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Samuel Earnshaw

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THE FEDERAL COORDINATOR OF TRANSPORTATION
(Concluded)

By Samuel Earnshaw*

III

THE FEDERAL COORDINATOR OF TRANSPORTATION

A. THE ADMINISTRATION OF THE EMERGENCY ACT

The administration of the Emergency Act, like the great part of all government administration through administrative agencies, was undramatic and unsensational, but none the less important and effective. Attention will first be directed to the background and quality of the man who was Federal Coordinator of Transportation during the three year period. Not only had he more than any other individual presented and developed the nature of and necessity for coordination in transportation, but also he had a strong hand in moulding the Act itself. His work directed toward the reorganization and rehabilitation of the railroads was magnified many times by the Coordinator machinery which he established in accordance with the Act, and, though the power to order was scantily exercised, the many reports and recommendations for legislation that appeared bear witness to the effectiveness of this machinery. These are to be considered in turn, and, finally, a hasty survey made of the instances where, by the sheer force of personal contact between the Coordinator or one of his staff members and the appropriate person supported by the persuasiveness of the good sense of the proposed idea itself, as backed up by studied facts, progress has been made toward the desired ends.

On the day the Emergency Act went into effect, the President appointed to the office of Federal Coordinator of Transportation Interstate Commerce Commissioner Joseph Bartlett Eastman. He had been a member of the Commission since February 27, 1919, when President Wilson had appointed him at the sug-

*By Ex. Order No. 6196 of July 6, 1933, Coordinator Eastman's appointment was officially proclaimed and he was relieved from his duties as Commissioner to the extent required by his new office.
gestion of Mr. Justice Brandeis, with whom he had been associated six years before in connection with the investigation of New England railroads by the Commission.80 Before coming to the Commission he had had opportunity to become familiar with street railway companies and other public utilities as Secretary to the Public Franchise League in Boston for seven years, following which he was a member of the Massachusetts Public Service Commission, having been appointed in 1915. That he gained the respect of the railroads generally is demonstrated by the fact that they gave him strong support, as did many other organizations, when his reappointment was contested in 1929.81

No man was better qualified to undertake the task of organizing the Coordinator's office and carrying out its work than Commissioner Eastman.82 The combination of intimate acquaintance gained with the problems of local regulation in Massachusetts and fourteen years of experience marked by "high competence and great service" on the Commission afforded background for the administration of this office of the highest quality. His stand on the great policy questions of the day has always been clearly defined and fully considered. Very marked is his leaning towards concentration of power in the Federal Government over railroads and associated transportation industries. In a brief submitted to the Commission in 1913 in the New England Railroads Case83 he concluded:84

"One lesson which this history teaches is that the Federal Government must extend the scope of its supervision and regulation over interstate carriers."

His suggested remedies in that case, which were substantially adopted by the Commission in its report85 are interesting:

"1. Federal supervision over capitalization and the issue of securities by interstate carriers.

"2. Federal limitation and regulation of the power of acquiring and holding stock and the securities of other companies.

"3. Federal supervision of all subsidiary companies and enforced publicity, by this means, of their affairs."

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83 27 I. C. C. 560 (1913).
85 p. 616.
The emphasis placed on publicity as a sanction, that appears in Point 3, suggests what will be found to be true later on, Eastman's recognition of the all-important role played by public opinion in any question of relationship involving government regulation.

His strong adherence to the philosophy suggested above coupled with his hard-headed independent thinking on problems in a field with which he is thoroughly familiar and in which he sees further significances, has led him to be distinguished as "the great dissenter of the Commission." So a commentator, remarking on his 400 dissenting opinions and his 200 odd opinions for the Commission sums up his approach as a Commissioner in this way:87

"A consistent thread runs through his decisions. He has condemned control of the railroads by holding companies, criticized fees and charges paid out in the reorganization of bankrupt carriers, and again and again since 1920 he has urged the policy he emphasizes as Coordinator—that the railroads must modernize their rates and services to keep pace with the new forms of transport."

Not inconsistent with this is his strong advocacy of the prudent investment theory of valuation88 and his opposition to no-par stock,89 and his constant insistence on adherence to the letter of the basic statute in administration.90

While keenly aware of the nature of the administrative process in the hands of the Commission,91 and deeply convinced of the need for the extension of Federal control beyond the limits

86 Of the 44 men who have sat on the Commission, Eastman is the only one whose political affiliation is recorded as "Independent".
88 Petition of National Conference on Valuation, 84 I. C. C. 9 (1923).
91 "In determining such questions (referring to determination of valuation question) knowledge of pertinent facts and an experience which makes it possible to visualize the probable results of a particular public policy are quite as important as familiarity with the law books. It is an instance in which the law is influenced if not governed by the facts. When, therefore, the question relates to the constitutional limits of the public regulation of railroads, an intimate knowledge of railroads, of their relations with and their importance to shipping and investing classes and to the public generally, and of their past history and future prospects becomes of the highest consequence. Such knowledge it is the peculiar duty of this commission to acquire." Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 50-51 (1927).
of the enactments, Commissioner Eastman always stood out firmly for the protection of a certain area of judgment in management into which no invasion should be tolerated as long as the railroads were privately operated under the Interstate Commerce Act. In *Reduced Rates*, 1922, in discussing the propriety of the Commission ordering a reduction in passenger fares he said:

"This, however, is not a matter which can be determined with any degree of certainty. It is rather a question of business judgment or wisdom. One of the chief objects of the return of the railroads to their private owners was to reap the advantages of the exercise of private initiative. While public regulation is necessarily an interference with management, it was not the intent of the act, as I read it, that we should substitute our judgment for the judgment of managers under such circumstances as these."

It is known that this attitude was the same with reference to the similar passenger fare case decided by the Commission in 1936, although he did not sit on the case when it was before the Commission on its merits. Accordingly, it would be inaccurate to cite Commissioner Eastman as an advocate of more regulation of every kind. His leaning, and it is only a leaning, not a relentless, metallic, inflexible compulsion, is subject to this very important qualification when the question of affirmative management is concerned, and his whole attitude towards the Emergency Act, although it has been demonstrated to have conferred very full powers of affirmative management, bears out the fact that in this as Coordinator his inclination did not change. As long as the railroads were under private management, they were to be the managers within the limits set by the minimum necessities of regulation. On the occasion of his appointment as Coordinator Mr. Eastman attempted to allay the fears of those who suffered trepidation at the thought of his sympathies for government ownership and at the same time of those who feared a dictatorial exercise of the granted powers by issuing a statement including the following:

"The Emergency Railroad Transportation Act, 1933, does not pretend to be a complete or final answer to the transportation problem of the United States, nor does it put the railroads under the control of a

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68 I. C. C. 676, 740 (1922).

"Passenger Fares and Surcharges, 214 I. C. C. 174 (1936). Commissioner Eastman sat only on a subsequent petition of the carriers for a suspension of the order in order to allow a substitute experiment on their part. (57 T. W. 773.)

June 16, 1933, 51 Traf. Wld. 1261."
Federal railroad czar . . . it sets up a Federal Coordinator of Transportation, who is not to manage the railroads, but whose duty it is, with the aid of the Interstate Commerce Commission, to help the railroads in exploring all possibilities for the avoidance of waste. . . ."

On the one occasion when a major order was issued the Coordinator seemed to go beyond this, or at least he was criticized for so doing,95 but it is submitted that that was just one occasion, and the circumstances there were almost unique. An isolated instance like this may or may not be of any significance or aid in forming a judgment as to the trend of a man's thought. With this brief review of the administrative philosophy of Joseph B. Eastman, it now remains to turn to an examination of the work accomplished under his guidance and leadership.

In discussing the various phases of the administration of the Act by the Coordinator it will be more convenient, for most purposes, to treat the three-year period as a unit, rather than to pause over chronological niceties which are now without significance. For example, the chart of the Coordinator's organization as set up by January, 1935, given herewith,96 is not an accurate picture of the organization in any of its stages of development except the state reached in that month, which was the stage of greatest extension, yet it will serve well enough for the purpose of indicating just how the Coordinator attacked the problem of setting up an organization.

The chart itself needs but little comment. Any mechanical static picture of this kind of a functioning organization is bound to be misleading, but in the main this chart shows the type of organization that was set up. Its most noticeable feature is, of course, the completeness with which the staff is given over to research. Only the regional directors and the executive assistants appear to have a normal function of administration as such, though in the course of events, minor executive duties fell to the lot of other staff members.

The field of research and study is divided up amongst the five special sections and the Research Staff, which latter is the catch-all for problems not falling under one of the other heads and some that do. The various regular advisory committees

95 Infra, pp. 305-308.
96 Mechanical difficulties forbade the reproduction here of the chart referred to, which was taken by Mr. Earnshaw from 98 Railway Age 116 (1935).—Ed.
of railroad men which appear at several points on the chart served to afford the regular staff the technical assistance they needed in the course of dealing with general problems of policy and attack. Similar to these were special advisory committees who were usually called on to deal with particular problems, such as the informal Advisory Committee on the Passenger Traffic Report of the Section of Transportation Service, which consisted of three University professors, two motor bus men, and six railroad executives.

The positions described above were filled by the Coordinator, for the most part, with railroad men. From the very start it was apparent that the total of available funds would be small and that in consequence, the burden of the work would have to fall elsewhere, either on the railroads or on the Commission. The Coordinator selected for his staff only experts of the highest standards. Many were high railroad officials, the great majority of the others were closely connected with the transportation industry. The shortness of the term to be served and the high appeal of the call to service in the moment of national emergency undoubtedly made possible the Coordinator’s securing of exceedingly able men from the entire country.97

It was recognized from the start that the Coordinator would have to lean mainly upon the Commission for assistance in a good many ways, particularly as to personnel. A few men were transferred permanently to the Coordinator’s staff. Others were loaned for specific purposes. In addition, clerical and other staff help was loaned to the Coordinator for varying periods of time.

In sum, the Coordinator, favored by circumstances, secured within a remarkably short time an expert, well-organized staff,  

97 A random list of those in the first class mentioned would be: J. R. Turney, Director, Section of Transportation Service, vice-president of the St. Louis Southwestern Railway, H. J. German, Eastern Regional Director, president of the Montour Railroad, M. J. Reynolds, Assistant to Director, Section of Trans-Pacific Company, V. T. Boatner, originally Western Regional Director, president Chicago Great Western Railroad 1929–31; and in the second category: Leslie Craven, Counsel, valuation counsel to the western railroads 1919–1932, R. L. Lockwood, Director, Section of Purchases, Department of Commerce and consultation work, W. H. Chandler, Eastern Traffic Assistant, active in traffic work, Otto Beyer, Research Department, later Director, Section of Labor Relations, consulting engineer as to labor relations, and John L. Rogers, originally Executive Assistant, special examiner for the Interstate Commerce Commission.
well able to deal with the major task of research which was its major assignment, reinforced by continuous free access to the technical resources of both the railroads and the Commission.

While under this organization there was a high degree of centralization in Washington, there was also local representation in the field. The Coordinator’s representatives were to serve both in aid of localized study and in the execution of final plans formulated by the central organization in Washington, being able to act from the vantage point of being on ground with which they were already familiar.

In anticipation of final action on the Act by the Congress, the railroads had set up “economy committees” to deal with problems of waste. When the Act was passed, these committees were not abolished. The regional committees which were set up under the Coordinator’s supervision in accordance with the terms of the statute bore a strangely close resemblance to them and were dominated by the same strong men of the railroads.

The work of these committees, which fell far below what had been expected of them, will be discussed incidentally later, and it is only necessary to point out here that their short-comings are not traceable to any organizational defects, but, on the contrary, the machinery provided for interchange of information was perfectly adequate for all demands made upon it. When the Association of American Railroads was formed at the end of 1934, it superseded to a large degree the committees as the connecting body between the Coordinator and the carriers.

Turning now to the formal orders issued by the Coordinator, the three minor orders issued need but little comment. The

98 General Order Number 1, issued July 1, 1933, requested certain basic employment data from the railroads, necessary for the Coordinator in the enforcement of the labor provisions of the Act. (See mimeographed copy of order issued by Coordinator, or 52 Traf. Wid. 140.) Among other things, the railroads were required to furnish figures monthly showing employment by occupational group and the comparison of these with the corresponding figures for May, 1933. This order remained in effect until vacated by the Commission in July, 1936, when there was found to be no further use for these figures, the labor provisions having expired with the Emergency Act the previous month. (101 Railway Age 157.)

The second order issued was Special Order Number I, issued July, 1933, in connection with the consolidation of the accounting work of the Boston and Maine and Maine Central Railroads involving the transfer of 115 employees from Boston to Portland and approximately 118 from Portland to Boston, all of whom applied for compensation
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most important order issued was one issued on October 25, 1934, the effect of which was to prevent two southern railroads operating segments of a Chicago-Florida passenger service through Evansville, Indiana, from transferring their interchange of through passenger cars at that point from one railroad, the Chicago & Eastern Illinois, to another, the New York Central.

In its original complaint to the Coordinator, the complaining road, then in trusteeship, had detailed the wastes and duplication which would inevitably follow the contemplated action, if taken. The opposing roads had stated in the response they submitted to the three committees, that the service offered by the complaining road was detrimental to their own operation of the route, in respect to such matters as solicitation of business, preference in obtaining equipment from the Pullman Company, speed, and the handling of advertising. In rendering a report favorable to the three defending railroads there can be no doubt that the joint meeting was influenced by the presence of the presidents of two of these, who partook actively in the Executive Session held after the representatives of the complaining road had gone. The conclusions were stated in four brief paragraphs, of which the first stated that "in view of the decline in the standing of the existing Dixie Route" and "the opportunities for retrieving the loss. . . . by a stronger connection" the commit-

under Section 7(d) of the Act. (By an agreement made effective July 1, 1933, the payroll and time-keeping of the two railroads was to be done by the Maine Central at Portland and all other accounting done by the Boston and Maine at Boston. Although seventy employees were dropped as a result of this move, they were afforded no relief, nor did they apply for any, as the reduction was not "by reason of any action taken pursuant to the authority of this title." (As required by Sec. 7(b) of the Act. This interpretation is given by the Coordinator in Expenses and Property Losses Growing Out of Transfer of Employees of Boston & Maine and Maine Central Railroads under Section 7(d), Title I, Emergency Railroad Transportation Act, 1933, p. 1 of mimeographed report, and rest on the assumption that the action was taken independently of the Act and in good faith, though this was not expressly stated.) However, Section 7(d), the pertinent section, was given a broader construction, the comparable words being "in carrying out the purposes of this title", and an order was issued appointing an examiner of the Interstate Commerce Commission to hold hearings and take testimony regarding, or "otherwise determine" with the aid of a land appraiser of the Commission, the expenses and property losses of the transferred employees, and to report his conclusions back to the Coordinator. This order was cancelled by Special Order Number 2 owing to the voluntary settlement of the controversy by the parties. (See mimeographed report that title, Oct. 9, 1933.)

