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THE FEDERAL COORDINATOR OF TRANSPORTATION

By Samuel Earnshaw*

I

INTRODUCTION

On June 18, 1933, the Congress of the United States enacted the "Emergency Railroad Transportation Act, 1933," authorizing the establishment of the office of Federal Coordinator of Transportation. On June 16, 1936, Title I of that act expired, and with it the office of Coordinator. However, the significance of the experience gained during the three short years of the existence of the statute did not cease with it. From the point of view of governmental administration of regulation something had been learned which, when placed against its own proper background in the current of historical development and experience, may prove to be of great value in the guidance of men's affairs in the future.

The Federal Coordinator of Transportation office was both conceived and born in darkest days of national emergency. The nation's industry as a whole was at a low point, and the railroad industry in the deepest depths. It was essentially an emergency measure, but it was something more. It was an experiment embodying the extension in the field of transportation regulation to an almost unprecedented degree of the function of government as a manager and at the same time of the formal use of persuasion in administration, the second extension to temper the first. A new note had been struck in the Transportation Act, 1920, whereby "regulation" took on an affirmative meaning in addition to its long established negative meaning. In a sense

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1 48 Stat. 211. Throughout this paper, except when the context clearly indicates otherwise, the use of "the Emergency Act" refers to Title I of the Act. Title II is briefly treated in note 58.

2 Infra, Part III. Presidential Proclamation of May 2, 1934, and Senate Joint Resolution 112, each of which in its turn extended the term of the office for one year.

3 41 Stat. 456.

4 Wisconsin Rate Cases, 257 U. S. 563, 42 Sup. Ct. 232 (1922); New
the Emergency Act of 1933 was a trial balloon sent up in the direction of an even more intense application of this new meaning. During the War the government had frankly assumed the responsibility for unified operation of the railroads, by vesting the power of management in the Director-General, a government officer, although much of the actual direction was carried on by the individual managements as before. Now, during an emergency of but slightly lesser proportions, an analogous technique was employed to bring some order out of the disrupted and disordered conditions in the American transportation industry, but one which differed widely from the War scheme in two important respects, the responsibility was left with the railroads themselves, and central in the Emergency Act scheme was the establishment of machinery for mutual exchange of thought and for cooperative action of government and management in a joint attack on the problem. Clearly, however, the problem would not completely disappear with the emergency, and it is difficult to believe that those who conceived such an extensive and far-reaching scheme were not unaware of the possibility of projecting it into the future on a more permanent basis, if experience under it proved favorable. It is significant that in neither the Presidential Proclamation nor in the Congressional Joint Resolution extending the term of operation of the Act was there mention of any continuation of the emergency. Accordingly, it would seem a valid conclusion that the Emergency Act, while essentially an emergency measure, represents an experiment not only in meeting the problem of extreme emergency but also looking to the orderly resolution of similar problems arising in less stormy times.

To those seeking to measure permanent influence in terms of orders issued or concrete action inspired for which due credit is given the contribution of the Coordinator will seem meagre

R. W. Harbeson traces the manifestation of this affirmative policy back to the Commission's concern with considerations of general efficiency and effectiveness in connection with general rate level investigations, citing as the earliest example Advances in Rates, 20 I. C. C. 243, 305, 307 (1911), 42 J. Pol. Econ. 106 (1934).
Supra, n. 2.

K. L. J.—3
indeed. Actually, if an opinion may be ventured at as early a stage as this, the Coordinator's lasting influence both in the sphere of railroad management and in that of transportation regulation was substantial. Congress established the office with the hope of stimulating and facilitating voluntary action by railroads to help themselves out of their financial troubles by working together to eliminate wastes and other preventable expenses.6 The railroads of the United States had been built and developed against a background of inter-railroad competition, to foster which had been the traditional governmental policy, as expressed in the Interstate Commerce Act and its many amendments and in the anti-trust laws. Having already opened the door a limited amount to joint carrier action in the Transportation Act,7 in bold reversal of this traditional policy, Congress now proceeded, in the Emergency Act, to throw open wide the door to legitimate cooperation and furthermore to reinforce this by directing the Coordinator to seek out and discover opportunities for profitable joint action through wide research and study,8 conferring on that agency power to order such cooperation under certain circumstances.9 In practice the Coordinator found himself so hampered by the temporary footing on which the statute placed him as well as by certain other restrictions contained therein that he was compelled to devote the efforts of the Coordinator organization largely to performance of the first of these functions.

During the period of the Coordinator's existence only one major order of any consequence was issued, and but three minor orders, but fortunately progress does not come only through orders. No less than sixty reports were issued in a little over three years, analyzing with thoroughness and great suggestiveness the majority of those transportation problems which are peculiarly national in character and on which study with perspective was needed, and in addition a good many more specialized problems narrower in scope. For example, in the former class were studies on merchandise traffic10 and freight car pool-

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6Emergency Act, section 4.
7Supra, n. 3; Amending section 5 of the Int. Com. Act, as to pooling, combination, and consolidations.
8Emergency Act, section 13.
9Ibid., sections 5 and 6.
ing, in the latter more specialized studies of a proposed merger of the Long Island and the Pennsylvania Railroad, and on "Preservative Treatment of Railroad Ties." These reports and the ideas contained in them were given wide circulation both among railroad men, for whom they were most pertinent, although they embraced many transportation subjects not directly concerning the railroads, and among the general public, both by formal submission to the Regional Coordinating Committees sanctioned by the Act, by conferences formal and informal, and by the Coordinator's many public addresses. Suffice it to say that, while only a few of the specific proposals were translated into action, the whole tone of thinking in the railroad world, the kind of considerations, the criteria to be used, the new language and ideology of coordination and cooperation, the whole tone was set by these emanations from the Coordinator's office, and it was definitely a new tone for most men in an industry where "American individualism" was still very deeply entrenched.

II Freight Car Pooling and Plan for Proposed Box Car Pool" issued Oct. 23, 1934.
14 Issued May 29, 1936.
15 Coordinator Eastman delivered 52 prepared addresses and numerous informal talks to Chambers of Commerce, Railroad Associations, labor groups and other interested bodies. "A List of the Prepared Addresses, Questionnaires, Reports, and Miscellaneous Statements of the Federal Coordinator of Transportation", pp. 1-5. Important staff members also carried on this work.
16 Perhaps the most important single idea that was effectively put across was the germinal idea of coordination itself. "Coordination" may refer to either or both of two processes, one, cooperation between units of the same form of transportation agency, as for example, to form a unified national railroad system, the other, integration of different types of transportation agencies as in rail-highway or rail-air service. Congress by using the name "Emergency Railroad Transportation Act, 1933" and by limiting its operation to railroads stressed the first meaning, and Coordinator Eastman ordinarily used the word in this sense (Moulton, 55 Traffic World 533). In this paper it will be so used, except where context clearly indicates the broader inclusive meaning is intended.
17 In this regard the following statement by the Coordinator in Jan., 1934, is significant: "The fact is, however, that these recommendations (as to various proposals) frequently fail to general adoption because of the high degree of individualism among the railroad managements. Carrier officials may resist because of pride of opinion or even for fear that adoption of the recommendation would in some way threaten their individual importance, but to a certain extent each railroad handles matters in its own way. Similar difficulties have
Besides the sixty reports above referred to were five devoted to questions of transportation regulation. Of the eight important legislative recommendations made the Congress has responded to three, joint carrier-employee agreements have obviated another, and final action awaits the others. In other ways also did the Coordinator affect the course of legislation. His testimony was sought as a matter of course by Congressional committees considering transportation legislation. Important legislation was submitted to his staff for criticism before enactment. The other parts of these legislative reports and the other reports were also effective in bringing into common view the kind of considerations to be weighed and the nature of the problem involved in legislation for the regulation and improvement of the American transportation system.

