THE LIGHTERAGE CONTROVERSY

The great battle that New Jersey has been waging for forty years[1] or more against the free lighterage practice in New York Harbor is a powerful reminder of the fearsomely refined and complex nature of our economic machine. The practice, seemingly a petty local detail in the sum total of economic adjustments, is represented by the combatants as being an inexorable arbiter of welfare and destiny in communities as far away as Boston, Baltimore, and Philadelphia—a good 200 miles, and as near as Jersey City, Newark, and Hoboken. The complaints are serious indeed. Because in New York Harbor, lighterage is free, Boston, which has poured concrete into modern docks, sees her freight dwindle, and Port Newark, newly improved, sighs for freight which was to arrive but never came. With Hoboken it is even worse. Once a great place for ships and shipping, it must look across the river at Manhattan if it would see many of its erstwhile sea-faring visitors, and since 1920 its population has declined 11,543. Associations of industrialists, manufacturers, and merchants in North Jersey protest that their rivals in Manhattan have an unfair advantage. The claims of Philadelphia and Baltimore even at their face value can not be taken so seriously. These cities are doing well, but they would like to do better and so for the moment they have joined New Jersey and Boston against New York. Manhattan, on the other side, is equally convinced of the great significances of free lighterage and its defense of the practice has been earnest and, until very recently, successful.

During the last 18 years the forum of the struggle has been the Interstate Commerce Commission, and it is that body which must decide this thorny, many-issued controversy. In 1916 a New Jersey petition aimed against free lighterage failed.[2] In a number of hearings[3] since, (not instituted by New Jersey) the

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[1] See for an account of this controversy Newark Evening News, Jan. 28, 1933.

[2] The New York Harbor Case, 47 I.C.C. 643 (1917).

[3] Iron and Steel Articles, 155 I.C.C. 504 (1929); Eastern Class Rate Investigation, 166 I.C.C. 314 (1930); Southern Class Rate Investigation, 109 I.C.C. 300 (1926); Consolidated Southwestern Cases, 123 I.C.C. 203 (1927); Wharfage Charges at Atlantic and Gulf Ports, 93 I.C.C. 609 (1924), 157 I.C.C. 663 (1929), 174 I.C.C. 263 (1931); Lautz Marble Corp. v. Erie R.R. Co., 115 I.C.C. 543

practice has withstood incidental or collateral attack. Three years ago New Jersey joined by Boston, Philadelphia and Baltimore, reopened the entire matter and now in 1933, at long last, has succeeded in convincing the examiner for the Commission that some of her claims are well-founded. Once more we await the Commission's final verdict. The present writer approaches with complete humility this esoteric battle-ground, furrowed as it is with the profound and technical mysteries of rate-making, cost-accounting, and the actual physical make-up of the transportation process. For a description of the controversy, the facts on which it is based, the issues which have been made he must rely on the reports of the Commission.[4] What law there is, is also in the reports. When the writer presumes to judge, the reader should be aware of the limitations of his competence.

THE TERMINAL FACILITIES OF NEW YORK HARBOR

The peculiar circumstances surrounding the handling of freight in New York Harbor are the matrix out of which our problem grows. New York Harbor is served principally by seven trunk lines which extend westward into the so-called trunk-line territory and two which extend into New England. Of the New England carriers, the Boston & Albany (leased and operated by the New York Central) has a freight terminal on Manhattan and the N. Y., N. H. & H. a freight terminal in the Bronx. Of those operating from the West, only one, the New York Central, has freight terminals on the Manhattan side. As a result most of the tonnage consigned to Manhattan must be carried there by water-craft. The waters surrounding Manhattan Island have been described as "an interior belt line employed in switching cars between the terminals of the trunk lines on the New Jersey shore and the industries, pier stations, and private terminals in various parts of the harbor. Unlike the cars on a belt line railroad or an industrial siding, the car floats and lighters plying in New York harbor are not restricted

(1926); 136 I.C.C. 183 (1928); Baltimore Chamber of Commerce v. Ann Arbor R.R. Co., 159 I.C.C. 691 (1930).

[4] The writer has also studied the elaborate report proposed to the Commission by Earl M. Steer, examiner for the Commission in the pending investigation, and much of the present article is a description and analysis of that report.

in their operation to a narrow road-bed or to the line of a particular carrier."[5] As a consequence a shipper or receiver conveniently located on the harbor front can avail himself of any carrier serving the harbor at a like cost. Physically this service is equally possible, though not as essential for persons located on the New Jersey shore.

There is more than one form of terminal delivery and the distinctions are important.

a. *Car floatage.* The freight cars on arriving at the New Jersey terminals[6] are sent into the classification yard; then switched to the float piers; run over float bridges onto the float barges and carried across the harbor. The cars may be disposed of in three general ways. They may be carried alongside pier stations, in which case the freight is unloaded or loaded onto the pier by the carrier, because it is impractical for shippers to do so. They may be run into team-track yards or off-track stations[8] on the shore in which case, according to the usual custom everywhere, they are unloaded and loaded by the shipper. In addition the carriers have stations in the so-called contract terminals. These terminals are run by independent contractors. They are universal: i.e. the same terminal is a station for all the carriers. The cars are floated between the trunk-line terminals and the contract terminals by the terminal company, which receives an allowance or a division of a joint rate for the floatage, switching, and terminal services, which it performs. The car-float service is considered to be equivalent to an extension of the carriers rails to the stations on the other side of the harbor. The Supreme Court has said:

> "The mere fact that the physical rails stop at Jersey City does not mean that the railroad transpor-

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[5] The New York Harbor Case, *supra* note 2, at 655.

[6] The New York, New Haven, and Hartford R.R. Co. floats cars from its Bronx terminal to pier stations in Manhattan.

[7] "Team tracks" are tracks to which freight is switched from main line tracks so arranged that teams may be placed alongside the cars to receive the freight.

[8] The writer has not been able to determine the exact nature of these off-track stations. They are different than the inland off-track stations described below, since it appears from the examiner's report that the cars are run off the floats onto these off-track stations. They are probably tracks which are not connected with main line tracks.

> tation there ends. It continues over to Brooklyn by means of floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the car-floats are brought into contact with the rail ends at Jersey City and the continuation thereof at Brooklyn, and in this way the transportation is carried on without interruption from the Western points directly to Brooklyn."[9]

The metaphysics of this Platonic concept need not be debated here. We shall have occasion below to consider its practical implications. However, it may be noted that these various car-float services are not absolutely equivalent. At the pier station the shipper receives apparently, loading and unloading without charge. On the other hand a shipper located near a contract terminal can use any carrier with equal advantage, and if he has a private siding on the lines of the contract terminal he saves draying to book.

b. *Trucking to Inland Stations.*[10] Three of the carriers maintain inland off-track stations on Manhattan. These are operated by an independent contractor, but they are not universal as are the contract terminals, each carrier maintaining a separate unit. The freight is loaded on trucks at the New Jersey terminals, ferried across, and carried to the inland station. Though there is no mystic trans-consubstantiation of the rail heads in this operation, the inland stations are nevertheless classed as true carrier terminals, just as if the rails extended to them.

c. *Lighterage and practices in lien thereof.* The cars, on arrival at the carrier terminal, are shunted into the classification yard, are then switched to the lighterage piers, and unloaded (the description here is of tonnage at the end of the journey) from the cars onto watercraft known as lighters. The lighters are towed across to ship-side, or public or private docks.

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[9] United States v. Baltimore & Ohio R.R. Co., 231 U.S. 274, 288 (1913).

[10] For a time inland off-track stations were maintained by the Erie, Lehigh Valley, and Pennsylvania railroads. See Constructive And Off-track Stations, 156 I.C.C. 205, 233 (1929) for a description. The Erie and the Pennsylvania sought to discontinue them and were given permission by the Commission. Discontinuance of Inland Stations, 173 I.C.C. 727 (1931).

The freight is moved to the steamship pier within reach of the steamship's sling or may be loaded directly from the lighter to the ship on the offside. Lighterage differs, therefore, from car floatage in two important particulars. The tonnage is delivered directly to the consignee either at shipside or private pier and the unloading of the freight from the car is performed by the carrier or his agent. Furthermore, the carrier allows the split delivery of a consignment i.e. delivery at two different places in the harbor without additional charge for the one extra delivery. There is some trucking and some car floatage in lieu of lighterage i.e. deliveries by truck or car-float to private piers or shipside.

