Stopping By the Bus Terminal on a Dark and Stormy Night: The U.S. Bus Industry Seven Years After Deregulation[1]

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I. INTRODUCTION

The industry we thought we knew,
With Trailways red and Greyhound blue,
But stopping to look, it's all quite clear,
There're some things old, but much that's new.

For much of the history of the bus industry, excitement and innovation were perhaps as likely as Snoopy sitting atop his dog house and writing the great American novel. Rather, the industry had a homey, don't rock the boat culture more indicative of a Robert Frost classic. Times have changed. The bus industry now has seven years experience following the Interstate Commerce Commission's administration of the Bus Regulatory Reform Act of 1982,[2] and whether caused by or merely

1. This paper is a slight modification of a paper entitled "U.S. Bus Industry Seven Years After Deregulation; Its Governing Law; Its Structure; The Issues it Faces," presented to the Canadian Transport Lawyers Association Convention in Toronto, Ontario on November 18, 1989.

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2. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in scattered sections of 49 U.S.C.) [hereinafter cited as Bus Act or BRRA]. The Interstate Commerce Commission, which administers the Bus Act, is cited as Commission or ICC.

coincidentally following the Bus Act, the industry is vastly different at the outset of the decade of the 1990's than it was at the outset of the 1980's.

The bus industry in the United States today[3] provides essential transportation in different markets and for different classes of passengers. Buses provide the only public transportation to and from thousands of smaller communities.[4] Buses provide essential daily transportation in more populated, urban regions of the country.

The bus industry in the U.S. has traditionally been regulated by the ICC in a manner similar to that of the trucking industry, although the regulatory approach to both industries diverged slightly as a result of the deregulatory legislation of the early 1980's.

This article is intended to provide an overview of current legal issues affecting the intercity bus industry.[5] The article focuses on the current state of federal regulation, with the caveat that states continue to exercise reasonable power in regulating bus transportation within their borders.

To a limited extent, the article also addresses the structure of the industry and some of the current issues with which it is faced.

The bus industry in the United States has a long and proud history. Though there have been highs and lows, and although it appears the cycles will continue, all knowledgeable observers seem to agree that the bus industry as a whole will continue to play an important part in the continuing transportation picture within the United States. The industry's importance and character are such that it is reasonably expected that the federal government will continue to regulate it to some degree, however the winds of regulation or deregulation may blow.

II. THE REGULATORY FRAMEWORK

Government regulation of the bus industry in the United States has been the object of some careful thought, individual attention, and slight modification over recent years. At least at the federal level, there is now in place a highly deregulatory system, with vestiges of traditional eco-

3. As perhaps an illustration of the dynamic nature of today's bus industry, as this paper is being completed, Greyhound Lines, the nation's only nationwide carrier, is in the midst of a major labor dispute. This is discussed within the context of this paper at the text corresponding to note 44, *infra*.

4. *See*, generally, *Reconnecting Rural America, Recommendations for a National Strategy*, U.S. Department of Agriculture, September, 1989.

5. Other important aspects of the industry include urban transit systems and school buses. Urban systems are generally under the guidance of the Urban Mass Transit Administration (hereinafter UMTA), while school business, regulated to some extent at the state and local level, are regulated at the federal level in terms of safety and operations by the National Highway Traffic Safety Administration. To the extent this regulation affects the intercity bus industry, it will be mentioned later in this article.

nomic regulation in certain sensitive areas.[6]

The bus industry was among the last of the transportation modes to be deregulated, following the airlines in 1978 and trucks and railroads in 1980. Thus, Congress had an opportunity to learn at least a bit from its experience in deregulating other transportation modes when bringing bus regulation into the "modern" deregulatory age.

The key legislation which defines bus regulation in the United States is the Bus Regulatory Reform Act of 1982. This Act, like the other deregulatory acts before it, was based on the premise that traditional regulation had been unduly burdensome. Congress expressed its desire to increase the flexibility of the regulatory scheme under which the bus industry operated.[7]

Under the Bus Act, entry was to be eased for new carriers and expansion of existing routes was to be eased for existing carriers. Depending upon the nature of the new proposal, it might be only "very easy" to obtain some new authorities or "very, very, very easy"—to obtain others.[8]

For those carriers engaged in charter and tour service, (which today probably constitutes the largest number of intercity bus companies) certificates were to be granted to any applicant which could demonstrate its "fitness" (defined as nothing more and nothing less than the ability to obtain requisite insurance coverage), without regard to traditional factors of public convenience and necessity, including any expressed public need for the service and any effect of the proposed service on existing

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6. Regulation of the industry at the state, and occasionally regional or local levels, remains subject to state and local laws. Standards and practices differ widely from state to state. For the most part, this article addresses federal regulation only.

7. The "Congressional findings" included in the Bus Act are illustrative of the Congressional desire for regulatory flexibility in the various deregulatory acts affecting the different modes. The Congressional findings for BRRA include the following:

> Historically the existing Federal and State regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, . . .; that State regulation of the motor bus industry has, in certain circumstances, unreasonably burdened interstate commerce; that overly protective regulation has resulted in operating inefficiencies and diminished price and service competition in the motor bus industry; that the objectives contained in the national transportation policy can best be achieved through greater competition and reduced regulation; [and] that in order to reduce the uncertainty felt by the Nation's motor bus industry and those persons and communities that rely on its services, the Interstate Commerce Commission should be given explicit direction for reduced regulation of the motor bus industry and should do everything within its power to promote competition in the motor bus industry[.] BRRA § 3; Note following 49 U.S.C. § 10101.

