Benefits of Economic Regulation of Oregon Intrastate Motor Carriers

DICK DOLAN*

TABLE OF CONTENTS

* Manager, Continuous Traffic Study and Special Projects, Transportation Program, Oregon Public Utility Commission, Labor & Industries Building, Salem, OR 97310. Mr. Dolan holds a Bachelor's Degree from Southern Oregon State College (1965) and has been licensed in Oregon since 1967 to practice as a Certified Public Accountant. Prior to joining the staff of the Oregon Public Utility Commission in 1979, he engaged in both public and private accounting, and has been responsible for a variety of management services including systems design, financial analysis, and budgeting and forecasting. In his current role, he is responsible for a program that monitors the flow of general freight within Oregon, and his section also provides research to the Commission on various transportation issues.

I. Regulatory Objectives and History

Transportation is one of the essential industries that constitute the infrastructure upon which the rest of commerce is founded. Access to the commercial transportation system is crucial to the economic development and survival of both large and small businesses and communities.

In Oregon, for-hire motor carriage is "a business affected with the public interest." Or. Rev. Stat. 767.020 (1987). The state transportation policy promotes safe, adequate and economical service to the general public at reasonable rates without unjust discrimination or destructive competitive practices. Regulation of intrastate motor carriage in Oregon enables the state to implement this policy.

For motor carriers, economic regulation provides both benefits and burdens. The burden is the common carrier obligation to serve the general public in its authorized geographic area in a non-discriminatory manner. The benefit is the freedom from destructive competition by carriers not required to serve the general public.

Entry and rate controls embody the essence of economic regulation of motor carriage. Entry regulation ensures adequate levels of service while protecting consumers from the development of monopolies within the industry. Rate regulation guarantees that shippers will benefit from the minimum level of rates required to adequately compensate carriers. At the same time, rate controls prevent discriminatory pricing and rate wars, which ultimately lead to erosion of the quality of service, deterioration of equipment maintenance and safety standards, and, eventually, to carrier bankruptcy.

Even before the turn of the century, Congress had determined that economic regulation of commerce was necessary if the national transportation system was to serve the needs of the general public. The Congressional decision to place the national transportation industry under federal regulation came about as a result of market imperfections impeding the flow of rail traffic. The shippers, not the carriers, brought these imperfections to the attention of Congress.

In 1887, the Act to Regulate Commerce was passed by Congress. The Act created the nation's first independent regulatory agency and brought the railroads under federal control. Since that beginning, the name of the Act to Regulate Commerce was changed to the Interstate Commerce Act, the Interstate Commerce Commission was formed, and additional legislation was adopted which would eventually bring other modes of transportation under the control of the Commission.

The motor carrier industry grew from about 700 registered trucks in 1904 to approximately 525,000 at the close of World War I.[1] As the infant industry grew, it began to compete with the railroads for business. It was plagued with many of the same market imperfections that had characterized the rail industry. Competition was fierce, rates were discriminatory and below compensatory levels, service was inadequate, and carriers regularly went out of business as a result of their distressed financial condition. Recognizing that motor carriage must be regulated in order to meet the public need, the District of Columbia enacted the first law governing motor carrier operations in 1913. In the next few years, their lead was followed by Pennsylvania, Colorado, Wisconsin, and New York. By 1935, when interstate motor carriage came under the jurisdiction of the Interstate Commerce Commission, almost every state in the nation had enacted legislation to regulate its intrastate motor carrier industry.

Economic regulation served the following purposes: 1) to prevent the extraction of unreasonable profits when monopoly power exists; 2) to subsidize certain traffic or modes of transportation found to be in the public interest; 3) to prevent favoritism of shippers based on bargaining power; and 4) to maintain stable and healthy expansion of transport facilities free from the ravages of rate wars.

The national transportation system, under the auspices of federal and state regulation, generally served the nation well. But the regulatory system had flaws. Regulation did not provide the industry with the incentives it needed to be innovative. It encouraged pricing and service complacency and protected inefficiencies.

