Articles

Railing at Railroads

Fritz R. Kahn*

INTRODUCTION

Although one would expect that the relationship of the Nation's large railroads and their shippers would resemble that of ordinary service providers and their patrons, the rapport between them is one all too often marked by hostility and distrust.[1] This enmity is due in no small measure to the relatively recent revisions of the regulatory regime applicable to railroads. Whether by enactments of the Congress or decisions of the Interstate Commerce Commission and its successor, the Surface Transportation Board, these changes have contributed to the hostility that frequently divides the carriers and their customers.

RATES

For nearly one hundred years railroad rates were required to be just and reasonable.[2] Section 1 of the Interstate Commerce Regulations Act provided that:

> "*All charges* made for any service rendered or to be rendered in the [railroad] transportation of passengers or property . . . *shall be reasonable and*

* Fritz R. Kahn received his LL.B. and A.B. from George Washington University. Mr. Kahn's practice emphasizes Transportation Law and he is the author of a number of articles about the regulation of Railroads and Motor Carriers. Mr. Kahn is also a member of the Transportation Lawyers Association.

1. At least two organizations, the Alliance for Railroad Competition (ARC) and the Consumers United for Rail Equity (CURE), represent shippers seeking relief from what they perceive to be the railroads' untoward actions.

2. Interstate Commerce Regulations Act, Ch. 104, § I, 24 Stat. 379 (1887)(codified as amended at 49 U.S.C. §§ 10701-10747 (1994).

> *just*; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."[3]

The Supreme Court later declared in *Texas & Pacific R.R. v. Abilene Cotton Oil Co.*, "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates."[4] The Interstate Commerce Commission, created by the Act, put it slightly differently in *Corn Belt Meat Producers' Ass'n v. Chicago, Burlington & Quincy R.R.*, stating that "[e]very shipper is entitled to a reasonable rate."[5]

It is no longer true that a shipper is entitled to a reasonable rate. Railroads are now free to set their rates wherever they may. The only exceptions to the railroads' rate-setting freedom are their common carrier rates on so-called market dominant or captive traffic, that is, freight for which there are no practicable alternative means of transportation.[6] "The [Board] now has no jurisdiction to review any rate unless it finds that the rail carrier defending the rate can exclude effective competition for the transportation to which the rate applies."[7]

The Commission and the Board in a handful of proceedings have found the considered coal movements to be market dominant to the participating railroads and the applicable rates to be unreasonable.[8] Neither agency, however, ever has found a non-coal rate—for example, a railroad's charges for handling shipments of plastics—to involve a market dominant movement or to be unreasonable.

Excluded from even such limited rate review as may be had on captive or market dominant traffic are railroad rates applicable on freight that the agency has elected to exempt. Section 207 of the Railroad Revitalization and Regulatory Reform Act of 1976 empowered the Commission to exempt "a transaction or service" from the statutory and

---

3. *Id.*

4. 204 U.S. 426, 437 (1907); *Accord* Arizona Grocery Co. v. Atchison, Topeka. & Santa Fe R.R., 284 U.S. 370, 384 (1932) ("[The Act] did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . .").

5. 14 I.C.C. 376, 395 (1908); *Accord*, Nagase & Co. v. Director General, 62 I.C.C. 422, 426 (1921) ("[A] shipper is entitled to a reasonable rate . . ."); Memphis Grain & Hay Ass'n v. St. Louis & San Francisco R.R., 24 I.C.C. 609, 615 (1912) ("[T]he shipper [is entitled] to a reasonable rate for the service performed."); Billings Chamber of Commerce v. Chicago, Burlington & Quincy R.R., 19 I.C.C. 71, 75 (1910) ("[E]very shipper is entitled to reasonable rates.").

6. *See* 49 U.S.C. § 10701(d) (1994).

7. *Western Coal Traffic League v. United States*, 694 F.2d 378, 382 (5th Cir. 1982), *reh'd*, 719 F.2d 772 (5th Cir. 1983) (Affirming *Market Dominance Determination*, 365 I.C.C. 118 (1981)).

