels are not materially out of joint with the average index number of prices as given us by the Department of Labor. The only place where it

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[34] *Ibid.*, 22-23.

[35] *Ibid.*, 24.

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is materially out of joint, is perhaps, in regard to agricultural products, but there the average increase of the freight rates on grain is only 41 per cent above what it was in 1913 or 1914, due to the decreases which we had ordered in 1921. . . . [36]

Mr. Hardie. I would like to repeat what Commissioner Esch pointed out, and that is that if prices of commodities and freight rates had gone up in proportion to each other, it is not clear to me where there would be much of any distortion of rates by commodities growing out of the percentage increases that have been made. For example, if wheat in 1914 was 90 cents a bushel and the rate for 500 miles was 45 cents, then half a bushel of wheat would buy 500 miles of transportation at that time. Now, if both the rate and the price had gone up 50 per cent, the price would to-day be $1.35, and the rate would be 67-1/2 cents, and as one is just twice the other, you would again be able to buy 500 miles of transportation with half a bushel of wheat. Therefore, if rates were, or if they could be based wholly on market prices of commodities transported, the sole problem now would be to find out the average prices of various commodities as they exist to-day; and by "to-day," I do not mean at this particular moment, but over a reasonable period of time, which could be considered as more or less permanent, and then we adjust the rates compared to the base year, whatever that may be, to preserve substantially the proportion that formerly existed.

But Commissioner Esch pointed out in his testimony that since 1913, using wheat as an illustration, the price has fluctuated from 77 cents a bushel to $2.19 — that is, the average price at the farm, according to statistics issued by the Government, not the wholesale market price. In the early part of 1920, when the peak price of wheat existed, freight rates were up 25 per cent from pre-war days, and the price was up 200 per cent, so that if half a bushel would have bought 500 miles of transportation in 1913 it would have bought 1,500 miles in the early part of 1920, and substantially did so because the price then had gone up more than the rate had gone up, which to-day is the reverse. I will not go into any further detail on that, because it has already been covered, but I do agree that the commission can and should consider general shifts in prices in fixing freight rates, not the day to day market fluctuations, but general shifts, if any. But that is true as a determining factor in fixing freight rates only to the extent that the value of the commodity is a determining factor. . . . [37]

Mr. [Olger B.] Burtness [North Dakota]. Now, I recall the commissioner's testimony with reference to the index numbers of all the commodity prices, farm prices, etc., and I recall how he testified that at the peak the index number was about 240, in 1920, and has now gone down to about 150. Could you tell us whether the actual cost of transportation has also decreased relatively in about the same proportion from 1920 to the present time?

Mr. Hardie. Well, I do not think it has in proportion to any 240 as against 150. I do not think the cost of transportation ever went up to any 240 — certainly the rates never went up that high. The rates never did go up anywhere near 240. There has, however, been a decline in the cost of transportation since 1920, and the commission has recognized that in making the general reduction which it did make in 1922, which is approximately $500,000,000 in freight charges to the country per year.

Mr. Burtness. In other words, the cost of transportation increased more slowly than the cost of commodities increased?

Mr. Hardie. I think it increased more gradually, yes, increased more slowly and to a less extent.

Mr. Burtness. And to a less extent. And since the peak in the cost of commodities, the cost of transportation has decreased more slowly and to a less extent than the cost of all commodities?

Mr. Hardie. Than the prices of commodities, yes.

Mr. Burtness. Could you recall what on the basis of 1913, what would be the peak of transportation charges — that is, the peak of all commodities was around 240; on that same basis, what would the peak of transportation charges be?

Mr. Hardie. If you treat the country as a whole, I think it was about 170 or 169; somewhere in there. But, of course, you understand it was not the same in all the

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[36] *Railroad Rate Structure Survey*, 29.

[37] *Supplement to Railroad Rate Structure Survey*, 15.

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groups. The peak is much greater in the East than it is in the West or South. We did not allow as great increases in the West and South as we did in the East.

Mr. Burtness. And now all commodities are down to about 150.

Mr. Hardie. That is the wholesale price.

Mr. Burtness. And transportation costs are also down to about that same figure.

Mr. Hardie. I would say freight rates in the aggregate are approximately 150 per cent of what they were in 1913.[38]

Summary of the Commission's attitude toward the resolution: In summary, the Commission was reluctant to undertake the task contemplated by the Hoch resolution because of the volume of work involved, the time required, and the expense of the investigation. At least, the Commission evidently wanted Congress to understand fully the magnitude of the project. In addition, its representatives pointed out the possibility of conflict between the provision for lower rates under the Hoch resolution, or, more properly, under the Smith resolution, which was not before the House Committee, and the requirement for an "adequate" return to the railroads under Section 15a of the Transportation Act. However, the Commission did not make clear that Section 15a constituted so great an obstacle as to nullify the intentions of the Hoch (Smith) resolution. No recommendation was made for modification or repeal of Section 15a even when the Commission's representatives were asked expressly for an opinion.

In the discussion, the Commission's theory of rate making was explained as based primarily on cost of service, including the "adequate" return to the railroads provided by Section 15a. Value of service was given some consideration, as were other factors, but the final decision on any rate was the product of the experienced judgment of the Commission as to the "justice" of the rate. Such a judgment could not be reduced to a "fixed rule." In fact, the Hoch resolution, emphasizing value of service, was considered superfluous because the Commission was already recognizing this element. At first, the spokesmen for the Commission discounted the disruption resulting from the horizontal rate changes of 1918, 1920, and 1922, but later the dislocation was acknowledged. Although the Commission had the right to fix maximum or minimum rates, it could not change any rate without evidence of its unreasonableness, preference, or prejudice. Mostly, it acted as a court for the resolution of rate disputes between shippers and carriers, with the formal assumption that other rates were satisfactory in the absence of complaints. The agrarian discontent was due to the fact that prices of agricultural products had not fluctuated in the same way as had prices of other commodities, i. e., manufactured goods, whose price index corresponded roughly to that of railroad rates. In the opinion of the Commission's representatives, this did not invalidate the theoretical correctness and justice of the percentage rate changes.

Testimony of the Secretary of Commerce. Among several other witnesses appearing before the Committee was the Hon. Herbert Hoover, then Secretary of Commerce. Secretary Hoover had been influential in the creation of the special committee of the U. S. Chamber of Commerce whose report of November 14, 1923 has already been discussed.[39] Hoover had also brought members of the Department of Commerce and of the Interstate Commerce Commission into conference, "some six or eight months" before the hearings of

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[38] *Ibid.*, 37-38.

[39] *Railroad Rate Structure Survey*, 45. "conference . . . was held more or less at my suggestion . . . "—p. 48.

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April 9, 1924, to discuss an exhaustive study of rate structure and the formulation of a constructive basis for rate reorganization.[40] When asked by Mr. Hoch what he considered to be primary commodities, the Secretary replied, "I would consider agricultural products, coal, iron and lumber, primarily [*sic*] commodities."[41]

"One primary difficulty in the actual reorganization of rates lies in the lack of diversity of traffic on many of the railroads, and while it is possible to point out great inequities in the rates, it is often difficult to affect [*sic*] reorganization owing to the lack of diversity. An *overhauling of the rate structure*, in other words, *would be much more easily accomplished after consolidation of the railroads and a larger diversification of traffic on the roads* [Italics supplied].[42]

Under the Transportation Act of 1920, an extensive plan was prepared about this time for the consolidation of railway lines into large systems. Opposition arose in the rivalries among various railway lines and among the holders of the multitude of securities which would have been involved in consolidation. As a result the plan and the counter-plans were finally dropped from further consideration.

"In the detailed question of inequity one of the outstanding points of criticism of the rate structure is the relation of L.C.L. [less than carload] and certain class rates to the rates on primary commodities. L.C.L. rates are probably not particularly profitable to the railways. They are much lower in proportion to the service demanded than are the rates on primary commodities to-day. I think that is generally conceded throughout the railway world, as well as amongst students of rates. Likewise, some of the class rates are unduly low compared to the rates on primary material."[43]

Change in rate relations causes industrial shifts: In a message to Congress President Harding had pointed out that increased concentrations of population in metropolitan districts were traceable to the favorable rates enjoyed by manufacturers in those areas. He thought that better living conditions could be obtained by the decentralization of industry. A similar conclusion was voiced in the following testimony, although the President actually referred to was President Coolidge.

Mr. [Walter H.] Newton [Minnesota]. The way it strikes me is this: Whether rightly or wrongly, there have been established in this country rates between different localities which have resulted in the establishment of industries, the building up of those industries, the investment of immense amounts of capital, employing a large number of workmen, and if there is to be any reorganization of the rate structure with the idea of changing that which has been established for years, it would seem to me that it would be—well, its possibilities for evil would be so great that it ought not to be embarked upon, and I personally would not want to in any way countenance any sort of a move looking toward anything of that kind, and if that is what is contemplated by the message [of President Coolidge to Congress] or by this resolution I would not favor it.

Secretary Hoover. I do not think anything of that kind is contemplated. One must bear in mind that we have had a gigantic reorganization of the rate structure in the last eight years. *At the very moment that we took the basic rates before the war and proceeded to add level percentages to them we threw their relativity entirely into distortion.* You take a silk gown worth $120, and the cost of transportation of a dollar from Chicago to New York or San Francisco or any other place, and as compared to a bushel of wheat, when you increase the rate on a bushel of wheat by 40 per cent you have increased the rate 10 times in relation to the value of the commodity that you have in the case of the silk gown. *The net result is that we have entirely torn our rate structure to pieces in this country by virtue of what we have done in the last*

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[40] *Ibid.*, 46.

[41] *Ibid.*, 47.

[42] *Ibid.*, 45-46.

[43] *Ibid.*, 46.

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eight years. That is resulting to-day in a very considerable shift of industry—just the evils that I mention. There is a tendency to drive industry into quarters where it has not hitherto existed, because of this change in the relativity of rates, and the President, I have no doubt, had in mind the desirability of reconsidering this situation, partly from the point of view which you have mentioned.

We have a prominent example in New England, where the effect of the rate increases has been to practically pauperize the New England railways.

Mr. Newton. Then, as I take it, the principal object would be to remove these inequalities naturally flowing out of these horizontal increases upon the basic rates that were in effect at the outbreak of the war?

Secretary Hoover. My impression is that the idea expressed both by the President and here is that the matter should be investigated to determine how far these inequities exist. *It is not my understanding that it is proposed here for the purpose of reorganization* [of the rate structure] *but simply for a determination of facts* [Italics supplied].[44]

Investigation to aid theory of rate making: As a further explanation of his views, Secretary Hoover said:

The value of a study like this would perhaps be illustrated by going back to the last time the rates were altered. As a result of studies by the Department of Commerce at that time we represented in the hearings before the Interstate Commerce Commission the extreme undesirability of a horizontal cut in rates, and protested vigorously, as the department has a right to do under the foundation act in all these matters, that the application of that horizontal reduction to L.C.L. and class rates, which would have made a very considerable difference in the revenues of the railways, if those rates had not been altered on that particular group of goods, that saving of revenue could perhaps have been applied to a greater amelioration of the basic commodities.[45]

Later, he added:

Furthermore, I had the assumption here that the object of this inquiry went rather further afield, that it went into the field of a study of the desirability of the rate system. A reorganization of the rate structure, I took it, was inclusive of the field of endeavor to set up an ideal rate structure.

Mr. [Ashton C.] Shallenberger [Nebraska]. That would have to take into consideration also, Mr. Secretary, the welfare of the general public, the rates as they affect all business and also the right of the railroads to earn a reasonable return. So we get back to the proposition which he [Commissioner Esch] advanced here, that under the present situation they can not do it.

Now, I would like to ask you if that perhaps does not bring in another condition: In the first place, that the *railroads are operating under practically a cost-plus system, so that no matter how great the expenses of the railroads may be in operation, they are entitled under 15a to earn a certain amount of money*. To illustrate what I mean, in 1919 to 1920 the cost of operation of the railroads increased over a billion dollars, yet the Interstate Commerce Commission took into consideration the fact that they are entitled to rates sufficiently high to enable them to earn that increased expense of operation, and with that thing in view, with that situation, rather, confronting them, it is difficult for the commission to give a reduction on these basic commodities, which, after all, do earn the principal returns for the railroads. *There is something else besides the adjustment of these classifications that comes in there and makes it very difficult to bring about the reduction in rates upon basic commodities as we desire*.

Secretary Hoover. I think that is the case. Of course, where the railways as a whole are operating on practically a cost-plus plan as you say, each individu[a]l railway, on the other hand, has rather a different situation, that, however, is apart from what

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[44] *Ibid.*, 49.

[45] *Ibid.*, 50.

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we are discussing. *I conceive that this is a study not so much for the adjustment of rates at the present moment as a study for the development of a more equitable rate system* [Italics supplied].[46]

Rate structure adjustment interlocked with railroad consolidation: The close relationship between the adjustment of the rate structure and the consolidation of the railroads was emphasized.

Mr. [Schuyler] Merritt [Connecticut]. Mr. Secretary, you said early in your remarks that the difficulty in this rate making was partly due to the lack of variety in the freight of some of the roads you have mentioned, such as the Chicago & North Western, and that it could be done easier after consolidation. Would it be your view as an economic proposition that, after such consolidation in which the Chicago & North Western and other roads were taken into a system, it would be good economics for certain basic commodities to be carried at a loss and make up that loss on some other commodities?

Secretary Hoover. *My own personal theory of rate making is that every commodity should pay the expense of its transportation and some contribution to the maintenance of the railways.* I would not suggest that transportation should be carried free on any commodity — less than cost, I mean.

Mr. Merritt. That is what I wanted to get.

Mr. Burtness. In the matter of consolidation, Mr. Secretary, do you feel that the facts that might be brought out in a general survey such as is proposed in this resolution would be of considerable value in determining later some of the questions of consolidation?

Secretary Hoover. *It is my belief that a thorough and comprehensive study of this question would become one of the strong arguments for consolidation.*

Mr. Burtness. Although it might be easier to put the recommendations into effect after certain combinations were made?

Secretary Hoover. Yes, in other words, that *any simplification of the rate structure would be extremely difficult at the present time, but it might become comparatively easy under a consolidation of systems.*

Mr. Burtness. In your opinion is there much probability of railroad consolidations under present legislation?

Secretary Hoover. I anticipate that before we have any very large measure of consolidation we will need further legislation. It depends somewhat on the interpretation of the present act by the Interstate Commerce Commission. If they were to permit consolidations to go forward within what they may conceive is the general plan as laid down in the bill, I think a great many might take place at an early date.

Mr. Burtness. At any rate, if I get your idea correctly, a thorough and complete investigation into the rate structure is interlocked considerably with the question of consolidation? The two more or less go together?

Secretary Hoover, We might express it this way, that *the investigation could go ahead, but the remedy is likely to be interlocked with consolidation* [Italics supplied].[47]

Use of railway rates for economic relief: Secretary Hoover. *There is a very considerable school of thought that believes that the railways should be used to effect economic ends in the country, more especially,* as Governor Shallenberger said, *that*

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[46] *Ibid.*, 53-54.

[47] *Ibid.*, 51.

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they are practically on a cost-plus basis. For instance, the building industries to-day are in a highly flourishing condition with high levels of price, and they are in need of no particular relief at the present time. There are also certain phases of agriculture that are in a very prosperous condition. They do not particularly need relief, but there are other phases of agriculture that are desperately in need of relief. Therefore *one school of thought is prepared to go to the extent of using railway rates to effect economic relief. I am not sure that there is not some truth in that argument,* though I would not want to embrace it as a whole. It might be well to consider what proportion of commodities should go into the two different classifications.

Mr. Rayburn. If that theory were adopted, Mr. Secretary, wouldn't that make a very fluctuating rate structure?

Secretary Hoover. No doubt it would, if one conceived that these disparities were going to alter every few months or weeks; if they are continued over a term of years that is another thing [Italics supplied].[48]

Statement of Congressman Homer Hoch. In explaining the resolution he had presented, Congressman Hoch said:

This resolution is based upon the proposition that the present freight structure is out of adjustment, that certain sections of the country are favored at the expense of others, and that certain commodities, particularly agricultural products, are, in general, bearing an unfair proportion of the freight burden. . . . Two of the principal features of the resolution are, first, that the commission is directed in making the revision to give regard to the general and comparative levels in the market value of the various classes and kinds of commodities as indicated over a reasonable period of years, and, second, to make such adjustments as will give regard to a natural and proper development of the country as a whole. *The complaint has been not simply as to the freight burden as a whole, but as to the unfair distribution of the burden, and it is the latter complaint with which the resolution primarily deals. . . .*

This improper distribution of the freight burden has borne particularly heavily on the products of the farm owing to the price deflation in those products. *The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of the service to the carriers is not the only factor that must be considered, but the value of the service to the shipper as well.* With reference to the price of a pair of shoes, for instance, the freight charge is so small as to be inconsequential, but with reference to the sale of the hide from which it is made the freight is a very material item. *Generally speaking, the freight on the raw material, the basic products, should be as low as possible, for the freight is such a large item that it can not be absorbed out of the profits* [Italics supplied].[49]

No new authority for Commission but direction to act: Mr. Huddleston. Mr. Chairman, I want to ask to what extent does this resolution confer authority on the Interstate Commerce Commission which it does not now possess?

Mr. Hoch. *I do not think it confers any authority that it does not now possess. I think that the commission has ample authority under the law to make this sort of inquiry at present.* The Interstate Commerce Commission is an agency of the Congress in the making of rates, and *this is a direction to that agency to proceed upon a particular sort of inquiry.*

Mr. Huddleston. What duty or assignment does this impose upon the commission that is not already upon it?

Mr. Hoch. The commission might be of the judgment that this sort of an inquiry was not necessary, or the commission might be of the opinion that it did not have ample funds or means to carry out this work.

The commission might feel and might very well contend that, not having been directed by Congress to do this particular sort of thing — and certainly having plenty to do — the commission having gone along through these years meeting the particular

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[48] *Ibid.*, 55.

[49] *Ibid.*, 18-19.

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issues that arise and that are presented by particular shippers or communities, that *this is simply a direction to the commission that the judgment of Congress is that they ought to enter upon a little more general inquiry.* I want to say that the resolution, so far as I am concerned, involves no criticism of the commission.

Mr. Huddleston. I understand you to say that it is now the duty of the commission to do this?

Mr. Hoch. That is not just the way I put it. It is the duty of the commission to adjust rates, but *whether it would be the plain duty of the commission to enter upon this sort of a comprehensive inquiry, without a specific direction from Congress might be a debatable thing.* It is within the power of the commission to do it, I think [Italics supplied].[50]

Principle of rate making unchanged: **Mr. Esch.** I said that it would not be a safe policy to base rates upon market prices. . . . Because of the violent fluctuation of the price.

Mr. Hoch. That is not out of harmony with what I have said here—that *obviously rates could not be changed constantly to meet the fluctuations of market prices. The resolution does not propose that*, but the point is this: *When over a considerable period of years it is indicated that the freight rate is entirely out of line with the value of the commodity, then I think the value of the commodity is at least one very important factor which must be taken into consideration.*

As I have said, *not only the cost of the service to the carrier must be considered but the value of the service to the shipper.* It has certainly been a very general feeling that farm products particularly, and not indicated solely by the deflation in the last year or two, but indicated over a considerable period of years, based upon their value, have been bearing an unfair proportion of the freight burden, more than the traffic should be asked to bear. . . .

If that is not true, if the commission finds that that is not true, then there is nothing in this resolution directing them to do anything. But it directs them to make that careful inquiry, that people may have an opportunity in a regular, formal way to present that view of this case and that they shall then make such adjustments as *they find to be necessary* [Italics supplied].[51]

Mr. Lea. Does your resolution contemplate that the rate charged to any of these basic commodities should be below the cost of transportation?

Mr. Hoch. It does not.

Mr. Lea. Does it necessarily assume that the freight rate on any basic commodity might not be raised after this investigation is made?

Mr. Hoch. It does not.

Mr. Burtness. Have you formed a conclusion on this feature, and when I say you I mean either yourself personally or people in whom you have confidence and whom you regard as experts, as to whether the difficulty now and the difficulty which you are trying to correct through proceedings taken under such a resolution is due largely to the horizontal increases which have occurred during the past few years, or whether there were like defects in the rate structure which existed in pre-war times?

Mr. Hoch. *My opinion*, for whatever it would be worth, *would be that there were many defects that existed before, but that these horizontal increases*, as Mr. Sanders has called attention to, *greatly accentuate whatever defects there were.*

Mr. Burtness. If there were no defects before, then would you still contend that these horizontal increases would cause defects?

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[50] *Ibid.*, 22-23.

[51] *Ibid.*, 23-24.

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Mr. Hoch. Oh, yes, indeed; in many cases.

Mr. Burtness. Outside of the aggravation of the defects which did exist?

Mr. Hoch. *An adjustment of rates that might be entirely equitable at one level might be entirely inequitable if you could apply a horizontal increase on the whole traffic to it . . .* [Italics supplied].[52]

Mr. Huddleston. Is this resolution intended in any respect whatsoever to change the principles of rate making as now observed?

Mr. Hoch. I would say that *it is intended to give a new emphasis to the idea of taking into consideration the values of commodities as indicated over a reasonable period of years,* a new emphasis, at least, to that factor, *and also,* in so far as it can be done without doing unwarranted injury to any established industries, *to take into consideration the development westward in the industry of the country.*

I would not want to say that that is a new principle, but I think the time has come when a new emphasis should be put upon that principle and a new attention given to it.

Mr. Rayburn. You do not deny or affirm that it is a new principle?

Mr. Hoch. I do not affirm that it is a new principle; no.

Mr. Rayburn. You do not deny that it is?

Mr. Hoch. May I ask a question? Do you mean whether it has been sufficiently applied? *As far as the principle itself is concerned, it is not new, but I would say the application of it in a more positive way would be somewhat new* [Italics supplied].[53]

Summary of Hoch testimony: Mr. Hoch believed that the Interstate Commerce Commission already had full authority to carry out the project proposed in his resolution. However, because of the magnitude and expense of the task, he thought that the Commission needed a Congressional directive before proceeding. No new principle was involved, as value of service had long been recognized by the Commission, but the application of this principle "in a more positive way would be somewhat new." The resolution did not contemplate that basic commodity rates should be below the cost of transportation or that they could not be raised after the investigation. But the inquiry would test the widespread belief that farm products were bearing too heavy a proportion of the freight-rate burden. If the rates were found to be too high on the value of service principle, the Commission could make the necessary adjustment under the authority conferred by the resolution. If the investigation did not find this general supposition to be true, a somewhat greater emphasis was to be placed on the value of service to the shipper than on the cost of the service to the carrier, although as stated, no commodities were to be carried at a rate below the cost of transportation.

Testimony of Agricultural Interests. Among the other witnesses appearing before the Committee was Mr. W. I. Drummond, of Kansas City, Missouri, Chairman of the Board of Governors of the International Farm Congress of America. He read a resolution adopted at the 17th annual session of the Farm Congress held at Kansas City in October 1923. Part of this resolution follows:

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[52] *Ibid.*, 25.
[53] *Ibid.*, 26.

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The principle of rate classification, under which the various articles and commodities pay tariffs based upon their value, bulk, and economic importance, is as well established as is the industry of transportation itself. A wise application of this principle, in our opinion, calls for a general lowering of the rates on agricultural and livestock products, even though such reductions must be compensated for by proportionate increases on goods not so fundamentally necessary to the life of the Nation and to the proper distribution of its population.[54]

Mr. Hoch incorporated in the record a communication of April 2, 1924 from the Western Fruit Jobbers Association of America. This said in part:

It is our conclusion that the true measure of ability of traffic to bear the cost of distribution is directly associated with the value of the goods transported. The price of any commodity at any stage in process to and including the finished goods necessarily includes, as an item of expense, transportation paid on raw materials or processed articles.[55]

Summary of House Hearings. In the hearings before the Committee the need for an investigation of the rate structure seems to have been generally admitted. The anticipated result of the inquiry was a lowering of freight rates on basic commodities, including agricultural products. This was to be accomplished by placing greater relative emphasis on the value of the service to the shipper. However, there was no intention of establishing any rates that would be below the cost of the service to the carrier or that would not allow the carrier some profit.

No new authority was conferred upon the Interstate Commerce Commission which, admittedly, could have carried on the investigation under existing laws. The resolution was a direction to make an investigation requiring considerable time and money and consequently needing some justification for diverting the attention of the Commission from its routine activities. There was a question as to whether or not any action by Congress was needed under the circumstances, but it was felt that, if action was unnecessary, no harm was done.

Potential conflict between Section 15a and the resolution was noted and several members of the committee expressed uneasiness on that score. However, the Commission's representatives assured the Committee that the conflict was not fatal to the intent and purposes of the resolution. On the whole, the Commission's representatives were reluctant to accept the resolution and discouraged it by warning of the time, work, and money required.

CONGRESSIONAL WEDDING OF THE HOCH TO THE SMITH RESOLUTION

On May 13, 1924, the House Committee on Interstate and Foreign Commerce reported on the Hoch resolution *(H. J. Res. 141)* with a recommendation that it pass.[56] Earlier on the same day, the Smith resolution *(S. J. Res. 107)* passed by the Senate the preceding day, was taken up in the House and referred to committee.[57]

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[54] *Ibid.*, 41.

[55] *Ibid.*, 64.

[56] *Congressional Record*, 68th Congress, 1st Session, 8497; U. S. Congress, 68th, 1st Session, *House Report 735*, p. 1 (Washington [1924]).

[57] *Congressional Record*, 68th Congress, 1st Session, 8456.

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On May 27, the House Committee reported the Smith resolution with amendments and recommended passage as amended.[58] The proposed amendments struck out everything after the enacting clause, inserted "in full the language contained" in the Hoch resolution, and added "thereto a paragraph containing a substantial part, with slight changes in language," of the Smith resolution.

> The paragraph containing language from the Senate [Smith] Resolution calls the attention of the [Interstate Commerce] commission to the existing depression in agriculture, and directs the commission "to effect with the least practicable delay such reasonable and lawful changes in rates as will promote the freedom of movement by common carriers of the products of agriculture affected by the depression, including livestock, at the lowest possible reasonable and lawful rates compatible with the maintenance of adequate transportation service." This direction to the commission involves no purpose to do injury to the carriers but expresses the will of Congress that in this time of agricultural depression the basic industry of agriculture shall be given with the very least possible delay every consideration in the matter of rates consistent with the maintenance of adequate transportation service.[59]

DEBATE ON HOCH-SMITH RESOLUTION

Debate on the amended *Senate Joint Resolution 107* occurred in the House on June 6, 1924. Many of the points that had been discussed in the hearings before the House committee were brought out by various speakers. Again it was stated that the Commission already had the authority to do what the resolution provided.

