Address

on

THE RELATION OF FEDERAL ANTI-TRUST LAWS TO INTERSTATE MOTOR TRANSPORTATION

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Before the

NATIONAL ASSOCIATION OF MOTOR BUS OPERATORS,

New Orleans, La.

Thursday, October 24, 1935

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By

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Member of the Federal Trade Commission

THE RELATION OF FEDERAL ANTI-TRUST LAWS TO INTERSTATE MOTOR TRANSPORTATION

Bidden by your invitation to discuss the relation of the anti-trust laws to transportation, - forbidden by the proprieties of my office from suggesting direct answers to many of the perplexing questions concerning this relationship prior to their determination by the Commission or the courts, - I appreciate, in my endeavors to reconcile my orders with these proprieties, the plight of the little girl who, told to learn to swim, was yet cautioned, "* * * Hang your clothes on a hickory limb, and don't go near the water."

The Federal Trade Commission, like the Interstate Commerce Commission, has quasi-judicial duties and its obligation and policy in respect thereof is to decide specific cases on their own facts. Each tub must stand upon its own bottom. Of course the courts decide only cases and controversies. The court is a referee, not an adviser. The judge will not suggest in advance whether he thinks you can jump the chasm, but will announce your success or failure after you have made the attempt.

You of the motor carrier industry are here enjoying your coming of age party. You have grown up. While coming of age is sometimes referred to as emancipation, I am sure all of you looking back to your own coming of age period recall that on such occasion you stood on the threshold of a new character of duty towards society. The previous speakers have outlined to you your new duties to the Federal Government under the Motor Carrier Act. I shall remind you that in your preparation for the meeting of these new duties, other and older duties to that Government and the great body of American citizens which it represents, should not be overlooked.

THE FEDERAL ANTI-TRUST LAWS

There are three laws which are somewhat generally referred to as the Federal anti-trust laws. These are the Sherman Act of 1890 and the Federal Trade Commission and Clayton Acts of 1914.1/

I expect to suggest to you that the Interstate Commerce Commission regulation displaces that of the Federal Trade Commission in respect of unfair competition of common carriers, leaving contract carriers subject to both; that it transfers enforcement duties under the Clayton Act from the Federal Trade Commission in respect of common carriers, but leaves in the Federal Trade Commission those duties in respect of contract carriers, and that while the Sherman Act still applies to all motor carriers, common and contract carriers are in some particulars given exemption therefrom because of the ICC regulation.

1/ See: Definitions of the anti-trust laws set forth in Section 1 of the Clayton Act and Section 4 of the Federal Trade Commission Act.

The Federal Trade Commission Act

So far as the Federal Trade Commission Act is concerned, common carriers subject to the acts to regulate commerce are specifically exempted from the corrective as distinguished from the investigative action of the Federal Trade Commission. In this Act, the acts to regulate commerce are defined in substance to mean the original act and all acts amendatory thereof and acts supplementary thereto.

Prior to the approval of the Motor Carrier Act of 1935, persons and corporations engaged in the interstate motor carrier industry were subject to the jurisdiction of the Federal Trade Commission in respect of investigative and corrective action directed against unfair trade practices forbidden by the Federal Trade Commission Act. Because of the broad definition of the phrase "acts to regulate commerce," contained in the Federal Trade Commission Act, there seems to be no doubt but that interstate common carriers by motor vehicle, upon becoming subject to the jurisdiction of the Interstate Commerce Commission, immediately cease to be longer subject to any part of the Federal Trade Commission Act, except those paragraphs of Section 6 which provide that the Federal Trade Commission may, upon application of the Attorney General, or under direction of the President or the Congress, investigate and report facts relating to violation of the anti-trust acts.

There remains a question concerning the status of interstate contract carriers in respect of the jurisdiction of the Federal Trade Commission under its act. While such contract carriers became subject to the jurisdiction of the Interstate Commerce Commission under the Motor Carrier Act of 1935, only common carriers are expressly exempted in the Federal Trade Commission Act.