The New York Rate Group

For many years the trunk-line carriers have published the same rates for long hauls to Northern New Jersey as to New York City. No additional charge is made for floatage or for lighterage to any place in the Harbor, within certain limits, "the free-lighterage limits". In the *New York Harbor Case*[11] (1917) the New Jersey interests[12] argued that this rate group was unfair; that it neutralized New Jersey's natural advantage of location; that it imposed on New Jersey a rate which must absorb the expensive terminal operations to Manhattan. The complainants proposed that the rate to the New Jersey shore be two cents per hundred pounds under the New York City rate.

There are two aspects of New Jersey's claim (1) that by reason of her location she should have an advantage over New York City and (2) that the free lighterage operated as a positive preference of New York. The first proposition is founded on the principle that the charges should be in proportion to the service given. This principle, however, is continually modified in actual operation by the equalization principle. When a number of carriers compete for tonnage in a terminal territory, the net rate to the shipper tends to be the same regardless of variations in distance and costs of service within the territory.[13] In

[11] 47 I.C.C. 643.

[12] The complainant was "Committee on Ways and Means To Promote The Case of Alleged Railroad Rate and Service Discrimination at the Port of New York." The defendants were the trunk lines.

[13] See Comment, Consideration and Control of Commercial Conditions

the *New York Harbor* case New York argued that there was a unity of interest among all the communities surrounding the harbor, the so-called metropolitan district.[14] As New York grew in wealth, attracting commerce and industry, inevitably New Jersey and the surrounding county shared in the general prosperity.[15] The vast congeries of banking, shipping, industrial, and cultural services, the great bulk of them centering in Manhattan, were available throughout the harbor. The Harbor was one great community, why not then equality in rates? A few years hence this argument was to gather additional power when New York and New Jersey by compact set up the Port of New York Authority for the "faithful co-operation in the future planning and development of the Port of New York".[16] The argument, of course, is qualitative, not quantitative, and, as such, must have some limitation lest it acquire a flavor of irony, like that classic proposition that the way to help the poor is to help the rich, since some—how much is the rub—of their riches will trickle through to the poor.[17] But with other arguments it was enough to convince the Commission. With its decision we are not disposed to quarrel. The Commission pointed to many other comparable instances of grouping. In San Francisco Bay the carriers absorb the costs of water hauls ranging from 5.6

IN RAILROAD RATE REGULATION (1931) 40 YALE L. J. 600, 603: "Equalization usually develops from competition between carriers who are fighting for the same business, or from the desire of one carrier to encourage business on different parts of its line. Economists defend equalization systems with three main arguments: (1) they promote healthy market competition which reacts to the benefit of the consumer; (2) they prevent port congestion and over-centralization of population; (3) they have worked for a long time and any radical change would be disastrous to commercial interests which have become adjusted to them."

Equalization may be of all points within a contiguous territory as in this case, or of two distant points such as now exists between Boston and New York.

[14] The Regional Survey of the Russell Sage Foundation defined the metropolitan area as extending into New Jersey on a radius of 40 miles from the city hall in New York.

[15] New York pointed to the Erie, and now the State Barge Canal built entirely from New York State funds as contributing to New Jersey's prosperity. New Jersey countered with the old Morris and Essex and the Delaware and Raritan Canals. The traffic from the Barge Canal has been far below expectations: around 3,000,000 tons per year, it is only about 1/9 the traffic carried by any one of the trunk lines.

[16] Certain witnesses for the defense, among them the Acting Governor of New York State and the Mayor of New York City, expressed the view that the State of New Jersey had violated the compact in filing and prosecuting its complaint (in the current litigation).

[17] Some figures as to relative growth are given below; note 50.

to 10 miles; thus Oakland and San Francisco located on opposite sides of the bay are grouped together. In Chicago all points within a terminal district 40 by 12.5 miles pay the same rates, there being a mutual absorption by all the carriers of the costs of necessary switching.

But even more persuasive with the Commission was the situation in the Port of Hampton Roads, since in a complaint brought by Newport News against the carriers the Commission[18] resorted to the unusual step of requiring the equalization of Newport News and Norfolk in the rates to the South, though Newport News is 12 miles beyond Norfolk by water. The rates had at one time been equal, but because of a dispute among the carriers on divisions, these schedules had been discontinued. The Commission has often maintained the doctrine that in discriminatory cases decisions are to be determined primarily by comparative conditions of transportation rather than economic need. It has said for example:

> "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to put one market in competition with another, or to treat all the railroads as part of one great whole."[19]

The 1920 amendments to the Transportation Act[20] and the Hoch-Smith Resolution[21] have raised the question whether the

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[18] Chamber of Commerce of Newport News, Va., v. Southern Railway Company, 23 I.C.C. 345 (1912).

[19] Ashland Fire Brick Co. v. Southern Ry., 22 I.C.C. 115, 121 (1911).

[20] 41 STAT. 456 (1920), 49 U.S.C. §§1-27. Particularly §15 considered *infra* notes 79 and 80 and text.

[21] 43 STAT. 801 (1925), 49 U.S.C. §556 (1926). Oracularly, Congress instructed the Commission that "It is declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may move freely." In Ann Arbor R.R. v. United States, 281 U.S. 658 (1930) the Court set aside rates on oranges, in proscribing which the Commission relying on the Resolution had given weight to the depressed state of the industry. The Court held that the Resolution was not intended to change the basic law; it was declaratory. See ROBINSON, THE HOCH-SMITH RESOLUTION, ETC. (1929) 42 HARV. L. REV. 610. This author considers the resolution an unwarranted political interference in the Commission's function and considers the policy laid down in the resolution one difficult and dangerous to administer. See *infra* notes 79 and 80 for the related subject of the minimum rate power.

Commission now has the power to consider commercial conditions in fixing rates and among other things to equalize freight costs between markets independent of sheer transportation criteria. But the *Newport News* case is an instance prior to 1920 where, within a limited range to be sure, the Commission not merely refused to find equalization unfair, but positively prescribed it in spite of a distance differential:

> "As to natural advantages; Newport News and Norfolk are practically on the same footing. Their harbors are ample and substantially equal. Both depend upon the south for the materials used in their manufactories and for markets for their manufactured products."[22]

The Commission contended that it could hardly condemn in New York harbor what it required at Hampton Roads.

> "The practice of embracing many points within the same group or zone has been so generally adopted by the carriers and so frequently recognized as proper by this Commission that its general propriety can hardly be challenged. Not only does this practice greatly simplify the publication of tariffs, to the convenience of both the carriers and the public, but the application of a common rate to a number of points in the same general territory effects an equality of opportunity which is usually most desirable; and this is particularly true where the points in question produce and ship the same commodity or derive their raw materials from the same sources. Producers in all parts of the port of New York are manufacturing goods for sale in common markets throughout the world."[23]

But it found further reasons for its rejection of the complaint. New Jersey did not ask that a charge be fixed for these services if they were found to be unusually costly. It asked for

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[22] Newport News Case, *supra* note 18 at 352

[23] The New York Harbor Case, *supra* note 2 at 712.

a differential under New York of two cents in any and all cases. The Commission was afraid that this would disturb the whole rate structure on the Atlantic Coast. Between 1860 and 1875 there was a furious rate war among the recently built Chicago-Atlantic Coast lines all of whom were competing for the long-haul export traffic, mostly of grain.[24] It was a struggle not only between carriers but between the cities where each carrier had its principle terminal: Boston, New York, Philadelphia, and Baltimore. In 1877 the carriers entered into an agreement establishing differentials applicable to the Atlantic ports on tonnage for export.[25] Boston and New York were to have the same export rate, Philadelphia should be two cents and Baltimore three cents under New York. These differentials were formerly offset by differentials in the ocean rates to and from European ports so that the through rates on export traffic were substantially equalized via the various north Atlantic ports. During the war the ocean differentials were abandoned and have not since been restored. Attacks[26] on the carrier differentials, both before and since the war have consistently failed, the Commission never having been convinced that they had been proved unfair or unreasonable on service and transportation criteria.[27] Now if the New Jersey rate were two cents below New York, New Jersey would become part of the Philadelphia rate group. It might divert considerable traffic from Philadelphia and cause that city to agitate for a lower rate to Philadelphia. Furthermore, the Commission felt that it was a far more flagrant violation of the distance-service-cost principle espoused by New Jersey to place her in the Philadel-

[24] See The New York Harbor Case, *supra* note 2 at 682 and Appendix B of the Maritime Association of the Boston Chamber of Commerce v. Ann Arbor R.R. Co., (Boston Maritime case) 95 I.C.C. 539 (1925) for the history of the port differentials.

[25] Domestic traffic tended also to move under these differentials. The New York Harbor Case, *supra* note 2 at 683.