8. It is presumptuous to cite one's own work, but the writer's article, The Bus Regulatory Reform Act of 1982 and Federal Preemption of Intrastate Regulation of the Intercity Bus Industry, 14 TRANS. L.J. (1986), is one of the most exhaustive analyses of those provisions of the 1982 Bus Act which apply to the bus industry.

carriers.[9] More recently, the ICC has turned to at least some consideration of safety as an element of fitness.[10] The Commission now requires each applicant to certify its U.S. Department of Transportation safety rating. If an applicant for passenger authority holds a "conditional" or "unsatisfactory" rating, its application will be rejected.[11]

For those carriers engaged in regular scheduled service, Congress retained a modicum of a traditional public need test. An applicant was first required to meet the fitness standard (i.e., show it could purchase insurance). Then, abandoning the traditional concept that the applicant must demonstrate a public need for the proposed service, the Bus Act assumes that need and imposes a burden upon objecting carriers to demonstrate that the transportation proposed "is not consistent with the

9. Bus Act, *supra*, note 2, § 6 at 1104, codified as 49 U.S.C. § 10922(c)(1)(B)(ii).

10. Ex Parte No. 55 (Sub No. 71), Notice of Policy and Final Rule Governing Submission and Evaluation of Safety Fitness Evidence in Motor Carrier Licensing Proceedings, 53 Fed. Reg. 49323 (Dec. 7, 1988). It might be noted in passing that the Bus Act required the Commission to consider both safety fitness and proof of insurance, 49 U.S.C. § 10922(c)(6), but until the end of 1988, the ICC essentially ignored its responsibility for ensuring safety.

11. One rare instance of the ICC taking a close look at passenger carrier safety involved its decision in Long Island Airports Limousine Corp., Extension—New York—New Jersey Service, MC-143668 (Sub No. 4), served September 16, 1987. That application, considered prior to the Commission's policy statement in Ex Parte No. 55 (Sub No. 71), was the subject of an in-depth procedure solely on the issue of applicant's safety fitness. The Commission relied upon a "conditional" DOT safety rating and "evidence [which] overwhelmingly shows a disregard for safety and flaunting [sic] of State law." (p. 5) In a later decision involving the same proceeding, served June 14, 1988, the Commission, basing its decision on the award of a satisfactory DOT safety rating to the carrier, awarded operating authority. Commissioner Simmons in a strong dissent observed that the applicant continued to disregard state and federal regulations "not only in the safety area but in others as well." He added, "in these circumstances, the most recent U.S. DOT safety audit should be given limited weight. Our responsibility to protect bus passengers from unsafe operators requires a much more meaningful analysis of safety records than that made by the majority . . . ." (p. 2) This call for greater scrutiny of safety has seemingly fallen on deaf ears as judged by the dearth of other Commission decisions in this area.

In fairness, it is true that there was an occasional ICC safety decision, but these were based solely upon DOT safety ratings, a presage of the Ex Parte No. 55 (Sub No. 71) policy finally adopted. For example, in Hammond Yellow Coach Lines, Division of Hammond Yellow & Checker Cab, Inc., Extension—Regular Routes, MC-139440 (Sub No. 5), served February 29, 1988, the Commission denied a passenger application on the basis of safety fitness. By a later decision served April 21, 1988, the Commission looked at a recently obtained "satisfactory" safety rating from the DOT and concluded without further discussion that the award of the satisfactory safety rating "establishes that applicant is now in conformance with applicable safety rules and regulations." (p.1)

For an even stronger statement by Commissioner Simmons, see his "comments" in American-Italian Tours, Inc., Extension—Three More Routes, MC-168048 (Sub No. 4), served January 16, 1986, in which he observed, "When presented with facts such as those brought out in this proceeding, the Commission has an independent obligation, quite apart from any reliance on DOT procedures, to ensure that carriers operating under authority granted by us continue to possess the requisite safety fitness. This is particularly so with respect to passenger carriage." (*Id.* at 6-7).

public interest."[12] For the first time, Congress actually defined those concepts which the Commission should address in making this public interest "determination." These included (1) the National Transportation Policy as expressed in the Interstate Commerce Act, (2) the value of competition to the traveling public, (3) the effect of the new authority on motor passenger service to small communities, and (4) if approval of the new application would impair the ability of existing carriers to provide "a substantial portion" of its "regular route passenger service which [the] carrier provides over its entire regular route system." The fourth consideration, which included vestiges of traditional regulation, was tempered with the further statutory statement that diversion of revenue in and of itself is insufficient to support a finding of impairment.[13]

Although the terminology of the Bus Act seems to imply that the Commission would maintain a meaningful role in continuing to regulate the interstate bus industry, in fact, the Bus Act has been interpreted by the Commission as meriting the approval of virtually each and every application for new operating authority. In the vernacular, it might be said that the ICC's entry policy is one of awarding requested operating authority to any applicant which can walk *or* chew gum at the same time.[14]

In the handful of known decisions denying a new application for operating authority, the Commission acted either upon unique questions of the applicant's fitness or questions concerning the bona fide nature of the application. To the knowledge of this writer, no application for expanded motor carrier authority following the enactment of the Bus Act has been denied on the success of an objector showing that the proposed service is not consistent with the public interest.[15]

As a matter of academic interest, with respect to rates, it may be noted that the Bus Act included a "zone of rate freedom" under which regular route rates could be modified without threat of Commission suspension,[16] and the Act provided specifically that rates relating to charter

12. Bus Act, *supra* note 2 § 6 at 1104; codified as 49 U.S.C. § 10922(c)(1)(A).

13. Bus Act, *supra* note 2 § 6 at 1105; codified as 49 U.S.C. § 10922(c)(3).

14. A leading case interpreting protestant's burden is Trailways Lines, Inc. v. ICC, 766 F.2d 1537 (D.C. Cir. 1985). *See* also Hudson Transit Lines, Inc. v. U.S., 765 F.2d 329 (2nd Cir. 1985); Lakeland Bus Lines, Inc. v. ICC, 810 F.2d 208 (D.C. Cir. 1987).