The debates in Congress in connection with the Federal Trade Commission Act would indicate that it was the purpose of Congress in 1914 not to have the Federal Trade Commission enter in any way the domain of the regulatory power of the Interstate Commerce Commission. This is apparent in the remarks of Representative Covington, Chairman of the sub-committee which prepared the bill. These remarks were, "But aside from that section (referring to the powers of investigation into violations of the anti-trust laws) * * * railways are carefully excluded. The committee felt that the Interstate Commerce Commission was so wisely, so well, and so satisfactorily, to the great body of the American people, performing its duties as a regulatory body over the railroads of this country, that it did not want to enter the domain of their power."

In view of the failure of the Congress to modify the exemption in the Federal Trade Commission Act, it would appear that interstate contract carriers by motor vehicle are subject to the jurisdiction of both the Federal Trade Commission and the Interstate Commerce Commission.

The Clayton Act

The Clayton Act of 1914 specifically mentions common carriers in Sections 7, 8, 9 and 10,2/ and provides in Section 11 that the authority to enforce compliance with Sections 2, 3, 7 and 8 by persons subject to the Interstate Commerce Commission shall be in that Commission, which also has some authority under Section 10.

The prohibitions of Section 7 of the Clayton Act are against the acquisition by one corporation of the stock of another or others, where the effect may be to substantially lessen competition, or to restrain commerce or tend to create a monopoly in any line of commerce, with a proviso to the effect that nothing in that section is to be construed to prohibit any common carrier from aiding in the construction of branches or short lines so located as to feed the main line of the company, aiding such construction, or from acquiring the stock of such branch lines or of independent branch lines where there is no substantial competition between the companies. A further proviso, however, makes clear that even such exempted transactions are not relieved from the Sherman Act. Hence, a motor carrier claiming to be outside of Section 7 of the Clayton Act, because its acquisition is of the stock of a feeder bus line and also not within Section 213 of the Motor Carrier Act because the total number of vehicles involved is less than twenty, may still be subject to prohibitions against combination found in the Sherman Act.

Section 9 of the Clayton Act forbids any embezzlement or any misapplication of its assets by an officer of any common carrier, under penalty of being found guilty of felony.

Section 10 forbids dealings to the amount of more than $50,000 within a year by a common carrier with corporations having interlocking directors, without competitive bids, under penalty of a maximum fine of $25,000 for the carrier, $5,000 for the officer, who may be sentenced also to one year in jail.

In respect of the jurisdiction under the Clayton Act, two questions may arise: The expression, "Laws to regulate commerce" or "act to regulate commerce" mentioned in the Clayton Act, are not therein defined. In the absence of a defining therein of the acts to regulate commerce as meaning the Interstate Commerce Act and all acts amendatory thereof and supplementary thereto, such as is contained in substance in the Federal Trade Commission Act, there is a question whether a narrow and strict construction might not limit the Interstate Commerce Commission's jurisidiction under the Clayton Act to railroads and other carriers, subject to Part 1; in other words, confining that Commission's jurisdiction to those carriers subject to the Interstate Commerce Act as it existed in 1914. In this connection, however, it is noted that Section 11 of the Clayton Act vests in the Interstate Commerce Commission the enforcement of Sections 2, 3, 7 and 8, "where applicable to common carriers."

2/ In Sections 9 and 10 the words "common carriers" appear unlimited by the usual qualifying phrase "subject to the laws to regulate commerce."

There, therefore, seems little doubt that the Interstate Commerce Commission has now become the enforcing authority in connection with the Clayton Act obligations of interstate common carriers subject to the jurisdiction of that Commission under the Motor Carrier Act of 1935. It appears, however, that the Federal Trade Commission remains the enforcement authority in regard to such activities of interstate contract carriers as may come under or in conflict with the Clayton Act.3/

This discussion of the dual control over contract carriers I assume to be of more academic than practical interest to the motor bus operators, in view of the information given to the Congress to the effect that there are no contract carriers of any consequence in the field of interstate transportation of passengers by motor vehicle. It was the information of the Senate Committee on Interstate Commerce, at least, that charter operations which perhaps might be considered contract carriage, were almost entirely conducted by interstate common carriers. Since all such common carriers by motor vehicle are now subject to the jurisidiction of the Interstate Commerce Commission these carriers have been pro tanto relieved as to all common carrier and such contract carrier operations as are permitted under Section 210 from the corrective jurisdiction of the Federal Trade Commission under both the Federal Trade Commission and Clayton Acts.