*The Louisville & Nashville and the Nashville, Chattanooga & St. Louis.
tees believed the three companies to have "the right to establish through passenger car service as proposed," the second that "substantial advantages" would accrue to the through service if the change were made, the third that apparently neither material capital expenditure nor increased maintenance expense would be necessitated, and the fourth dismissed as irrelevant the question as to whether the existing train service on the Chicago and Eastern Illinois would be maintained after any change. It is submitted that during the deliberations leading to this decision language like the following (in the answering statement by the defending railroads) must have met with sympathetic response in the committees, judging by the whole flavor of their action:

"The question here is the wisdom, propriety, and public interest in substituting the New York Central Lines for the Chicago and Eastern Illinois over that part of the Dixie Route between Chicago and Evansville.

"Heretofore, the many changes made in the Dixie Route have been considered matters entirely within the judgment of the managements of the interested carriers. It is believed that the same considerations apply to the present situation, and that the question in its ultimate form is whether the managerial judgment is to control or whether public authority shall substitute its opinion, not in a matter of public regulation, but in a detail of management."

The Coordinator based his decision on an administrative finding that the facts as asserted by the complaining road were true, that the result of the proposed change would be duplication of service, that the financial interest of the Chicago and Eastern Illinois vitally affected the public interest, and that under the statute he was bound to issue the order "in furtherance of the purposes of Title I. . . . and for the protection of the public interest." Significant is his language at page 5 in answer to the above contention:

"All public regulation is necessarily an interference with managerial discretion, but it is clear that as a matter of policy such regulation should be held to the minimum required by the public interest. Prior to the Emergency Railroad Transportation Act, 1933, it was not the policy of the Federal Government to undertake any control for the purpose of eliminating or avoiding such evils as 'unnecessary duplication of services' and 'wastes and preventable expenses.' In order to foster and protect interstate commerce in relation to railroad transportation by preventing relieving obstructions and burdens..."
thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation the Emergency Railroad Transportation Act, 1933, was passed. For a temporary period, under existing emergency conditions, the Federal Coordinator of Transportation was given power, subject to the review of the Interstate Commerce Commission and if the railroads would not act voluntarily, to require the elimination or avoidance of the economic evils above mentioned, among them:"

In conclusion, the Coordinator found that on the facts before him, he was bound to issue the requested order, pointed to a similar situation between Chicago and St. Louis where the railroads had voluntarily, under the guidance of the Commissioner of Western Railroads, eliminated some trains under analogous situations instead of putting on new ones, and stated that he would welcome review of his order by the Commission. He also suggested but did not rely on the possibility that this involved the elimination of a through route and was therefore within the proviso in Section 4. He had held no hearing of his own, although his staff had made a separate investigation, and he admitted it was possible the facts had not been sufficiently developed. His disarming statement favoring review by the Commission, reinforced by their haste to prepare for the winter travel season, seems to have discouraged the defending roads from appealing to the Commission. They carried the fight directly into the Federal District Court for the Northern District of Illinois (Eastern District), where, upon hearing on argument for an injunction, their bill was dismissed. This order is still in effect (May, 1937).

This order is important for several reasons. Since it was his first important order, each step was handled by the Coordinator and his legal adviser with particular care. While the statute did not make specific provision for this particular kind of case in two respects: where the action that would cause the waste was proposed action, to take effect in future, as opposed to practice already established; and where the Regional Coordinating Committees took action but did not recommend an order by the Coordinator, but only inaction; the general language of the statute and the broad purposes stated in the Act sufficiently embraced the particular situation. Again, the Coordinator held no hearing before rendering his decision, but rather he relied on the

\[\text{Supra, p. 194.}\]
\[\text{Infra, pp. 339-344.}\]
informal hearing afforded the parties before the regional committees and on the prospect of a full hearing before the Commission. Furthermore, he admitted in his opinion that he was exercising governmental power in a way unknown to peace time regulation. Here, then, was the only instance pointing towards what might have been the normal functioning of the Coordinator had not the labor restrictions been in the Statute and had other circumstances been more favorable. Full administrative investigation, flexibility, ample opportunity for informal hearing and presentation of argument, due attention to the public interest, and a final act of judgment by a highly qualified expert enlightened by a constructive attitude of adjustment of interests as opposed to one tolerant of destructive conflict, all these were present, in striking illustration of the administrative process at its best.

That there were no more orders issued by the Coordinator than those described above may be explained by reference to several factors. In the first place, the labor restrictions in Section 7 constituted not only a huge practical obstacle to be overcome, but also a tremendous psychological barrier to any action on the part of the railroads. That actually the kernel of this lies more closely to the latter than the former is suggested by the experience under the section of the Interstate Commerce Act which affords relief from the Anti-Trust Laws. For years before its enactment railroad management had complained of these laws as being the one thing that prevented their closer cooperation to serve the public interest, yet after this provision was enacted, no substantial action was taken. As has been more than once pointed out, there was some play afforded even by these restrictions, and small coordination projects might readily have been carried out, but the fact remains that they were not, so it is necessary to look to the other factors. Secondly, then, the railroads themselves, because of the labor factor or some other soon lost their enthusiasm for the use of the machinery set up by the Act. Until prevented by action of the Coordinator, consisting of the publication of a statement in which he gave his construction of Section 7(b) the railroads continued to work

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103 For the Coordinator's wide (some thought unjustifiably so) construction of Section 7(b) see infra, p. 350.
104 Section 5(15), supra, p. 203.
105 Supra, p. 193.
through their "economy committees" for the obvious purpose of avoiding the effects of that section. Thereafter they initiated practically no action of any kind through the legitimate committees or in any other way, and, while the railroads continued to be very helpful in the way of furnishing information in response to Coordinator questionnaires, the measure of their willingness to act and of their voluntary undertaking to fall in line with the spirit of the Act was greatly limited.

In the third place, the Coordinator was from the start very reluctant to issue orders. As has been pointed out, the provisions for the stimulation of voluntary carrier action and for study were the significant parts of the Act for him. He looked upon the power to order only as a last resort. Accordingly, only after long and careful study had been completed and the project reviewed from every possible angle would he even consider the issuance of an order, and even then, he was fully aware of the importance of winning the cooperation of those whom it would affect, to its successful execution. Because his own staff was necessarily so limited, he had to depend on railroad managements themselves for assistance in carrying out projects. If they were not sympathetic, there was little chance of success, and it appears from the above that in general railroad managements were apathetic at the very best, when it came to taking drastic steps for change, and this apathy is traceable in part to their dismay over the labor restrictions in the Act. Therefore, the conclusion presents itself that here was a combination of interrelated circumstances and factors, the net effect of which was to hold in complete check any effective use of the power to order. Only in extremely unusual situations, such as that in the "Dixie Route" case could any intimation lie of its inherent possibilities.

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107 In one instance the Southern Coordinating Committee asked the Coordinator to require the railroads in that region to observe certain principles with respect to constructing industrial sidetracks. (Summary of Work, p. 2.)
109 "Genuine power (the central problem in social relations), can only be grown, it will slip from every arbitrary hand that grasps it; for genuine power is not coercive control, but coactive control." M. P. Follette, "Creative Experience", XIII (1924).
110 Supra, pp. 365-368
On a few occasions the threat of order was resorted to, to accomplish more satisfactorily the desired ends of the statute. On one occasion the Southern Coordinating Committee asked for a general order in that area requiring conformity with certain principles of the construction of industrial side tracks. This information was conveyed to the appropriate carriers, but no further action appears to have been taken. Another more important occasion was when eleven terminal unification orders of "simple" projects were prepared and submitted to the various parties in interest. This was in the late winter and early spring of 1936. During the first two years of the office the Coordinator had confined himself to study and research, but now that the great bulk of that undertaken was nearing completion, he prepared, slowly and painstakingly, to "translate into action" at least some of the simplest recommendations proceeding therefrom. Accordingly, in his language, submitting the tentative orders, a firmer note may be detected:

"While the Coordinator would prefer voluntary railroad action and has done everything to encourage such action, he is convinced that the time has come to use the authority which the act has given him... The railroad machinery for handling these matters is apparently on dead center."

It is hardly surprising that public opinion was stirred up to a remarkable degree as a result of these threatened orders. It was particularly alive and articulate among the groups and the communities to be affected directly. For instance, in Mechanicville, New York, where a considerable number of employees would have been affected had the threatened order been carried out, mass meetings assumed riot proportions. The ranks of railroad labor across the country were stirred and the demand came ever stronger for a dismissal compensation agreement, no action having as yet been taken by Congress on the Coordinator's proposed legislation on the subject. The orders were never issued owing to the fact that holding them in abeyance at the President's request during the period consumed by negotiations between employers and employees over dismissal compensation

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111 Summary of Coordinator's Work, p. 2.
112 For example, at St. Augustine, Florida (2 railroads), at Mechanicville, New York (3 railroads), and at Worcester, Mass. (3 railroads).
113 100 Railway Age 243 (1936).
114 Agreement was finally reached on May 21, 1936, 57 Traf. Wid. 995.
brought them so close in time to the time of expiration of the Coordinator’s term, renewal of Title I being extremely uncertain, that any supervision of their execution by him would have been impossible, and accordingly the plan to issue them was postponed until June, when the Congress sealed their fate by failing to extend the Coordinator’s term of office.

On one other occasion the Coordinator formally resorted to threats. In connection with the enforcement of Section 7(3) of the Act, particularly the provisions forbidding the interference with the free choice by the employee of his representative union, the Coordinator threatened to prosecute unless certain pro-company-union policies were abandoned.\textsuperscript{115} Although this provoked some opposition and comment,\textsuperscript{116} it led generally to a cautious hands-off policy by the railroads in their relation with company unions.\textsuperscript{117} It is also known that not a few times during the course of informal conferences held to discuss what action should be taken regarding steps recommended in the Coordinator’s report the threat was uttered.\textsuperscript{118} While the resort to this method of provocation of carrier action proved about as abortive as more direct methods, it has a place in this survey on account of its importance in extending the power to order to an area converging on that area where only persuasion as a device would be successful, that is, in breaking down the sharp line of demarcation between formal action by order and informal action by suggestion.

Fitting comment has already been made on the importance of Section 13, both as reflected in the universal support it won while the Act was still young in its own legislative process, and in the nature of the organization established by the Coordinator. It now remains to suggest the effectiveness of the vast work done under it in the stimulation of creative thinking in transportation circles.

\textsuperscript{115} 52 Traf. Wld. 1083.
\textsuperscript{116} For example, 52 Traf. Wld. 1167.
\textsuperscript{117} The Coordinator was soon relieved of his responsibilities in this connection by the enactment of the 1934 amendments to the Railway Labor Act. (48 Stat. 1185.)
\textsuperscript{118} In December, 1933, the Coordinator resorted to a threat to establish container specifications, when he found the railroads completely non-cooperative as to this proposal, 54 Traf. Wld. 143.
Striking at the outset is the great variety of problems dealt with by the Coordinator's staff. The studies were in most all

The names of the reports issued by the Coordinator follow:

**Coordination**

*Foreign Experience with Transportation Control (mimeographed).*

**Coordination Projects**

Report on Economy Possibilities of Regional Coordination Projects (Terminals) Feb. 18, 1935
Second Report on Economy Possibilities of Regional Coordination Projects (Terminals) July 12, 1935
Consolidation or Joint Use of Railroad Major Shops June 16, 1936

**Cost Finding**

Cost Finding in Railway Freight Service June 5, 1936

**Equipment**

Steam Locomotives Nov. 2, 1933
Summary of Results of Questionnaire on Box Cars CP 1 Nov. 25, 1933
Depreciation—CP 1 Dec. 22, 1933
Results of Inspection of Freight Cars and Locomotives by Bureaus of Safety and Locomotive Inspection of the Interstate Commerce Commission Jan. 4, 1934
Freight Train Car and Retirement Program, CP 1, Eastern District April 2, 1934
Freight Train Car and Retirement Program, Southern District Feb. 15, 1934
Steam Locomotive—CP 2 April 24, 1934
Freight Train Car and Retirement Program, CP 1, Western District May 5, 1934
Repair Costs on Locomotives, CP 3 June 11, 1934
Freight Car Arch Bar Trucks with Cast Steel Side Frames July 23, 1934
Cross-Haul Movement of Empty Cars Aug. 3, 1934
Freight Car Pooling and Plan for Proposed Box Car Pool Oct. 23, 1934
Movement of Box Cars, CP 1B Dec. 18, 1934
Repair & Retirement of Freight Acts Dec. 21, 1934
Freight Car Ownership vs. Car Hire Feb. 11, 1935
Freight Car Construction Costs Feb. 25, 1935
Technical Improvements in railroad equipment, roadway and structures June 27, 1935
Comparative Costs Steam Locomotive Repairs Nov. 27, 1935
Freight Car Supply, Effects of operation under Per Diem Plan May 14, 1936
Container Report June 15, 1936

**Freight Traffic**

Freight Traffic Report, Errata, June 11, 1935
Railway Traffic Organization Aug. 2, 1935
Freight Traffic Report, Appendix I Nov. 2, 1935
Freight Traffic Rep. Appendix II, June 1, 1936
cases well-planned and thorough. As for their accuracy, which has been attacked a good many times on particular findings or technique, this present paper is no place for discussion of that, but one very vital fact is suggested, that reports going out with

Labor
Application of N. R. A. to the Railroads .................Sept. 1, 1933
Cost of Railroad Employee Accidents ......................May 21, 1935
Annual Earnings of Railroad Employees, 1924–1933 ....May 29, 1935
Employment Attrition in the Railroad Industry ..........Jan. 27, 1936
Hours, Wages and Working Conditions in Scheduled Air Transportation .............................................Mar. 31, 1936
Extent of Low Wages and Long Hours in the R. R. Industry ..............................................................May 15, 1936
Rules, Survey in Train and Engine Service ................June 10, 1936
Hours, Wages and Working Conditions, Water Transportation .........................................................Sept. 30, 1936
Hours, Wages and Working Conditions, Highway Transportation .....................................................Oct., 1936
Final Rail Labor Report ........................................Dec. 5, 1936

Merchandise Traffic
Merchandise Traffic Report ....................................Mar. 22, 1934
Conclusions of the Federal Coordinator of Transportation on Merchandise Traffic .........................May 29, 1936

Passenger Traffic Report
Views of Passenger Traffic Officers on Short Haul Passenger Traffic ..............................................May 1, 1936
Conclusions on Passenger Traffic .............................June 12, 1936

Miscellaneous
Railroad Owned Grain Elevators .............................Aug. 30, 1934
Centralized Scientific Research for Railroads ........Oct. 16, 1934
Clearing House for Railroads ................................Nov. 27, 1934
Summary of the Work of the Federal Coordinator of Transportation from June, 1933, to June, 1935 ..........June 12, 1935
Scrap Survey Report .............................................June 19, 1935
Railroad Fiscal Report ...........................................June 25, 1935
Supplies for Dining Cars ......................................July, 1936
Handling of Railway Stores Material ........................Oct. 7, 1935
Preservative Treatment of Railroad Ties ...................March 27, 1936
Report on Leasing of Railroad Grain Elevators ..........May 29, 1936
Transportation Subsidies: rail, motor, air, water: direct and indirect
Short Line Railroads and Their Problems
Demurrage Bureaus
the Coordinator's approval, because it was Coordinator Eastman's approval, could be considered dependable.