> Mr. Hastings. The gentleman has long been a member of this committee [Interstate and Foreign Commerce]. Does the gentleman think the Interstate Commerce Commission has that power now?
>
> Mr. Rayburn. I think the Interstate Commerce Commission has that power now, but does not feel justified in undertaking the vast task without this expression on the part of the Representatives of the people.[60]

Conflict with Section 15a Observed. One important objection to the resolution was indicated by Mr. Shallenberger and Mr. Huddleston, and acknowledged by Mr. Hoch.[61] This was the point made by Mr. Huddleston in the hearings before the committee – the conflict of Section 15a with the proposed resolution. Mr. Huddleston introduced several tables, previously employed at the hearings before the House Committee, showing earnings of railroads on the basis of the 5-3/4 percent allowed under Section 15a. He said in summary:

> They [Interstate Commerce Commission] feel that the railroads are only receiving a just return, such as is contemplated by the transportation act. If that is so every dollar that is taken off of one product must be put upon some other product, otherwise the loss will fall on the railroads. But the Interstate Commerce Commission holds that the loss should not fall on the railroads. Therefore if they take a dollar off of the charge for carrying grain they must put it on something else . . .

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[58] *Ibid.*, 9675; U. S. Congress, 68th. 1st Session, *House Report 867*, p. 1 (Washington [1924]).

[59] U. S. Congress, 68th, 1st Session, *House Report 867*, p. 2; *Congressional Record*, 68th Congress, 1st Session, 9675.

[60] *Congressional Record*, 68th Congress, 1st Session, 11022.

[61] *Ibid.*, 11026.

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Agriculture is not "the" basic industry; it is merely one of a number of basic industries. Any idea that agriculture is the only basic industry is provincial and unenlightened and ought not to find expression by legislation in this body.

The farmers of this country want you to repeal section 15a of the transportation act. They ask that of you; and instead of giving them the bread of that relief, which would be relief to all the people of this country, you give them this stone. It can be given in honesty only if it is believed that this resolution does not mean anything. If it does mean anything, you are robbing the balance of the rate payers of this country in an effort to curry political favor with the dissatisfied farmers. It is well to consider agriculture. It is one of the great interests of this country. It is entitled to consideration by the Congress; but promote it, I beg you, by legitimate and honest means and not by deception and not at the expense of other interests. You can not afford to pick out any one class of people and say, "I will prefer you at the expense of other people equally worthy throughout the country."[62]

Mr. Shallenberger had introduced a bill for the repeal of Section 15a and on May 8, 1924 he had filed a petition asking for a vote on his bill. The House Committee's hearings produced testimony from Commissioner Esch showing that any reduction of rates on agricultural products would involve compensatory increases in rates on other commodities. The Commission's representatives also said that agricultural products constituted only about 6 percent of the total tonnage of the carriers but produced an estimated 18.33 percent of their total revenue.[63]

PASSAGE OF THE HOCH-SMITH RESOLUTION

After the debate, the House passed the Hoch-Smith resolution, 139 to 8.[64] On June 7, the Senate considered it; on motion of Senator Smith, the Senate disagreed to the amendments and a committee composed of Senators Smith, Cummins, and Key Pittman was appointed to confer with the House.[65] The House insisted upon the amendments and appointed Messrs. Samuel E. Winslow, Hoch, and Rayburn to confer with the Senate Committee.[66] Somewhat later the conference report was brought up in the House for debate.[67] As explained by Mr. Hoch,

The only change from the House resolution is in the latter part of the resolution, where the commission is directed to make such "reasonable and lawful changes" in the rates on agricultural products as are consistent with the maintenance of an adequate transportation system. The word "reasonable" is stricken out, leaving the commission to fix such "lawful" rates, and in the judgment of the conferees this makes no substantial change, as they believe that no rates can be fixed that are "lawful" which are not reasonable, "reasonable" taking into consideration all of the elements that should be taken into consideration.

Mr. Huddleston, in opposition to the resolution, commented on the change.

The descriptive term for rates carried by the transportation act and generally used is "just and reasonable." This term has been defined by the courts and its meaning is fairly well understood. I know of no construction of the word "lawful" as applied to rates, but think it must mean such a rate as is nonconfiscatory; in other words, which is not violative of the fifth amendment. The case of Smythe v. Ames, construing the fifth amendment, holds that a regulatory body can not make rates so low

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[62] *Ibid.*

[63] *Ibid.*, 11020.

[64] *Ibid.*, 11026 (June 6, 1924).

[65] *Ibid.*, 11124.

[66] *Ibid.*, 11220 (June 7, 1924).

[67] For the discussion see *ibid.*, 11245-11246; for the conference report see U. S. Congress, 68th, 1st Session, *House Report 1023*, (Washington [1924]).

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as not to yield the carrier a "just return," and that rates below that limit are a confiscation of the carrier's property and violative of the fifth amendment. I can not be certain as to the meaning of "lawful," as used in the resolution, but believe that it will be held to justify any rate which will leave the carriers such a return from all rates as will not amount to a confiscation of their property. That is the best interpretation that I can put on the word "lawful" without time for further investigation.

A reduction of rates on agricultural products may never prove not to be "lawful" where it is accompanied by rates on other commodities which will in the aggregate altogether yield the carrier a "just return." If the Interstate Commerce Commission, in reducing rates on grain and hay, should raise them correspondingly on coal, iron, and lumber, there seems to be no low limit to which they may not prefer agriculture.

The point I want to present in these few moments is, are Members of the House willing that any industry or any group shall be preferred at the expense of the general public? . . . If you are prepared to do that kind of thing, then accept this resolution in the form in which it is reported by the conferees. But if you feel that it is bad public policy that any interest in this country shall profit at the expense of other interests, if you feel that every interest should pay a just return for the value of service that it receives from a carrier and not impose the expense of that service upon some other interest, then you can not afford to vote for this resolution.

The conference report was agreed to in the House on June 7, but the adjournment of Congress prevented further consideration in the Senate. At the next session the report was agreed to in the Senate on January 27, 1925 and was sent to the President for approval; this was given on January 30.[68] *Senate Joint Resolution 107*, better known as the Hoch-Smith resolution, thereafter became a problem for administration by the Interstate Commerce Commission.[69]

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[68]*Congressional Record*, 68th Congress, 2nd Session, 2501, 2747.

[69]For the text of the Hoch-Smith Resolution, see Appendix.

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INTERSTATE COMMERCE ACTIVITY UNDER THE HOCH-SMITH RESOLUTION

Rate-Structure Investigation Ordered; Regular-Procedure Cases (Agricultural Commodities—peaches, livestock; Treatment of Nonagricultural Commodities; Lake-Cargo Coal—in *Lake-Cargo Coal Rates, 1925)*; Docket 17,000, Rate-Structure Investigation Cases (Part 1, *Revenues in Western District (Ex parte 87)*; Part 2, *Western Trunk-Line Class Rates (Ex parte 87 Sub.-No. 1)*; Part 3, *Cotton*—early cotton production: consumption areas, shift in consuming area, rate-structure investigation and rate levels, adjustments upset by motortruck competition, interior compresses lose advantage, any-quantity rates threatened, summary regarding cotton; Parts 4 and 4A, *Petroleum and Petroleum Products*; Part 5, *Furniture*; Part 6, *Iron and Steel Articles*; Parts 7 and 7A, Grain and Grain Products; Part 8, *Cottonseed, Its Products, and Related Articles*; Parts 9 and 9A Livestock, Southern Territory Rates and Western District Rates; Part 10, *Hay Rates Within the Western District*; Parts 11 and 11A, *Sand, Gravel, Crushed Stone and Shells Within the Southwest*; Part 12, *Nonferrous Metals*; A Factor Overlooked by the Resolution; Part 13, *Salt*).

RATE-STRUCTURE INVESTIGATION ORDERED

Six weeks after the enactment of the Hoch-Smith resolution, the Interstate Commerce Commission ordered an investigation of the rate structure of those common carriers subject to the provisions of the Interstate Commerce Act. This investigation was docketed as No. 17,000.

The investigation broadly included the examination of rates in intrastate, interstate, and foreign commerce. Rates were to be readjusted to correct any defects found to exist. It was also to be determined "to what extent, if any, and upon what classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates . . . may and shall lawfully be required or authorized by the commission in order to offset or partially offset such reductions or other changes in rates . . . on other classes or kinds of commodities or classes of traffic, giving due regard, among other factors . . . " to the factors outlined in the Hoch-Smith resolution.

Appropriate decisions and orders were to be issued during the progress of the investigation. Such rate changes were to be effected promptly "as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression" at the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." [1]

The Commission issued simultaneously a notice calling attention to the investigation and inviting "the public generally, including shippers and carriers, whether as individuals or in organizations, and the public authorities, state and federal," to "file with the commission any desired brief or statement *as to the intent of the joint resolution, the construction thereof, and the procedure to be pursued in giving effect thereto*" and to submit any facts bringing rates, fares, charges, or other matters, within the provisions of the resolution. "Such memoranda can not, under the law, take

[1] U. S. Interstate Commerce Commission, *Annual Report* (1925), 38-39.

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the place of evidence upon the hearing or be given weight in the final consideration and disposition by the commission of the matters involved. *They are desired for the aid and guidance of the commission in shaping its procedure* [Italics supplied]."[2]

A new division, division 6, was created in the Commission to direct the investigation. The National Association of Railroad and Utilities Commissioners was invited to appoint a committee of its membership to cooperate in the investigation. In addition, a committee of officials of State regulatory commissions was selected to cooperate with an Interstate Commerce Commission committee in formulating and executing a course of procedure.[3]

While the investigation was getting under way, a number of cases into which the Hoch-Smith resolution entered were decided. They came under the resolution's provision "that no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution." Thus, two general groups of cases influenced by the Hoch-Smith resolution should be distinguished: Those which originated under the rate-structure investigation, Docket 17,000, and those which came before the Commission in its regular procedure. To avoid confusion the two groups are discussed separately. The routine-procedure cases are examined first, as they covered a shorter period of years than those under the rate-structure investigation which have extended up to the present time.

REGULAR-PROCEDURE CASES

Reference to the Hoch-Smith resolution was made in a great many routine cases, not all of which concerned agricultural products. In some instances the reference was little more than a passing remark, although in others it indicated that the resolution influenced the Commission even where it was not directly applicable to the case. Some appeals claimed the benefits of the resolution but mainly relied upon pertinent provisions of the Interstate Commerce Act. In a few cases the emphasis was on the resolution with supplementary support from the basic act. At times the Commission gave decisions on commodities involved in the rate-structure investigation, specifying that the ruling was without prejudice to subsequent findings under Docket 17,000. There was no regularity in treatment. The Commission's method of handling the problems will be brought out by examining a few cases.

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[2]Interstate Commerce Commission notice to the public on rate-structure investigation, March 12, 1925. A similar statement is given in U. S. Interstate Commerce Commission, *Annual Report* (1925), 39-40. Eighty-eight replies were received from traffic men, shippers, and railroads. The list is given in U. S. Congress, 70th, 1st Session, Senate Committee on Interstate Commerce, *Hearings . . . on the Confirmation of John J. Esch To Be a Member of the Interstate Commerce Commission*, p. 193-195, Feb. 18-24, 1928. These replies expressed "the most diverse lot of opinions that human minds ever saw gathered together as to what this resolution meant."—p. 195. "We had very extended oral arguments on the various views expressed; and we gave it very careful consideration because of our doubt as to the scope of some of the provisions of the resolution and a proper interpretation thereof. . . . There was no application made of the Hoch-Smith resolution until after we had the benefit of that discussion and of those briefs."—Commissioner Esch, p. 160.

[3]U. S. Interstate Commerce Commission, *Annual Report* (1925), 40.

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Agricultural Commodities. Among farm products, grain appeared most frequently, the cases relating to specific situations rather than to the over-all problem. Relief was granted or denied according to the local situation and without prejudice to any readjustments that might result from the major investigation under Docket 17,000.

The Hoch-Smith resolution was invoked against proposed increases on unmanufactured tobacco from Kentucky to St. Louis. These increases were intended to remove violations of the long- and short-haul clause which had grown up in the previous 15 years. The Commission said, "We do not understand that the Hoch-Smith resolution is designed to perpetuate violations of the law or that it can be invoked to justify advantages heretofore given tobacco producers of this section over near-by and competing tobacco producers," and approved the increased rates.[4]

Likewise, when shippers urged the resolution as "a legal barrier to increasing the transportation charge on carrots, whether in the form of increased rates or weight," in an instance in which the estimated weight of a 7/8 bushel hamper had been increased 6 pounds, the Commission said, "The Hoch-Smith resolution has no application in cases of this character." The estimated weight was then decreased 2 pounds.[5]

An illustration of the constant competitive unbalancing of rate adjustments which occurs even as readjustments are made is the case of the grape growers of New York and Pennsylvania who, after the California deciduous fruit decision, complained of unreasonable rates and of preference to California grapes. They alleged the continued existence of a depression in the eastern grape industry and asked consideration under the Hoch-Smith resolution. A small reduction was granted.[6]

Peaches: Rates on peaches from Georgia and the Carolinas were prescribed under the authority of the resolution. Particular reliance had been placed on the resolution by Georgia complainants who testified at length on the economic state of the industry. In contrast they pointed out the increasing prosperity of the southern carriers. Although several concurring commissioners thought the reduction should have been greater, one dissented from the preferential treatment of the peach traffic because he thought that the resolution "calls for such a 'redistribution of rates and charges as may be found necessary to correct any defects so found.' This language reasonably indicates that where the burden is found to be too great, it should be redistributed to other classes of traffic better able to bear it. . . . No indication is given as to how the carriers may recoup this loss or how the redistribution may be accomplished."[7]

The complainants were dissatisfied but upon reconsideration of the case the Commission affirmed its decision.

> The Georgia complainants insist that in this proceeding we have failed to comply with the requirements of the Hoch-Smith resolution. . . . While the unfavorable condition of the industry is doubtless due to some extent to causes over which the growers have no control, it is undeniable that it is also attributable in no small degree to controllable factors such as overproduction and faulty methods of distribution. The consequences of errors of judgment or of the failure to take needed corrective measures in an industry can not justly be made the ground for demanding reductions in freight rates.

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[4] 126 I.C.C. 93, 96 (1927).

[5] 136 I.C.C. 19, 21-22 (1927).

[6] 146 I.C.C. 403, 410 (1928).

[7] 139 I.C.C. 143, 163 (1928).

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In construing the requirements of the Hoch-Smith resolution in *Grain and Grain Products*, 122 I.C.C. 235, cited in the previous report, we said that it "provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits."

Have we given effect to the mandate of the Hoch-Smith resolution as thus interpreted? Our analysis in the previous report of that portion of the evidence relating to the level of the assailed rates from Georgia, to which the Georgia complainants have taken no exception, fails to establish that they are relatively high, due consideration being given to all recognized factors in rate making. The history of the rates there set forth shows that since 1920 substantial reductions have been voluntarily made by the carriers and we have required a further reduction. . . . Examination of this statement [of competitive rates] clearly reveals that Georgia shippers have by no means been laboring under rate disadvantages as compared with shippers in other producing areas. The extent to which Georgia shippers have dominated the markets is indicated in the following excerpt from the previous report:

"During the shipping season in Georgia far more peaches are shipped from that State to the destination territory here considered than from all other States combined, and this is likewise true with respect to most of the individual destinations in that territory. To 25 representative destinations the carload movement from Georgia in June and July, 1925, constituted 94.53 and 84.34 per cent, respectively, of the total movement to those destinations."[8]

Livestock: A plea for a general revision of livestock rates was denied in 1927, although certain rates which exceeded the aggregate of the intermediate rates were adjusted "for the purpose of removing existing discrepancies and in the light of the Hoch-Smith resolution."[9] Further investigation was promised under the rate-structure investigation.

Although counsel for complainants contend that Congress by the resolution referred to has declared the existence of a depression in agriculture, and that therefore that fact is not open to dispute (a contention with which we do not agree, see *Revenues in Western District*, *supra*, page 12, [113 I.C.C. 3 (1926)], much of complainants' evidence in the present case relates to the condition of the cattle industry. . . .

Complainants contend that the logical basis for ascertaining the lowest possible lawful rates is the cost of the service and that the pre-war rates on livestock would yield a very substantial profit above the average unit costs of handling. . . . In the past we have had occasion to consider at times what may be called "out-of-pocket" cost, but while it has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit. . . . We say "in principle" because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates.[10]

In the *Eastern Livestock Cases of 1926* complainant packers sought the establishment of fixed relationships between rates for livestock and meat in and to the eastern section of the country. Although some adjustments were made, the Commission said, "In this proceeding there is no evidence of a depression in the meat-packing industry entitling it to the special consideration which the Hoch-Smith resolution directs shall be given to industries suffering a general depression. Nor is there evidence which convinces us that fresh meats and packing-house products will not continue to move freely under the adjustment resulting from the findings herein."[11] One commissioner,

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[8] 148 I.C.C. 755, 762-763 (1929).

[9] 122 I.C.C. 609, 629-630 (1927).

[10] *Ibid.*, 612, 617-618.

[11] 144 I.C.C. 731, 774 (1928).

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dissenting, ended by saying, "The Hoch-Smith resolution, as I understand it, was intended to aid the producer, but in my opinion he will not benefit by the reductions here required."[12]

Treatment of Nonagricultural Commodities. In several cases the maintenance of carrier revenue from nonagricultural rates was considered essential to the possibility of reducing rates on agricultural commodities. In dismissing a plea for lower rates on wooden bungs from Cincinnati to eastern cities, the Commission said: "The Hoch-Smith resolution contemplates readjustments of the rate structure along lines which will permit commodities such as this that can stand maximum reasonable rates to bear them, and which will accord to agricultural products a rate basis which is as low as we may reasonably go under existing law. At the same time it is our duty to maintain carrier revenues reasonably intact in the absence of evidence that these revenues are excessive."[13]

When a complaint against rates on furniture was found to be partly justified, one commissioner dissented because "to the extent that low rates are prescribed on high-grade traffic such as furniture, compliance with the mandate of the Hoch-Smith resolution that the products of agriculture shall be accorded the lowest possible lawful rates compatible with maintenance of adequate transportation service is rendered more difficult. . . . While the basis prescribed will result in numerous increases, it will also have the effect of reducing a great many rates whose reasonableness can not be successfully challenged when measured by ordinary and accepted standards."[14]

In rejecting, almost in its entirety, a complaint against rates on zinc concentrates, the Commission stated that on commodities able to bear present rates there could be no reduction "if we are to accord relief to agriculture and other industries in distress, as contemplated by the Hoch-Smith resolution." However, this case is interesting as indicating that at least one depressed industry was able to obtain the relief contemplated by the Hoch-Smith resolution, years before the resolution was passed and without fanfare. The following explains the situation:

> The rates assailed are subnormal in the sense that they are as low as or lower than the rates in effect prior to August 26, 1920, whereas freight rates generally are from 12.5 to 26 per cent higher than the rates in effect prior to that date. *The removal of the general increase of 1920 was made by the carriers at the solicitation of shippers because of the condition of the industry,* but it is not contended that the present economic condition of the industry requires a further reduction in these rates. On the other hand, *the record shows a large increase in the value of concentrates since the general increase was removed,* and defendants assert that it should now be restored. Moreover, *the record indicates that the demand for zinc is rapidly increasing,* and, according to a witness for complainants, the Joplin-Miami field is the only large source of supply. We need not consider whether the general increase should be restored in these cases; but we cannot materially reduce the carriers' revenues from commodities which are able to bear the present rates, if we are to accord relief to agriculture and other industries in distress, as contemplated by the Hoch-Smith resolution [Italics supplied].[15]

A number of nonagricultural commodities claimed and received the benefit of the Hoch-Smith resolution because of depression in the industry. Against one rate complaint it was urged that depression in local coal mines would be accentuated by reducing rates

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[12] *Ibid.*, 784.

[13] 147 I.C.C. 375, 378 (1928).

[14] 128 I.C.C. 445, 465 (1927).

[15] 126 I.C.C. 677, 695-696 (1927).

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from more distant competing coal mines to a nearby market area contrary to the "policy of Congress laid down in the transportation act and in the so-called Hoch-Smith resolution." The rates were not changed.[16]

To an attack on rates for pig iron urging the application of the Hoch-Smith resolution, the Commission replied: "Certainly the present record is not sufficiently comprehensive to warrant a readjustment of rates such as is contemplated by that resolution." However, the rates were found unreasonable and new ones were prescribed.[17]

Lake-Cargo Coal - in Lake-Cargo Coal Rates, 1925. The Commission noted that at the time of previous hearings the industry in Ohio and Pennsylvania was comparatively prosperous. Since that time, conditions had changed so that many miners had left the region, some going to the southern coal fields. The industry was in a depression. "It does not appear that all this is due solely to the rate adjustment, but if that adjustment is improper it is our duty to correct it so far as possible, and ***we must give consideration to the conditions existing in the industry under the provisions of the Hoch-Smith resolution*** [Italics supplied]."[18] The rates involved gave differentials to one coal-mining area as against competitive areas on cargo coal going to lake ports. The rates were reduced in the decision after an extended discussion of cost studies.

The success of the northern coal producers led to repercussions from their southern competitors. These last proposed lower rates not "because the present rates are regarded by respondents as in excess of maximum reasonable rates, and as such amenable to attack under section 1 of the act, but solely for commercial and economic reasons. These commercial and economic conditions are alleged to create a public interest in these proposed rates which in itself is said to be sufficient for their justification."[19] The southern railways indicated an "extremely prosperous" condition and, in the exercise of "managerial discretion," proposed the reduction of lake rates. Calling attention to Section 15a, especially the provision for holding excess returns in trust for the United States, the Commission rejected the reduction saying:

> To the extent that managerial discretion on the part of a prosperous carrier may have the effect of lowering rates below the general level, it runs counter to the expressed policy of Congress as to uniformity, and nullifies the intent to impress a trust upon any excessive returns for important national purposes. Proposals which necessarily have this effect are not justified.
>
> Nor is the management of a prosperous carrier wholly free to pick out at will one commodity, such as bituminous coal, and in its discretion accord to it a basis of rates so low as not to afford a fair measure for the reasonableness of rates on even that traffic. The policy of Congress as to where the lowest possible rates shall be applied has been expressed by it in the Hoch-Smith resolution, to which we have given such effect as we could in respect of important commodities. *Georgia Peach Growers Exch. v. A. G. S. R. R. Co.*, 139 I.C.C. 143; *Calif. Growers' & Shippers' Protective League v. S. P. Co.*, 129 I.C.C. 25, 132 I.C.C. 582. Other important investigations, under the same resolution, with respect to agricultural products, including livestock, embracing practically the entire country, including the territory here particularly concerned, we now have in progress. To accord to a carrier the right to transport a substantial portion of its tonnage at rates upon the obviously low level here proposed, while giving no relief to the agricultural industry, including livestock, which Congress has declared to be in a depressed condition and entitled to the lowest possible lawful rates consistent with the maintenance of an adequate transportation system, is counter to that mandate. The Hoch-Smith resolution is not directed to the carriers; it is directed to us. Carriers who seek our approval of rate proposals will be expected to show that a finding of justification can be made consistently with the policies outlined for us in the resolution. This has not been done in this proceeding.[20]

[16] 115 I.C.C. 650, 656-657 (1926).

[17] 128 I.C.C. 737, 742, 743 (1927).

[18] 126 I.C.C. 309, 362 (1927).

[19] 139 I.C.C. 367, 374 (1928).

[20] *Ibid.*, 394-395.

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In a concurring opinion Commissioner Eastman said in part:

> Quite aside from the matter of rate wars, the majority opinion contains a very strong argument in support of our power to fix minimum rates, even within the zone of reasonableness, as a necessary adjunct to the duties imposed upon us by section 15a and also by the Hoch-Smith resolution. It does not seem to me that the latter added anything to the law, so far as a situation like the one before us is concerned. With respect to section 15a the argument, as I gather it, amounts briefly to this: In a suspension proceeding we may make such orders with respect to the suspended rates as would be proper in a proceeding initiated after they had become effective, and in section 15a we are required to "initiate, modify, establish, or adjust" rates, up or down, so that the carriers as a whole or in designated rate groups or territories will have certain aggregate earnings. Therefore it is our duty to refuse to permit rates, already below a reasonable maximum level, to be further reduced within the zone of reasonableness, when the effect will be to further impair the aggregate earnings of the group and create or add to a deficiency which must be made up elsewhere. I concede that much may be said for this position, and it may reflect our power. I question, however, whether we are justified in exercising this power, if we possess it, in the way suggested, for it seems to me, upon grounds which I have already indicated, that it involves a confinement of railroad competition within narrower limits than the law has contemplated, a confinement which might indeed in certain cases have the effect of seriously crippling individual carriers. Moreover, if it be our duty to administer the law in the manner suggested, it imposes a most formidable task upon us which is yet to be undertaken, for the rate structure of the country is, I believe, full of rates depressed to a very considerable degree for strictly competitive purposes.[21]

In such a highly competitive industry, the dispute did not close with the Commission's decision but was carried to the courts.[22]

DOCKET 17,000, RATE-STRUCTURE INVESTIGATION CASES

In the rate-structure investigation 13 parts and 4 subparts were set up. Each part covered an important commodity group and examined its general structure. In the 4 instances in which subparts were set up, each part covered the rate structure of the major commodity group in a particular rate territory.

Most of the parts were formed by bringing together in one investigation many complaints about rates on a particular commodity. Transportation relief to the farmer, if it was given any recognition in selecting commodities for study, was subordinate to the consideration that the rate-structure investigation provided the Commission with a convenient means of resolving a large number of pending complaints involving complex rate problems of particular commodities.

With a number of exceptions, most of the rates examined in the investigation were commodity rates rather than class rates and the rate structure was primarily involved rather than the general rate level. Several investigators of nonagricultural commodities had in mind the possibility of increasing rate levels to compensate for potential reductions on agricultural commodities.

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[21] *Ibid.*, 399-400.

[22] The Lake Cargo Coal cases were the subject of vigorous conflict, involving the railroads serving the two fields, the Interstate Commerce Commission, the producers of the two fields, and their political representatives in Congress. The nomination of John J. Esch to serve another term as a member of the Commission was rejected in order to call the Commission's "attention to its ultra vires actions . . . by a scrutiny of every appointment that is made when that appointment comes up for confirmation by the Senate, whether that be a new appointment or a reappointment." The Commission's interpretation of the Hoch-Smith resolution in the coal cases involving two competing fields was considered to be a dangerous tendency which should be curbed. *Hearings . . . on the Confirmation of John J. Esch . . . ,* 271-273.

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Each part of the investigation deals voluminously with more or less complex rate relationships which are of limited interest. To avoid unnecessary confusion in the discussion, attention is here given to the situation involved in each part and the effect of the action taken. To indicate the extent of the investigation, the first part assigned to a specific commodity – Part 3, *Cotton* – will be described in greater detail.

