

bag. It is the first time any intimation has been given as to how a power to reduce rates could be used to stop rebates. And it amounts to this: that instead of going at the rebate-paying line by the infliction of penalties and by peremptory mandamus to compel it to take all business on the same terms, the promoters of this bill propose to punish all the honest lines in order to hurt the one that is guilty!

"The fact is that the prevention of rebate-paying would be greatly assisted by the repeal of the fifth or anti-pooling section of the law. This is a matter of expert knowledge, upon which there is no disagreement among experts. As was well said by President Hadley, 'It may be stated as a fact of history that no nation has succeeded in prohibiting discrimination and pooling at the same time.' Section 5 of the law was simply a blunder. If your friends want to know how track buyers of wheat can be protected, let them study the situation which exists where railroads contract with each other for the equitable apportionment of traffic.

"In the transportation service the cheapest is by no means necessarily the best. The true desiderata are efficiency in operation together with stability and equality in price. It is therefore a requirement of law that the rates of common carriers shall be alike to all. Whatever tends to effectuate this requirement is desirable; whatever tends to break it down (as does the fifth section of the law) is undesirable. Every man has a right to know the rate paid by his neighbor, and to enjoy the same rate himself; fluctuations in tariffs are also harmful to business interests.

"Thus we see why agreements among railroads to maintain legally established and reasonable rates differ from combinations to support prices in other industries. The people do not want fixed prices upon merchandise; they believe conditions are best when they can buy the products of the farm, the mine, the factory and the packing-house at the lowest price in an absolutely open market. But in the business of common carriers and other public or quasi public services, the people properly demand a fixed price, the same to all.

"Whether or not section 3 may now be called nugatory depends upon entirely different considerations. We here leave the domain of mathematics and enter a region controlled by theoretical principles of justice, where men will always disagree in their application to particular cases. The section in full is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular

person, company firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'

"Most of the important rate controversies under the law have arisen under this section. This will be the case for all time. Every shipper imagines that his rate situation might be improved, and cudgels his brain to find some basis for the claim that some other shipper or locality or description of traffic is more favorably treated in the tariffs. Claims of this character are constantly arising, and will never cease to be presented. Some of them are well founded. Hundreds of such claims have been adjusted since the enactment of the law through the agency of the commission, either informally by correspondence or after hearing upon formal complaint. Meanwhile thousands of similar cases have been adjusted by the carriers themselves. This work is constantly going on. The principle laid down in this section of the law is continually appealed to, and its justice as well as its authority is constantly recognized. Shippers hastily assert that the section is nugatory when their personal grievances are not promptly corrected, but its authority has been thoroughly established by court decisions, and every day witnesses its application and enforcement somewhere and in some form.

"The variety of cases which section 3 controls is infinite. Let us consider a few concrete cases as illustrations of what is involved and what the law can do. I think that no violation of section 3 exists that can be proved to the satisfaction of a court, which that court can not and will not promptly correct. In any case of demonstrated infraction of Sec. 3 (and Sec. 4 as well) the federal court can issue its injunction requiring the undue preference (or the violation of the short-haul rule) to cease absolutely and immediately. By this I do not mean that the court has an unqualified power to prescribe the manner in which the correction shall be made (though usually it would amount to that in practice), but it has ample jurisdiction to define the undue preference or the unreasonable disadvantage and to require that it shall be corrected.

"For example, the commission considered a case where it appeared that the rate on railway ties was 25.13 cents, while the rate on other lumber was only 12 cents, and where it was evident that the rate on ties was intended to be prohibitory against the shipment of ties away from the line of the road in question. The commission believed this was unreasonably prejudicial to shippers of ties and so reported. The railroad at once reduced its rate on ties. If it had not done so, the court could have enjoined the continuance of the undue preference, which the road would then

be obliged to correct either by advancing the rate on lumber or by reducing the rate on ties. As it could not advance its lumber rate to 25.13 without losing a large section of its traffic, it would have to reduce its tie rate.

"So also in the case of relative rates upon wheat and flour; the court has power to make an order enjoining the continuance of the unreasonable disadvantage of which American millers complain, which would compel a parity of rates if the court so required, or the establishment of a reasonable differential, if so adjudged.

"In all cases of this character the remedy is with the courts, and is close at hand. It does not take over twenty days to get a preliminary injunction order, if a *prima facie* case can be made out. This is the method prescribed in the act for regulating the maladjustment of relative rates. The jurisdiction of the courts has never been minimized by any decisions whatsoever. It is fully available today and has always been open to every shipper. How then can it be charged that Sec. 3 is nugatory?

"We find, then, that neither sections 1, 2 or 3 can in any proper sense be called nugatory at the present time, nor has the jurisdiction of the court to enforce them become in anywise inoperative.

"Section 4, the famous short-haul clause, is also far from being nugatory. This was the most prominent provision of the law in the early days of its administration, and rates were changed in all parts of the country in order to bring them into conformity with the intent of the section as expounded by the commission in the Louisville & Nashville case. In the making of tariffs at the present time this section is kept constantly in view and is universally observed, except in cases where the carriers believe themselves to be justified in making exceptions by reason of differing circumstances and conditions.

"The original interpretation of this section by the commission has been fully sustained by the supreme court. It is true that a few years later the commission changed its construction in a single particular, which the court afterwards disapproved; but it is absurd to say that this decision made the section nugatory.

"Section 7 also is in full force and is universally obeyed. The carriage of freight is continuous and undelayed throughout the United States from every place of shipment to every place of destination. No complaint of violation of this wholesome provision has been heard.

"We have thus examined every declaratory section of the law and have entirely failed to find any justification for the charge that the statute is nugatory. The allegation that it has been made nugatory by 'certain court decisions' therefore wholly falls to the ground."