15. One genre of such cases were those involving applications for charter and special operations authority by publicly funded transit authorities. With one exception [Manchester Transit Transit Authority Common Carrier Application, MC-164973, served December 12, 1984, *aff'd*, American Bus Association v. ICC, No. 85-1270, Memorandum Decision, D.C. Cir., March 31, 1986], applications by publicly funded transit authorities for expanded authority were uniformly denied. *See* Southeastern Pennsylvania Transportation Authority, d/b/a/ SEPTA, Extension—Special Operations, MC-29850 (Sub No. 9), served February 26, 1986, and decisions cited therein. This controversy was effectively eliminated by the 1987 amendment dealing with the award of operating authority to publicly funded carriers. *See* note 31, *infra*.

16. Bus Act, § 11; codified as 49 U.S.C. § 10708(d)(4).

and special transportation could not be investigated and suspended at all.[17] Such provisions are of academic interest only, since, to this writer's knowledge, interstate passenger rate matters have not been before the ICC (except where intrastate rates are involved, *infra*) since the enactment of the Bus Act.

There remain two areas of some interest and controversy in connection with intercity bus operations, one focusing on regular scheduled service and the second on charter service.

One of the conceptual underpinnings of the Bus Act was Congress' recognition that intrastate bus service remained highly regulated by the states. Modifications of state operating authority were often hard to come by. Rate increases were often well nigh impossible to come by. The marked difference between the harsh regulatory philosophy of the states and the lenient philosophy of the ICC (even prior to the Bus Act), had led carriers free of traditional ICC regulation seeking to offer new and different services (or at least modifications of old services) being dragged back down to earth under continuing state regulatory burdens.

Although the concept of carriers providing regular scheduled service at a loss as a *quid pro quo* for their conduct of more profitable charter service had long been abandoned—in practice if not necessarily in stated federal policy—many states required carriers to continue to operate intrastate services at unreasonably low rates and despite low ridership. Carriers found it expensive, time consuming, and difficult to abandon unprofitable routes.

State regulatory requirements would result in the anomaly, for example, of an interstate carrier operating a scheduled service from New York City, through Buffalo, New York and into Cleveland, charging an interstate fare between New York City and Buffalo (the trip within New York State would be interstate if, for example, the passenger originated in Washington, D.C. and transferred at New York City for continuance to Buffalo) of perhaps $25 with the same intrastate rate between the same two points, as regulated by the New York Department of Transportation, of approximately one-half as much.

After several years of viewing deregulatory legislation affecting other modes, Congress (or more accurately, the bus industry lobbying Congress), recognized that if there was to be increased competition as the Bus Act sought to promote, then carriers would necessarily enter and leave the market. It was therefore necessary to permit carriers far greater flexibility than they had enjoyed in the past to deal with the newly competitive bus market.

Thus, Congress, employing its power under the U.S. Constitution to

17. Bus Act, § 11; codified as 49 U.S.C. § 10708(g).

regulate interstate commerce,[18] decreed that it would preempt a substantial portion of state regulation of interstate bus carriers that were also engaged (or even arguably engaged) in intrastate service. Congress included in the Bus Act a provision which would allow the ICC—a federal agency—to issue intrastate operating authority over the intrastate portion of the same route a carrier served in interstate service.[19] This allowed then current interstate carriers effectively to remove "closed door" restrictions in their certificates (the inability to pick up and drop off passengers within a particular state, or a portion of a particular state, which they served in connection with an unrestricted interstate route), by following the expedited, liberally construed procedure in the Bus Act.

Yet, the Bus Act went further. Obviously, under the ease of entry standards included in the Act, it would be far easier for carriers in almost every state to obtain intrastate authority from the ICC than to obtain it from the more regulatory minded state commissions. The Bus Act therefore included a provision allowing the ICC to award intrastate authority over those portions of *new* interstate routes within a single state.[20] This law created a situation in which some carriers would go to great lengths and employ vivid imaginations in order to describe a service as interstate rather than intrastate. By doing so, they might obtain both interstate and intrastate authority from the liberal minded ICC, rather than face the more rigorous requirements of the individual states.

As one might imagine, carrier imaginations (and the imaginations of their attorneys), occasionally ran wild, and situations arose around the country in which carriers were obtaining purely local operating authority through a tenuous claim that the proposed service was interstate in nature when, in truth, the carrier was only offering limited, local service. In 1987, Congress, reacting to the complaints of New York City,[21] and other states

18. U.S. Constitution, Article I, Section 8.

19. Bus Act, § 6; codified as 49 U.S.C. § 10922(c)(2)(A).

20. Bus Act, § 6, codified as 49 U.S.C. § 10922(c)(2)(B).

21. An early application proceeding in which the New York City Transit Authority voiced the objection of New York was Subscribe-A-Ride, Inc., Common Carrier Application, MC-188184, served April 8, 1986. That application involved a request to provide a scheduled regular route commuter service which would conceivably include potential transportation wholly within New York City. That application was approved, with the ICC's observation, "Any carrier initiating an intrastate operation that does not include interstate service pursuant to such a certificate may be subject to a complaint and Commission enforcement procedures."