In this connection the Circuit Court of Appeals said in the Fruit Growers Express case,4/ "The words 'where applicable to common carriers,' in Section 11 of the Clayton Act, must mean where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission." (Emphasis supplied.)

The Sherman Act

The relation of the Sherman Act to transportation was originally the question of much doubt. The Sherman Act of 1890 forbids (1) every contract combination or conspiracy in restraint of trade; (2) monopolizing, attempting to monopolize, or combining or conspiring to monopolize any part of trade or commerce. Shortly before the passage of this act, the railroads had been made subject to regulation by the Interstate Commerce Commission under the act to regulate commerce, passed February 4, 1887, which had as its objective the prohibition of unreasonable and discriminatory rates and fares.

In general, The Sherman Act prevents the stifling and substantial restriction of competition in interstate and foreign commerce, in order to keep the rates of transportation and the prices of commodities in such commerce open to free play of economic forces. The first provision of that law is directed at joint action, whereas the second is aimed primarily at individual action and makes unlawful any monopoly

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3/ In connection with Sections 2 and 3 of the Clayton Act, however, it is to be noted that in Fleetway, Inc., v. Public Service Interstate Transportation Co. (Aug. 28, 1934), 72 Fed. (2d) 761, the U. S. Circuit Court of Appeals for the 3rd Circuit said, "Transportation by buses does not constitute a 'commodity' within the meaning of the act."

4/ Fruit Growers Express v. F. T. C., 274 Fed. 205.

or attempt to monopolize commerce, even though only one corporation or individual is attempting to effectuate an unreasonable restraint of trade.

During the debates in Congress, various views were declared in regard to the legal import of the Sherman Act in relation to transportation. At one time the House proposed an amendment making it unlawful to enter into any contract for the purpose of preventing competition in transportation. This amendment was amended by the Senate to apply to any such contract as tended to raise prices for transportation above what was just and reasonable. As a result of the disagreements between the two houses of the Congress and the reports of a first conference committee, the law as passed contained no specific reference to transportation.

The point was not long in doubt. On January 6, 1892, the United States filed a complaint under the Sherman Act against the Trans-Missouri Freight Association and some eighteen railroad companies for having entered into a contract in which the association and the railroads had agreed to establish and maintain rates in the territory west of the Mississippi and Missouri rivers. After victories for the railroads in the lower courts, the case reached the Supreme Court of the United States in 1896.5/

To the suggestion that the Sherman Act did not apply to railroads, the court said: "Railroad companies are instruments of commerce, and their business is commerce itself. * * * To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between States would leave little for the act to take effect upon."

To the argument that such an agreement as was there in question was permitted by the Interstate Commerce Act, the court decided that while that act did not in terms prohibit such an agreement, it did not directly or by implication authorize it to be made. The court recognized numerous differences between businesses of a public character, such as transportation, and those of the ordinary trader or manufacturer, but pointed out also points of resemblance, saying, "Trading, manufacturing and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the prices for the transportation of commodities traded in or manufactured by the others is greatly enhanced from what it otherwise would be if free competition were the rule, affects and to a certain extent restricts trade and commerce, and affects the price of the commodity."

The railroads urged that the language of the statute did not mean to declare illegal every contract, but only such unreasonable restraints of trade as were condemned by the common law. The court, however, held

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5/ United States v. Freight Association, 166 U. S. 290.

that the Act applied to every contract in restraint of trade or commerce even though such contract between competing common carriers had for its purpose only the fixing and maintaining of reasonable rates for the transportation of persons and property, saying "The term is not of such limited significance. * * * When, * * * the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." The decision in this case was a 5 to 4 decision, with Justices White, Field, Gray and Shiras dissenting.

In 1898, the Supreme Court again had occasion to pass upon the legality of railway traffic associations, in the case of United States v. Joint Traffic Association.6/ This case involved an agreement between thirty-one eastern railroads to adhere for five years to the so-called reasonable rates which they had filed with the Interstate Commerce Commission, pursuant to the act to regulate commerce. This agreement also was held to be in violation of the Sherman Act as a contract in restraint of trade. The court saying, "The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases."

