THE LONG AND SHORT HAUL RULE IN MISSOURI

By Charles E. Cullen

> The principal objects of the Interstate Commerce Act were: (1) to secure just and reasonable charges for transportation; (2) to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; (3) to prevent undue or unreasonable preferences to persons, corporations or localities; (4) to inhibit greater compensation for a shorter than a longer distance over the same line; (5) and to abolish combinations for pooling freights. . . . It is not all discriminations or preferences that fall within the inhibition of the statute, . . . only such as are unjust or unreasonable, *Interstate Commerce Commission v. Baltimore and Ohio R. Co.*, (1892), 145 U. S. 263.

This quotation regarding the Act to Regulate Commerce of 1887 indicates the main reasons for most of the state legislation which had preceded its passage. The states had entered the field of regulation about twenty years earlier with the so-called "Granger Laws" aimed at the same abuses. In 1876 the Supreme Court of the United States had announced the policy that, "Until Congress acts in reference to the relations of this (railroad) Company to interstate commerce, it is certainly within the powers of Wisconsin to regulate its fares in matters of domestic concern," *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164. Until this policy was changed in *Wabash, St. Louis and Pacific R. Co. v. Illinois,* 118 U. S. 557, in 1886, the state regulatory legislation formed the only restraint on the abuses mentioned above in both intrastate and interstate commerce. The latter decision made necessary the action of Congress, and the Act to Regulate Commerce of 1887 was the result.

In the intrastate field the states continued their regulation, in many instances affected by local interests and prejudices rather than by sound economic policy. The product of these prejudices was a body of arbitrary regulations which became crystallized in the provisions of new legislation and new constitutions adopted during the period following the Civil War down to about 1880, when public opinion, outraged by what it considered exceptionally unfair treatment, was unusually biased.

This unreasoning attitude toward capital in general, as well as toward carriers, most of whose troubles could at least superficially be traced

to unwise financial manipulation or expansion, reflected in the Sherman Antitrust Act, the railroad legislation, and similar measures, has undergone great modification during the last forty years. Change has been wrought by amending or repealing legislation, or through "reasonable" interpretation by the courts, in the place of positive and rigid prohibitions. It took twenty years for the courts to point out that society could not have intended to destroy all combinations of capital, and had rejected those only which were in *unreasonable restraint* of trade. It took thirty-three years to produce a sound attitude toward transportation.

> The Transportation Act of 1920 introduced into the federal legislation a new railroad policy, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. *The New England Divisions Case,* 261 U. S. 184.

The purpose of the Transportation Act of 1920 was to provide for "the transportation needs of the country, and the necessity . . . of enlarging facilities," and to enable the carriers to "properly meet the transportation needs of the public." (Section 422.) Consolidations and pooling of interests or returns had been serious offenses of the last three decades. The Transportation Act of 1920 recognizes the economic advantage of and makes provision for the consolidation of railways into a limited number of systems, and the pooling of traffic or earnings (Section 407), and the division of joint rates, 257 U. S. 563, *supra.* Where opinion has been properly guided by study we have made considerable progress in wise regulation.

The fourth point mentioned in the opening quotation from *Interstate Commerce Commission v. Baltimore and Ohio R. Co., supra,* formed the subject matter of the famous "Fourth Section" of the Act to Regulate Commerce of 1887. It read as follows*:

> That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater com-

*The italics in all quotations in this article are the author's.

pensation in the aggregate for the transportation of passengers or of like kind of property, under *substantially similar circumstances and conditions* for a shorter than for a longer distance *over the same line, in the same direction, the shorter being included in the longer distance;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; *Provided, however,* that upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and such designated carrier may be relieved from the operation of this section of the act. Section 4, Act of Feb. 4, 1887, 24 Stat. at L. 380.

This section was amended by the Act of June 18, 1910, 36 Stat. at L. 547, known as the Mann-Elkins Act. So far as our purposes are here concerned, the changes made were the elimination of the phrase, *"under substantially similar circumstances and conditions";* "the insertion of *"or route"* after the words, "longer distance over the same line"; and the addition of *"or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this act,"* after the phrase, "the shorter being included in the longer distance."

In this shape the "Fourth Section" remained until amended by the Transportation Act of 1920, by the addition after the word "section," (fourth word from the end of the original act of 1887) of the following:

. . . but in exercising the authority conferred upon it in this provision, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity granted authority to meet the charges of a more direct line or route to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorizations shall be granted on account of merely potential water competition not actually in existence. Section 406, Act of Feb. 28, 1920, 41 Stat. at L, 474, l. c. 480.