8. *See*, Arizona Public Service Co., v. The Atchison, Topeka and Santa Fe R.R., No. 41185, 1998 WL 177702 (April 17, 1998); West Texas Util. Co. v. Burlington Northern R.R., No. 41191, 1996 WL 388443 (April 25, 1996), *aff'd*, Burlington Northern R.R. v. Surface Transp. Bd., 114 F.3d 206 (D.C. Cir. 1997).

regulatory provisions that otherwise would apply.[9] Pursuant to that provision, a whole host of commodities, including automobiles and trucks, lumber and furniture, most manufactured products, canned fruits and vegetables, poultry and meats, butter and cheese, and sand and gravel have been declared exempt, and railroad rates on these commodities may be set by the railroads at their unfettered discretion, without even the pretense of rate supervision by the Board.

Also exempt from any form of rate supervision, even on captive or market dominant traffic, as well as on exempt commodities movements, are the railroads' contract rates.[10] Approximately ninety percent of all railroad traffic currently moves on contract rates, and shippers are unable complain either to the Board or to a Federal or state court that the railroads' contract rates are unreasonable; such rates have been immunized from administrative or judicial scrutiny as to their reasonableness. In short, the presently effective regulatory scheme in no way safeguards that shippers are afforded reasonable railroad rates.

The 1887 Act, moreover, mandated that railroad rates be nondiscriminatory. Section 2 of the Act provided:

> That if *any common carrier* subject to the provisions of this act *shall, directly or indirectly*, by any special rate, rebate, drawback or other device, *charge*, demand, collect, or receive from *any person* or persons *a greater or less compensation for any service rendered,* or to be rendered, *in the transportation* of passengers or property, subject to the provisions of this act, *than it charges,* demands, collects, or receives from *any other person* or persons *for* doing for him or them *a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions,* such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.[11]

The Supreme Court, in *Louisville & Nashville R.R. v. United States*, declared, "The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at."[12] Illustrative of the discrimination that was proscribed by the Act was that found to be unlawful in *Wight v. United States*:

> The one shipper paid fifteen cents a hundred; the other, in fact, but eleven and a half cents. It is true he formally paid fifteen cents, but he received a rebate of three and a half cents, and regard must always be had to the sub-

9. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified at 49 U.S.C. 10502 (1994)).

10. 49 U.S.C. § 10709(c) (1994).

11. Interstate Commerce Regulations Act, Ch. 104, pt. I, § 2, 24 Stat. 379 (1887)(codified as amended at 49 U.S.C. §§ 10701-10747 (1994)).

12. 282 U.S. 740, 749 (1931), *aff'g* Use of Private Passenger Train Cars, 155 I.C.C. 775 (1929).

Transportation Law Journal, Vol. 28 [2000], Iss. 1, Art. 2

> stance and not to the form. Indeed, the section itself forbids the carrier 'directly or indirectly by any special rate, rebate, drawback or other device' to charge, demand, collect or receive from any person or persons a greater or less compensation, etc. . . It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefore.[13]

Equality between similarly situated shippers no longer is the case. Railroads are free to enter into contracts with their shippers, including secret agreements with preferred shippers providing for allowances or discounts from the rates that competing shippers must pay.[14] As the court noted in *Water Transport Ass'n v. Interstate Commerce Comm'n,* "contracts generally are confidential and, absent a specific legislative purpose, there is no reason to treat rail contracts differently."[15]

The Act to regulate commerce, furthermore, prohibited undue preferences or prejudices in the setting of railroad rates. Section 3 of the Act in part, provided:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any due or unreasonable prejudice or disadvantage in any respect whatsoever.[16]

In speaking of this section, the Supreme Court in *Texas & Pacific R.R. v. United States* said:

> The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those on the

13. 167 U.S. 512, 517-18 (1897), *accord,* Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 584 (1949) (holding that "the purpose of this section is to enforce equality between shippers of like commodities over the same line or haul for the same distance and between the same points."); Union Pacific R.R. v. United States, 313 U.S. 450, 462 (1941) (recognizing that "favoritism which destroys equality between shippers, however brought about, is not tolerated.")

14. *See* 49 U.S.C. § 10709(a) (1994).