Each report, as published, contained a presentation of the underlying data, either in tables or in other appropriate form, a full and careful analysis of this data, and, finally, summarized conclusions in the form of findings of fact and of recommendations. Most of the data had been gathered by elaborate questionnaires submitted to and painfully filled out by the railroads and other interested parties, such as shippers, pipelines, bus companies, and water carriers, it had then been collated and analyzed by one of the Sections or the Research staff, and, finally, the report had been written, usually by the Director in charge. Following hurried survey and approval by the Coordinator, it would be transmitted to the Regional Coordinating Committees, if of interest to them, for comment. On their returning the report with comment, informal conferences between their members and the Coordinator or his staff would follow, and attempts made to formulate concrete plans of action along the lines suggested by the report. This order was not always scrupulously followed, but it does give the general picture of the method used and the course followed in the formulation and publication of these reports and the ideas contained therein.

While there was no wholesale adoption of the specific recommendations or of the carefully worked out plans set forth in the various reports, there was at least a noticeable response to them. Osmosis of ideas is a slow process, particularly of new and painful ones in the railroad world, and, therefore, the bitterly slow response met by the constructive parts of the reports was to be expected. Naturally, such was not the expressed answer to those parts of the reports that appeared to criticize present management, and, unfortunately, the far too ample attention paid to vindicative attempts to defend against such apparent criticism diverted attention from the real meat there contained.

For example, the Merchandise Traffic Report, the first of the major reports, and probably the best received by transportation interests, contains, first the Letter of Transmittal by the Coordinator to the Regional Committees (pp. III-IV), then a Memorandum to the Coordinator by the Director of the Section of Transportation Service, which made it, being largely an acknowledgment of the assistance rendered by the various advisory committees (p. V), next, the statement of Facts and Recommendations in condensed form and following this the text (with 464 annotations), and, finally, the Exhibits, sixty-one in number (pp. 23-422).
The great bulk of the studies dealt with national problems as national problems, which meant that a new perspective was gained which had never been fully realized before. It was a fresh approach, and consequently the new ideas and the new formulations and suggested applications of old ideas were myriad. In his First Report on Legislation the Coordinator took up a note sounded by the Commission at an earlier date when he urged when he urged the carriers to form "a more perfect union to deal with matters of common concern." Nine months later came the formation of the Association of American Railroads, which must be attributed either to the stimulus of or to the provocation of the Coordinator. This was formed on October 12, 1934 to consolidate effectively the numerous railway executives' and operating officials' committees and associations together with the old American Railway Association. A charter was drawn up and adopted which conferred on the executive committee powers comparable to those given the War Control Board in the American Railway Association during the War. As has been already suggested, the Association from this time forward supplanted to a large extent the coordinating committees in the Coordinator scheme, and this was highly satisfactory in many ways, since the added degree of concentration and specialization afforded by it, as well as the facilities for executing coordination projects afforded in its regional organization and in its close connection with all railroad executives, offered to reinforce ideally and to effectuate efficiently the Coordinator's work. In other words, the Association could, if it would, strengthen the main structure of the Coordinator scheme by the improving of the work and function of the regional committees, and at the same time provide the necessary machinery, mostly lacking in the Coordinator's organization, to carry out the details in executing any project requiring railroad cooperation and supervision.

Under the supervision of the Association of American Railroads, a plan was devised and established to meet the condition of exceedingly wasteful empty car haulage, brought into sharp

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121 Sen. Doc. 119, 73rd Cong. 2nd Sess.
122 Fifteen Per Cent Case, 178 I. C. C. 536, 585 (1931). See the Commission's Comment on its formation, Emergency Freight Charges (1935), 208 I. C. C. 4, 63.
123 At p. 33.
124 98 Railway Age 113.
relief in the Coordinator's report on Car Pooling, which was called the "Frozen Per Diem Plan." In addition several terminal coordination projects were undertaken under the Coordinator's stimulus, during 1936 ten such instances being proposed and planned. It may not be out of place to add that the increased aggressiveness on the part of the railroads, the improved quality and attitude of service so widely noticeable on the part of the railroads since 1933 may in part be traced directly or indirectly to the work of the Coordinator. These instances cited as illustrations of the way in which the ideas presented in and suggested by the various reports did eventually bring about action demonstrate how hit-or-miss, how sporadic, and how unpredictable was the process by which these things were accomplished. There was no formal mechanical translation of ideas into action. There was only the puzzling yet constant phenomenon of more and more knowledge and of uncontrovertible facts by the sheer force of their own uncontrovertability getting themselves established inside houses where the doors had been closed to them.

Of all the Coordinator's tasks, the one which from the start was most certain to establish his name in the eyes of posterity was that of seeking out new channels for the stream of regulatory legislation. Empowered by Section 13 to "investigate and consider means of improving transportation conditions throughout the country" and placed under a statutory duty to submit from time to time such recommendations calling for further legislation to these ends "as he may deem necessary or desirable in the public interest," the Coordinator found that this function required a slightly different approach from his other functions of enforcing the Act, issuing orders in proper circumstances, and studying the railroads' own problems. It required an analysis of broad policies, both managerial and regulatory, and a careful examination of their long range results. While the other studies were conducted and functions performed in the light of and with a concern for the national aspect of the particular problem, this inquiry led him into an examination of the policy foundations.

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125 Under this plan empty car mileage was reduced and accounting costs cut by substituting for the elaborate inter-railroad individual car interchange accounting fixed monthly payments based on a test period. It is estimated that 14 million dollars were saved by it in 1933—55 Traf. Wld. 837, 57 Traf. Wld. 1101.

against which the particular problems, even though national in character, were projected and on which they rested.

In order to provide a satisfactory basis for more particularized study of policy questions, the Coordinator devoted much of his first two years to the making of a comprehensive survey of railroad operation, equipment, service, and rate policies, with emphasis on those aspects encountered peculiar to the railroad situation as a whole. Clearly, the one primary question to get out of the way was whether the railroads should continue to be considered able to meet modern demands. Coordinator Eastman concluded:

"The survey has not shown that the railroads are an obsolescent form of transportation. It does indicate that the thing has happened to them which has happened to many other industries with the progress of science and invention. A comparatively sudden but great change in conditions has outmoded many of their ways of doing business and accelerated obsolescence in their equipment and other property. They can adjust themselves to new conditions, but the process of adjustment will take time, will not be painless, and will draw upon reserves of enterprise and initiative. At the end of this process of adjustment lie reinvigoration and the creation of new traffic."

These conclusions give strong indication of two assumptions which underlie much of the Coordinator's work in discussing and proposing legislation, that the railroads' troubles are primarily the result of their own managerial policies, and that the overcoming of these troubles lies also with those who shape managerial policies. In other words, in regulation by government, extremely important as it is, lies neither the cause nor the ultimate solution of the particular problems confronting the railroads. While it may aid in getting the railroads out of their troubles, it cannot do the whole job. And legislation reaching to the very depths of specific policy questions attendant on the industry may be very effective in its own sphere.

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127 As of January 21, 1935, the Coordinator's broad summary conclusions were, 1. That substantial reductions of operating costs were possible; 2. That the use of motor types of equipment would be helpful; 3. That charges for accessorial and incidental services could be adjudged so as to be compensatory to the railroads; 4. That the rate structure should be adapted to competitive conditions—Third Report, House Doc. 89, 74th Cong. 1st Sess., pp. 617.

128 Ibid., p. 7.

129 Altogether five reports on legislation were submitted to the Commission for transmittal to the Congress. The first dated January 20, 1934, and printed as Sen. Doc. 119, 73rd Cong., 2nd Sess., was devoted to a general discussion of the railroad situation of the function of the Coordinator, the temporary extension of which it recom-
Before turning to the kind of question that it had been anticipated that he would deal with and the kind of question implicitly meant in the preceding paragraph, the Coordinator found himself compelled to examine the assumption on which they rested, and so he sought to answer the question "is there need for a radical change in the organization, conduct, and regulation of the railroad industry which can be accomplished by Federal regulation?" Was the status quo a safe starting point for dealing with the problems, or should an entirely new starting-point, radically different, be selected? After a careful and thorough weighing of the needs, the possibilities, and the considerations urged by numerous interests and students, the Coordinator answered the question in the negative. He first considered the alternative of public ownership and operation. Comparing it with proposals for large-scale and compulsory consolidations and with the suitability of the contemporary American railroad policy for dealing with the problem, he reached his famous conclusion:

"Theoretically and logically public ownership and operation meets the known ills of the present situation better than any other remedy."

However, he was not ready to recommend immediate resort to it, because of the financial condition of the country, and he was content to outline for Congressional consideration a possible plan for the acquisition of control over railroad properties by a government-sponsored body. The second, dated March 10, 1934, and printed as Sen. Doc. 152, 73rd Cong., 2nd Sess., considered the problems of the regulation of competing agencies of transportation, and contained bills for the regulation of motor and water carriers, and, in addition, a few minor amendments to the Interstate Commerce Act. The third, reported January 23, 1935, and printed as House Doc. 89, 74th Cong., 1st Sess., again reviewed the general regulation situation, renewed the recommendations of the water carrier and motor carrier bills and the minor changes in the Interstate Commerce Act, and added recommendations for a dismissal compensation bill, for amendment of Section 77 of the Bankruptcy Act, and for permanent and far-reaching reorganization of the Commission. The fourth report, submitted January 21, 1936, and printed as House Doc. 394, 74th Cong., 2nd Sess., reiterated the earlier recommendations with little change, and strongly urged that Congress establish a permanent Coordinator of Transportation, to act as a specialized agency of the Commission and, in addition, offered as a basis of discussion a proposed statute to facilitate unification. Finally, the fifth, of April 7, 1936, was devoted wholly to consideration of a plan for unemployment compensation for employees of all types of transportation agencies, which was to supplant the application of the Social Security Act (49 Stat. 620) to carriers. 100 Railway Age 623.

ernment corporation and for operation of the railroads by non-politically-minded trustees. The core of the proposal was embodied in a bill drawn up by the research staff at the request of Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, which he introduced into Congress on April 15, 1935, and which was referred to a committee but never reported upon. Another alternative was also set forth in some detail, the so-called "Craven Plan," suggestive of that enacted in the British Railways Act of 1921 providing for the gradual compulsory consolidation of railroads into a limited number of systems.

Having dismissed these alternatives as inapplicable at the time, the Coordinator worked out what was really a less radical but more complicated plan of expanding and improving on the traditional many-colored, many-sided form of regulation. This included proposed comprehensive regulation for water and motor carriers, for the expansion and reorganization of the Commission, for the establishment of a permanent Coordinator, and for the clarification of the status of and the protection of railroad labor.

The Motor Carrier Act as proposed was enacted by the Congress and became law on August 9, 1935. It extended substantially the regulatory system administered by the Commission over rates, service, and financial matters (including combinations, and the establishment in new business) to apply to "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," more particularly to common carriers, contract carriers and motor transportation brokers.

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131 Ibid, 82-84; Coordinator's Third Report, supra, 48-56.
133 11-12 George V, 417 (1921).
134 First Report, 84-105, including discussion of the legal problems involved, and an analysis of the Prince Plan, similar in many respects to this plan, Third Report, 45-49. See also adverse criticism from the point of view of the advocate of public ownership in I. Lipkowitz, "The Railroads Versus Public Interest" (pamphlet, New York, 1936), 21-22.
135 The Motor Carrier Act, 1933. 49 Stat. 543.
136 Section 202(b).
The similar proposed "Water Carrier Act, 1933," which was introduced into the houses of Congress simultaneously with seven others of his measures on February 4th and 5th, 1935, at the request of the Coordinator,\(^{128}\) conferred comparable powers

\(^{128}\) Legislation Recommended.

Amendments to the Interstate Commerce Act:

1. To enable the Commission to prescribe minimum as well as maximum joint water rates, and to establish through joint rail-water rates where deemed necessary in the public interest regardless of the "short-hauling" of any carrier.* 2d, 3d, and 4th Reports. Now before Cong. as S. 1261 (75th Cong., 1st Sess.)

2. To include ports and gateways in the protection of Section 3 against undue preference and prejudice.* 2d, 3d, and 4th Reports, enacted Aug. 12, 1935, 49 Stat. 607

3. To restore the Fourth Section to the form in which it was prior to 1920.* 2d, 3d, and 4th Reports

4. To shorten the statutory periods of limitation with respect to reparation claims to one year in the case of overcharges (and undercharges) and to 90 days in the case of all other claims.* 2d, 3d, and 4th Reports

Bankruptcy Revision Bill

Dismissal Compensation Bill*

Motor Carrier Act*

Reorganization of the Interstate Commerce Commission*

Unemployment Insurance for Transportation Employees

Water Carrier Bill*

Warfinger Bill*

* These starred bills were introduced into the houses of Congress on February 4th and 5th, 1935, at Coordinator Eastman's request as S. 1629-S. 1636, and as H. R. 5361-5365, 5378, 5379 (74th Cong., 1st Sess.), 79 Cong. Rec. 1420, 1501.

Suggested


To authorize the Unification of Carriers (for discussion purposes) 4th Report
over water carriers holding themselves out to transport people or property in interstate or foreign commerce. The reasons prompting these measures have been suggested above. Some regulation in the naturally monopolistic transportation industry is absolutely necessary. The railroads by force of circumstances have come to be subject to a high degree of regulation, if such loose terms may be pardoned, whereas their chief competitors have been subjected to very little by the Federal Government. Unless the door is to be thrown wide open to the idyllic conditions of free competition and laissez-faire, with the inevitable result of control by monopoly, some degree of control by the government must be retained and in all fairness if one form is to be so subject, the others also should be, unless particular circumstances free them of the evils. On the contrary, in these industries at this time particular circumstances seemed to increase the evils, and in the chaotic and unstable conditions many interests cried for salvation by government regulation.