It will be seen from the foregoing that, even in its original form, the federal regulation made provision for situations in which the strict prohibition against a "greater compensation . . . for a shorter distance than for a longer distance," (though clearly stated as not an

authorization of, "as great compensation for a shorter than for a longer distance,") would not apply. The amendments down to date further recognize that there are situations in which the carrier might justly charge less for a longer than for a short haul, and authorization for such charges has been approved by the Interstate Commerce Commission, "Intermountain Rate Cases," *United States v. Atchison, T. & S. F. R. Co.* (1914), 234 U. S. 476; and *Murfreesboro Board of Trade v. Louisville & N. R. Co.* (1919), 55 I. C. C. 648; but denied in "Transcontinental Rate Cases," (1922), 74 I. C. C. 48.

Unfortunately the liberalizing influences evidenced in the history of the federal control of carriers have not found corresponding reception in all of the states. Various causes underlie this conservatism, but it has been largely due to the fact that when restrictions become fixed in state constitutions and legislation supposedly passed in pursuance thereof, they are not easily susceptible of either amendment or repeal to meet changing conditions. Another preventive is the reluctance of state supreme courts to change a line of interpretation or construction adopted in some important decision and followed in a number of subsequent cases. Again, since the state supreme court's construction of the provisions of the state constitution are accepted by the Supreme Court of the United States when no conflict between the provision itself and the United States Constitution appears, it becomes useless to seek relief in that direction.

In Missouri, as in other western states, the abuses of the public by the carriers were met by restrictive legislation of the early stringent type. As regards the particular abuse by the carriers in discriminating unfavorably against the short haul by giving less rates for longer hauls, at the adjourned session of the Twenty Sixth General Assembly, which met December 6, 1871, the following act was adopted:

> No railroad corporation organized or doing business in this state, under any act of incorporation or general law of this state, now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its road *for any distance,* any larger or greater amount, as toll or compensation, than is *(at the same)* charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property *over a greater distance upon the same road,* nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith, which it has a right to use, nor shall any such railroad corporation

> charge or collect for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for similar quantities of the same class of goods, merchandise or property *over any such other portion of its road of equal distance;* and all such rules, regulations or by-laws of any railroad corporation as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed are hereby declared to be void. Section 1, Laws of Missouri, Adjourned Session, 1871-1872, pp. 69, 70.

This act, with the exception of the words *"at the same,"* in the parenthesis above, appears successively as Section 820, R. S. 1879; Section 2629, R. S. 1889; Section 1126, R. S. 1899; Section 3173, R. S. 1909; and Section 9974, R. S. 1919. The title of this act was, "AN ACT to prevent *unjust discrimination* and extortion in the rates to be charged by the different railroads in this State, for the transportation of freights on said roads." Its constitutionality was attacked on the ground that in prohibiting *all discriminations* and including other provisions in its other sections, it violated the constitutional provision, Section 32, Article 4, Constitution of 1865, by being broader than its title would indicate, but the constitutionality was sustained, 230 Mo. l. c. 511.

In 1875 Missouri adopted a new constitution, which like others adopted in neighboring states during this period, contained numerous restrictions on legislative and corporate action. The detail to which these provisions go is illustrated by Section 12 of Article 12 of that instrument, which is devoted exclusively to the "long and short haul" abuse. It reads as follows:

> It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and *suitable laws shall be passed by the General Assembly to enforce this provision;* but excursion and commutation tickets may be issued at special rates. Section 12, Article 12, Constitution of 1875. (Italics are ours.)

The act of 1872 is a rigid prohibition of greater compensation for a short than for a longer haul. The first part of the above constitutional provision seems fully as rigid. The one specified *"over any other portion of its road,"* the other, "any greater distance." It would seem from the language used in both that no two hauling situations, regardless of how distant from each other, or diversity of ease or difficulty of transportation, or plentifulness or scarcity of freight, would

seem to permit of a greater compensation for the shorter than for the longer haul. But what were *suitable laws* under Section 12 must be determined.

Fifteen years after the act of 1872, and twelve years after the adoption of the new constitution, the federal government enacted the Act to Regulate Commerce. Its provisions, as we have seen, were not so drastic as the earlier state laws. The "Fourth Section" prohibition was qualified by such phrases as: "like kind of property"; "under substantially similar circumstances and conditions"; "over the same line"; "in the same direction"; and "the shorter included in the longer distance." Fifteen years and a sounder economic viewpoint had at least slightly mellowed opinion.