That the work of the Coordinator was accomplished by informal and unusual methods rather than by formal and official "legal" acts, does not diminish the importance for the student of administrative law of the legal background against which that work was performed. Appended onto the great underlying charter of American railroad regulation, the Interstate Commerce Act, and onto the well-developed and effective regulatory system developed by the incomparable Interstate Commerce Commission under it, was this comparatively diminutive emergency experimental measure, the Emergency Act, with its small-scale administrative agency, the Coordinator. The fact that a member of the Commission was appointed Coordinator only serves to emphasize the fact that the latter Act and the latter office, while owing to the circumstances which prompted the enactment of the underlying statute, the nature of its function was somewhat different, can only be understood when thought of and interpreted in the light of the whole administrative experience and legal background of the former. Consequently, the interaction which existed between the Commission and the Coordinator, immeasurable as it was by its very nature, suggests a corresponding interplay between the legal doctrine centering

been experienced by the association of Railway Executives in its activities." (Coordinator's First Report, 73rd Congress, 2nd Sess., S. Doc. 119, 10-11 [1934].)

37 See infra, n. 138.
38 See infra, n. 150.
39 See infra, n. 148, 149.
on the Interstate Commerce Act and the legal questions raised by the Emergency Act.

While in only one case was the scheme established by the Emergency Act directly subjected to judicial scrutiny, it is thought profitable to discuss in general outline some of the main problems raised by the Act. This for the reason that it is not inconceivable that other acts drawn up along similar lines may be enacted in the future to which such discussion would apply, but most of all for the reason that, although there was little litigation, the very fact of the possibility of litigation was not without its impress both on the normal course of action taken by the Coordinator and on the judicial world in which such litigation, had it eventuated, would have occurred. Questions of construction of the basic statute cannot be ignored even in the course of this kind of treatment, for in these questions lurk larger questions of policy and power which, while yet unrecognized, wield their subtle influence on the course of decision and consequently on people’s general conceptions of “what is lawful.” The larger questions of delegation of power and due process, both in relation to the labor provisions and to those providing for administrative and judicial review, can only be lightly touched on within the limited bounds of this paper. However, the most penetrating and yet the most elusive factor in all this background, the fact of the emergency and the effect of that fact on the other legal considerations, must be reckoned with more completely. It will be developed that any significance of this factor for lawyers is that its correct application in a particular case will depend upon a sensitive inquiry into the judicial temper of the particular court at the particular time. In other words, to discuss in terms “the emergency doctrine” is but to state in another way that courts are subject to influence in their way by the atmospheric considerations which, under the guise of discretionary exercise of power, it has always been recognized are subject to the administrative agencies of government.

Finally, throughout this study it is necessary to bear in mind two factors, oft-unrecognized, oft-unrecognizable, which, indescribable and evasive as they are, characterize much of the action and influence a great deal of the consideration of the

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Emergency Act and its administration, namely, the kind of
economic and social world-within-a-world that is being dealt
with, and the man that was Federal Coordinator of Transpor-
tation, Joseph B. Eastman.

II

EMERGENCY RAILROAD TRANSPORTATION ACT, 1933

A. Background of the Act

"Coordination" in the transportation world was neither
new nor uniquely American in the year 1933. Whether it be
called a "principle" or an "idea" or by any other name, the
word "Coordination" stood for something very real in man's
experience, something very useful and very powerful which
might be readily and profitably applied in new ways when
called upon in situations such as that in which the railroads were
to be found in the winter and spring of 1933, the period during
which the Emergency Act was evolved.

The need, the emergency, which thus evoked Congressional
action was the extremely serious financial and consequent phys-

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21 "The railroad world is like a state within a state. Its population
of 3 million, if we include the families of workers, has its own customs
and its own vocabulary, and lives according to rules of its own mak-
ing. It is struggling to sustain a public debt of some twelve billion
dollars, to satisfy the holders of some ten billions of stock, and to meet
the competition of rival principalities who carry by water, air, pipe-
line, and highway." L. J. Garrison in "The National Railroad Adjust-
ment Board, A Unique Administrative Agency", 46 Yale L. J. 567, at
568 (1937) pointing out in a footnote that there is no sharp line of
demarcation between labor and management.

22 See Part III, infra.

23 Reference should be made at the outset to the phenomenal coin-
cidence of the deeply aroused interest in coordination of transportation
agencies and facilities at the time in a great number of countries of
the world. A study made by the Department of Commerce published
in 1933 (Railway and Highway Transportation Abroad) began: "A
world-wide movement designed to effect national coordination of land,
air, and water transportation is under way. It began on a broad scale
less than three years ago, but so rapidly has it progressed that today
coordination is either being tested or approached in every country of
importance that has rail lines." In England, France, Germany, New
Zealand and Argentina comprehensive coordination has been effected.
(See generally, 55 Traf. Wld. 447; and as to France and Germany,
H. E. Dougall "Some Lessons Drawn from European Experience", 25
Am. Econ. Rev. Supp. 111 (1935). In England there had been in
existence a Commission on Coordination in Transportation since 1929.
The Salter Report in 1933 flowing from the Conference on Rail and
Road Transport followed on the work of the Royal Commission on
Transport, 1930. (Ministry of Transport, Report of the Conference on
Rail and Road Transportation, July 29, 1932.) On the basis of this
conference and report the Road and Rail Traffic Act, 1933 (23 and 24
George V 988, 1039) was enacted, which, amongst other things, set
ical condition of the railroad industry of the United States. This was largely an inevitable accompanying phenomenon of the world-wide depression which started in October, 1929, but it was also the result of a number of other forces and factors, peculiar to the industry, which had made themselves felt increasingly after 1920: among others, severe and unrestrained competition from other types of transportation agencies, which were subject to less stringent governmental regulation, and the natural conservativeness which pervades the industry, which renders it peculiarly insensitive to, and therefore retards adjustment to, changing needs and requirements. The railroads had given out on everyone: the consumer of their services, the investor, the worker, and the public generally.

