used for purposes of the defense training program. Nor is their designation as such fiscal officers of the program made pursuant to any statute conferring the power of, and requiring their designation as such fiscal officers. However convenient, practical and reasonable it might be to have such treasurers perform these duties, their present official bondsmen would not be liable for a loss of such funds in their hands.

PUBLIC SERVICE COMMISSION: Jurisdiction of Commission in matter of discontinuance of train service, whether bankruptcy affects the question. Power to make rules. Validity of Rule 1R.

Bankruptcy: Reorganization of corporate structure of August 27, 1940 Railroad Corporation, whether action of Bankruptcy Court ordering discontinuance of train service supersedes jurisdiction of Commission.

August 27, 1940.

Hon. Perry McCart,
Chairman Public Service Commission,
Indianapolis, Indiana.

Dear Mr. McCart:

This is in answer to your request of August 20, 1940, in which you ask me to advise the Commission as to its authority and duty under a situation which has to do with the discontinuance of two passenger trains on the Chicago, Indianapolis & Louisville Railway Company.

You state that on the 9th of November, 1939, Holman J. Pettibone, trustee for the Chicago, Indianapolis & Louisville Railway Company, filed a petition before the Public Service Commission seeking an order which would authorize the discontinuance of passenger trains, No. 32 and No. 33, which operate between Chicago, Illinois, and Indianapolis, Indiana. The trains carry baggage, mail, and express, but no freight. The petition of the trustee avers that the cost of operating the two trains in the year 1938 exceeded the total operating revenue for the same period by $75,079, and also, that during the years 1937 and 1938, and the first eight months of the year 1939, the railroad, in its entirety, was operated at a financial loss. It is also stated that there are ten trains each
way operating daily between Chicago and Indianapolis over the Pennsylvania Railway and New York Central Lines.

The petition of the trustee was assigned for public hearing and was heard on December 20, 1939. The Commission has the petition under advisement and has made no decision, or order, in the case. Pending some decision, or order, by the commission, the trustee on August 17, 1940, discontinued operation of the two trains, No. 32 and No. 33, without notice to, or authority from the commission.

It seems to me there are three problems involved in the above proceeding:

1. What is the present status of the case pending before the Commission and by what authority the Public Service Commission adopted and promulgated Rule known as No. 1R?

2. What weight should be given to the evidence as to the financial loss in the train operation, and as to the railway as a whole?

3. Does the fact that the Monon Railroad is being operated by a Trustee under the provisions of the Bankruptcy Act affect the jurisdiction of the Public Service Commission over the question at issue under the petition, and what jurisdiction the Public Service Commission has over the discontinuance of trains furnishing intrastate service as well as interstate service?

Under the provisions of the Railroad Commission law, the Public Service Commission has jurisdiction over railroads for the purpose of regulating train service and accommodations. (Burns' 1933 Ann. Stat., Sec. 55-101). It is the duty of the Commission also, to inquire into the management of the business of all railroads, and to enforce the Railroad Commission law, and all other laws of the state which prescribe the duties and obligations and regulate the conduct of railroads and their dealings with the public. (Burns' 1933 Ann. Stat., Sec. 55-113 (b) and (c).) To enable the Commission to carry out this law it is given power and authority to institute and prosecute any appropriate action at law, or suit in equity, against any railroad to compel it to observe the requirements of the Railroad Commission Act, and all other laws of the state (Burns' 1933 Ann. Stat., Sec. 55-127). The statutes of Indiana require railroads to furnish sufficient accommodations for the transportation of passengers and property (Burns' 1933 Ann. Stat., Sec. 55-701).
Outside of any special statute, it may be stated that railroads are obligated to furnish accommodations reasonably adequate to serve the necessities and convenience of the public in the territory through which they operate. The Supreme Court of Indiana, in the case of Pittsburgh, etc. R. Co. v. Railroad Com., etc., 171 Ind. 189, at page 201, makes this observation:

"In one sense of the term appellant's property is private, and as such it is within the protection of the federal and state constitutions; but such property is subject to (2) due regulation, since it has been devoted to a public use, particularly since that use is, in a limited sense of the term, for the purposes of a public highway. Lake Superior, etc. R. Co. v. United States (1876), 93 U. S. 442. As was said in Barton v. Barbour (1881), 104 U. S. 126, 135. 'A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserv the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto.'"