Just as market imperfections were the driving force behind regulatory efforts during the early part of the century, regulatory failure provided the

1. A. OVENS, TRANSPORTATION AND TRAFFIC MANAGEMENT 5 (1981).

momentum for a deregulatory wave that engulfed the political scene in the late 1970's and early 1980's. Professor Paul Stephen Dempsey, in his book *The Social and Economic Consequences of Deregulation: A Decade Late, and The Band Played On*, commented on that period in regulatory history:

> Various forms of de jure and de facto interstate deregulation resulted both from legislation passed by Congress in the mid-1970's and early-1980's, and from the appointment by Presidents Carter and Reagan of individuals fervently dedicated to deregulation of the federal regulatory commissions. The federal statutes partially deregulating various aspects of the transportation industry include the following:
>
> The Railroad Revitalization and Regulatory Reform Act of 1976,
> The Air Cargo Act of 1977,
> The Airline Deregulation Act of 1978,
> The International Air Transportation Competition Act of 1979,
> The Motor Carrier Act of 1980,
> The Staggers Rail Act of 1980,
> The Household Goods Transportation Act of 1980,
> The Bus Regulatory Reform Act of 1982,
> The Shipping Act of 1984,
> The Civil Aeronautics Board Sunset Act of 1984, and
> The Freight Forwarder Deregulation Act of 1986.
>
> The high water mark of deregulation as a blossoming political movement seems to be behind us, having peaked late in the Carter and early in the Reagan Administrations. As the American people have had more experience with the grand experiment in deregulation, they have become less enamored by it. Congress has not passed a major deregulation act in recent years, and is now considering various reregulation proposals for those modes which have experienced the most comprehensive deregulation—airlines and railroads. And while a few states jumped on the bandwagon and adopted intrastate trucking deregulation in the early 1980's, that momentum seems to have died, too, for no state has opted for intrastate deregulation since 1984. Today, the overwhelming majority of states continue to regulate intrastate motor carriage.[2]

Dempsey correctly observes that the American public is becoming more and more disenchanted with deregulation. According to trends observed by the Consumer Federation of American, public support has shifted away from deregulation, and back toward regulation. The Federation published a report, entitled *Public Opinion About Regulation and Deregulation in the Transportation and Communication Industries*, which concluded:

> A plurality, and perhaps even a majority, now support tighter regulation. In none of the industries where there has been substantial deregulation does a majority of respondents believe that deregulation has been in the best inter-

2. P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION: A DECADE LATER AND THE BAND PLAYED ON, 2 (1988).

ests of individuals and the nation. Pluralities also believe that deregulation has hurt consumers.[3]

Even some of the few states that chose to follow the federal lead, deregulating their intrastate motor carrier industries, have found deregulation unsatisfactory.

California, the nation's most populous state, partially deregulated in 1980. In 1984 it began a two-year study to examine the impact on its intrastate trucking market. The study concluded that the effects of deregulation had been devastating to the industry and had impaired intrastate commerce. As a result, the California Commission readopted rate regulation.

West Virginia also returned to traditional rate regulation in 1987, after a six-year experiment with deregulation.

Wisconsin is still deregulated, but according to Joe Sweda, an early deregulation proponent and the current Wisconsin Transportation Commissioner, his office has received numerous complaints of discriminatory rates, poor service to rural areas, escalating loss and damage claims, and safety hazards created by irresponsible motor carrier operations.[4]

The Oregon legislature, in conjunction with the Oregon Public Utility Commission, investigated the relative merits of the regulation vs. deregulation issue in 1980. According to Robert Hollis, a well-known transportation attorney who participated in the 1980 investigative hearings, Oregon's regulatory policy at that time was one "utiliz[ing] a balanced program of regulation and competition, providing for Commission controlled but not exclusive entry, Commission controlled but carrier initiated rates, and substantial but not pervasive Commission involvement in safety operations and conditions of service."[5]

Both the Commission and the legislature found the existing regulatory system yielded results consistent with legislative goals and the public policy. Neither those legislative goals nor the regulatory policy have changed since that determination and the public interest continues to be served in the regulated Oregon environment.