While the court refused to modify the Trans-Missouri case rule that the statute applied to every contract in restraint of trade, it did say, "In Hopkins v. United States,7/ decided at this term, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'" In this case there was a dissent by three Justices with another Justice taking no part in the decision.

6/ United States v. Joint Traffic Association, 171 U. S. 505.
7/ 171 U. S. 578.

Subsequent to these decisions, however, the Supreme Court in the Standard Oil and Tobacco cases8/ read into the Sherman Act a so-called "rule of reason," under which the Anti-Trust Act is interpreted to prohibit only undue restraints and not to proscribe such restraints as are reasonably incident to legitimate business and not characterized by unfair or oppressive methods. These traffic association cases, however, settle the question of the applicability of the Sherman Act to contracts between members of the transportation industry for the purposes of keeping down competition among themselves and the maintaining of reasonable rates.

The motor carrier industry, as an industry, was born to find this policy of the law which is represented by the Sherman Act, in full force and effect. The interstate motor carriers always have been subject to the Sherman anti-trust law. Their position in this respect is changed in several particulars by the maturity of that industry and its coming under Interstate Commerce Commission regulation.

It has been held in respect to railroads9/ that while the government may prosecute criminally or proceed by injunction or forfeiture, under the Sherman Act, against a combination of carriers fixing rates, a shipper may not recover treble damages nor obtain an injunction against the carriers, where such rates, although prescribed pursuant to an unlawful conspiracy within the condemnation of the Sherman Act, have nevertheless been approved as reasonable and nondiscriminatory by the Interstate Commerce Commission. This decision was based upon the theory that to allow recovery would defeat the purpose of the Interstate Commerce Act in legislating against unjust discrimination. This relief from two of the remedies given individual complainants under the Sherman Act would seem to be available in respect of any motor carrier rates found reasonable by the Interstate Commerce Commission under the Motor Carrier Act.10/

In connection with the prohibition against stock acquisitions under the Clayton Act, it is noted that the illegality is dependent on the effect; that is to say, there must result a substantial lessening of competition or a tendency to create a monopoly, local or general. Under the Sherman Act, it has been held that the test of the legality of a combination is neither its present effect upon nor its present conduct toward the remaining competitors, but its effect upon competition. The court held in the case of the Terminal Railroad Association of Saint Louis,11/ that whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. If the necessary result is materially to restrain trade between the States, the

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8/ Standard Oil Co. of N. J. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106. (1911).

9/ Keogh v. C. & N. W. R. Co. (1922), 260 U. S. 156.

10/ This freedom has been held true in cases arising under both the Sherman and Clayton Acts (Mississippi Barge Line v. U. S., decided in 1934, 4 Fed. Supp. 745, affirmed 292 U. S. 282; Central Transfer Co. v. Terminal Railroad, 288 U. S. 469.)

11/ United States v. Terminal, etc. Association, Apr. 22, 1912, 224 U. S. 383.

intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important.

Section 213 of the Motor Carrier Act outlines the lawful procedure to effect mergers and consolidations. Paragraph (f) of that section relieves all those affected by any order of the Commission made pursuant to this section from the operation of the anti-trust and all other Federal and State laws to the extent necessary to enable the doing of anything authorized or required by the Commission's order.

By paragraph (e), consolidation, merger, purchase, lease, operating contract, or acquisition of control between two or more motor carriers not controlled by or affiliated with carriers by other means, are exempted from the operations of Section 213 where the number of motor vehicles involved is not more than twenty. Since any consolidations or mergers falling in this category are outside of Section 213 and require no order of the Commission to make them effective, the carriers or persons effecting them derive no benefit from the statutory exemption from the anti-trust laws set forth in paragraph (f).

On the other hand, where, for example, a railroad purchases or leases or acquires control of a motor carrier the transaction is not exempted by paragraph (e) and must have the approval of the Commission even though the total number of vehicles involved is not more than twenty. Given that approval, the anti-trust laws are set aside to the extent necessary to enable the applicant to do anything authorized or required by the Commission's order in the premises. The so-called rule of reason was thought by the drafters of paragraph (e) to ensure against hardships on the small operators who merge outside this statutory exemption.

