

ously, an attorney for the Tennessee Public Service Commission departed from Nashville, Tenn. for Chicago. Witnesses had to be secured immediately for an emergency court hearing on a temporary restraining order that afternoon. Counsel for the railroad (headquartered at Louisville, Ky.), the United States and the Commission had to be notified immediately.

We were ready to proceed at 2 PM at the U.S. District Court in Chicago. However, the judge previously assigned to hear procedural matters in the suit already filed in the companion "Georgian" case⁴ was engaged in jury trial, necessitating hearing before another judge who happened to be available that Friday afternoon.⁵ The restraining order was entered at about 4 PM.

These events are described to illustrate the difficulties present even under the present set up, which difficulties would be greatly magnified under S. 2687; indeed, it is my opinion that judicial review would be impossible in virtually all instances.

Once the temporary restraining order is issued, it is the usual practice to file a petition for reconsideration to the Commission. This is required in most discontinuance cases since the decision is made by Division 3 of the Commission, and does not constitute a "final order" under the Commission's rules.⁶ The temporary restraining order would be continued in effect (subject to review by the three-judge panel) pending the Commission's disposition of petitions for reconsideration. This period usually exceeds 60 days because protestants have 30 days to file their petitions, the carrier has 20 days to reply thereto, and the Commission itself must thereupon re-evaluate the matter. Upon issuance of the order on reconsideration, assuming the Commission affirms the initial decision of Division 3, the court would next consider whether an interlocutory injunction should issue.

The burden is usually upon plaintiffs to the action to see to it that the court is furnished with a certified copy of the transcript made at the Commission. This is of very little expense since one or more of the protestants has usually ordered the daily hearing transcripts for its own use in preparing briefs to Division 3.

In short, to seek judicial review of an I.C.C. train-off decision, which would be impaired if the trains are discontinued pending such review, requires a high degree of coordination and cooperation by all counsel. Judicial review is not expensive.

THE PROPOSED PROCEDURE

S. 2687 would drastically modify the present procedure. Indeed, it is doubtful that the public's right to judicial review could be maintained at all.

1. *Final order*.—Section 2321 of Title 28, which would be repealed, presently authorizes suits "to enforce, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission". Section 17(9) of the Interstate Commerce Act provides that a suit to set aside a *decision, order or requirement* may be made under the same provisions as are applicable to suits to set aside orders.

The new sections 17(10)(a) and 17(10)(c)(i) would not carry over the order from 28 U.S.C. 2321 into the proposed new section 17(10) of the Interstate Commerce Act. Rather, the U.S. courts of appeals would have exclusive jurisdiction to "enjoin, set aside, annul or suspend, in whole or in part, all *final orders* of the Interstate Commerce Commission . . ." The proposed change from *order* in the present statute to *final order* might very well be construed to preclude the present practice of instituting actions in train-off cases, before the final order is issued upon reconsideration, in order to save the train and not to prejudice the Commission in its deliberations on reconsideration. A three-judge court for the Middle District of Pennsylvania gave considerable attention to this question. *City of Williamsport v. United States*, 273 F. Supp. 899 (M.D. Pa. 1967).

2. *Contents of review petition*.—The new section 17(10)(c)(i) would make it a statutory requirement that petitions for review of I.C.C. matters filed in the courts of appeals must contain a copy of the "order, report or decision of the Commission." Apart from the finality requirement, this might prove impracticable in a passenger discontinuance case because the time of release in Washing-

⁴ See footnote 3. The action was filed May 27, 1968.

⁵ The case is docketed as No. 68 C 1666, Tennessee Public Service Commission, et al. v. United States, N.D. Ill. E.D., filed September 6, 1968.

⁶ 49 CFR 1100.101(a)(2).