[26] New York Produce Exchange v. Baltimore & Ohio R.R. Co., 7 I.C.C. 612 (1898); in the matter of differential rates, 11 I.C.C., 13 (1905); Chamber of Commerce of N. Y. v. N. Y. C. & H. R.R. Co., 24 I.C.C., 55 (1912); Boston Maritime Case, *supra* note 24 and further proceedings in 126 I.C.C. 199 (1927).

[27] However, the differentials as such no longer apply to domestic traffic. Distance scale class rates were prescribed in Eastern Class Rates Investigation, *supra* note 3. Under the distance scale the rate differences to and from Baltimore & Philadelphia under New York are greater than the port differentials.

phia rather than New York grouping.

> "By a process of natural evolution the rate structure, as it developed, accommodated itself in a general way to the commercial and industrial conditions, and the inclusion of the manufacturing cities of northern New Jersey in the New York rate zone was the logical, if not the inevitable, result of economic conditions. Historically, commercially and industrially the cities of northern New Jersey within the metropolitan district constitute a part of New York, and the request now made on behalf of these cities that they be lifted outside of the New York rate zone and transferred to the Philadelphia zone seems anomalous."[28]

It was part of New Jerseys' case that she was paying a rate which took care of costly terminal services, of which she made little use, though, of course, lighterage and floatage are performed to some extent on the New Jersey side in making deliveries both from the New Jersey terminals and the Manhattan terminals of the New York Central.[29] As evidence of the costliness of the terminal service, New Jersey pointed out that the terminal carrier before dividing a joint rate deducted three cents per one hundred pounds for terminal service, made allowances of the same amount to receivers who did their own draying from New Jersey, and refused to lighter or float certain heavy commodities. But the Commission found nothing unusual in the absorption of terminal charges on long-hauls. It admitted that "the cost of delivery at interior points in New Jersey is decidedly less than the average cost of effecting delivery in New York harbor" but "that the cost of delivering a car in Jersey City, Hoboken, or Bayonne is sometimes less and sometimes more than the cost of harbor delivery,"[30] the latter fact being due to difficult switching operations. Whatever the variations, and they did seem to be in favor of New Jersey even on an insufficient and inconclusive showing of comparative

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[28] The New York Harbor Case, *supra* note 2 at 713.

[29] It appears that approximately 19% of the tonnage lightered is lightered to New Jersey points.

[30] The New York Harbor Case, *supra* note 2 at 680

costs, the Commission considered that the general principle of equalization was powerful enough to level them. Furthermore, it was the opinion of the Commission that the specific rates did not ordinarily make provision for terminal costs, so that New Jersey was not necessarily paying any more than she should. Under recent Commission orders the Eastern class rates are figured on a mileage scale, and it is true that rates to New York harbor are based on the distance plus an arbitrary of ten miles. But the cost figures compiled in the recent report shows that this arbitrary does not begin to cover terminal costs.

There were certain admitted specific inequalities in the rate grouping which operated against New Jersey, which subsequent decisions of the Commission have not removed, and the abolition of which is recommended by the recently proposed report to the Commission. Thus the commodity rates between New Jersey points and New England are generally on the Philadelphia basis; as for the class rates certain points in New Jersey are grouped with New York, but a number of points, among them Newark, which are grouped with New York on long-hauls, pay higher class rates to New England. In the *Eastern Class Rates*[31] case, the Commission justified these differences on the ground that the New York, New Haven, Hartford which carried most of the New England tonnage had unusually high marine charges, so that it was proper to add something for the extra haul to New Jersey particularly where as to Newark, the haul was considerably longer. But as the present examiner points out, the New Haven performs lighterage service on New England freight consigned to Manhattan and the cost figures show that this service is considerably more expensive than the floatage on the New Jersey tonnage. Another inequality is in the rail-water, and rail-water-rail rates to the South and Southwest on freight which goes by ship out of Manhattan. New Jersey points pay a higher rate than New York on such shipments to cover the initial New Jersey haul and the cross-harbor costs. In short on the long-hauls (100 miles or more) to and from the West, New Jersey with the location advantage pays as much as Manhattan; yet where as in the New

[31] *Supra* note 3 at 438.

England and Southern water-hauls the location is unfavorable, she pays more than New York. Thus New Jersey complains that there is no balancing of advantages and disadvantages in the group adjustment.[32] In fact, to the current New Jersey complaint on this score the New York interveners and the Port Authority offer no objection, and the examiner for the Commission recommends that these inequalities be righted.

Showing of Preference in the New York Harbor Case

This part of New Jersey's complaint was not well presented in the 1917 case, since the thrust of her petition at that time was to secure an advantage by a generally lower rate. Thus, the distinction between floatage and lighterage of which so much is made in the current litigation does not seem even to have been suggested. As we have noted, free lighterage is equivalent to free store-door delivery, relieving the shipper of unloading and drayage costs; on the other hand car-floatage to the carriers' Manhattan terminal, though it may exceed the cost of a New Jersey terminal delivery, gives no additional advantage to the shipper.[33] However, the cost figures before the Commission in 1917 did not show that lighterage was any more expensive than car floatage, and the Commission treated both types of delivery as on a parity saying that "in effect the *lighters* and car floats may properly be regarded in a sense as merely an extension of the rails of the trunk lines from Jersey City to Manhattan and Brooklyn, a thought that emphasizes the impropriety of according lower rates to the New Jersey cities solely because lighters and car floats are not usually employed in effecting delivery there."[34]

But New Jersey complained that the result of lighterage

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[32] "There are limits of reasonableness in the making of rates which admit of a certain degree of flexibility in the adjustment, for the sake of convenience and simplicity or for the purpose of meeting commercial and competitive conditions. Out of such situations rate blankets grow, and there is nothing unlawful in their construction, provided they are well balanced and their advantages and disadvantages fairly distributed." Inland Empire Shippers League v. Director General, 59 I.C.C. 321, 341 (1920).

[33] With the exception that, as already mentioned, conditions at the Manhattan pier stations are such that the carriers must unload the cars there, thus saving the shipper this usual expense.

[34] The New York Harbor Case, *supra* note 2 at 679. (Italics ours.)

and floatage was to make all the carriers accessible to Manhattan shippers, whereas New Jersey shippers who might be accorded the same advantage by reciprocal switching were discriminated against by the refusal of the carriers to accord such privileges, apparently either with or without charge. There was a belt line along the New Jersey shore connecting five of the carriers so that such an arrangement was possible. The answer of the Commission to this claim was not very satisfactory. There were it is true a number of joint through rates particularly to Jersey City, which gave shippers some choice of lines; there were some instances in which switching changes were absorbed by the line haul carrier, but many possible combination services were not made available. Said the Commission:

> "That the conditions under which freight is delivered in New York harbor are unique is not open to question. The fact that industries located along the shores of Manhattan Island, Brooklyn, and Staten Island have convenient access to the terminals of the rail carriers on the New Jersey shore is attributable principally to favorable natural conditions. Because of the flexibility of their terminal operation, previously discussed, it is but natural that the carriers should accord a terminal service correspondingly flexible."[35]

The irony of this reasoning could hardly be other than bitter to New Jersey. It was the difficult physical location of Manhattan which was held to justify lighterage and floatage. Once approved, it is then transformed into a "favorable natural condition". It is true that the water-belt makes lighterage possible but the water-belt does not make it free.

The Commission also justified the difference in service on the ground of competition with respect to terminal services. In other words, competition with the New York Central whose

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[35] *Id.* at 728. The Commission also raised some doubts as to its power to require one railroad to switch traffic over the line of another. To so require might in some cases "short-haul", in effect, the carrier; i.e., require it to engage in a joint-haul over a route which embraced "substantially less than the entire length of its road." Under §15(4) of the Transportation Act, the Commission can not require a carrier to engage in such a joint-haul and so in the Commission's opinion, it would be doing indirectly what it cannot require directly.

line ran into Manhattan, and also among themselves, accounted for the marine facilities accorded; on the other hand in New Jersey should a carrier provide switching facilities to another competing line, it might do itself out of the long-haul. It is difficult to determine how important is the factor of competition. The Supreme Court has said in a case in which a carrier sought to justify a discrimination on grounds of competitive conditions:

> "The innocent character of the discrimination practised by the Illinois Central was not established, as a matter of law by showing that the preferential rate was given to others for the purpose of developing traffic on the carriers' own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust."[36]

The justification based on competition is, apparently, only successful where the discrimination may be supported on an independent ground.[37] An example of the indecisive character of competition argumentatively is provided (to anticipate) in the current litigation when the examiner having arrived at the conclusion that the absorption of floatage costs is proper, and of lighterage is not, finds that competition supports the former practice but is no defence of the latter.[38]

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[36] United States v. Illinois Central R.R. Co., 263 U.S. 510, 525 (1924).

