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ADDRESS

By

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Prepared for Delivery

Before the

Twenty-first Annual Meeting

ASSOCIATION OF

INTERSTATE COMMERCE COMMISSION PRACTITIONERS

Hotel Jefferson

St. Louis, Missouri

Luncheon, Thursday, November 9, 1950

12:15 P. M.

I am most pleased with the privilege which your kind invitation has afforded me of participating with you in this annual meeting which marks the coming of age of your Association. Twenty-one years ago, following closely the establishment of the Interstate Commerce Commission register of licensed practitioners, your Association became the pioneer among organizations of practitioners before administrative agencies. During its twenty-one years of existence the accomplishments of your Association have more than justified the vision and hopes of its founders and the pride of its present day membership. A lasting contribution was made in the very beginning when your Association, motivated by the highest ethical considerations, adopted a code of ethics, establishing standards of conduct for practitioners before administrative agencies, which has been the model for other similar associations.

You have taken a keen interest, I know, in the controversy which has been waged in the years immediately past regarding qualifications for practice before administrative agencies. The various congressional proposals, some of which would limit appearances before administrative agencies to duly licensed attorneys, others of which would permit only limited exceptions to that rule, have received your scrutiny, I am sure. And the views of your members coming as they do from the "elders" among specialized practitioners have much weight.

Suffice it to say here that the valuable assistance which can be rendered to administrative agencies by lay technicians of fine attainments, would be sorely missed by these agencies in the discharge of their important duties, should any enactment confine appearances before them to lawyers alone.

Moreover, the specialized problems and experience of governmental administrative agencies make it desirable to permit those agencies to pass upon the qualifications of persons who seek to practice before them.

The present federal regulatory system for the railroads began with the legislation which came shortly after the warning of President Cleveland contained in his second annual message to the Congress on December 6, 1886. "By a recent decision of the Supreme Court of the United States," he said, "it has been adjudged that the laws of the several states are inoperative to regulate rates of transportation upon railroads if such regulation interferes with the rate of carriage from one state into another. This important field of control and regulation having been thus left entirely unoccupied, the expediency of federal action upon the subject is worthy of consideration." He referred, of course, to the Supreme Court's decision, on October 25, 1886, in the case of Wabash R.R. v. Illinois. Congressional action soon followed.

When, in February of 1887, the Interstate Commerce Commission was created to undertake railroad rate regulation after state regulation had broken down, the experimental nature of the means provided by Congress for carrying its mandates into effect was readily acknowledged. This first experiment in governmental delegation of regulatory authority and control to an independent administrative agency did not achieve immediate success, but it proved its worth and set the pattern for other independent administrative agencies to follow.

The Commission has now been in existence almost two-thirds of a century. By amendments to the basic legislation of 1887 and by supplementary enactments, its powers have been greatly increased. Between the years 1903 and 1920 the plan of railway regulation was perfected and in more recent years,

from 1929 to the present time, federal regulation in the field of transportation has been broadened and has come to include the activities of motor carriers, certain carriers by water, and freight forwarders, as well as oil pipe lines. In the later period, coextensive with the life of this Association, the jurisdiction of the Interstate Commerce Commission has been extended to participation in proceedings for the reorganization of railways in bankruptcy. Moreover, the scope of regulation has been enlarged by giving to the Commission additional powers over certain contracts of the carriers and over the installation of safety devices. The statutes which have conferred additional powers and duties upon the Commission reflect the increasing regulatory demands which the expanding transportation facilities of this country have made upon government in the past 64 years.

In the statutory scheme which has emerged, the Congress has placed heavy duties upon the Department of Justice. Regulation is achieved by the Interstate Commerce Act and the legislation which amends it, but equally as important, there is an area in which the anti-monopoly and antitrust statutes apply, for which the Department of Justice has the responsibility.

In the course of our day-to-day activities in these fields, lawyers in the Department regularly appear before the Interstate Commerce Commission, where they are in a very real sense working with you as administrative practitioners. In another capacity, as counsel before the courts for all agencies of the United States Government, lawyers of the Department of Justice defend the decisions of the Interstate Commerce Commission. And sometimes we are in the position of differing with the Commission, and so we oppose its decisions. I thought you might be interested in some examples which would illustrate to you the activities of the Department which are

intimately related to your work and to the work of the Interstate Commerce Commission.