Up a Transport Advisory Council in the Ministry of Transport to “advise and help him (the Minister of Transport) in connection with his functions in relation to means and facilities for transport and their coordination.” In Canada a very important report was published in 1932 by the “Royal Commission to Inquire into Railways and Transportation,” (the so-called “Ruff Committee”) which in its conclusions (Report of the Royal Commission to Inquire into Railways and Transportation, 1931-1932) stated the need for: “Machinery... for cooperation between the two systems (Canadian National Railways and Canadian Pacific Railway) for the elimination of duplicate services and facilities and the avoidance of extravagance...” and for: “... the removal of unnecessary or wasteful services or practices to the avoidance of unwarranted duplication in services and facilities, and... the joint use and operation of such properties as may be conveniently and without undue detriment to either party be so used.” Since that time appropriate legislative action has been taken, and consequently, to some degree, coordination is now effectively applied in Canada. (The Canadian National-Canadian Pacific Act, 1933, Part II, 23-24 Geo. V 165, 172 et seq., 100 Railway Age 957.)


The railroad industry is at a difficult crisis and presents a major national problem. It has technical aspects, but as frequently happens, the answer is not to be found primarily in technique... the railroad problem is primarily a human relationship problem. It arose and rests in entrenched antagonisms... conventional thinking is usually at the root of our troubles. It is at the root of the railroad problem.” L. Craven, “The Problem of Railroad Competition”, 25 Am. Econ. Rev. Supp. 102 (1935).

The seriousness of the situation is demonstrated by the figures showing the tremendous decline in volume of traffic and revenue from 1926 through 1933:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1926</td>
<td>874,589</td>
<td>1,439,612</td>
<td>$5,955,191</td>
</tr>
<tr>
<td>1929</td>
<td>786,432</td>
<td>1,419,333</td>
<td>5,774,937</td>
</tr>
<tr>
<td>1932</td>
<td>687,854</td>
<td>687,854</td>
<td>2,862,986</td>
</tr>
<tr>
<td>1933</td>
<td>434,848</td>
<td>733,391</td>
<td>2,858,784</td>
</tr>
</tbody>
</table>
In the face of such a situation, the seriousness of which became more and more widely appreciated as the national depression deepened, various organized groups of those affected became aroused and began to demand some kind of action. Par-

7 To the user of the railroad, the shipper and the traveler, this condition meant inadequate and antiquated service and excessive rates.

Available Service to Users of Railroad Service (Ibid. 1933 s-99)

<table>
<thead>
<tr>
<th>Year</th>
<th>Passenger Train Miles (thousands)</th>
<th>Freight Train Miles (thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1926</td>
<td>584,972</td>
<td>622,295</td>
</tr>
<tr>
<td>1929</td>
<td>568,095</td>
<td>598,343</td>
</tr>
<tr>
<td>1933</td>
<td>380,435</td>
<td>368,666</td>
</tr>
</tbody>
</table>

Estimated Undermaintenance of Service Facilities, total for all Railroads of the United States, as of the spring of 1933, $1,000,000,000 (Statement by Commissioner Eastman. Hearings, “Emergency Railroad Transportation Act, 1933”, Senate Com. on Interstate Commerce, p. 53).

Cost of Freight Service and the General Price Level

(General Price Index from Federal Bank of N. Y., 80 Standard Trade and Securities, No. 29, 0-17. Other statistics from I. C. C. Statistics, 1933, S-99.)

<table>
<thead>
<tr>
<th>Year</th>
<th>General Price Index</th>
<th>Freight Rev. per Ton-Mile</th>
<th>Index (1913=100)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1913</td>
<td>100</td>
<td>.729</td>
<td>100</td>
</tr>
<tr>
<td>1926</td>
<td>171</td>
<td>1.096</td>
<td>150</td>
</tr>
<tr>
<td>1927</td>
<td>171</td>
<td>1.095</td>
<td>150</td>
</tr>
<tr>
<td>1928</td>
<td>176</td>
<td>1.094</td>
<td>150</td>
</tr>
<tr>
<td>1929</td>
<td>179</td>
<td>1.088</td>
<td>149</td>
</tr>
<tr>
<td>1930</td>
<td>183</td>
<td>1.074</td>
<td>147</td>
</tr>
<tr>
<td>1931</td>
<td>159</td>
<td>1.062</td>
<td>145</td>
</tr>
<tr>
<td>1932</td>
<td>132</td>
<td>1.056</td>
<td>145</td>
</tr>
<tr>
<td>1933</td>
<td>129</td>
<td>1.009</td>
<td>138</td>
</tr>
</tbody>
</table>

7 To the investor it meant that the value of most railroad securities had been reduced and was uncertain, as the showing of the industry as a whole well indicates.

Net Income or Deficit Class I Railroads

(I. C. C. Statistics, Railways, 1933 S-60)

<table>
<thead>
<tr>
<th>Year</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>1929</td>
<td>$896,806,611</td>
</tr>
<tr>
<td>1930</td>
<td>523,907,474</td>
</tr>
<tr>
<td>1931</td>
<td>134,761,911</td>
</tr>
<tr>
<td>1932</td>
<td>139,203,821</td>
</tr>
<tr>
<td>1933</td>
<td>5,862,836</td>
</tr>
</tbody>
</table>

Percentage of Railroad Mileage in Receivership or Trusteeship on December 31, 1933: 16%

(Interstate Commerce Commission, Annual Report, 1934, p. 4)

As a result, railroad credit as a whole was desperately impaired, which meant that the only source of capital was the Federal Government, which required high grade collateral for its loans.

Reconstruction Finance Corporation Loans Authorized by the Interstate Commerce Commission, 1932-1933

(Ibid. 1932, 258; Ibid. 1933, 129; Ibid. 1934, 155)

<table>
<thead>
<tr>
<th>Year</th>
<th>Loans (in millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1931</td>
<td>$346,325,179         (69 railroads)</td>
</tr>
<tr>
<td>1932</td>
<td>88,102,096           (24 railroads)</td>
</tr>
<tr>
<td>1933</td>
<td>82,958,575           (9 railroads)</td>
</tr>
</tbody>
</table>
ticular interest groups began to exert themselves in an effort to find some solution to "the transportation problem" or to some phase of it most directly related to their particular source of complaint. From many sides came the call for a national transportation policy. Naturally also, numerous agencies in the Federal government had become concerned, and were devoting much effort to the study of the problems involved.

