Montana Law Review

Volume 36
Issue 1 *Winter 1975*

Article 12

1-1-1975

Section 13(4) of the Interstate Commerce Act: Unfair?

John Alke

Follow this and additional works at: https://scholarworks.umt.edu/mlr

Part of the Law Commons
Let us know how access to this document benefits you.

Recommended Citation
John Alke, *Section 13(4) of the Interstate Commerce Act: Unfair?*, 36 Mont. L. Rev. (1975).
Available at: https://scholarworks.umt.edu/mlr/vol36/iss1/12

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

SECTION 13(4) OF THE INTERSTATE COMMERCE ACT: UNFAIR?

John Alke

INTRODUCTION

The railroad rate structure in Montana, as in all states, currently labors under a system of dual regulation. The Interstate Commerce Commission is vested with jurisdiction over interstate rates by virtue of a congressional delegation of authority derived from the commerce clause of the United States Constitution.[1] The Public Service Commission of the State of Montana is vested with jurisdiction over intrastate rates, rates for that traffic which originates and terminates in Montana, as a valid function of its police powers,[2] a function specifically reserved to the individual states by act of Congress.[3]

With the existence of the dual system the federal government, at least in theory, has not preempted the field of railroad rate regulation. The ICC is, however, granted jurisdiction over intrastate rates under the circumstances enumerated by Section 13(4) of the Interstate Commerce Act.[4]

> Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared unlawful, it shall prescribe the rate, fare, or charge, or the maximum and minimum, or the maximum or minimum, thereafter to be charged . . . .

This power is granted to the ICC to the extent necessary to remove the discrimination against interstate commerce. The Supreme Court has ruled that state regulation of intrastate rates can discriminate against interstate commerce in two ways.[5] The discrimination can be a direct

[1]Interstate Commerce Act § 1(1), 49 U.S.C. § 1(1) (1910).

[2]State v. Jackson, 75 Mont. 240, 293 P. 1073 (1926).

[3]Interstate Commerce Act § 1(2)a, 49 U.S.C. § 1(2)a (1910).

[4]Interstate Commerce Act § 13(4), 49 U.S.C. § 13(4) (1958).

[5]In *Wisconsin R.R. Comm. v. C., B. & O. R.R.*, 257 U.S. 563 (1922), the Supreme Court judicially molded the concept of revenue discrimination. It declared a "dovetail relation" between § 13(4) and § 15a(2) of the Interstate Commerce Act. Section 15a(2) of the Act, 41 Stat. 488 (1920), *as amended* 49 U.S.C. § 15a(2) (1940) states:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate), will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Published by ScholarWorks at University of Montana, 1975

Montana Law Review, Vol. 36 [1975], Iss. 1, Art. 12

result caused by the creation of rate differentials between interstate and intrastate traffic so great as to favor a certain class of shippers or a certain geographic area ("persons-locale" discrimination). It can also be indirectly caused by forcing subsidization of the intrastate system by maintaining rates that are abnormally low, and not returning their fair proportionate share of income ("revenue" discrimination).

The origins of Section 13(4) lie in the former circumstances. The State of Texas was forcing its railroads to maintain intrastate rates which priced Louisiana interstate shippers out of the Texas markets. The Supreme Court, in *Houston E. & W. Texas Ry. v. U.S.*, ruled that since the ICC had found the interstate rates to be a reasonable freight charge, the considerably lower intrastate rates were discriminating against interstate commerce by favoring the Texas intrastate shipper.[6] Six years later Congress was "persuaded"[7] to legislatively incorporate the case by creating a proceeding before the ICC initiated by petition of the railroads.[8]

THE PROBLEM

Railroad rates are usually determined in an adversary proceeding before the regulatory agency. The railroad petitions the agency to allow it to raise its rates by some amount and interested parties are given a chance to come before the agency to contest the petition. A proceeding under Section 13(4) does not alter the adversary nature of the proceedings but it does change where its emphasis lies. Under Sec-

---

The interesting fact is that as conditions changed Congress changed § 15a(2) to meet the new economic facts of life. The Supreme Court, however, refused to incorporate these changes into the "dovetail relationship". In *Florida v. U.S.*, 292 U.S. 1, 5 (1933) the court stated:

> "Appellants insist that this result was reached because of what was described as the "dovetail relation" between § 13(4) and § 15a, and that the amendment of the latter section by Emergency Railroad Transportation Act, 1933, has effected a radical change. They contend that the Commission no longer has authority to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint. We are unable to accept that view. Section 13(4) was not amended by Emergency Railroad Transportation Act, 1933. The authority conferred by § 13(4) to prescribe intrastate rates for the purpose of removing unjust discrimination was not withdrawn. The Congress had knowledge of the construction given to § 13(4) by this court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would not have undertaken to change a policy of such great importance without explicit language indicating that purpose."

[6]Houston E. & W. Texas Ry. v. U.S., 234 U.S. 342 (1914).

[7]In *Wisconsin*, the Court gave judicial notice to the unusual circumstances behind the adoption of this legislation. The federal government had taken over the management of the railroads from January 1, 1918 to March 1, 1920. When it sought to return control to private management, that private management declined to accept control unless this legislation was passed.

[8]As pointed out, *supra* note 5, *Wisconsin* declared the congressional intent to be the creation of a "dovetail relation" between § 13(4) and § 15a(2). The Court declared in *Bd. of R.R. Comm.'rs of N.D. v. Great Northern*, 281 U.S. 412 (1930) that the congressional intent was to incorporate the *Houston* case. *Houston* in no way contemplated a "dovetail relationship", perhaps raising a question of consistency.

tion 13(4) the proceedings focus on the issue of determining whether the elements necessary to the ICC's jurisdiction are present, not whether the intrastate rates are reasonable. To be sure, the two are closely entwined, but this note will show that the courts have followed a policy which has allowed the ICC to gloss over the latter determination in order to expedite a determination of the former. The ultimate burden faced by either a Montana shipper seeking to contest a rate increase, or the Public Service Commission seeking to defend its rate order will lie not in proving the reasonableness of the intrastate rates but in divesting the ICC of jurisdiction.[9]

PROVING AND DISPROVING DISCRIMINATION

> Assume both the interstate and intrastate rail rates occupy some position of stability. Railroad A petitions the ICC for an increase in its interstate rates. Interstate shippers do not do a good job contesting the increase and it is fully granted by the ICC. Railroad A then petitions the Public Service Commission of Montana for a similar increase in intrastate rates. Grain shippers who would be adversely affected by the increase expend great time, effort, and amounts of money to prepare a good presentation before the Public Service Commission to contest the increase. They convince the Commission of the merits of their case, and it decides to allow railroad A to raise its grain rates by only one half the amount petitioned for. Railroad A then petitions the ICC under Section 13(4) alleging discrimination against interstate commerce. What will the shippers or the Public Service Commission have to prove to prevail before the ICC?

The ICC is immediately vested with jurisdiction to hear the merits of the charge of discrimination against interstate commerce. However, it is without jurisdiction to alter the intrastate rate structure unless it can draw a finding of discrimination from the record produced by the proceeding.[10]

In the first place it is unlikely that a charge of "persons-locale" discrimination will have to be argued against. The Supreme Court retreated from its earlier broad statements in *Houston E. & W. Texas v. U.S.* and narrowly construed the ICC's jurisdiction under such a charge.[11] All "persons-locale" discrimination is not forbidden, only that which is unreasonable.[12] A finding of "persons-locale" discrimination in one part of the state will not support a statewide order by the ICC as the scope of the ICC's jurisdiction can not exceed the scope of the discrimination.[13]

[9]*American Express Co. v. Caldwell,* 244 U.S. 617, 624 (1914) states: "But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination."

[10]*Florida v. U.S.,* 282 U.S. 194, 212 (1930) states:

> "The Commission has no general authority to regulate intrastate rates, and the mere existence of a disparity between particular rates on interstate and intrastate traffic does not warrant the Commission in prescribing intrastate rates."

[11]The broadest language was probably that of the original case, *Houston E. & W. Texas Ry. v. U.S., supra* note 6 at 354.