Hollis observes, "The legislature, in my experience, is . . . highly pragmatic in shaping regulatory legislation, framing its goals in societal rather than academic terms. The legislative process, with its tempering

3. CONSUMER FEDERATION OF AMERICA, PUBLIC OPINION ABOUT REGULATION AND DEREGULATION IN THE TRANSPORTATION AND COMMUNICATION INDUSTRIES 10 (1988).

4. Letter from Joseph Sweda to Rep. James Moody (Oct. 15, 1985) (reprinted in Your Letter of the Law 33 (Mar. 1986) and made part of the Oversight Hearings on the Motor Carrier Act of 1980 (Subcommittee of the Public Works and Transportation Committee of the U.S. House of Representatives (Nov. 5, 1985)).

5. R. Hollis, Comments Submitted to the Oregon Public Utility Commission on behalf of the Oregon Trucking Association, Inc. 5 (Sept. 16, 1988) (File MRS 1000).

and balancing of the interests of numerous constituencies, almost never yields statutes reflecting pure theory, economic or otherwise. The Commission's long-standing regulatory mandate . . . is a pragmatic charge to secure good quality utility services for consumers at fair, just and reasonable rates."[6]

Certainly there can be no disagreement between regulators and legislators, who share the pragmatic view, and the deregulatory theorists as to the fact that transportation is an infrastructure industry and the public need must be met. The difference in viewpoints is purely philosophical.

Deregulators believe the free market will provide a higher degree of allocative efficiency than what they perceive as "protectionist" regulation. The theoretical "improvement" in efficiency, they contend, will automatically protect the public interest. Oregon regulators and legislators, on the other hand, recognize the marketplace has many imperfections. They believe regulation is necessary if the motor carrier industry is to achieve the economic goals of allocative efficiency coupled with the societal goals of indiscriminate rates, adequate service, and public safety.

Deregulation has had difficulty delivering the benefits it promises. However, the relentless pursuit of this ideology by free market theorists continues to bring regulation under severe criticism. Regulators today must not only fulfill their statutory obligation to ensure the public receives the benefits of market competition without the adverse impact that unregulated competition brings; they must do so while defending their actions to those theorists who, in the main, have little if any practical understanding of either the motor carrier industry or the benefits of regulation in general.

II. OREGON'S REGULATORY CHALLENGE

Even in Oregon today, the Public Utility Commission (PUC) must continually study regulatory policy to deliver the innovative changes necessary for regulation to remain in step with the state's changing economy. Only by continued scrutiny of regulatory policy, in the changing economic environment, can the state be assured it will not suffer from the same regulatory ills that led to federal deregulation.

Assistant Commissioner David Astle, of the PUC's Transportation Program, testified as to future goals before an Oregon Joint Interim Committee on Transportation in January, 1988:

> PUC has given high priority to a project currently underway involving a thorough review and analysis of policies it follows in regulating intrastate for-hire motor carrier transportation of both freight and passengers. The goal of the project is to develop and communicate to the industry and the general public

6. *Id.* at 3.

the policies which the Commission intends to follow in regulating Oregon's motor carrier industry and to identify the criteria which it will consider most important in reaching decisions on specific types of cases. . . .

Industry representatives have strongly emphasized their desire for a clearer statement and consistent application of the Commission's policies and criteria employed in reaching decisions affecting economic regulation of motor carriers. Many carriers view consistent application of regulatory policy as a necessary ingredient in guiding their decisions on whether or not to invest in physical plant and rolling equipment to provide for future business growth. Members of the public and shippers have also expressed concern about some aspects of economic regulation, especially where they perceive it as limiting Oregon shippers' and producers' ability to compete with shippers and producers in other states.

Accordingly, the Commission believes this is an appropriate time to review its administration of Oregon's motor carrier regulatory system to see if it is consistent with legislative intent . . . and with the public interest. Active participation by regulated carriers, shippers, and other interested parties is being solicited. After a review and discussion process, eventually involving some public hearings, policy proposals will be forwarded to the Commission for final review and adoption.[7]

The Transportation Program's "Economic Regulation Policy Development Project" is an analysis of a total of 19 different aspects of economic regulation in Oregon. The policy review is expected to be completed late in 1989. A list of issues being reviewed by the Commission in the "Project" includes:

General Issues

—Restrictions on common control of common carrier and contract carrier authority—policy regarding dual operations.