Part 1.– Revenues in Western District (Ex parte 87). Shortly after the Interstate Commerce Commission had issued its order instituting the general Rate Structure Investigation, Docket 17,000, the principal carriers in the western rate district filed petitions for increases in freight rates. A horizontal 5-percent increase in all existing freight rates was proposed with exceptions as to certain commodities, on the allegation of the existence of a financial and operating emergency due to inadequate earnings. Adequacy of earnings was measured by the standards set up under Section 15a of the Transportation Act of 1920. Failure to earn a fair rate of return was alleged to have threatened the maintenance of an adequate transportation system. These petitions for rate increases followed so closely upon the authorization of the rate investigation under the Hoch-Smith resolution that they were probably a strategic move of the western carriers to anticipate any effort to reduce their rates on agricultural commodities.

In view of the resolution and the petitions of the western carriers, the Commission decided to deal first with the western district to ascertain the extent of the agricultural depression, what rate reductions, if any, could be made, and whether rates could be increased on other commodities or classes of traffic to compensate for such reduction as well as to provide any increase in revenues found to be proper.

In its conclusions the Commission denied the petitions for increased rates, saying, "it is quite clear from the evidence that so far as the major portion of the western district is concerned no financial emergency exists. In this portion the carriers appear to be both financially and physically sound."[23] Many inequalities in the rate structures in portions of the western district were indicated in the record. The Commission thought the inequalities should be corrected but asserted that it "is the right and duty of the carriers to take the steps necessary to correct improper rate relations as they may be found to exist. . . ."[24]

The Commission found that "very little was presented with respect to the rate structure affecting products of agriculture which would enable us to readjust the rates on these commodities, or reach a determination as to what, in the light of the resolution, would constitute reasonable and properly related rates in the different sections of the western district. . . . The record, however, warrants us in concluding that in proposing changes in existing rate structures, either for the purpose of improving earnings of carriers in western trunk-line territory, or for the pu[r]pose of rectifying inequalities in existing rate structures, carriers should propose no advances in the rates on products of agriculture, including livestock, except where particular rates on such products may need adjustment to remove inconsistencies, or where it can be shown that the product in question is not affected by depression."[25]

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[23] 113 I.C.C. 3, 37 (1926).

[24] *Ibid.*, 38.

[25] *Ibid.*, 38-39.

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Thus, the first of the rate-structure parts disclosed inequalities but failed to make readjustments. The case primarily concerned carrier petitions for increased rates which were denied and the location of rate-structure maladjustments was an incidental accomplishment of the hearings. Agriculture had the consolation of a suggestion by the Commission that no rate advances should be proposed on agricultural products except to remove inconsistencies or except on products unaffected by depression.

Part 2.- Western Trunk-Line Class Rates (Ex parte 87 Sub.-No. 1).[26] During the course of the hearings in *Revenues in Western District (Ex parte 87)*, the carriers filed a petition "praying for a complete revision of the chaotic class-rate structure within w.t.l. [western trunk-line] territory, to the end also that the revenues of the carriers in that territory 'may be increased to more nearly yield a fair return.'"[27] At that time several class-rate investigations and a number of formal complaints against class rates, all relating in whole or in part to class rates within western trunk-line territory were pending. These various cases were brought together in Docket 17,000, Part 2, insofar as the class rates in the given territory were involved.

The Commission found that the general level of class rates in the western trunk-line territory was relatively low and justified an increase. Many instances were placed in evidence showing undue preference between localities in western trunk-line territory and between that territory and central and southwestern territories. Such discriminations were readjusted within the western trunk-line territory, but the rate-structure relations with other territories were not so extensively regulated. Certain agricultural products which moved on carload class rates were not subjected to any class-rate increases because agriculture had not yet fully recovered from the post-war depression. If rates proposed in readjusting the rate structure were lower than the existing rates, the proposed rates would become maximum rates, but not all agricultural products were so treated.

Agriculture was not the only industry in which depression was recognized by some special consideration in rates. Beverage industries, particularly cereal beverages, were noted even though the depression of the cereal-beverage industry was acknowledged to be due to prohibition enactments rather than to any influence of freight rates. "The desperate condition of the cooperage industry is ascribed . . . to the competition of other containers, particularly the tank car . . . The evidence shows that the excelsior industry in w.t.l. [western trunk-line] territory has declined and suffers from the competition of plants in the Southwest accorded commodity rates to many w.t.l. destinations."[28]

Part 3.- Cotton.[29] Cotton was the first specific commodity assigned for individual rate-structure study under the resolution.

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[26] 164 I.C.C. 1 (1930).
173 I.C.C. 637 (1931).
178 I.C.C. 619 (1931).
181 I.C.C. 301 (1931).
196 I.C.C. 494 (1933).
197 I.C.C. 57 (1933).
204 I.C.C. 595 (1934).
210 I.C.C. 312 (1935).
213 I.C.C. 44 (1935).

[27] 164 I.C.C. 1, 11, *Western Trunk-Line Class Rates*. Decided May 6, 1930.

[28] *Ibid.*, 222.

[29] 165 I.C.C. 595 (1930).
172 I.C.C. 53 (1931).
174 I.C.C. 9 (1931).
176 I.C.C. 249 (1931).
176 I.C.C. 643 (1931).
181 I.C.C. 474 (1932).
185 I.C.C. 769 (1932).
208 I.C.C. 431 (1935).
215 I.C.C. 219 (1936).

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Rate structures for cotton have been the resultant of the historical development of production and marketing characteristics of the cotton itself as well as in the development of the several means of transportation. An appreciation of the background of custom and tradition would be necessary to understand fully the relatively inflexible system of cotton distribution.

Early cotton production–consumption areas: Early cotton production was confined to areas having easy access to the sea because almost all the cotton was exported. Even when cotton mills were established in New England the transportation was by water. The initial railroad development naturally radiated inland from export centers on the seacoast, but the basis for competition between southern ports had already been established when railroad construction began to encourage interior production. Although domestic consumption increased gradually, the mills were nearly all in New England and water transportation continued to be important although rail transportation began to be competitive. The "any-quantity" rate basis which resulted from this competition is still in use. Following the Civil War, cotton consumption by the New England mills became more important and led to better transportation service with a highly competitive rate structure between the south-to-north rail carriers and the coastwise steamship lines.

The long rail haul of the southern carriers and the further development of interior producing areas by small operators fostered the development of cotton compresses at interior points. This introduced some additional variations in the rate structure. When cotton moved to ports for export in the early days, it had been carried in uncompressed bales and was compressed at the port, with no deduction from the rail rates for the cost of any compression done before the rail movement. Now, with the all-rail haul to consuming centers, the economy of hauling cotton compressed near the point of production created an entirely new basis for rail rates. Uncompressed cotton had one rate, compressed cotton a lower rate, and the Southwest developed a rate for compression-in-transit. In the Southeast, carrier-privilege compression rates were established.

Other services such as concentration and warehousing were performed in the markets which were established at the interior compress points. They were in competition with similar services provided at the ports and were advantageous to the producers. Therefore, the carriers established rates which permitted not only compression in transit but also concentration (assembling by class and grade of marketable lots of even-running grade and staple) in transit.

At the beginning of the century, there were three main channels in the movement of cotton: (1) through southern ports for export, (2) by water to New England, and (3) by rail to New England. Port competition as well as rail and water competition was keen. Competition of compression and concentration facilities in the interior with similar facilities at ports was strong. The proper functioning of this distribution mechanism was essential to the welfare of most of the population, therefore, the status quo was defended by custom and maintained by competition with little influence from Federal regulation of railroads.

Shift in consuming area: A significant change took place in the years that followed. A shift in the consumption of cotton was made from the New England mills to southern mills. Whereas southern mills consumed only 188,000 bales to New England's 1,129,000 bales in 1880, by 1924 the South used 4,050,000 bales, New England taking only 1,566,000 bales. With the southern mills located in the Carolinas, the old channel by rail to New England was diverted so that the south-and-north carriers

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surrendered traffic at intermediate junctions to east-and-west carriers. The practice of compression was considerably affected by the consumption of cotton in the producing territory with the shortening of the haul of raw cotton to the mills.

The new west-to-east traffic in the south created new traffic channels. Gulf ports had been the gateways for the Southwest production of Oklahoma, Texas, Arkansas, and Louisiana, for the shipments from this area had largely moved by water to New England even as late as 1924-25. With the increasing importance of the Carolina mills, cotton interests of the eastern portion of the southwest territory became concerned over rail rates to and beyond the Mississippi River. On the other hand, the competitive position of southeastern producers had improved, because they were able to offset lower yields through lower freight rates due to proximity to the Carolina mills.

These adjustments of production and consumption extended over a period of years and were not experienced equally in all areas. Rate revisions also were made over the years, but because they were championed by local groups of unequal power, some of the revisions were not equitable from a national viewpoint.

During the World-War period cotton prices and freight rates rose. In 1918, cotton prices were 231 percent of 1913 and the rate increase of that year brought rates to 133 percent of 1913. By 1920, with rates increased to 171 percent of 1913, cotton prices had declined to 127 percent of the 1913 level. Dissatisfaction with rates became pronounced, but, peculiarly enough, the general level of freight rates was not assailed as much as were specific rates. This attack on specific rates resulted from the effort to obtain a competitive advantage for producing areas, interior or port markets, or for the ports themselves. In this selfish effort to secure special rate adjustments, little support was found for a widespread cooperative attack on the general level of rates.

Rate-structure investigation and rate levels: When the Commission began its extensive survey of the cotton rate structure under the Hoch-Smith resolution, it was faced with the very complicated rate structure which had been gradually erected under the circumstances described. A further complication existed in that the general question of compression rates, rules, and practices was at the moment unsolved.

The investigation was ordered by the Interstate Commerce Commission on November 26, 1926; the proposed report of the Commission examiner was served November 30, 1929; and the case was submitted to the Commission for decision on March 14, 1930. The decision of the Commission was given July 15, 1930. These dates are given because the Hoch-Smith resolution was considered important until the Supreme Court decision of June 2, 1930, in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, construed the resolution as making no substantial change in the existing law. Yet, the resolution had been invoked only in the complaints of the Oklahoma and Mississippi State commissions. Complaints of cotton growers' cooperative associations had specifically disclaimed any demand for application of the provisions of the resolution on account of economic depression in that industry. Instead there was a "general attack upon the level of cotton rates from all points of origin to all ultimate destinations to which cotton moves in substantial volume, and to the ports, and a general attack upon the relation which cotton rates generally bear to the rates on other commodities." There was "no general attack upon the relation of cotton rates to or from different communities or sections."[30]

[30] 165 I.C.C. 595, 598 (1930).

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In the decision, the principal gain in the attack on rates was limited to the adjustment of the more glaring inconsistencies as they affected particular areas and ports. Oklahoma and the Mississippi Valley territory, for instance, were put on a competitive footing with areas whose State governments had obtained earlier concessions for them. Mobile was made competitive with New Orleans over a much wider area, and Wilmington, California, was given a chance to compete with Texas Gulf ports for the increasing production of cotton in Arizona and New Mexico. When viewed in the light of earlier adjustments of rates affecting different producing areas, market centers, and port differentials, these new adjustments reflected no radical departures but merely carried on the process of balancing competitive forces.

Adjustments upset by motortruck competition: At the time the Interstate Commerce Commission arrived at its decision, forces were at work which threatened to make these findings obsolete. Every portion of the cotton distribution structure was faced with radical changes: production areas, the interior compresses and markets, the ports, and, especially, the rail carriers. The post-war plateau of cotton rates broke in 1930, but this was due neither to the decision of the Commission nor to declines in cotton prices. Primarily responsible for this drop was the competition with railroads of motortrucks and Government-owned barge lines. Competition in the transportation field upset the rate concepts which had long bulwarked the economic fabric of the south. The legislative and regulatory agencies, bound by the traditional practices of cotton production and distribution, had given no mandate for the changes which this competition threatened to make. Regulatory commissions had hesitated to propose such prospective realignments because of their far-reaching and unpredictable effects.

As a consequence, the adjustments resulting from the rate-structure investigation were largely offset in the railroad endeavor to meet motortruck competition. In a later case,[31] truck competition in Texas brought lower rail rates which threw the relationship of Oklahoma, Arkansas, and Texas to Mobile out of adjustment as no truck-compelled competitive rates were necessary from this area.

Interior compresses lose advantage: Motortruck competition threatened another time-honored factor in cotton distribution – the interior compresses. Trucks could get a capacity load with uncompressed cotton, and nothing was gained by the trucker in hauling higher density cotton. Truck rates were quoted, therefore, at the same amount for either compressed or uncompressed cotton and thus the compresses at the ports benefited at the expense of competitors in the interior.

The Commission apparently sensed that motortruck competition was capable of bringing about a lower rate level where regulatory investigation and legislation had failed, for the suggestion was made that rail rates should be competitive but not so low as to be destructive since trucks exerted a wholesome influence in the transportation of cotton. But, the Commission continued significantly,

> The intensity of the truck competition decreases as the distance from the ports increases and it is true that to the extent that the rates from the nearer territory are placed upon a lower basis than from that which is more remote the old prejudice and preference will be continued, but with the difference that the new competitive conditions

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[31] 174 I.C.C. 9 (1931)

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render it not undue. . . . While in special cases it may be proper to establish rates which are lower than gross cost, including overhead, it is evident that to go materially below the average cost, particularly on a high-grade comparatively expensive commodity such as cotton, would result in rates that are not reasonably compensatory.[32]

Any-quantity rates threatened: A third effect of motor-carrier competition was the critical examination by the railroads of the any-quantity basis of rail rates. Any-quantity rates dated from the earliest days of railroads and enabled the small producer to compete with the large operator. This new attitude was indicated in proposed carload rates by carriers in Texas on compressed and uncompressed cotton equal to the any-quantity, compress-in-transit rates then in effect. Interior compresses saw in the proposal a threat to encourage the movement of uncompressed cotton to ports. The proposed rates were found to be unlawful, on the basis that they did not allow a differential for compressed cotton of greater density.[33]

In 1935, rail carriers successfully defended a carload basis.[34] "Carload" is almost a misnomer as the basis is an adaptation of the any-quantity basis. Carload minima apply out of the concentration point whereas less-than-carload lots move into concentration on a local rate. This amount is credited to the through carload charge from the origin to final destination, when cotton is shipped out of concentration in carload lots. This basis puts a premium on heavy loading and thus leads to a more efficient use of equipment than the any-quantity basis. Variations in carload minima and the spread between them brought port and interior merchants into conflict again. The efficiency of handling cotton shipments in heavy carload lots led large producers and port compresses to suggest "straight" carloads as a basis whereby through rates on a lower level would be quoted on car lots offered rail carriers without involving the expensive l.c.l. collecting service in movement to concentration.

Summary regarding cotton: The rate-structure investigation of cotton is typical of the investigations for other commodities. It indicates how rate structures grew up under the marketing urgency of the period with adaptations and variations to fit changes in marketing distribution. Rate relationships were generally more important than rate levels. Yet in the rate-structure investigation under the Hoch-Smith resolution, rate levels were primarily attacked rather than rate structures. In fact, there was an effort to maintain the structure between localities, markets, and final destinations.

Some readjustments were made in rates, but reduced levels were finally obtained through competition for areas favored with motor-carrier and water-carrier developments. The reduced-rate level was probably lower than could have been prescribed by the regulatory commission under existing laws and resulted from voluntary action of rail carriers.

Parts 4 and 4A.- Petroleum and Petroleum Products.[35] This investigation was divided into two parts. The first part dealt with rates from the midcontinent field to

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[32] *Ibid.*, 15, 17.

[33] 191 I.C.C. 388 (1933).

[34] 208 I.C.C. 677 (1935).

[35] Part 4: 171 I.C.C. 286 (1931).
176 I.C.C. 637 (1931).
179 I.C.C. 19 (1931).
182 I.C.C. 470 (1932).

Part 4A: 171 I.C.C. 381 (1931).
174 I.C.C. 745 (1931).
179 I.C.C. 35 (1931).
203 I.C.C. 10[illegible] (1934).
227 I.C.C. 187 (1938).

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the important consuming centers of the country and the second with rates in the southwest within the midcontinent field and to the gateway destinations.

Petroleum furnishes an excellent illustration of a highly competitive commodity, both in production and in marketing, which is not tied to the rails for transportation. In addition to the three usual means of transportation - rail carriers, water carriers, and motor carriers - petroleum has a fourth means - pipe-line carriers. Some of the business units that handle petroleum are large enough to own, control, and operate equipment for water, motor, and pipe-line transportation. Even the movement of rail carriers might be made in tank cars privately owned by petroleum companies. Obviously, many of the important factors relating to either rate structure or rate level were outside the jurisdiction of the Interstate Commerce Commission except for those producers and marketers who were too small to have alternate means of transportation. Yet these small units were at the competitive mercy of the large companies and could not be expected to continue operation under rate structures or levels that disregarded the presence of the large companies.

The rate-structure investigation regarding petroleum was an effort to find a source of increased revenue for the railroads as an offset to potential reduced rates on agricultural products rather than an effort to eliminate "inconsistencies" from the rate structure. Commissioner Eastman expressed his doubts about the feasibility of considering petroleum in this connection. "So far as I have been able to ascertain, however, in fixing the maximum level of rates on petroleum products in this proceeding within the east and within the south, the majority have been guided almost wholly by the apparent effect upon the carriers' aggregate revenues. I say 'apparent effect' because when the realities of the situation are taken into consideration, there is strong reason to believe that this fixing of maximum rates is hardly more than a benevolent gesture. If the carriers wish to secure as much revenue as possible from this traffic, they will do well to disregard these maximum rates and devote their attention to the existing competition and still more to that which can be foreseen in the near future."[36]

In addition to the increased revenue considerations, the Commission tried to arrive at some equitable relationship between rates in other parts of the country and the midcontinent rates. This, of course, meant increases in some instances and reductions in others. Individual commissioners were in disagreement as to what really was the effect of their efforts to increase carrier revenue and, at the same time, establish equitable rate relationships in the complex and highly competitive petroleum-transportation field. In any event, the results were not stable as supplementary reports and collateral cases of the succeeding years have shown.

Part 5.- Furniture.[37] Furniture was selected as the type of traffic which could bear a high level of rates to compensate the carriers under Section 15a for lower rate levels maintained on so-called basic commodities under the Hoch-Smith resolution. The shippers were interested in rate relationships rather than rate levels. At the time the investigation was initiated the furniture industry was enjoying a high degree of prosperity.

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[36] 171 I.C.C. 286, 348-349 (1931).

[37] 177 I.C.C. 5 (1931).

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While l.c.l. furniture traffic moved on class rates, much of the carload traffic moved on commodity or classification-exception ratings. Moreover, some of the minimum-weight loadings for carloads were relatively low. A similar interterritorial rate structure showed the influence of competitive factors in the industry.

Apparently accepting in principle the carrier's contention that the existing rates were in a chaotic state which justified the application of a class basis, the Commission arrived at that decision for carload rates. For l.c.l. rates, a modified version of the shippers' proposed formula for determining proper classifications and relationships between l.c.l. and carload traffic was accepted.

The revenue increases, which the carriers anticipated as a result of the prescription of their proposed rate levels, never materialized. If such increases had been made effective, the shippers demonstrated that they were ready, willing, and able to divert a large portion of the tonnage to motor carriers. So, during 1932 and 1933, rates were established on an entirely different plan. The novel feature of the new rates was the establishment of percentages of first-class with graded minimum-loading weights. These percentages, furthermore, were graded downward as the minimum-loading weights were graded upward. Thus the rates became dependent on the weight of the shipment.[38]

An appraisal of the effects of the Hoch-Smith rate-structure investigation on furniture rates must be made in the light of the reasons for the investigation of furniture rates in the first place. The carriers had welcomed the investigation as a potential source of increased revenue and the shippers had hoped to obtain rate concessions from it. In view of later events, the Commission's effort to help the carriers resulted in an academic rather than a realistic approach to the problem of rate-level or rate-structure adjustments on furniture traffic. The rates prescribed were, in reality, "paper rates."

The juncture of three economic forces explains the failure of the theories of the Commission and the carriers to work effectively. Motortruck competition shattered the monopoly concepts held by the Commission and the carriers; increased local competition in furniture manufacture and distribution disrupted established practices in the industry; and the depression affected the furniture business earlier and more severely than many other industries. The cumulative effect of these three factors made the Commission's findings out of date by the time they were published.

Part 6.- Iron and Steel Articles.[39] This investigation was confined to carload rates within official classification territory where more than 90 percent of the steel production of the United States was located. Most of the steel produced was fabricated within official territory or contiguous areas.

The Pittsburgh-plus system of fixing prices influenced the marketing of rolled steel for many years previous to 1924. An important effect of the system was to minimize the influence of freight rates in determining the market. After the system

[38] 209 I.C.C. 116 (1935).

[39] 155 I.C.C. 517 (1929). 161 I.C.C. 386 (1930). 161 I.C.C. 608 (1930). 168 I.C.C. 107 (1930). 232 I.C.C. 519 (1939).

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was discarded, the influence of freight rates was restored in the marketing of steel, and the proper adjustment of rates between competing points of production became of paramount importance.

The investigation indicated that the steel industry was prosperous, with keen competition between producers and producing points which emphasized rate structure rather than rate levels. Although the carriers were not earning the rate of return fixed by Section 15a, the general level of steel rates was relatively high when judged solely from the standpoint of transportation characteristics. Production of steel and volume of movement fluctuated without regard to rate levels. Many instances of improperly related rates were shown.

Application of the principles of the resolution to the steel rate structure was explained by the Commission: "if agricultural products and livestock are to receive the benefit of the lowest possible lawful rates compatible with the maintenance of adequate transportation service, commodities, such as the iron and steel articles here under consideration, which are able to bear relatively high rates, must be accorded rates which approach but do not exceed reasonable maxima."[40] Differences existed in the interpretation of the resolution but the Commission, shippers, and carriers seemed to agree that the objectives of the steel investigation were rate uniformity and protection of carrier revenues. Rate uniformity was achieved by the use of a distance scale but no provision was made for the maintenance of carrier revenues. In fact, one commissioner estimated that the proposed adjustments would reduce carrier revenues at least $2,500,000 annually.

This investigation gives another illustration of the conflict between Section 15a and the Hoch-Smith resolution. In view of the Commission's explanation of the application of the resolution to the investigation regarding steel, why were steel rates not increased generally to compensate for proposed reductions in agricultural rates?

Application of Section 15a was considered on a regional or territorial basis whereas the Hoch-Smith resolution was not restricted. However, the proportion of agricultural commodities carried in the total traffic varied greatly among the regions. For the carriers of the region considered in the steel investigation, agricultural traffic was a small part of the total traffic, and the revenue derived therefrom was mostly the result of divisions with originating carriers in other regions. Divisions are usually only a small portion of the through rate even though the mileage covered is relatively great. On the other hand, the carriers west of the Mississippi River obtained a large proportion of their traffic from agricultural commodities upon which they were chiefly dependent for their revenues, and for which they had been obliged to perform the expensive traffic collection service. Thus a reduction in agricultural rates on the western carriers would not be offset by an increase of steel rates in official territory. Two separate and distinct groups of carriers were involved and one territorial group could not be expected to contribute to another territorial group. In fact, prosperous lines objected even to lending excess profits to less fortunate lines in the same territory under the same Section 15a which had made the excess profits possible.

The equitable distribution of the transportation burden was carefully weighed in establishing the iron and steel rate adjustment. Although the resolution referred

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[40] 155 I.C.C. 517, 562 (1929).

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to depressed industries in general, agriculture was specifically selected as an industry for which transportation costs should be reduced. By implication, prosperous industries would have their rates increased so that carrier revenues might not be impaired. Industries served by official-territory carriers were relatively the most prosperous in the country. Agricultural enterprises served by carriers operating outside official territory were in a depressed condition.

The inherent weakness of the Hoch-Smith concept is thus revealed. Carriers serving the industrial territory were best able to make rate reductions and carriers serving the extensive agricultural territories were least able to do so. Almost without exception, carriers of the two groups were not under common management or control. This, in substance, is the reason "burden distribution" failed in the operation of the steel rate-structure investigation.

Parts 7 and 7A.– Grain and Grain Products.[41] The history of the rate structure of grain and grain products and the history of the Hoch-Smith resolution are intimately related. The origins, development, and final frustration of the Hoch-Smith concepts are imbedded in the rate-structure cases of this agricultural commodity. Much of this history has previously been discussed.

The record in the grain investigation is voluminous. It is extensive, thorough, and so complete as to obscure some of the real issues involved. Voluminous evidence was recorded of the depression in grain growing although it was the depression in grain that had led to the passage of the resolution that directed the investigation. By the time this and the many other complex points were more than adequately covered in the record and a decision was reached by the Commission, the general economic conditions had changed so much that the United States Supreme Court merely took "judicial notice" of the changes which adversely affected the carriers and directed a reopening of the case to consider carrier depression.

A complex and complicated system has built up around the movement of wheat from farm to market. Primary markets in competition for grain from various growing areas had rates related to each other. Rates through primary markets were equalized to destination markets. Several transit privileges were included in rates. The rate inbound to the primary market is a relatively high local rate which is the rate on the movement of basic interest to the producers. The rate outbound from the primary market is a relatively low rate which gives consideration to the high inbound rate. These outbound rates were the interest of the grain dealers in the primary market.

Transit privileges are generally to the advantage of the grain dealers, yet, the cost of these "free" transit privileges are assessed in the local rate paid by the producer for moving grain into the primary market. The proposal of a separate charge for transit privileges met with much opposition.

The greater part of the evidence and the chief contentions centered about rates for wheat. A close relation existed between the various wheat rates so that one could not be changed without having an effect upon the others. "In fact, generally speaking,

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[41]Part 7: 164 I.C.C. 619 (1930). 173 I.C.C. 511 (1931). 205 I.C.C. 301 (1934). 215 I.C.C. 83 (1936). 223 I.C.C. 235 (1937). 229 I.C.C. 9 (1938). 231 I.C.C. 793 (1939). 234 I.C.C. 694 (1939). Part 7A: 238 I.C.C. 207 (1940).

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all the rates on wheat may be likened to a huge blanket covering the entire country, and a pull on any part of this blanket to the extent of 1 or 2 cents, sometimes even a fraction of a cent, will be felt in every other part."[42] The effect of the rate changes made in the decision, on the movement between specific points and on carrier revenues, could not be foretold with any accuracy. Significantly, the Commission went on to state that the failure of the revision to afford adequate revenues for the carriers would prompt further proceedings.

> While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates.[43]

Several of the commissioners gave separate opinions which indicated that many of the fundamental issues were not entirely resolved by the decision. Aside from technical matters relating to rates, the comments of Commissioner Eastman should be interesting to the farm group.