[12]Wisconsin R.R. Comm. v. C., B. & O. R.R., *supra* note 5.

[13]Illinois Cen. R.R v. State Public Util. Comm. of Ill., 245 U.S. 493 (1918).

Discrimination must involve actual traffic, not just potential traffic.[14] The concept of "persons-locale" discrimination provides too narrow a scope of jurisdiction to be of use to the railroads or the ICC. It requires more specific proofs than those involved in "revenue" discrimination. Presumably fifty odd years of supervision by the ICC has made the incidence of "persons-locale" discrimination very minimal.

What will have to be countered is the charge that the intrastate rates discriminate against interstate commerce by not producing their fair share of revenues, or in other words "revenue" discrimination. In theory a mere disparity between the interstate and intrastate rates is insufficient to grant to the ICC power over the intrastate rate structure.[15] The jurisdiction of the ICC to alter intrastate rates under a theory of "revenue" discrimination is bottomed on the ability of the ICC to draw from the record five essential findings:

(1) Intrastate rates are abnormally low and do not contribute their fair share of revenues.

(2) Conditions of movement are not more favorable for intrastate than interstate traffic.

(3) The intrastate rates cast an undue burden on interstate commerce.

(4) The increase in intrastate rates ordered by the ICC will cause a substantial increase in revenue.

(5) Such change in intrastate rates would not make them unreasonable and would remove the discrimination against interstate commerce.[16]

The third element is clearly an ultimate fact that finds its basis in the remaining four elements. For a Montana protestant in a Section 13(4) proceeding to prevail he must be able to produce in the record evidence to disprove these four elements.

It is the kinship between the first and second elements which poses the greatest difficulty for the protestant. In view of the Supreme Court mandate that something more than a disparity between the rates must be shown, the first element standing by itself would require some examination to be made of intrastate costs and whether the intrastate rate structure is returning revenues sufficient to cover them. That examination is not made by the parties in a Section 13(4) proceeding.

The problem stems from the unified nature of the entire railroad system. Intrastate traffic usually travels co-mingled on the same trains with interstate traffic. Precise data as to which portion of any traffic movement is intrastate or interstate is not available. However, meaningful estimates can be arrived at. The entire rate making process is based on estimates and projections. In Section 13(4) proceedings the

[14] Florida v. U.S., *supra* note 10 at 208.

[15] *See* material, *supra* note 10.

[16] The Supreme Court declared in *Public Service Comm. of Utah v. U.S.*, 356 U.S. 421 (1958) that these elements were implied by its earlier decision of *King v. U.S.*, 344 U.S. 254 (1952).

railroads refuse to submit intrastate cost estimates.[17] The ICC has not required them,[18] and the courts and Congress have refused to force the ICC to require them.[19]

The ICC has obviated the necessity of any real data collection by inferring the first element from the second element, that the conditions under which the two types of traffic move are the same. The reasoning is that if the conditions under which the two types of traffic operate can not be found to be substantially different, then whatever level of rates is necessary at the interstate level to meet costs must be the same level at which intrastate traffic must operate to meet their costs, as the costs must be the same.

A general showing by the railroads that the interstate and intrastate traffic travel co-mingled is sufficient to support a finding that conditions are substantially the same.[20] Proving that conditions are not substantially the same is considerably more difficult. The finding has been sustained even though there is no interstate traffic for the intrastate traffic to co-mingle with.[21] A New York federal court in effect made the finding unassailable. The protestant in that Section 13(4) proceeding showed that interstate passengers traveled in new cars with air-conditioning. The intrastate passengers traveled in older cars with no air-conditioning and a greater capacity, hence at lesser cost. The court was unconvinced and stated that even if the protestant had proved the difference in conditions he alleged, his remedy was not to protest the rise in intrastate rates but to petition the ICC for better service.[22] A showing that the same railroad was hauling the same goods for a cheaper rate elsewhere has also been declared unpersuasive.[23] Traffic density studies showing a much higher density of traffic intrastate have likewise been declared unpersuasive, though they have also succeeded.[24] There is some authority to the effect that a showing by a protestant that there is a direct relationship between the amount of a railroad's profit and the per cent of the total amount of traffic that intrastate

[17]In 1972 the ICC promulgated a data sheet to be submitted by railroads in all rate cases, INCREASED FREIGHT RATES AND CHARGES, APPENDIX *B*, 341 I.C.C. 539 (1972). The railroads refused to submit that part of the forms which constituted a cost separation into interstate and intrastate shares.