—Restriction on common control of a motor carrier and a broker.

—Policy regarding issuance of common carrier authority from the facilities of a named shipper.

—Distinctions between regular and irregular route authority.

Entry

—The criteria or minimum showing necessary for the Commission to grant certificated authority to transport (a) general commodities, (b) sand and gravel, and (c) logs, poles, and piling; focusing on the statutory requirement that applicants, in the event of protest and hearing, show that the service "is or will be required by the public convenience and necessity."

—The standards for determining "true need" in applications for temporary authority to operate. Also the standards for approving temporary operations pending the transfer of existing authority.

—Dormancy of authority and its impact on a transfer proceeding.

—The standards for staff intervention and withdrawal in applications for operating authority.

7. *Hearings Before the Oregon Joint Interim Committee on Transportation*, 1 (Jan. 22, 1988) (statement of David Astle, Asst. Commissioner, Oregon Public Utility Commission Transportation Program).

Rates
—Criteria for approving rate proposals prior to a hearing.
—Implementation of a monthly rate docket in lieu of the present bimonthly docket.
—Policy regarding the approval of special backhaul rates.
Enforcement
—Priority of operating authority investigations and rate audits.
—Penalty assessment and methodology used to compute number of violations.
—Complaint settlement procedures.
—Necessary standards of proof in action for aiding and abetting a carrier's illegal intrastate operations.

Oregon, through its Legislative Assembly and PUC, has taken steps to ensure that motor carrier economic regulation does not promote inefficient trucking operations or provide unreasonably high profits to Oregon's regulated trucking companies. Through laws and policies which encourage individual initiative in setting rates at the lowest reasonable level, by assuring that small communities receive a reasonable level of essential service, and by protecting motor carrier customers from the widespread rate discrimination now practiced at the interstate level, motor carrier regulation in Oregon is serving a useful public purpose in a cost-effective manner.

III. Interstate Deregulation—The Real Impact

The social and economic benefits provided by the motor carrier industry under rate and entry regulation have generally been taken for granted in our society, just as the benefits of regulation were taken for granted prior to deregulation of the airline, railroad, banking, and telecommunications industries. In fact, the problems attributable to deregulation are recognized only after industry stability disappears. Similarly, many problems directly attributable to partial deregulation of the motor carrier industry are only now being recognized.

These problems include rate wars and transportation rates below cost. Tariffs and rate structures have become more complex, and discriminatory rates are commonplace as a result of discounting. Large shippers in major traffic lanes benefit from lower rates and higher levels of service, but they do so at the expense of smaller shippers and those marooned in more remote areas.

The motor carrier industry has suffered the worst economic losses in its history. Instability in the industry has increased while productivity and efficiency have declined. Not surprisingly, there has been a significant increase in the number of carrier bankruptcies.

Deregulation of the motor carrier industry at the federal level has

caused the less-than-truckload (LTL) sector to become an oligopoly, and in some markets, a monopoly.

In the truckload sector of the industry, relaxed entry standards have resulted in overcapacity. The number of empty miles operated has increased while load factors decreased. Theorists said deregulation would eliminate the problem of empty backhauls. Instead, rates on truckload traffic have dropped to levels so low that they are not compensatory. Operating ratios have gone up and established companies are going out of business. Survivors have difficulty borrowing money for fleet replacement because of low earnings. As a result, the average age of the motor carrier fleet increases and maintenance is deferred. Pressure is placed on employees to take wage cuts in order to keep their jobs, which decreases the amount those consumers can spend in their communities. Lower pay rates frequently result in less-experienced employees replacing people who refuse to take pay cuts. The combination of poorly-maintained equipment and inexperienced drivers results in increased truck accidents.

A. Deregulation in Oregon—"What If"

How would deregulation affect Oregon? Based on the interstate experience, Oregon might expect to see a negative impact on motor carrier service, freight rates, and highway safety.