Since the need for proposed reorganization of the Commission was contingent on the passage of the Water Carrier Act, the Congress never had occasion to pass on it. The Commission, however, characterized it as premature and uncalled for, urging that the Commission itself should have full power and responsibility to reorganize itself. To this the Coordinator replied that the latter should be the general rule, but this case was different, since (1) the character of the new task to be imposed was radically different calling for basic changes, and (2) the Commission was too much absorbed in its work and too much divided in its own opinions to accord the enlarged question of reorganization proper attention. The proposal was to enlarge the Commission to fifteen, to provide for a permanent Chairman and for the specialization of function within the Commission.

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Criticized and Rewritten

Railroad Retirement Act (the first) Enacted June 27, 1934. 48 Stat. 1283

Railway Labor Act Amendments Enacted June 21, 1934. 48 Stat. 1185

by establishing the following divisions: (1) Railroad Division, (2) Water and Pipe Line Division, (3) Motor and Air Division and (4) Finance Division. The chairmen of these were to sit with the permanent chairman as the Control Board, which was to pass on questions of general transportation importance and which would have the duty of approving or disapproving the formation of special divisions which the Chairman should appoint. Further, there was to be a permanent Coordinator, possessing broad discretionary power, who would take over the Commission’s functions of planning on a national scale and of recommending general legislation, and who would take over the temporary Coordinator’s other functions under section 13 of the Emergency Act, to act as liaison officer between the Commission and the other arms of the Government. Apart from the larger scheme of which it was later a part, in his very first report, Coordinator Eastman had suggested:142

“In my judgment, there should be an officer of the government, with powers like those of the present Coordinator. However, I would not yet make such an arrangement permanent, for it needs further trial before it is given any final form.”

In his Fourth Report among the recommendations there appeared, separate from the qualified renewed recommendation of the reorganization measure, the following:

“4. Enact legislation for the creation of a Coordinator of Transportation associated with the Interstate Commerce Commission along the general lines set forth in S. 1635 and H. R. 5365 (74th Congress, 1st session).”

The report also contained further discussion of the consolidation problem, and in it a bill was submitted solely as “a basis for discussion” entitled “A Bill to authorize the unification of carriers engaged in interstate commerce and for other purposes.”

Significant were the amendments proposed by the Federal Coordinator to the railroad provisions of the Bankruptcy Act, which went into effect August 27, 1935.143 The effect of these was to speed up procedure under that Act by relaxing the strict requirement in all cases of the approval by two-thirds of the stockholders and creditors in each group and by correspondingly tightening Court power. The Commission was to submit a reorganization plan to the court for approval before submitting

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142 First Report, 34.
143 49 Stat. 911.
it to creditors. The valuation procedure was simplified, and the Court left freer in its choice of Trustees.\textsuperscript{144}

After a thorough study of the displacement of labor by specific coordination projects and by labor saving devices and of the other factors involved, the proposed bill for Dismissal Compensation was written. It is important because the comprehensive scheme it set out and the method of compensation suggested strongly influenced the nature of the terms of the voluntary agreement reached by the national representatives of the employers and of the employee on May 21, 1936. For members of three wide age classifications the bill set up a scale of compensation, by lump sum for men under 55, and by annuity for those 65 or over, with an optional arrangement in between, graduated with service, providing an age differential, related to earnings, and carefully articulated with the Railroad Retirement Act,\textsuperscript{145} which at the time was still thought valid. The threat to secure passage of this bill, then under consideration by Congress, was later used as a means to exert pressure on the railroad employers during the subsequent negotiations commenced February 3rd.\textsuperscript{146}

Additional recommendations in the broader related field of unemployment compensation were submitted in the Coordinator's fifth report on legislation. This contained a study of the effect of the Social Security Act\textsuperscript{147} on the railroad situation and proposals for a substitute plan.

While the Coordinator dealt with all of the important proposals mentioned above and also with some minor ones in his reports on legislation, they by no means represent the whole of his influence on the course of legislation. Both the original Railroad Retirement Act\textsuperscript{148} and the 1934 Amendments to the Railway Labor Act,\textsuperscript{149} (one effect of which was to supplant paragraph (e) of Section 7 of the Emergency Act dealing with employer restrictions on the free union activities of employees) were presented to the Coordinator's staff for study and revision. Reference has already been made to the numerous appearances

\begin{footnotes}
\footnoteref{144}{Leslie Craven and W. Fuller, "1935 Amendments to Railroad Reorganization Legislation", 49 H. L. R. 1254 (1936).}
\footnoteref{145}{48 Stat. 1283.}
\footnoteref{146}{100 Railway Age 555 (1936).}
\footnoteref{147}{49 Stat. 620.}
\footnoteref{148}{48 Stat. 1233.}
\footnoteref{149}{48 Stat. 1185.}
\end{footnotes}
of Coordinator Eastman before Congressional Committees. His opinion was greatly in demand as that of an expert who was more than an expert. Rather, he was almost everywhere recognized as a man of great experience possessed of the widest familiarity with railroad matters, an almost overcautious hesitancy to express any opinion unless all the facts were at hand, and, most important of all, sound judgment. His position as chairman of the Commission's committee on legislation doubtless added even more to the demand and respect for the expression of his opinion. Although the extent of the Coordinator's influence exercised in this way cannot be measured, it is submitted that it was and is considerable, and that it has not been exhausted yet.

The informal semi-official work of the Coordinator and his staff was by no means confined to the field of legislation. At the very commencement of his term he was called upon by the President to act as mediator in a dispute between the national representatives of railroad employers and employees. The question was raised whether there should be an extension of the temporary nation-wide wage reduction agreed upon at the Chicago conference the year before.

With the Coordinator's aid, the parties agreed to a one-year extension of the existing agreement. The following year he was called upon to furnish his good offices again, at which time the dispute was settled on a permanent basis. In addition to the part taken in these nation-wide settlements, it is important to notice the similar one the Coordinator took in connection with local settlements of problems raised by the execution of coordination projects. On the Kansas City Southern Railway issues involving the displacement and transfer of men arising

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150 Supra, p. 186.

See, for example, his testimony on the Pettingill Bill to amend the 4th Section of the Interstate Commerce Act (reported 57 Traf. Wld. 383, 439 (1936), on air carrier regulation, 56 Traf. Wld. 197 (1935), and water carriers regulation, 57 Traf. Wld. 439 (1935)).


152 Under Senate Resolution 71 (74th Cong.) the duty was imposed on the Coordinator to select the roads to be investigated by the Special Investigating Committee (Senator Wheeler's Committee). Accordingly, July 5, 1935, he submitted names of 18 roads and on July 16, 1935, of 7 more, in addition to those of several banking houses. 55 Traf. Wld. 971, 56 Traf. Wld. 55, 57 Traf. Wld. 1201.

153 51 Traf. Wld. 1262 (1933).

154 53 Traf. Wld. 809 (1934).
out of a shift in operating arrangements were satisfactorily settled, on the Pere Marquette he assisted in settling a dispute over representation, and the question of dismissal compensation was negotiated in connection with the arrangement made by the Baltimore and Ohio to operate into Pittsburgh over the Pittsburgh and Lake Erie under his direction. Reference has already been made to the steps taken to enforce Section 7(e) concerning company unions.

In addition to his accomplishments in the field of labor relations, the Coordinator’s comparable accomplishments in other fields are noteworthy. The effectiveness of his staff in negotiating arrangements more satisfactory to the railroads was demonstrated in their achieving a degree of success in connection with dockage and other similar agreements in the North Atlantic Ports. The Coordinator personally acted in bringing pressure to bear on the steel industry in reducing the price of steel rails from $40 a ton to $36.375, a matter in which the President took a definite interest, and from the outcome of which the railroads derived benefit in the opportunity furnished to buy more rails at an earlier time on account of the lower price and the extra PWA funds made available because of the reduction. Other informal matters of this kind were the facilitation of railroad purchasing of equipment, the stimulation of the formation of voluntary committees between groups of competing carriers for consideration of their joint problems, and, finally, the securing of voluntary reductions in salaries by railroad executives to a maximum of $60,000 a year.

Of the accomplishments last considered the reduction in salaries, trifling as it was, constitutes perhaps the most significant, in at least one very important respect. Standing as a symbol of the railroads’ refusal to adjust themselves to realities and consequently of their inefficiency and unresponsive attitude to-

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359 96 Railway Age 359 (1934).
360 52 Traf. Wld. 594 (1933).
361 I. C. C. Finance Docket 10630 (1935), 55 Traf. Wld. 233. Liberal terms were granted displaced employees in a similar arrangement on the Union Pacific System held to be without Section 7 by Coordinator Eastman, 56 Traf. Wld. 230 (1935).
362 Summary of Work, 20–22.
363 Ibid, 25.
364 Mention should also be made here of the simplification of interline accounting and settlements accomplished on the basis of a recommendation of the Coordinator. (Summary of Work, 17.)

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wards the public in the eyes of the general public, high salaries of railroad officials had to be reduced, and reduced in a conspicuous manner to counteract this bad impression and to win back a large body of the public to a desire for a sympathetic understanding of railroads and their problems. In this feat of bringing about a restoration of the general public's interest and confidence in the railroads, the Coordinator played a leading part. After the passage of the Emergency Act a certain amount of the pressure which had been worked up demanding action in the situation had been released, with the result that the general public had to some extent lapsed into forgetfulness of the continuing seriousness of the railroads' condition. When the authorities in Washington sought to expend public work funds elsewhere, Coordinator Eastman argued forcefully that they be applied to the elimination of grade crossings. When pessimists foretold the doom of the railroads and bitterly attacked them for their shortcomings, he turned on the attackers and sounded a ringing note of hope and confidence:

"Let me say . . . that I have no idea that the railroads are approaching the status of the canal boat and the stagecoach, and that I see no need for the industry to decline. The opportunities for improvements in equipment, facilities, methods of operation, and service are very great. The worst danger is that full scope for these opportunities will not be given."

The Coordinator represented a constituted powerful force ever present on the scene hammering away at the shippers, the water carriers, the motor interests, the chambers of commerce, the labor associations and the general public to seek a deeper understanding of the railroad problem than an approach to it solely through its narrow aspects which touched them at first hand would afford, by realizing its complex nature and national character, and by seeking methods of improvement based on such realization. He was a fountainhead of education and information; he was also a force seeking to bring all the parties concerned together. He made the people feel that the railroad problem was their problem, and he started them on the way towards its solution.

But that he thus took the part of the railroad industry and

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161 Statement issued August 2, 1933, “Elimination of Grade Crossings.”
162 Speech before the National Association of Mutual Savings Banks, May 16, 1934. 53 Traf. Wld. 959-961.
constantly affirmed his faith in its future by no means indicates that he spared the individual railroads from criticism and severe attack when he thought it was needed. From the first he was aware that he was in a delicate situation, that to succeed he must have railroad men with him, and yet what they must join with him on was in the attack on their own ways of doing things. The Coordinator started off very mildly, and ardently sought to win the support and cooperation of all. However, when in the course of his duties some act was necessary which might antagonize the railroads, he never hesitated a moment to take direct action. In August, 1933, to attempt to strengthen the support of the Administration’s policy of re-employment he sent telegrams to the president of every Class I railroad in the United States requesting them to do their best to increase employment, which must have been received unenthusiastically by some railroad men who looked to him to aid in discovering economies, which to them meant cutting down on labor. In a letter to the president of the New York Central Railroad in September of the same year, the Coordinator showed no patience with the vindicative attitude of that road when it urged postponement of the Pennsylvania’s attempt to experiment with store-door delivery service. Moreover, by February, 1935, a year and a half later, he was openly expressing doubts as to the railroads’ desire to cooperate either with him or with themselves, after their continued refusal to take action on his proposals. A month later he accused the railroads as being studiedly on the defensive and of being more zealous to prove him wrong than to find constructive ways out of difficulty in his work, and the following year stated flatly that the railroad executives were to blame for the failure to succeed of the Coordinator’s policies towards the American railroads and that they had used Section 7(b), as an excuse. At the same time he pointed out the basic trouble.

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104 52 Traf. Wld. 553.
"At bottom, the trouble is that the managements think narrowly in terms of their own particular roads, rather than in broader terms. Quite naturally and quite properly they put the welfare of the particular road first and foremost. What they do not appreciate, as I think they should, is the extent to which the individual welfare will be promoted by action which is for joint benefit or common good."

It was the more unfortunate that this should be the state of affairs at the time when the great bulk of the research work was finished and the time had come to "translate its results into action," a process which was completely dependent on the cooperation and favorable interest of the railroads themselves. The railroads not only objected to what appeared to them to be the imposition from above of proposals which did not take into sufficient account particularizing factors and individual "interests," but also to the way in which these proposals were presented. It was the Coordinator's custom to issue the reports to the public at large at the same time they were submitted to the railroads' committees, and therefore it was easy to interpret this as an attempt to establish the proposals by the pressure of public opinion rather than by virtue of their intrinsic merits. The railroads were always exceedingly helpful in filling in endless questionnaires submitted to them by the Coordinator, for which painful and thorough work due credit was given. In sum, the Coordinator had the thankless task of trying to reconcile almost irreconcilable points of view, of the users of the railroads with their grievances, of the pessimists with their sinister predictions, the antipathetic, unconcerned public whose interest was really vital, remote though it seemed to them and, finally, of the railroads themselves with their apparent inability to face problems

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266 See the Coordinator's Statement, 1935: "Now that much of the work of research has been done, the time has come to translate its results into action. This is possible..." Summary of Work, 38.

268 Discussing the restrictive effects of Section 7, he continued, "(This is possible) even if the present restrictions on reduction in railroad employment remain in the law and are enforced. Because of the steady attrition in railroad labor forces resulting from permanent separations from service, the effect of these restrictions will only be to delay the realization of economies. In time they can be fully obtained, just as happened in similar circumstances in Great Britain, after the consolidation of the railroads into four systems following the close of the World War. In the event of an upturn in traffic and railroad business, requiring in and of itself additional employment, the economies could be realized very quickly, notwithstanding the restrictions." Ibid., 38-39.

270 Coordinator's Summary of Work, 36-37.
as national problems, their increasing tendency as time went on to defend rather than to seek to improve, and their growing impatience with the methods used by the Coordinator in attempting to spread the gospel of coordination.  

