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Before the
Surface Transportation Board

JR - 27

STB DOCKET NO. AB-167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-55 (Sub-No. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE OF SERVICE EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE OF SERVICE
EXEMPTION – IN HUDSON COUNTY, NJ

PETITION TO RECONSIDER / REOPEN

1. Comes now James Riffin, (“**Riffin**”) who herewith respectfully files this Petition to Reconsider / Reopen, the **April 28, 2017** Decision wherein the Surface Transportation Board (“**STB**”) affirmed the October 26, 2016 decision issued by ALJ Dring, and in support says:

2. 49 CFR 1115.3 governs petitions to reconsider. Such petitions must be filed within 20 days after the decision challenged. However, the STB has the discretion to extend the filing period for an additional period, not exceeding an additional 20 days. (40 days total.) 1115.3(e).

3. 49 CFR 1115.4 governs petitions to reopen. Such petitions may be filed at any time.

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4. “Material error” is a ground for both petitions to reconsider / to reopen.

5. It does not appear to Riffin that there is any material difference between filing a petition to reconsider vs. a petition to re-open. Consequently, Riffin will defer to the STB as to what it wishes to label this petition.

MATERIAL ERROR OF LAW

6. Riffin argues the STB’s April 28, 2017 Decision involves material error of law: It violates Riffin’s Constitutional 4th Amendment Rights; The STB does not have the statutory / Constitutional authority, to compel Riffin to disclose papers / documents / e-mails, when no “Complaint” has been filed.

7. In *Harriman v. I.C.C.*, 211 U.S. 407 (1908), the Supreme Court said:

“The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, **to require any witness to answer any question that may have a bearing upon any part of what it has in mind.** The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, **not an investigation upon complaint**, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to **construe the act creating the Commission**, upon which its powers depend.” *Id.* 417. Bold added.

“And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and **require them to disclose any facts, no matter how private**, no matter what their tendency to disgrace the person whose attendance has been compelled. ... By §12 of the act of 1887, the Commission has authority to require the attendance of witnesses ‘from any place in the United States, at any designated place of hearing.’ No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.” *Id.* 417-418. Bold added.

“Whatever may be the power of Congress, it **did not attempt**, in the act of February 4, 1887, chap. 104, 24 Stat. at L. 379, U.S. Comp. Stat. 1901, p. 3154, to do more than to regulate the interstate business of **common carriers**, and the **primary purpose** for which the Commission was established was to enforce the regulations which Congress had imposed. ... District attorneys to whom the Commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and ‘for the purposes of this act the Commission shall have power to **require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.**” *Id.* 418-419. Bold added.

“We are of opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace **ONLY COMPLAINTS FOR VIOLATION OF THE ACT**, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the **main purpose** of the act was to regulate the interstate business **of carriers**, and the secondary purpose, that for which the Commission was established, **was to enforce the regulations enacted**. These, in our opinion, are the purposes referred to; in other words, **the power to require testimony is limited**, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary, – those where the investigations concern a specific breach of the law.” *Id.* 419-420. Bold and Caps added.

“That this is the true view appears, we think, sufficiently from the original form of §14. That section made it the duty of the Commission, ‘whenever an investigation shall be made,’ to make a report in writing, which was to ‘include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made **by the common carrier** to any party or parties who may be found to have been injured, and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.’ As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned **except in connection with a complaint for contraventions of the act**, such as the Commission was directed to ‘investigate’ by §13, or in connection with an inquiry instituted by the Commission. ... **Obviously such an inquiry is limited to matters that might have been the object of a complaint.**” *Id.* 420. Bold added.

“The plain limit to the authority to institute an inquiry given by §13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite **exclude** the inference of broader power from the general words in §12, as to inquiring into the management of the business of common carriers subject to the provisions of the act” *Id.* 420. Bold added.

“We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach

of existing law, in which, and in which alone, as we have said, there is any need that **personal matters should be revealed.**" *Id.* 421. Bold added.

"All that we are considering is **the power**, under the act to regulate commerce and its amendments, **to extort evidence from a witness by compulsion.**" *Id.* 422. Bold added.

8. In *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), the Supreme Court said:

"[T]he Commission **claims an unlimited right** of access to the respondents' papers with reference to the possible existence of practices in violation of section 5." *Id.* 305.