That railroad companies, generally, in the State of Indiana have recognized the jurisdiction of the Commission over train service and other like accommodations for the public have applied to the Commission for authority to discontinue trains, or abandon some service no longer believed to be necessary under changed conditions; however, in order that this problem of discontinuing train service must be made more definite, the Public Service Commission, on the 24th day of September, 1937, adopted and promulgated a rule known as No. 1R, which is as follows:

"Before any railroad company engaged in intrastate commerce in the State of Indiana shall discontinue
any passenger train or trains rendering intrastate service, such railroad company shall file its petition with this Commission, requesting authority so to do. In such petition such company shall set out in detail the number and schedule of such train or trains; the name of the cities and towns served in the state of Indiana; whether such trains transport mail, express, baggage and freight in addition to passengers; total amount of revenue received from the operation of such trains operating within the State of Indiana; and the cost of such train operation for the previous calendar year; and such other facts as may be necessary to fully advise the Commission as to such passenger train service."

Section 55-101 Burns' Ind. Stat. Ann. 1933 reads in part as follows:

"The power and authority is hereby vested in the railroad commission of Indiana, and it is hereby made its duty, as hereinafter provided, to supervise all railroad freight and passenger tariffs, and to adopt all necessary rules and regulations to govern car distribution and delivery, train service and accommodations * * * ."


It is my opinion that under the powers conferred upon the railroad commission as above quoted, it gives the Public Service Commission specific authority to pass rules and regulations pertaining to train service. Therefore, Rule No. 1R is within the authority and powers conferred upon the Public Service Commission to adopt the above rule and said rule has the effect of the statute. Dastervignes v. United States, 122 Fed. 30; Wainwright Adm. v. Penn. Co., 253 Fed. 459.

It is further my opinion that the Rule 1R could not be complied with by filing a petition asking for authority to discontinue a train and then take the train out of service. The Public Service Commission can only speak by its orders made and it would follow that as the rule states:
"Before any railroad company engaging in intrastate commerce shall discontinue any passenger train or trains rendering intrastate service, such railroad company shall file its petition with this commission, requesting authority so to do."

The above language clearly indicates that the rule contemplates the Commission issuing an order granting or denying such authority. I interpret the rule to mean that where a passenger train is in operation and the railroad company files a petition in conformity with the rule, asking authority to discontinue the train, that the train must be kept in service until the Commission has acted upon the petition, and entered an order denying or granting said petition. Otherwise, the rule is violated.

It was in conformity with the general practice and in obedience to the requirements of the above rule that the petitioner, Holman J. Pettibone, trustee, applied to the Public Service Commission for authority to abandon the two trains on the Chicago, Indianapolis & Louisville Railway.

In answering the question involved in problem under (1), as to the status of the proceeding now pending before you, in my opinion, the fact that the trustee has gone ahead without any authority from the Commission and has discontinued the operation of the two trains, has no bearing whatever on the pending proceeding; and your decision may be given upon the record as made at the hearing; regardless of the discontinuance of the trains.

As to problem number (2), your inquiry indicated that the financial situation of the railway as a whole, and a claimed loss in the operation of the two trains, if sustained by the evidence, is an element to be considered in authorizing the discontinuance of the trains, or in denying the prayer of the petition.

Both the out of pocket cost of train operation, and the general financial situation of the railroad, as a whole, are important elements to be considered in a decision by the Commission, whether or not certain train service should be continued. However, that alone may not be the determining factor in the decision, because, as is stated by the Supreme Court of the United States, in the case of Atlantic Coast Line v. North Carolina Corp., 206 U. S. 1, 26:
“The primal duty of a carrier is to furnish adequate facilities to the public. That duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result.”

The same principle is restated in the case of Missouri Pac. Ry. v. Kansas, 216 U. S. 262, 278, where the court says:

“But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred.”

However, in the more recent decision of Miss. Comm. v. Mobile and Ohio Ry., 244 U. S. 388, the court emphasizes the fact that the financial situation of the railway, as a whole, should be carefully considered.

The Supreme Court of Indiana in a recent decision on the question, whether or not a railway should be permitted to abandon a certain station, said:

“The evidence shows that the receipts exceeded the expenses by a small amount. This is only one element of the case. The railroad company possessed the power of eminent domain. It condemned property and brought its line across the country wherever and whenever it chose. Having been granted that authority by the Legislature, it owed to the public the reciprocal right of service. It was not only its privilege to make a profit from its operation, but it owed a duty of service to each community through which it passed. It is a matter of common knowledge that some
communities are more profitable to the company than others, depending on population and business enterprises. Not all persons or corporation engaged in business in the commercial world, or operating a public utility, are able to realize a profit from each item of business. Merchants sometimes carry a line of goods, unprofitable as to that particular line, but necessary to accommodate customers. A railroad company operating through a community, enjoying the rights of eminent domain, should be more responsible to the community than a concern engaged in private commercial lines of business."