> The extent to which the farmer will benefit from reductions is uncertain. He may, and probably will, be helped a little, but it will not go far to solve the agricultural problem. That, however, lies beyond our province.
>
> While I am no expert on the subject, my impression, for what it may be worth, is that it is highly important to the farmer in marketing his grain that all unnecessary waste and duplication in the process of distribution between the farm and the ultimate consumer be eliminated; and certainly much unnecessary waste in transportation now exists and is so much dead weight which the freight rates must carry. . . . Finally, in addition to the elimination of waste in distribution, I am strongly inclined to believe that to ensure the best price for their product proper cooperation among the farmers themselves is far more important than such matters as the "pulls" of competing market places, of which we have heard so much. In this proceeding the millers, dealers, and markets have consumed more time and record space than any other interests. . . . Throughout the record and upon argument the millers, dealers, and markets, while conceding their selfish interest in the rates, have endeavored to show that their activities and their various rate privileges, such as "free" transit and rate breaks and the parity of flour and wheat rates, all operate to the advantage of the farmer and result in a better price for his product than he would otherwise obtain. It has at times been difficult to understand how the farmer, with all these friends working zealously in his behalf, can yet be in a state of depression.[44]

The Commission's decision was made at the end of a period of great prosperity for the country as a whole. With the impact of the subsequent depression, causing a sharp reduction in carrier revenues, the railroads insisted that the grain case be reopened in the light of changed conditions. This the Commission refused to do until so ordered by the United States Supreme Court.[45]

Meanwhile, the rail carriers had a much smaller volume of traffic of all descriptions than when the original decision was made. Moreover, motor-carrier competition was producing repercussions which affected the carriers' attitude toward grain rates. This competition was a minor factor in the movement of grain, but it had seriously reduced the rail revenues from other traffic, and the rail carriers' defense of status quo in the rate levels for grain was determined. For their part, the market interests were experiencing a reduction in total volume, and the carriers felt pressure

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[42] 164 I.C.C. 619, 697 (1930).

[43] *Ibid.*, 698.

[44] *Ibid.*, 706, 712, 713.

[45] 284 U. S. 248 (1932).

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from that quarter to grant even more privileges. As a result, the findings on rehearing did not sustain the adjustments of the original decision.[46] Chairman Lee, concurring in part, stated that "subordination of the interests of the farmer is evident throughout the entire report. The result is that the local rates [which the farmer pays] prescribed to the primary or rate-break markets are relatively too high and the proportional rates [which are paid by the market interests] between the markets are relatively too low."[47]

Modifications in the original adjustment of grain-handling practices were gradually effected.[48] In the latter case, a dissenting opinion by Commissioner Eastman said, "The solicitude for the markets and the mills on the part of the carriers and on our own part engrafs upon the grain-rate structure all manner of wasteful privileges and concessions for which the carriers must in some way receive compensation. The accepted method has been to pad the grain rates. I am convinced that the result is greatly to increase the cost of distribution at the expense of the farmers. . . . What is now happening is not progress but retrogression."[49]

Dissenting in part, Commissioner Porter said,

In my former expression I also recorded my opinion that the prescribed rate-break adjustment was unbalanced, in that it gave too much to the primary markets in the relatively low proportionals [outbound rates from markets] and too little to the farmer and the country elevator in the relatively high gathering rates [inbound rates] to the markets. The granting here of free transit at primary markets under those proportionals has the effect of handing just that much more to the markets without corresponding benefits to the country grower or dealer, and to that extent aggravates the unbalanced situation referred to. . . .

This is bound to give additional benefits to the primary markets and result in added wasteful transportation with additional drains upon the carriers'revenue, without any important benefit to the man on or near the farm, who is even now contributing relatively more than a just share to the transportation burden. I am inclined to believe that, after almost a decade of exhaustive study in attempted regulation of this grain-rate adjustment at a cost of hundreds of thousands of dollars, the net result which will probably follow the action here taken is that, within a brief period, we will find ourselves practically where we started."[50]

Part 8.- Cottonseed, Its Products, and Related Articles.[51] Investigation of the cottonseed rate structure was undertaken largely because of the existence of 73 concurrent cases relating to this commodity. The issues raised in these cases had a common background of emphasis on the lack of uniformity in the rate structure.

The byproduct nature of cottonseed and its products limited the extent to which any freight-rate adjustments might afford relief to cottonseed producers, under the concepts embodied in the Hoch-Smith resolution. The prices received by the farmers had little, if any, effect upon the volume of cottonseed offered for sale. A farmer took what he could get for his seed and considered himself fortunate in seasons when the

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[46] 205 I.C.C. 301 (1934).

[47] *Ibid.*, 475.

[48] 215 I.C.C. 83 (1936); 223 I.C.C. 235 (1937).

[49] 223 I.C.C. 235, 248-249 (1937).

[50] *Ibid.*, 249, 250.

[51] 188 I.C.C. 605 (1932). 214 I.C.C. 331 (1936).
203 I.C.C. 177 (1934). 216 I.C.C. 493 (1936).
205 I.C.C. 15 (1934). 220 I.C.C. 137 (1937).
210 I.C.C. 748 (1935). 225 I.C.C. 257 (1937).

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price was above average. Cotton was the main product; the seed brought extra income, and the value of the seed might depend upon the demand for one or more of its by-products. Moreover, the cottonseed producer's interest in freight rates was confined to the haul of the seed to the oil mill, except when he was a member of an oil-mill association. Unregulated motor carriers handled a larger part of the traffic and even the rail-carrier traffic was a relatively short haul.

Because of these characteristics of the marketing and transportation of cottonseed, the investigation was devoted almost entirely to the rate structure of the products of the oil mills and was primarily concerned with the question of uniformity. It was necessary to examine the steps in the production of each of the byproducts as well as its movement, use, relative value, and marketing characteristics. Even competitive products were examined. The effort was directed toward removal of geographical preference and prejudice.

The rate structure established provided a structural uniformity using the linters and fiber rate scale as the base. As the structure provided *maximum* reasonable rates, the uniformity may have been theoretical in view of the existence of motortruck and barge competition which would limit the traffic moving on maximum rates. Because of the dissimilar commercial conditions of the associated byproducts, the same factors of supply and demand would not extend beyond a group of products except for a general cyclical change in the whole economic system and, even then, it would not necessarily be to the same degree.

In summarizing the effect of the Hoch-Smith resolution, it may be observed that this investigation was not inaugurated with relief for farmers in mind but rather as a means of resolving the issues of a multitude of cases relating to rates on cottonseed and its products. Hoch-Smith rate inquiries set the style for handling complex problems such as this one, and the resolution was responsible for the creation of investigatory machinery which could be readily used. Because of marketing and transportation characteristics, adjustments made possible by the investigation could not directly affect the farmers' return. Because of the diversity of uses of the commodities, difficulty was naturally experienced in obtaining a common criterion for value of service consideration. The prescription of maximum reasonable rates with established relationships proved unrealistic, because of competition by motortrucks. On the whole, this investigation suggests the possibility of carrying uniformity too far, particularly in observing the principle in theory but overlooking the actual practice.

Parts 9 and 9A.- Livestock, Southern Territory Rates and Western District Rates.[52] The rate-structure investigation regarding livestock was concerned chiefly with problems of place discrimination which were the outgrowth of the general increases and reductions in rates. Lack of uniformity in rate structure rather than the rate level was the principal issue. The Deciduous Fruit Decision had been rendered by the court before these cases were decided by the Commission.[53]

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[52]Part 9: 171 I.C.C. 721 (1930). 182 I.C.C. 491 (1932). 190 I.C.C. 611 (1933). 197 I.C.C. 83 (1933).
Part 9A: 176 I.C.C. 1 (1931). 179 I.C.C. 104 (1931). 185 I.C.C. 457 (1932). 190 I.C.C. 175 (1932). 200 I.C.C. 535 (1934). 201 I.C.C. 795 (1934). 238 I.C.C. 425 (1940).

[53]*Ann Arbor Railroad Co. v. United States*, 281 U. S. 658. Decided June 2, 1930.

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In the southern territory (southeast), rates for livestock had been made on several different bases with no uniformity. Intrastate rates were less than interstate rates and other discriminations were common. Later, a uniform distance scale of rates for interstate application was proposed throughout the south, but this was rejected and a compromise distance scale was established on May 16, 1923. The intrastate application of the scale was to be obtained by the shippers. The scale was not established intrastate in Georgia and South Carolina and parts of Alabama, Mississippi, and Florida. Movement of livestock was toward the north and east with numerous convenient markets. Long-distance movement was unnecessary.

The Commission upheld the compromise scale as reasonable but found undue prejudice against persons and localities in interstate commerce and unjust discrimination against interstate commerce from low intrastate rates. Certain other unreasonable rates and practices were remedied. "The Hoch-Smith resolution relied upon, among other things, by the shippers to warrant a reduction in rates set up no standard of reasonableness of rate level, or relation other than that already provided by the interstate commerce act. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. The conclusions herein are reached under that act."[54]

In the western district, the lack of uniformity in rates for livestock resulted from inconsistency in the application of the general rate increases and reductions and from the practice of making rates in terms of different bases from one locality to another. As a result, long- and short-haul rate relationships had been disrupted, and the inherent competitive advantage of both local markets and distant markets had been altered. In addition, motor-carrier competition on short hauls had become an increasingly important factor.

A distance-scale method of rate making seemed desirable to all, but the central-western markets advocated a uniform rate of progression, whereas far-western producers supported a tapering scale of progression having small spreads between Missouri River markets and the Chicago market, with a trial market-transit privilege. In the end, the Commission prescribed two rate levels within the western district, one for the area east of the Rockies and the other for the mountain-Pacific territory. The first area combined the western trunk-line and the southwestern territories. Thus, the livestock rate-structure investigation not only tended toward rate uniformity but, more significantly in view of the Hoch-Smith resolution, toward rate increases over a wide area of the Plains States with decreases in the mountain-Pacific area.

Later cases have not greatly changed the relationships set up as a result of the investigation, but motor-carrier competition has made heavy inroads on short-haul traffic which the rails seem unable to regain because of the superior service of the motortrucks.

Part 10.- Hay Rates Within the Western District.[55] The extent to which the Interstate Commerce Commission was willing and/or able to follow the mandate of the Hoch-Smith resolution in its investigation of rates on agricultural products was indicated in the case of hay. The Commission concluded, after reviewing the facts presented, that it could not lawfully require any general, uniform readjustment of the freight rates on hay in the western district or in any major portions thereof, and that it would have to confine itself to removal of specific violations.

[54] 171 I.C.C. 721, 741 (1930).

[55] 195 I.C.C. 461 (1933).

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Intrastate rates on hay were generally lower than interstate rates, but even the latter were shown to be only 47 percent above pre-war levels, while rates averaged 52 percent higher on all commodities other than wheat and coarse grains. The reasonableness of rates for hay, furthermore, was seldom questioned before the rate-structure investigation was begun, and shippers almost without exception asked that the current adjustment not be disturbed.[56] Although rate uniformity was desirable in general, the opinion of the Commission was that here it was undesirable. The rates in effect were the result of the free play of competitive forces and to strait jacket these competitive forces with a uniform level was not practicable. The creation of one level of rates from producing and nonproducing points alike, where hay moved steadily and where it never moved, would have required a scale so high that it would have been unreasonable when applied to actual movements where current rates were based on characteristics of such movements. "The futility of such action to gain the ends for which this investigation was instituted is clearly shown by this record."[57]

When the general investigation of the rate structure was inaugurated, the Commission faced a problem of how far it was desirable, practicable, and necessary to carry the application of Hoch-Smith concepts in administering the Interstate Commerce Act. This was an administrative problem entirely apart from any consideration of the judicial interpretation of the resolution.

Eight years after passage of the resolution, the Commission found some definite answers. First, if the great majority of the shippers and carriers were satisfied with the current adjustment, no change was desirable. Second, if the current adjustment was the product of the free play of competitive forces, intervention by a regulatory body was unwise. Third, if the rail movement accounted for only an insignificant part of the total production, the prescription of an over-all rate level to secure uniformity was unsound. In 1922, only 1.5 percent of the total production of hay was estimated to have been shipped by rail. Closely allied to this factor was the futility of establishing a rate level high enough to be compensatory for every movement, real or potential, because such a rate level would stifle what small volume of rail traffic existed. Finally, it was necessary that the Commission be free to act. The Supreme Court had forced the Commission to make such a choice and the Commission had only one alternative.[58] After having established maximum reasonable rates, a finding of unreasonableness as to any particular rate which is lower than the prescribed maximum, cannot be sustained in the courts. Therefore, the importance of being unhampered in the determination of the reasonableness of particular rates outweighted the desirability of rate uniformity.

Parts 11 and 11A - Sand, Gravel, Crushed Stone and Shells Within the Southwest.[59] The characteristics of the sand-and-gravel movement raise the question of the relevancy of an investigation of their rate structure under the Hoch-Smith resolution. Sand, gravel, and crushed stone move in large volume, usually for short distances; they are loaded to capacity, and are the lowest grades of freight, incurring little risk of loss

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[56] *Ibid.*, 467.

[57] *Ibid.*, 477.

[58] *Arizona Grocery Co. v. A., T. & S. F. Ry. Co.*, 284 U. S. 370 (1932).

[59] Part 11: 155 I.C.C. 247 (1929). Part 11A: 177 I.C.C. 621 (1931).
157 I.C.C. 498 (1929).
213 I.C.C. 44 (1935).
213 I.C.C. 559 (1936).

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or damage. In the large horizontal rate changes of 1918, 1920, and 1922, no exceptions were made for their benefit. Partly because of this fact, producers had felt the competition of local production and the carriers had to meet both water and highway competition.

Investigation of rates for sand and gravel was distinctive in that the consumers represented were not individuals or private corporations, but were State highway commissions. Producers of sand and gravel, furthermore, took a relatively inactive part in the proceedings.

According to the record, the prices of these commodities had a considerable range throughout the territory, and prevailing prices at more than 300 production centers in the territory were the result of local competitive conditions. Few other commodities bore as high a percentage of freight charges in relation to value of commodity. On the other hand, few commodities moved at such low rates as did this traffic which, moreover, produced a substantial part of the carriers' revenue.

All parties generally admitted that the principal defect of the existing distance scale was its irregular gradation, which had resulted from the horizontal rate changes. When the State highway commissions insisted that low rates on these commodities were in the public interest, the carriers referred to the Hoch-Smith resolution. They said that the traffic in sand and gravel was nonagricultural, the industry was not in a depression, and the traffic should be required to bear its share of the transportation burden.

Although insisting that adjustments in the rate structure should be based on usual transportation standards, the Commission established rate levels lower than those previously effective. This was interesting since the Commission had said that notwithstanding "the existing rate situation the evidence indicates as a whole a rather free movement of this traffic throughout the Southwest, except where due to location of plants certain aggravated relative rate situations are presented."[60] Commissioner Eastman expressed an opinion that the majority decision showed inconsistency in prescribing a lower level of rates in the southwest than prevailed in other parts of the country, whereas in almost every other instance commodities moved on higher rate levels in that territory.[61]

Part 11A resulted from a complaint of the Missouri State Commission and extended the territory to Kansas and Missouri for the rate prescribed in Part 11. Commissioners Woodlock, Eastman, and Porter [illegible] were below [illegible], but even low rate levels did not keep the traffic and revenue for the rails. In the *Fifteen Percent Case, 1937-1938*, it was stated:

> The total production of sand, gravel, and crushed stone in 1926 was about equal to that in 1928, but while 49 percent of the total production in 1928 was shipped by railroad, in 1936 only 24.1 percent of the total so moved. The principal reasons for this decline in rail movement are truck and water competition, the noncommercial operations of the States or political subdivisions thereof, and the increased and widespread use of portable plants and of roadside pits and quarries as sources of supply which are not served by rail carriers.

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[60] 155 I.C.C. 247, 277 (1929).

[61] *Ibid.*, 283.

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> Although applicants have established many voluntarily reduced truck-competitive rail rates, the trucking of these commodities, which the record indicates is performed largely by contract or private carriers, has continued to increase throughout nearly every section of the country. . . . As indicating the extent to which rates have been reduced to meet motortruck and water competition, it was shown that out of a typical large aggregate of these commodities shipped by rail in 1937 almost 32 percent moved at special or reduced rates.[62]

If the original intentions of the investigation had been to increase rates on sand and gravel, the futility of such an attempt was indicated by the transfer of the traffic to competitive carriers and to competitive sources of supply. Since no cost studies were brought into the decision, the question of the compensatory nature of the rates prescribed seems not to have been considered important. All in all, Parts 11 and 11A seem out of place in a rate-structure investigation, especially under the Hoch-Smith resolution.

Part 12.- Nonferrous Metals.[63] In its search for traffic that could produce additional revenue to the carriers through rate increases, the Commission discovered in nonferrous metals "a good opportunity for the carriers to secure a needed increase in revenues." But such an increase did not materialize in the decision on the rate-structure investigation. The failure of the theories of the Hoch-Smith resolution to prove applicable to this traffic points out a weakness of the resolution.

Ores, concentrates, smelter products, and the refined metals constituted desirable traffic. These commodities "loaded heavily" and moved throughout the year in large volume between a relatively few points. They caused very little expense to the railroads for loss or damage, required no special equipment or expedited service, and involved no large mileage for empty cars. Four phases existed in the transportation of nonferrous metals: 1, ore from mine to concentrating mill, 2, concentrates to smelters, 3, smelter products to refineries, and 4, refined metals to manufacturing plants. At the time of the investigation, the movement of ores and concentrates accounted for two-thirds of all the nonferrous traffic tonnage. The direction of traffic flow was indicated by the fact that copper, lead, and zinc were largely manufactured and consumed in official territory—copper to the extent of 95 percent of the total copper, brass, and bronze articles manufactured.

Mining is a major industry in mountain-Pacific territory. Rates on movements of ores and concentrates applied not only to the greater part of the traffic but also affected rate adjustments on the remainder of the nonferrous traffic. The greater part of the movement was intrastate, and the very low intrastate levels had either the tacit or actual approval of State regulatory bodies. The large horizontal increases of 1918 and 1920 had been removed. In Utah, for example, the current rates were 25 to 50 cents per ton below the 1909 level. Rate reductions had been voluntarily made by the carriers, mostly during the post-war depression.

The rate structure had no uniformity as to considerations of distance and value. Blanket rates applied on movements from individual producing districts. Each rate was arrived at by representations of shippers that the grade of ores and concentrates, the volume available, and the costs of producing them and extracting the metal, would justify only a certain expense of transportation per ton. Where rates were not

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[62] 226 I.C.C. 41, 109-110 (1938).

[63] 204 I.C.C. 319 (1934).

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determined by this method, length of haul and value of commodity were considered. The existence of numerous instances of inequalities was apparent but no complaints were registered by shippers or carriers as to this rate structure.

The Commission had thought that an investigation as to the reasonableness of these rates was necessary, although shippers, carriers, and even State commissions were almost unanimously opposed to the establishment of a distance scale. No information regarding cost was offered by either shippers or carriers, so recourse had to be made to comparisons of rate and revenue. The record showed that revenues per car and per car-mile compared favorably with those of other commodities. Revenues per ton-mile were much lower. These comparisons led the Commission to conclude that the rates in question occupied the lower zone of reasonableness and were not as a whole less than compensatory, even though information on cost was missing.

In substance, the Commission found that no general rate adjustment was warranted because: 1, a distance scale was held to be undesirable by shippers and carriers, 2, rates had to continue to be made to meet particular needs, 3, traffic was localized, and 4, there were no complaints. Rates on traffic originating in less important producing areas of the country were also found by the Commission to be less than reasonable maxima but not less than reasonable minima. Here, also, the rates had been made to move volume tonnage. The Commission proposed no change in the existing rate structure, principally because the rates were not assailed by shippers, but it pointed out that a revision, if it were to be made, would result in many increases.

Refined copper was consumed chiefly in official territory. Again, there was no consistency in the rate structure, no alleged unreasonableness, no widespread complaint, and, consequently, no change was proposed.

Thirty manufacturers accounted for 95 percent of the total rail movement of copper articles. With the exception of the movement from New England points to New York harbor on commodity rates, originally established to meet water competition not now effective, 90 to 95 percent of copper articles moved on class rates. The existing commodity rates were found by the Commission to be depressed rates – less than the reasonable maxima but not less than the minima. The proposal of the New England carriers to reestablish a class-rate basis met with no objection from the Commission. It was the Commission's belief, however, that motortruck competition would thwart any attempts at rate increases. This belief was more than substantiated after the close of the hearings when the railroads inaugurated reductions of 20 percent, generally, in official territory to meet truck competition.

In reviewing lead and zinc rates in general, the Commission concluded that, although less attention had been paid to the value of the commodity as a distinct factor in creating the existing rate structure, the arrangement was apparently mutually satisfactory to the carriers and the shippers. The rates were described as being below the reasonable maxima and in many cases close to reasonable minima.

The gist of the Commission's finding in respect to the traffic of tin was that the rates and movement were relatively unimportant in an investigation having the breadth of scope of the current one.

In contrast to the localized nature of the movement of nonferrous metals in general, the traffic in scrap and byproducts was widespread. Competition existed

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between the scrap and virgin metals, the value of the first being less than the value of the second. Largely because of the widespread nature of the movement, a uniform application of maximum reasonable rates was prescribed.

A Factor Overlooked by the Resolution. If the Hoch-Smith resolution failed to accomplish the ends sought by its sponsors, one cause of the failure was a fundamental weakness of one of its prime assumptions. In the case of nonferrous metals the commodities under consideration were moving on extremely low rates. Here was desirable traffic from a transportation standpoint. Here was a well-established industry made up of prosperous manufacturers whose operations fluctuated through a feast and famine of activity. Why, then, were the rates obviously based on the famine level of operations and maintained at that level throughout the various swings of the business cycle? Why were the rate reductions which were voluntarily made by the carriers such, that, if they had been required by the Commission, to use Commissioner Eastman's words, "the air would have been filled with the complaints of the railroads against the evils of oppressive regulation"?

The very important fact is that these were questions which only the managements of individual railroads could answer. Basically, it was a matter of managerial discretion and responsibility. Although no information regarding costs had been given, the Commission had considered the rates to be compensatory. *If a given rate was lawful, judged by the criteria set forth in the Interstate Commerce Act, the Commission had no authority to require the carriers to establish any other rate.* Such a restriction on action by the Commission prevailed, even though the Commission might believe that a different rate would assist the carriers in making up any deficiencies in revenue which might result from the lower rates on agricultural commodities contemplated by the resolution. Such decisions of the railroad managements were subject to review by the stockholders of the railroads and not by the Commission. The resolution failed to take that fact into account.

Part 13.- Salt.[64] As explained by the Commission, "This proceeding is a general investigation of the rates on salt throughout the entire United States, with a view to determining whether that commodity is sustaining its lawful share of the general transportation burden, the lawful level of the rates on that commodity in relation to the rates on other commodities, and the lawful relation of the rates from the various producing fields."[65]

Salt is usually divided into two general classes, rock salt and evaporated salt. Rock salt is mined; evaporated salt is produced to some extent from natural surface or underground brine, but the largest part comes from brine made by forcing fresh water over solid salt deposits. Although salt is produced at a number of fields throughout the United States, nearly three-fourths of the total production in 1929 was in Michigan, New York, and Ohio.

There is no known substitute for salt for any of the purposes for which it is used, so salt is not competitive with any other commodity.

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[64] 197 I.C.C. 115 (1933).
203 I.C.C. 451 (1934).
222 I.C.C. 375 (1937).
227 I.C.C. 347 (1938).

[65] 197 I.C.C. 115, 117 (1933).

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There is, however, keen competition between the producers in each field, as a result of which all producing points in a given field are usually grouped and take the same rates, except for short hauls. There is just as keen competition between the various producing fields and between the carriers serving them, and accordingly, the relation of the rates from the various fields is of importance to both producers and carriers.

While the bulk of the salt produced in each field is distributed to adjacent territory, each also distributes in territory adjacent to other fields. . . . The fact that salt is generally sold on a basis which requires the seller to absorb the difference between the freight rate from his producing point and the lowest freight rate from any producing point, is indicative of the keen competition between the various fields.[66]

Transportation characteristics of rock salt are materially different from those of evaporated salt. Thus, the bulk salt had heavier loading characteristics than the package or the mixed loadings. Then, too, the movement of bulk salt is more concentrate than that of package salt or mixed carloads, because bulk salt usually goes to commercial users and package salt to many distributors for redistribution. Moreover, the average haul of bulk salt was generally shorter than that of package or mixed shipments. Both rock and evaporated salt are shipped in bulk, loose in the cars, and in containers of various kinds. Although box cars are commonly used, bulk rock salt occasionally is shipped in open-top cars. Evaporated salt requires a better-conditioned car whether in bulk, package, or mixed shipments. Cars used for bulk salt must be thoroughly cleaned before they can be used for other high-grade traffic. The average value of evaporated salt is more than twice as great as that of rock salt. The greater value of evaporated salt is due principally to the additional cost of producing the higher grades, all of which (except in Louisiana) are of evaporated salt which is generally packaged.

A summary of the salt rate cases, from 1923, indicated that they had resulted in rates which had yielded the carriers, as a whole, revenues more than $1,500,000 below the sum produced by previously existing rates. Evidence showed the unprosperous condition of the carriers in 1930, and that thereafter such conditions became progressively worse until the spring of 1933, since which time there had been improvement, although their condition in the fall of 1933 was still less favorable than in 1930 and 1931, and they were currently in dire need of additional revenues.

In the words of the Commission, "The most important questions presented in these proceedings are (1) whether there should be a single or dual basis of rates on salt, (2) what the general level of rates should be, and (3) what the relation of the rates from competing producing fields to certain destination territories should be."[67] Later in the statement of the decision it acknowledged that a "strong and convincing showing has been made as to the necessity and propriety of a dual basis of rates on salt, particularly in official territory and along the borders thereof. Whether such a basis should be prescribed throughout the entire country, and what the commodity descriptions and minimum weights should be under a dual rate basis are not free from difficulty, however."[68] Everything considered, the Commission believed the line should be drawn between bulk and package salt under a dual basis of rates. The Commission decided that the dual basis should be uniformly applied because of the highly competitive conditions that exist in the salt industry and the desirability of not having severe spreads in the rates at the borders of the various rate territories, in addition to the uniform differences in transportation conditions throughout the country. The prescribed rates were estimated as increasing the revenues of the carriers as a whole approximately $1,000,000 annually.

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[66]*Ibid.*, 122.

[67]*Ibid.*, 156.

[68]*Ibid.*, 161.

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INTERPRETATIONS OF THE HOCH-SMITH RESOLUTION

Congressional Interpretations (Rate-Structure Views Before Congress; Retrospective Views of Senators); Interstate Commerce Commission Interpretations (The First Rate-Structure Case, Docket 17,000, Part 1; Reconstruction of Rate Structure — southern class rate investigation, Docket 17,000 rate-structure investigation; Special Consideration to Agricultural Products; Special Consideration of Depressed Industries; No New Rate-Making Authority; The Lowest Possible Rates; The Deciduous-Fruit Case — Commissioner Eastman's comment, comments of other commissioners, Commission decision on further consideration); Interpretation by the Courts (The Supreme Court Decision in the Deciduous-Fruit case — Eastman comment on decision; The Commission Grain Case — the grain case before the Supreme Court; Supreme Court Considers Intrastate Rates and Hoch-Smith Resolution; Lake Cargo Coal Before Commission — question becomes moot before Supreme Court).