"The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation **do not make men's affairs public.** ... Anyone who respects the spirit as well as the letter of the **Fourth Amendment** would be loath to believe that Congress intended to authorize *306 one of its subordinate agencies to sweep all our traditions into the fire (*I.C.C. v. Brimson*, 154 U.S. 447, 479), and to direct fishing expeditions into **private papers** on the possibility that they may disclose evidence of crime. ... It is **contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant**, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman v. I.C.C.*, 211 U.S. 407, and as to correspondence, even in the case of a common carrier, in *U.S. v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 335. *Id.* 305-306. Bold added.

"We cannot attribute to Congress an intent to defy the **Fourth Amendment** or even to come so near to doing so as to raise a serious question of Constitutional law." *Id.* 338.

ARGUMENT

9. The Supreme Court has made it abundantly clear: The STB **has no power to compel** a non-carrier to disclose **any private 'papers'** unless a **Complaint** has been filed alleging some violation of the Interstate Commerce Act / Interstate Commerce Commission Termination Act.

10. In this proceeding, **no complaint has been filed.** There is no investigation into whether any of the STB's regulations, have been violated. Riffin is not a carrier. He is but a party to this proceeding.

11. Consequently, the STB **does not have the power / jurisdiction**, to compel Riffin to disclose any of his ‘papers’ to Jersey City, the Rails to Trails Conservancy, the Harsimus Stem Embankment Preservation Coalition, or to their attorney, Charles Montange.

12. Since (A) ALJ Dring’s Orders were premised on his **misunderstanding** of the power / jurisdiction, of the STB to compel Riffin to disclose his private papers, via the STB’s discovery regulations, and (B) since the Supreme Court has held that the STB’s discovery power / jurisdiction, **is limited** to discovery relating to a **complaint**, and (C) since no complaint has been filed, and (D) since no investigation has been commenced by the STB to determine whether any of its regulations were violated, **it was an error of law** for ALJ Dring:

- A. To summons Riffin to his court room;
- B. To entertain, or to consider, City et. al’s Motion to Compel;
- C. To order Riffin to provide City et al. with any of Riffin’s papers / e-mails; and
- D. To sanction Riffin.

13. WHEREFORE, for the foregoing reasons, Riffin would respectfully pray:

- A. That the STB reconsider / reopen the ALJ Dring Appeal proceeding;
- B. Determine whether it has the power / jurisdiction, to:
 - a. Summons Riffin to its / ALJ Dring’s, court room;
 - b. Entertain, or consider, a Motion to Compel filed by City et. al, when no complaint has been filed / no investigation has been commenced to determine if any STB regulations have been violated;
 - c. To order Riffin to provide any of his private papers / e-mails, to any party in this proceeding;
 - d. To sanction Riffin for his alleged failure to provide City et. al. with copies of Riffin’s private papers / e-mails;
- C. Vacate the STB’s April 28, 2017 decision;

- D. Vacate ALJ Dring's October 26, 2016 decision;
- E. And for such other and further relief as would be appropriate.

Respectfully,

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on or before the 30th Day of May, 2017, a copy of the foregoing James Riffin's Petition to reconsider / reopen, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid.

James Riffin



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Abrogation Recognized by [Craib v. Bulmash](#), Cal., August 28, 1989

29 S.Ct. 115

Supreme Court of the United States.

EDWARD H. HARRIMAN, Appt.,

v.

INTERSTATE COMMERCE COMMISSION.

No. 315.

No. 316.

No. 317.

|

Nos. 315, 316, 317.

|

Argued November 3, 4, 1908.

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Decided December 14, 1908.

TWO APPEALS from the Circuit Court of the United States for the Southern District

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order denying a petition of the Interstate Commerce Commission to compel an answer to certain questions put during an investigation by the Commission. Affirmed.

See same case below, [157 Fed. 432](#).

The facts are stated in the opinion.

West Headnotes (1)

[1] Commerce

Witnesses and Production of Evidence

Witnesses cannot be required to testify before the Interstate Commerce Commission except in connection with complaints for violation of the interstate commerce act or with the investigation by the Commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of section 12 of that act, 49 U.S.C.A. § 12, giving the Commission power to require testimony

“for the purposes of this act,” which power cannot be exercised by the Commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the requirement of section 20, 49 U.S.C.A. § 20, respecting reports by carriers, nor to aid the Commission in recommending, pursuant to section 21, 49 U.S.C.A. § 21, additional legislation to Congress.