At the present time there are about 34,000 active motor carrier accounts in Oregon, according to weight-mile tax rolls. Those carriers operate approximately 220,000 power units. In a deregulated Oregon environment, it is very likely that both the number of vehicles and the number of carriers would grow. The number of carriers in the nation increased by about 16,000 as a result of federal deregulation. Most of the new entrants were truckload operators, and about 80% of them operated only one truck.

With entry made easier, new entrants would begin competing for existing traffic. The ensuing destructive competition would probably result in the increased exiting of carriers, particularly smaller operations. Eventually, one might predict there would even be fewer large carriers, but those remaining would haul a greater proportion of the intrastate traffic.

Based on the interstate experience, it is likely that some freight rates would decrease and some would increase. Similarly, the level of motor carrier service might increase for some and not for others. Decreases in rates and increases in levels of service might occur on the most profitable traffic in the most attractive traffic lanes, particularly Interstates 5 and 84. Increases in rates and decreases in levels of service would probably occur on the less profitable traffic in the less attractive traffic lanes, particu-

larly the coastal region and eastern Oregon. Fluctuations in rates and service would most predictably apply to LTL shipments to and from any small community generating a low volume of traffic.

Based on the interstate experience, individual ratemaking and discounting would limit shipper knowledge of the rates being offered by most carriers and rates being paid by competing shippers. Most small carriers do not have adequate staff to provide cost analysis permitting ratemaking on an informed basis. Large shippers would be able to coerce carriers into making rate and service concessions, which would promote discrimination. The cost of joint movements would probably increase substantially. Interlining would be hampered due to the necessity for each participating carrier to make separate rate agreements with every other participating carrier, in the absence of antitrust protection. One might expect loss and damage claims to increase, too.

An influx of new carriers, especially an increase in the number of owner-operators, would dictate an increase in the size of the state's safety enforcement staff. Studies mentioned later in this report discovered that the new entrants, following interstate deregulation, were ones with the highest accident propensity. It is reasonable to assume the same safety questions would follow new entrants in a deregulated Oregon.

Aside from the jeopardy to highway safety, and the additional expense for safety enforcement, Oregonians might also be forced to suffer substantial "out-of-pocket" costs in the form of lost highway-use tax revenues. In 1987, Oregon collected more than $128 million in weight-mile taxes. More than $117 million of that went to the Highway Fund to finance and maintain Oregon highways.

The present regulated environment makes it somewhat easier to collect, and raise, highway-use taxes. The threat of operating authority suspension poses an effective deterrent to all entry-regulated carriers who would delay payment of highway-use taxes. Additionally, carriers subject to rate regulation can expect to eventually recover tax increases through general rate increases. Based on the interstate experience, a deregulated Oregon might expect the increase in carriers, especially an increase in owner-operators, would result in a significant increase in carrier bankruptcies and more highway-use tax defaults.

IV. Arguments Against Deregulation

A. The Drift Toward Monopoly

The motor carrier industry can generally be separated into two parts based on service: one part providing less-than-truckload (LTL) service and another part handling truckload traffic. LTL operations handle a large number of small shipments, require heavy capital investment for a termi-

nal network and operating equipment, and employ a large labor force. Truckload operations, by way of contrast, generally handle only volume traffic in truckload quantities, require a minimal investment in equipment, and find labor to be a very small part of their operating cost. Truckload operators frequently specialize in the transportation service they provide by hauling only certain types of freight, such as heavy equipment, automobiles, etc. Deregulation has created unique problems for both the LTL and truckload sectors of the industry. Those problems, however, have a common thread in that they all negatively impact the public interest. Rates, service, and safety all have suffered.

Deregulation has caused the less-than-truckload segment of the motor carrier industry to become a national oligopoly, and in some markets, a monopoly. In the LTL market, there have been no successful new entrants. Fortune 500 megacarriers who now control that market have a larger market share than at any time in history.