CONGRESSIONAL INTERPRETATIONS

As shown in the section concerning its history, the Hoch-Smith resolution is a hybrid. Representative Homer Hoch introduced two resolutions in the House, each providing for a general rate-structure investigation.[1] The second became a part of the resolution as passed by the Congress. Senator Ellison D. Smith introduced in the Senate, a very short resolution which declared agriculture to be the basic industry of the country and, therefore, entitled to special consideration in railroad rates.[2] Although the measure was finally passed as a Senate joint resolution, it is substantially an amalgam and properly designated as the Hoch-Smith resolution.

Three general directions were given by the Congress to the Interstate Commerce Commission: 1, in adjusting freight rates, consider the condition of the industries concerned; 2, make a rate-structure investigation, and in readjustments give due regard to value of service, development of the entire country, and maintenance of the transportation system; and 3, give agricultural products the lowest possible lawful rates compatible with the maintenance of transportation service. The comprehensive nature of each of these instructions and the possible conflict among them were called to the attention of Congress in the public hearings, but the resolution was passed without further clarification.

Congress was not deterred by an estimate that a rate-structure investigation would take at least 10 years, nor did the difficulty of ascertaining the economic condition of industries seem an abnormal task — the depression in agriculture was obvious and required only the readjustment of rates to the lowest possible lawful level. Congress, however, tied a string to its promise of lower railroad rates by conditioning lower rates upon "the maintenance of an adequate system of transportation" or "compatible with the maintenance of adequate transportation service." It declined either to consider a bill for the repeal of Section 15a or to clarify the Hoch-Smith resolution. Some of the misunderstanding arose during the House hearings where the Commission's representatives had said there was no conflict between the two pieces of legislation.

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[1]House Joint Resolutions 94, December 17, 1923, and 141, January 16, 1924; *Congressional Record*, 68th Congress, 1st Session, 346, 1071.

[2]Senate Joint Resolution 107, March 24, 1924; *Congressional Record*, 68th Congress, 1st Session, 4780.

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In the hearings and discussions, emphasis was placed repeatedly upon value of service as a rate-making principle, and the Hoch-Smith resolution is sometimes referred to as a Congressional declaration that the value-of-service principle is "the true policy in rate making to be pursued by the Interstate Commerce Commission." Value of service was considered to be in proportion to the market value of the commodity. Inasmuch as the maintenance of an adequate transportation system was a prerequisite condition to the reduction of rates, it must have been assumed that value of service would always be more than the cost of service including all out-of-pocket costs, overhead costs, and a profit on the railroad investment.

Value of service as a rate-making principle had been used from the earliest days of the railroads, so its appearance in the Hoch-Smith resolution did not indicate the introduction of a new principle. Under regulation, rate cases had placed great emphasis on cost of service, and court decisions had established the principle that a set rate which did not cover full costs plus a profit would be confiscatory. When the horizontal changes of 1920 further disrupted the structure so that rates approximated or exceeded the value of service, the prevailing depression in agriculture intensified the discontent with railroad rates. Thus, attention was again directed toward value of service rather than cost of service.

Rate-Structure Views Before Congress. President Harding, President Coolidge, and Secretary of Commerce Hoover who later became President, had urged Congress to pass legislation leading toward a readjustment of railroad rates. Harding sought the decentralization of industry to promote better living conditions; and Coolidge followed this up with Secretary Hoover's recommendation that the rate structure be investigated to remove the many inequities which had arisen partly as a result of the horizontal rate changes. Secretary Hoover had also inspired a report by a committee of the United States Chamber of Commerce on the desirability of overhauling the rate structure.

The Joint Commission on Agricultural Inquiry, reporting in 1921, recommended reductions in the rates on agricultural products and other basic commodities and urged greater consideration "to the relative value of commodities and existing and prospective economic conditions."

Congressman Hoch in explaining his resolution said it conferred no authority upon the Interstate Commerce Commission which that Commission did not already have, and that it was simply a direction to proceed upon a particular form of inquiry which might otherwise be considered unnecessary or expensive.

All these views, together with the testimony of witnesses for the Commission, were before Congress when it passed the Hoch-Smith resolution. In the final House debates, in June 1924, the resolution was both hailed as a party aid for agriculture and depressed industries and denounced as a meaningless gesture and a political sop. The political campaign in the fall of 1924 was for a presidential election. When Congress convened after the election, the Senate passed the resolution in a routine way, and within a few days, it was signed by President Coolidge without flourish. Seemingly, legislative interest in the resolution had largely died down.

Retrospective Views of Senators. An indication of what some legislators thought of the Hoch-Smith resolution is given in the following passages from the 1928 Senate hearings on the confirmation of Mr. John J. Esch for reappointment as an Interstate Commerce Commissioner.

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Senator Glass. What has the Hoch-Smith resolution got to do with it, Mr. Esch? Of what force is a joint resolution of the Congress when and if it comes in direct conflict with the statute?

Commissioner Esch. We are not supposed to pass upon the constitutionality of statues or of resolutions of Congress.

Senator Glass. Well, do you mean to say that the commission is obliged to act upon a joint resolution of Congress when it is obviously in conflict with a statute [Section 15a of the Transportation Act of 1920]?

Commissioner Esch. I say we are not the authority to determine the constitutionality of an act of Congress or a resolution. We assume that Congress acted within its power.

Senator Glass. There is nothing unconstitutional about the Hoch-Smith resolution. There is really nothing contrary to the statute in the Hoch-Smith resolution. I have not been here, but I assume your attention has been called to the fact that the resolution directs this inquiry and the conclusions to be had in accordance with the law. Therefore the Hoch-Smith resolution did not modify in the remotest way the statute itself. *It was a mere expression of the sense of Congress that if at that time, momentarily, any relief could be given to these interests in accordance with law, that Congress would desire it to be done. That is all there is to the Hoch-Smith resolution.*

Commissioner Esch. It may be construed, then, as merely directory?

Senator Glass. Well, directory within the scope of the statute. It says so. It says that your inquiry may be had and your conclusions reached in accordance with the law. Therefore it does not modify the law.

Commissioner Esch. It is a direction to the commission to take into consideration certain things.

Senator Glass. In accordance with the law. *It directs the commission to act, if it may, after its inquiry in accordance with the law, and it could not direct the commission to do it outside of the law, because a joint resolution of Congress can not be substituted for a statute. It can not repeal or modify a statute.*

Commissioner Esch. It is a joint resolution signed by the President.

Senator Glass. No; concurrent resolutions are signed by the President.

Commissioner Esch. No; this is a joint resolution signed by the President, the Hoch-Smith resolution.

Senator Glass. That does not matter. But the joint resolution itself says that the inquiry must be had and the conclusions reached in accordance with the statute. So it does not modify the statute the least bit in the world.

Commissioner Esch. Well, as I stated—perhaps you were not here—we have in a case decided last year, the Western Fruit case, interpreted the Hoch-Smith resolution. Our interpretation of it is now contested in court, and the opponents of our action contend that if our interpretation of that resolution is correct, then the resolution itself is unconstitutional. Those issues are in court and our action has been confirmed by the lower court, and it is on its way to the Supreme Court.

Senator Glass. Then you hold, and you think the commission intends to hold, that under the Hoch-Smith resolution it is authorized to conduct inquiries and to reach conclusions outside the statute?

Commissioner Esch. No; I think myself we must be within the statute. I am only speaking for myself. I think we must comply with the statute.

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Senator Glass. *Then of what relevancy is the Hoch-Smith resolution if you must comply with the statute? It simply ordered an inquiry and directed that conclusions be reached in accordance with the law. Therefore your whole attention, it seems to me, should then have been directed to what the law says and not what the Hoch-Smith resolution says.*

Commissioner Esch. Of course, it depends in a way upon the volume of traffic which may move as to whether or not we may consider these other factors that are alluded to in the Hoch-Smith resolution, and they speak about making readjustments and ironing out discrepancies that now exist and things of that kind.

Senator Glass. That is the business of the commission, anyhow, is it not, in any event, whether Congress passes a joint resolution or not?

Commissioner Esch.. We have been doing that in a piecemeal fashion up to the time of the Hoch-Smith resolution. Now, we are doing it in a more wholesale fashion.

Senator Glass. Well, I want to put a stop to it myself.

Commissioner Esch. We have some 13 parts now under the Hoch-Smith resolution that are in process.

Senator Glass. You regard the Hoch-Smith resolution as a permanent statutory law, do you?

Commissioner Esch. I think it is directory, a directing act of Congress, to guide the commission in the performance of its duty.

Senator Glass. *Congress has no right to guide the commission in the performance of its duty except within the scope of the statute that Congress has already passed.*

Commissioner Esch. It prescribes the commission's duties, but in this calls particular attention to the things which the commission might do or should do. Therefore it says that it is the true policy of rate making, etc., in adjusting freight rates that the conditions which at any time prevail in our several industries should be considered. Now, there Congress saw fit to direct our attention to that phase of the matter. We probably did not pay as much attention to that feature; that is, the condition of industry theretofore. Now by that direction the commission takes into consideration the conditions of an industry in the prescribing of rates or an investigation of rate structures. [Italics supplied].[3]

At the end of the hearings, Senator Alben W. Barkley, in a statement for the record, gave a further explanation of the legislative intention embodied in the resolution.

In the matter of the Hoch-Smith resolution Commissioner Aitchison yesterday seemed to recent [*sic*] the suggestion that that was a mere political gesture. I can understand, of course, that the commission in considering the Hoch-Smith resolution must take it as is [*sic*] comes to it. Though I do not think it is at all inappropriate to consider what went on in the House and the Senate if it sheds any light on the interpretation of that resolution.

I would like to put in the record the circumstances under which that resolution was introduced. It was considered by the committee, of which I was then a member. Senator Capper, of Kansas, and other distinguished Senators and Members of the House were introducing and urging bills for the repeal of section 15 (a) of the transportation act on the ground that under the so-called guarantee provisions the Interstate Commerce Commission was fixing freight rates that were unjust and unfair to agriculture, which at that time was depressed. It was apparent that neither committee in the Senate or the House favored the repeal of section 15 (a). It was almost equal[ly] apparent that no legislation for the benefit of agriculture was immediately in prospect. And it was generally understood in the committee and on the floor of the House that the Hoch-Smith resolution was an effort to impress upon the commission the desirability of giving some preference to agricultural products as compared with other products shipped throughout the United States.

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[3] *Hearings . . . on the Confirmation of John J. Esch . . . ,* 76-78.

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> It was never my understanding from what occurred in the committee or in the debates in the House that the Hoch-Smith resolution was to be taken as a mandate or as a suggestion to the Interstate Commerce Commission to undertake to equalize the difference in industrial conditions existing within the same industry in different sections of the country, but that its primary purpose was to take one industry as a whole compared with another industry as a whole with especial reference to agriculture, and try to work out a rate structure that would be beneficial to the depressed condition of agriculture which existed at that time.[4]

INTERSTATE COMMERCE COMMISSION INTERPRETATIONS

At the House Committee hearings, representatives of the Interstate Commerce Commission displayed a reluctance to accept the tasks imposed on them by the Hoch-Smith resolution. Of the two separate resolutions, Hoch's, which provided for a rate-structure investigation with subsequent adjustments, was preferred. At the same time the Commission's representatives emphasized, to the point of magnifying, the volume of work and amount of time required for such an investigation. As to the Smith resolution providing special consideration for agricultural products, representatives of the Commission asked "where can the increases necessary to compensate for rate reductions on agricultural products or 'basic' commodities be obtained?" The Congressional instruction in Section 15a of the Transportation Act of 1920 was said to require the Commission to provide a rate level which would allow the railroads a net return of 5-1/2 to 6 percent on aggregate investments.

Secretary Hoover had suggested that rates on less-than-carload traffic and certain class-rate traffic were too low in comparison with those on certain primary commodities. He thought adjustments in these rate relationships would help solve the problem. The Commission claimed that many necessities moved on l.c.l. rates and that, in some sections, staples move on class rates. The difficulty of selecting "luxuries" for rate increases was pointed out in this confusion of classification and commodity traffic in different parts of the country.

Value of service as a rate-making principle was not new to the representatives of the Commission, but they did not think rates should fluctuate with price levels. In dealing with rate groups, the Commission had based them on cost of service plus a fair return under Section 15a, but in dealing with individual rates, "the commission has never construed the law as requiring the application of such a principle to individual rates, and in actual practice this would be impossible for two reasons; first, there are no means of ascertaining the cost of handling perticular shipments with even approximate accuracy; and, second, because to do so would undoubtedly in many instances throw too heavy a burden upon low-grade commodities and too little upon high-grade articles . . ."[5] Although the market value of commodities was to be considered in determining rates under the resolution, so was the maintenance of an adequate system of transportation. This was interpreted as meaning that the effect of Section 15a was in no way altered by the resolution, inasmuch as the 5-1/2 to 6 percent fair return was considered necessary for the maintenance of an adequate transportation system.

The Interstate Commerce Commission created division 6 for carrying out the rate-structure investigation under Docket 17,000. Reconstruction of the rate structure was undertaken for each selected commodity and its related products, as a part of Docket 17,000. Although the Commission may not have been enthusiastic, it took the Hoch-Smith resolution seriously and not merely as a "sop to agriculture."

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[4]*Ibid.*, 270.

[5]*Railroad Rate Structure Survey*, 36.

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The First Rate-Structure Case, Docket 17,000, Part 1. The western and mountain-Pacific groups of railroads, anticipating a reduction in rates of agricultural products when the order setting up Docket 17,000 was issued, took the initiative and petitioned for an immediate increase in revenues. Their condition, they alleged, had become precarious because they had not earned the fair rate of return provided under Section 15a since the passage of the Transportation Act of 1920. These petitions were first docketed as *Ex parte 87* and later made Part 1 of Docket 17,000.[6] Although Class 1 carriers of the western district had failed to earn 5-3/4 percent return in 1924 by over $181,000,000, they did not ask to recover that amount, which would have required an increase of approximately 11 percent in freight revenue. Instead, they urged the existence of an emergency so acute that they were impelled to seek a 5-percent advance in freight rates which, however, was subject to numerous modifications and exceptions. Their proposal would have produced approximately $80,000,000 on the basis of 1924 traffic statistics. To overcome the remainder of the alleged deficiency, the carriers proposed an upward revision and readjustment of Western trunk-line class rates, increased express rates, increased mail compensation, and readjustments of particular rates. In a supplemental petition, it was estimated that a proposed class-rate readjustment would produce over $11,500,000. This petition was docketed separately as Part 2 of Docket 17,000, *Ex parte 87 (Sub.-No.1). Western Trunk-Line Class Rates.*[7]

This first case in Docket 17,000, Part 1, was based primarily "upon the fact that the net railway operating income has for some years fallen below the equivalent of a 5.75 per cent return on their recorded investment in property used for transportation purposes . . . " which was the rate of return allowed under Section 15a.[8] Thus, at the very start, the Commission was faced with the conflict between the Hoch-Smith resolution and Section 15a.

Counsel for various State interests presented a motion to dismiss the carriers' petition because of insufficient evidence, and because, in effect, the Hoch-Smith resolution barred the Commission from granting general rate increases until the completion of the rate-structure investigation. It was urged that the resolution had the effect of repealing Section 15a. To this motion the Commission replied:

> we are of the view that we are not debarred by the resolution from affording the carriers relief through the medium of a general increase in rates prior to the completion of the investigation under that resolution, if need for such action arises upon a clear showing of necessity. Both section 15a and the resolution must be given a construction which makes them practicable and workable. See *New England Divisions Case*, 261 U.-S. 184, 197.
>
> With the contention that the resolution repeals section 15a we are not in accord. The resolution has the force and effect of an act of Congress. In it there is no specific repeal of any provision of existing law, and there is no reason for holding that the resolution by implication repealed or suspended the provisions of section 15a.
>
> The resolution clearly points out that in making any change in accordance with its provisions, we shall give due regard "to the maintenance of an adequate system of transportation," and that the fixation of the "lowest possible lawful rates on products of agriculture, including livestock," shall be "compatible with the maintenance of adequate transportation service." These are expressions somewhat similar to those used by the Supreme Court in decisions rendered prior to the adoption of the resolution, specifically referring to the provisions of section 15a wherein Congress indicated that in determining what would be a fair return consideration should be given, among other things, to the transportation needs of the country and the necessity of enlarging such

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[6] *Revenues in Western District*, 113 I.C.C. 3. Decided July 14, 1926.

[7] 164 I.C.C. 1. Petition was filed November 19, 1925, report submitted October 26, 1929, and the case decided May 6, 1930.

[8] 113 I.C.C. 3, 13-14 (1926).

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facilities in order to provide the people with adequate transportation. See *Wisconsin R. R. Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, decided February 27, 1922; *New England Division Case*, *supra*, page 190, February 19, 1923; *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478, January 7, 1924. Congress could not have intended to repeal or suspend by indirection so important a provision of law as Section 15a. . . .

If certain products of agriculture or, certain kinds of livestock are not "affected by that depression" they do not come within the direction of the last paragraph of the resolution. A primary purpose of the last paragraph was that because of the then existing depression in agriculture the products of agriculture affected by that depression should receive expedited consideration . . .

It is provided by the resolution that we shall prescribe on products of agriculture so affected by depression, including livestock, the lowest possible lawful rates. It is contended, therefore, that the present rates thereon may not be increased unless they are found to be confiscatory. While confiscatory rates are unlawful, it does not follow that all rates which escape confiscation are lawful. As we construe the resolution, it does not prevent increases of rates on all livestock or on all products of agriculture which are above the point of confiscation.[9]

In its conclusion, which found that no financial emergency justifying rate increases existed at that time, the Commission said: "The record, however, warrants us in concluding that in proposing changes in existing rate structures, either for the purpose of improving earnings of carriers in western trunk-line territory, or for the purpose of rectifying inequalities in existing rate structures, carriers should propose no advances in the rates on products of agriculture, including livestock, except where particular rates on such products may need adjustment to remove inconsistencies, or where it can be shown that the product in question is not affected by depression."[10]

This expression of special consideration for agricultural products under the Hoch-Smith resolution was stated in a number of other cases in words such as, "In view of the evident purpose of the Hoch-Smith resolution we are loathe to permit any increases in the transportation burden placed upon products of agriculture such as grain, except for reasons clear and explicit and where it appears that the resulting charges will not be unreasonable."[11]

Reconstruction of Rate Structure. Southern class rate investigation: That portion of the Hoch-Smith resolution which directed a rate-structure investigation did not start the Commission in an entirely new field. During the legislative hearings and in legislative debate, it was stated that "This resolution directs the Interstate Commerce Commission to do something which some claim they have the power of doing now but which they do not care to undertake without the express direction of Congress to go into the whole rate structure of the country and try in a lawful way to iron out the inequalities that exist in that structure."[12] That the Commission thought it had the power to make a territorial rate-structure investigation and had anticipated by several years the direction from Congress was indicated by the southern class-rate investigation.[13] The investigation was instituted upon the Commission's own motion on February 6, 1922, and covered the interstate class rates within southern territory and between that territory and official territory. It was stated "that the *general rate level* within southern territory and in other parts of the country would be determined in the general rate investigation then under way. . . . Therefore, it would 'not be

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[9] *Ibid.*, 11-13.

[10] *Ibid.*, 39.

[11] 118 I.C.C. 585, 596. Decided November 29, 1926. Proposed restoration of transit charges were allowed in part.

[12] Mr. Rayburn in *Congressional Record*, 68th Congress, 1st Session, 11022 (June 6, 1924).

[13] 100 I.C.C. 513. Submitted January 17, 1925, decided July 7, 1925.

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the primary purpose of this inquiry either to add to or subtract from the aggregate revenues of the carriers, but rather to adopt a *class-rate structure* which will be as simple as it can be made, with due regard for the public interest, and free from undue prejudice, and which will serve the purposes that class rates ought to serve' [Italics supplied]."[14]

The discussion preliminary to the conclusions stated:

> This proceeding is unique in its scope and in the opportunity which it affords for fundamental consideration of railroad rates. In *C. F. A. Class Scale case*, 45 I.C.C., 254, we fixed the interstate class rates of central territory; in *Proposed Increases in New England*, 49 I.C.C., 421, the similar rates of New England; and in *Memphis-Southwestern Investigation, supra*, the similar rates of a large section of the Southwest. But none of these cases covered one of the three great classification territories, as does this inquiry; none of them dealt with interterritorial as well as intraterritorial rates; and none of them had to do with a part of the country where widespread fourth-section departures and differences between interstate and intrastate rates so complicate the situation as they do here.
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> We have before us a class-rate structure practically in its entirety, and for this reason prior decisions with reference to southern class rates are of lesser help.[15]

Among the general principles listed as guides were the simplification of the rate structure and the following comment on Section 15a:

> The tendency in recent years has been to give more and more consideration to the national need for a properly coordinated railroad service. This principle runs through the legislation of 1920, and is expressly declared in what is now paragraph (5) of section 15a of the interstate commerce act. The application of this principle will result in a greater degree of territorial uniformity in rates than would be possible if attention were concentrated on the individual railroad properties. It assumes that differences in earning power will to a material extent be cared for by adjustment of divisions or through the operation of the recapture clause.[16]

Regarding cost and value of service the Commission made a passing comment:

> The railroad rate structure of the country is not the result of the application of so-called scientific principles. It is the product of the efforts of freight-traffic managers seeking maximum revenue for their respective railroads, modified to some extent by public regulation. Where competition has made it necessary, the traffic managers have always been ready to handle freight at very low rates rather than not to handle it at all. It has been, indeed, the presence of competition at certain points and its absence at others which have caused most of the confusion in the rate structure. . . .
>
> In public regulation, because of the desire to avoid unlawful discrimination, the tendency has been toward closer adherence to the distance principle. It is also a fact that this principle usually furnishes the basis in testing the reasonableness of rates, for both carriers and shippers resort to comparisons with other rates charged on similar traffic *for similar distances* under similar transportation conditions. . . .
>
> In fixing maximum reasonable rates, competition is not a factor which we [Interstate Commerce Commission] may take into consideration. The carriers may, within limits, make low rates for the purpose of meeting competition, but we are without power to compel them to meet it. Value and cost of service are recognized as factors which we may properly take into consideration. In the case of class rates, value of service is chiefly of importance in determining the classification ratings. Distance scales are frequently criticized, as in this proceeding, on the ground that cost of service is not dependent upon distance alone. This is true when service is viewed in detail, for other factors affect cost, such as grades, curves, cost of construction, weather conditions, and density of traffic. . . . Broadly speaking, however, cost of service

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[14] *Ibid.*, 519.

[15] *Ibid.*, 602.

[16] *Ibid.*, 603.

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undoubtedly does increase as distance increases, and in any adjustment of rates such as are here in issue detailed consideration of costs is impracticable. . . . Moreover, as some of the shippers have pointed out, distance at least measures the *quantity* of service rendered, and distance scales have the great practical advantage that they are based on a theory that is readily understood. The distance adjustments of class rates which we have prescribed in other territories have proved stable and have given general satisfaction.[17]

Docket 17,000, Rate-Structure Investigation. Thus, the Commission had already made a start toward the reconstruction of rate structures in the southern class-rate investigation before the Hoch-Smith resolution was passed. With the exception of Parts 1 and 2, dealing with the western district and western trunk-line rates, the Commission did not follow the method of *territorial* rate-structure investigation which it had used in the southern territory. Instead, it investigated the rate structure for a *particular commodity* and related products. The difficulty of dealing with commodity or commodity groups led the Commission to state in its 1932 *Annual Report:* "Generally speaking, the Docket 17000 cases have developed into unwieldy proportions. Our experience with them has shown that the country is too big to make it generally practicable to deal with it as a whole or even with the major classification territories, except in proceedings especially adapted to large territorial treatment, such as the classifications themselves. Substantial benefits have resulted from the general surveys which have been made in the Hoch-Smith cases, but these have been offset by the disadvantages connected with unavoidable delay because of the protracted character of the hearings in arriving at specific rate changes in particular territories or to meet particular situations."[18]

This was followed in the 1933 *Annual Report* by a sketch of the progress of the Docket 17,000 investigation and the conclusion,

It is apparent, therefore, that the investigation, insofar as it relates to the separate important commodity groups, has been largely completed.

In our last annual report we discussed the unwieldy proportions into which the docket no. 17,000 cases have developed. Experience has shown that necessary changes in the rate structure can be effected by us with the least delay (which is the mandate of the Hoch-Smith resolution) through the usual course of hearing complaints, or by investigations on our own motion, rather than under a general nation-wide investigation which is likely to assume unduly ponderous proportions. In view of all the circumstances we therefore entered an order on October 2, 1933, that except for the orders already made in this proceeding or which may be entered in respect of such orders as supplementary or ancillary thereto, and except for those parts of the proceeding which have been heard or upon which testimony is being heard, and not yet submitted, the general investigation be discontinued.[19]

Although this seemed to indicate an early conclusion to rate-structure investigation cases, the initial report on one part of Docket 17,000 (Part 7A, *Grain and Grain Products, Southern Territory)* was given as recently as March 1940, and supplemental reports on other parts appear from time to time, currently.

Special Consideration to Agricultural Products. Although the Commission repeatedly stated that the Hoch-Smith resolution directed that special consideration be given to agricultural products, it recognized that not all agricultural products were suffering from depression. In special considerations, rates were sometimes decreased; certain increases asked by carriers were denied; and sometimes transit privileges were granted or the cancellation of transit privileges by carriers was denied.

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[17] *Ibid.*, 611-612.

[18] U. S. Interstate Commerce Commission, *Annual Report* (1932), 30.

[19] *Ibid.* (1933), 12.

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The livestock industry obtained rate benefits under the resolution, but it also seems to have been able to get them before the resolution was passed. The isolated chicory industry of Michigan was said to have benefited by a rate decrease granted to the processor. Some other agricultural products received rate readjustments but the extent to which the producers benefited is unknown. Readjustments of cotton rates came primarily because of motortruck and barge competition and not through the Hoch-Smith resolution.

On the other hand, the grain growers were admittedly suffering depression, and rates were high, but general readjustments were not made. The rate from the farm to the primary market is of special interest to producers, but when changes were made they were usually in the rates beyond these markets. In this connection, Commissioner Eastman made the following statement in a speech to farm interests:

> Practices have grown up with respect to railroad transportation of some farm products which I think will repay careful study on the part of the farmers. Take the case of grain, the rates from the farm to the primary markets are said to be, and I think are, of critical importance to the farmers, and there has been complaint on the ground that they are high considering the heavy loading and other favorable characteristics of the traffic. The fact is, however, that by rather general insistence, *in which the farmers have seemed to join* the rates on grain have been made applicable to the lighter-loading grain products, such as flour. Not only that, but a tremendous amount of free transit service, for storage, milling, and processing purposes, is given in connection with the rates, with the result that shipments wander all over the country with all manner of out-of-line and even back hauls in the most wasteful and prodigal fashion. Of course all this service is not really free but has to be taken into consideration in fixing the level of the grain rates, just as weight must also be given to the fact that they apply to flour, meal, and feed as well as to the grain itself.
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> It is quite possible that I have a slight obsession on this point, because my own views seem to run counter to the general trend. The dealers and the millers and the mixers all insist, and at great length, that the parity of rates between grain and flour and all the alleged free transit service are of great advantage to the farmer and give him, through the force of competitive bidding for his products, a better net price after deducting the freight rates than he would otherwise receive. They appear before us, in fact, *in the guise of guardians and protectors of the farmer*. It may be so, but I have yet to be convinced. I suggest only that *the farmers ought not to take too much for granted on this general subject, but give it some careful independent study on their own account*. And while they are doing this, it would be well, also to give some attention to the wastes in railroad capital and operating funds which have occurred through the competitive building at the terminal markets of great elevators which have been leased on very favorable terms to operators who are supposed to control a large volume of grain traffic, and to the means which may be available for improving these conditions [Italics supplied].[20]

Special Consideration of Depressed Industries. Economic conditions in industries other than agriculture were given consideration with varying results. The following cases illustrate the Commission's interpretation of the resolution.

