

Book Reviews

FREE WHEELING? A REFERENCE FOR ECONOMIC DEREGULATION IN THE TRUCKING INDUSTRY: Leonard A. Jaskiewicz and Edward J. Kiley. Alexandria, VA: Interstate Carriers Conference, 1987, 133 pp.

by PAUL STEPHEN DEMPSEY*

The "what-if" world of motor carrier transportation in a completely deregulated environment is examined in this interesting and well-written book. The authors, prominent Washington D.C., transportation law experts, purposefully avoided a survey approach, and instead attempt to inform those both within and without the motor carrier industry the state of affairs that would exist when (not if) total deregulation occurs.

Chapter One deals largely with how bills of lading will be viewed in the absence of regulation. For instance, "short term" bills of lading can currently be used, because much of the requisite contract language is contained in the statutes governing the industry and both parties know of the content. With deregulation, all, or substantially all, of those items will have to be negotiated on an item-by-item, contact by contact basis. However, the authors point out that much of the necessary language exists in the common law. Also, in individual negotiation, parties can contract lower rate structures by "dealing away" liability and by providing prior declarations of value. The authors find this approach preferable to litigation. Other basic contract elements must be incorporated in the bill of lading (e.g. time for filing claims, time for initiating litigation). But wouldn't this ultimately lead to a return to the long form contract, thereby increasing transaction costs and opening the door for adhesion contracts? The book provides few insights.

Chapter One also includes a discussion of the application of state law in an interstate transportation setting, together with Article 7 of the Uniform Commercial Code, as a potential source of law.

Chapter Two examines labor relations. The premise adopted is that total deregulation would fundamentally change the legal climate for interstate carriers. Instead of federal law controlling the definition of an independent contractor, that determination would be left to each state, thus

* Professor of Law and Director of Transportation Law Program, University of Denver College of Law.

creating uncertainty as to liability under the doctrine of *respondeat superior*. Also, when deregulation occurs, the National Labor Relocations Act and its distinction between employees and independent contractors could well be muddled, especially as applicable to unionization.

Four other areas (employee rights, withholding tax, minimum wage and overtime) are analyzed. The conclusions reached are that deregulation would have a negative impact on the industry with respect to all four.

Chapter Three examines the issue of what motor carriers will be called (answer—most of the time “common carriers”), and the death of contract carriers post deregulation. A lengthy discussion ensues concerning who will be called “common carriers” *vis-à-vis* “private carriers” (common law precursors to contract carriers) based on common law.

Rates and charges and how their enforcement would come under the auspices of the FTC and how price discrimination can be prohibited through an amendment to the Robinson-Patman Act are discussed. Remember that Robinson-Patman’s prohibition against discrimination applies only to the sale of goods, not services. The authors aptly point out that at the time the statute was promulgated, America’s major service industry, transportation, was already subject to the antidiscriminatory prohibitions of the Interstate Commerce Act. Hence, there was then no need to extend Robinson-Patman protections to this industry. Other subjects (e.g. set-offs, lack of published tariff rates, equipment) are discussed under the purview of common law, noting the possibility of burdensome state regulations.

Chapter Four looks at the function of the U.S. Department of Transportation [DOT] as the new regulating body in a deregulated world. This chapter deals with the DOT’s expansive role in the areas of employee safety, equipment safety, service and operations. After examining pending and proposed rules, the authors conclude that with or without economic deregulation, the DOT will continue to expand its regulatory authority in the area of safety operations, thereby relieving the Interstate Commerce Commission [ICC] of much of its influence and power. The chapter concludes by offering the following alternative scenarios:

1. The Congress will continue to introduce legislation that will eliminate rather than transfer economic and operational regulation; or
2. It will at least vest jurisdiction to regulate motor carriers regarding such activities as leasing practices, credit regulations, claim rules, in the DOT.

The book shifts gears (so to speak) in Chapter Five by examining the effect that deregulation would have on intermodal transportation—that which is provided by a number of companies when more than a single mode of transportation is involved. The authors proceed to examine the

effects of deregulation on the several combinations of intermodal transportation (*i.e.* motor carrier and railroads, water/motor relations, and air carrier operations).