Through all these efforts there shows more and more clearly

To the employee it meant insecurity of employment and the possibility of further wage decreases:

Average Number of Employees for the Year and Total Compensation
(I. C. C. Statistics, 1933, S–28)

<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Total Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1926</td>
<td>1,779,275</td>
<td>$2,946,114,354</td>
</tr>
<tr>
<td>1929</td>
<td>1,660,850</td>
<td>$2,896,566,351</td>
</tr>
<tr>
<td>1933</td>
<td>971,196</td>
<td>$1,403,840,833</td>
</tr>
</tbody>
</table>

30 See, for example, G. L. Wilson, "The American Transportation Crisis" (1933). S. L. Miller, "The Principles of Inland Transportation," Ch. XL (1933); and compare C. S. Duncan, "A National Transportation Policy" (1936). Of the particular interest groups, the most notable was the group of insurance companies, banking associations, dealers in railroad supplies, and universities holding railroad securities which appointed Bernard Baruch, Calvin Coolidge, Clark Howell, Alexander Legge and Alfred E. Smith to serve as the National Transportation Committee, the conclusions of which, together with the underlying data amassed by Harold G. Moulton and the Brookings Institution, were published as "The American Transportation Problem" (1933). To this committee another group, the Joint Committee of Railroads and Highway Users, voluntarily submitted its report (51 Traf. Wld. 239). Other active groups were those shippers and supply dealers who made up the National Transportation Conference (See report, that title, 1933-1934), the members of the Associated Traffic Clubs (See 52 Traf. Wld. 737), the National Industrial Traffic League (See 52 Traf. Wld. 851), the newly formed American Transportation Association (See 55 Traf. Wld. 733), and the United States Chamber of Commerce (See Report on Competing Forms of Transportation, Sec. 1933, 50 Traf. Wld. 1285).

The Interstate Commerce Commission had conducted several general investigations (Ex Parte 104—Practices of Carriers Affecting Revenues and Expenses, 209 I. C. C. and 210 I. C. C. (1935); Coordination of Motor Transportation, 182 I. C. C. 263 (1932); Duplication of Produce Terminals, 188 I. C. C. 323 (1932); General Rate Level Investigation, 1933, 195 I. C. C. 5 (1933); Increases in Intrastate Freight Rates, 186 I. C. C. 615 (1932), and had urged specific legislative remedies for some of the evils. (Annual Report, 1932, pp. 100-103.)

The Department of Commerce, following a general session on the transportation question at the White House on April 1, 1933, organized two conferences to carry on the discussion. One was attended by representatives of the shippers, railroad management, the investors, and the financial interests, and was marked by the extraordinary statement by President Loree of the Delaware & Hudson Company, that an annual saving of one and a half billion dollars, through coordination and abandonment of unprofitable services, was possible (51 Traf. Wld. 676), the other was devoted to a study of the various proposals by railway labor executives.
one important truth: there was need of greater cooperation by all the agencies and individual companies concerned. The idea of coordination offered the greatest hope, not coordination as an abstract or ethereal conception but as a concrete process or method forged during the long and painful experience of generations of railroad men. The history of the railroads of America is from the beginning the story of the gradual linkage and integration of a vast number of single isolated units and types of facilities into more and more of a single, unified national transportation system. The Great War hastened this process. 

In the earliest days of railroads transportation people had been forced to find ways to exchange freight with canal, stage coach, and other railroad lines. At the time canal boats would be hauled on flat cars over certain distances much as loaded trucks are so hauled today. The movement for the interchange of cars, having overcome local statutory restrictions, was successful in the fifties, as was the movement for the standardization of gauge in the seventies. On the other side of the picture it appears that it was by virtue of governmental requirement that the air brake and the automatic coupler were universally installed. Nor was State action effective in preventing widespread pooling of traffic by the railroads from 1870 to 1887 (See two very interesting monographs printed as Langstroth & Stilz, "Railway Cooperation" (1899)), in connection with which there grew up railroad “territories” with their own associations for classification and other rate-making purposes. In 1886 the two “Time Conventions” which had been formed earlier to facilitate time calculation for passenger service schedules were merged to form the American Railway Association, the main function of which, during its early years was to formulate freight car interchange practice and supplementary rules. Its Car Service Division and Shippers Advisory Board have handled the car distribution problem very well. What collective action there was by railroad managements in the years just prior to 1933 was taken through the Association of Railway Executives, which was concerned largely with matters of Federal legislation and other matters of large public consequence.

On the declaration of war the railroads had immediately banded themselves closer together in a serious effort to meet the extraordinary demands made on them, and there was evolved the War Control Board, to which was entrusted by the individual roads a considerable amount of power, but conditions proved to be too extreme for even this unprecedented cooperation by the railroads, as was later explained by Walter D. Hines, a railroad executive who was the first Assistant Director under Government control and later became Director-General, in this way: “Unification to make existing facilities go as far as possible had not been achieved” (W. D. Hines, “War History of American Railroads” (1928), p. 20).

Thereupon by Presidential Proclamation, the Federal Government took over the operation of the railroads. The Director-General was given complete authority over the entire railroad system of the country to the extent necessary to fulfill the needs of the government in war. In the actual course of administration, however, although there were some changes in the details of organization, considerable power was left in the hands of the officers of the individual railroads, who remained in the places where they had been before, and the Director-General’s efforts were largely devoted to the facilitation of the efficient,
yet after its termination, when Federal legislation set the stage for still greater cooperation and coordination, there seemed to be a reaction the other way, which would seem to demonstrate that coordination in any sense of the word has been accepted in the railroad world only under the pressure of dire circumstances in one practical situation after another. Now again in 1933, with one of the greatest emergencies in their history threatening them with disaster, the railroads were ready to experiment again.34

It is probable that the first mention of a Coordinator as a possible government agency to aid in the solution of the railroads' problems in the 1929 depression was made by Commissioner Eastman himself in a speech before the New York Traffic Club on May 20, 1931, where he said:35

"In fact if such cooperation cannot be brought about by voluntary act of the railroads themselves, the alternative is action by the Federal Government. The study and research into the facts which I have suggested to be necessary could be carried on by a federal agency. It might be done by the Commission, or a new department of the government could be organized for the purpose. . . ."

With different emphasis, the same theme was taken up by Commissioner Claude Porter a year later, when he advocated a Director of Transportation to supervise regulation and coordi-

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34 Added stimulus was given to many by the presence of the spectre of government ownership or operation, a presence which was very real (W. M. Daniels, "Towards Nationalized Railroads", 41 Current History 411 (1935)). After the passage of the Act, Kenneth Burgess, a former general solicitor of the Burlington Route, remarked, "The whole scheme of the Emergency Act is an effort to avoid the necessity of government ownership". 52 Traf. Wld. 852 (1933).

There was, in some circles, energetic agitation for outright consolidation on a large scale; among the plans urged were the Prince Plan, reprinted annually in Poor's "Railroads" 1933–1935, the Theodore Prince Plan, described in House Hearings on the Emergency Act, pp. 141–147, and the Amster Unification Plan, referred to, ibid., 122–125; the Commission's own plan, as modified, was not without its supporters, Consolidation of Railroads, 63 I. C. C. 455 (1921), 159 I. C. C. 522 (1939), and 185 I. C. C. 403 (1932).