In *Effects of Deregulation on Motor Carriers*, Nicholas Glaskowsky commented on the growing trend toward concentration in the LTL sector of the deregulated motor carrier industry:

> . . . large-scale LTL operation is a very complex business requiring substantial capital investment, involving a large amount of fixed overhead cost and, consequently, having significant economies of scale.
>
> One industry outcome since deregulation is that thus far there have been no successful entrants into the large scale interstate LTL segment of the industry. The only notable attempt was made by Leaseway, and it failed. It is clear that the barriers to entry into the LTL sector are very high, primarily due to the need for a large and expensive network of terminals.[8]

Glaskowsky went on to quantify the trend at the national level:

> . . . in 1978 the largest four interstate LTL carriers had a fifth of the market for such freight, the ten largest had 39 percent, and the top twenty had 43 percent. . . .
>
> By early 1985 the amount of interstate LTL traffic carried by the four largest carriers had risen to 35 percent (a 75 percent increase over their previous 20 percent), the ten largest carriers had 60 percent (a 70 percent increase since 1978), and the twenty largest had 67 percent of the market (a 56 percent increase).[9]

"The rate growth of the interstate LTL traffic concentration since deregulation," Glaskowsky concluded, "is without parallel in American business history. It is unquestionably a direct result of motor carrier deregulation, and the increasing concentration of LTL traffic in the hands of a shrinking number of carriers is continuing."[10]

---

8. N. GLASKOWSKY, EFFECTS OF DEREGULATION ON MOTOR CARRIERS, 6 (1986) (report of the Eno Foundation for Transportation, Inc.).
9. *Id.* at 25.
10. *Id.* at 26.

B. DESTRUCTIVE COMPETITION

According to the Alfred Kahn school of marginal economics, the motor carrier industry functions well in a free market because it does not suffer from destructive competition.[11] Destructive competition, according to that school of thought, is a concern only in industries with a high level of fixed costs and immobile plant; and trucking has exactly the opposite characteristics.

Garland Chow disagrees. The Assistant Professor of Transportation and Logistics at the University of British Columbia co-authored an article in 1985 entitled *Motor Carrier Bankruptcy in an Uncertain Environment*. Chow and University of Portland Professor of Finance Richard Gritta observed that following the Motor Carrier Act of 1980 "reduced profitability was due in large part to sustained price competition reflected in discounting and lower rates. There is little doubt that this would have been minimized if the ICC had maintained strict control of rate competition and entry into the industry as in previous years. If deregulation means increased competition, the natural result is increased turnover via bankruptcy of competitors. *Competition is, by its very nature, destructive.*"[12]

In describing that competition in a 1987 report, *Highway Safety—A Cost of Motor Carrier Deregulation*, Dabney Waring quotes a New York State Automobile Association study:

> The federal government's deregulation of the trucking industry, intended to decrease red tape and governmental interference, has created a free-wheeling marketplace where safety takes a back seat.
>
> Before deregulation began in 1980, major trucking firms exercised substantial control over interstate rates and routes. Since that time, savage price wars have forced many major firms out of business. In their place, some 12,000 new firms have sprung up, many of them independent, single-vehicle, owner-operators. These firms are in fierce competition for a volume of freight that has dropped almost 45%, a decrease that adds to the underbidding and discontinuing and declining profit margins for truckers.[13]

Waring warned that while some new carriers may "weather the storm," others will face two alternatives: exit or cut corners:

> Exiting is not as simple as might first appear. It was stated that economic barriers are low; this is not because tractor-trailer units are cheap, but because they can be obtained for relatively low down payments. Substantial monthly payments against the lien continue. In the ongoing condition of excess capacity, there is not a ready market for used equipment. Foreclosure means loss of original investment and a damaged credit rating. The ten-

11. Prof. Alfred Kahn, former Chairman of the Civil Aeronautics Board, is considered to be the "father of airline deregulation."