15. 722 F.2d 1025, 1032 (2d Cir. 1983), *aff'g in part,* R. R. Transp. Contracts, 367 I.C.C. 9 (1982); *accord,* W. Fuels-Illinois, Inc. v. Interstate Commerce Comm'n, 878 F.2d 1025, 1028 (7th Cir. 1989) ("The *WTA* court wrote that the statute's recognition of a need for confidentiality 'is not surprising since contracts generally are confidential and, absent a specific legislative purpose, there is no reason to treat rail contracts differently.'").

16. Interstate Commerce Regulations Act, Ch. 104, pt. I, § 3, 24 Stat. 379 (1887)(codified as amended at 49 U.S.C. §§ 1701-17047 (1994)).

point subject to the higher charge.[17]

The Commission in *Castle v. Baltimore & Ohio R.R.* stated:

> Common carriers are bound by every principle of justice and of law to accord equal rights to all shippers who are entitled to like treatment, both in the receiving of supplies and shipment of their products; and a carrier who under any pretext whatsoever grants to one shipper an advantage which it denies another violates the spirit and thwarts the purpose of the law.[18]

Section 3 and the protections it provided are no more; the prohibition against undue preferences or prejudices has been repealed,[19] and no comparable provision appears in the presently effective statutory scheme of railroad regulation. Thus, the railroads are free to set their rates so as to prefer certain shippers to the disadvantage of others, and the aggrieved shippers, paying the greater charges, are without any remedy before the Board or the courts.

Finally, to aid in its administration and enforcement, the Act to regulate commerce required that the railroads set out their rates in tariffs filed with the Commission and that the tariffs' terms be strictly observed. Section 6, in part, provided:

> That every *common carrier* subject to the provisions of this act *shall print* and keep for public inspection *schedules showing* the *rates and fares* and charges *for the transportation* of passengers and property which any such common carrier has established and which are in force at the time *upon its railroad, as defined by the first section of this act.*
>
> . . . .
>
> And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith; than is specified in such published schedule of rates, fares, and charges as may at the time be in force.[20]

These requirements, that the railroads' rates be contained in tariffs

17. 289 U.S. 627, 648 (1933); *accord* Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 478 (1911) ("the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality."); New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 391 (1906) ("It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism.").

18. 8 I.C.C. 333, 345 (1899).

19. The addition of subsections (e) and (f) to 49 U.S.C. § 10741 by Section 212 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1912, effectively repealed the prohibition against undue preference and prejudice.

20. Interstate Commerce Regulations Act, Ch. 104, pt. I, § 6, 24 Stat. 379 (1887)(codified as amended at 49 U.S.C. §§ 1701-17047 (1994)).

lodged with the Commission and that there be no deviation from the tariffs' terms, gave rise to the so-called filed rate doctrine. The classic statement of the filed rate doctrine appeared in *Louisville & Nashville R.R. v. Maxwell*, in which the Supreme Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice, of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.[21]

As it relates to railroad rates, the filed rate doctrine has been repealed.[22] Railroads no longer need to publish their rates in tariffs filed with the Board; upon request, the railroads simply must advise the shipper what rates will be assessed on its traffic. The shipper has no means of learning what its competitors are paying to secure identical transportation services; the railroads are under no obligation to advise a shipper of another shipper's rates.

In sum, when it comes to rates, shippers are wholly at the mercy of the railroads. The railroads effectively can assess whatever rates they wish, and the shippers are without any recourse. Their choice is the proverbial one to take it or leave it.

SERVICE

From the standpoint of railroad service, the most significant development of the past several years has been the narrowing of routing alternatives and the increasing dependence upon a single railroad that faces many shippers, largely as a result of Commission and Board decisions.

The Act to regulate commerce required the railroads to interchange traffic between themselves and to cooperate in the handling of interlined shipments so as to assure the continuous carriage of freight. Section 3, in part, provided:

> Every common carrier subject to the provisions of this act shall, accord-

21. 237 U.S. 94, 97 (1915); *See also*, Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130 (1990) ("For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate."); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 416 (1986) (quoting Keogh v. Chicago & Northwestern R.R., 260 U.S. 156, 163 (1922), "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff.").

