FORAKER'S CHALLENGE IS ACCEPTED

As Senator Foraker is a member of the committee on interstate commerce, he will have a voice and a vote in framing a bill for the regulation of railroad rates, and for that reason his utterances are of great public interest. In a recent interview given wide publicity by the press, he issued a reply to Secretary Taft's speech at Akron, which is also a reply to President Roosevelt's speeches. Among other things Senator Foraker said:

> There is no reason whatever why, if any locality thinks it is discrimmated against or any shipper thinks he is discriminated against, application should not be forthwith made for relief, and relief secured if the charge can be sustained, for the court is by the statute expressly invested with full jurisdiction to entertain the compraint and administer a complete remedy. This statute has been in force ever since the 19th day of February, 1903. If Secretary Taft or anybody else will tell me wherein this remedy is deficient, or tell me in what manner a better remedy can be provided by conferring the rate-making power on the interstate commerce commission, we shall then have reached the point where glittering generalities can be dismissed and intelligent discussion may commence.

This challenge being general The Commoner, through a gentleman who has had wide experience in railroad affairs, will attempt to show wherein the statute of February 19, 1903, does not provide a sufficient remedy, and wherein the conferring of the rate-making power upon the interstate commerce commission will provide a practical remedy.

The gentleman to whom The Commoner refers has several times been quoted on this important subject, and the reply he makes to Senator Foraker's challenge should be carefully read by every one desiring to be accurately informed on the subject of railway rate regulation.

Replying to the Foraker challenge this gentleman says:

THE PRESENT LAW

The first thing is to know what remedy the act of February 19, 1903, provides. We quote from that act as follows:

> Section 3. That whenever the interstate commerce commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process * * * subject to the right of appeal as now provided by law.

THE OLD LAW

Wherein does this boasted remedy surpass in efficiency that provided in the act to regulate commerce as amended March 2, 1889, section 16, which is substantially as follows:

> That whenever any common carrier * * * shall violate or refuse or neglect to obey or perform any lawful order * * * of the commission it shall be lawful for the commission * * * to apply in a summary way, by petition, to the circuit court of the United States sitting in equity * * * alleging such violation or disobedience * * * and said court shall proceed to hear and determine the matter * * * and if it be made to appear to such court * * * that the lawful order * * * of said commission * * * has been violated or disobeyed it shall be lawful for such court to issue a writ of injunction or other proper process to restrain such common carrier from further continuing such violation or disobedience of such order * * * of said commission, and enjoying obedience to the same.

The original act contemplated a hearing by the commission, and a decision or order. In the event of refusal to comply with its orders the courts were to enforce them. The law of February 19, 1903, makes it the duty of the court to hear the case instead of the commission, and then enforce its decision. So far as results are concerned neither law has provided a practical remedy, and results are what we want.

THE FATAL ERROR

The fatal error in both these laws is that the order or decision does not become effective until it has been affirmed by every superior court in the land. The almost interminable delays defeat the remedy. Not only that, but knowing that relief can not be secured readily many wrongs are endured rather than attempt to secure it, and none knows this so well as the railroads. That is why they object to having the rate-making power conferred upon the commission. When the fact is realized that the question of rates is not one of law, it becomes at once clearly apparent why the effort of congress to provide a method of securing relief through the courts is a failure. In its eighth annual report, page 6, the commission refers to a supreme court decision in the Reagan vs. Farmers Loan & Trust company case, in which the court distinctly stated that

> Judicial interference with schedule rates prescribed by the legislature, or the commission * * * is confined to restraining a regulation of rates * * * unjust and unreasonable to the carrier such as to work practical destruction to rights of property and that prescribing charges for carriers is held to be a legislative or ministerial duty rather than a judicial function.