[72 Cases that cite this headnote](#)

Attorneys and Law Firms

***116 *408** Messrs. **John G. Milburn, John C. Spooner,** and Robert S. Lovett for harriman.

***410** Messrs. **Walker D. Hines** and Paul D. Cravath for Kahn.

***411** Messrs. **Cordenio A. Severance, Frank B. Kellogg,** and Henry L. Stimson for the Interstate Commerce Commission.

Opinion

Mr. Justice **Holmes** delivered the opinion of the court:

These are appeals; on the one side, from an order of the circuit court directing the appellants, Harriman and Kahn, to answer certain questions put during an investigation by the Interstate Commerce Commission, and, on the other, from ***414** a denial of a like order as to two other questions, answers to which the Commission had required.

In November, 1906, the Interstate Commerce Commission, of its own motion, and not upon complaint, made an order reciting the authority and requirements of the act to regulate commerce (Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), and proceeding as follows: ‘And whereas it appears to the Commission that consolidations and combinations of carriers subject to the act, and the relations now and heretofore existing between such carriers, including community of interests therein, and

the practices and methods of such carriers affecting the movement of interstate commerce, the rates received and facilities furnished therefor, should be made the subject of investigation by the Commission to the end that it may be fully informed in respect thereof, and to the further and that it may be ascertained whether such consolidations, combinations, relations, community of interests, practices, or methods result in violations of said act or tend to defeat its purposes,-it is ordered that a proceeding of investigation and inquiry into and concerning the matters above stated be, and the same is hereby, instituted.' A time and place was set for the first hearing, and the inquiry thus begun was continued for about two months, resulting in the report of July, 1907, entitled 'Consolidations and Combinations of Carriers,' ect. 12 Inters. Com. Rep. 277.

In the course of the inquiry the appellant Harriman was called by the Commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the executive committee of the Union Pacific Railroad Company. The relations between the Union Pacific and other connecting roads, parallel or not, were under investigation and are set forth in the Commission's report. It is enough to say that the Union Pacific Railroad Company is incorporated under the laws of Utah, and, as has been asserted and assumed, has power under the state laws to purchase the stock of other railroads,-a power that it has *415 exercised on a large scale. Among other things, it bought 103,401 shares of the preferred stock of the Chicago & Alton Railway Company. These shares had been deposited with bankers, Kuhn, Loeb, & Company, by their owners, under an agreement authorizing the bankers to sell them to any purchaser at such price and upon such terms as should be approved by Messrs. Stewart, Mitchell, and the witness, Harriman. He was asked whether he owned any of the stock so deposited, and how much, if any. These questions, under the advice of counsel, he declined to answer.

Next he was asked with regard to stock of the Atchison, Topeka, & Santa Fé Railroad Company, bought by the Oregon Short Line Railroad Company, another Utah corporation, the stock of which was owned by the Union Pacific, whether it was a part of the stock that had been acquired previously by him and two others, and whether it or any part of it was owned by any of the three. After answering the first question, 'I think not,' he was

stopped by his counsel and refused to answer further. Again, it appearing that the Union Pacific, in July, 1906, purchased 90,000 shares of Illinois Central Railroad stock from Messrs. Rogers, Stillman, and the witness, he was asked whether that stock was acquired by a pool of the three, whether it was acquired with a view of selling it to the Union Pacific, and whether it or any part of it was bought at a much lower price than \$175 a share with the intent just mentioned. These questions the witness declined to answer. It appearing further that Kuhn, Loeb, & Company, who were the fiscal agents of the Union Pacific, had sold to it 105,000 shares of the Illinois Central stock on the same date, he was asked if he had any interest in these shares, and whether they were acquired by a pool for the purpose of selling them to the Union Pacific. These questions the witness declined to answer. Again, it appearing **117 that the Union Pacific had purchased stock of the St. Joseph & Grand Island Railroad Company from the witness since the last-mentioned date, he was asked when he acquired the stock and what he paid for it, and again declined *416 to answer. Finally, after it had been shown that since July, 1906, the Union Pacific had bought a large amount of New York Central Railroad stock, the witness was asked whether any of the directors of the Union Pacific were interested, directly or indirectly, in this stock at the time when it was sold. An answer to this question also was declined. All these refusals to answer were persisted in after a direction to answer from the Commission. The circuit court ordered them to be answered and Harriman appealed.

