THE ICC AND THE RAILROAD REFORM ACTS

JANICE M. ROSENAK

MS. ROSENAK: Thank you.

I am very pleased to participate in this program today. It is great to see so many old friends and, of course, the Centennial of the oldest regulatory agency is an occasion to celebrate.

The topic of this panel is the 1980s legislation. However, before turning to that legislation, Dan O'Neal asked that I touch on the rationale that caused Congress to decide in 1887 that there ought to be an Interstate Commission.

I am sure that all of you are aware of the background in general terms. The Act to Regulate Commerce, which established the ICC effective in April of 1887, grew out of public agitation and Congressional investigations of rail rates and financing practices. The Granger movement was very active during the 1870's. The farmers complained about discriminatory rail practices and high rail freight rates. A decline in the price of agricultural products made the burden on farmers particularly severe.

In response to problems of this nature, a number of midwestern legislatures enacted fairly extreme railroad laws in the 1870's. A series of Supreme Court decisions generally upheld the validity of railroad regulation, but an 1886 decision, the *Wabash* case (118 U.S. 557), held that a State could not control rates on interstate traffic. This undoubtedly hastened Congressional action. In addition, it should be noted that the railroads actively supported some type of Federal regulation — to avert the possibility of burdensome State laws.

Actually, numerous bills were introduced in the years preceding passage of the Interstate Commerce Act. Several bills passed the House, but the Senate failed to take action. A Texas Congressman named Reagan

was particularly active. He introduced bills year after year (from 1877 on). In 1884, the House passed Reagan's bill. In 1885, the Senate passed the Cullom bill (named after Senator Cullom of Illinois). It was at this point that Senator Cullom appointed a select committee to study the matter, resulting in the famous "Cullom Report" submitted in January of 1886 — a report that helped shape the final form of the Act. The Cullom bill, setting up a Commission, passed the Senate. The House then passed the Reagan bill which left enforcement to the courts. Again, the two Houses were deadlocked. But this time a compromise was reached. An Act establishing a Commission was agreed to, and the bill was signed into law by President Grover Cleveland on February 4, 1887.

It should be noted that, by this time, the Granger movement had lost its strength, and competition had forced rail rates down. Thus, discrimination in its various forms was considered the greatest evil at which the bill was aimed. The first Chairman, Thomas Cooley, a law professor and justice of the Michigan Supreme Court, was generally well regarded. The salary of the Commissioners was $7,500, an amount higher than that of all other judges at the time with the exception of Supreme Court members. The first budget was $100,000.

In brief, the legislation as passed required that all rates be "just and reasonable." Discrimination and undue preference and prejudice were prohibited, and the publication of rates and fares was required, with strict adherence to published charges. Under the long-and-short haul clause, no common carrier could receive greater compensation for a shorter than longer distance over the same line "under similar circumstances and conditions." (This provision was at issue in many of the early ICC cases). In its final form, the Act was, interestingly enough, to be administered by an independent Commission of *five* members. Thus, in a sense, the Commission is back where it started — although the rail law it administers today differs substantially from the 1887 legislation.

One of the parties in an 1897 case describes the situation at the time of passage of the Act in the following terms:

> At the time of passage, the railway carriers were the absolute and irresponsible masters of all interstate commerce. The several States, in trying to break up, or at least to mitigate the unjust tyranny of these great corporations and combinations that held the largest part of the intercourse of the people in their grasp (and which in many instances undertook to control political as well as commercial affairs) found themselves baffled, and practically defeated in their efforts by the national constitutional provision that only Congress could regulate interstate commerce. In this state of affairs, and to redress such enormous grievances, the Interstate Commerce Act was passed.

As is apparent, feelings were running very high at the time.

A further description of the underlying rationale for the original Act is

set forth in the first annual report of the Commission, dated December 1, 1887:

> The Act to regulate Commerce was passed. . . .in recognition of a duty which, though long delayed, had at length, in the opinion of Congress, become imperative. The reasons for the delay are well understood. When the grant was made by the Constitution, the commerce between the States was quite insignificant. . . On the land, there was very little that could be said to rise to the dignity of interstate commerce.
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> The report details the circumstances of railroad development. Because of the demand of every city for a railroad, there was substantial overbuilding, and a large proportion of public money sunk in railroads was lost. By the time of the ICC's first report, the Commission noted that 108 roads were then in the hands of receivers. Rate wars and secret rebates are cited.
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> The memorandum book carried in the pocket of the general freight agent often contained the only record of the rates made to different patrons of the road; and it was in his power to concede a special rate on one day, and to nullify it on the next by doing even better by a competitor.
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> Similar problems existed in the transportation of passengers. According to the report, the general fact was that those able to pay the most paid the least; for the poor man seldom had any ground on which to demand free transportation, while the rich man was likely to have many grounds on which he could make it for the interest of the railroad company to favor him.
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> The manner in which corporate stocks were manipulated was referred to as "often a great scandal," and the persons in control of the railroad "amassed great fortunes" in a very short time. This gave the public the impression that these fortunes were unfairly acquired at the expense of the public, and strengthened the demand for legislation.
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> In closing, the Commission noted that "the Act to Regulate Commerce" laid down certain rules to be observed by the carriers which were intended to be" and emphatically are rules of equity and equality and which, if properly observed, ought to and no doubt will restore the management of the transportation business of the country to public confidence."