A CONVINCING DECISION

In the fourth report of the commission, commencing at page 13, will be found a learned and convincing discussion of this subject, expressed substantially as follows:

> A very common assumption is that the question of reasonableness of rates is one of law, and that the decisions of the commission must be subject to review by the courts. In order that the question of rates should be one of law it is essential that there be some clear and definite rules whereby rates can be made; rules obligatory upon the carrier as well as upon the tribunals that regulate them, and which may be enforced against the carriers as well as in their favor. If such rules existed, stockholders might have them enforced against the action of the directors, or other officers, in fixing the rates. But every person familiar with the subject of transportation by rail is perfectly aware that there are no such rules. No managing officer claims that they exist, and not one undertakes to regulate his action in the determination of rates by fixed, definite, unchangeable principles such as constitute rules of law. On the contrary, every step leading to the establishment of the rates that shall be charged begins and ends in the exercise of discretionary authority. Rates are never measured exclusively by either the weight, bulk or cost of the article, nor by value to the owner in having it transported; and if all of these and other considerations bearing upon the subject are taken into account in the fixing of rates, as they always are, there is no rule by which it can be determined how much importance should be attached to any one, or any combination of them. The first step in rate-making is a classification of the articles offered for carriage, and arranging them into classes which are to bear different rates. In making this classification all the considerations that can properly bear upon it are to be taken into account. In every classification, therefore, articles whose value is very great in proportion to the bulk or weight are classed high in the expectation that the rates imposed upon them will pay not merely the cost of transportation and a fair profit, but will contribute also toward adequate remuneration for the carriage of such articles as can not bear proportionate charges. Thus the cost of carriage to the carrier itself is no more a controlling consideration than is the value of the service to the owner of the property. If any court were to undertake to pass upon a question of reasonable rates as one of law it would be necessary to begin with this classification. It would necessarily undertake to give the proper force to each of those considerations which influence the actions of the carrier in classifying the articles, though it could only do this upon the discovery of some positive rule or rules of action such as no railroad manager and no public officer ever invested with authority has as yet been able to discover. A mere statement of the case shows how impossible it is that a question of classification should be one of law.

QUESTIONS OF SOUND JUDGMENT

On page 17 of the same report the commission said:

> An attempt is made to give authority to the courts to interfere by the suggestion that property or charter rights, or both, are involved in the matter of fixing rates, and that it is not possible the conclusions of an administrative board should be final. This is an endeavor by the mere use of words to confer jurisdiction upon the courts where the substance is altogether wanting. Property or contract rights are involved in these cases precisely as they are in numerous other cases of the exercise of power under the police authority of the state, either by itself or by its municipalities. It is said sometimes that the power may be exercised to such an extent that the property of the roads would in fact be confiscated, and most alarming pictures have been exhibited to the public of boards bent upon destruction.
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> The effort has sometimes been made to indicate a rule which must constitute the minimum of reduction in all cases, by not making rates so low that the roads could not pay interest and dividends, after maintaining the road and paying running expenses. This comes nearer to a suggestion of a rule of law for these cases than any other that has come to the knowledge of the commission. But it is so far from being a rule of law that it is not even a rule of policy, or a practical rule to which any name can be given, and to which the carriers themselves or the public authorities can conform their action. To attempt to consider the condition of roads and their equipment, improvements to be made and the innumerable questions that are involved in running expenses, it is very obvious that there can be no standard of expense which the courts can act upon and apply, but that the whole field is one of judgment in the exercise of a reasonable discretion.
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> Many roads never have and probably never will be able to pay their obligations and to pay dividends to their stockholders. Many have become bankrupt. But such roads are almost invariably operated with benefit to the sections of country served, and manage to pay running expenses and perhaps partly pay interest on present indebtedness. If the rule suggested is a correct one and must be adhered to by public authorities, then it is entirely impossible that those who operate these roads can prescribe excessive charges, since it is impossible to fix any rates that would bring their revenue up to the point of enabling them to pay any dividend, for the reason that their competitors would charge lower rates. But the rule suggested would also be one under which those roads would be entitled to charge the most which cost the most, and also those built with money borrowed instead of with money of the stockholders; the larger the debt the higher the rates that would be legal.
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> But over and beyond all this the attempt to apply the rule suggested would be absolutely futile for the reason that the rates prescribed for one road would necessarily affect others that either directly or indirectly came in competition with it. If, therefore, a court is to undertake to protect the one against its rates being so reduced as to endanger the payment of its obligations, it must reach out and restrain any regulation by the public authorities of the rates of all competitors, irrespective of the question whether they also are or are not subject to the same risk. The commissions created by law for the regulation of railway transportation do not deal with questions of classification or of rates as questions of law, but as being what they necessarily are—questions of discretion and sound judgment.

AN ADMINISTRATION DUTY

Congress has been trying to saddle a legislative or administrative duty upon the judiciary department, and has failed. The relief sought has not been attained, which conclusively proves