This argument was expressed in another way in a proceeding involving a petition for declaratory order to determine the propriety of certain local New York City operations. In Erin Tours, Inc.—Intrastate Operations—Petition for Declaratory Order, MC-C-10956, served March 23, 1988, the ICC considered this issue. In its decision in the same case served August 2, 1988, it found that the carrier was performing wholly intrastate operations, and that such operations could not be conducted under an ICC awarded certificate (p. 2). The Erin case relied upon a new law enacted to deal with this precise issue. *See* note 22, *infra*. Another case involving New

and localities, amended the law, imposing a condition on intrastate/interstate certificates which allows a carrier to provide intrastate service under an ICC certificate on only those routes over which it is actually conducting interstate service. The interstate service must be actual and substantial, although the interstate and intrastate services need neither be identical nor provided in the same vehicle.[22]

The award by the ICC of intrastate regular route authority is a particularly contentious issue, since, in practice, the ICC and its liberal regulatory philosophy frequently ride roughshod over the local regulatory interest of the state. In this writer's experience, at most, states reluctantly accept federal intrusion in this area; at worst, they make efforts—both subtle and not so subtle—to reassert their own jurisdiction, regardless of what the ICC may say or do.[23]

Within the framework of this issue, the number of disputes have seemingly been reduced as states reluctantly accept the ICC's power. There remain occasional proceedings involving claims of local transportation, frequently directed to the conduct of local airport service.[24]

York's continued assertion of its power vis-a-vis the ICC is New York City Transit Authority v. ICC, 834 F.2d 302 (2nd Cir. 1988).

22. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987), § 340, codified as 49 U.S.C. § 10922(c)(2)(J).

23. At least in concept, many of the issues raised in these cases are those also raised in the recent slew of intrastate/interstate cases involving property transportation, including Armstrong World Industries—Transportation Within Texas, 2 I.C.C.2d 63 (1986), *aff'd* State of Texas v. U.S., 866 F.2d 1546 (5th Cir. 1989), and its progeny. A bus case involving the primary jurisdiction of the ICC to interpret its own certificates is Holland Industries, Inc. v. Missouri, 763 S.W.2d 666 (Mo. 1989).

24. The leading case is Funbus Systems, Inc.—Intrastate Operations—Petition for Declaratory Order, MC-C-10917, with corresponding court review in Funbus Systems, Inc. v. California P.U.C., 801 F.2d 1120 (9th Cir. 1986). The ICC's decision on remand in MC-C-10917, served January 6, 1988, provides a detailed analysis of the issue. Other leading cases include Gray Line Tours Co. of Southern Nevada v. Interstate Tours and Limousines, Inc., et al., MC-C-10907 (Sept. 11, 1986), with corresponding court review in Gray Line Tours Company of Southern Nevada v. ICC, 824 F.2d 811 (9th Cir. 1987). Another decision which looks to the substantial nature of a carrier's interstate operations is Airporter of Colorado, Inc. v. ICC, 866 F.2d 1238 (10th Cir. 1989).

More recent ICC decisions include Erin Tours, Inc., *supra*, note 21, [dealing with local transportation in the New York City area], and O'Hare Wisconsin Limousine Service, Inc., Intrastate Operations—Petition for Declaratory Order, MC-C-10980, served March 24, 1988, [dealing with airport operations]. Another purely local decision is that in American Coach Lines, Inc., Petition for Declaratory Order, MC-C-30038, served September 14, 1988, which dealt with seeming overlapping jurisdiction between the ICC and the Washington Metropolitan Area Transit Commission, a unique regulatory agency created by an interstate compact to deal with local, interstate passenger transportation in the Washington, D.C. area. The latest such decision is that in San Juan Air Services, Inc., d/b/a Shuttle Express—Petition for Declaratory Order, MC-C-30091, served November 15, 1988, *aff'd*, Evergreen Trails v. ICC, No. 89-1024, D.C. Cir., Memorandum Order filed January 11, 1990, which deals with another element of the interstate-intrastate dispute in the context of the "incidental to air" exemption in 49 U.S.C. § 10526(a)(8)(A).

To say that this issue is one of the areas of greatest contention in bus regulation is not to say that there are a plethora of such cases involving the issue, but rather to say that in the bus licensing area, there are no other active issues.

There is a second, somewhat related area of interest arising from provisions of the Bus Act. In two areas other than licensing, Congress explicitly provided for ICC preemption of state regulation in terms of rates and in terms of exit. The ICC was given the power to preempt the states after first giving the states an opportunity to act.

Under the law, in terms of raising intrastate fares[25] or seeking formally to abandon a particular intrastate route[26] (both involving intrastate service on a route over which the carrier also provides interstate service), the Bus Act provided that if a state does not grant the requested relief within a fixed time, the carrier can appeal to the ICC. In every known instance (with the exception of a handful in which procedural considerations precluded a decision on the merits), the ICC has granted relief to carriers which have pursued either of these courses of action.[27]

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25. bus Act, § 17; codified as 49 U.S.C. § 11501(e). A leading case is Commissioner of New York DOT v. ICC, 750 F.2d 163 (2nd Cir. 1984), *cert. denied* 105 S. Ct. 2019. Another case is State of Texas v. U.S., 761 F.2d 211 (5th Cir. 1985). A more recent case is Alabama Public Service Commission v. ICC, 839 F.2d 815 (D.C. Cir. 1988). That this issue has become less significant is reflected in the ICC Annual Report for fiscal year 1988, which reports that only two such petitions seeking rate relief for intrastate rates were filed during that year (p. 82).