Incidentally, the original Act was about 10 pages long. However, the Commission's power was restricted by several early Supreme Court cases, and Congress subsequently expanded the ICC's jurisdiction — first, as to railroads, and later by conferring jurisdiction over other modes of transportation. By the time of the recodification of the Act in 1978, the "green book" had grown to almost 300 pages.

But, by then, we were in a new era. Alternative modes of transportation were available for most rail traffic. The railroads were experiencing serious financial difficulties. This led in 1976 to enactment of the 4-R Act, legislation intended to eliminate unnecessary restraints on competition, through such concepts as market dominance. In addition to more limited regulation, the process itself was expedited. And the Commission was

directed for the first time "to make a continuing effort to assist the carriers in obtaining (adequate) revenue levels."

Despite the substantial nature of the 4-R Act reforms, the legislation was less successful than anticipated, in part because little activity occurred, while many of the major changes, such as market dominance, were litigated.

Further rail legislation became necessary. The Administration introduced its proposal, S. 796, and, following extensive hearings, the Senate and House developed rail bills (S. 1946 and H.R. 7235, respectively). I was with the Senate Commerce Committee at the time. As some of you will remember, in addition to the Congressional hearing process, numerous informal meetings were held with Senate and House staff. There was a consensus that less regulation was desirable. At the same time, a consensus was lacking on certain familiar issues: jurisdictional thresholds; revenue adequacy; maximum-rate provision; joint rates.

Nevertheless, the bill introduced by Senators Cannon, Long, and Packwood was generally favorably received and proceeded through Committee fairly smoothly. Then the trouble began. Certain utilities continued to express concern with regard to coal rates which led to the Cannon-Long controversy on maximum rates. Additional hearings were held; there was intense lobbying on this issue. All efforts at compromise failed until about 30 minutes before the rail bill was scheduled to go to the floor on April 1. At that time, a compromise was reached — the so-called "Long-Cannon Amendment," 49 U.S.C. 10707a(e)(2). With this change, S. 1946 passed the Senate by an overwhelming vote of 91-4 on that day, April 1, 1980.

Another compromise was reached just before Senate floor action. That concerned the joint rate surcharge provision. This issue had been considered during the hearing and drafting process, but specific language was not included in the legislation. Then, Conrail and Southern Railway agreed on a proposal which became a part of the bill. Because not all railroads or other interested parties had the opportunity to study the provision, Senator Cannon offered assurance that appropriate changes would be made as the legislation proceeded to the conference process.

Meanwhile, on the House side, most of the controversy centered on the maximum-rate provisions — and, to some extent, the surcharge provisions. As the bill was reported out of committee, H.R. 7235 provided that the railroads could establish any rate, unless there was no actual or present potential transportation alternative and the rate resulted in a revenue-variable cost percentage equal to or less than the cost-recovery percentage. (Increases were limited to 10 percent a year for two years to ease the transition.)

Shippers did not perceive the House bill as providing sufficient pro-

tection for captive traffic. In addition, there was serious concern by carriers and shippers with regard to the practicality and reliability of the cost-recovery percentage. As on the Senate side, the utilities contended the bill would have a serious effect on coal rates and on conversion.

The House bill came to the floor in early July but action was not completed before the July recess. When consideration was resumed in late July, Congressman Eckhardt offered an amendment substantially changing the maximum-rate provisions. When that amendment was adopted, the bill was withdrawn. Subsequently, during the rest of July and the month of August, various compromise negotiations took place. Agreement was ultimately reached in early September (the Staggers/Rahall/Lee amendment), and the House passed H.R. 7235. Following weeks of conference consideration and approval of the report by the House and Senate, S. 1946 was signed by the President on October 14, 1980 (most provisions were effective October 1, 1980), and the "Staggers Rail Act of 1980" became law.

Since that time, the Commission has been involved in implementation of the Staggers Act. I came back to the ICC as Legislative Counsel in 1981 and was involved in the annual oversight hearings on the effects of the Staggers Rail Act. In general, as you know, the Commission has consistently testified that the Staggers Act is working well. These were not always easy hearings, however, particularly on the Senate side where Commerce Committee members like Senator Long and Senator Ford usually had a few comments on the ICC and its performance. Things will certainly not be the same now that Senator Long has retired. I remember one hearing at which the witness, as is customary, started out by trying to give his name and the name of the Association he represented. At this point, he was interrupted by Senator Long who commented that it didn't matter who he was or whom he represented — just get on with the testimony, the Committee had a full schedule.