22. Former 49 U.S.C. §§ 10761 & 10762 were repealed by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

> ing to their respective powers, afford all reasonable proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith . . . .[23]

Section 7 provided:

> That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by any other means or devices , the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.[24]

Railroads remain under statutory obligations to provide for the interchange of traffic[25] and the continuous carriage of freight.[26] In practice, however, the railroads, aided by the Commission and the Board, have been able to avoid these requirements.

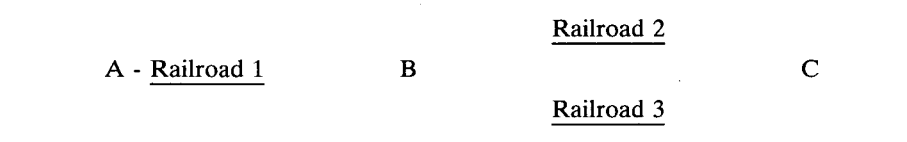

ILLUSTRATION 1

The originating railroad, Railroad 1 in Illustration 1, traditionally entered into through-route, joint-rate agreements with the destination railroads, Railroads 2 and 3, and participated with them in the providing of service without discrimination. The joint rate from origin, A to destination, C, would be the same or equalized, and the shipper, therefore, had a choice of routing its shipments via the one combination of railroads or the other, depending upon the nature and quality of their services, with the knowledge that it would suffer no rate penalty. As the Supreme Court noted, in *Southern Pacific Co. v. Interstate Commerce Comm'n*:

> That act recognizes the right of the carriers to agree upon, and provides for the publication of, joint through tariff rates between continuous roads, on

23. Interstate Commerce Regulations Act, Ch. 104, pt. I, § 3, 24 Stat. 379 (1887)(codified as amended at 49 U.S.C. §§ 1701-17047 (1994)).

24. *See id.* § 7.

25. *See* 49 U.S.C. § 10741 (1994).

26. *See id* § 10744.

> such terms as the roads may chose to make, provided, of course, the rates are reasonable and no discrimination, or other violation of the act is practised. The initial carrier did not, on its line, reach the Eastern markets, but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates with all or any one of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provisions of the act.[27]

Nominally, the railroads continue to offer joint rates; practically, however, their joint rates are nothing more than the sum of the rates each of the railroads participating in a through movement has set for itself. The euphemism that the railroads employ is "multiple independent factor through rates," (MIFTR). The term first surfaced in the decision of the Commission in *Society of the Plastics Industry, Inc. v. Consolidated Rail Corp.*[28] in which Conrail sought to justify its unilateral cancellation of joint rates on plastics moving from the southwest, contending that it needed "the freedom to adjust its rates for its portion of through movements of plastics, in the same manner as it is free to adjust its rates for local movements, without the concurrence of connecting carriers."[29] The Commission agreed, and, in concluding that multiple independent factor through rates were joint rates, the Commission rationalized:

> We conclude that a MIFTR is a joint rate, and that the independent factors thereof are divisions. The difference between a traditional joint rate and a MIFTR is in the mechanism for making adjustments after the rate has been established. A traditional joint rate requires a separate arrangement or agreement to make each adjustment. A MIFTR embodies a general arrangement or agreement to accept any such adjustment that any other carrier participant may propose. Both a traditional joint rate and a MIFTR require agreement among all participants in the rate. The fact that the participants in a MIFTR concur at the outset in the right of any party to take independent action with respect to its portion of the rate, rather than entering into specific rate agreements following that initial agreement, does not change the fact that a MIFTR is a joint rate. It is a unitary rate that is jointly held out over the lines of two or more carriers and is established by arrangement or agreement between the carriers.[30]

The railroads' reliance upon multiple independent factor through rates has destroyed whatever rate equalization had been achieved by the

27. 200 U.S. 536, 559 (1906).

28. Soc. of Plastics Indus., Inc. v. Consol. Rail Corp., I.C.C. No. 40298, 1990 WL 300440 (Oct. 11, 1990); *aff'd,* Soc. of Plastics Indus., Inc. v. Interstate Commerce Comm'n, 955 F.2d 722 (D.C. Cir. 1992).

29. *Soc. of Plastics Indus., Inc.*, I.C.C. No. 40298.