12. Chow and Gritta, *Motor Carrier Bankruptcy in an Uncertain Environment*, 14 TRANSP. L.J. 50 (1985) (emphasis added).

13. NEW YORK STATE AUTOMOBILE ASSN., TRUCK SAFETY SHORTCOMINGS 2 (Feb. 1986).

> dency then is to hang on as long as possible. Most of the new TL entrants don't know how to manage their need for future cash and wind up running until they break down completely—then they get out because they don't have replacement cash.[14]

In a 1987 report, *The Economic Effect of Trucking Deregulation*, Michael Evans reported productivity in the motor carrier industry went from an average increase of 1.5% per year for the 1960-1980 period to a decline of 0.7% per year for the 1980-1985 period. Productivity in 1985 was actually lower than in the recession year of 1980.[15]

Evans determined that the ratio of total investments in all trucks, to total investment for all other producers of durable equipment, declined from an average of 11.5% during the 1970's to 8.3% for the 1980-1985 period. He found the average age of trucks, which had declined from 7.3 years in 1970 to 6.9 years in 1979, had increased every year since deregulation to an average of 8.2 years by 1984.[16] Since 1979, the proportion of trucks 12 years and older had increased 33% and the proportion of trucks retired had diminished 32%. Evans concluded that "the capital stock of the trucking industry has deteriorated sharply since the onset of deregulation."[17]

In testimony before the California Utilities and Commerce Committee in 1986, the California Trucking Association (CTA) presented evidence of that state's experience with deregulation. The Association reported that since deregulation the number of firms operating at a loss had increased by 59%. It noted that this was in spite of the fact that the industry had changed its cost structure to spend "much less on employee wages and benefits."[18]

In a 1988 survey of California shippers and receivers, Friends University Professor William Brooks found 60% of small shippers and 69% of large shippers pointed to deregulation as a "significant factor" in creating "instability" in the motor freight industry. Brooks found the instability had caused nearly one of every four large shippers to suffer financial loss as a result of motor carriers ceasing operations or taking bankruptcy. Up to 40% of small shippers also reported economic loss.[19]

---

14. D. WARING, JR., HIGHWAY SAFETY: A COST OF MOTOR CARRIER DEREGULATION 3 (1987) (report for The Coalition for Sound General Freight Trucking).

15. M. EVANS, THE ECONOMIC EFFECT OF TRUCKING REGULATION 3 (1987) (report for The Coalition for Sound General Trucking).

16. *Id.* at 5.

17. *Id.* at 6.

18. *Correlation Between Regulation and Public Safety: Hearings Before the California Assembly Utilities and Commerce Committee*, 1 (Oct. 8, 1986) (statement of the California Trucking Association).

19. *A Survey of California Shippers' and Receivers' Attitudes Toward Trucking Regulation: Hearings Before the California Public Utilities Commission*, 1 (Oct. 27, 1988) (statement of William Brooks).

Robert Wittenberg, Director of Marketing and Commerce for Gross Common Carrier, Inc. of Wisconsin Rapids, Wisconsin, outlined certain effects of deregulation in a presentation before the National Conference of State Transportation Specialists in June 1986:

> Gross Common Carrier finds itself in a situation many times where it can no longer attract traffic between major markets in the state of Wisconsin unless it prices its rate proposal either below cost or at a cost with no allowance for profit. . .[20]
>
> The large shippers are demanding transportation rates that are below the carriers' costs. Large multi-page invitations to bid are distributed by shippers that spell out conditions under which to bid or (under which they) will accept bids. Many carriers are so desperate for the business that they bid each other to death . . . many of these bids are far below the operating costs of the carrier successful in securing the business. Consequently, these carriers have no choice but to make up the difference on small shippers. This is also fueled by carriers operating in a weak financial condition, the weaker the carrier financially, the more important it may become just to generate revenue to meet payroll and debt. These companies fall as easy prey for shippers to place heavy demands upon. The stronger carriers must either meet these price demands to be competitive, cut back operationally, or run empty room on equipment reducing efficiency.[21]

1. *PREDATORY PRICING*

In his book, *The Social and Economic Consequences of Deregulation: A Decade Later, and The Bank Played On*, Paul Stephen Dempsey observed that the smaller, regional, interstate LTL carriers have suffered from predatory pricing as the large national LTL carriers move into regional markets. Dempsey reported, ". . . large carriers, it is alleged, use the profits they earn on less competitive long-haul routes to sustain the deep (and sometimes below cost) discounts offered in short-haul markets. As a consequence, there has been a high failure rate among small and medium size motor carriers."[22]