New York Central R. Co. v. Public Service Com., 212 Ind. 329.

The obligations of a railway in serving the public are well summed up in the decision in Chesapeake & Ohio R. v. Public Service Comm., 242 U. S. 603.

"Duties are measured by public needs and limited by the reasonable exercise of its franchise."

The question presented to your commission, is whether the Public Convenience and necessity served by the trains outweigh any financial loss shown by the evidence. This is not a law question but one committed solely to the Commission by the Legislature, and nothing in this opinion is intended to, or should, influence the commission in deciding the case of the petition on the record made at the hearing. I have no information what the record shows as to the necessity for a continued operation of the two trains.

As to the question in problem (3) inasmuch as the petitioning trustee invoked the jurisdiction of the Commission by asking it to pass upon the necessity and convenience of the continued operation of the two trains, it appears that he is not in a position to question the jurisdiction of the Commission to decide the question he submitted to it. The petition has not been withdrawn or dismissed. Moreover, I am of the opinion in view of the decision of the Supreme Court of the United States in the case of Palmer v. Commonwealth of Massachusetts, reported in 60th Supreme Court, 34, the fact that the railroad is being operated by a trustee appointed
in a Federal Court under Sec. 77 of the Bankruptcy Act, does not affect the jurisdiction of your Commission or the State of Indiana in proceeding in this matter, except as a part of a complete plan of reorganization for an insolvent interstate railroad, as subdivision F of Sec. 77 of the Bankruptcy Act specifically provides that a plan of reorganization of an interstate railroad as a whole duly approved by the court should prevail over all state laws and the orders of any state authority. In other words, if the Chicago, Indianapolis & Louisville Railway Company has perfected the plan of reorganization that has been approved by the court, the court would then have such jurisdiction under the Bankruptcy Act to make an order permitting the trustee to take the two trains off and if these facts do not exist to give the Federal Court jurisdiction under the Bankruptcy Act in reorganization. The jurisdiction of the Public Service Commission of Indiana and proceedings pending before it are not affected. These facts are not presented in your request and can only be ascertained upon investigation by your Commission.

In the Palmer case, the court said:

"In view of the judicial history of railroad receiverships and the extent to which Sec. 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road."

Now proceeding with this exception in mind, the facts in the Palmer case are as follows:

While the New York, New Haven and Hartford Railroad was under the jurisdiction of the Federal Court because of its application for reorganization under Sec. 77 of the Bankruptcy Act, the bankrupt trustees applied to the Department of Public Utilities of Massachusetts for leave to abandon eighty-eight local passenger stations in Massachusetts. The Department held twenty-one hearings on the question of
abandonment but before a decision of the Department was made, a creditor initiated an action to have the trustee abandon the local service. The District Court ruled that Sec. 77 gave him authority to dispose of the petition on its merits and heard the question and received evidence and ordered an abandonment of the stations.

The Supreme Court first decides that Congress did not give the Court this power. The Court called attention to the fact that the judicial process in bankruptcy was "brigaded with the administrative process of the Commission". The court further said:

"In construing legislation, this Court has disfavored inroads by implication on state authority and resolutely confines restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. Minnesota Rate Cases, 230 U. S. 352; Kelley v. Washington, ex rel., 302 U. S. 1.

"The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the overriding interests of interstate commerce required it, Colorado v. United States, 271 U. S. 153, this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuance. Public Convenience Application of Kansas City Southern Ry., 94 C. C. 691; see Proposed Abandonment, Morris and Essex Ry. Co., 175 I. C. C. 49. If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads we ought to find language fitting for so drastic a change."

The court further said:

"About a fourth of the railroad mileage of the country is now in bankruptcy. The petitioners ask us to say that district judges in twenty-nine states
have effective power, in view of the weight which often attaches to findings at nisi prius, to set aside the regulatory systems of these twenty-nine states with all the consequences implied for those communities. Congress gave no such power.