26. Bus Act, § 16; codified as 49 U.S.C. § 10935. The major court case dealing with this issue is Pennsylvania Public Utility Commission v. U.S., 749 F.2d 841 (D.C. Cir. 1984). Three ICC decisions which provide an extensive discussion of the issues under this section of the law and include citation to numerous ICC proceedings are Petition of Greyhound Lines, Inc. for Review of a Decision of the New York State Department of Transportation Pursuant to 49 U.S.C. 10935, MC-1515 (Sub No. 378) served August 23, 1985; Petition of Trailways Tennessee Lines, Inc. for Review of a Decision of the Alabama Public Service Commission Pursuant to 49 U.S.C. 10935, MC-55312 (Sub No. 27), served January 2, 1986; and Petition of Greyhound Lines, Inc. for Review of a Decision of the Public Utilities Commission of Ohio Pursuant to 49 U.S.C. 10935, MC-1515 (Sub No. 390), served July 15, 1986.

27. In the rate area, the recalcitrant and seemingly undaunted states are Connecticut and Massachusetts, which seem merely to sit on proposed fare increases without action. Among recent decisions, that in The Arrow Line, Inc., Petition for Review—Connecticut Intrastate Fares, MC-C-30119, served September 15, 1988, includes citations to a number of earlier ICC decisions in this area. The Commission's decision in Petition of Peter Pan Bus Lines, Inc. for Review of a Decision of the Massachusetts Department of Public Utilities Pursuant to 49 U.S.C. 11501(e), served July 11, 1988, is of interest primarily in its definition of the calculation of the 120 day period in which a state must act to trigger the appeal provisions of the Bus Act. The Commission in its July 11, 1988 Peter Pan decision withheld granting relief on the basis of its calculation of the 120 day period, but relief was subsequently granted by a decision served August 23, 1988.

The one known decision in which the ICC did approve a request under 49 U.S.C. § 10935 was Petition of Trailways Lines, Inc. to Discontinue Bus Transportation in the State of California Pursuant to 49 U.S.C. 10935, MC-109780 (Sub No. 111), served February 23, 1987. That petition was not approved, because it appeared that Trailways did not substantially comply with California requirements in submitting its initial petition to discontinue service to that state agency.

In the early days of the Bus Act, there was some dispute over how these provisions should be employed. It is now clear, seven years after the Act, that the ICC will grant relief to a petitioning motor carrier in every imaginable circumstance.

Perhaps the most interesting remaining comment on this issue is one concerning federalism. Under the scheme of things in the United States, the federal government can set forth in a statute a basis for relief from burdensome state regulation and express its sense that the states ought to adhere to (or at least move their policies much closer to) the federal philosophy.[28] Without regard to that statement, some states have obviously decided they won't be bothered and will do things their own way.

By way of example, Massachusetts maintains its traditional policy of simply suspending (i.e. postponing without any consideration on the merits) for a period of one year any intrastate rate increase. Thus, carriers with Massachusetts intrastate routes find themselves returning again and again and again to the ICC appealing the failure of the Massachusetts Commission to come into line with the federal standards and at least act within a reasonable period on intrastate rate increases.

What is perhaps most galling for the carrier is that although ICC procedures permit the state to participate in the appeal to the ICC to justify its action, Massachusetts, as an example, ignores that ICC proceeding as well, recognizing that by its failing to act, it establishes a situation in which the ICC will ultimately act to approve intrastate rates, thus allowing the Massachusetts regulatory agency—presumably—to tell its constituency that it has not been "guilty" of permitting a carrier to charge higher rates.[29]

The situation with respect to formal requests to abandon intrastate service is similar, with the exception that in the real world, carriers frequently simply stop running routes rather than seek formal approval to

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The ICC decision was specifically not one on the merits of the request to discontinue service (p. 6).

28. Included in § 17 of the Bus Act is a "Sense of Congress" statement to this effect, stating, "It is the sense of Congress that each State should revise its standards and procedures (including timing requirements) for rates, rules, and practices applicable to intrastate transportation provided by motor common carriers of passengers to conform such standards and procedures to the standards and procedures for rates, rules, and practices applicable to interstate transportation provided by motor carriers of passengers not later than 2 years after the effective date [of the Bus Act]." This is not codified, but appears as a note following 49 U.S.C. § 11501.

29. For example, not long after Peter Pan petitioned the ICC to allow it to increase its Massachusetts intrastate rates, Petition of Peter Pan, MC-C-30104, note 27 *supra*, it was required to return again to the DPU to increase other intrastate rates. Peter Pan Bus Lines, Inc.—Petition for Review—Massachusetts Intrastate Rates, MC-C-30171, served December 19, 1989. In neither of these cases did Massachusetts make any presentation. Instead, it chose not to act at all on the carrier's request.

discontinue their activities, regardless of whether that is technically in compliance with the law.