The petition of the Interstate Commerce Commission set forth two other questions which the witness refused to answer, and on which it asked the order of the circuit court. One was a general one, whether he was interested in any stocks bought between the 19th of July and the 17th of August that appreciated, and another, more specific, was whether he or any director bought any Union and [or] Southern Pacific in anticipation of a certain dividend, the suggestion being that announcement of the dividend was delayed for the directors to profit by their secret knowledge and that they did so. With regard to these the petition was denied, and the Interstate Commerce Commission appealed.

The appellant Kahn was a member of the firm of Kuhn, Loeb, & Company. He also was asked whether any of the directors of the Union Pacific were the real owners of any of the shares of the Chicago & Alton Railroad deposited,

as has been stated, with Kuhn, Loeb, & Company, and sold to the Union Pacific. He was asked further in various forms whether the before-mentioned 105,000 shares of Illinois Central stock, or any part of them, really belonged to or were held for any of the directors of the Union Pacific. And again, whether, at the same time that he bought these shares, he bought for Messrs. Harriman, Rogers, and Stillman the stocks they sold at the same time that he sold his. Finally he was asked whether the 105,000 shares, and the 90,000 shares turned in by Stillman Rogers, and Harriman, were all bought through his instrumentality for a pool of which they and he were members, that *417 was operating in Illinois Central stocks for some months before July, 1906. All these questions he was directed by the Commission to answer, but refused. The circuit court ordered him to answer, and he appealed.

Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the Commission, upon which its powers depend.

Before taking up the words of the statute the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose

any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen *418 that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the Commission has authority to require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in [Interstate Commerce Commission v. Brimson](#), 154 U. S. 447, 478, 479, 38 L. ed. 1047, 1057, 1058, 4 **118 [Inters. Com. Rep. 545](#), 14 [Sup. Ct. Rep. 1125](#). Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt for make such a delegation anywhere in the act.

Whatever may be the power of Congress, it did not attempt, in the act of February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions. Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the Commission has 'authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required *419 to execute and enforce the provisions

of this act.' District attorneys to whom the Commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and 'for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.' [26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3162.] Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpoena by an order of court and for taking depositions, which do not need statement.

The Commission, it will be seen, is given power to require the testimony of witnesses 'for the purposes of this act.' The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

We are of opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice *420 of privacy is necessary, - those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the Commission, 'whenever an investigation

shall be made,' to make a report in writing, which was to 'include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.' As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the Commission was directed to 'investigate' by § 13, or in connection with an inquiry instituted by the Commission, authorized by the same section, 'in the same manner and to the same effect as though complaint had been made.' Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned.

****119** They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers subject to the provisions of the act, the Commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing 'such information and *data* collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation *421 relating thereto as the Commission may deem necessary.' Act of March 2, 1889, chap. 382, § 8. 25 Stat. at L. 855, 862, U. S. Comp. Stat. 1901, pp. 3158, 3170.

It is true that, in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, chap. 3591, § 3, 34 Stat. at L. 584, 589, U. S. Comp. Stat. Supp. 1907, pp. 892, 899. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If, by virtue of § 21, the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning

them for the still vaguer reason that their testimony might furnish *data* considered by the Commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi judicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the Commission is § 20, amended by act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 593, U. S. Comp. Stat. Supp. 1907, pp. 892, 906. This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the Commission may add in certain particulars, and further, 'to require from such carriers specific answers to all questions upon which the Commission may need information.' The Commission may require certain other reports, and is to have access to all accounts, records, and memoranda. The section now deals at length with this matter and how *422 accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power, under the act to regulate commerce and its amendments, to extort evidence from a witness by compulsion. What reports or investigations the Commission may make without that aid, but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906 (34 Stat. at L. 823), directing the Commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the Commission the same

power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. at L. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, chap. 3591, 34 Stat. at L. 595, U. S. Comp. Stat. Supp. 1907, p. 910, extending the former acts relating to the attendance of witnesses and the compelling of testimony to 'all proceedings and hearings under this act.' If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. [Knights Templars' & M. Life Indemnity Co. v. Jarman](#), 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108.

Order in 315 and 316 reversed.

Order in 317 affirmed.

Petition denied.

Mr. Justice **Moody**, not having been present at the argument, took no part in the decision.