But one of the strangest experiences at a hearing during my tenure involved not Staggers oversight, but a hearing on coal-slurry pipelines. It happened that, on this day, the Chairman was scheduled to testify at two hearings. When the coal-slurry hearing fell behind schedule, we left to attend a Joint Economic Committee hearing on motor carrier matters. After completing that testimony, the Chairman and accompanying staff returned to the pipeline hearing. Most of the Committee had left by this time; the two Congressmen remaining had only one interest: water. The Chairman struggled valiantly to convince the Congressmen that this was not a matter within ICC jurisdiction. Nevertheless, the questioning continued. Becoming increasingly annoyed, one of the Congressmen finally said, "Well, you've got a big staff down there at the Commission. Put them to work and get back to me with answers on these questions about

state water rights." And that is how it happened that our office researched the constitutional question of whether it is possible for Congress to protect state water laws in light of the commerce clause — learning more than we ever wanted to know about water law in the process! (Although perhaps this information may yet prove useful — the area where we live just outside Santa Fe is presently involved in litigation with several nearby Indian pueblos over water rights).

What can be said about the Staggers Act? For the most part, it is clear that the Act has accomplished its intended purpose of removing unnecessary regulation, providing an opportunity for carriers to obtain adequate earnings, and to respond quickly to satisfy shippers' changing needs. All of you would agree, I'm sure, that activity under the contract rate provision has been particularly noteworthy. I think the number of contracts filed since passage of the Act stands today at over 50,000. There are still issues in the rail area. The Railroad Accounting Principles Board is presently looking at some of these questions. The RAPB released an Exposure Draft on February 20, 1987; its principles and report to Congress will be submitted later this year. The recent decision of the Third Circuit affirming the Commission's Final Guidelines in Ex Parte No. 347 (Sub-No. 1) should be helpful in resolving some long-standing controversies.

Other issues, including the future of the ICC, will undoubtedly be debated on the Hill as the year progresses. Dan O'Neal is going to focus on where we go from here. But it is important to note, I believe, that most of those who criticize Staggers have focused on the implementation of the Act by the Commission rather than the Act itself. The legislation was needed to assist in the revitalization of the rail system, and both carriers and shippers have benefited from the improved service (tailored to shippers' needs), more responsive pricing, and greater reliance on the marketplace which has resulted from the Staggers Act.

In closing, I would like to say — in case you're wondering about the absence of jokes in my presentation — well, since, as Chairman O'Neal will recall, I tend to forget jokes as well as punch lines, I have decided to leave this to our next speaker, Will Riss. We were on the Hill together and, as I recall it was always his task to come up with jokes or anecdotes appropriate for the occasion (though he did accuse those who used them of messing up the timing).

Again, I'm delighted to be here today. Thank you.

MR. O'NEAL: Thank you, Jan. I do remember some of those hearings. I remember we had a problem with the L. & N. Railroad in Kentucky, and we had a meeting down here at the Interstate Commerce Commission with both U.S. Senators from Kentucky, the Governor of Kentucky, Governor Carroll, at that time and Carl Perkins, who was one of the more

senior members of the House. They brought in local Kentucky television, and we had quite a show in what was the Commissioners' Conference Room at that time. We had a lot of fun trying to close that meeting, I remember, because I thought that, since the meeting was at the ICC, I should be the one who closed the meeting and said, "Thank you very much; we'll do what we can." Every time I tried to close it, though, Carl Perkins would insist on having the last word. We went around for about ten minutes, and finally, I gave up. I figured, well, he's the senior congressman up there, and I guess I better get smart and not go any further.

We had a hearing later. The Commission adopted a 27 percent increase for coal rates into that area, and Senator Wendell Ford, I think, unfortunately, he still remembers this. We had a hearing on the Hill shortly thereafter, and after everybody else had questioned me, and Jan, I think, was with me at that time, — Wendell Ford looked at me, and he said, "Now, Mr. Chairman, we're going to play some hard ball." And believe me, it was no fun.

Next I want to introduce Will Ris. Will was also on Capitol Hill. He was also with the Senate Commerce Committee, and he was there during a very critical period of time. From 1978 to 1981, he was majority counsel to the committee, and he was the primary staff person responsible for drafting the Motor Carrier legislation. He was once at the Civil Aeronautics Board. He worked not only on trucking legislation, but he also worked on airline deregulation. He is now a principal in the firm of Wexler, Reynolds, Harrison & Schule. They do Washington-type things like lobbying and government relations. They have a lot of different clients — American Air Lines, USAir and several others.

Will received a B.A. from Northwestern University, an M.A. from Johns Hopkins and a J.D. from the Denver College of Law and an L.L.M. from Georgetown. So Will, I guess, during the course of that has learned a lot about a lot of things, including good jokes. So, Will?