[18]Excepting the data sheet mentioned in note 17, *supra*, the ICC has not required the railroads to separate costs. Even those forms laid out in *Appendix B* were declared optional after the railroads refused to submit them. The ICC generally relies on *King v. U.S.* and *Illinois Commerce Comm. v. U.S.*, both cases *infra* note 19, for its position.

[19]King v. U.S., 344 U.S. 254 (1952); Illinois Commerce Comm. v. U.S., 292 U.S. 474 (1934); *contra* Chicago, M., St. P., & Pac. R.R. v. Illinois, and Public Service Comm. of Utah v. U.S., both cases *infra* note 36.

[20]North Carolina ex rel N C. Util. Comm. v. ICC, 347 F. Supp. 103 (E.D. N. Carolina 1972).

[21]Northwestern-Hanna Fuel Co. v. U.S., 161 F. Supp. 714 (D. Minn. 1957).

[22]New York v. U.S., 98 F. Supp. 855, 860 (N.D.N.Y. 1951), *aff'd* 342 U.S. 882 (1951).

[23]Arkansas Grain Corp. v. U.S., 263 F. Supp. 480 (E.D. Ark. 1966).

[24]*Compare*, Public Service Comm. of Utah v. U.S., *infra* note 36 *with* New York v. U.S., *supra* note 22.

traffic occupies helps prove that conditions are not the same for the two types of traffic.[25]

In the older Section 13(4) cases appears another method of arriving at a finding of abnormally low rates without examining any cost data. The ICC and the courts indulged in the "presumption of official regularity." It presumed that the federal and state agencies have succeeded in fine tuning the rate structure to the point that all the rates are in the proper state of equilibrium. Thus, the ICC by declaring reasonable a new higher interstate rate upsets the equilibrium. The only way equilibrium can be restored and each rate again produce its fair share of revenue is for the intrastate rates to be raised also.[26] The presumption has been used in a Montana rate case.[27] Under the presumption, cost studies submitted by protestants proving no discrimination have been declared unpersuasive.[28] It may, however, be reversible error for a finding of "revenue" discrimination to be founded upon this presumption. The Supreme Court has since declared that in a "revenue" discrimination case the question is not the relationship of the rates to each other but the relationship of the rates to the income they produce.[29]

The necessary relationship of rates to income in a "revenue" discrimination case makes the fourth element, that the increased intrastate rates will increase revenue, essential to the jurisdiction of the ICC. If the increase in rates would not increase the intrastate system's share of revenues, then the lower rate was in fact not discriminatory under the "revenue" discrimination concept, and the ICC is without power to alter it.[30] This element presents perhaps the most vulnerable point of the modern Section 13(4) proceeding. If a protestant can prove that the increase in rates will divert traffic to alternate modes of transportation to such an extent that it will offset the additional revenue paid in by the remaining traffic he has divested the ICC of any power over the rate. However, more than mere prophesy of traffic diversion will be necessary to offset railroad claims that there will be no substantial traffic diversion. The opinion of the railroad is presumed to be the correct one as it is reasoned that if the railroad is wrong it is the only one that will have to bear the burden of its mistakes.[31] Evidence of a trend in traffic diversion over the years has succeeded in proving diversion.[32] Demonstration that an industry is in an intensely competitive market situation and would be ruined by the rate increase has also succeeded.[33]

[25]Public Service Commission of Utah v. U.S., *infra* note 36.

[26]Ohio v. U.S., 6 F. Supp. 386 (S.D. Ohio 1933) *aff'd* 292 U.S. 498 (1934).

[27]Montana v. U.S., 2 F. Supp. 448 (D Mont. 1933) *aff'd mem,* 290 U.S. 593 (1933).