The Interstate Commerce Commission has ruled in numerous cases12/ that it has nothing to do with the enforcement of the Sherman Act; the most that it can do when it discovers a violation of that act is to report the matter to the Attorney-General. The Federal Trade Commission's jurisdiction to investigate for the Attorney-General or the President or the Congress, in respect of violations of this act, has been mentioned previously, and a violation of this Act by a person or corporation subject to Section 5 of the Federal Trade Commission Act may be also an unfair method of competition condemned by the latter Act.

The enforcement and administration of the Sherman Act lies with the Attorney-General and the Federal courts. The latter have not

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12/ The I. C. C. is without authority even to determine if the antitrust act has been violated. The most it could do would be to lay proofs disclosed by investigation before the Attorney General. Spring v. B. & O. R. Co., 8 I. C. C. 443; China, etc. v. Georgia R. Co., 12 I. C. C. 256; Warren Mfg. Co. v. So. Ry. Co., 12 I. C. C. 381.

Proceedings to enforce said act are properly cognizable by the courts and not by the I. C. C. Tift v. So. Ry. Co., 10 I. C. C. 548; Central, etc. v. Illinois C. R. Co., 10 I. C. C. 505.

And unfair competition to which a trust may have subjected the independents, is outside the Commission's authority. State of Iowa v. A. C. L. R. Co., 24 I. C. C. 134.

defined what is an unreasonable or undue restraint of trade, any more than they have defined the phrase "due process," or a "reasonably prudent man," to cite familiar legal phrases, but the Supreme Court has through the years, by process of inclusion and exclusion, furnished a number of examples of things which may lawfully be done and a number of things which offend against the law. It is upon the basis of these cases that any opinion must be founded in respect of the extent to which cooperative action can be had in the motor carrier industry without offending against the Sherman Act.

Price Fixing

The Supreme Court's decisions give no promise of exemption from prosecution for violation of the anti-trust law where price-fixing is involved, even though only reasonable prices be fixed. As recently as 1927, in the Trenton Potteries case,13/ the court said, "That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the Standard Oil and Tobacco cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. * * * Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it can not be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."

It may be stated that the Appalachian Coals case,14/ at first heralded as indicating a new viewpoint in the court, can be reconciled and distinguished. Read in connection with the earlier cases, it indicates the law to favor free and open competition under the anti-trust laws, within such bounds as will eliminate monopolies and protect members of industry from cut-throat competition.

Traffic Associations

Despite the decisions in the traffic association cases, the railroads have continued to maintain freight bureaus and to engage in some collective activities. In 1923, the Interstate Commerce Commission reported, in response to a Senate resolution, the results of its

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13/ United States v. Trenton Potteries Co., 273 U. S. 392.

14/ Appalachian Coals, Inc. v. United States, Mar. 13, 1933, 288 U. S. 344. Points to be considered in this case are: (1) the plan was not yet in operation, hence there was no evidence of its evil effect; (2) the coal industry was a distressed industry in desperate need of stabilization, hence no proof of evil intent; and it is noted that the Supreme Court ordered the District court to keep jurisdiction of the case and to watch the effect of the plan. This case recognizes that cooperative effort looking toward correction and dissemination of information upon which individuals may make individually a more enlightened determination of their charges, is not condemned.

investigation of the Trans-Continental Freight Bureau.15/ Its report indicates that the activities of that bureau did not hamper the freedom of individual action on the part of its member roads, and it concludes that the maintenance and operation of such a bureau is not a violation of any of the provisions of the Interstate Commerce Act. Some members of Congress, however, have advocated investigations by the Federal Trade Commission, the Interstate Commerce Commission, or the Senate Committee on Interstate Commerce, into the legality under the Sherman Act of the operation of such bureaus.16/

Exclusive Arrangements

In a case involving, among others, the Alaska Steamship Company and the Canadian Pacific Railroad Company, the Supreme Court held that, "The right of the carrier to select its connections must be admitted, * * * but there is another important element to be considered. The charge of the indictment is that the agreements were entered into, not from actual trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska, and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines." The court said: "There is a charge, therefore, of infringement of the anti-trust law, - of something more done than the exercise of the common law right of selecting connections, and the scheme becomes illegal."17/