As to railroads, the authors point out that the motor carrier will assume the position of a shipper when dealing with the railroad. Several issues of which motor carriers must be aware are identified. Most of the differences will be ministerial in nature and are an expansion of the areas touched on in Chapter One. These issues primarily deal with contractual language and clauses that will need to be specifically negotiated.

As to water/motor relations, the authors state that "[t]he proposed elimination of all economic regulation of the surface motor carrier industry would have little practical effect on the operations of the motor carrier as they pertain to the participation of such carriers in through intermodal international transportation movements." *Id.* at 59-60. The authors examine Federal Maritime Commission [FMC] jurisdiction as it applies to Motor Carriers as NVOCCs, as ocean freight forwarders, ocean freight brokers, and motor carrier liability on through intermodal international transportation. All will be marginally impacted by deregulation, according to the authors.

As to international air commerce, however, the changes could be measurable because of the existence of the Warsaw Convention and its attendant rules on liability. The authors point out that these waters are fairly untested and therefore muddy. Some general recommendations and ideas are offered.

Chapter Five, by far the longest chapter in the book, explores the potential growth of antitrust actions when complete deregulation is achieved. The chapter begins with a review of the Sherman Act and several U.S. Supreme Court decisions interpreting it. Next, the authors forcefully point out that the motor carrier industry, under the regulatory jurisdiction of the ICC, currently enjoys immunity from much of the Sherman Act, both statutorily and by virtue of implied immunity. Very lengthy discussions follow and address such areas as mergers, pooling and monopolization, among others. The discussion centers around the various loss of immunities once the ICC is abolished. Some ways around the potential increased exposure to antitrust liability are suggested. Basically, practices must be "non-rate" oriented. The thrust of any attempt by motor carriers to standardize industry transactions or practices must not be viewed as affecting rates. One possible exception to this might be joint-line movements where rates are by definition agreed upon and affected. However, even joint-line arrangements could be a violation under the Sherman Act if instituted for anti-competitive purposes.

As to implied immunity, much of it would be lost if the ICC were abolished. The authors review several Supreme Court decisions (*Keough* and

Square D, for instance) to show how the courts find no antitrust liability where regulations dictate behavior. Therefore, abolition of the ICC would remove many of the immunities available under the *Keough* doctrine. Mergers would be similarly affected if implied immunities vanished under deregulation, as would carrier interlocks, injunctions and monopolization.

The FTC's greatly expanded role in antitrust actions in a deregulated market is discussed at length. Since the FTC currently keeps its fingers out of the ICC antitrust pies, abolition of the ICC will force FTC action. The authors present an overview of the various FTC statutes that would affect the industry.

The final area addressed in the book is that of state antitrust laws, made important because federal deregulation would allow some state antitrust statutes to apply.

The book will serve as a useful reference for transportation lawyers and industry executives as we enter the brave new world of deregulation. But perhaps a bit more could have been done to provide pragmatic solutions to the issues posed. Remembering the authors' own assumption that deregulation *will* occur, providing more examples of tangible applications would have strengthened the presentation. For example, the authors could have provided items such as a new Model Bill of Lading, examples of agreements between shippers and carriers that would *not* violate antitrust laws, and perhaps just a bit more "this is what you should do" analysis. It would have been easier reading had the numerous statutory and common law citations been dropped to footnotes. Nevertheless, considering its length, there is quite a lot of useful information packed in this succinct reference guide. It joins the collection of books essential for a transportation law reference library in the deregulated environment.¹

1. See also, D. SWEENEY, C. MCCARTHY, S. KALISH & J. CUTLER, JR., *TRANSPORTATION DEREGULATION—WHAT'S DEREGULATION AND WHAT ISN'T* (1986); P. DEMPSEY & W. THOMS, *LAW & ECONOMIC REGULATION IN TRANSPORTATION* (1986); W. TYE, *ENCOURAGING COMPETITION AMONG COMPETITORS* (1987).