35 47 Traf. Wld. 1264.
nation of the five chief forms of transport. Mr. Roosevelt in his famous Salt Lake City campaign speech went on record as being strongly in favor of a comprehensive reorganization of the railroad and regulatory structure through consolidation and the elimination of wasteful competition, declaring the principles of his policy to be:

"... avoid financial excesses; adjust plant to traffic; coordinate all carrier service; above all, serve the public reasonably, swiftly and well."

The suggestion as thus developed was incorporated in modified form in the recommendations of the National Transportation Committee. In its report were embodied not only proposals for the unification of regulation but also strong proposals for the elimination of competitive and other wastes, and through it these found their way into some legislation that was drafted and proposed by a group of leading railroad executives, and submitted to the Department of Commerce in April, 1933.

For a better understanding of the railroads' proposition, reference must be made to the large-scale experiment which was being made at that very time by the Western railroads. On December 15, 1932, they had set up a coordinating committee under a "Commissioner of Western Railroads," to whom had been delegated wide powers as to pooling, service, rate matters, and preventable waste, with a duty to conduct research. While this scheme was sufficiently slow in being put into execution so that it was overtaken by the Emergency Act before any great spectacular results appeared, it did furnish something of a pattern to guide the draughtsmen of the proposed legislation. In the bill the problem of competitive waste was to be attacked by

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38 The majority, with reference to the reorganization of the Commission, urged that: "Either one man or at most an executive committee of three, should have exclusive responsibility and authority in all executive functions." (Report printed in "The American Transportation Problem", III). And Alfred E. Smith remarked provocatively: "I favor the abolition of the Interstate Commerce Commission and the creation in its place of a new department of transportation headed by one man, or a one-man bureau in the Department of Commerce determining policies with the approval of the Secretary of Commerce. What we need is a new transportation system, not endless hearings on a system that does not work." (Ibid., p. lvii.)
39 51 Traf. Wld. 639, 779.
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regional coordinating committees of railroad executives in the eastern, southern, and western regions of the country, to which were to be entrusted full powers to carry out coordination measures and to issue orders in the enforcement thereof, free from the restrictions of the anti-trust laws, and which were to be aided by a Federal Coordinator who was to have powers both of extensive investigation and of review over committee orders, with final, though optional, review of action taken vested in the Interstate Commerce Commission. The bill was referred to a committee consisting of Commissioner Eastman, Dr. W. M. W. Splawn, then chief counsel to the Committee on Interstate and Foreign Commerce of the House of Representatives, and A. Lane Cricher, chief of the Transportation Division in the Bureau of Foreign and Domestic Commerce, which had been set up after the April conferences at the Department of Commerce to study "the Prince Plan" and other proposals then made, and it formed the basis of the draft for a proposed bill which this committee then reported to the President. After a small conference at the White House further hearings were held for representatives of the various interested groups. Thereupon the President appointed a committee of six, which was known as "the President's Committee," to complete the final preparation of the measure for submission to the Congress.40

On May 4, 1933, in submitting the prepared measure to the Congress President Roosevelt recommended:

"as a temporary measure . . . the creation of a Federal coordinator of transportation who, working with groups of railroads, will be able to encourage, promote, or require action on the part of carriers, in order to avoid duplication of service, prevent waste, and encourage financial reorganizations. Such a coordinator should also, in carrying out this policy, render useful service in maintaining railroad employment at a fair wage."41

40 Its members were Commissioner Eastman, Secretary of Commerce Roper, Dr. Splawn, Senator Dill (Chairman of the Senate Committee on Interstate Commerce), Representative Rayburn (Chairman of the House Committee on Interstate and Foreign Commerce) and Secretary of the Treasury Woodin; Senate Hearings, p. 11, House Document, 324 Ser. 9751, 73rd Cong. 1st Sess.

41 Referring to Title I of the Emergency Act. Title II, which is not relevant to the immediate purposes here, although extremely important in the development of the Interstate Commerce Act because of its repeal of the recapture clause, of its broadening of the consolidation provisions, and its extension of the Commission's jurisdiction over holding companies.
He concluded:

"The experience gained during the balance of this year will greatly assist the Government and the carriers in preparation for a more permanent and a more comprehensive national transportation policy at the regular session of Congress in 1934."

From the last sentence it is clear that the Act was submitted as an experiment, and it is interesting to observe the note struck here (that this was only very temporary) in the light of the developments later on when a good many people came to think of the Coordinator more as a permanent agency. Also referred to in the message were the railroads' most pressing problems of the day in the suggestive key-words: "waste," "financial reorganizations," and "maintaining railroad employment."

At the close of the Presidential message the tentative Act was introduced into the Senate as Senate Resolution 1580 \(^{42}\) and into the House as House Resolution 5500 \(^{43}\) and was referred to the appropriate committees. The important problems raised by the President and many others were fully discussed in the committee hearings, which lasted four days in the Senate with fifteen witnesses \(^{44}\) and nine days with eighteen witnesses and four statements in the House \(^{45}\). Among the main witnesses heard by the committees were Secretary Roper and two members of his original committee, Commissioner Eastman, whose testimony was more extended than that of any other, Dr. Splawn, Carl Gray of the Union Pacific for the large railroads, R. V. Fletcher, general counsel of the Railway Executives, and Donald Richberg, representing the Railway Labor Executives' Association. Also represented were the State Commissions, the Electric Railways, the Short lines, the National Industrial Traffic League, the National League of Commission Merchants, the People's Lobby, the Water Carriers, and various labor interests. It was well established during the course of the testimony that the Coordinator was not to be a "czar," that his function in the line of research and study loomed very important in the minds of most of the witnesses, and that the labor question was the most delicate one presented by the bill. While the railroad managements accepted the bill, which differed radically from theirs in certain respects,

\(^{42}\) 77 Cong. Rec. 2860.
\(^{43}\) 77 Cong. Rec. 2908.
\(^{44}\) Senate Hearings, Emergency Railroad Transportation Act, 1933.
\(^{45}\) House Hearings, Emergency Railroad Transportation Act, 1933.
without enthusiasm, and labor looked on its passage as inevitable and so contented itself with offering numerous sweeping amendments, and the State Commissioners were represented as being apprehensive about the Coordinator's power over their work, the representatives of the Administration stood out strongly for this bill. That action was needed, all were agreed, yet whenever a provision affected the particular interest, then the bill was defective, in the eyes of those concerned with that interest.