30. *Id.* (footnotes omitted).

maintenance of traditional joint rates and effectively has denied shippers the free choice of alternative railroad routings which they previously enjoyed. In Illustration 1, if Railroad 2's MIFTR is lower than Railroad 3's, of course, the traffic will gravitate to Railroad 2, unless its service is appreciably inferior. A shipper, who otherwise might have preferred using Railroad 3, would be penalized if he were to do so. As a practical matter, the shipper is relegated to the use of only one railroad; he becomes captive to it.

A shipper's dependence upon a single destination carrier becomes even more evident if one railroad can serve both the origin and the destination.

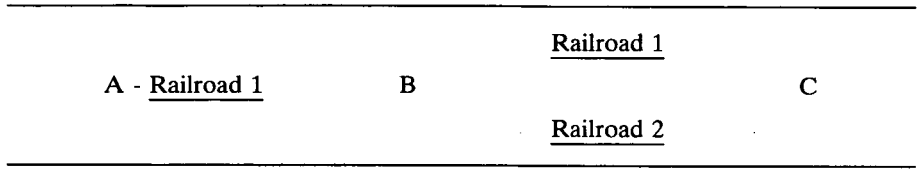

ILLUSTRATION 2

Heretofore, a railroad, such as Railroad 2 in Illustration 2, was able to offer competing services to the consignees at the destination station, notwithstanding that another railroad, Railroad 1, served both the origin and destination points and, accordingly, was able to provide single-line service between them. Railroad 2 was kept competitive by Railroad 1's neutrality at the interchange point or gateway and by its participating with Railroad 2 in the maintenance of joint rates from origin to destination equalized with Railroad 1's own local rates. The Commission, declared:

> If a rate when made by one company as a single rate would in law be unobjectionable, it would be equally so when made by several as a joint rate. The policy of the law and the convenience of business favor the making of joint rates, and the more completely the whole railroad system of the country can be treated as a unit, as if it were all under one management, the greater will be the benefit of its service to the public and the less the liability to unfair exactions.[31]

Beginning in 1980, however, the railroads embarked upon the systematic cancellation of joint rates.[32] Among the railroads most adversely affected by the cancellation of joint rates was the Pittsburgh and Lake Erie Railroad Company, a regional railroad which competed with Conrail

31. Martin v. Chicago, Burlington & Quincy R.R., 2 I.C.C. 25, 42 (1888).

32. *See*, Joint Line Cancellation – Soda Ash – Union Pacific R.R., 365 I.C.C. 951 (1982); Restructures Rates on Grain and Grain Products, Conrail, 365 I.C.C. 635 (1982); Cancellation of Intermediate Routing, Michigan N. R.R., 365 I.C.C. 51 (1981).

in the greater Pittsburgh area. As the court noted in *Pittsburgh & Lake Erie R.R. Co. v. Interstate Commerce Commission,*

> Conrail provides rail service throughout the industrial northeast and midwest. P&LE runs a smaller, more regional railroad, and its routes are for the most part limited to southwestern Pennsylvania and northeastern Ohio. A substantial percentage of P&LE's traffic moves through interline service. Conrail's lines parallel those of P&LE and extend beyond them. Many of Conrail's single-line routes can therefore compete with the through routes established by Conrail and P&LE.[33]

The court went on:

> On October 19, 1982, Conrail filed a cancellation tariff withdrawing from several joint rates, some of which applied to through routes on which P&LE participates. . . A division of the Commission voted to suspend the rate and conduct an investigation, but that decision was reversed by the Commission. The determination not to suspend or investigate the cancellation was . . . unreviewable, and the new rates went into effect shortly after the Commission decision.[34]

The cancellation of its joint rates with Conrail and the commercial closing of their through routes rendered the P&LE noncompetitive and spelled the beginning of the end of the P&LE. Shippers in the area both railroads served also lost the alternative service which PL&E had provided.

The cancellation of joint rates and the commercial closing of through routes have occurred with greatest regularity as an incident to the merger of railroads.