[37] In the following instances justification based on competition failed, United States v. Illinois Central R.R. Co., *supra* note 36; Washington D. C. Store Door Delivery, 27 I.C.C. 347 (1913); Chamber of Commerce of Newport News, Va., v. Southern R.R. Co., *supra* note 18.

Under §2 of the Transportation Act forbidding discrimination between persons for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances" the Supreme Court has held that "the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination . . ." Seaboard Air Line R.R. Co. v. United States, 254 U.S. 57, 62 (1920).

[38] His reasoning is this: The New York Central having freight lines into Manhattan can make terminal deliveries without performing any additional service beyond the rail-heads. The other carriers to compete must make terminal deliveries by car-float, and if they were required to make a charge for floatage their rates would be greater than the Central's. But lighterage is a greater service than terminal delivery and the Central performs lighterage beyond its rail-heads in the same fashion as the other carriers. Thus, no one carrier has an

New Jersey claimed also that the free lighterage practice retarded the growth of her ports. A number of experts, though there was some disagreement, testified that the most economical mode of interchange from car to boat was to run the cars directly onto the steamship piers and unload them into the ships. In Manhattan the piers have no rails and are not capable of being equipped with them. Even if they were, the cars would first have to be floated across the river. But as long as the carriers provide free lighterage with its many advantages, there is no inducement for ships to go to New Jersey, and hence no occasion for building facilities there for direct interchange between car and boat. It was claimed that the organization of the port was inefficient; that the concentration of shipping activity in Manhattan meant unnecessary congestion and consequent high costs; that the port was, as a result, unbalanced. Thus, New Jersey's natural advantages were sacrificed; legions of shippers throughout the country were burdened by the indirect effect on the rate structure of exorbitant terminal costs, and the port itself was being robbed of its maximum development.

But the Commission was not convinced. It was not shown conclusively it said, that direct interchange from the terminal pier to the boat was superior to, or as good as, lighterage. The latter was more prompt and flexible, nor did the cost figures submitted show that lighterage was unusually expensive. Furthermore the facilities in New Jersey were at the time inadequate (thus was New Jersey's plea turned against itself) and the Commission maintained that there was a lack of the necessary central administrative control in New Jersey for the proper development.[39] In reply to the argument that the relief sought

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initial competitive advantage with respect to lighterage, and the fact that the free lighterage practice arose as a result of the competition for the great Manhattan traffic is not enough to justify it.

[39] "The result of the division of authority in New Jersey and of the lack of foresight on the part of individual municipalities is strikingly evidenced at Jersey City. Located almost in the heart of one of the best harbors in the world, with more than five miles of frontage on the lower Hudson River and upper New York Bay, and served by five of the country's great trunk lines of railroad; in short, possessing all the qualifications which a seaport of the first rank should have, Jersey City has been content to see her valuable water front 'turned into a huge railroad yard.' Of her five miles of shore line more than 90 per cent

for would improve terminal conditions at the port the Commission said that "it is clear that the authority to regular rates was not delegated to the Commission for any such purpose."[40]

Thus were all the New Jersey arguments repulsed but they were not gainsaid for all time. "It must be observed, however," the Commission warned, "that the position taken by the complainants is in a measure justified from an economic viewpoint, and that while at the present time all parts of the metropolitan district may with propriety be grouped for rate-making purposes, there may come a time when the burden of handling the enormous tonnage in and out of the port will be so onerous that Manhattan itself may need such relief as lower rates to and from New Jersey shore would in part afford."[41]

Has that time come? In 1928 New Jersey set out to prove, as against the still unconvinced carriers and the New York interests, that the time had indeed come. In this litigation New Jersey was joined by the ports of Boston, Baltimore, and Philadelphia, all of which claimed that free lighterage operated as an unfair discrimination against them. New Jersey again asked for more favorable rates than New York but having already foundered once on this claim, it asked for other possible alternative relief: to wit, an extension of the free accessorial services to certain points in New Jersey which were outside of the free lighterage limits and yet took the New York rates on long-haul freight, and for the posting of additional charges for the accessorial services. The New Jersey petitioners were the State of New Jersey which emphasized the alleged retardation of port development, and the New Jersey Traffic Advisory Committee (representing cities and industries) whose chief interest was the relation of the rate adjustment to New Jersey industries.

Comparative Costs of Terminal Facilities

The pivot of the whole controversy is the comparative costs of the terminal facilities. The chief distinction of the present

is owned by the carriers. Of the 133 long piers on the New Jersey side of the harbor only one is public owned." The New York Harbor Case, *supra* note 2 at 668. The Commission does refer to the plans for Port Newark, South Cove in Jersey City, and the Bayonne Terminal project.

[40] *Id.* at 733.

[41] *Id.* at 738.

record from that in the *New York Harbor* case is the greater detail and the more elaborate differentiation of the cost statistics.

The average shore to shore costs for lighterage was put at $1.48 per ton, for floatage at $.64 per ton.[42] This difference was accounted for largely by the fact that the floatage from the New Jersey stations to the Manhattan ones is concentrated and steady, as distinguished from lighterage which is in the nature of individual and scattered delivery at private pier or ship.[43] The additional charges for handling the lightered tonnage, loading or unloading of which in lightering there are two separate operations the cost of both being absorbed by the carrier, brought the average lighterage costs to about $2.00 per ton, exclusive of general maintenance and interest charge, which, if figures in an earlier case[44] are accepted, brings the average to $2.75 per ton.

There was very little evidence as to the handling and capital charges on the floatage which must be added to make the floatage figures comparable to the lighterage figures. This comparison is of extreme importance in view of the conclusions of the examiner. He recommends, that the general New York rate group be maintained, that the line haul rate include the delivery at on-track or off-track stations necessitating floatage, but that an additional charge be made for lighterage since it is both a greater and more expensive service. It will be noted that

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[42] The figures for shore-to-shore costs were prepared by the trunk-line defendants in co-operation with the Port Authority. They are considered to be entitled to great weight, because they were prepared with a view to possible unification of marine operations and not for these cases. They are based on operations for the months of October 1924. The carriers sought to show that various costs in connection with lighterage had declined since 1924; also that there were great variations in lighterage costs. In view of the final relief granted, a flat fee of 60c per ton for lighterage, the examiner considered the fact of variation immaterial; and also the exact costs, since the 60c was in the examiner's opinion considerably less than the difference in cost between the flotage to terminal (i.e., ordinary terminal service) and lighterage (greater than terminal service).

[43] The steamship permit system also increases the cost of lighterage. Under the system, designed to facilitate and hasten loading at the ship, lighters must be on hand at an appointed hour or if late wait a considerable time. This makes for short loads and increased labor costs.

[44] Charges for Wharfage, etc. at Atlantic and Gulf Ports, 93 I.C.C. 609 (1924), 157 I.C.C. 663 (1929), 174 I.C.C. 263 (1931) spoken of hereafter as the Wharfage cases.

the shore-to-shore costs for lighterage are about 2½ times those for floatage, $1.48 to $.64. The examiner seems to assume that the additional services to be expended on the floated tonnage can not be more than the additional services on the lightered tonnage. Thus, a difference of nearly $.80 per ton would still remain. As to the handling charges this is probably a proper assumption, since lightered goods are handled twice and much of the floated goods only once. However, it is quite probable that capital charges are greater, since large and expensive terminals must be kept on the Manhattan side to receive floated freight, whereas lightered goods are carried directly to the receiver. The only complete cost figures for floatage adverted to were taken from an earlier decision, *Discontinuance of Inland Stations in New York City,*[45] which showed a cost of $2.30 per ton on freight floated to and received at the Pennsylvania Desbrosses Street Station. The examiner discounts this figure in various ways. It includes capitol costs, he says. But it does not seem to include all such costs. It is not necessarily, he goes on, representative. However, it was a probable future cost figure made up from operations at other terminals, and the carfloat route is one of the shortest. Furthermore, the Pennsylvania was seeking to do away with its inland off-track station on the ground of its unusual costliness. It naturally attempted to place the Desbrosses Station, which was to be a substitute, in the best light and estimate the cost as low as possible. It set the cost of its inland stations at $2.97 per ton, $2.49—2.60 representing the allowance to the trucking company which operated the inland station service.