The coal-mining interests of Indiana objected to the reduction of rates on coal from competing areas into Indiana on the basis that they would increase the depression in the local mines—a result which the Hoch-Smith resolution allegedly did not intend. In this instance the Commission rejected the rate reduction.[21]

Northern coal fields also were suffering from depression and claimed relief in the form of lower rates on lake cargo coal, to increase their differential over the southern coal fields. This reduction was granted.[22] Carriers for the southern coal

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[20] Joseph B. Eastman, "Transportation Charges and Agriculture," National Farm Institute, *Proceedings*, 1939, p. 85-86.

[21] 115 I.C.C. 650, 656 (1926).

[22] 126 I.C.C. 309, 365 (1927).

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fields proposed a reduction on lake cargo coal to restore the differential, but the Commission rejected this proposal saying that when reductions were warranted, Congress had indicated by the Hoch-Smith resolution where they should be made.[23]

The southern carriers obtained a permanent injunction against the Commission's order,[24] and the Commission appealed to the United States Supreme Court. Meanwhile, after the start of a rate war, the southern and northern lake-cargo-coal carriers worked out an adjustment increasing southern coal rates to a level that was higher than the original but lower than that ordered for the northern fields. The United States Supreme Court decision found the issue moot, but, in accordance with precedent, reversed the lower court.[25]

In the zinc industry, which was found to be prosperous, the rates on zinc concentrates were considered not unreasonable but prejudicial to certain localities, whereupon rates were reduced to remove the prejudice. Rates for this commodity could not be materially reduced if relief was to be given under the Hoch-Smith resolution.[26]

The railroads themselves were considered as depressed industries entitled to special consideration when they showed a need of increased earnings for the preservation of an adequate transportation system. The railroads had the additional legal advantage of Section 15a which, according to the Commission's interpretation, entitled them to a return of 5-3/4 percent on the value of all property used for transportation.

No New Rate-Making Authority. The Commission held that the Hoch-Smith resolution "sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits."[27] It also held that the resolution "does not prevent increases of rates on all livestock or on all products of agriculture which are above the point of confiscation."[28]

The Commission also held that "both section 15a and the resolution must be given a construction which makes them practicable and workable. See *New England Divisions Case*, 261 U. S. 184, 197.

"With the contention that the resolution repeals section 15a we are not in accord. The resolution has the force and effect of an act of Congress. In it there is no specific repeal of any provision of existing law, and there is no reason for holding that the resolution by implication repealed or suspended the provisions of section 15a."[29]

As regards the consideration of the depression in agriculture, the Commission said:

If certain products of agriculture or certain kinds of livestock are not "affected by that depression" they do not come within the direction of the last paragraph of the resolution. A primary purpose of the last paragraph was that because of the then

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[23] 139 I.C.C. 367, 395 (1928).

[24] *Anchor Coal Co. v. United States*, 25F. (2d), 462. Decided April 14, 1928.

[25] *U. S. v. Anchor Coal Co.*, 279 U. S. 812. Decided March 5, 1929.

[26] 126 I.C.C. 677, 695-696 (1927).

[27] 122 I.C.C. 235, 264 (1927).

[28] 113 I.C.C. 3, 13 (1926).

[29] *Ibid.*, 11-12.

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existing depression in agriculture the products of agriculture affected by that depression should receive expedited consideration. It would not be a reasonable construction of the resolution to hold that it conclusively presumes the existence of depression in all products of agriculture, including livestock, until we report the result of our investigation held under the direction and authority of said resolution.[30]

The Commission, however, had been giving consideration to the depression in agriculture since its beginning.

In various cases since the postwar depression began we have had occasion to consider the economic condition of the agricultural and livestock industries. In *National Live Stock Shippers League v. A., T. & S. F. Ry. Co., supra.* decided August 3, 1921, the record established that the livestock industry was in a serious condition. In *Rates on Grain, Grain Products, and Hay, supra,* decided October 20, 1921, we found that the grain-farming industry was in a state of financial prostration. In *Reduced Rates, 1922, supra,* decided May 16, 1922, we noted that the serious situation in agriculture obtaining in 1921 had improved. In *Rates and Charges on Grain and Grain Products, supra,* decided July 10, 1924, we found that the agricultural industry, both in the western group and in the remainder of the country, was in a somewhat better economic condition, although still unsatisfactory, than in 1921. We said: "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it can not be accepted as controlling."[31]

The Lowest Possible Rates. The lowest possible rates for agricultural products were said to lie within the "zone of reasonableness" and should cover all costs which may be allocated to the particular traffic plus some margin of profit. This view of the Commission is summed up in the following quotations:

When, therefore, the carriers in an investigation and suspension proceeding propose what in substance amounts to a general increase in rates over a large area on agricultural commodities which have been shown to be affected by depression, they must clearly demonstrate that such increase is justified under the law including the provisions of the resolution.

As aforesaid, the intent of the resolution is that products of agriculture affected by depression shall move at the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S., 585; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S., 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service, in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be "compatible with the maintenance of adequate transportation service."[32]

Complainants contend that the logical basis for ascertaining the lowest possible lawful rates is the cost of the service and that the pre-war rates on livestock would yield a very substantial profit above the average unit costs of handling. Apparently complainants assume that in any such computation of profit only expenses directly attributable to the traffic need be considered and that livestock need not contribute to such maintenance-of-way expenses as are occasioned by depreciation, decay, floods, or storms, or assist in defraying general expenses, taxes, or transportation expenses not incurred in a particular service.

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[30] *Ibid.*, 13.

[31] *Ibid.*, 30.

[32] *Grain and Grain Products*, 122 I.C.C. 235, 264 (1927).

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The Hoch-Smith resolution, however, enjoined upon us to fix the lowest possible rates that might lawfully be required, compatible with the maintenance of adequate transportation service. It set no new standard of lawfulness, but said, in effect, that to the extent that there are flexible limits to our discretion we should fix the lowest rates falling within those limits. In the past we have had occasion to consider at times what may be called "out-of-pocket" cost, but while it has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia*, 236, U. S. 605. We say "in principle" because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates. Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation.[33]

The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. In the *Western Rate Advance Case*, 20 I.C.C. 307, pages 347, 348, we said:

"What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined – in fact has been created – to repress its upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service."

Both the commission and the courts have repeatedly referred to a flexible limit of judgment in reaching a conclusion as to the reasonableness of a rate or a schedule of rates. Otherwise stated, there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services.

We again conclude that "the lowest possible lawful rates" which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service.[34]

Henry C. Hall, who had resigned from the Commission, gave a similar interpretation of the lowest possible rates for agricultural products in his testimony at the hearings on the confirmation of Commissioner Esch.

Senator Glass. As to the Hoch-Smith resolution, do you think that it in the remotest way modifies the statute itself?

Mr. Hall. It is law.

Senator Glass. I know. I will say that it is law; but it says that the inquiry must be made and a decision reached according to then existing law. That is the text. It says according to law. Now, what law? Has not that reference to the interstate commerce act itself?

Mr. Hall. Certainly, the interstate commerce act is a part of the law; but here is my difficulty with that, Senator: Take the third or last paragraph of the Hoch-Smith resolution, reading –

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[33] *American National Live Stock Association* v. *A., T. & S. F. Ry. Co.*, 122 I.C.C. 609, 617-618 (1927).

[34] *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I.C.C. 25, 33-34 (1927).

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"In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Senator Fess. You see there that through the act that expression is used and accentuated, lawful rates. How are you to determine the lawful rate without relating it to the statute itself?

Mr. Hall. Very well; then I will proceed to relate it to the statute itself. The statute lays a duty upon the carrier and this resolution does not lay any duty upon the carrier. The statute lays upon the carrier the duty of establishing just and reasonable rates. The commission has recognized, and the courts have recognized, that there is a zone of reasonableness and that within that zone the rate is reasonable. It may not be up to the maximum or down to the minimum, but inside that zone it is reasonable.

Now, take a case where the carrier, under that statutory mandate resting upon it, has established on products of agriculture rates which are within that zone. We can not find otherwise. Has this Hoch-Smith resolution given us the power to lay hold of that rate, which is reasonable, and substitute for it another rate, a lower rate, which is also within that zone?

Senator Glass. Not if the lower rate is not a reasonable rate?

Mr. Hall. I am assuming that both are within the zone of reasonableness. Now, under the act, if the carrier has put its rate inside the zone, we have no fault to find with it, and we have no power to touch it because the carrier has complied with the law; it has not violated the act; but we come along and in the exercise of what we conceive to be the authority conferred by the Hoch-Smith resolution we pick out the minimum rate in that zone and we say, "Although your rate complies with the law; it is within the zone of reasonableness and we can not find to the contrary; nevertheless, we are going to say to you that you can not use that rate, and you have to reduce from one reasonable rate to another reasonable rate, which is the one that we fix." They are both reasonable.

Senator Glass. That is solely with respect to agricultural products?

Mr. Hall. That direction to bring about movement "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service" is solely with respect to agricultural products and livestock, which is included.[35]

The Deciduous-Fruit Case. After the Commission interpretated the Hoch-Smith resolution in the deciduous fruit complaint, the United States Supreme Court added its interpretation in *Ann Arbor R. R. Co.* v. *United States*[36] – frequently referred to as the Deciduous Fruit Case. A brief review of the proceedings before the Commission will bring out more clearly the issues involved.

The early deciduous-fruit case was decided June 25, 1925. The decision presented by Commissioner McManamy was unanimous and held that the rates were not unreasonable. Although reference was made by the complainants to the Hoch-Smith resolution, which had been approved January 30, 1925, the evidence placed in the record was not in full accordance with that required by the resolution. After noting its passage and reciting the factors to be given due regard in connection therewith, the Commission dismissed it with the statement: "We have given consideration to the matters mentioned in the resolution."[37]

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[35]*Hearings . . . on the Confirmation of John J. Esch . . .* , 176.

[36]281 U. S. 658. Decided June 2, 1930.

[37]100 I.C.C. 79, 106.

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The second deciduous-fruit case was decided July 20, 1927. Commissioner Aitchison presented the majority opinion; Commissioners Eastman and Woodlock, joined by Taylor, gave separate concurring opinions; and Commissioner McManamy gave a dissenting opinion. This case differed from the earlier one in that an effort was made to present evidence in the record to conform with the conditions of the resolution.

Upon this record, the majority opinion held that the rates previously considered to be not unreasonable were now considered to be unreasonable, that new rates were prescribed, "and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture now affected by existing depression in agriculture."[38] The majority interpreted "the lowest possible lawful rate" to mean the lower range of the zone of reasonableness within which the Commission had the power to prescribe rates. Cited in support of this interpretation were *Grain and Grain Products*, *American National Livestock Association* v. *A., T. & S. F. R. R. Co.*, and *Western Rate Advance Case.*[39]

Although the complainants alleged a violation of Section 3 of the Interstate Commerce Act, no great reliance was placed upon that allegation.[40] Violations of Section 1, paragraph 5 and Section 15, paragraph 1 were also asserted, but the primary reliance throughout was placed upon the Hoch-Smith resolution.

The departments of agriculture of New York, Pennsylvania, and Michigan appeared on behalf of the railroads and opposed any reduction in rates on grapes from California. Interveners from Arkansas, who did not object to a reduction on rates for California deciduous fruits but sought similar reductions for their own peaches and grapes, were dismissed as being outside the record. The eastern grape growers based their opposition on the high competitive situation between California grapes and eastern grapes.

Commissioner Eastman's comment: Commissioner Eastman's concurring opinion is quoted in full.

> *While it is by no means clear that the rates in issue are unreasonable and ought to be reduced, complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt*, and I can for that reason accept the results reached. I am influenced in this conclusion, also, by the fact that *the record contains no attack on the enormous destination blanket to which these rates apply*. Certain incidents of that blanketing, however, ought to be pointed out. *The burden clearly falls chiefly on the eastern lines*. They participate in the rates where they are lean and not where they are fat. When the fruit stops at such points as Denver, Kansas City, Omaha, or Chicago, the western lines keep the entire rate; but for their hauls the eastern lines never receive more than an attenuated division. *The eastern lines might, therefore, with reason have attacked the blanket, but this they did not see fit to do. On the contrary they apparently left the defense of the case largely to the western lines. Out of 15 counsel whose names are signed to the brief of defendants, only one represents an eastern line.*
>
> Out of the reduced rate of $1.60 the eastern lines will receive 27.5 per cent east of Chicago when the fruit moves to New York City, or 44 cents for a short-line distance of about 900 miles. As the majority report shows, the average rate on grapes from points in New York State to New York City is about 68.5 cents for an average haul of 354 miles. Granting that there may be less terminal service incident to the haul of western fruit from Chicago than to local hauls of fruit in New York State, that fact falls far short of accounting for the disparity above indicated. The eastern growers of fruit are suffering from financial depression quite as much as the California

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[38] 129 I.C.C. 25, 57.

[39] 122 I.C.C. 235, 264 (1927), 122 I.C.C. 609, 617 (1927), 20 I.C.C. 307, 347-348 (1911).

[40] 129 I.C.C. 25, 40.

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growers, and, it seems to me, have less opportunity than the latter for remedying their situation by expedients other than a reduction of freight rates. So far as juice grapes are concerned, the California growers apparently dominate the market and are suffering chiefly from overproduction and competition among themselves. The eastern growers have no such dominating position in any branch of the fruit industry, and must bear the burden also of less favorable climatic conditions.

Both we and the eastern carriers must face squarely the fact that if the reductions herein ordered are justified, it is very probable that an even stronger case for reductions in fruit rates can be made throughout the eastern territory [Italics supplied].[41]

This comment foreshadowed the movement for the overthrow of the Commission's decision by the United States Supreme Court. With rates blanketed east of Denver, the share going to the eastern lines would be relatively small so that naturally the eastern lines would be the ones to object. The action in the court case was brought by the eastern and the western railways.

Comments of other commissioners: The concurring opinion by Commissioner Woodlock stressed that portion of the Hoch-Smith resolution which requires the maintenance of an adequate system of transportation. He thought that insufficient attention had been given to this direction.

Commissioner McManamy, in his dissent, said in effect that this was only a retrial of the first case and that the record contained few, if any, additional facts. He pointed out that the "rates which the majority condemn as being too high are lower than the deciduous-fruit rates from the principal producing areas to the same destinations. . . .

"This constitutes practically an invitation to reopen the question of the reasonableness of those rates, and this without doubt must be done if we are to avoid undue preference and prejudice as between localities."[42]

He continued:

The majority report as well as the concurring expressions show that *the decision is predicated upon the Hoch-Smith resolution.* To my mind *too much weight is given to the provision relating to the level of the rates and too little to other provisions of that resolution.*

We are directed to correct existing rates which are "unjustly discriminatory or unduly preferential, thereby imposing undue burdens or giving undue advantage as between various localities or parts of the country," yet *we are here reducing rates on deciduous fruits that are already lower than the rates on the same commodities for shorter hauls from other sections of the country — in fact, are lower, distance considered, than the rates on deciduous fruits from any section of the country to the same destination.*

The resolution also directs us to give due regard "to the maintenance of an adequate system of transportation." What is involved in the maintenance of adequate transportation service for deciduous fruits? The report refers at length to the expense of the service and the character of the equipment used, but *I do not think this has been given proper weight.* We are dealing here with commodities which move only under intensive refrigeration, in the most expensive and highest type of equipment, and at the highest practicable speed.

In my opinion the finding of the majority is not supported by the record in this case. It does not find support in any previous decision of ours, nor can it be predicated upon the Hoch-Smith resolution if all of the provisions of that resolution are given proper weight [Italics supplied]."[43]

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[41] *Ibid.*, 57-58.

[42] *Ibid.*, 60.

[43] *Ibid.*, 60-62.

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The Supreme Court held that these separate opinions indicated that the Hoch-Smith resolution was the sole reason for the change from the original case, and that insufficient consideration was given to the provision for the maintenance of an adequate transportation system which qualified the Hoch-Smith resolution and which was a part of the basic law in Section 15a of the Interstate Commerce Act.

Commissioners Meyer, Hall, Campbell, and Brainerd did not participate in the decision. This left only seven commissioners to handle the case; three of them joined in concurring opinions, one in a dissenting opinion, and three (Aitchison, Esch, and Lewis) apparently were satisfied with the main opinion.

Commission decision on further consideration: The order in 129 I.C.C. 25 was modified on October 14, 1927, to eliminate its application over routes through the north-Pacific-coast gateways. Upon further consideration, all other parts of the order were upheld on November 14, 1927. Consideration was also given to correcting errors which had entered into the reference to a relative cost study. Commissioner Eastman now dissented, Commissioner McManamy continued his dissent, and only Commissioner Hall is listed as not participating in the disposition of the case. Commissioner Eastman's dissenting comment said:

> When this case was first decided, I was, as I then indicated in a concurring expression, by no means clear that the rates attacked were unreasonable, but gave complainant the benefit of the doubt because of the Hoch-Smith resolution. The further consideration which I have since given to the case leads me to agree substantially with Commissioner McManamy, who has dissented. I would have little difficulty in finding the $1.73 rate unreasonable for the shorter hauls in the blanket, but I do not believe that it is unreasonable, even in the light of the Hoch-Smith resolution, for the longer hauls to the Atlantic seaboard and trunk-line territory — and that is where the great bulk of the shipments find their destination — nor as a blanket rate.[44]

INTERPRETATIONS BY THE COURTS

The Supreme Court Decision in the Deciduous-Fruit Case. Following the procedure forecast by Commissioner Eastman, the eastern railroads joined the western railroads in seeking relief from the order in the District Court of California. The bill was dismissed, and an appeal was taken to the United States Supreme Court. The Supreme Court stated the question in the following language: "The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it."[45] In the brief of the United States and Interstate Commerce Commission for the *Ann Arbor* case, the question presented was:

> The validity of the order is the ultimate question, a determination of which involves the following subordinate questions: (1) whether the order is supported by substantial evidence; (2) whether the Commission committed error of law in constructing the joint resolution of Congress known as the Hoch-Smith resolution; and (3) whether the rates prescribed are confiscatory.[46]

The Court, however, did not consider the full question as presented in the brief, but confined itself to the issue given in its own statement. Therefore, the opinion of the Court was limited to the Commission's construction of the Hoch-Smith resolution and did not consider its constitutionality. The first paragraph was held to state no new

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[44] 132 I.C.C. 582, 584-585.

[45] 281 U. S. 658, 666 (1930).

[46] P. 2.

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policy in rate making; the second to concern matters whose consideration was required under existing laws, and, therefore, were not new; and the third paragraph,

> not [to] purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.[47]

The Court gave particular attention to the Commission's construction of the third paragraph, which had been used to justify the condemnation of existing rates as unreasonable and unlawful. Had these rates been considered independently of the paragraph, they must have been upheld under applicable Sections 1, paragraph 5, and 3, paragraph 1 of the existing law. The Court considered the paragraph to require only lawful changes in the rate structures, and, without a self-contained definition of such changes, reference must be made to Section 15a, paragraph 1, of the existing law to determine the conditions and methods of making lawful rate changes.

Regarding the Commission's interpretation of the words "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service," the Court stated that they were insufficient to support the construction of the resolution adopted by the Commission and were "more in the nature of a hopeful characterization of an object deemed desirable for, and in so far as, it may be attainable, than of a rule intended to control rate making."[48] While the language of the resolution could not be lightly disregarded, said the Court, neither could it be used to overthrow existing laws which reflect settled legislative policy. Because the meaning of these words was considered ambiguous, and because the Commission's interpretation of them would raise a constitutional question, the Court held that the language effected no substantial change in the meaning or operation of Sections 1, paragraph 5, 3, paragraph 1, and 15, paragraph 1 of the existing law. Therefore, the order of the Commission was set aside.

Eastman comment on decision: The first case dealing with agricultural products that was handled by the Commission after the *Ann Arbor* decision was Part 7 of the *rate-structure investigation.*[49] The decision was given on July 1, 1930, a month after the *Ann Arbor* decision on June 2, 1930. In this case the Commission said:

> The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company v. United States*, 281 U. S., 658. The findings herein are under the provisions of the interstate commerce act.[50]

Although no other statement was made in the majority opinion, Commissioner Eastman in his separate opinion, concurring in part, commented at length on the effect on the Commission of the Supreme Court's decision. In substance, he said the Commission had been doing exactly what the Supreme Court ruled it should do, insofar as the information to determine costs of transporting specific commodities was available. His discussion follows:

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[47] 281 U. S. 658, 668.

[48] *Ibid.*, 668-669.

[49] *Grain and Grain Products within Western District*, 164 I.C.C. 619 (1930).

[50] *Ibid.*, 661.

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Level of the rates.- Throughout this proceeding the Hoch-Smith resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." In a recent case, *Ann Arbor R. R. Co.* v. *United States*, decided June 2, 1930, the Supreme Court considered and set aside our action, in part under that resolution, in *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I.C.C. 25, 132, I.C.C. 582. Referring to the third paragraph of the resolution, which contains the language with reference to the "lowest possible lawful rates," the court made this statement:

"Indeed, it is apparent from the commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1 (5) and 3 (1) of the existing law.

"We are of the opinion that the commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law."

Later, in referring specifically to the words "lowest possible lawful rates compatible with the maintenance of adequate transportation service," the court said:

"If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system they work no change in the existing law."

And it finally arrived at the conclusion that these words "must be held to work no substantial change in the meaning or operation of Sections 1 (5), 3 (1), and 15, paragraph (1), of the existing law."

In *Grain and Grain Products*, *supra*, at page 264, we interpreted this provision of the resolution as follows:

"It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service; in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be 'compatible with the maintenance of adequate transportation service.'"

In my judgment this interpretation is entirely consistent with the provisions of the interstate commerce act, although it may be that for the sake of clarity, we should have used the words "some substantial margin of profit." I disagreed with the conclusions reached in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, *supra*, because I did not believe that those conclusions were adequately supported by the evidence, in the light of this interpretation of "lowest possible lawful rates." But under that interpretation such rates, it will be noted, must be "high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit." Pointing out, then, that it has always been recognized that some commodities may be required to pay a greater margin of profit than others, we reached the conclusion that it is the intent of the resolution that agricultural products affected by depression "shall in this respect be included in the class of most favored commodities."

In its recent decision, above cited, the Supreme Court makes it clear that "conditions in the particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness," and that the "depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the

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need for maintaining an adequate transportation system." But if rates can not be reduced below the cost of service plus some substantial margin of profit, as was found in *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, obviously the only way in which the depressed condition of an industry can be given any weight is in determining the margin of profit to be allowed. That the percentage may be varied is clearly indicated in the case just cited, where the court said, at pages 598, 599:

"The legislature, undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business."

But if the percentage of profit may be varied, obviously the variations may be both above and below the normal percentage, because only in this way can a reasonable average be maintained. It follows, therefore, that our interpretation of "lowest possible lawful rates," above quoted, is consistent with the interstate commerce act and the Supreme Court's construction of that act.

We also had this to say in *Grain and Grain Products, supra*, at page 266:

"The Hoch-Smith resolution has brought to the forefront the question of the distribution among commodities of the transportation burden, thus emphasizing the need for considering the relative costs of service and the relative earnings of the various kinds of freight traffic, difficult as this task may be."

We further said:

"It is also clear from the record in this case that the rates on grain and grain products, particularly to the primary markets, are deserving of a consideration, from the standpoint of relative earnings and fair share of the transportation burden, which perhaps has not hitherto been sufficiently given them. We have pending No. 17000, Part 4, *Grain and Grain Products*, hereinafter called the general investigation, which embraces the rates on grain and grain products in the entire western district and from that district to the ports of the country for export. That proceeding will afford the opportunity for such consideration."

This was notice that in this general investigation we would wish to obtain all the information possible in regard to the cost of transporting grain and grain products. Several of the State commissions responded to this suggestion and at considerable trouble and expense prepared and submitted cost studies that were more or less comprehensive. Statistics and studies were also presented by our Bureau of Statistics. The carriers, however, refrained from offering any direct evidence in regard to costs and contented themselves with rebuttal evidence of fragmentary character in criticism of the studies made by others. It is their position that it is not practicable to ascertain the cost of hauling grain and grain products. Yet this has not been their position with respect to other forms of traffic, in contesting the orders of State commissions on the ground of confiscation. In *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, at page 590, where lignite rates prescribed by the State were found to be confiscatory, the following was quoted from the opinion of the State court:

"As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the State, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity."

The State court made a finding in dollars and cents of the amount of expense chargeable to the traffic in question, and this finding was sustained by the Supreme Court. See also *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, and *Boyle* v. *St. Louis & S. F. R. Co.*, 222 Fed. 539.

Under the accounting and statistical systems now maintained by the carriers it is difficult to arrive at a wholly satisfactory approximation of the cost of handling any particular form of traffic, without a very elaborate and costly special study based on checks and observations extending over a comparatively long period of time and having for their purpose the accumulation of data which are not recorded as a matter of normal

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routine. However, although no such special study has here been made in any comprehensive way, there is considerable evidence of record bearing on costs, and by the reasonable exercise of informed judgment it is possible, I believe, to arrive at conclusions with respect to the average costs of transporting grain and grain products in the western district which will not be arbitrary but within reasonable limits of accuracy.

In the resolution the words "lowest possible lawful rates" are qualified by the phrase "compatible with the maintenance of adequate transportation service." In order to maintain such service, carriers must in the long run be able to earn what may be termed a minimum fair profit. It is imaginable that in the western district, or certain of its regions, competitive conditions so control and limit the rates on other important traffic that the only way for the carriers to earn a fair profit is to make the rates on grain and grain products pay more than their fair share. It may be urged with much force, also, that if this fact were established it would be our duty under section 15a to permit the rates on grain and grain products to be maintained at such requisite level. By similar reasoning it is urged by representatives of railroad security holders that if the carriers in a given group are earning less than the fair return contemplated by section 15a, we are estopped from requiring reductions in rates affecting any substantial volume of traffic, no matter what the level of those rates may be.