A - Railroad 1	B	Railroad 2 Railroad 3	C

BEFORE MERGER

A - Railroad 1	B	Railroad 1 Railroad 3	C

AFTER MERGER

ILLUSTRATION 3

As already noted, Railroad 1 before a merger would traditionally

33. 796 F.2d 1534, 1537 (D.C. Cir. 1986).
34. *Id.*

maintain through-route, joint-rate arrangements with Railroads 2 and 3 and participate with them in the interlining of freight without discrimination. The equalization of rates enabled a shipper to route via one combination of railroads or the other and obtain delivery of shipments via either Railroad 2 or Railroad 3.

To safeguard that a shipper would suffer no loss of alternative service as a result of the merger of railroads the Commission for more than three decades attached the so-called *DT&I* conditions, first imposed in *Detroit, T. & I. R.R. Control.*[35] In effect, the *DT&I* conditions required the merged railroad, Railroad 1 in Illustration 3, to preserve the interchange at point B, and "to maintain and keep open all routes and channels of trade via existing junctions and gateways"[36] between it and the connecting carrier, Railroad 3. In other words, notwithstanding the single-line service that the merged railroad, Railroad 1, was able to offer, the imposition of the *DT&I* conditions kept Railroad 3 competitive and assured shippers a choice of service via the one railroad or the other. As the Commission explained in *Traffic Protective Conditions*:

> The Commission has interpreted the DT&I Conditions, specifically Condition 1, to require rate equalization. A consolidated carrier was generally prohibited from maintaining rates on its new single-line routings resulting from the consolidation below the rates on any competing joint-line routes in which it participated. We feared that if a single-line rate was lowered without securing the concurrence of all connecting carriers in lowering the corresponding joint-line rates, the "commercial closing" of certain routes or gateways would occur and competition would be reduced.[37]

In the *Traffic Protective Conditions* proceeding, the Commission reversed itself, held that the *DT&I* conditions themselves were anticompetitive and concluded that future railroad mergers could proceed without the imposition of the *DT&I* conditions. Thus, all of the recent mergers, BN/SF[38], UP/SP[39] and CN/IC[40], all proceeded without the imposition of the *DT&I* conditions.

The implications of the agency's policy change are best illustrated by

35. 275 I.C.C. 455 (1950).

36. *Id.* at 492.

37. 366 I.C.C. 112, 113 (1982).

38. Burlington Northern Inc.—Control and Merger—Santa Fe Pacific Corp., Finance Docket No. 32549 served August 23, 1995, *aff'd*, Western Resources, Inc. v. Surface Transp. Bd., 109 F.3d 782 (D.C. Cir. 1997).

39. Union Pacific Corp. —Control and Merger—Southern Pacific Rail Corp., Finance Docket No. 32760, served August 12, 1996, *aff'd*, Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999).

40. Canadian National R.R.—Control—Illinois Central Corp., STB Finance Docket No. 33556, served May 25, 1999.

reference to the break-up of Conrail between NS and CSXT.[41] Shippers on Conrail with freight destined to the south and southeast, to points such as New Orleans, LA, Birmingham, AL, Atlanta, GA, Raleigh, NC, or Jacksonville, FL, served by both NS and CSXT, could route their shipments via the gateways of Cincinnati, OH, Columbus, OH, Hagerstown, MD, or Washington, DC, for delivery via either the NS or CSXT. With the break-up Conrail effected without the imposition of the *DT&I* conditions, however, shippers at stations such as Ypsilanti, MI, Elkhart, IN, or Steubenville, OH, now served by NS, are effectively foreclosed from using CSXT on shipments to the commonly served points in the south and southeast; shippers at stations such as Oswego, NY, or Highland, IL, now served by CSXT, are effectively foreclosed from using NS. The break-up of Conrail has closed the gateways that formerly afforded shippers alternative railroad routings. Affected shippers have lost the benefits that the competition between NS and CSXT achieved, namely, the relatively lower rates and better service that competition between railroads invariably brings about. Their shippers have become increasingly captive to NS and CSXT.

The statute theoretically affords relief to a shipper served solely by a single railroad by providing for competitive access.