Another area of some interest with respect to remaining ICC award of authority is that in the charter field. Carriers with a subsidy from the Urban Mass Transportation Administration ("UMTA") for the purchase or operation of buses to perform local transit services also seek in some instances authority from the ICC to perform interstate charter services.[30]

The Bus Act itself included, for the first time, a distinction between private companies and those who are "a recipient of governmental financial assistance for the purchase or operation of buses." In applications where such "recipients" sought to provide charter service, they were to be included as carriers subject to the "public interest" test, rather than those who would "automatically" be awarded charter authority under the "fitness only" test which applies to other charter applicants.[31]

The dispute in this area, although spilling over to the ICC, is more one within the confines of UMTA itself. That agency in 1987 issued its own "charter rules," which generally prohibit the operation by carriers who receive UMTA funding of their own charter service in competition with private operators.[32]

This issue is a significant one, not so much for the decisions of the ICC dealing with the rare instances in which it arises—or even the decisions of UMTA in determining what is permissible under its rules—but instead as an example of government grappling with the concept of cross-subsidization, in which a government subsidized carrier is competing with private carriers in an arena in which the government subsidy was not arguably intended to apply.

This area is, understandably, an emotional one for carriers who see themselves competing with their own tax dollars, and one with significant political overtones. It is also one of the few bus-related issues which remains a "hot topic" in the current regulatory environment.

Another area of activity has been spawned by the Greyhound-Trailways merger.[33] As a result of the merger, there were created many duplicative regular route operations in an economic environment which many in the industry believed would not support two carriers. A number of in-

30. *See* Southeastern Pennsylvania, *supra* note 15, and cases cited therein.

31. Bus Act, § 6; codified as 49 U.S.C. § 10922(c)(1)(B)(i). This current law applies to private recipients of public funding. Public recipients of public funding have other requirements at 49 U.S.C. § 10922(c)(1). This section of the law was simpler when first enacted as § 6 of the Bus Act. Additional, current restrictions on recipients of public funds were included in a 1987 amendment.

32. The rules appear in 49 CFR § 604. A thorough background appears at 52 *Fed. Reg.* 11916 (April 13, 1987), as amended by 53 *Fed. Reg.* 53348 (Dec. 30, 1988).

33. *See* text at note 44, *infra*.

dependent carriers entered into pooling arrangements with Greyhound Lines to pool traffic over these duplicative routes as permitted by 49 U.S.C. § 11342(a). For the most part, these applications were unopposed and routinely approved.[34]

In one known instance, an existing carrier with at least a peripheral concern in the competitive aspects of the pooling arrangement filed a protest. The affected labor union also voiced its objection. Nonetheless, the Commission readily found that the anti-competitive concerns were either misplaced in this proceeding or simply unfounded and approved this application as well.[35]

A final legal development within the bus industry is one borrowed from the trucking industry, namely a response to the uncertainty created by the filed rate doctrine. Increasingly, charter carriers have filed applications with the Interstate Commerce Commission for authority to serve any user of charter services, not just named users, presumably following the lead of the unrestricted contract permits issued in the property field.[36] These applications are routinely approved and the applicant then returns to the ICC with a specific petition for exemption from tariff filing requirements for its newly authorized contract operations, which is also routinely approved.[37]

This appears to be a traditional exercise of "going through the regu-

34. Three such decisions, each served on November 28, 1988, includes Carolina Trailways—Pooling—Greyhound Lines, Inc., MC-F-18917; Southeastern Trailways, Inc. and De Luxe Trailways, Inc.—Pooling—Greyhound Lines, Inc., MC-F-18939; and Capitol Bus Company—Pooling—Greyhound Lines, Inc., MC-F-19154.

35. Adirondack Transit Lines, Inc. and Pine Hill-Hingston Bus Corp.—Pooling—Greyho und Lines, Inc., MC-F-19190, served February 8, 1989.

36. Where property applications are concerned, carriers can request authority to serve an entire class of shippers as a contract carrier under 49 U.S.C. § 10923. Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Service, 133 M.C.C. 298 (1983). This seems to have been followed in practice by passenger carriers on a case by case basis. Applications for such authority are ubiquitous. Two recent such applications include *Application of Mealey Transportation, Inc.*, MC-227670, ICC *Register* February 23, 1990, p. 27; *Application of Orville B. Scott*, MC-227451, ICC *Register* February 27, 1990, p. 15.

37. Practice for property carriers and passenger carriers differs. In Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. 150 (1983), *aff'd*, Central and Southern Motor Freight Tariff Association v. U.S., 757 F.2d 301 (D.C. Cir. 1985), the ICC granted a blanket exemption to all motor contract carriers of property from tariff filing requirements. That decision did not apply the blanket exemption to passenger carriers, but did invite passenger carriers to file individual petitions for exemption. 133 M.C.C. at 152-53. Many have acted on that invitation.

Within the pertinent provisions requiring the filing of tariffs, the ICC is authorized to grant motor contract carriers relief from its tariff filing requirements upon request, when the relief is found to be consistent with the public interest and the National Transportation Policy. 49 U.S.C. § 10702(b); 49 U.S.C. § 10761(b); 49 U.S.C. § 10762(f). The award of such approval is granted routinely. Recent instances of such awards are Airlines Acquisition Co., Inc., d/b/a/ Airlines Transportation Company—Exemption from Tariff Filing Requirements, No. 40370, ICC *Register*

latory motions" to obtain perhaps a modicum of additional protection. To this writer's knowledge, no claim similar to a property carrier undercharge claim has been made upon a passenger carrier, but by obtaining unrestricted contract authority and an exemption from tariff filing requirements, the passenger carriers achieve additional—if appreciated only in the minds of attorneys—protection.