The tonnage floated by the contract terminal companies for the railroads, however, is handled at considerably less cost to the railroads, than the estimated lighterage costs. The allowances by the railroad to the companies range from $1.06 to $1.68 per ton. This is less than the shore-to-shore plus handling costs on lighterage which were found to run around $2.00 and about one-half of the $2.75 per ton found in the earlier *Wharfage* cases,[46] which were made up to include capital and

[45] *Supra* note 10.
[46] *Supra* note 44.

overhead costs. This last figure, however, applied only to ship-side delivery, (i.e it excluded lighterage to private piers not destined for a ship) it also included the direct interchange from car to ship on the New Jersey side, which the examiner, however, contends would bring down the average rather than raise it.

One of the most curious cost items in the record is that about ¼ of the tonnage lightered by the trunk lines is performed for them by private lighterage firms at $.60 per ton. It will be remembered that this is only 2/5 of the shore-to-shore costs, shown by the carriers when they perform the lighterage themselves and is as low as the shore-to-shore cost for floatage. It is explained by saying that these companies handle the heavier tonnage which is not entitled to free lighterage and which by reason of its weight makes for more concentrated loads. It may be asked, however, whether it is not this figure, rather than the general lighterage cash figure, which should be compared with the allowances made by the carriers to the contract terminals for floatage. Also it was suggested that there were a number of possible economies which would reduce the lighterage costs, but the examiner claims that these have been proposed for years and never adopted, and that the decision must be made on facts as they are.

In another part of the examiners' report it is incidentally mentioned that floatage costs for three given lines are from $33.36 to $37.01 per car, and lighterage from $31.30 to $44.12 per car. These figures surely do not show the great difference between floatage and lighterage costs which are made out to exist in other parts of the report. Some explanation of these figures seems necessary.[47]

The defense maintained that in some instances terminal costs in New Jersey were equal to the marine costs to or from New York. It was apparently quite difficult to get exact figures on the New Jersey costs. Most of the carriers can switch over the Hoboken Shore Line, a belt line of 1.5 miles serving the New Jersey piers. The switching service cost the carriers from

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[47] These figures do not include a number of capital costs, which means that the floatage figures might be even more than the lighterage.

$27 to $39.95 per car compared with selected floatage costs of $33.36 to $37.01 per car, and lighterage costs of $31.30 to $44.12 per car. The floatage and lighterage costs made no allowance for capital and maintenance charge, the switching costs did. Admittedly these comparative figures are not very good. It does not appear how large a part of the New Jersey tonnage is handled over the Hoboken Shore Line. There are no figures for handling elsewhere in New Jersey though it is apparently assumed that these are considerably less than the marine costs. The examiner draws from these figures first, a concluion that at least some of the deliveries in New Jersey are as expensive as the floatage service, a fact which is supposed to justify the grouping of New Jersey with New York; and secondly, that they are not, however, as great as the lighterage costs. The figures quoted in this paragraph do not bear out the distinction between lighterage and floatage, however much it may be thought that the whole record does. Furthermore, the same figures seem to show that even the switching costs over the Hoboken Shore Line are less than the marine services.[48]

Special attention was directed to the New York Central which carries its freight into Manhattan by rail. The terminal services were shown to be conducted under unusually congested conditions and the terminals themselves were and will be constructed at colossal costs, the average cost per mile for the 12.39 miles south of Spuyten Duyvil, including proposed improvements, being $654,362 per mile to $330,840 per mile on the New Jersey side. The examiner finds that because of these figures the Central's terminal operations may cost as much as floatage, but certainly not as much as lighterage. How this conclusion is arrived at is not made clear in the report.

With these cost figures as a preliminary basis let us consider the grounds of the recent New Jersey complaints, and the suggestions of the examiner.

THE RATE STRUCTURE

Once more New Jersey seeks a differential rate under New York, because of its natural advantages. This time it attempts

[48] Furthermore, the figures of switching costs include capital costs, whereas those of marine costs do not.

to translate this natural advantage into terms of cost advantage. We have already referred to certain inequalities in the rate grouping with reference to New England and Southern points.[49] These the examiner believes should be removed, but in other respects he does not find the grouping unreasonable. His reasons are substantially those already set forth in connection with the *New York Harbor* case. True, it is shown that the floatage charges are probably more, but not how much more, expensive than New Jersey terminal charges. The examiner again points out that the line-haul rate was not designed to afford exact compensation for terminal charges, so that New Jersey points were not paying for expensive and unused services, and that in any case the very condition of the principle and the practice of grouping is variation in the costs of the movement to different points in the group. The magic touchwords, "port unity" are again invoked, and as in the earlier case, statistics are paraded onto the stage to show that in population, industries, etc., the growth of New Jersey compares favorably with that of New York City.[50]

Free Lighterage

Layer after layer having been stripped from New Jersey's complaint and discarded, its core is seen to be, at least in the eyes of the examiner, the free lighterage practice. The New Jersey complaint here is two-fold. The first grievance is due to the fact that at present a large part of the New Jersey port is outside of the free lighterage limits. Among the points to which lighterage is possible but which must pay an additional fee are the Kill von Kull, the Passaic and Hackensack Rivers, the Staten Island Sound, and Newark Bay on which is located Bayonne and Port Newark. These points are in the New York long-haul rate group; they must pay the same rates that New

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[49] *Supra* pp. 137-138.

[50] E.g. from 1880 to 1927 the value of products manufactured in Greater New York increased about 8.6 times, while those of Newark increased about 7 times, Jersey City about 3.4 times, and Paterson about 8 times. The New Jersey section of the metropolitan district showed a greater percentage gain in population from 1880 to 1930 than did New York City. However, the Bronx and Queens have increased in population much more rapidly than the New Jersey section. Hoboken has declined in population 11,543 since 1920.

York City pays, and yet pay extra for lighterage. Generally, the distances to them are greater than those within the present limits. However, in some cases they are less, and apparently the differences in distances here involved have a very slight effect on the lighterage cost. This particular grievance was not stated in 1917, probably because the port facilities at that time were not as well developed as they are to-day. The Port Authority agrees that New Jersey has a just cause for complaint on this score and there is little opposition to it. In the recent case of *City of Newark v. Pennsylvania R. R. C.*[51] the carrier which absorbed loading charges on lumber at Philadelphia and Camden, but refused to do so at Port Newark, was found to have violated §3 of the Act relating to undue prejudice. This decision is in line with earlier rulings[52] and supports, if the cost analysis here is correct, the recommendation that no greater charge be made to the points named to those at present within the free lighterage limits. This recommendation, however, does not in itself require an abolition of free lighterage, but merely an extension of the limits.

Requiring more analysis is the conclusion finally arrived at that a charge of three cents per 100 pounds, sixty cents per ton, be made for lighterage within the entire lighterage territory.

The examiner's recommendation that a fee be imposed for lighterage rests on two grounds, that it is more expensive than the other terminal services, and that it is a greater service than the terminal service to which the shipper is ordinarily entitled. We have already set forth and examined as far as we were able the figures comparing floatage and lighterage. They purported to show that the latter was considerably more expensive. We suggested a few doubts as to the showing, but we shall now pass on to the problem of unjust discrimination under §3. Under this section it must appear that there is a discrimination and that it is actually operating unjustly. We shall consider the complaint under two aspects: unfairness to the New Jersey

[51] 182 I.C.C. 51 (1932).

[52] Cassassa v. Pennsylvania R.R. Co., 24 I.C.C. 629 (1912); Anacostia Citizens Asso. v. Baltimore & Ohio R.R. Co., 25 I.C.C. 411 (1912); Washington D.C. Store-Door Delivery, 27 I.C.C. 347 (1913) (These cases are known as the Store-Door Delivery cases); South San Francisco Chamber of Commerce v. Southern Pacific Co., 53 I.C.C. 285 (1919).

ports, unfairness to New Jersey industry.

It appears that 80% of the tonnage lightered in New York harbor is consigned to ship-side. New Jersey complains, as she did in 1917, that free lighterage reduces the attractiveness of direct rail-water inter-change, and so has retarded the growth of her port.[53] The examiner finds that there is justice in this claim. But considering the basic assumptions of the rate grouping this writer cannot agree. If it be assumed that the Port of New York is one unit, it is immaterial where the docks are. The *Galveston* cases,[54] cited by the examiner, relate to equalizing the competing ports of New Orleans and Galveston. They may apply to Boston's but not to New Jersey's case. If existing terminal facilities in New Jersey go unused, because they do not receive free lighterage (as is the case with Port Newark) this is ground for complaint, but it is not clear how extensive the unused facilities are. Furthermore, if the free lighterage limits are extended as recommended the existing New Jersey facilities will be placed on a par with New York's, and the shipping will be better distributed throughout the harbor. It would seem very unfortunate to encourage the building of additional harbor facilities. The large Staten Island piers are only partially used, the same is true of the Port Newark piers and New York is now projecting more piers on Jamaica Bay. However, the examiner is of the opinion that the imposition of a fee will not lead the ships to seek piers with direct rail connections since there are other counter-balancing considerations. This admission weakens the New Jersey case from one point of view, though on the other hand it answers our objections to the increase of facilities by denying that there will be any increase.