A	Railroad 1	C		
B	Railroad 2	C	Railroad 2	D

ILLUSTRATION 4

One means of achieving competitive access is by reciprocal switching,[42] whereby the destination railroad, Railroad 2 in Illustration 4, for a fee, must transport the cars of a competing carrier, Railroad 1, enabling the latter carrier, even though it cannot physically serve the consignee's facility at D, to offer single-line rates to compete with the destination railroad's single-line service.[43] Another means of achieving competitive access is through terminal trackage rights[44] whereby the destination railroad, Railroad 2, for a fee, must permit physical access over its line to the trains and crew of a competing railroad, Railroad 1, in Illustration 4.[45]

The Commission has effectively nullified the competitive access remedies, however. In its *Midtec* decision, the Commission said that the com-

41. CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc., STB Finance Docket No. 33388, served July 23, 1998.

42. 49 U.S.C. § 11102(c) (1996).

43. Review of Rail Access and Competition Issues, STB Ex Parte No. 575, served May 4, 1998.

44. 49 U.S.C. § 11102(a) (1996).

45. Review of Rail Access and Competition Issues, STB Ex Parte No. 575.

petitive access remedies were available only upon a demonstration of the delivering railroad's anticompetitive conduct:

> The key issue in this case is whether CNW has engaged in or its likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive. The essential questions here are: (1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service. These issues are just as relevant in determining whether the public interest requires reciprocal switching as in determining whether it requires terminal trackage rights. Both remedies are effective means of assuring carrier cooperation—when due to the intransigence of a monopoly carrier that cooperation has broken down—to assure that shippers receive adequate service.[46]

In the intervening fourteen years since the *Midtec* decision was rendered, not one shipper has been afforded competitive access; not one shipper has been relieved of the rate and service constraints of being served by only a single destination railroad.

Yet another nail was driven into the coffin of railroad competition by the Board's decisions in the so-called Bottleneck cases.[47] The Board held that the destination railroad, Railroad 2 in Illustration 4, was under no obligation to provide separate local rates for the bottleneck portion of through service, that is, from the junction at point C to the destination at point D. In other words, although the shipper may be able to obtain the commodity it wants from another source, situated at point A in Illustration 4, and another railroad, Railroad 1, is ready, willing and able to haul the freight to the junction at point C, there to be interchanged to the delivering carrier, Railroad 2, the latter can block the competing railroad's access to the destination by refusing to publish local rates over the bottleneck segment. The shipper, thus, is rendered totally captive to the one railroad and must bear whatever exorbitant rates the carrier elects to collect and suffer whatever inferior service it chooses to render.

Conclusion

That some shippers feel a sense of frustration in dealing with the railroads is perfectly understandable. In many instances the shippers are totally at the mercy of the railroads, whether in terms of rates or service. While no one wants to turn back the clock to 1887, the affected shippers

46. Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986) (footnotes omitted), *aff'd*, Midtec Paper Corp. v. U.S., 857 F.2d 1487 (D.C. Cir. 1988).

47. Central Power & Light Co. v. Southern Pacific Transp. Co., No. 41242, decided December 31, 1996, and April 30, 1997, *aff'd*, MidAmerican Energy Co. v. Surface Transp. Bd., 169 F.3d 1099 (8th Cir. 1999).

Transportation Law Journal, Vol. 28 [2000], Iss. 1, Art. 2

feel that what little regulation remains is woefully biased in favor of the railroads.

Some semblance of regulatory balance would be achieved if the Board were to reverse its *Midtec* and Bottleneck decisions and thereby allow a consignee served by only a single railroad access to a second carrier. As the Supreme Court noted in *American Trucking Ass'ns. v. Atchison Topeka & Santa Fe Railway Co.*, "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."[48] And if the Board were to decline to do so, the Congress should. It would not be the first time that the Congress has insinuated itself in the agency's actions, even after court review,[49] and the plight of many shippers calls for such relief.

48. 387 U.S. 397, 416 (1967).

49. *See* § 3403 of the Omnibus Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, nullifying the reviewing court's remand of Norfolk Southern Corp.—Control—NAVL, 1 I.C.C. 2d 842, 854-56 (1985), *rev'd,* International Brotherhood of Teamsters v. ICC, 801 F.2d 1423 (D.C. Cir. 1986), *aff'd on rehearing*, 818 F.2d 87 (D.C. Cir. 1987).