"Arguments of convenience against denial of the existence of this power have been strongly pressed upon us. Continuance of state control over these local passenger services will, it is urged, impair the bankruptcy court's power to formulate a reorganization plan for the approval of the Interstate Commerce Commission. Such embarrassments, due either to the time required for exhaustion of the orderly state procedure or to the financial losses that may be involved in the continuance of local services until duly terminated by the state, may easily be exaggerated. It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, do supplant state authority. But, in any event, against possible inconvenience due to observance of state law we must balance the feeling of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesman-like imagination that transcends the wisdom of local attachments."

Your letter states that the two discontinued trains operate between Chicago, Illinois and Indianapolis, Indiana. From this it may be inferred that there is also some incidental question as to whether or not the Indiana Commission has jurisdiction over these trains which carry interstate commerce. Congress has never "occupied the field" of train service and regulation. Until Congress acts on that subject the states may legislate with respect to it. This principle is well illustrated by the recent case of Kelley v. State of Washington, 302 U. S. 1. In that case the State of Washington had enacted a law fixing certain requirements with respect to
motor tug boats used in interstate commerce. Congress had also made certain regulations with respect to boats of that character. However, the regulations of Congress did not cover the particular things which were in the requirements of the state. The state law was upheld against the contention it was at interference with interstate commerce. More recent decisions uphold the right of the state to deal with local problems although interstate commerce may be affected. Richholz v. Public Service Commission, 59 S. Ct. 532. South Carolina, etc. v. Barnwell Bros., 303 U. S. 177, 184; E. P. Welch Co. v. State, 306 U. S. 79.

In the train abandonment case of Missouri Pacific Ry. v. Kansas, 216 U. S. 262, the Supreme Court of the United States discusses the question whether or not the commission's order which required the railroad company an interstate carrier chartered in another state, to put on a train and operate it to the state line, was a burden on interstate commerce.

"Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system and therefore did not destroy the power of Kansas over its domestic commerce or operate to bring under the sway of the United States matters of local concern and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject as to its purely local or state business to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned to the controlling power conferred by the Constitution upon the Government of the United States.

"The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line where there was no terminal facilities, but in a disguised form reiterates the complaint where we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of
authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that as the state line may be but a mere cornfield and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the state line, but twenty miles beyond to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and, therefore, must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation and besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. Atlantic Coast Line v. Wharton, 207 U. S. 328."

I think it is manifest from the Supreme Court decisions that a state regulatory commission may be given jurisdiction to regulate train service and accommodations within the state where it is required by public convenience and necessity. Your jurisdiction, of course, does not reach outside of the state, nor to interstate commerce, except as it is indirectly affected by providing for adequate train service within the State of Indiana.

Your inquiry asks, generally, as to the authority and duty of the Commission, in view of the situation outlined in your
letter. The Indiana law (Burns 1933 Ann. Stat., Sec. 55-120) provides that every carrier failing to comply with any order made against it by the Commission shall forfeit and pay to the State of Indiana, for each failure of such order, a penalty of not less than one hundred dollars, or more than one thousand dollars. Another section of the Statute (Sec. 55-124) provides that if any railroad company shall do any other act prohibited, or shall fail, or refuse to perform any other duty enjoined upon it, for which a penalty has not been provided, for every such act of the violation it shall pay the State of Indiana, a penalty not more than one thousand dollars to be recovered in a civil action.

It should be kept in mind in weighing the act of the trustee in discontinuing the trains while the matter was under consideration by the Commission, that after a ruling or an order by the commission in a proceeding before it, any party dissatisfied with the decision has a statutory right to a court review of the legality of the Commission's order. It would seem that if the Trustee anticipated an adverse ruling on his petition that the orderly method provided by law for a party dissatisfied with a commission's ruling ought to have been taken into account. It is to the Indiana laws that the Chicago, Indianapolis & Louisville Railway Co. owes its being.

Your inquiry further says that appeals are being made to the Commission for the purpose of having the trains re-instated. I believe this question of train re-instatement, by a mandamus suit or other appropriate proceeding in court, must depend upon the present status of the Chicago, Indianapolis & Louisville Railway Company in the Federal Court.

If a complete plan of reorganization has been confirmed by the court and the court, pursuant to said plan of reorganization made an order directing the trustee to take the two trains in question off, if this should be the case as previously pointed out in this opinion, the Public Service Commission could not make any order in that event affecting the jurisdiction of the Federal Court nor the court's order, ordering the trains discontinued. However, if these facts do not exist, then the further proceedings would depend on the answer of the Commission to the question whether or not the public needs require the service of the trains.