*423 Mr. Justice **Day**, dissenting:

I am constrained to dissent from the opinion of the court in this case. It seems **120 to me that too narrow a construction has been given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations engaged in interstate commerce.

The court, in the prevailing opinion, has not placed its decision upon the want of power in Congress to legislate concerning the subject-matter of investigation in this case. The decision is based wholly upon the construction of the act of Congress; and, as I am unable to concur in the view taken in the opinion, I will state the grounds upon which my dissent rests.

The reports of committees which accompanied the enactment of the interstate commerce law in its original form show that importance was attached to the power conferred upon the Commission to make investigation as

well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the states and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the government to which the Constitution has delegated power to regulate commerce among the states and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the Commission, in its first annual report, said:

‘This is a very important provision, and the Commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor.’

***424** In numerous instances investigations have been conducted by the Commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the Commission; witnesses have been subpoenaed; and testimony has been taken without objection from those interested that the power of the Commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

The act itself makes provision for two kinds of investigation,—the one under § 12, upon the initiative of the Commission without written complaint; the other under § 13, where investigation and orders are made upon complaint.

We are concerned in this case with an investigation undertaken upon the initiative of the Commission under § 12 of the act. That section, so far as pertinent, provides:

‘That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceeding for the enforcement of the provisions of this act and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses ***425** of the courts of the United States; and, for the purposes of this act, the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

‘Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And, in case of disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.’ [As amended by act of Feb. 10, 1891, 26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3162.]

The plain reading of this section is that, for the purposes of the act, the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses, and the production of books, papers, contracts, tariffs, agreements, and documents relating to any matter under investigation. ****121** Notwithstanding the broad language used by Congress, it is now held that the power of the Commission to require testimony embraces only subjects stated in complaints for the violation of the act, or investigations by the Commission upon matters which might have been the subject of complaint. I am unable to follow the reasoning which thus cuts down the

expressed words of the act, which enables the Commission to require testimony for all purposes of the act. The complaints under the act may relate to unreasonable rates, to discriminating practices, to the management of the affairs of the carrier as involved in or connected with the conduct of interstate commerce, to the relations of interstate carriers with each other, and the like matters, directly affecting corporations and individuals engaged in interstate commerce. These things are within the purposes of the act, but no more so, in my judgment, than the declared purpose of the act to endow the Commission with investigating powers, having in view the ascertainment of the manner in which interstate commerce business is conducted *426 and managed, with a view to intelligent action upon these important subjects.

For the purposes of the act this power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, etc., relating to any matter under investigation, is specifically conferred by Congress. To make the act read that the power shall be conferred only for the purposes of laying the ground for redress of specific complaints, or things which might be the subject-matter of complaints, narrows its provisions from the broad power conferred in the language used by Congress to powers limited to the execution of only a part of the act. It seems to me that the restricted construction given in the opinion has the effect to entirely reform the act of Congress, substituting for it, by judicial construction, a much narrower act than Congress intended to pass, and did, in fact, pass.

In § 12, which requires the district attorneys under the direction of the Attorney General to take all necessary proceedings for the enforcement of the act, and empowers the Commission, for the purposes of the act, to issue subpoenas and require the production of books, papers, etc., there is in terms conferred, as the basis of this judicial action and this power to summon witnesses, authority to inquire into the management of the business of corporations subject to the provisions of the act, in order that the Commission may keep itself informed as to the manner and methods in which the same is conducted, and to obtain from common carriers thus engaged full and complete information to enable the Commission to prevent bad practices and to perform the duties and carry out the objects for which it was created.

Nor are the purposes of the act for which the power to subpoena witnesses, require the production of books, papers, etc., alone defined in § 12. In § 20 of the act, in order to enable the Commission to make its reports, it is authorized to require from common carriers specific answers upon all questions upon which the Commission may need information, such reports to *427 contain a showing of the amount of the capital stock, the amount paid therefor, the manner of payment for the same, etc., and § 21 of the act requires the Commission to make an annual report which shall contain such information and *data* collected by the Commission as may be considered of value in the determination of questions concerning the regulation of commerce, together with such recommendation as to additional legislation relating thereto as the Commission may deem necessary. These things are ‘purposes of the act’ no less than the hearing of complaints and making orders touching the same. For all these purposes § 12 conferred the power which was sought to be exercised in this case. That inquiries might take a wide range is shown in the acts of Congress giving immunity to persons required to testify, and providing that no person shall be excused from attendance and testifying, or from producing books, papers, etc., before the Interstate Commerce Commission for the reason that his answers or the production of such testimony may tend to criminate him, and granting immunity from prosecution because of such compulsory testimony.