Like most legislation the final enactment represented a compromise between conflicting interests and to some extent between conflicting theories. Few important changes and additions had been made to the original draft presented by the President's Committee. The short lines, well remembering the rough handling they received during the regime of the Director-General during the War, sought amendment, not accepted in Committee, to prevent unfair elimination of joint routes. Both the short lines and the electric lines sought representation on the regional coordinating committees. Further safeguards were inserted for the interests of the States. The investigatory duties of the Coordinator were clarified by the specification of labor conditions and relations as a subject of study. Section 16, making special provision for court appeal, was also added. Far more important, however, was the entirely new Section 7, the labor section, which was inserted by the Senate Committee after the close of the hearings. As will later appear, the practical

46 Senate Hearings, pp. 175–179, 192–195. The Final Amendment, the Proviso in Section 4 of the Act, was added on the floor of the Senate.
47 This found its way into Section 2 of the Act.
48 In Secs. 9 and 16.
49 Sec. 13.
50 The Committee explained its action in this way: "Your committee gave the most careful consideration to the proposals of the railroad labor executives. They insisted that economies to be secured should not result in additional dismissal of large numbers of railroad employees. More than 750,000 railroad employees have been dropped from the payrolls during the hard times period. There are approximately one million men left in service. Your committee believes that the people as a whole and particularly the railroad employees still in service, should be assured by the terms of the law itself that there will be no wholesale dismissals by the Coordinator or the regional committees. For these reasons your committee amended the bill so the coordinator cannot dismiss employees, but his orders may result in reducing the number of employees each year by making it unnecessary to fill vacancies caused by death, retirement or resignation. In case business improves and more employees are needed, the coordinator can make an order to absorb that additional number so long as the
effect of the addition of this provision was to transform the entire nature of the Act. Section 7 also now provided for the compensation for employee property losses resulting from the execution of coordination projects. Thus amended, the Emergency Act was brought onto the floor of Congress.51

In the Senate after two days of debate the Emergency Act, which had been in charge of Chairman Dill of the Committee on Interstate Commerce, was passed,52 and nine days later in the House, where Representatives Rayburn and Parker had been in charge of it, similar action was taken.53 In neither house was this debate very exhaustive or spirited.54 Supporters urged the particular facts of the emergency situation out of which the Act had grown, the universal demand for action, and the general support of the various interests for this proposal, which represented only a mild advance in regulation and which could not injure labor. Opponents attacked the bill on the one hand as constituting little more than a re-enactment of certain parts of the Interstate Commerce Act or, on the other hand, for introducing dictatorship into railroad regulation. The cry of unconstitutionality was raised twice, by Senator Borah and Representative Beck,55 but was not discussed. Doubters questioned the effect of the labor restrictions, on the one hand, as to their efficacy in safeguarding the interests of labor, and on the other, as to their devastating effect on the rest of the Statute, except for Section 13. The need for research and study was unanimously recognized and generally favored, yet emphasis on the more controversial issues diverted, to some extent, attention from that very salutary provision. Particularly stressed was the danger of encroachment on the rights and on the regulative practices of the States, and Senator Wheeler, now (1937) chairman of the Senate Committee on Interstate Commerce, attacked the measure as a scheme of a small number of selfish investors in railroad securities to preserve their investments in time of present number of employees is reduced." (Senate Report 87, 73rd Cong., 1st Sess., printed in 77 Cong. Rec. 4250.)  


52 77 Cong. Rec. 4441.
53 77 Cong. Rec. 4999.
54 In the Senate, 77 Cong. Rec. 4247, et seq. 4429, et seq. In the House, 77 Cong. Rec. 4852, et seq., 4934, et seq.
55 77 Cong. Rec. 4434, 4946.
stress. In general, the broad outline of the proposed purpose and function of the Coordinator and his office was adequately and sympathetically placed before the Congress, and the overbearing good sense of it at a time when action was desperately needed assured its passage from the start.

B. The Act

On June 16, 1933, the Emergency Railroad Transportation Act, 1933, became effective. It contained two titles, the first dealing primarily with temporary emergency measures, and the second embracing permanent amendments, to the Interstate Commerce Act. The latter, although of great significance, are not strictly relevant to a study of the Federal Coordinator of Transportation.

The main structure of Title I consists of provisions establishing the office of Federal Coordinator of Transportation, provision for regional coordinating committees selected by the carriers on the basis of the Coordinator's designation of three regional divisions of the nation's railroads, specification of the purposes of the Act and of the powers and duties of the Coordinator and the committees, restriction of the foregoing by the enumeration of certain safeguards for the rights of employees, and finally, the sections dealing with review and enforcement of orders. One section, Section 15, elaborates the standard to be applied by the Commission in approving railroad applications for Reconstruction Finance Corporation loans, and, while it is an emergency measure, is not closely related to the rest of Title I, and therefore will not be further treated here.

77 Cong. Rec. 4270-4281.
8 The minute differences between the Senate Bill and the House Bill were ironed out after Conference and the reports approved June 9, 1933 (77 Cong. Rec. 5398, 5435). One compromise was on the assessment of the railroads, then a unique method of supporting Federal regulation, yet assented to by them, to the amount of $1.50 a mile instead of the Senate's $2.00 a mile and the House's $1.00.
8a Secs. 201-209, 48 Stat. 217-221. Title II amends the Interstate Commerce Act by repealing the recapture clause (the old Section 15-a as enacted in 1920) and substituting for it general language establishing a vague standard of reasonableness of rates, by expanding the authority of the Commission to embrace direct control of holding companies and by remoulding and strengthening the consolidation and combination provision of Section 5 in requiring among other things closer adherence to the Commission's prescribed plan of consolidation and to the old policy of inter-railroad competition, except when a Commission order gives relief from the anti-combination provision of this or any other acts.
Turning now to an examination of the principal provisions of the Act in more detail, Section 2 provides for the establishment of the office of Federal Coordinator of Transportation, "in order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate system of national transportation." The Coordinator is to choose his staff without regard to the civil service laws or the Classification Act, subject to the approval of the President, and, of course, he is not to sit on the Commission while it reviews one of his orders.

Section 3 provides for the division of the carriers of the country into three groups by the Coordinator, and for the formation of the corresponding regional coordinating committees, each consisting of five regular members, and two special ones, one to represent the short lines, and one the electric lines in matters concerning them. The members are to be chosen through the regular management channels, the vote of each railroad being accredited according to its mileage, but no railroad being allowed more than one representative on any committee.

The next section, Section 4, declares the purposes of Title I to be:

"(1) to encourage and promote or require action on the part of the carriers and of subsidiaries, subject to the Interstate Commerce Act, as amended, which will (a) avoid unnecessary duplication of services and facilities of whatsoever nature and permit the joint use of terminals and trackage incident thereto or requisite to such use: . . .;
(b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense; (2) to promote financial reorganization of the carriers, with due regard to legal rights, so as to
reduce fixed charges to the extent required by the public interest and
improve carrier credit; (3) to provide for the immediate study of
other means of improving conditions surrounding transportation in all
its forms and the preparation of plans therefor."

This section is the key-section of the whole statute. It offers
guidance to courts in interpreting other sections. It outlines
the broad considerations which evoked the statute and suggests
an approach to the resolution of latent ambiguities elsewhere in
the statute. In other words, this section sets the tone, provides
the medium against which the detailed provisions of the remain-
ing sections of the Title are projected.