Another basic relationship which gave rise to a number of problems of its own was that between the Coordinator and the Commission. Legally, the Commission was above the Coordinator, by virtue of its power of review over any order issued by him, and legally the Coordinator had few powers that the Commission did not possess, with the most marked exception the general dispensing power over the Anti-Trust Laws and other laws, State and Federal, which the Commission only possessed in connection with consolidations and pooling. The Commission’s chief reference was restricted to the maintenance of adequate, reasonable, and non-discriminatory rates and service, whereas that of the Coordinator was to the more efficient management and the strengthening of financial structures of the railroads as a whole.  

The Commission’s raison d’être was to protect the rights of the user of the railroads and the general public, after, as well as before, the policy change in 1920, the Coordinator’s to encourage and assist the railroads themselves out of these particular difficulties. The former dealt with cases, weighing conflicting interests of shippers, of investors, of labor, of management, of the State, against the background of the

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171 Because most of his dealing was directly with railroad management, the Coordinator had less occasion to confer directly with railroad labor. His early expressions of disappointment at the restrictive nature of Section 7 as finally enacted and his sharp note of warning to labor that its fate was directly dependent on coordination on two occasions (Address before railway labor union officials, Jan. 12, 1935, 55 Traf. Wld. 111, and Address before Brotherhood of Railway and Steamship Clerks, Nov. 9, 1935, 56 Traf. Wld. 799) did not strengthen their support of his policies. Actually, when the protective Section 7 of the Emergency Act was rendered unnecessary by the agreement reached on dismissal compensation (supra, p. 323) labor seemed to lose interest in the further existence of the Federal Coordinator (infra, p. 337).

172 Section 9 of the Emergency Act.

173 Infra, n. 193.

174 Coordinator Eastman’s feeling as to the function of his office and its relation to the Commission’s is indicated in the following passage from his statement made on appointment as Coordinator: “It (the Act) sets up a Federal Coordinator of Transportation who is not to manage the railroads but whose duty it is, with the aid of the Interstate Commerce Commission, to help the railroads in exploring all possibilities for the avoidance of waste and preventable expense, and to encourage and promote, and, if need be, require actions which will have that result.” 94 Railway Age 899.
interest of the public, (and in general investigations the process was much the same) whereas the latter dealt with wholes, with policies, with kinds of operating and managerial practices, with technical questions, with legal questions, all in terms of national change, and national improvement, focussed around the central question, of how an efficient, paying national system of transportation was to be developed. To the Commission the broad lines were important only as they threw light on the individual case or investigation in hand, but to the Coordinator the broad lines were the central concern, and the other factors only coloring. Yet while the emphasis of each of the two agencies was different, there were overlappings possible. The Coordinator had no power over particular rates, yet it was his duty to study the general rate structure and to recommend changes therein, and the Commission, while lacking power to control completely terminal practices, did make studies of possible economies by improvement therein.\textsuperscript{175}

This contrast in method as carried out in actual practice, putting aside the question of power, is well brought out by the contrast between the Coordinator's "Passenger Traffic Report," (1935) (which dealt with the nature of the travel market, the nature of service required by the public, the factors conditioning the traveller's price, carrier sales promotion, and lastly, the kind of service the nation's railroads were furnishing), and the order issued in \textit{Passenger Fares and Surcharges}\textsuperscript{176} where the Commission, looking at the situation from the revenue standpoint of these particular carriers, and weighing each of the above factors in relation thereto in order to make better service available to the public, resorted to an order affecting but one item in the picture, a very powerful one to be sure, yet in sharp contrast to the general reordering and readjusting sought by the Coordinator from his approach. Here in this borderline situation the ends, both immediate and long-range, sought by both coincided, yet the Coordinator sought to attain them by means of a general reformation of service and by a fundamental readjustment of the rate structure, whereas the Commission had to content itself with a single order, very broad in effect, dealing with one, but

\textsuperscript{175} Ex Parte 104, Part VI, which was referred to Federal Coordinator at the inception of his term. Interstate Commerce Commission, Annual Report, 1933, 29.

\textsuperscript{176} 214 I. C. C. 174 (1936), and see \textit{infra}, pp. 335-336.
only one, factor in the situation, the rate level. By their very nature most of the other elements could not be dealt with by order, and it was peculiarly the character of the Coordinator agency to deal effectively with these.

As far as furnishing, equipment, and personnel went, the Commission was the Coordinator's best source. The Commission cheerfully furnished office space and other facilities, rendered incidental services, and loaned its staff members on occasion. In August, 1933, it established rules, as directed by the Act, for procedure in review of Coordinator orders. In each of its annual reports it referred to the work of the Coordinator then in progress. Each of the Coordinator's reports on legislation it transmitted to the Congress, as directed by the Act, usually with but scant comment. The Commission stood with the Coordinator in most of his recommendations, but took a strong stand in opposition to the proposed Commission reorganization plan. Again, it was difficult for a body like the Commission to sympathize with what was implicitly an assertion of its inability to cope with a problem of reorganization in its own way, according to long-established practice. Naturally, the Commission was desirous of being allowed to accomplish by itself any reorganization necessitated by new demands. Accordingly, the proposal was attacked as premature and better suited to treatment by the Commission itself than by Congress. There was but one dissent.

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177 Interstate Commerce Acts Annotated 5975-5976.
178 Annual Report, 1933, 4, 18-20, 29, 36, 68; 1934, 14, 15; 1935, 19, 41, 86; 1936, 14.
179 The first and fifth reports (supra, n. 129) were passed on to the Congress without comment; the second was approved unanimously, except as to the 4th Section (Interstate Commerce Act) amendment, where two Commissioners dissented; the third met with Commission approval, except as to the proposal to reorganize the Commission, which was strongly opposed (one dissent), the dismissal compensation bill being stated to be outside the Commission's power to approve or disapprove; and the fourth report followed along after the third, except as to the mere matter of a proposed change in the statutory period of limitation for claims against the railroads, and the suggestion of the establishment of a permanent Coordinator (as to which there was significant refusal to comment).
181 Commissioner Miller, Third Report, IX. He was joined in his dissent by Commissioner Caskie after his appointment, Fourth Report, IX. These two commissioners also affirmatively urged the establishment of a permanent Coordinator.
In the related proposal for the establishment of a permanent Coordinator the Commission was simply non-committal, saying: 182

"After three years' experience with this additional agency, with complete reports before it, we believe that Congress is well advised as to whether or not the office should be made permanent."

That is, the Commissioners, with but two exceptions, 183 did not enthusiastically support the continuance of the Coordinator, but they were unwilling to go so far as to oppose extension. While this might be made to appear quite inconsistent with the stand taken on the reorganization of the Commission, it would seem that its significance should be limited to the fact that it demonstrates the latter's non-responsive attitude toward the office of Coordinator, even though administered by one of its members. There can be little doubt that there was a subconscious conflict here, but one which probably remained subconscious.

In the matter of research, the relationship between the two agencies was most satisfactory. At the opening of his term certain unfinished reports were turned over to the Coordinator. 184 Reference to the latter and then back again to the appropriate bureau of the Commission was made as a matter of course as to some matters. 185 There was similar exchange and use of materials on the completion of reports. Just as the Coordinator had made use of the earlier work of the Commission which pointed out some of the landmarks in his field, 186 so the Coordinator's work became useful to the Commission in its duties. His reports and conclusions were referred to with some regularity. 187 In addition, in the course of business the Coordinator would turn

182 Coordinator's Fourth Report, Supra, VIII.
183 Supra, note 131.
184 For example, Ex Parte 104, I. C. C. Annual Report, 1933, 29.
185 The Commission's report on demurrage bureaus was prepared by Director Bartels of the Bureau of Service, was referred by the Coordinator to the coordinating committees, as strengthened by the concurrence in the conclusions by his regional traffic assistants, and after an "inadequate discussion" it was returned by the American Railway Association. It was then sent a second time to the regional coordinating committees for consideration—53 Traf. Wld. 643, 695; 54 Traf. Wld. 786.
186 See note 31, supra.
187 For example, see citation of his material four times in Emergency Freight Charges, 1935, 215 I. C. C. 435, 439, 497 (1935).
over to the proper bureau of the Commission requests from the
general public of a routine nature.188

In the passenger fare case of 1936 the Coordinator's Section
of the Transportation Service Report on passenger traffic was
heavily relied on.189 While the Coordinator did not participate
in this case when it was being heard on the merits, he was called
on to act as Commissioner in breaking a tie on the occasion of
the railroads’ petition to institute a compromise measure in
modification of the order already issued. He favored the enforce-
ment of the original order on the ground that the railroads’ pro-
posal was of such a compromise nature that it would render
less trustworthy the experiment ordered by way of reduced
fares.190 Although he had few occasions to exercise his voting
power as a Commissioner, the fact that the Coordinator was
also a Commissioner influenced the relationship substantially.
Practically, the Coordinator was familiar with the Commission's
ways and machinery, and the result was the complete avoidance
of misunderstanding between bodies that comes more easily with
unfamiliarity with the other's ways. In certain other capacities
Coordinator Eastman was still Commissioner Eastman, for
example, in connection with certain accounting reform matters
commenced before his term and continuing on down after it.191

188 For example, the matter of requests by interested bodies to
restore to service abandoned railroad facilities. Annual Report,
1934, 72.

189 "Passenger Fares and Surcharges", 214 I. C. C. 174, 180, 182, 240
(1936).

190 "Traf. Wld. 773.

191 During his entire term as Coordinator, Mr. Eastman partici-
pated in 17 proceedings in his regular capacity as Commissioner,
many of these being cases in which he had participated before his
appointment. Alpha Lux Co. v. Reading Co., 197 I. C. C. (1933),
In the Mathevol Automatic Train Control, 197 I. C. C. 29 (1933),
Capps v. Norfolk So. R. R., 197 I. C. C. 365 (1933), Loma Cement Mills
Train Control Devices: S. P. Co., 198 I. C. C. 647 (1934), In the
Matter of Automatic Train Control Devices: Alton Railroad, 198 I. C. C.
I. C. C. 429 (1934), Appeal of Am. Barge Line Co., 200 I. C. C. 717
(1934), Pooling Passenger Train Revenues and Services: B. & M.
Am. Lime & Stone Co. v. Penn. R. R., 201 I. C. C. 465 (1934) (dis-
sent), Depreciation Charges of Carriers By Water, 210 I. C. C. 250
(1935), Pooling Ore Traffic in Wisconsin & Michigan, 210 I. C. C. 599
(1935), Lehigh Stone Co. v. B. & O. R. R. Co., et al., 213 I. C. C. 537
(1936), Depreciation Charges of Sleeping Car Cas., 215 I. C. C. 597,
215 I. C. C. 629 (1936).
But it is a fair conclusion that the cooperation between the two agencies, and the mutual understanding, and the possibility of the Commission’s carrying on the Coordinator’s work into the future are all traceable in large part to this important fact, that Coordinator Eastman was still a commissioner.

This leads into the interesting and difficult question as to the effect of the existence of the Coordinator on the guiding policies and the actual functioning of the Commission. On the surface, (disregarding the superficial administrative disarrangements and rearrangements occurring during the three year period), the Commission has continued to perform its function without change of any kind, but this leaves unanswered the question whether there has not been a subsurface flow of some kind which may have telling effect, stirred up by these temporary operations on the surface. Under the Emergency Act the Coordinator had broad power to assume a managerial function. Under the Interstate Commerce Act, as amended by the Transportation Act, the Commission had similar powers almost as broad. For example, paragraph 15 of Section 1 provides:

> "Whenever the Commission is of opinion that shortage of equipment, congest of traffic, or other emergencies requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing or making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interests of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion.

192 Supra, pp. 201, 205.

193 As to car service rules, Section 1(14); emergency control over car service, terminals, and traffic arrangements, Section 1(15); routing over roads when necessary, Section 1(16) and Section 1(17); control over extensions and abandonments, Sections 1(18), (19), (20), and discretionary power over them, extension of line or lines, Section 1(21); use of terminals by other carriers, Section 3(4); pooling of freights, Section 5(1); physical connections rail lines and docks, Section 6(13a); direction of traffic not routed by shippers, Section 15(10).
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will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may, after subsequent hearing, find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic and for such periods as it may determine, and to modify, change, suspend, or annul them. . . .”

Commenting on the breadth and expansiveness of these powers of the Commission, Professor Sharfman remarks:194

“In a very real sense the Commission becomes under such circumstances the directing head of the railroad systems. Except insofar as the repeatedly expressed reference to the promotion of the public interest must serve as a dominating guide, the Commission, as thus empowered, in case of necessity, to suspend established practices, to order the pooling of equipment, to require common use of terminals, to direct traffic priorities, and to control the routing of shipments, is virtually endowed with an uncharted discretion in removing service maladjustments and furthering general transportation needs.”

But the Commission has on very few occasions undertaken to assume definitely managerial functions. It did go to what seemed to be the extreme in Public Service Commission of Oregon v. Central Pacific Railway Company195 in ordering the construction of 185 miles of railroad line in the Northwest. In another direction, that of wide-scale passenger-fare initiation, what many considered an extreme196 was reached in Passenger Fares and Surcharges,197 when the passenger rates of the entire United States were ordered reduced to a scale of two cents a mile in coaches and three cents, without surcharge, in Pullmans. Two Commissioners, one of them Commissioner Eastman, did not sit on this case. Of the remaining nine, four dissented. To the determining assertion for the majority, speaking through Commissioner Porter that:198

“If we have the power to set aside managerial discretion where the latter seeks to impose an undue burden upon carriers generally by an unwarranted reduction in rates, we must have the same power where it is sought to effect a like result by maintaining an unwarrantedly high level of rates.”

194 The Interstate Commerce Commission, Vol. 1, 238.
195 159 I. C. C. 630 (1929), set aside by the Supreme Court, 288 U. S. 14, 53 S. Ct. 266 (1933).
196 See, for example, former Commissioner Thomas Woodlock in the Wall Street Journal: “By its order . . . the Commission has at one stroke undertaken to assume the last remaining function of management—that of initiating rates for service.” 57 Tar. Wld. 773-774.
197 214 I. C. C. 174 (1936).
198 Ibid., 230.
Commissioner McNanamy answered: 199

"I do not understand that the law gives us the authority to assume managerial duties to the extent that is here proposed."

and Commissioner Lee: 200

"This appears to me to be peculiarly a matter of managerial discretion."

Commissioner Lee seems to have agreed with the majority as to the question of judgment, but agreed with the minority that there was a fallacy in Commissioner Porter's opinion, which is perhaps suggested by the words "sought to effect a like result," which seems to assume that there is no question at all that reduced rates would not result in increased revenues. The indications are that Commissioner Eastman, had he been called upon to vote, would have agreed with Commissioner Lee. 201 The other two dissenters differed from the majority merely on the question of judgment.