That like modification was desirable in Missouri was evidently recognized by the General Assembly of 1887, for it passed an act, the main portion of which, was in substance the first part of Section Four of the federal act, as follows:

> It shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property *under similar circumstances and conditions* for a shorter than a longer distance *over the same line in the same direction: Provided, however,* that nothing contained in this section shall apply to the carriage, storage or handling of property, either free or at reduced rates, for the United States, for the state of Missouri, or for any fair, exposition, religious, scientific, benevolent, or charitable purposes. Laws of Missouri, Extra Session, p. 17; appearing as Section 2637, R. S. 1889; Section 1134, R. S. 1899; Section 3185, R. S. 1909; Section 9986, R. S. 1919.

Unfortunately the act of 1872 was not expressly repealed. It had been included in the revision of 1879 (Section 820), and in the revision of 1889 (Section 2629). Thus after 1887, the state had three provisions: the act of 1872, the constitutional provision of 1875, and the act of 1887, all bearing directly on the "long and short haul" problem, besides auxiliary acts imposing penalties for breach of the regulatory laws and another provision of the Constitution of 1875, Section 14 of Article 12. There was no provision in the Constitution of 1865 similar to either Section 12, set out above, or Section 14, which reads as follows:

> Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The *General Assembly shall*

pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time *pass laws establishing reasonable maximum rates* of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties.

Here would seem to be a sufficient authority for the General Assembly to pass suitable legislation to correct any unjust discriminations on a proper economic basis, and to determine that any discrimination between long and short hauls, merely as such, was not necessarily unjust.

Since the passage of the act of 1887, litigation with reference to the long and short haul clause has hinged around its effect upon the act of 1872. As indicated heretofore, both survived in the successive revisions of the statutes. The litigation over the "long and short haul" law in Missouri is a striking example of the obstacles facing the adaptation of regulatory measures to a changed and enlightened economic viewpoint. It has taken until August 13, 1926, to overcome the effect of conservatism and adherence to precedent.

In 1903 the act of 1872 came before the supreme court of the state in an action of McGrew v. Missouri Pacific R. Co. for the recovery of excess charges on coal from Myrick, the point of shipment, to Kansas City, a distance of 42.3 miles, the rate being fifty-five cents per ton. The rate at the same time from Myrick to Boonville, a distance of 77 miles, was forty cents per ton. The court ruled that a demurrer to the petition was wrongfully sustained by the lower court, and specifically determined that the act of 1872 was not repealed by the act of 1887. Judge Gantt wrote the opinion which decided that the two acts would stand together, the former covering all instances of such discrimination, and the latter those of the kind specified. The decision of the case on retrial was in accord with this opinion, 118 Mo. App. 379. The opinion was also followed in *Cohn v. St. Louis, I. M. & S. R. Co.,* (1904) 181 Mo. 30.

The carriers continued to regard the act of 1887 as controlling, and McGrew again sued to recover excess charges, the case reaching the supreme court in 1910. One of the judges was disqualified, and the other six divided equally, so a special judge was called upon. Hon. Willard P. Hall was chosen, and the opinion, in a four to three decision written by him, is to be found in 230 Mo. 496.

Excluding the contentions regarding the legality of those laws al-

lowing recovery of attorney's fees and penalty damages, the grounds of appeal were as follows:

1. That the Act of 1872 (now Section 9974, R. S. Mo. 1919), was in violation of Section 32, Article 4, of the Constitution of 1865.

2. That it was repugnant to and in violation of Section 14, Article 12, of the Constitution of 1875.

3. That both the Act of 1872, and Section 12, Article 12, of the Constitution of 1875, were in conflict with the Constitution of the United States.

4. That the Act of 1872 had been repealed by the Act of 1887, (now Section 9986, R. S. Mo. 1919).

As indicated before, the first contention was overruled and the act was held not invalid because its title could be held to be no broader than its content.

The majority ruled with regard to the second point, that it was not repugnant to Section 14 of Article 12. Despite the fact that both Sections 12 and 14 had been copied from the Constitution of Illinois of 1870, and legislation in furtherance of both had been declared unconstitutional, Judge Hall distinguished the conditions of their application in Missouri. His chief argument was that "long and short haul" provisions were being considered both before and after the adoption of Section 12 by other states, which were revising their constitutions. Most of those states, both before and after our adoption, adopted provisions similar to those of our act of 1887, but Missouri, with full knowledge of such modifications retained the stricter language." The language of our constitution, so widely different from all the others in these respects, was not a mere accident, but indicates a fixed and settled purpose and intention to establish a rigorous and unalterable and unvarying short-haul rule as the policy of the state." 230 Mo. l. c. 521, 522.