In the so-called Reparation Cases, we have a good example of cases in which we engage in litigation before the Commission which is similar to the type of litigation before that body handled by members of this Association. The cases to which I refer are seventeen separate complaints filed by the Department of Justice with the Interstate Commerce Commission against the railroads pursuant to section 13 of the Interstate Commerce Act, and instituted by the Department of Justice pursuant to the general authority conferred by Congress upon the Attorney General to institute and conduct litigation to establish and safeguard Government rights and properties. These complaints, which were filed by the Attorney General at the instance of the War and Navy Departments and of the Maritime Commission, allege that the rates and charges made by railroads on certain commodities shipped by the Government during World War II were unreasonable and unlawful, in violation of section 1(5)(a) of the Interstate Commerce Act, or that the rules, regulations, and practices affecting such rates were unreasonable or unlawful in violation of section 1(6) of the Act. Damages resulting from the violations are sought, as authorized by section 8 of the Act. That the United States, as a shipper, has the right to invoke the jurisdiction of the Interstate Commerce Commission, and that the Commission is the proper forum to hear such complaints is implicit in the decision of the Supreme Court in United States v. Interstate Commerce Commission, 337 U.S. 426 (1949).

The complaints are predicated upon findings made on October 20, 1945, by a special committee appointed by the Director of the Bureau of the Budget at the request of Senator Wheeler, then Chairman of the Senate's Committee on

Interstate and Foreign Commerce. This special committee consisted of Mr. W. B. Hammer, Chairman of the Interstate Commerce Commission Suspension Board, and Charles E. Bell and E. B. Ussery, practicing lawyers specially qualified in the field of rate matters. The tenor of the special committee's findings is illustrated best by its general finding that, "The Government has not only paid excessive charges in a stupendous amount before and since Pearl Harbor, but it is still paying such excess charges on presently moving traffic and will continue to pay them until appropriate action is taken to remedy this situation."

Following the report of that committee, Secretary of War Patterson, believing that the Interstate Commerce Commission, and any other forum that might have jurisdiction in such cases, should review the rates established, and the charges paid by the Government, on War Department traffic, requested Attorney General Tom Clark to institute the necessary proceedings.

We are looking forward to some decision by the Commission with reference to these matters in the near future. I understand that all evidence has been submitted by the Government as well as by the railroads in five of the cases and that steady progress is being made in the submission of evidence in the remaining 12.

An example of our acting as counsel <u>for</u> the Interstate Commerce Commission is to be found in our current appearance in the United States Supreme Court to uphold the order of the Commission against the Alabama Great Southern Railroad and others. In that case the Interstate Commerce Commission prescribed joint rail-barge rates which were differentially lower than corresponding all-rail rates, without specifically finding that the operating costs of rail-barge service were lower than those of all-rail service. A

judgment by a three-judge district court upheld the validity of the Commission's order.

The railroads of the country have joined in attacking the Commission's authority to establish such rate differentials. Their principal contention is that the Commission's order deprives the railroads of their "inherent advantages of lower costs of service and superiority of service," in violation of the provisions of the Interstate Commerce Act. The Government is urging, on the other hand, that the rate differentials prescribed by the Commission are reasonable and fully justified under the applicable statutory standards. It is our contention that relative transportation costs, while relevant as one of the many factors which enter into the process of rate-making, were not intended by Congress to be the sole controlling test. The Government is arguing that Congress imposed no obligation on the Commission to sound the death knell of rail-barge transportation by requiring parity of rates for services which, though competitive, are economically unequal.

There are thus issues in this case of greater importance to the transportation industry and to the Nation than the mere technical legal issues involved.

In addition to being counsel for the Interstate Commerce Commission, the Department of Justice has on occasion been in a position to aid the Commission in its administrative functions by employing other laws which are under the Department's jurisdiction. A case in point is the antitrust action brought against the Pullman Company a few years ago.