It is submitted that the treatment accorded this case on the part of the Commission may possibly indicate a more aggressive stand on the borderline questions of judgment, and a greater willingness to exercise the broad powers of management referred to above. On the other hand, any attempt even to suggest an adequate answer to this question would require a comprehensive survey of all of the Commission's work in the light of a perspective furnished by time which is not available at present. How much the Commission's emphasis has shifted and will shift towards more of a concentration on problems of waste and inefficiency on a national scale can be the subject for no more than conjecture. While it was nearly inconceivable that in 1933 the Commission could have acted in recognition of the situation of the railroads as a whole as an "emergency" within these sections, which would have been a strained construction both in the light of the Commission's administrative history and the probable Congressional "intent" (specific recognizable open-and-closed situations had been visualized, such as war, car-shortage, strikes, or a general railroad break-down in a particular area,

199 Ibid., 263. Contrast Commissioner Porter's language in his dissent in the Central Pacific Case, supra: "the State is not the owner of the property and is not clothed with the power of management incident to ownership." 159 I. C. C. 630, 666 (1929).

200 Ibid., 265.

201 Compare supra, p. 301.
where particular railroads were concerned), is it any less inconceivable that it might have taken such action in 1936 or thereafter, had similar conditions arisen?202

Public interest, and with it Congressional interest, in the question of providing a permanent basis for the Coordinator’s work seemed to wane with the intensity of the emergency which that work was originally intended to deal with. The President had extended the effectiveness of Title I by proclamation on May 4, 1934, to allow the Coordinator an opportunity to finish studies then in progress and to put some of them into practical application,203 and at the time expressed the hope that further legislation would be forthcoming. A year later, after a hearing at which the Coordinator testified that the railroads’ benefit from the work under the Act, already commensurate with the expense involved, was just beginning, and at which the Association of American Railroads opposed the extension on the ground that it had now been superseded by the Association, which desired to carry on the work of coordination, (without the restriction of Section 7(b)), Congress by joint resolution extended Title I for another year.204 In June, 1936, active support for the further renewal was meagre. The labor executives, who had always been primarily interested in Section 7(b), had now won their agreement for dismissal compensation, and so withdrew their support. The railroads were for the same reason less concerned than ever.

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202 The appointment of Marion L. Caskie, the Coordinator’s Southern Traffic Assistant to the Membership of the Commission will definitely tend to strengthen the carry-over of ideas and approach.

203 Senate Joint Resolution 112, 74th Congress, First Session, extending the effective period of the Emergency Railroad Transportation Act, 1933:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Title I of the Emergency Railroad Transportation Act, 1933, shall continue in full force and effect until June 17, 1936, but orders of the Coordinator or of the Commission made thereunder shall continue in effect until vacated by the Commission or set aside by other lawful authority, but notwithstanding the provisions of Section 10, no such order shall operate to relieve any carrier from the effect of any State law or of any order of a State commission enacted or made after this title ceases to have effect.

Section 2. That it shall be the duty of each carrier to pay into the fund provided for by Section 14 of the Emergency Railroad Transportation Act, 1933, within twenty days after June 16, 1935, $2 for every mile of road operated by it on December 31, 1934, as reported to the Commission, and it shall be the duty of the Secretary of the Treasury to collect such assessments.

Only the administration officers and the short lines, who were interested in an uncompleted study of their problems and in the extension of the proviso in Section 4 preserving joint routes, came out definitely in favor. When no action was taken on the regular measure for extension, Senator Wheeler in a desperate last minute attempt to preserve the office until the next session of Congress reported out an emasculated form of the Emergency Act on June fifteenth. Congress being otherwise occupied, no final action was taken on this, and so, with little stir in any quarter, the office of Federal Coordinator of Transportation expired the next day, June sixteenth.

B. The Judicial Construction of the Emergency Act

The legal problems raised by Title I of the Emergency Railroad Transportation Act, 1933, while less significant perhaps than some of the other problems which mark the story of the Coordinator experiment, are important in any study of the Federal Coordinator of Transportation for two reasons. First, some realization of their nature is essential to a full understanding of the work actually done and the policies pursued as set forth above. Second, they must be taken into account in connection with any speculation as to the character and possible fate of any similar legislation in the future. Owing to the fact that in


204 On this date, June 16, 1936, there was approximately $20,000 of the fund contributed by the railroads in the United States Treasury. This the railroads contributed for the purpose of completing and publishing the remaining studies, of which there were four. (57 Traf. Wid. 1190), (58 Traf. Wid. 5256). The direct cost of the maintenance of the Coordinator's office to the railroads, who had been under duty to pay on a mileage basis (supra, p. 204) was approximately $1,350,000 for the three years. This had been supplemented by special contributions from the Civil Works Administration totaling $650,000 for special studies in 1935. Statement made by Commissioner Eastman September 16, 1936, 58 Traf. Wid. 525. See also Hearings on Extension of Emergency Railroad Transportation Act, 1933, 74th Cong., 1st Sess.

207 The cases dealing with Title I of The Emergency Act were:
Texas v. United States, 292 U. S. 522, 54 S. Ct. 819 (1934). Holding that an order of the Commission approving a consolidation of offices and shops on the Texarkana & Fort Smith Railway should stand regardless of the Emergency Railroad Trans-
only one instance was the action of the Coordinator challenged in
the courts, the discussion of these problems will necessarily be
centered around the one case which arose, and their wider
aspects expanded and outlined on the basis suggested by its care-
ful and discerning opinion.

In Louisville & Nashville Railroad Co., et al. v. United
States which came before the Federal District Court for the
Northern District of Illinois, the Louisville & Nashville Rail-
road sought to enjoin the enforcement of the Coordinator's one
major order. This was issued on October 25, 1934, on the
complaint of the Chicago and Eastern Railway, and directed the

"The broadening provisions of the Emergency Railroad
Transportation Act, 1933, confirm and carry forward the pur-
pose which led to the enactment of Transportation Act, 1920.
We found that Transportation Act, 1920, introduced into the
federal legislation a new railroad policy, seeking to insure an
adequate transportation service. To attain that end, new
rights, new obligations, new machinery, were created.
(Cases.) It is a primary aim of that policy to secure the
avoidance of waste. That avoidance, as well as the mainte-
nance of service, is viewed as a direct concern of the public.
(Cases.) The criterion to be applied by the Commission in
the exercise of its authority to approve such transactions—
a criterion reaffirmed by the amendments of Emergency Rail-
road Transportation Act, 1933—is that of the controlling pub-
lic interest. And that term as used in the statute is not a
mere general reference to public welfare, but, as shown by
the context and purpose of the Act, has direct relation to
adequacy of transportation service to its essential conditions
of economy and efficiency, and to approve private provision
and best use of transportation facilities. . . ."

sustaining an order of the Commission striking part of a tariff as
failing to compensate the carrier for an accessorial service, the Court
relied in part on Section 4 of the Emergency Act.

Chicago, M., St. P. & P. R. Co. v. Hedges, 5 Fed. Supp. 752 (W. D.
Washington, 1933). Dismissing an application for an injunction
against a State excise tax. At p. 761, concurring opinion by Cushman, J., cites the Emergency Act to show the existence of an emer-
gency in the railroad industry.

Louisville & Nashville Railroad Co., et al., v. United States,
to as "the Dixie Case".

Coram Barnes, Evans & Sullivan, JJ. The action was brought
under Section 15 of the Emergency Act, which provides that the pro-
cedure set forth in the Urgent Deficiencies Appropriation Act (33 Stat.
219) for the review of Commission orders be followed in actions for
the review of final orders of the Coordinator.

Supra, pp. 305 to 308.
continuance of the through interchange of passenger equipment on the "Dixie Route" between the Louisville and Nashville Railroad and that line at Evansville, Indiana, and forbade the establishment of a similar arrangement in substitution therefor between the Louisville and Nashville and the New York Central System. The order, which had been issued only after a hearing by the three Regional Coordinating Committees (set up under the Emergency Act) on the papers and oral testimony of the railroads involved leading to no affirmative recommendation, and only after thoroughgoing investigation by the Coordinator's staff, rested on the conclusion that, were the Louisville & Nashville allowed to institute the change, wasteful duplication of service and the elimination of an existing route would result, since traffic considerations would justify the continued operation of the old train service by the Chicago & Eastern Illinois, while, at the same time, operating considerations would compel the New York Central to add to its previous service, in direct contravention of the declared policy of the Emergency Act. The attack on the order centered on two major contentions, that the order was beyond the Coordinator's statutory authority, and that it violated the due process clause of the Fifteenth Amendment of the Constitution. There were no allegations in denial of the Coordinator's conclusion as to waste, so that the issue was not presented to the court on the merits but only on the question of legal power. The short answer given by the three-judge court was that the issuance of the order was within the statutory

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212 A temporary injunction had been granted by Judge Barnes, whose court already had jurisdiction over the Chicago & Eastern Illinois reorganization proceedings. No. 52, 871, printed in Brief for Appellee, 64.

213 Section 4(1) (a) of the Emergency Act reads: "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 joint use: Provided. That no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the Coordinator."

214 The case was argued on the pleadings, and the exhibits attached thereto, which included (1) a history of the "Dixie route" service from 1892 on (compiled by the counsel for complainants), (2) the C. & E. I. Trustee's original letter of application to the Coordinator, and his later memorandum, (3) the response of the three defending railroads (N. Y. C. L. & N., and N. C. & St. L.) to the former, (4) the Trustee's memorandum to the Coordinating Committees, (5) the report of the Coordinating Committees, (6) the C. & E. I. Bondholders' Committee's intervening petition to the Coordinator, and (7) the Coordinator's Report and Order.
authority of the Coordinator and since it found that an administrative question was involved and that the administrative procedure provided in the statute had not been invoked by the plaintiffs it declared the case not yet "at the judicial stage" and dismissed the bill. Thus the holding goes no farther than to settle the pertinent questions of construction of the Emergency Act and to apply the doctrine that one must exhaust one's administrative remedy before resorting to the courts in controversies involving "administrative questions" under it.

The opinion deals with the latter problem at the outset.\textsuperscript{215} Pointing out that the Act required the Commission to take some action on a petition for review even though that be only to dismiss the appeal it then considered the various factors to be weighed in the making of such an order—the financial condition of the Chicago & Eastern Illinois the potential effect on it of the deprivation of its chief source of passenger revenue, the quality and effect of the service to be substituted by the New York Central. Concluding that such matters clearly called for determination by an expert administrative body the court followed without further discussion the closely analogous case of United States v. Illinois Central Railway,\textsuperscript{216} and accordingly turned to the question of the Coordinator's statutory authority.

After an extraordinary understanding survey of the broad outlines and general purposes of the Act\textsuperscript{217} it was sought to interpret Section 6(a), which reads in part:

"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 provisions of Section 5,\textsuperscript{218} he is hereby authorized and directed to issue and enforce such order . . . ."

To the contention that the committees had "acted" in writing their letter to the Coordinator, which asserted no positive position but rather one of "hands off", the court answered that this was hardly "acting" and further that such nonaction should not stand in the way of the Coordinator's power to order con-

\textsuperscript{215} 10 Fed. Sup. 185, at 191.
\textsuperscript{216} 291 U. S. 457, 54 S. Ct. 471 (1934).
\textsuperscript{217} Pp. 191-192.
\textsuperscript{218} Section 5 makes it the duty of the Committees to initiate "severally within each group and jointly where more than one group is affected" action to carry out the purposes set out in subdivision (1) of Section 4, as to which see note 213, \textit{supra}.
ferred in Section 5, accepting, doubtless, the Government's contention that, under the suggested construction, the functions of a Coordinator would be rendered futile."

To the contention that no words in the Act authorized the issuance of such an order, answer was made that the whole statute gave such a meaning to Section 5 and 6(a) as to justify the order, if it would prevent unnecessary duplication of services and facilities and the elimination of a "route now existing" without the consent of all participating lines, and as to these it was held that such a finding was possible under the facts. Finally, it had been urged in argument that no hearing had been afforded the plaintiffs, and that this violated due process. In reply, the court said:

"This was a hearing and a determination of an administrative question by an administrative officer..."

and, accordingly, that administrative, rather than strictly judicial, process would suffice.

A study of the opinion leads inevitably to three general conclusions. The court assumed without discussion that the whole body of administrative law as developed with reference to the Interstate Commerce Commission applies as readily to question relating to the Coordinator arising under the Emergency Act. Secondly, the court approached sympathetically the Act as a whole, seeking to construe it in the light of its history, nature, and background. Finally, the influence of the so-called "emergency doctrine" is not imperceptible in the opinion: It is submitted that, so far as these three propositions are concerned, the attitude of this court but reflects that of the modern court, wherever it is sensitive to the innumerable pressures—economic, political, and social that, intruding, make to disrupt the traditional judicial calm. Accordingly, it will be of value to examine these conclusions in more detail and to suggest into what provinces they lead.

In the first place, the court in dismissing the argument that no proper hearing had been granted the plaintiffs was falling in line with a well-established precedent as to the Commission

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219 Brief for the Government, 8.
220 At p. 193.
whereby in certain cases a hearing may be dispensed with.\textsuperscript{221} Then by following the \textit{Illinois Central Case},\textsuperscript{222} where an order of the Commission was sustained without further review by the Supreme Court because the machinery provided for administrative review had not been invoked, the court made applicable to the Coordinator a doctrine, well-established in the many fields of administrative law,\textsuperscript{223} and closely akin to the doctrine of "primary jurisdiction,"\textsuperscript{224} one of the fundamental doctrines governing judicial review of Commission orders.\textsuperscript{225} Where adequate safeguards are afforded, court review of each act of judgment contributing to the final result is not indispensable\textsuperscript{226} and the opportunity for full review by the Commission of the Coordinator's entire action provided a fairly certain and complete safeguard in this case. Before the Senate Committee, Commissioner Eastman had expressed this thought when he called the proposed Coordinator just a "glorified examiner of the Commission".\textsuperscript{227} Furthermore, as this court recognized when it limited

\textsuperscript{221} Avent v. United States, 266 U. S. 127, 45 S. Ct. 34 (1924), sustaining a car service order of the Commission apparently issued without a hearing, in accordance with Section 1(15) of the Interstate Commerce Act. But see Southern Railway v. Virginia, 290 U. S. 130, 54 S. Ct. 148, where the Court overthrew a state statute vesting in a highway official power to determine the need for grade crossing elimination and to make the necessary order without a hearing as being arbitrary. Three judges dissented.