The function of investigation which Congress has conferred upon the Interstate Commerce Commission is one of great importance; and while, of course, it can only be exercised within the constitutional limitations which protect the individual from unreasonable searches and seizures and unconstitutional invasions of liberty, the act should not be construed so narrowly as to defeat its purposes.

In the case of [Interstate Commerce Commission v. Brimson](#), 154 U. S. 447, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, this court had under consideration the provisions of § 12, authorizing the Interstate Commerce Commission to conduct an investigation upon its own motion, and in that case this court said:

‘An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call

witnesses before it, and to require the production **122 of books, documents, and *428 papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules.'

And in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 506, 42 L. ed. 255, 17 Sup. Ct. Rep. 896, this court said:

'It [the Commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business.'

In the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S., at page 438, 51 L. ed. at page 558, 27 Sup. Ct. Rep. at page 354, this court said:

'The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act.'

In the case last cited it was held that a rate filed with the Interstate Commerce Commission could only be

attacked for unreasonableness by a proceeding before the Commission, with a direct view to a change in the rate. The power thus invested in the Commission, no less than the power conferred in this case, affected shippers from Maine to Texas, and required a shipper making complaint against a common carrier for carriage in a remote part of the country to obtain redress for unreasonable rates only by a proceeding before the Interstate Commerce Commission, which ordinarily sits in the capitol at *429 Washington. Legislative power vested in Congress over interstate commerce embraces the whole country; and while it may be extremely inconvenient to compel the attendance of witnesses and the production of the papers, etc., throughout a domain so large as ours, that consideration does not detract from the power of Congress over the subject-matter.

Assuming, for the purposes of this case and the construction of the statute, that the relations of directors in a corporation engaged in interstate commerce to the sales of stock to such corporation may be the subject of inquiry when Congress confers such power upon the Commission, I think that in this act Congress has conferred such power. If such is the proper construction of the act, it follows that the Commission had a right to propound the questions which the circuit court directed to be answered. In my view the judgment of the circuit court should be affirmed.

Mr. Justice **Harlan** and Mr. Justice **McKenna** concur in this dissent.

Mr. Justice **Harlan** also dissents in No. 317.

All Citations

211 U.S. 407, 29 S.Ct. 115, 53 L.Ed. 253



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Abrogation Recognized by [In re McVane](#), 2nd Cir.(Conn.), January 12, 1995

44 S.Ct. 336

Supreme Court of the United States.

FEDERAL TRADE COMMISSION

v.

AMERICAN TOBACCO CO.

SAME

v.

P. LORILLARD CO., Inc.

Nos. 206, 207.

|

Argued March 7, 1924.

|

Decided March 17, 1924.

In Error to the District Court of the United States for the Southern District of New York.

Petitions for mandamus by the Federal Trade Commission against the American Tobacco Company and against the P. Lorillard Company, Inc. The petitions were denied (283 Fed. 999), and the Trade Commission brings error. Judgment affirmed.

West Headnotes (3)

[1] Antitrust and Trade Regulation

Administrative Proceedings and Investigations in General

A resolution of the Senate, directing the Federal Trade Commission to investigate and report the tobacco situation as to domestic and export trade, etc., but without reference to any alleged violation of Anti-Trust Acts, 15 U.S.C.A. § 1 et seq., is not within the provisions of Act Sept. 26, 1914, § 6, 15 U.S.C.A. § 46, authorizing the Commission, on direction of the President or either House of Congress, to investigate and report the facts relative to any violation of the Anti-Trust Acts by any corporation, and hence such a resolution need not be considered on

petitions for mandamus to compel production of records for inspection.

[42 Cases that cite this headnote](#)

[2] Antitrust and Trade Regulation

Investigations and Reports

A ground must be laid for a demand of the Federal Trade Commission that a private corporation produce certain records, and the demand must be reasonable, and some evidence of the materiality of the papers demanded must be produced, before the corporation can be compelled to comply.

