United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

Judge V.

This is a curtain copy of a letter sent Judge Sanborn only – I told him I sent this to you.

EBA

St. Louis, Mo., Oct. 25, 1910.

My dear Judge:-

Your letter of the 22nd enclosing a memorandum addressed to Judges Van Devanter and myself of date Oct. 21st in the cattle case was duly received by me and I have given patient consideration to the suggestions made by you. I have again read carefully the Tompkins case in 176 U.S. and I think I understand the doctrine of the Supreme Court as there announced. The findings made by a master may be challenged when presented to the trial court and it may become the duty of the trial court to examine the testimony to see whether those findings are sustained. It may also become the duty of an appellate court to examine the testimony for the same purpose. Such is about all the Supreme Court says with respect to our duty. If the findings of the master are challenged then we may do it. In this case Judge McHugh did not challenge the findings of the master but asked us to assume them to be true and to hold that upon that assumption his conclusion, which was also a finding of a fact, namely; that the rates fixed by the Interstate Commerce Commission were not unjust or unreasonable or unduly preferential, was erroneous. I am unable to so find. I made a pretty careful analysis of this report of the master and explained myself at our last conference on this case and do not deem it necessary to repeat what I there said, but my judgment is that the findings of the master in their several details are not necessarily inconsistent with his ultimate conclusion and are not probably inconsistent with

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the ultimate conclusion. There is nothing in them, in my opinion, to challenge the accuracy of the ultimate conclusion. The issue created by the pleadings was whether the cost of carriage of live stock was fifty per cent or something like that in excess of the cost of carrying other carload freight. That was the contention made by the railroad companies. The master responded to that issue by finding that the cost was not in excess of twenty per cent over the cost of carrying other carload freight. It seems to me the railroad companies realized the difficulty in determining the exact cost and were satisfied to make a broad issue and that the finding of the master was strictly responsive to the issue as made. I realize, as I said at the time of our final conference, that the master made some mistakes to which his attention was called on the exceptions subsequently argued before him. He corrected the mistakes, namely; one with respect to the earnings of the railroads on cattle. He changed it from his original finding of twelve mills per ton mile to ten and one-half mills, I believe. He also changed the next table by disclosing that the percentage of profit to cost was smaller than what he had stated in his original and first findings. But after he had corrected them all, the corrected things, taken in connection with the other facts found and with the evidence, caused him to believe and he so reported, that the rate fixed by the Commission was not unjust or unreasonable or unduly preferential. I think the master took into consideration as shown by his report all of the items that are claimed by counsel to enter into the extra expense of carrying cattle. In fact that subject was treated exhaustively in over a dozen pages of his report. I cannot bring myself to the conclusion after a most careful dissecting of the master's report and a very careful consideration of your suggestions in the memorandum

furnished, that the master and the Interstate Commerce Commission, after a lengthy trial like the one that was had before both of them and after the consideration of the vast volumes of testimony before both of them, made a mistake on a question of fact and arrived at an unjust and unfair conclusion of the matter. I think in order to upset the action of the Commission and the report of the master that nothing else could be done by me than to devote myself to this record for months. Certainly I would not be able to satisfactorily consider the bulk of evidence in this case which was before them and make any sort of a finding before the 15th of November when we must act.

My conclusion is the same as that announced by me at conference that the order should be that the cause was submitted to us on the pleadings, master's report, exceptions thereto and proof and that we order the exceptions to be overruled, the report confirmed and the bill dismissed. If you deem it your duty to take a different view and determine to write an opinion in the case and if Judge Van Devanter adheres to the views expressed by him in conference I think that either he or I should write a majority opinion putting the case, however, upon the grounds which I have indicated, and the ones which we were requested to put them on by counsel.

Very sincerely yours,

E.B.A.

Hon. Walter H. Sanborn,
United States Circuit Judge,
St. Paul, Minnesota.