III. The Structure of the Intercity Bus Industry

Traditionally, the bus industry in the United States was synonymous with the names "Greyhound" and "Trailways," both in the mind of the public and in the minds of members of the bus community themselves.

In 1987, Greyhound Lines entered into an agreement to purchase most of the operations conducted under the Trailways name, and, after a heated battle at the ICC to obtain the agency's approval of the transfer, the transaction was ultimately approved.[38] Only a handful of existing carriers even bothered to raise their anti-competitive concerns at the ICC during the agency's consideration of the merger. The Commission's response was that any such anti-competitive concerns were speculative only, and if anti-competitive abuses should arise at some future time, carriers could return to the ICC and make those concerns known again.[39]

As for government policy, the merger was supported in the first instance under the "failing firm" doctrine of anti-trust law. It was shown that Trailways was in such severe financial position and there were no other potential purchasers, so the purchase by Greyhound was the only way to save the foundering Trailways.[40]

On a long term basis, the ICC determined that the "relevant market" in which competition should be judged was the intercity passenger market, rather than the bus market. Thus, to the extent that Greyhound may have monopoly-like power in a particular market vis-a-vis other bus carri-

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January 31, 1990, p. 35, and Comfort Coachline, Inc.—Exemption from Tariff Filing Requirements, No. 40364, ICC *Register* February 16, 1990, p. 24.

38. This merger involved the "new" Greyhound Lines of Dallas, Texas and its Greyhound operations within the United States and Trailways, Inc., a major member of the National Trailways Bus System. The "old" Greyhound Corporation of Phoenix, Arizona is no longer in the intercity bus business in the U.S., but continues to own Greyhound of Canada.

39. The ICC's decision approving the purchase by Greyhound of Trailways includes a lengthy, and probably most current and thorough description of the ICC's view of the passenger bus industry. GLI Acquisition Co.—Purchase—Trailways Lines, Inc., MC-F-18505, served June 7, 1988, Fed. Curr. Rep. (CCH) ¶ 37470.01 (May 27, 1988) *aff'd*, Memorandum Decision, Peter Pan Bus Lines, Inc. v. ICC, No. 88-1532, D.C. Cir., decision filed May 8, 1989. Any careful consideration of the structure of the bus industry, the role of the bus industry in the nation's transportation system, the relevant market for bus travel, and the ICC's view of competition within the intercity bus industry must begin with a thorough review of the ICC's June 7, 1988 decision.

40. GLI Acquisition Co.—Purchase—Trailways Lines, Inc., MC-F-18505-TA, served July 2, 1987 (pp. 4-6).

ers, its lack of market power vis-a-vis other modes of intercity passenger transportation suggested to the ICC that there would be no anti-competitive effects worthy of ICC consideration.[41]

With the merger completed, an analysis of the structure of the industry, therefore, must begin with the new Greyhound-Trailways combination, with its extraordinary market presence, power, and resources.

A recent ICC list of the results of the ten largest passenger carriers is illustrative.[42] More than 85% of the operating revenues of the ten largest carriers are those of the combined Greyhound/Trailways organization. Of the nine "other" large carriers, seven operate almost exclusively in the heavily populated New England states; of these, several carriers are primarily suburban, commuter carriers and one operates primarily airport limousine service.

It is also noted that the revenues of the ten largest carriers constitute 85% of the total revenues of all Class I ICC passenger carriers.

One can thus readily conclude that as the industry is now structured, there is Greyhound/Trailways; there are a small number of independent carriers generating significant revenues; and the remainder of the industry pales in comparison.[43] Having said that there is extraordinary concentration in the industry, one must also recognize that there are innumerable independent, smaller carriers, primarily engaged in charter and tour services, which operate from every major city and minor town throughout the United States. Many of these are financially sound in their own way, having understood the importance of engaging in operations within the limits of their financial, managerial, and market capabilities. As a whole, they are an important segment of the industry. Individually, their size and power are insignificant.

As this article is completed, the very structure of the industry has been called into question by the nationwide strike by the Amalgamated Transit Union against Greyhound, which has seriously disrupted the operation of the intercity bus system.[44] The seeming acrimony surrounding this dispute and the apparent hard-line approach by Greyhound in dealing with its union at least raises the question of the future viability of Greyhound as a nationwide carrier, at least insofar as the traditional view of that carrier is concerned.

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41. GLI Acquisition Co., *supra* note 39, pp. 6-10, Fed. Carr. Rep. (CCH) at ¶ 37470.02-.03.

42. "ICC issues report showing first quarter 1989 earnings of the nation's ten largest bus companies," ICC Press Release No. 89-131, July 7, 1989.

43. The severe concentration in the bus industry has been acknowledged for many years. *The Intercity Bus Industry*, Office of Transportation Analysis, Interstate Commerce Commission, January, 1984, pp. 11, *et. seq.*

44. "Five Thousand Communities Hit by Bus Strike," *Washington Post*, March 3, 1990, p. A-1.

At this moment, no one can predict the ultimate effect of this labor dispute on the maintenance of the Greyhound system, but given the ease of entry provisions of the law and the willingness of at least some operators to act decisively under the freedoms embraced in the Bus Act, change in the system is at least possible if not necessarily predictable.

IV. CURRENT ISSUES CONFRONTING THE BUS INDUSTRY

In considering the dynamics of the bus industry, one must recognize not only the regulatory system in which the industry operates, but also some of the significant issues with which it is faced.