\textsuperscript{222} Supra, n. 216.

\textsuperscript{223} Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617 (1932); Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633 (1900).


\textsuperscript{225} The doctrine was also applied to review of orders of the Shipping Board. See the comment of the Court in U. S. Navigation Co. v. Cunard S. S. Company, comparing the Shipping Act of 1916 (39 Stat. 728) to the Interstate Commerce Act: "These and other provisions of the Shipping Act clearly exhibit close parallelism between that act and its prototype, and the applicability to both of like principles of construction and administration." 284 U. S. 474, 484, 52 S. Ct. 247 (1932).

\textsuperscript{226} Union Bridge Co. v. United States, 204 U. S. 364, 27 S. Ct. 367 (1907); Monogahela Bridge Co. v. United States, 216 U. S. 177, 30 S. Ct. 356 (1910); United States v. Ju Toy, 195 U. S. 253, 25 S. Ct. 644 (1905); and compare language of Hamilton, L. J., whose view was accepted by the House of Lords (1915 A. C. 120), in Local Govt. Board v. Arlidge, 1914 K. B. 160, 201. "There is no place here for a phrase that was used in argument, namely, the appellant's 'common law right' to stand before his judge," favoring a construction of a statute that set up an administrative procedure for reviewing orders closing houses unfit for habitation that provided neither for hearing of claimants (by the reviewing board) nor for publication of orders which at the same time greatly reduced the scope of court review.

\textsuperscript{227} Hearings, on Emergency Railroad Transportation Act, House Com. on Int. & For. Commerce, 50.
itself to the determination whether or not the findings of the Coordinator could be supported "by the facts", even when court review is permitted its scope is narrowed to question as to (1) constitutionality, (2) statutory authority, and (3) certain subsidiary questions in essence comprising the test whether there has been substantial as well as formal conformity with the underlying charter, for example, whether there was evidence before the administrative body from which its finding could be made, a narrower question than is presented when the ordinary appellate court reviews on appeal the action of a lower court. But there is a limit beyond which courts will not go in narrowing the scope of their own review, well expressed in the caveat uttered by Mr. Justice Harlan some thirty years ago:

"Suffice it to say, that the Courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of essential rights of property."

Arguments based on the interconnected doctrines of Separation of Powers and Delegation of Powers are seldom heard in this present day where Commission action is being attacked. Nor were they made in the Louisville & Nashville case, although from the point of view of abstract political theory the Coordina-

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229 Monongahela Bridge Case, supra, 216 U. S. 177, at p. 195.

230 It is quite possible that it was fear of "the doctrine of negative orders" which led counsel in the Dixie case to resort to the courts in preference to the Commission, for, had the Commission refused to take action, this doctrine legalistically applied would have operated to prevent any review by the courts. However, this uniquely would have constituted a case for the application of the principle of the quoted dictum. See Proctor & Gamble v. U. S., 225 U. S. 282, 32 S. Ct. 761 (1912). 2 Sharfman 406-417. It follows from the text above that the established case law confirming the Commission's power to enforce orders and to conduct investigations would also have been carried over to reinforce the Coordinator's similar powers. See Interstate Commerce Commission v. Brimson, 154 U. S. 447, 155 U. S. 1, 14 S. Ct. 1125 (1894).

231 In St. Louis & Iron Mt. Ry. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616 (1908), the Court disposed of the argument that there was improper delegation to the Commission when it was given the power to fix the uniform height for draw bars on freight cars throughout the country very briefly and bluntly, citing the leading administrative law cases on this point, Butterfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349 (1904), and the Union Bridge Case, supra, n. 226.
tor's vested powers certainly represent an admixture of a rare sort. If Mr. Justice Holmes' proposition that: 232

"Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . ."

be accepted, the great bulk of the Coordinator's vested power was "legislative"—his power to alter operating arrangements (as in this case), to revise traffic and service practices, and to effectuate terminal unifications and other coordination projects, all through the power to order. To these must be added his broad power to dispense laws, both State and Federal, a power of the broadest nature. 233 And if it is agreed that the "judicial" function is that in which he: 234

"investigates, declares, and enforces liabilities as they stand on present or past facts and under the law supposed already to exist. . . ."

232 Referring to the rate-making function, Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226, 29 S. Ct. 67 (1908).
233 The dispensing power is well analyzed in E. Freund, "Administrative Powers over Persons and Property", 128-135. It is not an unusual power even in democratic America, and its constitutionality has been upheld several times. The Laura, 114 U. S. 411, 5 S. Ct. 581 (1885) (sustaining the Secretary of the Treasury's power to remit penalties paid under a marine inspection statute), Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, 48 S. Ct. 587 (1928) (assuming the validity of provisions permitting the Commissioner of Internal Revenue to relax the statutory mode of assessing taxes where it resulted in undue hardship), Lehigh Valley v. U. S., 234 Fed. 692 (E. D. Pa.) affirmed other jrsds., 243 U. S. 412 (sustaining the power of the Commissioner to relax the operation of the sections of the Panama Canal Act (37 Stat. 568) as provided therein as to operation by the railroads of competing water lines, other than through the Canal), United States v. Southern Pac. Co., 290 Fed. 443 (Utah, 1929), and New York Central Securities Corp. v. Interstate Commerce Com., 54 Fed. (2d) 122 (S. D. N. Y., 1931), affd. other grounds, 287 U. S. 12 (sustaining the Commission's power to relax the anti-trust laws in Section 5(15) of the Interstate Commerce Act). Although such a power is usually extremely broad on its face, it is narrowed considerably in its application by the requirement of exercise only in conformity with the general lines of the statute in which it is found and by the due process clause. In the intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986 (1914), the power of the Commission to suspend operation of the Fourth Section within its discretion was challenged and met squarely as to these limitations, and while the opinion of Chief Justice White appears to be guided by certain conceptualistic ideas of delegation, there is evidence in the opinion that the decision was dictated by other influential considerations: the impracticality with dealing with that particular situation in any other way, the expert nature of the Interstate Commerce Commission, and the increasing resort of government to administrative bodies similar to it which was beginning to be noticeable at the time. The Court relied heavily on the last of these, citing numerous cases.
234 Referring to the rate-making function, Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226, 29 S. Ct. 67 (1908).
then his power to bring about the determination of just compensation for employee property losses resulting from coordination carrying out the purpose of the Act and his power to determine just compensation for use of carrier property or services in connection with orders issued may be considered "judicial." Thirdly, the residuum of his functions and duties may as well be called "administrative" or "executive" as by any such demanding term, yet today an argument frankly based on the abstract doctrine of separation of powers would hardly stand one moment before the practical considerations to be urged on the other side in defense of the Coordinator. Therefore, the basis of attack would have to be, as it was in a later case, that the delegation of power to the Coordinator was void for the lack of the necessary standard.

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235 Under Section 7(d).
236 As provided in Section 8.
237 But compare the following extract from the Brownlow Committee's Report of Jan. 8, 1937, referring to the independent regulatory commissions in the Federal Government:

"Those independent commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three." Report of the President's Committee, "Administrative Management in the Government of the United States," 36 (1937).

239 Brief for appellant, 31-32. The limitations as to standards have been recently discovered in two cases dealing with different sections of the National Industrial Recovery Act (49 Stat. 195). An Executive Order forbidding the transportation in interstate commerce of "hot oil" issued under the statute which set little apparent limit on the President's discretion was declared invalid in Panama Refining Co. v. Ryan, 293 U. S. 338, 55 S. Ct. 241 (1935), in which Chief Justice Hughes declared: "there are limits of delegation which there is no constitutional authority to transcend. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule." (430.) To this Mr. Justice Cardozo in his dissent replied: "... the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their infinite variety. The Interstate
court did recognize the possible validity of the order in the *Louisville & Nashville Case*, it implicitly recognized the validity of the delegation as to this particular order. What standard there was was provided in the main by the words of Section 4(1)—"avoid unnecessary duplication of services and facilities ... and avoid wastes and other preventable expense"—and by the general structure and purposes of the statute. That "waste" is an extremely broad word was clearly brought out in the Congressional committee hearings on the Act. Yet it is no broader than "reasonable", which has delimited the standard for the Commission, the powers of which have been said to be "among the broadest and least restrictive in the whole range of Interstate Government," in countless instances throughout its history, and which has been worked out in accordance with the method described by Judge Mack:

"To determine, however, the true meaning of the proviso, the entire act must be examined. In the light of the other sections, and of the legislative and judicial history of the clause, we are of opinion Commerce Commission probing the economic situation of the railroads of the country, consolidating them into systems, shaping in numberless ways their capacities and duties, and even making or unmaking the prosperity of great communities . . . (cases) is a conspicuous illustration. . . . What may be delegated to a commission may be delegated to the President." (440.)

The President's code-making power received similar treatment in the Schechter case, 295 U. S. 495, 55 S. Ct. 837 (1935).

For example, John E. Benton, general solicitor of the National Association of Railroad and Utility Commissioners, referring to the possible effect of the exercise of the power to order on the work of the State Commissions made the following statement before the House Committee in the hearings on the Act:

"That (the language concerning waste and preventable expense) is wide enough to embrace any order or regulation whatsoever which causes expense, which may be prevented by an order from the Coordinator . . ." (House Hearings, 133.) In similar vein is the statement of H. R. Burford, general counsel for the Louisiana & Arkansas Ry.:

"It may be contended that the extraordinary power here conferred will not be used. There is nothing to prevent it. No standard or rule is prescribed and no line can determine whether it is guilty of 'waste' as used in the bill, either in securing or in the movement of traffic." House Hearings, 258.

Commissioner Eastman at the time, when asked if the proposed Coordinator would have authority to force salary cuts by executives, replied:

"Well, those words are extremely broad, 'other wastes and preventable expense' . . . If he can translate that in his own mind into a waste, I think he would have that authority." Senate Hearings, 57.

Annotation to Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1934), in 79 L. Ed. 446, at 509 (1935).
that the guide to the exercise of the Commission's discretion is to be found in the other sections of the act..."

Under the Emergency Act a certain delimitation was afforded by its general plan and purpose, a delimitation refined by the specific limitations contained therein, of which there were three, the labor restrictions, that as to the limitation of joint routes, and that (confined to orders affecting State laws or regulations) requiring a finding of necessity for the order "to prevent or remove an obstruction to or burden upon interstate commerce."243 As a conclusive indication of the reality of the interrelation between the established course of decision as to the Interstate Commerce Act and treatment accorded the Emergency Act, the significant remarks of Commissioner Clyde B. Atchison should be cited:244

"The (Interstate Commerce) Act with its successive amendments has repeatedly served as a model for other regulatory statutes, both State and Federal. (Continuing in note.) The effect is to import into such later acts of Congress the interpretation, application, and effect of the Interstate Commerce Act."246

With reference to the court's approach to the construction of the Act, it is significant that a considerable proportion of the opinion is given over to an exposition and analysis of its purposes as reflected both in the words of Section 4 and in the broad lines of the statute as a whole. Both in the interpretation of the phrase "the committee has not acted" and of the phrase "to avoid unnecessary duplication of service and facilities... and in other wastes and preventable expense" the foregoing considerations were dominant. As to the elimination of an "existing

244 Section 10(b).
246 There were a number of parallel provisions in two acts, which should be noted, such as those relating to the coordination of transportation agencies generally (Section 4 of the Emergency Act and Section 6(13) of the Interstate Commerce Act), the suspension of the anti-trust laws and other conflicting statutes, state and federal (Section 10(a) and Section 5(15) respectively), the operating efficiency of the carriers (Section 4 and Section 15a (both the old and the new) respectively), the notification of and consultation with state authorities when their interests are concerned (Section 10(b) and Section 1(19) respectively), and to enforcement by the United States District Attorneys (Sections 12 and 16(12) respectively). Jurisdiction to review final orders of both Coordinator and Commission is conferred by Section 16 of the Emergency Act and by the Urgent Deficiencies Appropriations Act (38 Stat. 219).
route", the court recognized that a narrower question was raised, yet still a question to be settled by an administrative agency. A different disposition had been made of the interpretation of this proviso in an earlier case, where the question was whether, after passage of the Emergency Act, a railroad could discontinue on its own initiative a through route and joint rate with another carrier. The Circuit Court of Appeals for the Fifth Circuit had answered this in the negative, on the assumption that the Congress had intended that the Act should foster coordination and stabilize existing routes throughout the whole country without exception. The contrary view was later taken in the Fourth Circuit, where the court, supported in its reasoning both by the analogy provided by a local coordination case in the Supreme Court, in which Section 11 was held not to have affected the scheme previously sanctioned by the Commission under Section 5 of the Interstate Commerce Act, and by administrative interpretation by the Coordinator's staff and by the Commission, relied on the contrast between the temporary measure enacted in Title I and the permanent nature

247 Under Section 6(3) of the Interstate Commerce Act.
248 Note 246, supra.
251 In reply to a request for an official ruling on the question Charles E. Bell, Executive and Traffic Assistant to the Coordinator, answered by letter as follows: "... the prohibitions therein against eliminating routes without the consent of all participating carriers, or upon order of the Coordinator, are merely limitations upon the powers, duties, and functions set forth in the Emergency Act, and not general provisions intended to modify the Interstate Commerce Act. To take any other view would mean that each and every participating carrier in every tariff published in the United States would have the right to appeal to the Coordinator before it could be eliminated from any tariff. Manifestly, that was not the intent and the Coordinator has not the machinery to investigate and pass on all such situations." Letter to E. M. Yarborough, Gen. Frt. and Pass. Agt., South Georgia Ry. Co., Quitman, Ga. Nov. 30, 1934, printed at pp. 27-28 of the brief for the appellant in Atlantic Coast Line v. Hampton & Branchville R. R. Co., supra.
252 In a proceeding under Section 1(18) in which the Brotherhood sought to have conditions imposed in accord with Section 7(b) of the Emergency Act upon a carrier which was seeking to consolidate its operation, the Commission ruled:

"Our jurisdiction under the Emergency Act applies only after the Coordinator has issued an order. . . ." Chicago, Great Western Railway Trackage case, 207 I. C. C. 315, 318 (1935).
of the amendments to the Interstate Commerce Act in Title II.

No court was called on to construe the vital Section 7(b) of the Emergency Act, although the Coordinator felt called on to issue his interpretation of it on two occasions. The first was favorable to the railroad employers and was published when he was seeking to stimulate carrier action during the first month of his administration, and the second, one less favorable to the carriers when he was seeking to combat their "ghost" committees set up merely to evade the restrictions of Section 7. In

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Excerpts from this statement follow:

Section 7(b) of Title I of the emergency railroad transportation act, 1933, contains restrictions on reduction in the number of employees in the service of a carrier and in their compensation "by reason of any action taken pursuant to the authority of this title." I have expressed the view that these restrictions do not apply to any lawful action taken by individual carriers or by carriers jointly which does not result from any authority conferred by the act or involve the use of any agency or mechanism which it creates, and to this opinion I adhere. . . .