For many years the railroads of the United States had been complaining that the Pullman Company had been using its power to exact unconscionable rental fees and service charges from them and to prevent the inauguration by

the railroads of new-type lightweight sleeping car service which had found great favor with the railroad-traveling public. This power of the Pullman Company had been derived from the fact that the Pullman Manufacturing Company enjoyed a monopoly in the manufacture of sleeping-car equipment which was marketed to the railroads through the Pullman Operating Company. The private contractual relations between the Pullman Company and the railroads were the source of frequent criticism by the Interstate Commerce Commission. However, under the statutory scheme of regulation, the ICC had jurisdiction only over the fares charged the public for sleeping-car service; it lacked the power to deal effectively with the onerous and monopolistic terms imposed upon the railroads by the Pullman Company.

To eliminate the blighting effects of this monopoly and to free the railroads to provide the kind of modern passenger service the railroad-traveling public was demanding, the Department of Justice in 1940 filed an antitrust suit under the Sherman and Clayton Acts against the Pullman Company and succeeded in having the court order the divestiture of the Pullman Operating Company from the Pullman Manufacturing Company. In January of 1946, the Operating Company was ordered sold to railroads doing over 95 per cent of the passenger business. These railroads are now free to supply the traveling public whatever service they believe is necessary to enable them to compete with the airlines and other competitive forms of transportation.

Our work with the Commission and for the Commission has many facets affecting our departmental responsibilities -- more of course than I could hope to discuss with you in my talk here. For instance, as a result of enactment by the 80th Congress, over the President's veto, we now have on the statute books the Reed-Bulwinkle Act. As you know, that law authorizes

exemption from the antitrust laws for any carrier acting in concert with one or more competing carriers in the establishment of rates and related matters, if the ICC approves the procedural agreements under which such action is taken. The Commission is authorized to approve these agreements subject to prohibitions and other requirements specified in the Act, if it finds that "by reason of the furtherance of the national transportation policy" exemptions from the antitrust laws should apply.

The Reed-Bulwinkle Law must now be interpreted and applied. Applications for approval of agreements have been filed by railroads, motor carriers, and water carriers with the Interstate Commerce Commission. The Department of Justice has intervened in a large number of these proceedings; we have participated at hearings, and filed briefs. In some proceedings, carrier agreements have been approved by the Commission. In others, the applications have been dismissed or withdrawn after the presentation of our views. In still other cases, the Commission, while approving the agreements, has imposed conditions requiring amendment of certain provisions to meet objections raised by the Department of Justice.

We believe serious questions remain to be resolved as to the scope of the Reed-Bulwinkle Law and as to the interpretation of several of its provisions. Such questions, which it seems must ultimately be determined by the Courts, affect not only the appropriate administration of the Interstate Commerce Act; their resolution is also of prime importance in defining the area in the field of transportation to which Congress intended the antitrust laws to apply.

Some cases, in which the Department of Justice opposes the orders of the ICC, notwithstanding its customary duties as counsel for the Commission, are

perhaps the most publicized. The Mechling case (330 U.S. 567) is an interesting example of this situation. As a consequence of orders of the Commission, grain which was moved East to Chicago by barge on inland waterways, was subjected to a higher rate for the remainder of the trip on Eastern railroads than was grain which had arrived at Chicago by rail alone. The rate difference was resulting in the use of rail in preference to barge transportation. The Commission's order had the effect of taking away the money benefits to be gained from using barges on inland midwestern waterways.

The Commission's construction was opposed by the Secretary of Agriculture on the ground that it prejudiced the farmers who had access to barge transportation, and it was clear to Department of Justice lawyers after a consideration of the over-all picture that his opposition was justified. When the Secretary of Agriculture, the Inland Waterways Corporation, and the Mechling and other barge lines brought action to set aside the order of the Commission, the Attorney General admitted the allegations of the complaint. The District Court set aside the Commission's order and, when the Interstate Commerce Commission appealed to the Supreme Court, that Court affirmed the District Court's decision.

Translated, that decision has meant substantial direct benefit to farmers. The fifty million bushels of grain involved in the Mechling case is a mere drop in the bucket when you calculate the amount of grain affected by the decision. Our admission of the allegations against the ICC thus resulted in direct benefits to the farmer and to the consumer public arising out of transportation savings effected through the continued use of river barge supplemented by rail transportation.