[37 Cases that cite this headnote](#)

[3] Searches and Seizures

Corporations; Offices and Records

The Federal Trade Commission, under Act Sept. 26, 1914, §§ 6, 9, 15 U.S.C.A. §§ 46, 49, has no power to compel tobacco companies to produce all their books and papers, relevant or irrelevant, including those relating to intrastate business, in order to disclose the possible existence of practices in violation of section 5, 15 U.S.C.A. § 45, in view of U.S.C.A. Const. Amend. 4, as the mere fact of carrying on commerce not confined within state lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad company now may be.

[158 Cases that cite this headnote](#)

Attorneys and Law Firms

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***303** Mr. Wm. D. Guthrie, of New York City, for defendant in error P. Lorillard Co.

Mr. Junius Parker, of New York City, for defendant in error American Tobacco Co.

Opinion

Mr. Justice HOLMES delivered the opinion of the Court.

[1] These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the Act of September 26, 1914, c. 311, § 9, 38 Stat. 717, 722 (Comp. St. § 8836i), and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda and correspondence for inspection and making copies. They were denied by the District Court. [283 Fed. 999](#). The resolution directs the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, etc. The act directs the Commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the Commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The Commission and the party concerned are both given a resort to the Circuit [*304](#) Court of Appeals. Section 5 (Comp. St. § 8836e). By section 6 (Comp. St. § 8836f) the Commission shall have power (a) to gather information concerning, and to investigate the business, conduct, practices and management of any corporation engaged in commerce, except banks and common carriers, and its relation to other corporations and individuals; (b) to require reports and answers under oath to specific questions furnishing the Commission such information as it may require on the above subjects; (d) upon the direction of the President or either House of Congress to investigate and report the facts as to alleged violation of the Anti-Trust Acts (Comp. St. § 8820 et seq.) By section 9 (Comp. St. § 8836i) for the purposes of this act the Commission shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against and shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. In case of disobedience an order may be obtained from a District Court. Upon application of the Attorney General the District Courts are given jurisdiction to issue writs of mandamus to require compliance [**337](#) with the act or any order of the commission made in pursuance thereof. The petitions are filed under this clause and the question

is whether orders of the Commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the Commission charging the respondents severally with unfair competition by regulating the prices at which their commodities should be resold, set forth the Senate resolution, and the resolutions of the Commission to conduct an investigation under the authority of sections 5 and 6(a), being Comp. St. §§ 8836e, 8836f, and in pursuance of the Senate resolution, and for the further purpose of gathering and compiling information concerning the business, conduct and practices, etc., of [*305](#) each of the respondent companies. There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring, in the case of the American Tobacco Company, the exhibition during business hours when the Commission's agent requests it, of all letters and telegrams received by the Company from, or sent by it to all of its jobber customers, between January 1, 1921 to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

[2] The Senate resolution may be laid on one side as it is not based on any alleged violation of the Anti-Trust acts, within the requirement of section 6 (d) of the act. [United States v. Louisville & Nashville R. R. Co.](#), 236 U. S. 318, 329, 35 Sup. Ct. 363, 59 L. Ed. 598. The complaints, as to which the Commission refused definite information to the respondents, and one at least of which, we understand, has been dismissed, also may be disregarded for the moment, since the Commission claims an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of section 5.

The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. [Smith v. Interstate Commerce](#)

Commission, 245 U. S. 33, 43, 38 Sup. Ct. 30, 62 L. Ed. 135. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize *306 one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 14 Sup. Ct. 1125, 38 L. Ed. 1047), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253, and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335, 35 Sup. Ct. 363, 59 L. Ed. 598. The question is a different one where the State granting the charter gives its Commission power to inspect.

[3] The right of access given by the statute is to documentary evidence-not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. *Wigram, Discovery* (2d Ed.) § 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co. v. United States*, 262 U. S. 151, 156, 157, 43 Sup. Ct. 514, 67 L. Ed. 917. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale v. Henkel*, 201 U. S. 43, 77, 29 Sup. Ct. 370, 50 L. Ed. 652. In the *307 state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co. v. Vermont*,

207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658. The form of the subpoena was not the question in *Wheeler v. United States*, 226 U. S. 478, 488, 33 Sup. Ct. 158, 57 L. Ed. 309.

The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes **338 that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford v. Wallace*, 258 U. S. 495, 520, 521, 42 Sup. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 256, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion-but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

Judgment affirmed.

All Citations

264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786