I cannot accept this theory. Our duty under section 15a is to be performed in the exercise of our power "to prescribe just and reasonable rates." Our duty in this proceeding, as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, remain our duty under section 15a to see to it that the carriers have a general body of rates sufficient to produce, "as nearly as may be," the fair return stipulated by that section. It may develop that this can not be accomplished, owing to various competitive conditions, without imposing a further burden upon grain and grain products. But we can not assume in this proceeding that this will prove to be the fact. It remains to be established after a thorough consideration of the rates on other forms of traffic.[51]

The Commission Grain Case. In the grain case cited above, the Commission had made a comprehensive survey of grain rates throughout the grain territory. It mentioned a transcript of some 53,000 pages, together with 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums which had been thoroughly examined in arriving at the decision.[52]

Necessarily, considerable time had elapsed from the start of the hearings until their conclusion. A major portion of the record had been made in 1928, closing on September 22, 1928. After the decision there were many petitions for rehearing, reargument, and reconsideration from both carriers and shippers. Some of these petitions were denied by separate orders and the remainder were denied in a supplemental report, decided April 13, 1931.[53] Among the petitions was that of the A., T. & S. F. Railway and other carriers, asking for reconsideration on the basis of changed conditions since the record was made in 1928 – the changed conditions being the economic depression which started in 1929. After denial, the carriers appealed to the District Court for the Northern District of Illinois, which dismissed the case.[54] They next appealed to the United States Supreme Court which gave its decision on January 4, 1932, in *A., T. & S. F. Ry.* v. *U. S.*[55]

The grain case before the Supreme Court: The only question dealt with by the Supreme Court was "the fundamental question presented by the action of the Commission in denying the appellant's second application for a rehearing." The Court distinguished

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[51] *Ibid.*, 718-722.

[52] *Ibid.*, 697.

[53] 173 I.C.C. 511.

[54] 51 F (2d) 510.

[55] 284 U. S. 248.

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between an ordinary petition for rehearing, which is for the purpose of directing attention to matters alleged to have been overlooked or mistakenly conceived in the original decision, and the second petition of the carriers which was considered in the nature of a supplemental bill. In the words of the Court:

It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself. . . .

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact dominating thought and action throughout the country.[56]

Therefore, reasoned the Court, the 1928 record is not representative of 1931 conditions, and the Commission should have reopened the proceeding. In justifying its failure to reopen proceedings, the Commission cited the volume of material and the length of time consumed in making the record, which would have to be substantially repeated in making a new record. To this the Court said:

These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.[57]

The final conclusion of the Court was that the original and supplemental order of the Commission could not be sustained. The discussion of the Commission's powers is interesting.

We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under . . . [sections] 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.[58]

The decision in the Atchison case has become a precedent both for the Court and the Commission. Justice Brandeis has said "The *Atchison* case rests upon its exceptional facts. It is apparently the only instance in which this Court had interfered with the exercise of the Commission's discretion in granting, or refusing to reopen a hearing."[59]

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[56] *Ibid.*, 260.

[57] *Ibid.*, 261-262.

[58] *Ibid.*, 262.

[59] 298 U. S. 349, 389 (1936).

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Supreme Court Considers Intrastate Rates and Hoch-Smith Resolution. The Hoch-Smith resolution was indirectly involved in another case before the United States Supreme Court. In this case, the Board of Railroad Commissioners of North Dakota investigated intrastate rates beginning May 29, 1925. In September 1927, the State Commission directed that the record be held open for future hearing until after the Interstate Commerce Commission should render a decision in its rate-structure investigation, Docket 17,000. However, a few months later the State Commission resumed its investigation and, on May 8, 1929, issued an order reducing the existing intrastate rates.

The carriers appealed to the United States District Court for an injunction which was granted, and the State Commission then appealed to the Supreme Court of the United States. It was urged before the Supreme Court that the injunction was in aid of the rate-structure investigation of the Interstate Commerce Commission. The Supreme Court held that the injunction had the effect of preventing the State from enforcing the rates that it had prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. In reversing the District Court the Supreme Court stated: "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."[60] In other words, the proper channel for relief of alleged unjust discrimination was first through the Interstate Commerce Commission.

Lake-Cargo Coal Before Commission. In dealing with lake cargo coal, the Interstate Commerce Commission had permitted the establishment of a rate structure which gave the northern coal fields a rate differential of 25 cents less than the rate for the southern coal fields. In a case brought by the northern coal fields the differential was further increased by 20 cents on the plea that the northern coal operators were suffering a depression which entitled them to relief under the Hoch-Smith resolution.[61] Inasmuch as the southern fields were in competition with the northern fields, the further increase of the differential brought a reaction from the carriers serving the south. This reaction took the form of a proposed schedule of rates restoring the differential to 25 cents by reducing rates on southern coal to lake ports. The Commission ordered the cancellation of the proposed tariffs.[62] The basis for the Commission's order was that the southern coal rate was already very low and to reduce it further was unreasonable. The Commission said:

> To the extent that managerial discretion on the part of a prosperous carrier may have the effect of lowering rates below the general level, it runs counter to the expressed policy of Congress as to uniformity, and nullifies the intent to impress a trust upon any excessive returns for important national purposes. Proposals which necessarily have this effect are not justified.
>
> Nor is the management of a prosperous carrier wholly free to pick out at will one commodity, such as bituminous coal, and in its discretion accord to it a basis of rates so low as not to afford a fair measure for the reasonableness of rates on even that traffic. The policy of Congress as to where the lowest possible rates shall be applied has been expressed by it in the Hoch-Smith resolution, to which we have given such effect as we could in respect of important commodities. *Georgia Peach Growers Exch. v. A. G. S. R. R. Co.*, 139 I.C.C. 143; *Calif. Growers' & Shippers' Protective*

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[60] *North Dakota v. Great Northern*, 281 U. S. 412, 430. Decided May 19, 1930.

[61] 126 I.C.C. 309 (1927).

[62] 139 I.C.C. 367 (1928).

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League v. *S. P. Co.*, 129 I.C.C. 25, 132 I.C.C. 582. Other important investigations under the same resolution, with respect to agricultural products, including livestock embracing practically the entire country, including the territory here particularl concerned, we now have in progress. To accord to a carrier the right to transport substantial portion of its tonnage at rates upon the obviously low level here proposed while giving no relief to the agricultural industry, including livestock, which Congres has declared to be in a depressed condition and entitled to the lowest possible lawfu rates consistent with the maintenance of an adequate transportation system, is counte to that mandate. The Hoch-Smith resolution is not directed to the carriers; it i directed to us. Carriers who seek our approval of rate proposals will be expected t show that a finding of justification can be made consistently with the policies outline for us in the resolution. This has not been done in this proceeding.[63]

In concurring with the majority opinion, Commissioner Eastman commented upon th relation of the Hoch-Smith resolution to Section 15a.

Quite aside from the matter of rate wars, the majority opinion contains a ver strong argument in support of our power to fix minimum rates, even within the zone c reasonableness, as a necessary adjunct to the duties imposed upon us by section 15a ar also by the Hoch-Smith resolution. It does not seem to me that the latter added any thing to the law, so far as a situation like the one before us is concerned. Wit respect to section 15a the argument, as I gather it, amounts briefly to this: In suspension proceeding we may make such orders with respect to the suspended rates a would be proper in a proceeding initiated after they had become effective, and i section 15a we are required to "initiate, modify, establish, or adjust" rates, up c down, so that the carriers as a whole or in designated rate groups or territories wil have certain aggregate earnings. Therefore it is our duty to refuse to permit rates already below a reasonable maximum level to be further reduced within the zone c reasonableness, when the effect will be to further impair the aggregate earnings of th group and create or add to a deficiency which must be made up elsewhere. I concec that much may be said for this position, and it may reflect our power. I questior however, whether we are justified in exercising this power, if we possess it, in th way suggested, for it seems to me upon grounds which I have already indicated, that i involves a confinement of railroad competition within narrower limits than the law ha contemplated, a confinement which might indeed in certain cases have the effect c seriously crippling individual carriers. Moreover, if it be our duty to administer th law in the manner suggested, it imposes a most formidable task upon us which is yet t be undertaken, for the rate structure of the country is, I believe, full of rate depressed to a very considerable degree for strictly competitive purposes.[64]

Question becomes moot before Supreme Court: On April 14, 1928, a Federal Cour granted the southern carriers a permanent injunction setting aside the Commission' order.[65] The Commission appealed to the United States Supreme Court, but between th date of the injunction and the argument before the Supreme Court the northern an southern coal carriers compromised on a new differential—basically 35 cents—which wa somewhat more than the original but less than that granted in the Commission's order t the northern fields. During the period before the compromise, the beginnings of severe rate war appeared. The northern carriers immediately restored the 45-cer differential when the southern carriers reduced their rates by 20 cents under th authority of the injunction. The compromise was a recognition of the futility c economic conflict on the part of the carriers themselves. As for the case before th Supreme Court the question became moot, and, following the usual practice, the Cour reversed the District Court and remanded the case for appropriate action to the lowe court.

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[63] *Ibid.*, 394-395.

[64] *Ibid.*, 399-400.

[65] 25 F (2d) 462.

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ACCOMPLISHMENTS OF THE HOCH-SMITH RESOLUTION

Current Conditions in Industry; Rate Structure Adjustments (Competitive Transportation and the Rate Structure; Cost of Service an Approximation; Cost of Service a Regulatory Defense); Lowest Lawful Rates for Agricultural Products (Proof Required of Depression in Agriculture; Counter Claims to Depression in Agriculture; Lowest Possible Lawful Rates; Congressional Direction Considered "a Hopeful Characterization of an Object Deemed Desirable"); Summary of Achievements.

Somewhat more than 5 years after the passage of the Hoch-Smith resolution the United States Supreme Court interpreted it as adding nothing to the Interstate Commerce Act. In the intervening period it had been relied upon in many cases before the Interstate Commerce Commission, and under it the Commission had carried on extensive rate-structure investigations which have continued to the present date. Large amounts of money and time, not only of the Commission but also of railroads and shippers, have gone into these investigations. With all this huge expenditure in the name of the Hoch-Smith resolution what has been accomplished?

Three general objectives were set up in the resolutions: 1, the consideration of current conditions in an industry as the "true policy in rate making," 2, the investigation of the rate structure and correction of maladjustments, and 3, the prompt accomplishing of "lawful" rate-structure changes to give agricultural products the "lowest possible lawful rates" and the deciding of current cases in accordance with this direction.

CURRENT CONDITIONS IN INDUSTRY

The "true policy in rate making" clause engendered a great deal of confusion. Should the Commission investigate the economic conditions surrounding an industry in addition to investigating the rate structure before a decision could be made on the rate? Would a rate which was reasonable under other conditions be unreasonable because of economic conditions in the industry? Would rates have to be readjusted with fluctuations in the economic conditions? These questions represent the doubts which were raised by the true-policy declaration.

From time to time, the Interstate Commerce Commission had considered cases in which the economic condition of the shipper was urged as a basis for determining rates. One of the primary reasons for the passage of the Interstate Commerce Act had been the elimination of unfair discrimination. Would it be fair discrimination to give a lower rate to a shipper because of adverse economic conditions? Other shippers would not think so. Would it be fair to give a lower rate to one locality because of adverse economic conditions? Other localities could protest against undue preference or undue prejudice which are contrary to the law. Would it be fair discrimination to give a lower rate to an industry because of adverse economic conditions? Other industries could protest if the lower rate to the depressed industry forced them to carry an unfair share of the transportation burden.

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The Supreme Court had interpreted this element of the Interstate Commerce Act in passing upon decisions made by the Commission. The position of the Court is indicated in the following brief statements of opinions. It held that the Commission could not protect a portion of the lumber industry from the adverse economic effect of a rate change.[1] A depression in the lumber industry was not considered a proper basis for reducing rates.[2] In a case involving a privately owned grain elevator, the Court held that the law did not attempt to equalize fortunes, opportunities, or abilities,[3] nor to equalize opportunities among localities.[4] In holding the Child Labor Act of 1916 unconstitutional, the Court reasoned that Congress could not be given power to equalize industrial conditions through rate adjustments under the commerce clause of the Constitution.[5]

As to mere consideration of the conditions in an industry "in so far as it is legally possible to do so" while adjusting freight rates under the Hoch-Smith resolution, the Supreme Court said: "This policy is not new. In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness; and it also has been recognized that so far as can be done with due regard for the interests affected, rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce."[6]

As far as the first objective of the Hoch-Smith resolution is concerned, the Commission seemed to have accomplished a true policy in rate making in the regular course of procedure. It had permitted evidence on the conditions existing in the industry to be introduced in the record and had considered this evidence in determining rates, both before and after the advent of the resolution. Apparently, the Senate Committee which rejected the reappointment of Commissioner Esch thought the Commission had gone too far in considering the existing conditions when determining rates under the resolution. In the hearings before the committee this tendency to look into economic conditions, labor conditions, the conditions which existed in various areas, and the relative prosperity of various producers was referred to as a dangerous trend which existed long before the passage of the Hoch-Smith resolution.[7] There is every reason to believe that the railroads as well as the Commission have given consideration to the economic condition of an industry in proposing rate changes.

In any event, the "true policy in rate making" declared in the Hoch-Smith resolution did result in somewhat greater emphasis upon the conditions in the industry when rate changes were considered.

RATE-STRUCTURE ADJUSTMENTS

The second objective of the resolution was the investigation of rate structures and the correction of any defects found to exist. In making adjustments the Commission

[1] *S. P. Co.* v. *I.C.C.*, 219 U. S. 433, 449 (1911).

[2] *I.C.C.* v. *U. P. R. R.*, 222 U. S. 541, 553, 555 (1912).

[3] *I.C.C.* v. *Diffenbaugh*, 222 U. S. 42 (1911).

[4] *U. S.* v. *I. C. R. R.*, 263 U. S. 515, 524 (1924).

[5] *Hammer* v. *Dagenhart*, 247 U. S. 251, 273 (1918).

[6] *Ann Arbor R. R.* v. *U. S.*, 281 U. S. 658, 666-667 (1930).

[7] *Hearings . . . on the Confirmation of John J. Esch . . . .*

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was directed to give consideration to the comparative market value of the commodities and "to a natural and proper development of the country as a whole" subject "to the maintenance of an adequate system of transportation." This is a huge task even when broken down by commodity groups which, incidentally, were not limited to agricultural products. Nor could such a limitation have been reasonably imposed as the rate structures of different commodities are interrelated through the rate level and, for those commodities which have competitive uses, through those uses. If the rates in one rate structure are lowered without a compensating increase in traffic volume, the maintenance of the general rate level would necessitate an upward adjustment of the rates in the rate structures of other commodities. Moreover, under Section 15a the rate level was required to be maintained so that the return to the railroads would be 5-1/2 to 6 percent.

In the *Southern Class Rate Investigation*,[8] the Commission had taken a step toward systematic structural improvement in class rates. This investigation was instituted by the Commission on its own motion on February 6, 1922 and "Its purpose is to determine whether the rates and ratings under investigation are 'unreasonable, or unduly prejudicial to or unduly preferential of particular localities, persons, or descriptions of traffic.'" As a general rate level investigation for the country as a whole was then under way "it would 'not be the primary purpose of this inquiry either to add to or subtract from the aggregate revenues of the carriers, but rather to adopt a class-rate structure which will be as simple as it can be made, with due regard for the public interest, and free from undue prejudice, and which will serve the purposes that class rates ought to serve.'"[9] This investigation was similar to the rate-structure investigation proposed by the Hoch-Smith resolution. However, it did not include commodity rates nor were readjustments directed specifically to the market value of the classes and kinds of commodities.

The rate-structure investigation of the Hoch-Smith resolution was carried out as Docket 17,000 which was divided into parts. The first report in each part examined the historical reasons for the existing rate structure before making any adjustments. When the overall rate structure for a commodity was examined in this way, various inconsistencies were noted, and corrections were prescribed. In making these readjustments some of the rates were lowered and some were raised. The effort was directed toward removing preference and prejudice and not primarily toward changing the rate level.

Although the resolution directed that consideration be given to the market value of the commodities this was qualified by due regard for the maintenance of an adequate transportation system. When construed in the light of Section 15a, this meant that the rate level must be kept high enough to produce a sufficient return to attract such capital as the railroad might need.

Such a conflicting situation necessarily made the work of the Commission more difficult inasmuch as any effort to lower the rates on the basis of comparative market value could be countered by the carriers with a showing of cost of service and impairment of return under Section 15a.

Therefore, it is not surprising that the rate-structure investigation resulted in very little reduction. There were both increases and decreases, as noted previously,

[8] 100 I.C.C. 513 (1925).

[9] *Ibid.*, 518-519.

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and the rate structures affected were those of nonagricultural as well as agricultural products. Even the Hoch-Smith resolution, which appeared to authorize discrimination on the basis of market value, could not overcome the court-approved discrimination based on the direction of Section 15a, to include an adequate return in the cost of service.

Competitive Transportation and the Rate Structure. In the case of some commodities, the rate structure was altered and rates were lowered, not because of the direction of the Hoch-Smith resolution but because of the competition of other forms of transportation. Agitation for these rate changes, which were seemingly contrary to Section 15a, arose mainly from the carriers themselves. Thus, motortruck and water competition led to lower rates for cotton, and motortruck and pipe-line competition led to lower rates for petroleum.

This leads to an important question. If the former rates were based on cost of service, upon what basis are the new rates justified? Since the carriers have emphasized cost of service as a justification for discrimination, is it possible that cost of service in certain segments of the rate structure for a particular commodity drops rather suddenly when competition takes part of the traffic volume away? An increase of traffic volume usually means a lower unit cost of service, and conversely a decrease increases the unit cost. Therefore, it is not probable that rate decreases on a particular commodity, in a segment of the rate structure which encounters competition, can be justified as fair discrimination in relation to other commodities on the basis of cost of service. The only justification for this discrimination is on the basis of the value of service — a basis which the carriers said was indefinite and fluctuating when it was suggested in the Hoch-Smith resolution.

In case of competition, the value of service to the shipper on either of two transportation agencies will be measured by the lowest rates quoted. When one agency lowers its rates to the level of the other it has used value of service as the measure of the rate. But, was the lower rate based on the cost of service for the particular commodity? It might or might not be. Whenever the value of service exceeds the rate, the incentive to find a lower-rate means of transportation is not so great as when the rate exceeds the value of service.

In fact the incentive to find lower-rate transportation increases as the rate increasingly exceeds the value of service. The incentive may become so great that shippers undertake to provide their own means of transportation, either individually or cooperatively. The genesis of many motortruck and pipe-line operations may be traced to this incentive. Rates charged on the new transportation means may, therefore, be based on either cost of service or value of service, but, in either case, the gross income should cover the total cost plus some return on the investment, or the transportation agency will eventually fail financially.

Cost of Service an Approximation. There is an impression that, although value of service is not susceptible of accurate measurement, cost of service may be readily determined. This is not true. Any cost-of-service determination is really an approximation — estimated and not determined. A rate set from such evidence is not

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mathematically exact.[10] The carrier's claims as to its ability to estimate the cost of service for a commodity may be contradictory at different times. This would suggest that cost-of-service estimates can be raised or lowered as convenient for the carrier.

On a railroad, the same car may carry a number of commodities whose individual rates differ widely from each other even though shipped between the same two points. One train may have carloads of the same net weight but consisting of different commodities whose rates differ widely between the same shipping points. Some of the difference in rates is due to variations in cost of service, brought about by assuming risk of damage in transit or handling and ancillary transportation functions. The greater risk is due to the higher value of the commodity and not to the cost of transporting it. This greater risk because of higher value prompts the carrier to furnish a better type of equipment and more careful handling which increases the cost of service. This increase is due to the value of the commodity, which is also used as the measure of the value of service, consequently it seems as though the usual cost-of-service estimation is a combination of both principles of rate making.

Although the Hoch-Smith resolution placed somewhat greater emphasis on the value-of-service principle of rate making than had heretofore been given, little was accomplished in extending its application. Value of service was thought of in relation to market prices. These prices fluctuated almost daily and from place to place and, therefore, would result in an unstable rate. Cost of service was thought of in relation to figures taken from the carrier's books, and the exactness with which the fifth, sixth, or tenth decimal place could be given created an illusion of preciseness which would be wholly unwarranted if the premises of the rate calculations were wrong.

If the cost-of-service principle in rate making was carried out fully, the carrier would probably find itself losing traffic. It cannot fairly be said that the individual rates on all commodities fully cover all costs including a substantial compensation for the carrier. Conversely, the individual rates on some commodities more than cover all costs including full compensation for the carrier. Railway passenger service frequently shows a loss which must be recovered from freight operations if the carrier is to survive. If the carriers increase fares to cover all passenger costs, passenger traffic will fall off through diversion to motor busses and private automobiles, just as it did following the first World War. The value of the passenger service is less than the cost on the volume carried. When fares were reduced, several years ago, to bring them somewhat below the passenger's value of service, traffic increased sufficiently to more than offset the lowered fare and actually increase revenue above expense.

Cost of Service a Regulatory Defense. In the preregulatory period, and for a long time after the Interstate Commerce Commission was established, railroads fixed

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[10] In *I.C.C. v. U. P.*, 222 U. S. 541, 550. Decided January 9, 1912. The Supreme Court said of a lumber rate:

> There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load. With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate.

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rates on the estimates of their experienced traffic men as to "what the traffic will bear." As the Commission more and more frequently passed on the reasonableness of a particular rate, the cost of service was emphasized because of the seeming preciseness with which it could be derived. The Commission was placed on the defensive by both carrier and shipper and anything which contributed towards making its work more authoritative was welcomed. The cost-of-service principle served this purpose as it was fortified by the records of the carrier and could be used as a defense against carrier, shipper, and public.

From the time of *Smythe* v. *Ames*,[11] when the Supreme Court set forth a variety of property valuations upon which the carrier was entitled to a return, through the *Northern Pacific Ry.* v. *North Dakota* case,[12] where the Court said the rate on any commodity or class of traffic should bear its full cost including a "substantial reward" for the carrier, to the cases[13] where the Court interpreted Section 15a as part of a comprehensive program to rehabilitate the railroads so as to make them adequate for the public, the opinion of courts and Commission increasingly has been that the primary function of railroads is to recover a "substantial reward" for their services.

Traffic has retreated from the high rate level of the railroads to other forms of transportation, particularly to motor carriers and, for petroleum, to pipe lines. Water carriers also have been available. As traffic left the railroads, control of competitive transportation was sought and finally secured through the Federal regulation of motor carriers by the same agency which regulates the railroads and, more recently, through the Federal regulation of water carriers. The motor carriers opposed regulation because they believed that the relatively higher railroad rate level would be forced upon them. Although it does not seem that the fear was justified, the cost-of-service principle is again coming to the fore.

LOWEST LAWFUL RATES FOR AGRICULTURAL PRODUCTS

In the third paragraph of the Hoch-Smith resolution, the Commission was directed, "in view of the existing depression in agriculture," as soon as possible to effect changes that would enable these products to receive the lowest lawful rate with due regard to the maintenance of an adequate transportation system. It is difficult to evaluate the benefit, if any, received by agriculture under this paragraph. Probably its benefit was in preventing increases of rates on agricultural products rather than in providing decreases.

In *Revenues in Western District*,[14] which was docketed as Part 1 of the rate-structure investigation, the proposed increases on agricultural products were denied. In Part 2, *Western Trunk-Line Class Rates*,[15] there were no increases on ordinary agricultural products.

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[11] 169 U. S. 466 (1898).

[12] 236 U. S. 585 (1915).

[13] *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456 (1924); *N. E. Divisions Case*, 261 U. S. 184 (1923); *Wis. R. R. Com.* v. *C. B. & Q. Ry.*, 257 U. S. 563 (1922).

[14] 113 I.C.C. 3 (1926).

[15] 164 I.C.C. 1 (1930).

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Proof Required of Depression in Agriculture. In other parts of the rate-structure investigation which concern agricultural products, the benefits of this section of the resolution were claimed. Although Congress mentioned the existing depression in agriculture, this depression had to be extensively evidenced in the record for each case. This necessarily took time and delayed the progress of the case. Part 7, *Grain and Grain Products*, was ordered instituted on December 30, 1926, and the opinion of the Commission was given July 1, 1930. The record in this case was voluminous with evidence of a very complex rate structure and of the depression in grain. A controversy arose between Congressman Hoch and the Commission over the delay in the progress of the case and the necessity of introducing extensive proof of depression among the grain growers.[16] But the Commission insisted that according to the law, it could not give a decision not supported by evidence in the record. The record was closed September 22, 1928, and nearly 2 years later, the Commission gave its opinion which proposed the lowering of certain grain rates.[17]

The carriers immediately sought a rehearing claiming that their financial condition was serious, and that the proposed rates would threaten the maintenance of an adequate transportation system, contrary to Section 15a and the Constitution of the United States. The Commission denied the application for a rehearing on the ground that it would require further lengthy and expensive proceedings which would delay the current case in which the opinion had been reached after regularly conducted and protracted hearings participated in by both carriers and shippers. When the rehearing was denied in the spring of 1931, the carriers filed suit in the courts. The United States District Court upheld the Commission,[18] but the United States Supreme Court reversed the District Court, on January 4, 1932, and directed that an injunction be issued against the Commission's order. The Supreme Court said:

> It is said that "in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record," and that its determination "cannot reflect accurately fluctuating conditions." These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. *This is not the usual case of possible fluctuating conditions, but of a changed economic level.* And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice [Italics supplied].[19]

The Court took judicial notice of the "changed economic level" for the carriers, but the "changed economic level" for agriculture was thought of as "the usual case of possible fluctuating conditions" which require lengthy hearings and a voluminous record. The fluctuating condition of agriculture had persisted on a changed economic level for a period of years, whereas the 1929 financial crash affecting the carriers had occurred only a little over 2 years previously.

Counter Claims to Depression in Agriculture. In other cases, when efforts were made to show the existing depression in the production of a particular agricultural product, counterclaims were made by the carriers to show that the condition was normal,

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[16]See *United States Daily* (Washington, D. C.), May 14, 1928, p. 671, 676, May 21, p. 743, 748, June 5, p. 881, 886, June 26, p. 1084.

[17]164 I.C.C. 619 (1930).

[18]51F (2d) 510.

[19]284 U. S. 248, 261-262.

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temporary, within the control of the agriculturist, or unrelated to responsibility of the carrier. A favorite counterclaim was that the low prices were due to overproduction which could be controlled by the agriculturists. The fact that this production was moved in large volume by the railroads regardless of the low prices received by farmers was advanced to show that "the freedom of movement by common carriers of the products of agriculture affected by that depression" had been promoted in accordance with the Hoch-Smith resolution. The clause, "at the lowest possible lawful rates," was omitted in such references, but "compatible with the maintenance of adequate transportation service" was often included. The carriers often claimed that the fluctuation in market prices of wheat over the period of grain movement was of comparatively greater importance than the railroad rate. The fact that market prices relate to spot supply, which depends somewhat upon transportation delivery or delay, was not noted. Another counterclaim was that even if the rates were reduced, as asked by the agriculturalists, the share of each farmer would amount to a trivial sum, while the total reduction borne by the carriers would be an important percentage of their revenue.