Another important case in which the Department has taken a position opposed to that of the ICC involved the protection of civil rights. I speak

of course of the highly publicized Henderson case, decided at the last term of the Supreme Court. The Solicitor General and I appeared on behalf of the United States because the case raised basic questions as to the validity of racial segregation on the railroads.

I think you may perhaps be interested in some of the background of the Henderson case. The pertinent facts can be briefly stated. The railroad reserved one table in its dining cars exclusively for colored passengers, and all other tables exclusively for white passengers. The "Jim Crow" table was at the kitchen end of the car and separated from the next table by a curtain or a five-foot high partition extending from the side of the car to the aisle.

The applicable statute, section 3 of the Interstate Commerce Act, makes it unlawful for a railroad to subject any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The Supreme Court had held, in Mitchell v. United States, 313 U.S. 80, that the "sweeping prohibitions" of the statute extend to acts of discrimination which, if done by a state, would violate the equal protection clause of the 14th Amendment.

Elmer Henderson's suit was brought in a three-judge district court to set aside an order of the Interstate Commerce Commission, which upheld the railroad's regulation directing racial segregation on its dining cars. After the district court upheld the Commission's order, Henderson appealed to the Supreme Court.

The Interstate Commerce Commission prepared a motion asking the Supreme Court to dismiss Henderson's appeal, and forwarded the necessary papers to the Department of Justice for approval and filing. It was at this point that the case first came to the attention of the Solicitor General. The Solicitor General declined to sign the motion to dismiss the appeal and notified the Chief Counsel of the Commission that he would not join in it and that if the

Commission filed it, he would affirmatively oppose it on behalf of the United States. The motion was not filed.

The Solicitor General and I, representing the United States, contended in the Supreme Court that the railroad's regulation and the Commission's order were invalid. You will thus observe that even though the United States, one of the appellees, won the case in the district court, the Government joined the appellant in asking the Supreme Court to reverse the lower court's decision. This seemed to many people to be a most strange course of conduct. We were accused of failing to cooperate with and support another federal agency.

The Solicitor General and I felt, however, that our first responsibility was to represent the interests of the United States before the Supreme Court, and that it would be a violation of our duty to our country and to the Court to take a position which we were convinced was in conflict with the Constitution and laws of the United States. Under the statute imposing a general and inclusive prohibition against discrimination in service by an interstate railroad, the question for decision was whether it was nevertheless the policy of Congress to authorize racial segregation on railroad dining cars.

We were gratified with the decision of the Court which vindicated our position and proved to be another heartening indication that we are slowly but surely loosening the paralyzing grip of racial discrimination which has stood in the way of extending opportunities equally to all Americans.

In the important and complex field of transportation regulation, you and we in the Department of Justice have many problems in common. I am confident that with your continued cooperation and our combined efforts we will be

able to do much to arrive at solutions which will mean the continuation of improvements to keep our transportation system out in front, as it is today, serving the Nation in the interest of all the people.

I have spoken to you at some length about the work of the Department of Justice in the field with which you as ICC practitioners are directly concerned. Of course, as Americans you have interests and concerns far beyond the scope of the work of your Association or of the Interstate Commerce Commission.

The Department of Justice, as you know, bears the responsibility for the internal security of our country. In these troubled times the burden of this responsibility is a great one. We are carrying this responsibility, ever alert and determined that our Government and our country shall remain secure.

In this field the Congress, in passing the Internal Security Act of 1950, has recently added to the Department's responsibilities. That Act presents numerous problems — far too many for me to discuss with you here. Many of these problems will ultimately be resolved by the courts. Other provisions, in order to be made more workable, may require amendatory legislation by the Congress. The Act, as you know, became law only after it was passed over the President's veto. It is now, however, one of the laws of the land, and as such I shall enforce it and shall do my best to make it work and to achieve the congressional purpose in passing it.

In our labors in these fields, as well as in all our labors, I am sure that I can count on you as Americans for your full support. We are all working toward one goal — to keep our country secure from within and secure from without, to cooperate with other peace-loving nations in the interest of world peace, to assure to all our people the fruits and the blessings of our great democracy and our democratic way of life.