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[53] In a sample month, October 1928, of the cargo vessels docking in the harbor 86% docked in New York, 11% in New Jersey, 3% unassigned; of passenger vessels 91% in New York, 9% in New Jersey.

Of the total number of piers in the harbor (steamship, railroad, private) 189 or 27% are in New Jersey; of the 160 piers used by railroads, 86 or about 54% are in New Jersey; of the 144 piers used by steamships about 14 or 10% are in New Jersey.

The average value of waterfront property on the New York side is $152,418 per acre; on the New Jersey side, $28,341 per acre.

[54] Galveston Commercial Ass'n v. Galveston, Harrisburg and San Antonio Ry., 100 I.C.C. 110 (1925); 128 I.C.C. 349 (1927); 160 I.C.C. 345 (1929) *Aff'd* Texas & Pacific Ry. v. United States, 42 F. (2d) 281 (S.D. Tex. 1930) now on appeal to the Supreme Court. See the discussion of these cases in the YALE LAW JOURNAL *loc. cit. supra* note 13 at 605.

Secondly, it is said that free lighterage gives store-door delivery to some shippers and not to others. This claim relates to the 20% of the lightered tonnage of materials, delivered at private piers for industrial and manufacturing uses. This claim, if well-founded, is as available to inland located shippers in Manhattan as in New Jersey, though the point was not taken; all the New York interests represented were against the petition.

The cases show that a discrimination of this sort is not necessarily a violation of §3.

In *Rates in Chicago Switching District*[55] the railroads sought to discontinue a free lighterage and tunnel service and the Commission refused to allow it. Other shippers, it is true, were given the benefits of reciprocal switching which, however, was not as great a service as lighterage, though it was as costly. It is part of New Jersey's complaint that there is no reciprocal switching equivalent to the free lighterage, and this may constitute a difference from the Chicago case. The examiner relies on the *Washington Store Door* cases.[56] In one[57] of them Anacostia complained that the carriers made free store-delivery to other parts of the city of Washington, but not to Anacostia. This discrimination was found unjust. But it was held that the Baltimore & Ohio Railway which had a freight station in Anacostia need not give store-door delivery there, though it did give it elsewhere. Anacostia was small, its business district concentrated and near to the station. Again we may refer to the fact that a carrier may and usually does absorb the switching charges required to place a car on a private siding, (of which there are more in New Jersey than Manhattan) though the shipper is thereby placed in a better position than one who must dray his freight from the carrier's station.[58] As Mr. Justice Holmes has said referring to the Interstate Commerce Act, "The law does not attempt to equalize fortune, opportunities or

[55] 34 I.C.C. 234 (1915) A charge to the shipper of 50c per ton over the line-haul rate has since been imposed for the tunnel service, (a form of store-door delivery) though not, apparently, for lighterage.

[56] *Supra* note 52.

[57] Anacostia Citizens Asso. v. Baltimore & Ohio R.R. Co., *supra* note 52.

[58] *Cf.* Penn Refining Co. v. Western N. Y. & Penn R.R. Co., 208 U.S. 208 (1908). In this case the shipper secured an advantage by reason of owning tank-cars, being given a rate more favorable than one who had to ship oil in barrels.

abilities."[59] These instances are a sufficient indication that absolute equality of treatment is not required to escape the condemnation of §3, and indeed it is the generally stated theory of the Supreme Court that whether a discrimination is unjust depends on the circumstances, the relative locations, the conditions under which the service is performed, and the pressure of competition on the carrier.[60]

The examiner places great reliance on the recent findings in *Constructive and Off-Track Freight Stations on Manhattan.*[61] "A construction station is an incorporeal point reached by motor truck and placed so as to conveniently conclude the carrier's tariff obligation, which is made to extend beyond its railhead and to afford a direct movement to and from the shipper's store door without the necessity of unloading the truck en route."[62] The freight is loaded from the cars to the trucks at the New Jersey terminal. The trucks proceed to Manhattan by ferry or tunnel. The first point of contact with Manhattan is the constructive station. Up to that point, the truck acts for and is paid by the carrier; thereafter, for the shipper. The service is in lieu of floatage or truckage to an actual station in Manhattan, be it pier, team-track, or off-track inland station. It was admitted that the present terminal and delivery services in Manhattan are excessively costly, and that some form of store-door delivery through the use of trucks might reduce the difficulties and the costs. The Commission, however, was of the opinion that the constructive station device under consideration "tended" to violate §3 and §15a. The violation of §3 was based on the fact that the freight was unloaded at the carrier's expense. If this constructive station service is given in Manhattan it should be given in the Bronx and in New Jersey and since it is not intended to be given either place, (since the ordinary terminal facilities there are adequate) it should be discon-

[59] I.C.C. v. Diffenbaugh, 222 U.S. 42, 46 (1911).

[60] "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge." I.C.C. v. Baltimore & Ohio R.R. Co., 145 U.S. 263, 283 (1892) As to whether competition justifies discrimination see *supra* note 37 and accompanying text.

[61] *Supra* note 10.

[62] *Id.* at 208.

tinued; nor could it be justified on the ground that the carriers not being able to reach New York with their rails, must find some way of reaching it since, "it is well settled that the carriers have long since extended their rails to New York by means of car floats. The constructive station on Manhattan, *therefore,* is an added facility which, if of advantage to Manhattan shippers, may be rightfully demanded by competing shippers in the same rate district."[63]

The Commission was of the further opinion that the device had been used by each carrier in succession to divert business from one another,[64] and already the trucking companies were cutting their drayage charge to the shipper in order to secure the allowances from the carrier. "This is competition of the most destructive sort because it produces no new traffic."[65] Is it on this ground that the Commission finds the practice incompatible with §15a? The second paragraph of that section provides that " . . . the commission shall initiate, modify . . . rates so that carriers as a whole . . . will under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn . . . a fair return upon the aggregate value of the railway property . . . 'Provided, that the commission shall have reasonable latitude to modify . . . any particular rate which it may find to be unjust or unreasonable . . . "

This language is rather general to afford a basis for condemning a single isolated practice, without any evidence as to its effect on the general income of the carrier. As Commissioner

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[63] *Id.* at 225. (Italics ours.)

[64] The New York Central having on-track stations in Manhattan did not wish to establish constructive off-track stations to compete with its on-track stations. To meet the challenge it esablished a constructive lighterage practice whereby every lighterage point within the harbor was made a constructive station. The goods would be trucked from its on-track station to a possible lighterage point at the carrier's expense, and beyond at the shipper's. This was clearly a service in addition to, rather than merely in lieu of, terminal delivery.

All the carriers, except the New Haven, wished to do away with the constructive station practice. It had been hoped that the costly pier stations could be done away with, but too little traffic moved by the constructive station to make that possible.

[65] *Id.* at 227. Mr. Commissioner Eastman did not agree with this conclusion. The free loading was, he believed, a violation of § 3 but this could be avoided by charging the shipper for loading. He could see no objection to the New Haven's constructive station plan which did indeed seem to be a saving to the carrier.

Eastman said in his concurrence, " . . . §15a is, I believe, immaterial here. We are empowered to investigate economy and efficiency of management, and can make allowance for waste or inefficiency in our regulation of rates, but there is nothing in the law which makes either the one or the other unlawful."[66]

Is this decision controlling in the lighterage controversy? It would seem that the Commission regarded the constructive-station practice as discriminatory not merely because of its greater service (the free unloading), but because an adequate terminal service (by floatage) already existed. It was because of this that the constructive station device was an additional facility[67] and one designed principally, as the Commission thought, as a competitive device intended to upset existing freight channels rather than to solve honestly the terminal problem in Manhattan. A discrimination which is part of a long-standing system of terminal arrangements, even though it at one time arose out of competition, has a far better chance of being approved than a device which is intended to draw off traffic from other lines.[68] Viewed from this aspect, the lighterage, despite its greater service feature, is in the same class as the floatage. It antedates, in fact, the floatage and was the first mode of terminal delivery in Manhattan. It was initially the outcome of competition among the carriers, but it does not serve at present to lure freight from one to another carrier.[69] Though

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[66] *Id.* at 237. But see note 82 *infra* where Eastman puts §6 to a use similar to the Commission's use of §15A.