The following section puts on the committees the duty of
initiating carrier action to carry out the purposes enumerated
in paragraph 1 of Section 4, so far as can be voluntarily accom-
plished by the carriers. In cases where they are unable so to do,
the Coordinator is given the power to issue orders, if in the
public interest and "in furtherance of the purposes of this
title." Section 6 provides for cooperation between the Coordi-
nator and the committees, and he is given access to all records
and other necessary materials, and in addition, the members
and examiners of the Commission are given power to administer
oaths and require by subpoena the attendance and testimony of
witnesses and the production of materials and the taking of
depositions in his aid, and the same rights, privileges, and immu-
nities are accorded persons testifying that apply to persons tes-
tifying before that body. As to orders, this section provides
that:

"If, in any instance, a committee has not acted with respect to any
matter which the Coordinator has brought to its attention and upon
which he is of the opinion that it should have acted, under the pro-
visions of Section 5, he is hereby authorized and directed to issue
and enforce such order, giving appropriate directions to the carriers
and subsidiaries subject to the Interstate Commerce Act, as amended,
with respect to such matter, as he shall find to be consistent with the
public interest."

This section provides the club which the Coordinator can hold
over the heads of those railroads who do not wish to cooperate.
In the previous section room was allowed for action when taken
on the initiative of the carriers, here the broadest discretionary
power is granted, the only apparent standard being, if the words
of the section alone be taken, consistency with the public interest.
Latent in much of this language are ambiguities. The more strik-
The vital labor section, Section 7, is the most controversial in the Act. It first permits labor organizations, both those represented in the Chicago agreement of 1932 and those not so represented, to form parallel committees to the regional committees, and confers upon the latter, or the Coordinator, as the case may be, the duty to confer with the former before taking action affecting their interests. Paragraph b, the crucial one, limits the reduction in the number of employees of any carriers "by reason of any action taken pursuant to the authority of this title" below the level existent in May, 1933, less a deduction, not exceeding 5% a year, of the number of employees who have died, resigned or normally retired. This paragraph further guarantees to each employee who was on the payroll in May that he shall not "be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." The legal questions raised by this paragraph will be dealt with later, so suffice it to remark that more sweeping language in a statute than this would be hard to find.

Section 7, paragraph (c), authorizes the establishment of regional boards similar to those provided for in the Railway Labor Act for the settlement of controversies arising out of action taken under the authority of the Act, also for the compensation of employees for losses suffered from transfers from one community to another on account of coordination activities. Finally, paragraph (e) requires the carriers, "whether under control of a judge, trustee, receiver, or private management" to comply with the Railway Labor Act and with those parts of the Hastings Bankruptcy Act which forbids the change of wages or conditions of railroad employees other than in accordance with the Railway Labor Act or the Chicago agreement, and also which forbids the exercise of influence over the employee’s choice

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62 Part III, infra.
63 This embraced practically all the Brotherhoods and major railroad organization of the country, in the direct line of operating and associated functions. 92 Railway Age 232 (1932).
64 44 Stat. 577.
65 47 Stat. 1467.
as to labor organizations, which includes outlawry of yellow dog contracts.

The publication and taking effect of orders, which are to remain in effect until vacated by the Coordinator or suspended or set aside by the Commission "or some other lawful authority, as hereinafter provided" is provided for in Section 8, which also affirms the power of the Coordinator over pooling arrangements and compensation for the use of property as he deems necessary or desirable.

Because Section 9, which outlines rather fully the procedure to be followed in administrative review of Coordinator orders, is extremely important, for the sake of accuracy it is set out in full here:

"Any interested party, including, among others, any carrier, subsidiary, shipper, or employee, or any group of carriers, shippers, or employees, or any state commission, or the Governor of any State, or the official representative or representatives of any political subdivision thereof, dissatisfied with any order of the Coordinator may, at any time prior to the effective date of the order, file a petition with the Commission asking that such order be reviewed and suspended pending such review, and stating fully the reasons therefor. Such petitions shall be governed by such general rules as the Commission may establish. If the Commission, upon considering such petition and any answer or answers thereto, finds reason to believe that the order may be unjust to the petitioner or inconsistent with the public interest, the Commission is hereby authorized to grant such review and, in its discretion, the Commission may suspend the order if it finds immediate enforcement thereof would result in irreparable damage to the petitioner or work grave injury to the public interest, but if the Commission suspends an order, it shall expedite the hearing and decision on that order as much as possible. Thereupon the Commission shall, after due notice and a public hearing, review the order and take such action in accord with the purposes of this title as it finds to be just and consistent with the public interest, either confirming the order or setting it aside or reissuing it in modified form, and any order so confirmed or reissued shall thereafter remain in effect until vacated or modified by the Commission."

Section 10 relieves the carriers, when under order and to the extent required by the order, from the operation of the Anti-Trust Laws and "of all other restraints or prohibitions by law, State or Federal, other than health or safety measures, except the requirements of the Railway Labor Act." This broad and significant provision is modeled on paragraph 15 of Section 5 of the Interstate Commerce Act. It then provides for notice to State officials before orders are issued which affect their interest. The strong concern on the part of certain outspoken legislators for interests of the individual states and their regulations
was responsible for the emphasis placed on the safeguarding of the States’ interests, which is illustrated by this extra check on the issuance of orders which afford relief from any State law or order:

"The Coordinator shall issue no order . . . unless such order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce."

The following section protects existing contractual obligations incurred prior to the enactment of the Act "with regard to the location or maintenance of offices, shops, or roundhouses at any point," and then in turn are penal provisions providing heavy fines for non-compliance with orders, prosecutions for which are to be by United States District Attorneys.66 There is also a proviso affording protection against enforced personal service and against interference with individual or collective "refusal" to work.

In the light of the subsequent administrative history Section 13 is by far the most important. In prescribing the Coordinator’s duties of investigation the Congress directed studies over a very wide area. They were to be comprehensive and extensive under the general head of considering "means of improving transportation conditions throughout the country." Cost finding, labor, and legislation were specifically referred to, and also the ability of the railroads, "financial and otherwise," to help themselves. In general, the language was broad and the Coordinator free to carry on about what he wanted to within the broad limits, but its tone strongly indicated that the purpose of the studies was to aid management and take the industry’s point of view rather than the attitude of a regulatory body studying these problems from a government point of view.

The next section, number 14, provides for the method of financing the Coordinator’s work, unusual in the field of Federal regulation at that date, by assessment of the roads on a mileage basis,67 and the final two sections68 are concerned with court

66 The imposition of a duty on the district attorneys "to prosecute . . . all necessary proceedings for the enforcement of the provision of this title and for the punishment of all violations thereof . . ." indicates that the non-criminal remedies employed in enforcing orders of the Interstate Commerce Commission are intended to be authorized in addition to the ordinary criminal ones.

61 For the first year this was $1.50 a mile, for the second $2.00 (48 Stat. 954), and for the third $2.00 (49 Stat. 376).