[28]Ohio v. U.S., *supra* note 26.

[29]Florida v. U.S., *supra* note 10.

[30]U.S. v. Louisiana, 290 U.S. 70, 90 (1933).

[31]South Carolina v. U.S., 136 F. Supp. 897 (E.D. S. Carolina 1956); Alabama v. U.S., 141 F. Supp. 488 (N.D. Ala. 1956).

[32]FREIGHT RATES AND CHARGES, 308 I.C.C. 274 (1959).

[33]If the freight rate increase will potentially destroy the industry's market, it can de-

The fifth element, that the new intrastate rate will not be unreasonable, is mostly window dressing. If the second element is found, the same logic that leads to a conclusion of the first element will also lead to a conclusion of the fifth element. It was soon decided that the requirement for a full hearing did not include a reexamination of whether the interstate rate was reasonable.[34] Thus, the Section 13(4) proceedings start with the assumption that the interstate rate is reasonable. If conditions of movement are found to be the same for both types of traffic the new intrastate rate must be reasonable also.

ANALYSIS AND CONCLUSION

The difficulty of disproving the elements necessary to the jurisdiction of the ICC over intrastate rates has created the situation where the federal government has in fact preempted the field of railroad rate regulation when in theory the state is to play an equal role or at least the primary role in intrastate rate regulation. This situation stems from a conflict in jurisdiction legislatively created at the request of the railroads. In essence the conflict has been resolved in favor of the federal government by a series of court decisions in the 1930's and 1940's. The prevailing view and its policy considerations is perhaps best expressed by Justice Reed in his dissent in the 6-3 decision of *North Carolina v. U.S.*,[35] one of the Supreme Court's later decisions, a departure from the standard line of authority.

> We think the argument, which the court has sustained, has its source in a misconception of the purpose of the present proceeding. The petitions were filed by the carrier, the investigation made and the order under dispute here was entered to coordinate the intrastate passenger fares in these four states with the passenger fare structure of the entire country. 258 ICC 133. There has been a number of recent proceedings involving the national structure. The evidence, which will be referred to later, presented in these proceedings is, we think properly to be considered in this investigation and the power of the Commission to require intrastate fares in the four states to conform to interstate fares in the four states is to be appraised in the light of a purpose to establish a national passenger rate structure.

In 1958 the Supreme Court attempted to reverse its long standing line of decisions by requiring firm evidence of discrimination in the form of a separation of costs into interstate and intrastate shares before the state could be divested of its primary jurisdiction over intrastate railroad rates.[36] Congress immediately responded by amending Section 13(4) to allow the ICC to find "revenue" discrimination without any separation of costs.[37]

---

stroy the industry. Raising those rates will have the potential of diverting traffic at least to the extent of that traffic produced by the endangered industry.

[34]Georgia Public Service Comm. v. U.S., 283 U.S. 765 (1931).

[35]North Carolina v. U.S., 325 U.S. 507, 523 (1945).

[36]Chicago, M., St. P. & Pac. R.R. v. Illinois, 355 U.S. 300 (1958); Public Service Comm. of Utah v. U.S., 356 U.S. 421 (1958).

[37]Interstate Commerce Act § 13(4), 49 U.S.C. § 13(4) (1958), *amending* 41 Stat. 484 (1920).

Montana Law Review, Vol. 36 [1975], Iss. 1, Art. 12

Perhaps it is time to reconsider the policy issues involved and either allow the federal government to regulate all intrastate rail rates or set up a true system of dual regulation. There are at least three basic objections to the current system.

The first is that it imposes a large cost burden on those contesting a rate increase. Under Section 13(4) the railroads have two chances to prove every intrastate rate case, and with hundreds of millions of dollars at stake can well afford to utilize both opportunities fully. The Montana shipper must appear before two different forums to contest the requested rate increase. The second hearing may entail entirely new evidence by the railroad, and as pointed out earlier, focuses on different issues. A third hearing may be necessitated before the ICC by the device of a savings clause.[38] All this serves to price prospective protestants out of the rate consideration procedure. Their only other alternative is to hope the Public Service Commission will contest the Section 13(4) proceeding and adequately represent their interests.