Pooling

Paragraph 1 of Section 5 of the Interstate Commerce Act, which originally prohibited all pooling, was amended in recent years to permit the pooling of earnings or traffic, under supervision of the Commission. Paragraph 15 of this section relieves against the restraints and prohibitions of the anti-trust laws to the extent necessary to enable carriers to do anything authorized or required by the Commission's order in respect of any of the "foregoing provisions of this section," which would seem to include the authorization for pooling contained in paragraph one of that section. No similar paragraph permitting pooling of earnings or traffic is found in Section 213 of part 2 of the Interstate Commerce Act, and hence no specific exemption is extended to motor carriers in respect of arrangements for pooling. The Circuit Court of Appeals some years ago found unlawful the pooling and division of freight receipts between two steamship lines where the result was a fixing of rates for the carriage of freight in interstate commerce by that combination, which had a monopoly of all the freight traffic. 18/

15/ In re: Transcontinental Freight Bureau, 77 I. C. C. 252.

16/ Resolutions to that effect introduced during the 73d Congress were not acted upon, and such resolutions introduced during the first session of the 74th Congress were not reported out of committee during that session.

17/ United States v. Pacific & Arctic Co., Apr. 7, 1913, 228 U. S. 87.

18/ Lee Line Steamers v. Memphis H. & R. Packet Co. (C. C. A. 6, Jan. 4, 1922), 277 Fed. 5.

Policy to Preserve Competition

While the policy of the Sherman law has been questioned by business from its enactment down to the present, the Supreme Court in speaking of the State and Federal laws directed against combinations, has said "According to them, competition not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interests and the power such unification gives."19/

In the Paramount Films case20/ the Supreme Court said: "The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results."

Perhaps the best theory of reconciliation of the retention by the Congress of the Anti-Trust Acts as applied to a regulated industry is that of adherence to the Aristotlian "Golden Mean." The policy of Congress is to keep to the middle of the road and to thus discourage the unrestrained acceleration of either combination or competition.

Certain it is that the Congress has been reluctant to recede from its opposition to combinations in restraint of trade, believing, perhaps, in the aphorism of George Stephenson, "When combination is possible, competition is impossible."

Conclusion

In recapitulating the discussion, I want to remind you that the Motor Carrier Act has effected the release of interstate common carriers by motor vehicle from the corrective jurisdiction of the Federal Trade Commission under the Federal Trade Commission Act, while leaving interstate contract carriers probably subject to that Commission's corrective, as well as investigative, action. Of course the doors of the Federal Trade Commission are open to all of you as complainants. It seems appropriate to suggest that in the case of the Birmingham Automotive Jobbers,21/ the motor carriers, along with other consumers of automotive supplies, have been the beneficiaries of an order of that Commission.

The effect of the Motor Carrier Act in respect of the chief sections of the Clayton Act appears to have substituted the Interstate Commerce Commission as the enforcing authority charged with the obligation of policing activities of interstate common carriers by motor

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19/ National Cotton Oil Company v. Texas, 197 U. S. 115.
20/ Paramount Films Corp. v. United States, 282 U. S. 30.
21/ The Birmingham Automotive Jobbers' Association and its members were ordered (after consent answer) to cease and desist from carrying out the terms of agreements to fix and maintain uniform prices, discounts, resale prices, etc. Docket 2382 of the Federal Trade Commission, decided August 9, 1935,(21 F. T. C. 229).

vehicle under the Clayton Act. In so far as interstate contract carriers are concerned, it appears that the Motor Carrier Act works no change in their situation.

The Motor Carrier Act does not take away from you any practical freedom from prosecution that you may have enjoyed previously under the rule of reason interpolated into the Sherman Law by the Supreme Court. In two important respects the Motor Carrier Act affords you greater and more specific exemption than you previously had; namely, the probable exemption at the hands of the courts from the suits of individuals for treble damages and injunctions and the statutory exemption of paragraph (f) of Section 213 in respect of mergers. These exemptions no doubt extend to both common and contract carriers, subject to the jurisdiction of the Interstate Commerce Commission.

In conclusion, I encourage you in your efforts to take full advantage of the opportunities afforded your industry to more fully share with the railroads the benefits and obligations of public service in the transportation field. I urge you to carefully study your rights and duties under the Motor Carrier Act, but I must remind you that despite your coming of age, you have filial obligations under the Anti-Trust Laws to the Federal government.