Thirdly, the decision pointed out, following *L. & N. Railroad Co. v. Kentucky,* 183 U. S. 503, that "in the absence of a valid agreement protecting it from interference on the part of the state in this regard (if indeed such an agreement could be made, which was not decided) a railroad company has no constitutional right to discriminate either between individuals or localities, and the state has the constitutional power to prohibit absolutely such discriminations," and held that the act of 1872 and section 12 of the Constitution were not in conflict with the federal Constitution.

Fourth, as regards the contention that the act of 1887 repealed the

act of 1872 by implication, Judge Hall followed Judge Gantt's decision of 177 Mo. 533, and rejected repeal by implication. Speaking for the majority he also *decided that Section 12 of Article 12 was self-enforcing;* and even if the act of 1872 were repealed, a shipper needed no legislation to enable him to recover for its breach.

The finality with which these principles were laid down is somewhat marred by the able dissent of Judge Woodson. The prevailing opinion covers 65 pages, the dissent 50 pages, 230 Mo. 496-612.

Apparently the matter was settled and the rulings of this case were followed in *McGrew v. Missouri Pacific R. Co.,* (1914) 258 Mo. 23, and *McGrew v. Missouri Pacific R. Co.,* (1919) 280 Mo. 466.

Two cases of *McGrew Coal Company v. Missouri Pacific R. Co.* (memorandum decisions, No. 17317, and No. 17318, decided June 29, 1915, rehearings denied July 12, 1915, reported in 178 S. W. 1179) the second by stipulation to abide the decision in the first, were taken to the Supreme Court of the United States by writ of error and affirmed by that court, May 21, 1917. *Missouri Pacific R. Co. v. McGrew Coal Co.,* 244 U. S. 191. Quoting the statement of the supreme court of Missouri, 230 Mo. 561:

> Section 12 of Article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than the amount charged for any greater distance. That declaration establishes a rule and creates a right in every passenger and shipper to a compliance with, and an obedience to its terms. . . . Said section has the same force and effect as if it read, "It shall not be lawful in this State for any railroad company to charge, under penalties which the General Assembly shall prescribe, for freight or passengers a greater amount for the transportation of the same, for a less distance than the amount charged for any greater distance. Had said section read that way, its effect as an operative law would have been too clear for controversy." To my mind it is equally clear under the present reading.

Mr. Justice McReynolds, delivering the opinion of the court, stated that the *state court's interpretation of the constitutional provision made it unnecessary to consider the validity of the statutes* which the railroad claimed were unconstitutional. He also sustained the interpretation of Judge Hall as to the effect of *Louisville and N. R. Co. v. Kentucky,* 183 U. S. 503, on the constitutionality of such legislation, in the absence of any controlling contract or protecting charter.

The absolute prohibition of any greater charge for a short haul than a longer haul regardless of any other consideration than mere mileage, seemed fixed in Missouri.

In 1920 another action was brought by the McGrew Coal Company, this time against Walker D. Hines, Director General of Railroads, for recovery of excess freight charges for the transportation of coal from plaintiff's mines to various points on the lines of the Missouri Pacific Railroad Co. James C. Davis and Andrew C. Mellon were successively substituted as successors in official capacity to Mr. Hines. The first count alleged, that, on December 28, 1917, plaintiff shipped 354,600 pounds of bituminous coal over the lines of the Missouri Pacific Railroad Company from Myrick to Archie, both in Missouri, and that the Director General charged and collected . . . 90 cents per ton by the carload, when said Director General at the time collected for the same class of coal, and over the same railroad, the rate of 60 cents per ton by the carload from Liberal, Mo., to Granby, Mo., a greater distance than from Myrick to Archie. There were 168 counts in the petition, each based on a separate shipment, alike in tenor, but differing in the facts of shipment.

The case reached the supreme court on appeal by the defendant from a decision in the lower court and the court sat en banc on the case. On August 13, 1926, a unanimous opinion, prepared by Chief Justice Blair, was handed down, and a rehearing was denied, October 8, 1926. The decision, which is a complete reversal of opinion on the principal points theretofore adjudicated, is to be found in *McGrew Coal Company v. Mellon,* 287 S. W. 450.