Secondly, at the state level in Montana the railroads face a greater burden in proving the necessity of an increase in revenue. At the federal level the railroad need only show how cost pressures have necessitated an increase in revenue by some amount.[39] At the state level the railroad must prove the necessity of an increase in each rate or class of rates.[40] The former method allows a railroad to be granted permission to generally raise rates, and the railroad is allowed to raise any rate, regardless of whether it is individually remunerative or not. The latter method entails a much deeper study into the intrastate rate structure and requires justification of each rate increased. The Section 13(4) procedure allows the railroad to avoid the burdens of proof imposed on it by Montana law.[41]

Lastly, Section 13(4) applies any rate increase intrastate in a much different manner than the same increase is applied interstate. When a railroad is given permission by the ICC to raise its rates by some general amount, the increase is permissive. Thus, if the railroad petitions for

[38]The ICC is able to find discrimination based on "typical" evidence. However, some rates may be a typical and be totally unfair or unreasonable after the rate increase. The savings clause is a reservation in the rate order for further hearings by a party who after laboring under the new increase may wish to further contest it. The courts view the saving clause with great respect, generally feeling it grants validity to a sweeping rate order based on minimal evidence.

[39]*See generally* King v. U.S., *supra* note 19.

[40]Montana Citizens Freight Rate Ass'n v. Bd. of R.R. Comm'rs, 128 Mont. 127, 271 P.2d 1024, 1027 (1954).

[41]*King v. U.S., supra* note 19, specifically overruled *Montana v. U.S.* 106 F. Supp. 778 (D.Mont. 1952). In *Montana* the federal district court had used reasoning analagous to that required by Montana law. However, the fact that such rate justifications are not required at the federal level does not mean they can't be applied at the state level. In view of the fact that most intrastate rail rate cases will end up before the ICC, if the strict standard is applied by the state, and keeping in mind that the federal standard will then apply, there is a certain degree of futility in attempting to apply the standard laid down in *Montana Citizens Freight Rate Ass'n.*

and receives authorization for a general increase of 10%, the railroad may raise its rates up to the maximum of 10% or any lesser amount. It may even lower its rates if it chooses to do so. However, intrastate rates prescribed through a Section 13(4) proceeding are usually prescribed as a minimum, or perhaps more accurately as a constant.[42]

It is time to reexamine and reevaluate. Just what is the best method to regulate the railroad rate structure? Should the federal government preempt the field? Should the determination be based on an adversary proceeding? These questions are far beyond the scope of this note. However, it seems that the current system, operating in between a true system of dual regulation and a system of unitary regulation has borrowed the worst aspects of both. It gives the railroads a second chance at the expense of Montana. Manpower and dollars are needlessly wasted, both in the private and public sectors through the needless duplication.

Perhaps the single most effective step in curing the ills of the present system would be to repeal the portion of Section 13(4) amended in 1958 and require a more exacting burden of proof from all parties involved in the Section 13(4) proceeding. By substituting data for presumptions, Section 13(4) would once again be only a remedy for discrimination in rate making. As it presently exists it is an excuse to substitute federal regulation for state regulation at the expense of cherished notions of federalism. In the words of Justice Douglas:

> Unless we made the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty.[43]

[42]Commissioner Freas makes the same observation in his dissent in MISSOURI INTRASTATE RATES AND CHARGES, 289 I.C.C. 764 (1954). The practical effects of the § 13(4) proceeding is to apply the new intrastate rate as a minimum. When rates are raised interstate by 10% by ICC order, the change is permissive and does not necessarily reflect the actual interstate rate. When petitioning the ICC for § 13(4) relief the railroad alleges the general 10% increase. If the ICC finds revenue discrimination based on that allegation, it must then raise intrastate rates by 10% to remove it. In some instances the Commission has stated that intrastate rates will not be lower than interstate rates, which would at least imply the possibility of equal treatment. However, this sort of prescription seems to do injustice to the principle that a mere disparity between interstate and intrastate rates is not discrimination.

[43]New York v. U.S., 342 U.S. 882 (1951) (dissenting opinion).