[67] This seems to be the effect of the words quoted on p. 23 *supra*. Note in particular our italics.

[68] E.g. the constructive station practice was approved in Transfer of Freight Within St. Louis and East St. Louis, 155 I.C.C. 129 (1929). In the course of its report the Commission said (p. 153): "There is no attempt on their [the carriers'] part, . . . to reach out with the constructive station, beyond their lawful obligations, for the purpose of securing tonnage, one from the other." On the other hand, in Draggage Absorptions by South West Missouri R.R. Co., 113 I.C.C. 179 (1926), 128 I.C.C. 405 (1927), 140 I.C.C. 627 (1928) a carrier in a mining country the lines of which did not run to the individual mines sought to divert traffic from the established carriers whose lines were more favorably placed, by devising an intricate system of constructive stations for the reception of ore from the mines. This scheme and like schemes were successively condemned by the Commission. The last of its three decisions was reluctantly upheld by a federal court, the ground of the decision being extremely obscure. Wallower v. United States, 32 F. (2d) 524 (W.D. Mo. 1928).

[69] Thus in the Constructive Station case *supra* note 10 on which the examiner relies, the Commission (at p. 222) referring to the difficulty of serving Man-

it is a greater service than station delivery, it is in substitution of, rather than in addition to, station delivery. Furthermore, it is secured as a result of natural advantage. Whereas the constructive station service is physically possible anywhere, the lighterage can be performed only for shippers located on the water either in New York or New Jersey.

Though these reflections suggest that New Jersey's case under §3 is not completely convincing, the examiner's conclusions are not necessarily wrong. The possible latitude of administrative judgment in a problem of such enormous complexity makes dogmatic criticism impertinent. This leads us, in conclusion, to two other considerations which though extrinsic to New Jersey's case independently support it. These are the showing made in support of Boston's complaint and §6 of the Transportation Act.

THE RELATION BETWEEN BOSTON'S AND NEW JERSEY'S COMPLAINT

Reference has already been made to the long-haul differentials as a result of which the rates to Baltimore and Philadelphia are less than the Boston rates.[70] In the *Boston Maritime*[71] case the Commission refused to disturb these differentials since on a consideration of service factors none of the rates were found to be unreasonable in themselves. In this litigation Boston again seeks the same relief and the examiner does not find that the situation in this respect has changed. With the problem involved in those decisions we are not directly concerned. The core of Boston's complaint, however, is against New York Harbor and in particular the free lighterage practice. The line-haul rate to the two cities on the important grain traffic[72] from the

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hattan says that the carriers "must adopt extraordinary measures in extending their service to this island. For 62 years they have made this extension by means of the car float and *lighter*, supplemented by pier stations and a few team-track locations." (Italics ours). Lighterage is thus classed as one of the normal and established modes of terminal service.

[70] *Supra* pp. 135-136.

[71] *Supra* note 26

[72] The grain traffic is important for Boston in its export trade since it is one of the few products available "to bottom" the ships. It is a question how much of the grain traffic can be diverted to Boston by the relief granted in this case. Grain may be shipped much more cheaply through the New York Barge canal. Forty million bushels of wheat went to New York by the canal in 1928. In

Great Lakes is the same, though the distance to Boston is greater. Parity exists also on export and import traffic from the so-called differential territory and points west of Albany. The rates from points in the trunk-line territory reflect New York's favorable distance advantage. Boston, however, complains that her terminal costs are so much less than New York's that the entire cost of service to New York is greater despite lesser distances.[73] Thus, a table prepared by Boston of the costs from a group of representative points to shipside shows an average cost to the carrier of $5.25 per ton to Boston and $6.37 -$6.57 per ton to New York, or a ratio ranging between 121.3% and 125.5%. The lower costs are accounted for by the superior harbor facilities in Boston, the cars being run onto the piers and the tonnage transferred directly to the ship. Despite economical facilities Boston has been steadily losing export trade, most of it to New York Harbor.[74] Free lighterage, with its gratuitous handling and the split delivery privilege, is a potent magnet. Add to this that lighterage when done at Boston is charged to the shipper, and that where the boat pier is not on the rails of the line-haul carrier there is often an unabsorbed switching charge. Boston is particularly bitter concerning the diversion of New England traffic to New York, the distance to New York often being considerably greater. The free lighterage is said to contribute materially to the diversion. In sum, Boston's proof of prejudice seems distinctly stronger than New Jersey's, and the unity of the port argument has no application here.

These facts bear a very curious relation to New Jersey's

1929 total ex-lake grain shipments for export were, in millions of bushels, 60 to New York, 17 to Baltimore, 9 to Philadelphia, 4 to Boston. Assuming that the 1928 and 1929 traffic were nearly the same and that the Barge Canal shipments were for export, the Canal shipments are about 66⅔% of total ex-lake shipments to New York. This would show that there is still considerable shipment of grain by rail, despite the low costs and great unused capacity of the Canal, so that there may be some possibility of diverting some of the grain traffic to Boston if carrying costs are favorable.

[73] To the New York rates based on mileage, 40 miles is added on traffic going over the New Haven and 10 on traffic going over the New York Central, but in the examiner's opinion this mileage in terms of class rates is but a small part of the excess of New York over Boston terminal costs.

[74] The value of Boston's exports in 1921 was $46,269,119, in 1928, $43,000,000. For New York the figures are $1,600,000,000 and $1,700,000,000, respectively. In 1900 the ratio of New York to Boston was 5 to 1, in 1928, 40 to 1.

case. The examiner is unwilling to recommend lower rates for Boston than for New York. Since one of the possible routes to Boston from the West is the water route via New York, a lower rate to Boston than to the intermediate city of New York might be contrary to the long-and-short-haul clause (§4) of the Transportation Act.[75] The simpler procedure would be to require a charge for lighterage, on the ground that it is both more expensive and a greater service than ordinary terminal delivery.

To reach this result under §3, however, might be difficult. It is held that the discriminations condemned under this section must be by a carrier which serves both the preferred and the complaining localities.[76] Only so may the carrier have the alternative power of terminating the discrimination by either raising the preferential rate or lowering the prejudicial rate. This rule has been broadened by making the section applicable where the carrier "controls" both rates by participation in joint hauls.[77] In a recent decision the Commission has applied the section where the defendant carrier originated freight to both localities but "controlled" only one rate.[78] This case is now an appeal to the Supreme Court. The only carriers which serve both Boston and New York are the New York Central and the New Haven. To require them, alone, to impose a lighterage fee would help Boston on the New England traffic. These railroads might complain that since the other carriers in New York give these services free, they must be able to do so. But they are the only ones engaged in the New England traffic and if the fee were limited to that traffic that objection might be eliminated.

However, that would satisfy Boston only in part, and under the rules of law adverted to above, it would be difficult to find the other carriers guilty of discrimination against the port of Boston. It is possible that the other carriers might be reached under the power to prescribe minimum rates (§15). The ordinary and obvious use of this power is to eliminate

[75] Furthermore the class rates have only recently been investigated and fixed by the Commission in general on a distance scale. Eastern Class Rate Investigation, *supra* note 3.

[76] This is the doctrine of the Ashland Fire Brick case, *supra* note 19.

[77] See Comment in YALE L. J. *loc. cit. supra* note 13, at 606.

[78] The Galveston cases *supra* note 54.

unprofitable rates. But it has been used to equalize transportation charges on commodities from competing territories served by different carriers irrespective of transportation criteria.[79] Whether §15 can thus be used to avoid the limitations placed by the Court's decisions upon §3 has not yet been decided by the Supreme Court.[80] But the examiner avoids these difficulties, by his independent finding that the record in the New Jersey complaint justifies the imposition of the lighterage fee on the carriers. Thus, the New Jersey complaint is made to do service for Boston but also it may be surmised that the difficulty of otherwise giving relief to Boston may have been influential in securing relief for New Jersey, and, in particular, of determining the form of the relief.[81]

THE APPLICATION OF §6 OF THE TRANSPORTATION ACT

It is possible to justify the examiner's recommendations on §6 of the Transportation Act, which provides that the schedule of rates, fares, and charges which every carrier is required to

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[79] E.g. The Salt Cases of 1923, 92 I.C.C. 388 (1924) *aff'd* Jefferson Island Salt Mining Co. v. United States, 6F (2d) 375 (N.D. Ohio 1925) and the famous Lake Cargo Coal Cases, 101 I.C.C. 513 (1915); 126 I.C.C. 309 (1927); 139 I.C.C. 367 (1928) as to which see the recent monograph MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1933) and an informative review of the book 42 YALE *L. J.* 814. (1933). Also reviewed in 46 HARV. L. REV. 869. (1933).