68 Section 15 is the section dealing with Commission review of R. F. C. loans.
review of orders under the Urgent Deficiencies Appropriation Act\textsuperscript{69} (as all Commission orders are reviewable) and the duration of the Title (which is to be one year, unless extended a year or less by Presidential Proclamation), but Coordinator orders or Commission orders made under Title I are to remain in effect until vacated by the Commission "or other lawful authority," but this does not apply to so much of any order as affords relief from a State law or State commission order. By proclamation of May 4, 1934, the Statute was so extended, and by Senate Joint Resolution 112 of June 14, 1935, it was extended for the third year,\textsuperscript{70} which kept it in effect through June 17, 1936, at which time the Congress failed to take the necessary action, with the result that Title I passed out of existence on that day.

This survey of the provisions of the emergency title of the Act\textsuperscript{71} demonstrates that the final product of the legislative process was still in conformity with the letter and spirit of the President's message. The original scheme brought forward by the railroads of setting up regional committees with powers and duties to carry out joint action with the cooperation of a Federal officer and free from the restraints of the Anti-Trust Laws had been substantially preserved. The power sought by the railroads for the committees had been vested in the Coordinator, though their duties remained much the same. The power to order, as set forth in Sections 5 and 6, and as necessarily delimited by Section 4, if such a wide declaration of purposes could be said to "delimit," was very broad. Roughly, any order which in the Coordinator's mind would make for the elimination of waste and rehabilitation of the American railroad system, would be permissible. Accordingly, the Coordinator was empowered by these words to become in fact, if he would, the manager of the railroads' affairs. In the light of subsequent developments and the kind of discussion to which this paper must confine itself

\textsuperscript{69} 38 Stat. 219.
\textsuperscript{70} 49 Stat. 376.
this aspect is apt to be obscured, but it is a point which should not be passed over.

To return to the all-important Section 4, one thing that stands out is the emphasis on voluntary action by carriers. The purpose is "to encourage and promote or require action." Clearly this legislation is in line with other recovery legislation which attempts to bring about desirable results by stimulating joint action, leaving somewhere in the background power to bring about similar results by legal process if all other means fail. This legislation is not primarily legislation for the "control" of the railroads, but rather one for the performance of "service". Of the latter inevitably some regulation was a necessary consequence, but it is important to notice that of the two demands made of emergency legislation, namely, extension and unification of government regulation of transportation and the elimination of competitive and other wastes, only the latter was directly dealt with by Title I. To the disposition of the Coordinator under Section 13 were referred all suggestions for further extension of regulation.

Not only was the power to order implicitly restricted by the emphasis placed in Section 4, but it was explicitly restricted by Section 7. The nicely balanced machinery which had been set up by earlier portions of the statute was, to state it mildly, disturbed and deranged by the restrictions the effect of which was to freeze the total railroad payroll at the point where it was in May, 1933, with but small allowance for natural reductions, and to give each railroad employee something of a "vested right" in his job, at least with reference to any action taken by the carriers under the Act. As a result, serious consideration of the effect of the restrictions in the particular situation involved was necessary even before an order could be contemplated by the Coordinator. In his testimony before the Congressional Committees, Commissioner Eastman had suggested the following as a partial list of possible areas for the operation of the Act, adding suggested remedies (in parenthesis):

Unnecessary duplication of service or facilities, including
Wastes at large railroad centers (joint use of freight and passenger terminals, etc.)

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72 The distinction is taken from Ernst Freund, "Administrative Powers Over Persons and Property", Chapter 1 (1928).
73 Senate Hearings, p. 20; House Hearings, p. 32.
Unnecessary passenger and freight train service (pooling)
Use of circuitous routes
Extravagance in the solicitation of traffic
Waste in equipment repair expense (joint use of shops)
Waste in passenger ticket offices (consolidated ticket offices)
Reduction of unprofitable services (substitution of motor transportation)
Wasteful practices in Merchandise Traffic Handling (cooperation between railroads)
Wasteful practices in the operation of unnecessary motor-bus or truck service paralleling rail service
Unsatisfactory accounting practices
Unnecessary allowances to large shippers for services
Unduly low charges for warehousing and accessorial services
Waste in the use of Equipment (pooling, change in car-rentals)
Wasteful practices in purchasing equipment, supplies, etc.
Wasteful practices in the payment of damage claims
Wasteful practices in dealing with freight forwarding companies
Wasteful rate policies (to be met by general plans to adjust the freight rate structure to modern needs)

It is submitted that of all these items only the last eight would be free from the labor restrictions. Conceding that there is a small area left by the 5% a year allowance for the reduction of forces in connection with the upper nine items and that other savings might be made without the discharge of labor, the powerful fact still remains that the great savings most railroad men had anticipated were largely at the expense of labor, and that these now were substantially blocked. This condition was bound to exist in the railroad industry, because it is a service industry the rendition of which depends to an exceedingly large degree on human labor. The result of this condition was, as will appear subsequently, that the machinery set up by the early sections of the act was from the start practically idle, except insofar as a function was found for it in connection with the great volume of work done under Section 13 and in connection therewith.

The Emergency Railroad Transportation Act, 1933, in common with the National Industrial Recovery Act and the Agricultural Adjustment Act, as well as with the Interstate Commerce Act, as amended by the Transportation Act in 1920, was strengthened by a provision affording relief from the Anti-Trust

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75 48 Stat. 195.
76 48 Stat. 31.
77 Section 5 (15).
Laws and other State and Federal laws restricting its action. Here the Congress granted a very broad dispensing power to the Coordinator. No law or governmental order in the United States was beyond his power, if it interfered with the carrying out of his functions under the Act. Yet again, as in the case of Sections 5 and 6, if this were construed along with the general purpose and aims of the statute, it was far less broad than appears at first blush. Its indispensability cannot be disputed, for the enforced competition policy of both the Interstate Commerce Act and the Anti-Trust Laws flatly conflicts with the methods and immediate aims of coordination as set forth above.

In sum, the Emergency Act, which was once termed "probably as complicated and complex a bill as ever came before the Congress of the United States," like most pieces of legislation represents a piece of patchwork. Onto the strong basic structure embodying machinery well adapted to carry out that kind of coordination which many interests had called for and the railroads themselves had proposed for themselves, were appended qualifications and restrictions dictated by policies seemingly in direct conflict with the policy of coordination to eliminate waste. (The policy of maintaining employment at the May, 1933, level was in apparent conflict with the policy of cutting expenses by the elimination of those employees whose services were really of no benefit to the railroad economy in order to strengthen the railroads' financial position.) In practice the appendages dictated the fate of the Act, and the effectiveness of the dominant policy of encouraging coordination, while not completely or permanently checked by it, was in a measure retarded thereby, and the carrying out of that policy because of them, largely forced into the form of action under one small segment, rather than under the whole large scheme envisaged by the proposers of the Act.

(To be concluded in the May issue.)

Statement of Representative Parker of New York on the floor of the House, 77 Cong. Rec. 4861, referring undoubtedly to the combination of the comprehensive emergency measures and the intricate amendments to the Interstate Commerce Act contained in Title II.