The bus industry has its share of significant issues, but within the focus of this article, one must say that most of these are issues which are not directly related to the regulatory scheme.[45]

Although meaningful figures are not readily available, it is safe to say that with the exception of a handful of intercity carriers engaged in regular route transportation (be it true intercity transportation or even long distance commuter service within major metropolitan areas), charter and tour revenues provide a significant—if not the most significant—proportion of most carrier revenues. Deregulation of charter and tour operations on the federal level (and, generally on the state level to varying degrees) has resulted in overcapacity, leading to severe price competition, resulting in a diminution of overall carrier profits. This, coupled with ever increasing costs of operation, including the staggering cost of the newest intercity motorcoaches, increased cost of labor, including benefits, and other operating costs, including fuel and taxes, has resulted in mere economic survival being a major issue for many smaller charter and tour carriers within the industry.

Regardless of the number of efficient management programs which are instituted, regardless of the modernization of maintenance facilities and customer service facilities, and regardless of computerization of record keeping and billing, many carriers are faced with a close-to-being-unbearable squeeze on their profits.

In an earlier day, the federal investment tax credit provided an impetus for many bus carriers to invest their earnings in improved and expanded fleets of equipment. The elimination of that credit several years ago has substantially lessened the former ease and attraction of investment by existing carriers in their fleets.

Many carriers are today operating aging fleets of equipment, with models costing the then significant amount of $155,000 now replaceable only with comparable models which cost twice as much.

45. The assertions in this portion of this article are those of the author alone, based upon his observations of the industry.

In many instances, only new entrants, highly leveraged, and barely able to make lease payments on these expensive coaches, enter the charter market and provide fierce price competition, anxious only in the short run to meet their lease payment obligations, thereby further exasperating this problem.

Thus, one major problem of many existing charter and tour carriers (and these make up most of the industry) is merely to remain in business.

In this context, traditional regulatory concerns in general are of little significance, except in those rare, purely local situations in which a new entrant seeks to take on an existing carrier in providing a particular, specialized service. In such circumstances, the significance of regulation is merely to provide an entertaining legal argument upon which to advance the goal of keeping a new entrant out of a market which an existing carrier now rules.

A second issue—of perhaps more interest to industry observers than industry participants—is the result of seven years of Bus Act experience on the availability of adequate service to the public. The bus industry has historically been viewed as one providing essential public services, and comments regarding the industry have frequently examined the effect of the flexibility inherent in the Bus Act upon the essential mission of the industry to provide service to small communities and those unable to take advantage of other modes of intercity transportation.[46] Observations concerning this issue are in large part anecdotal. Further, as the ICC's decision approving the Greyhound-Trailways merger makes clear,[47] one's conclusions are ultimately shaped by one's assumptions of the relevant market.

As of this date, it is reasonable to assume that at least one result of the current Greyhound strike will be a reassessment of the costs of providing service to smaller communities and perhaps some effect upon the level of service to such communities.

A final significant issue is the pending Americans with Disabilities Act, which, it first appeared, would require all new intercity buses at some future date to be equipped with wheel chair lifts and space for wheel chairs on the coaches. Many in the industry expect that this may have a catastrophic financial effect on carriers, by resulting in yet another significant increase in the cost of new motor carrier equipment, while at the same time resulting in diminished passenger capacity. The latest Wash-

46. Discussions of the level of service to the public include The Intercity Bus Industry, *supra* note 43 at 77 *et seq.*; GLI Acquisition Co., *supra*, note 39, p. 11, *et seq.*; Illinois Bus Service Since the Bus Act: A Diminishing Intercity Network, Illinois Commerce Commission, November, 1984; and a letter from then ICC Chairman Heather Gradison to Senator Larry Pressler, September 8, 1986, assessing regular route entry and exit experience under the Bus Act.

47. GLI Acquisition Co., *supra* note 39.

ington rumors suggest the legislation will be modified before enactment to lessen its impact upon the bus industry, but until the legislation is enacted, one can only speculate.

All in all, when one speaks of issues confronting the bus industry, one generally speaks of business issues—as opposed to regulatory issues—and for those regulatory issues which do take on some significance, the debate is purely local, rather than industry-wide. The business issues are those of almost any business; few are unique to transportation.

V. CONCLUSION

Within the United States, the intercity bus industry remains regulated by the Interstate Commerce Commission. Nonetheless, the enactment of the 1982 Bus Act and the generally deregulatory bent of the ICC has resulted in a system of regulation which is in almost every case a nuisance at most and often to be virtually ignored.

Surely, every bus operator must be aware of and comply with appropriate regulations, and surely every operator must be aware of the peculiar state and local regulations which exist in particular markets, but for the most part, the bus industry in the United States operates under the free market, business driven environment in which other transportation modes operate. In that event, knowledge and understanding of the industry is of equal—if not more—importance than knowledge of transportation law. Yet, if one were to attribute to any transportation mode the characteristics evoked by the phrase "miles to go before I sleep," it would be the intercity bus industry. It is one which, despite today's importance or unimportance of regulatory requirements, continues to provide essential day in and day out services to many thousands of communities which are otherwise unserved by public transportation.[48] They are so essential that one can reasonably assume there will always be a continuing interplay between regulators and the marketplace to fashion the industry to meet the industry's unique role in the transportation system.

48. Greyhound normally serves 9,500 of the 10,000 communities in the U.S. with intercity bus service. By way of comparison, all airlines serve 477 communities and Amtrak serves 498. "Five Thousand Communities," note 44, *supra*.