It appears, however, that in each region the carriers have also created a general committee which is separate from the regional coordinating committee, and that the duties of these general committees are much the same as those which the act imposes upon the regional coordinating committees, i.e., to search out means of avoiding waste and preventable expense and promote voluntary action by the carriers to this end. The plan seems to be that these general committees shall function independently, and that the projects which they consider shall not be brought to the attention of the regional coordinating committees or of the Coordinator unless voluntary action by the carriers proves impossible. This is with the thought, I take it, that any economies which the carriers may be able to accomplish in this way with the help of the general committees will not be subject to the labor restrictions of Section 7(b) . . . .

I know that the general committees were instituted prior to the passage of the act, or trace their lineage to committees which were finally emerged as the emergency railroad transportation act, 1933, and it seems clear that these committees would, but for the provisions of Section 7(b) have been merged with and in the regional coordinating committees.

It is, of course, important that entire good faith should be maintained with the President and Congress, whose will is reflected in Section 7(b), and that anything which savours of evasion should be avoided. From this point of view, I can not escape the conclusion that projects for economy which are found to require consideration by committees representing the carriers of any region collectively should be handled as the act contemplated that they would be handled, namely, through the agency of the regional coordinating committees which are understudies or substitutes therefor.

With a view to accomplishing this result, I deem it my duty now to refer to the regional coordinating committees for investigation and report all projects within their respective regions which are embraced under certain general heads listed in the appendix hereto. They cover matters which, as my regional directors have found, the general committees are now investigating or propose to investigate. They do not
treat ing it any court would have necessarily been limited in its desire to give full and sympathetic construction to the Act by the established canon that, where possible, that construction must be adopted which avoids the possibility of constitutional invalidity. The paragraph in question provided:

“The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service 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.”

On the one hand, lay the possible construction urged by the railroads, that the effect of (1) the position of the provision in Title I and (2) the words “by reason of any action taken pursuant to the authority of this title” was to limit its application to instances where formal action was taken through the machinery provided by the Act. On the other hand, lay the Coordinator’s construction, that wherever joint carrier action was taken, the effect of which was to run afoul of these provisions, and the purpose of which on the part of the carriers was to evade them, they would be applicable. In between lay a great expanse of middle ground. Under any of these constructions a constitutional issue would be raised, yet the intensity with which it could be urged would vary with the breadth of the construction adopted. On the one side there would be the danger of a
practical emasculation of the statute, and on the other all the dangers inherent in anything done in the name of the law that looks like the coercion of employers to employ.258 In sum, while it may be assumed that the sympathetic approach of the court in the Dixie case toward the Act would generally be prevalent

commerce clause. ("As their (the railroads') service is vital to the nation, nothing which has a real or substantial relation to the suitable maintenance of that service, or to the discharge of the responsibilities which inhere in it, can be regarded as beyond the power of regulation . . . ." Hughes, C. J., dissenting (with whom Justices Brandeis, Stone and Cardozo concurred) in Railroad Retirement Board v. Alton Railroad, 295 U. S. 330, 375-376, 55 S. Ct. (1935), which declared a comprehensive pension system for railroad employees not regulation of interstate commerce; see also dissenting opinion of Cardozo, J., in which Brandeis and Stone, JJ., joined, I. C. C. v. Oregon-Washington R. Co., supra, n. 254 (where the majority narrowly construed Section 1 of the Interstate Commerce Act to deny the Commission power to order a 185 mile extension of line). But it is not clear that restrictions of the power to discharge employees at will would be so authorized, even though attached to a measure offering encouragement and sanction to voluntary railroad action in self help. On the one side would be such cases as the Railroad Retirement Case, supra, and on the other the Employers' Liability Cases, 223 U. S. 1, 4, 32 S. Ct. 1 (1912), Wilson v. New, 243 U. S. 332, 37 S. Ct. 293 (1917), and the recent cases sustaining the Wagner Labor Relations Act, 57 S. Ct. 615, 57 S. Ct. 642, 57 S. Ct. 645, 57 S. Ct. 648, 57 S. Ct. 650 (1937).

The area of validity under the due process clause cannot be definitely delineated, yet a suggestion is offered as to its rough bounds by the Wolff Packing Co. Case, 262 U. S. 522, 43 S. Ct. 630 (1923), in which the Court rejected a comprehensive scheme resting upon a system of compulsory arbitration in labor relations, even though there was a local emergency situation involved, and by the instances gathered together by Mr. Justice Roberts in the Nebbia Case, 291 U. S. 502, 529, 54 S. Ct. 505 (1934) where restrictions on "absolute freedom" in the employer-employee relation have been sustained (at page 527).

To them should be added, among others, cases sustaining restrictions on the employer's right to deal with his employees except through their freely chosen representatives, Texas & N. O. v. Brotherhood, 281 U. S. 549, 50 S. Ct. 427 (1930), extended in Virginian Ry. v. System Fed. No. 40, 57 S. Ct., 592 (1937), to sustain a court order under the Railway Labor Act requiring an employer to "treat with" the duly certified representatives of his employees. In the last analysis, as far as the due process clause is concerned, each case goes on its own peculiar facts and is dominantly affected by the temper of the court at the particular time (see infra. pp. 353-354.

258 In reliance on the proviso in Section 12 "that nothing in this title shall be construed to require any employee or officer of any carrier to render labor or service without his consent, or to authorize the issuance of any orders requiring such service, or to make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or services," the defending railroads (Louisville & Nashville, Nashville, Chattanooga & St. Louis, and New York Central) had argued to the Coordinator that his order would result in such enforced service. They did not raise the argument before the District Court, however.
as to most matters of construction suggested by it, a definite limitation must be recognized in those instances where the danger of unconstitutionality was thought to be present.

First year law students are always taught the catching phrase "danger invites rescue." It is the intention to ponder here the similar phrase "emergency creates (legal) power." Throughout the opinion in the Louisville & Nashville case there are evidences that the fact of emergency was very real to its writer. In discussing the broad purposes of the Act, which were at one point stated to be

"to administer oxygen to critical patients and to revive those who were suffering from sinking spells. . . ."

and in liberally interpreting its words, the court lived up to its recognition that

"this act is clearly remedial in character, and should be construed accordingly. . . ."

by according full weight to the fact of the emergency situation in which it had been enacted. While as here construction may be equally influenced by the element of emergency, strictly speaking, the so-called "emergency doctrine", is concerned with constitutional power. Wilson v. New best sets this forth, for present purposes. In that case action was brought to enjoin the enforcement of the Adamson Act, passed in response to an urgent message by President Wilson on the eve of a nation-wide railroad strike. Arbitration had failed, the nation was threatened by war, and the establishment of an experimental readjustment of wages by the device of shortening the day from ten hours to eight while still requiring the same per-day rate to be paid for a short period of time appeared to be the only means of averting disaster. In turning aside the attack of unconstitutionality Mr. Chief Justice White discussed the broad nature of the power conferred and the direct interest of the public in the subject-matter concerned, examining with care each detail of the situation to meet which the legislation had been enacted. It is

251 "Generally speaking, a study of it (the Act) warrants the conclusion that it was enacted to save certain railroads from bankruptcy and to perpetuate an efficient means of interstate transportation in the United States."
243 U. S. 332, 37 S. Ct. 298 (1917).
not clear whether the Chief Justice was referring to the commerce power or due process when he said, in answer to the assertion that the emergency cannot be made the source of power:

"The proposition begs the question, since, although an emergency may not call into life a power which has never lived, nevertheless emergencies may afford a reason for the exercise of a living power already enjoyed."

Furthermore, the holding was carefully limited to the exact set of facts of the case, with the result that in recent cases the doctrine could be cited on one side, and then on the other without materially affecting the actual result reached by the Court. Without doubt the particular exigencies of the situation in the Wilson Case governed the decision as they did in the Rent Cases, and in the Minnesota Moratorium Case. Courts have often given recognition to the existence of the depression which witnessed the birth of the Emergency Railroad Transportation Act, 1933. In the light of recent experience with "the judicial process" and of the considerations set forth above, it is difficult to conceive that any court would not be influenced to some extent in its approach to the Act by the special considerations raised in the case before it. In so doing, whether it phrased the result in those terms or not, it would be acting well within the established precedent sometimes called "the emergency doctrine". And even though a court be of a temper to sustain legislation in more normal times surely invalid, there are limits beyond which it cannot go. On the one hand is the famous warning sounded

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263 At p. 348.
266 Mr. Powell comments on the latter case: "Formal in the extreme was the rejection of all saving grace in emergency. Could the Court but find it there, it could with ease have said that in troublous times the local so affects them that the relation between them is direct and close. . . . The Court went a way it chose and not a way compelled." "Commerce, Pensions, Codes", 49 H. L. R. 1, 219 (1935).
268 Note 264, supra.
in *Ex Parte Milligan*,\(^{270}\) which invalidated action taken under an unjustified declaration of martial law:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government . . . ."

which may or may not mean anything, depending on numerous factors outside the scope of this paper, except perhaps that no matter how serious the emergency, blatant and frank disregard of Constitutional provisions will not be sanctioned by the Court. On the other hand, is another obvious limitation, well stated in *Chastleton Corporation v. Sinclair*,\(^{271}\) a case declaring invalid the Rent Law in the District of Columbia succeeding that sustained earlier in *Block v. Hirsh*:\(^{272}\)

"A law depending on the existence of an emergency or other state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Just who decides when the emergency is over and when ""the facts have changed"" presents a number of further problems. However, although there has been improvement in the railroad industry and a great deal of progress has been made, it is submitted that the disease has not been wholly rooted out as yet, and that accordingly this limitation would be less significant in the present connection. The Coordinator's experimental status, his power to affirmatively manage the railroads, to remake adjustments, to affect labor relationships, to control individuals, all these and many more would have to have been tested out case by case, situation by situation, adjustment by adjustment, before any satisfactory conclusions would lie. Of the satisfaction of possessing such, fate has forever deprived those who are still curious enough to seek a certain answer, yet the possibility lies ahead that at some time in the future new light will be reflected back by new happenings.

Out of a great need has come an undeniable demand for action to attack the transportation problems of the American nation. A germinal idea, prevalent in the minds of thoughtful students of these problems both at home and abroad, formulated

\(^{270}\) 4 Wall. 2, 120, 121, 18 L. Ed. 281 (1866).

\(^{271}\) See n. 267.

\(^{272}\) Per Holmes, J., 264 U. S. 543, 44 S. Ct. 405 (1924).
in terms of the incomplete yet not wholly insignificant experience of American railroad men up to that time as modified to satisfy the forceful demands of labor and of localism, was embodied in a statute, the Emergency Railroad Transportation Act, 1933. Its administration was entrusted to a man as able, as experienced, as highly respected, and as closely connected with its evolution as there was to be found. He brought to it a carefully worked out philosophy of administration, which left no room for arbitrariness and very little for affirmative management on the part of the regulatory body. Supported by an expert and well-organized staff, the Federal Coordinator of Transportation, striving for a full and sympathetic application of the common sense principles developed by his studies and expounded in his reports, undertook to achieve this more through the informal and penetrating device of persuasion than through orders. The Act itself set up a framework to facilitate this process, which framework was later supplemented by the Association of American Railroads, itself one of the tangible results, direct or indirect, which flowed undeniably from the Coordinator's work. Another was a number of coordination projects, terminal unifications and others, which were carried into execution in various parts of the country, and another the tremendous stimulus received by thought on railroad and regulatory problems throughout the land. Still another was the carefully worked out program of legislation submitted to the Congress, some of which was to be adopted immediately and some of which was to furnish the basis for further proposals and later action. Perhaps most significant of all was the high standard of thought and action, a standard tempered by a national approach, both as to operating problems and service and regulation and labor relations, which was brought to and permanently instilled in that all-conditioning environment in the modern economy, the railroad world, by the endeavors of Coordinator Eastman.

With many aspects of such an administrative agency law courts are little concerned, particularly when it has established a high reputation for itself. Yet they do stand ever ready to protect "fundamental rights" whenever occasion arises. Even an agency primarily devoted to the service function can violate its
basic charter, and when it is given the power to make affirmative orders, it is essential that some technique carefully evolved in experience be provided to secure a constructive adjustment of the conflicting interests. *Louisville & Nashville v. United States* illustrates how the one court that did pass on such an order did avail itself of the well-formulated body of judicial experience that has been evolved in connection with the Interstate Commerce Act, without sacrificing any of the distinctive features of the Emergency Act or disregarding the dimly outlined spectre of constitutionality which lurked in the background. It gave full effect to the policy behind the Act by adopting a construction of ambiguous language which accorded full play to the Coordinator, in striking illustration of the modern tendency of courts to recognize that the exigencies of governmental administration are not to be dealt with legalistically on a basis of abstract logic or grammar but with a full view to the situation and the process involved as the whole. The meaning of "law" expands and the sharp difference between the philosophy of the judge and that of the administrator continues to disappear, though their functions remain distinct. Accordingly, the study of the legal background of the Coordinator permits one to peek into the future a little more confident of the trend administrative law is following.

To conclude, the comparatively small experience and effectiveness of the Federal Coordinator of Transportation, an experimental agency created in times of great economic emergency, has contributed far more than its share to the history of our time and will stand ever in a place of importance and influence with relation to later developments in governmental administration and administrative law. The Coordinator's achievements are but the bases for extensive future action. His ideas, while but slowly accepted, will inevitably lead to improvements on a plane never before directly reached by our government. His organization and technique have opened the way for many other experiments yet to come. Carefully organized, conscientiously administered, with standards always of the highest, constructively contributing to the growth of the law in its function and capacity of developing the interests of the whole people to the fullest, yet with due
concern for the interest of the individual, Coordinator Eastman's agency has demonstrated what man's government at its best can do.278

(Concluded)

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278 Besides the general sources consulted in the preparation of this paper, I have found the following publications of the Coordinator particularly helpful:

A List of the Prepared Addresses, Questionnaires, Reports, and Miscellaneous Statements of the Federal Coordinator of Transportation, June 16, 1933, to June 16, 1936. (Mimeographed.)

Reports to Congress:
- Fifth Report (Unemployment Compensation), unprinted, April 7, 1936.

Summary of the Work of the Federal Coordinator of Transportation under the Emergency Railroad Transportation Act, 1933, June, 1933, to June, 1935. (Multigraphed.)