As a counterclaim to the existence of depression prices for agricultural commodities, which was urged by farmers, the carriers showed that prices were normal or even above normal when compared with recent years. Prices below this level were "temporary fluctuations." The fact that prices had been low over a period of years did not seem to qualify as a "changed economic level" for agriculturalists. If anything, according to the carriers, it simply indicated the farmers' negligence in overproducing.

Always held out as a specter before the agricultural groups were the heavy losses they would suffer if the lower rates they asked resulted in financial impairment of the carriers, so that transportation equipment could not be supplied promptly for the seasonal and perishable crops. There had been losses because of lack of transportation equipment when needed, but this was probably due, at least in part, to other causes rather than to financial impairment alone. Inadequate supply, for example, was spoken of as entirely due to the financial inability of the carriers to buy additional equipment because of the low rates. As a loss resulting from inadequate car supply could overwhelm individuals or areas, the argument was forceful in preventing rate reductions and even in increasing rates.

Lowest Possible Lawful Rates. In the Deciduous-Fruit Case, the Commission tested out the depression-in-agriculture paragraph of the resolution. In an earlier deciduous-fruit case, the Commission had decided that the existing rates were neither unreasonable nor unduly preferential.[20] The Hoch-Smith resolution had been passed after the record in this case was closed, so the required evidence on depression in the deciduous-fruit industry was not in the record. Eighteen months later, on December 27, 1926, the deciduous-fruit growers filed another application for a rate reduction under Sections 1, paragraph 3, and 3, paragraph 1, of the Interstate Commerce Act and under the Hoch-Smith resolution. Most of the emphasis of these complainants was on the depression clause of the resolution, and extensive evidence as to the economic condition of the California deciduous-fruit growers was placed in the record. Upon this record, the Commission decided that the rates previously approved were now unreasonable and unlawful and prescribed reduced rates.[21]

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[20] 100 I.C.C. 79 (1925).

[21] 129 I.C.C. 25; 132 I.C.C. 582 (1927).

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The third paragraph of the resolution was construed by the Commission as placing agricultural products in a "most favored" class to which "the lowest possible lawful rates" should be given.

Both the commission and the courts have repeatedly referred to a flexible limit of judgment in reaching a conclusion as to the reasonableness of a rate or a schedule of rates. Otherwise stated, there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services. We again conclude that "the lowest possible lawful rates" which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service.[22]

In addition to showing depression in order to qualify for the application of the Hoch-Smith resolution, the deciduous-fruit growers had made "a comparison of relative rate levels" to show that the rates on deciduous fruits were disproportionately high in comparison with those on other traffic and so were violative of the Interstate Commerce Act.

Since shortly after August 26, 1920, the date of the last general increase, there has taken place a gradual downward readjustment of the transcontinental rate structure with a corresponding decline in the rates maintained locally in the Mountain-Pacific group. In spite of this downward trend the rates on deciduous fruits, except to points in Group J, are still 50.4 per cent higher than the June 24, 1918 basis. As a result deciduous fruits are higher as related to the pre-war level than are the rates upon the great body of transcontinental and Mountain-Pacific traffic. As illustrative, complainant shows the comparative increase in 75 commodities moving eastbound transcontinentally and 65 commodities moving westbound, admitted by defendants [railroads] to represent a fair cross-section of the transcontinental traffic. On eastbound traffic the rates are on an average 29 per cent above the June 24, 1918 basis, while westbound they are but 22 per cent above that basis. Import and export rates from and to Pacific coast ports now exceed the June 24, 1918 basis on an average by 41 per cent and 18 per cent, respectively. A somewhat similar showing may be made as to certain traffic moving locally in Mountain-Pacific territory. Many of these transcontinental rates were reduced in order to retain or to secure traffic which would otherwise move by water, and other reductions were made to permit specific competitive commodities to move or to reach certain markets. The circumstances and conditions surrounding their movement are to that extent dissimilar.[23]

Congressional Direction Considered "a Hopeful Characterization of an Object Deemed Desirable. After the Commission had decided that the rates should be reduced, the carriers went to the courts. Eventually, the reduction was set aside by the Supreme Court on the ground that the Commission had erroneously construed the Hoch-Smith resolution which added nothing new to the basic interstate commerce law. The Supreme Court held that the first and second paragraphs of the resolution considered matters already covered by law and so were not new and the third paragraph

does not purport to make any change in the existing law, but on the contrary requires that that law be given effect.

The commission stresses the concluding words in the same sentence with "lawful changes" and evidently regards them as qualifying the natural import of the latter and in effect specifying a new and reduced scale to be applied in rate making. The words stressed are, "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making.[24]

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[22] 129 I.C.C. 25, 34.

[23] *Ibid.*, 39-40.

[24] *Ann Arbor R. R. v. U. S.*, 281 U. S. 658, 668-669 (1930).

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Agriculture had counted heavily on the third paragraph of the Hoch-Smith resolution as an aid to lower transportation rates. This paragraph was the sole substance of the Smith resolution before its consolidation with the Hoch resolution directing the rate-structure investigation. But, as just stated, the Supreme Court called the Congressional direction to the Commission to effect "the lowest possible lawful rates" for agriculture affected by the depression, "more in the nature of a hopeful characterization of an object deemed desirable . . . than as a rule intended to control rate making."

SUMMARY OF ACHIEVEMENTS

One accomplishment of the Hoch-Smith resolution was a further step toward improvement in rate structures which had been disorganized by the large horizontal rate changes. Rate structures require continuous attention if injustices are to be minimized. The goal, seemingly receding and never attained, is the perfect rate-structure balance, free from all preference and prejudice.

In some agricultural rates increases were prevented, and in others decreases were obtained.[25] Whether the benefits derived by agriculture from these actions compensated for the expenses of passing, administering, and prosecuting the cases, it is difficult to determine. Under the Supreme Court's interpretation of the Hoch-Smith resolution, agricultural products must justify their rate complaints under the Interstate Commerce Act. Probably this justification was looked upon with greater favor by the Commission because it followed the precedent of established procedure.

Commodities other than agricultural products came under the depressed-industry clause of the resolution and perhaps received greater aid. Unhampered by legal restraints such as were placed on the resolution, the competitive influence of motortrucks and waterways effected the lowering of certain rates on agricultural products and so were beneficial to that portion of agriculture which could use them.

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[25] When general increases were authorised by the Interstate Commerce Commission in *Fifteen Percent Case, 1931*, 178 I.C.C. 539 (1931); *Emergency Freight Charges, 1935*, 208 I.C.C. 4 (1935); and *Fifteen Percent Case, 1937-1938*, 226 I.C.C. 41 (1938), general increases on agricultural commodities were either denied or the increases were less than those approved for other commodities. These decisions are mentioned because they indicate that the Interstate Commerce Commission gave consideration to the economic condition of agriculture. Also in a number of cases decided before the passage of the Hoch-Smith resolution, the economic condition of agriculture had been recognised by the Commission, such as in the grain case decided October 20, 1921, 64 I.C.C. 85, which reduced by one-half the horizontal percentage rate increases authorised in *Increased Rates, 1920*, 58 I.C.C. 220. Decidod July 29, 1920.

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REASONS FOR FAILURE OF HOCH-SMITH RESOLUTION TO ACCOMPLISH STATED OBJECTIVES

Mandate for Action with no New Rate Principles; Extensive Task for Interstate Commerce Commission; Time Required for Investigation Offsets Advantages; Depression in Industry as Well as in Agriculture; Conflict with Section 15a; Lack of Traffic Diversity on Agricultural Railroads.

That the Hoch-Smith resolution failed to accomplish its objectives has been generally admitted, but the reasons for this failure are not so clear. If the resolution was only a "sop to agriculture" or a "political gesture" in a presidential year, then it may be considered to have fully accomplished its purpose. If, on the other hand, the motives of the legislators are given the benefit of the doubt, why did the resolution fail to give agriculture even a fraction of the expected help.

MANDATE FOR ACTION WITH NO NEW RATE PRINCIPLES

In the first place, the joint resolution seemed primarily a mandate requiring action and containing no new rate-making principles. It contained no new authority, as was admitted in legislative debate, but was intended to encourage the Commission to undertake a broad, expensive, rate-structure investigation such as had been done on a smaller scale in the regular routine of its work. There was no clarification of the confusing question—what shall be the function of the cost-of-service principle and of the value-of-service principle in the making of railroad rates? When the Commission was directed to give due regard to the comparative market value of commodities in making rate adjustments, the discretion was nullified by the accompanying qualification to give due regard also "to the maintenance of an adequate system of transportation." When the Commission was directed promptly to effect "lawful changes" in the rate structure in order to give agricultural products suffering from depression "the lowest possible lawful rates," the direction was nullified by the qualification "compatible with the maintenance of adequate transportation service." When Congress told the Commission the "true policy in rate making" was that the economic conditions in the several industries "should be considered," Congress qualified even the colorless phrase "should be considered," by adding "in so far as it is legally possible to do so."

With these nullifying qualifications in mind, it is very difficult to conceive that Congress ever seriously intended to give much weight to value of service as a rate-making principle. In explaining the resolution, Mr. Hoch stated, "But, as gentlemen will notice by reading the resolution, it does not contemplate that there shall be anything ruthless done; in fact, it specifically provides that it shall not interfere with the maintenance of an adequate transportation service."[1] All this is like the fond mother's permission to her darling daughter to go in swimming—"Hang your clothes on a hickory limb but don't go near the water." Under the legal limitations of the joint resolution, the Commission certainly cannot be held responsible for the failure to aid agriculture.

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[1] *Congressional Record*, 68th Congress, 1st Session, 11019 (June 6, 1924).

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Probably the best Congressional characterization of the resolution, prior to the Supreme Court decision in the deciduous-fruit case, was that given by Senator Carter Glass.[2]

EXTENSIVE TASK FOR INTERSTATE COMMERCE COMMISSION

The rate-structure investigation directed by the resolution had no nullifying inhibitions, and, as Mr. Shallenberger said,

> Agriculture is not going to get relief by this legislation. This resolution only asks the commission to do the thing it has done, is now doing, and just what it will continue to do in the future under the present law. . . .
>
> Gentlemen, we are to have the commission investigating something which they already fully understand, and they are to take 10 years or more to do it and spend millions of dollars of the people's money. *Investigations by commissions are for two major purposes, to kill time and spend money.* You do not grant them any new power in this bill; you do not give them any authority they do not now have. This legislation is simply a gesture to placate the farmer [Italics supplied].[3]

In the investigation carried on by the Commission as Docket 17,000 there were 13 parts. The first two dealt with western trunk-line rates and not with particular commodities, and each of the remaining 11 parts, 4 of which were split into subparts, dealt with a particular commodity and its products. The volume of testimony and exhibits placed in the record was overwhelming even for the expanded personnel of the Commission. The situation is described as follows:

> The Resolution directed us, among other thmngs, to reconstruct the rate structure of the country and to reapportion the burden under it. In a sense, every rate case is a revision of the existing rate structure, but the Hoch-Smith Resolution was apparently intended to hasten that process. Generally speaking, the Docket 17000 cases have developed into unwieldy proportions. Our experience with them has shown that the country is too big to make it generally practicable to deal with it as a whole or even with the major classification territories, except in proceedings especially adapted to large territorial treatment, such as the classifications themselves. Substantial benefits have resulted from the general surveys which have been made in the Hoch-Smith cases, but these have been offset by the disadvantages connected with unavoidable delay because of the protracted character of the hearings in arriving at specific rate changes in particular territories or to meet particular situations.[4]

In announcing the discontinuance of the general investigation on October 2, 1933, the Commission said:

> Experience has shown that necessary changes in the rate structure can be effected by us with the least delay (which is the mandate of the Hoch-Smith resolution) through the usual course of hearing complaints, or by investigations on our own motion, rather than under a general nation-wide investigation which is likely to assume unduly ponderous proportions.[5]

In the hearings on the Hoch-Smith resolution, the Commission's representatives had been reluctant to, if not antagonistic toward undertaking the investigation, and emphasized all the objections and drawbacks. After the resolution was approved, the public was invited to submit statements on the intent of the resolution and the

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[2]See Chapter 4, page 77.

[3]*Congressional Record*, 68th Congress, 1st Session, 11020 (June 6 1924).

[4]U. S. Interstate Commerce Commission, *Annual Report* (1932), 30.

[5]*Ibid.* (1933), 12.

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procedure to be followed in effecting it. The Commission wanted these statements for aid and guidance in shaping its procedure. After they were filed, "the commission had an oral discussion as to the proper interpretation of the Hoch-Smith resolution."[6] Whether the Commission's seeming unwillingness to undertake the investigation entered into the administration of the rate-structure and depressed-industry cases is very difficult to ascertain.

TIME REQUIRED FOR INVESTIGATION OFFSETS ADVANTAGES

Another disappointment in the working out of the resolution was the delay occasioned by the comprehensive record prepared in the investigation of the rate structure of commodities. This delay was said to have offset the advantages of any improvement in the rate structure because of the changes which took place between the start of an investigation and the filing of a decision. Although much material on the rate structure of commodities was in the records of earlier cases, the record in the rate-structure investigation was made complete in itself insofar as possible. This, of course, was in accordance with the Interstate Commerce Act which requires a decision of the Commission to be confined to the evidence in the record before it. It required considerable time to prepare, present, rebut, analyze, and draft a report of all this evidence. The comprehensive character of such a broad rate-structure investigation must inevitably require time. The delay in reaching a decision not only proved discouraging to the agricultural group, even though it finally brought reductions; it also proved inadequate under changed conditions. When these conditions were adverse to the carriers, as in the grain case,[7] relief was sought and received from the courts.

DEPRESSION IN INDUSTRY AS WELL AS IN AGRICULTURE

Another reason advanced for the failure of the Hoch-Smith resolution to fulfill the expectations of the agricultural group was the prevalence and extent of depression in other industries, particularly after 1929. Under the policy declared in the resolution, any industry suffering depression was eligible to seek the benefits of reduced rates. As brought out in the rate-structure investigation of nonagricultural commodities, some of the commodities had been receiving low rates and, except for minor adjustments in the structure, continued to receive them. As the carriers were entitled to recover all their costs and to receive a fair return upon their transportation investment, the low rates on nonagricultural commodities limited the possibility of reductions on agricultural products.

CONFLICT WITH SECTION 15A

Under Section 15a of the Transportation Act of 1920, the Interstate Commerce Commission was directed to establish rates so that rail carriers as a group would "earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." For the first 2 years, Congress prescribed

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[6] *Hearings . . . on the Confirmation of John J. Esch* . . . , 160.

[7] *A., T. & S. F. v. I. C. C.*, 284 U. S. 248 (1930).

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5-1/2 percent and authorized the Commission to increase it up to 1/2 percent, to provide for betterments and improvements. The Commission first fixed 6 percent as the fair rate of return but in 1922 changed it to 5-3/4 percent. Although many individual railroads earned as much or more than the prescribed return, railroads as a group did not fare so well. Obviously any attempt to adjust downward the rates on agricultural commodities would be met by a demand from the railroads for an increase of rates on other commodities to block the adjustments.

Conflict between Section 15a of the Transportation Act of 1920 and the Hoch-Smith resolution was responsible for interpretations unfavorable to the resolution. Although this conflict was foreseen when the resolution was being considered in Congress, no effort was made to avoid or to minimize it. In fact, the resolution was so drafted that Section 15a was given precedence over depression: Conditions prevailing in an industry "should be considered in so far as it is legally possible to do so''; in correcting maladjustments in the rate structure, the Commission "shall give due regard, among other factors . . . to the maintenance of an adequate system of transportation"; in view of the existing agricultural depression, the Commission was directed to make "such lawful changes in the rate structure of the country" as would promote the movement of depressed agricultural products "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." As Section 15a was part of the existing law at the time the resolution was being considered, and as it did not specifically repeal Section 15a, the resolution was consequently subject to the Section. Under these conditions, the resolution was aptly described by the United States Supreme Court as "more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making."

LACK OF TRAFFIC DIVERSITY ON AGRICULTURAL RAILROADS

One other factor adversely affecting the hope for lower agricultural rates through the resolution is the lack of traffic diversity on many railroads that are important in the movement of agricultural products. On these carriers is thrust the peak movement of an agricultural product, with only a small movement throughout the rest of the year. Obviously, if such carriers are to be available for future agricultural movements, they must be maintained. With a limited movement of nonagricultural products spread throughout the year, the difference between a profit and a loss for the carrier hinges on the agricultural product. A succession of losing years would inevitably be reflected by a deterioration in the ability of the carrier to service the agricultural movement. A condition like this might easily result in a loss to agriculture greater than the cost of the higher rates necessary to maintain the carrier.

Whenever agricultural groups sought rate reductions, the possibility of such a condition of handicapped transportation facilities was placed before them. As between the existing rate situation and the potential limited carrier facilities, the agricultural groups naturally expressed a preference for adequate facilities.

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LESSONS FOR THE FUTURE DERIVED FROM THE HOCH-SMITH RESOLUTION

Rate-Making Mandates too Rigid; Consistency in Mandates Essential; Economic Conditions more Effective than Mandates (Section 15a Set Impossible Condition; Competitive Transportation Aided some Agricultural Commodities); Rate-Structure Dislocation Continuous.

RATE-MAKING MANDATES TOO RIGID

A Congressional mandate on rate making can be too rigid for practical application by the Interstate Commerce Commission. Under the theory of regulation which created the Commission, the legislative function of rate making is delegated to the Commission, to be tempered with discretion based upon a closer examination of any rate situation than Congress could find time and technical skill to give. The regulatory discretion granted to the Commission should be flexible enough within the limits of the delegated legislative function to permit the exercise of judgment in any specific case. Unless this regulatory discretion is granted, the Commission is reduced substantially to a body whose function is merely to classify specific cases into the pigeonholes of a Congressional mandate for predetermined action.

The use of legislative mandates to regulatory commissions (the Interstate Commerce Commission, State commissions or any regulatory commission) is generally the result either of pressure groups seeking an advantage or of failure of the commission to use its discretion wisely. If there is merit in the position of the pressure group, the commission is the duly qualified and constituted body to pass upon the facts as presented, according to law and orderly procedure. To enact a legislative mandate under this condition is, in effect, to prejudge favorably the position of the pressure group, which, of course, is contrary to an unbiased procedure.

In the second case, where the commission has failed to use its discretion wisely, a legislative mandate directing the use of discretion in a limited direction does not remedy the situation. Such a restriction may result in great injustice to some groups, or even to all groups, who appear before the commission. The real remedy in this case is to obtain a better qualified personnel for the commission, as the failure is due to error in judgment. If the error in judgment is uncompensated, a constant bias will exist which may require a thorough readjustment of the commission personnel before it can be corrected.

CONSISTENCY IN MANDATES ESSENTIAL

Even if it were conceded that mandates on rate making from the legislative body to its regulatory agent, the commission, were desirable in the public interest, it is necessary that such mandates be consistent with fair regulatory practice and with each other. Otherwise, the mandates serve merely to confuse the regulatory body and to

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relieve it of the responsibility of using discretionary judgment in the impartial solution of problems brought before it.

In the present study, two mandates of Congress to the Interstate Commerce Commission were involved in conflict. The rule of rate making given in the Transportation Act of 1920 and known as Section 15a directed the Commission to adjust the rate level of carriers so that they would receive a 5-1/2 to 6 percent return upon their transportation property. For this purpose, the carriers were considered in sectional groups and not as individual railroads, and, consequently, some individual carriers might receive more than the prescribed return, whereas other individual carriers might receive less. Part of the excess return of the prosperous carriers was to be recaptured and used to assist the less fortunate carriers. The determination of any individual rate was still to be based upon the principles given in the Interstate Commerce Act, independently of the economic condition of the individual carriers involved in the case.

When individual rates were under consideration, however, the carrier or carriers (for many commodities require the services of more than one railroad) frequently brought in evidence that showed the rate of return involved in the case to be less than the 5-1/2 to 6 percent specified, but not guaranteed, in Section 15a. The effect of such evidence on the Commission's decisions is not always clear, but the evidence was noted in the report of the case as having a bearing on any action taken.

That the prosperous carriers did not enter into the spirit of cooperation that existed among carriers who were being "fostered" by the Federal Government under the provision of the "rule for rate making," was indicated by the attacks upon methods of railroad-property valuation and upon the recapture clause itself. Eventually, the recapture clause was upheld in the United States Supreme Court in a case in which a railroad wished to retain its profits for the benefit of its stockholders.

The mandate that was in conflict with the rule of rate making of Section 15a was the Hoch-Smith resolution of 1925, in which the Commission was told that "the true policy in rate making to be pursued" was the consideration of the economic conditions of the industry that was shipping the commodity. The depression affecting some products of agriculture was declared particularly to justify a prompt readjustment of rates upon these agricultural commodities. In addition, a general rate-structure investigation was authorized to remove defects of preference and prejudice among localities and sections of the country, classes of traffic, and classes and kinds of commodities, in line with this "true policy" and with the value-of-service principle.

Where Section 15a had carried a mandate rule of rate making which provided a 5-1/2 to 6 percent rate of return in consideration of the depressed condition of carriers, the Hoch-Smith resolution carried a mandate "true policy in rate making" which provided "lowest possible lawful rates" for agricultural products in consideration of their depressed condition and special treatment for the products of other industries affected by depression. The primary interest of one was the railroads and of the other, the users of the railroads. In declaring the "true policy in rate making," the resolution limited the action of the Commission to lawful rates compatible with the maintenance of an adequate transportation system. Such a qualification either represented careless drafting of the resolution or intentionally subordinated the resolution's "true policy in rate making" to Section 15a's "rule for rate making." An examination of the legislative history will give ample support for either conclusion. Inasmuch as the potential

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conflict between Section 15a and the proposed resolution was discussed in detail in the legislative committee hearings and was pointed out in legislative debate, it must be assumed that Congress was fully aware of the situation. If, as accused in the legislative debates, Congress was merely tossing a sop to agriculture, "the resolution is a case of keeping the promise to the ear and breaking it to the hope.'" The conflict of these two mandates, one an act of Congress, the other a joint resolution, was one-sided in favor of the "rule for rate making" which, as long as not repealed or restricted, took precedence over the "true policy in rate making."

Putting aside any attempt to fathom the reasons why Congress sanctioned the conflicting mandates, and looking at the effect upon the Interstate Commerce Commission, it is evident that the resolution resulted in some confusion. The confusion extended not only to the "true policy in rate making" but also to the rate-structure investigation. Before undertaking the investigation the Commission sought the advice of "the public generally, including shippers, carriers, and public authorities," on the interpretation of the resolution and on the procedure to be followed under it. In many of the cases which later came before the Commission, evidence under the "rule for rate making" was submitted by the carriers, whereas evidence under the "true policy in rate making" was submitted by the shippers and public authorities. Actually, the Commission would have been in a better position to use its discretion in making a judgment decision with due regard for the public interest if neither mandate had been given by Congress.

ECONOMIC CONDITIONS MORE EFFECTIVE THAN MANDATES

More compelling than Congressional mandates in ultimate effect upon rates are economic conditions which affect business, industry, and agriculture. Under the "true policy in rate making" of the Hoch-Smith resolution, these conditions were to be considered when adjusting rates. Regardless of whether or not they were considered by the Commission and whether they had any effect on the decision, these economic conditions eventually made themselves felt directly or indirectly in the rates.

Section 15A Set Impossible Condition. The mandate of the "rule for rate making" given in Section 15a failed because it set an impossible condition. Rates high enough to provide the 5-1/2 to 6 percent return on the value of transportation property were so high as to discourage traffic. The use of the reproduction-cost method of determining the value of transportation property contributed to the difficulty by making the rate base, to which the 5-1/2 or 6 percent was applied, generally greater than the rate base would have been had original cost or prudent investment been used in its determination. A discussion of this point is beyond the present study, but the effect of the practice is indicated because of the relation of the effect to the Hoch-Smith resolution. It is sufficient to point out that the "rule for rate making" mandate of Section 15a resulted in rates high enough to discourage traffic on the railroads and to encourage experimentation with other forms of transportation such as pipe lines, motor carriers, and water carriers. In this diversion of traffic, the mandate defeated the purpose for which it was given — the protection of carrier return. Although the percentage-return mandate was withdrawn by Congress when rewriting Section 15a in 1933, the subsequent placing of motor carriers (1935) and water carriers (1940) under the same regulatory body with the rail carriers permitted regulatory control of competition.

Competitive Transportation Aided Some Agricultural Commodities. Although the rate-structure investigation may have temporarily cleared up some dislocations, the rates prescribed under the mandate of the "true policy in rate making" were a disappointment,

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particularly to the agricultural groups. The influence of the prior mandate of the "rule for rate making" was seemingly to restrict, if not to block, the full observance of the Hoch-Smith resolution. As a result of the competition of motortrucks and barges, some agricultural commodities had rates lower than those provided by the Commission under the resolution. Economic pressure to overcome the obstacles of high transportation charges in the movement from farm to market, which stood between the producer and a market, had led to experimentation. Cotton in particular benefited by the transportation competition and received low railroad rates. But agricultural commodities, such as grain, which were confined to rail transportation in the movement from farm to market, were substantially restricted to the existing rate level.

In view of the foregoing discussion, it might properly be urged that agricultural interests devote their time and energy to improving the effectiveness of present means of transportation and to experimenting with and developing other means, rather than attempting directly or through legislative mandate to obtain rate concessions from the transportation system. As long as such legislative mandates as the "rule for rate making" of the original Section 15a serve to hold up the transportation rate level, the agricultural interests, and even industrial and commercial interests who find this maintained rate level exceeding the value of the service, will have to seek improved and more efficient means of transportation. Out of the seriousness of the transportation rate-level problem, may evolve a new system of transportation unburdened by a heritage of rail-level maintenance. This new system will co-ordinate railroads, motor carriers, and water carriers, so that traffic may benefit from the advantages of each.

RATE-STRUCTURE DISLOCATION CONTINUOUS

In regard to the rate-structure investigation itself, it can be said that it is never really in balance. The rate structure is always undergoing renovation in large or small degree. Economic changes produce traffic changes which in turn result in dislocating the existing structure. To an industrial producer who would like to start an industry in a new area or to an agricultural producer who would like to reach a new market, the rate structure may be a handicap until it is readjusted. To an industrial producer who seeks a new source of material, or to a market which seeks a new source of agricultural products, the existing structure may be an equal handicap. These adjustments are constantly being made by the regulatory commission, and in this way, the rate structure has been built up piecemeal, year after year. A wholesale readjustment such as that contemplated by the provision for the rate-structure investigation in the Hoch-Smith resolution, places a very heavy burden upon the regulatory commission, the carriers, and the shippers, and in the end may result in a greater disturbance to the traffic movement than does the day-to-day patchwork of current cases.

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APPENDIX

TEXT OF THE HOCH-SMITH RESOLUTION[1]

That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

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[1]Joint Resolution of January 30, 1925. 43 Stat. 801.

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