The appellant railroad company had asked the court to again consider the points which had been decided in what the court calls the "Hall decision," to distinguish it from the numerous other McGrew v. Missouri Pacific Railroad cases, and the validity of the act of 1872, and the self-enforcing features of Section 12, were carefully examined.

It was decided that the act of 1887 (Section 9986, R. S. 1919), did repeal the act of 1872 (Section 9974, R. S. 1919), and Judge Gantt's decision to the contrary, followed by Judge Hall, was directly overruled. The court said that to conclude otherwise, "convicts the Thirty-Fourth General Assembly of wasting its time in doing a silly and useless thing. . . . Under the maxim, *inclusio unius est exclusio alterius,* it was not unlawful under the 1887 act, for a railroad to charge more for a short haul than for a longer haul, if the two hauls were in different directions, and the circumstances and conditions thereof were

not the same." "However, if the foregoing considerations may fairly be said to leave any doubt that the 1872 act is no longer in force, what doubt can possibly remain since the passage in 1913 of the Public Service Commission Act? Section 47, Laws of 1913, p. 583, (now Section 10456, R. S. 1919) provides, in substance, that, when the commission shall be of opinion, after a hearing, that the rates, fares or charges demanded, exacted, charged, or collected by any railroad for the transportation of persons or property in this state are, among other things, "unjustly discriminatory," the commission shall determine the just and reasonable rates, fares, and charges to be thereafter observed and in force. No logical conclusion can be reached other than that it was the intention of the Forty-Seventh General Assembly thereafter to leave to the commission the entire subject and field of rate regulation, including unjust discriminations and other abuses, without the commission being in any wise bound by previous legislative enactments upon the subject which had not been expressly repealed. If this is the correct view, and we doubt not that it is, then the 1872 act, even though not repealed by implication by the 1887 act, and the 1887 act as well, were swept into the discard, and were repealed by necessary implication by the enactment of the Public Service Commission Act."

With regard to the second contention, the court said: "The correctness of the judgment below therefore depends solely upon the soundness of Judge Hall's conclusion that Section 12, Article 12, of the 1875 Constitution is self-enforcing, and in itself made the alleged excessive charges unlawful, and gave the shipper a cause of action therefor without the aid of 'suitable laws.'" After setting out Judge Hall's statement, set forth as cited by Mr. Justice McReynolds in 244 U. S. 191, *supra,* the court says, "There could be no question concerning the correctness of his conclusion were it not for the clause providing that the General Assembly shall pass suitable laws to enforce said provision; that is Section 12, Art. 12, as a whole." On the theory that "Constitutional provisions are not self-executing . . . if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect," it is decided that, "It is clear from the language of Section 12, Art. 12, itself that it was the intention of the framers of the provision that it was not to go into effect immediately. If it was their intention that it should go into immediate effect, why the proviso that the General Assembly should pass suitable laws to enforce it."

As there was no valid legislation in force to justify the decision of

the lower court, and since Section 12, Art. 12, is not self-enforcing, the judgment for the plaintiff was reversed. "It results that the cases of *McGrew v. Railroad,* 230 Mo. 496, 132 S. W. 1076, and *McGrew v. Railway Co.,* 177 Mo. 533, 76 S. W. 995, and our subsequent decisions which have followed them, must be, and are, overruled, in so far as such cases are out of harmony with our opinion. (This covers 258 Mo. 23; 178 S. W. 1179 (two cases), 280 Mo. 466, and others dependent on the two expressly overruled.)

The court recognizes the progress made elsewhere, which marks the changes in view discussed in the first part of this article in the following words: "The 1887 act and the later Public Service Commission Act of 1912 are in harmony with legislative action in other states, with the construction placed upon the federal long and short haul statute and with the principles of rate-making authorities generally."

As the court definitely decided that there was no statute now in effect to cover the short and long haul problem, both having been repealed by implication by the Public Service Commission Act, both acts, now Sections 9974 and 9986, were repealed expressly by the Fifty-Fourth General Assembly in the session of 1927, and a new section 9986 was enacted, and approved March 11, 1927, which is as follows:

> It shall not be lawful for any railway company in this state to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates, but excursion and commutation tickets may be issued at special rates. Laws of 1927, p. 385.

This is practically the same as the first part of the Fourth Section of the Interstate Commerce Act as it is today, and is the present condition of the "long and short haul" rule in Missouri. It has taken a long time to bring it up to date, and the present supreme court is to be congratulated on facing the issue though it involved a repudiation of well entrenched precedents.

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