See *supra* note 21 as to the Hoch-Smith Resolution which also has a bearing on this question.

[80] Under §15 the Commission is authorized to fix rates where the rates are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter" [i.e. the Transportation Act of 1920]. These words alone set no limit to the factors that can be considered in determining discrimination nor would they require that discrimination be by a carrier serving both the prejudiced and the preferred localities. But it must be remembered that before 1920 the Commission had no power to fix rates, that the chief function of §15 was to give it this power, and it may be that the only purpose of §15 is to give this power and that the conditions under which it is to be exercised are to be determined by other sections dealing directly with discrimination and unfair rates. The Supreme Court has suggested that such is the case in Central Railroad of New Jersey v. United States, 257 U.S. 247 (1921) the Court (per Brandeis, J.) saying (at 259) "What Congress sought to prevent by that section (§3) as originally enacted was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act nor any earlier amendatory legislation has changed in that respect the purpose or scope of Section 3."

[81] In this connection it may be noted that the New York interveners requested that the Boston case be heard separately from the two New Jersey cases. The request was refused.

file shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require." This leaves it within the discretion of the Commission whether to require separate charges for accessorial services. Mr. Commissioner Eastman has stated recently what, in his opinion, is the guiding policy in the application of this section:

"Compensation for these special services may be secured in two ways, either by making a separate charge or through the freight rate. There are two general objections to the latter method of securing compensation. In the first place, it becomes difficult, if not impossible to determine what actual compensation, if any, is being received for the special service, and hence equally difficult to determine whether it involves burden upon other traffic. In the second place if either imposes precisely the same burden upon the shipper of the commodity in question who receives the special service as it imposes upon the shipper who does not receive it, or if compensation is not in fact obtained through the freight rate upon this commodity, it transfers the burden to traffic in general."[82]

As long ago as 1915 Mr. Commissioner Harlan dissenting in the *Chicago Switching* case stated that "The social and economic effect upon the smaller communities of the growing cost to the carriers in operating their terminals at large industrial centers"[83] made it incumbent upon the Commission to require

[82] Dissenting in The Wharfage Cases, *supra* note 44, 157 I.C.C. at 692, and see his further remarks dissenting in the same proceeding 174 I.C.C. at 266. It should be noted that this conception of §6 is similar to the conception of §15A held by the Commission (Eastman dissenting) in the Constructive Station case *supra*, notes 10, 61, 66 and text at p. 23. There is this difference: a finding under §15A that a service was being given at a non-compensatory rate would require that a greater rate be charged. Under §6 it is simply required that the component parts of a rate be shown, as well as the costs of special services But §6 would not in itself be determinative of whether the absorption of any of these charges by the carrier was discriminatory, non-compensatory, etc., though it would have a tendency to bring into operation these criteria by exposing the situation.

[83] *Supra* note 55 at 247. In City of Newark v. Pennsylvania R.R. Co.; *supra* note 51 the Commission required the carrier to absorb charges for additional services at Newark or to discontinue absorbing them at other points. But Mr. Commissioner Mahaffie was of the opinion that a reasonable charge should be made for the service. "The absorption by the carriers of these charges frequently results in undue preference of certain shippers, and not only depletes carrier revenue, but tends to shift the burden of such services upon other shippers

special charges for additional terminal services, one of which in that case was *lighterage.*[84]

Under this theory of §6 it should be unnecessary for any particular party to show prejudice. In fact the very purpose of the separate statement of charges would be to determine whether the terminal traffic was bearing its own costs. Thus, it would be much simpler to support the examiner's recommendations than it would under §3.[85] However in the recent *Wharfage Charges*[86] cases (upon which the defense relied heavily), the Commission refused to require separate charges for storage, handling, lighterage, and dockage at the Atlantic ports including New York, though over the vigorous dissent of Commissioners Eastman, McManamy, Porter, Tate, and Mahaffie. The Commission, apparently, does not accept the theory that to invoke §6 it is not necessary to make a showing of specific prejudice. They refused to require separate charges, on the ground that there was no proof of unjust discrimination, diversion of freight, or that the rates as a whole to the Atlantic ports were so low as to burden other traffic.[87] The present record may

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who do not benefit by similar allowances. The carriers need more revenue. One way to get it is to eliminate unnecessary free services."

When the carrier is compelled to grant a free service without discrimination, he may and sometimes does omit the free service entirely; *e.g.* Merchants and Manufacturing Asso. v. Baltimore & Ohio R.R. Co., 30 I.C.C. 388 (1914). This case represents the final upshot of the Store-Door Delivery Cases, *supra* note 52.

[84] There is usually in most harbors an extra charge for lighterage. A small amount of free lighterage is performed at Baltimore, Chicago, Norfolk, and Portsmouth.

[85] See, however, the question suggested in note 82 *supra* whether a finding under §6 is sufficient in itself to require the carrier to exact the special charge.

[86] *Supra* note 44.

[87] Mr. Commissioner Eastman dissenting pointed out that this investigation had been undertaken on the Commission's initiative and that it did not lie with private parties to prove that the admittedly low charges (or none at all) for storage, dockage, etc., in New York City were not prejudicial; that it was up to the Commission to find why these charges were so low and whether they were unfair. Apparently these words have had some effect. Investigation by the Commission's examiner of storage practices in New York City has continued, and the examiners have reecntly advised the Commission that the storage charges in New York City netted the carriers a loss in 1931 of $1,260,441 and that the carriers should be warned to desist less they invite a suit against themselves for violation of the Elkins Act. [32 Stat. 847. (1903), 49 U.S.C. §41], New York Times, March 14, 1933, p. 20.

The history of terminal practices on Manhattan: the free lighterage, free dockage, non-compensatory warehouse charges all testify to the tremendous pressure of competition for the New York traffic with its consequent unfortunate effects on other ports.

offer a point of difference in that there was a showing that traffic has been diverted from Boston by the free lighterage practice, and that, in the examiner's opinion, the New Jersey ports have suffered.

CONCLUSION

There is almost general agreement that, if Northern New Jersey and New York City are to constitute a single rate group for long-haul freight rates, certain inequalities operating against New Jersey should be eliminated. Thus, New Jersey shipments to New England and to the South by the rail-water, and rail-water-rail routes should take the same rates as New York, plus a uniform lighterage fee if a fee on all lighterage movements is imposed. Furthermore, the "free lighterage" or uniform lighterage fee limits should be enlarged to take in all points which pay the New York long-haul rates.

In our opinion the case for an extra lighterage fee is inconclusive, at least considered from New Jersey's viewpoint. The largest part of the freight lightered (80%) is to shipside. If the unity of the port is assumed, it does not matter where the ships go, and the fact that the development of new shipping facilities in New Jersey has been retarded does not support a claim of unjust discrimination. Furthermore, the examiner, himself, seems to doubt that the relief afforded will disturb current docking arrangements. It would be unfortunate to encourage, in this time of over-developed facilities and declining exports, any new building. This relief may be of some help to New Jersey in promoting the greater use of already existing direct interchange facilities in New Jersey.

As to the remain traffic (20%) lightered to private pier (industrial, manufacturing uses, etc.) the cases do not sustain the proposition that the lighterage service is necessarily unfair to those shippers not located on the water, though a finding that it is unfair would be well within the range of possible judgment. There is no concrete evidence alluded to by the examiner, however, that the practice affects off-shore industry adversely, nor New Jersey industry in particular.

It is possible that the imposition of the fee may do New Jersey more harm than good by diverting traffic to Boston

(which it is intended to do) and to Baltimore and Philadelphia, and thus decreasing the importance of the Port of New York. However, Boston has established a reasonably strong showing of discrimination, and seems entitled to relief though it is difficult to give her complete relief unless the minimum rate power is used against the carriers which do not serve New England or unless these carriers are reached under the New Jersey complaint. Finally, these complexities could be avoided by a use of the broad powers to establish separate charges for accessorial terminal services. In this way it should not be necessary to show specific discrimination. Costs of service would be placed on those who receive it and not thrown back in unpredictable fashion on the rate structure as a whole. And if, in these needy times, the railroads' revenue were thereby increased, it would not be the least of the advantages to flow from the examiner's recommendations.

LOUIS L. JAFFE.

CAMBRIDGE, MASS.