The high failure rate cited by Dempsey appears to hold true in the Oregon experience. In September 1988, John Mathews of O.K. Delivery System, Inc., submitted a statement to the Oregon Public Utility Commission in which he listed 48 regional carriers that had either failed, liquidated, or been acquired by other carriers in mergers since January 1984. He noted that no less than three dozen of the carriers were family-owned Oregon-based carriers.[23]

---

20. R. WITTENBERG, THE REAL WORLD, HOW DEREGULATION HAS CHANGED THE TRANSPORTATION INDUSTRY AND GROSS COMMON CARRIER, INC., 8 (1986).

21. *Id.* at 15.

22. P. DEMPSEY, *supra* note 2, at 27.

23. J. Mathews, Comments Submitted to the Oregon Public Utility Commission 5 (Sept. 29, 1988) (File MRS 1000).

It is abundantly clear that industry dominance by a few large carriers has occurred at the national level in the LTL sector of the industry since deregulation. Discriminatory monopolistic pricing practices have resulted, along with curtailed service levels to areas outside the major traffic lanes. The national carriers continue to engage in predatory pricing as they further increase their market share, while regional LTL carriers battle their way to extinction. According to Dempsey, "The concentration unleashed by deregulation is an anathema to the public's interest in the benefits of a healthy competitive environment."[24]

While deregulation has been the driving force behind concentration in the LTL portion of the industry, it has also created a glut of carriers in the for-hire truckload sector. This market is typically characterized by a large number of relatively small carriers, usually operating only a few trucks each. Shippers requiring the services of this segment of the industry are generally quite large in comparison to the size of the carriers they use. The result is an imbalance of market power between carrier and shippers, with shippers asserting most of the power. The larger the shipper, and the smaller the carrier, the more pronounced the imbalance. As might be logically expected, it is the shippers who dictate rate levels in the truckload market, and those rates are traditionally very low. In many instances, they are even below marginal costs of operation as the smaller carriers scramble to haul anything that will generate a little cash flow.

In *Effects of Deregulation on Motor Carriers*, Nicholas Glaskowsky said:

> The picture in regard to truckload traffic is almost exactly opposite what has happened in the LTL sector of the industry. Due to the difference in operating cost structure between truckload and LTL movements, deregulation has spawned about 12,000 new truckload "carriers." Many of these are very small operations—just one, two, or a few trucks—and there seems to be no end to them. . . . It is not likely . . . that there will be any diminution of competition for truckload traffic despite the low profit margins being realized by most truckload operators.[25]
>
> The entry of so many new and small (with low overhead) truckload operators has created so much excess capacity and made truckload rates so competitive that many of these new operators must inevitably settle for uneconomic returns, quit, or go broke.[26]

2. *Private Carriers*

Prior to deregulation, private carriers could engage in transportation only when it was incidental to a primary business purpose other than

24. P. DEMPSEY, *supra* note 2, at 114.
25. N. GLASKOWSKY, *supra* note 8, at 27.
26. *Id.* at 8.

transportation. Since deregulation, private carriers have contributed to overcapacity in the truckload sector by more often operating as "for-hire" carriers in return trip or "backhaul" traffic. Advocates of deregulation predicted that relaxed entry standards would allow these private carriers to compete with established common and contract carriers to obtain backhaul traffic, resulting in greater "allocative efficiency" in the form of fewer empty miles and lower rates. There are elements of truth in the prediction, but they failed to tell the whole story.

Relaxed entry standards diverted traffic from established for-hire carriers because the private carriers often priced their backhaul service at or below marginal cost. After all, the truck had already delivered the private carrier's goods and had to return home. It presented an opportunity to offer extremely low rates because any contribution the return trip traffic could make to the operating cost would be pure gravy. The private carrier could offer any level of rates that would pay more than the pickup and delivery cost of the backhaul freight.

Deregulation, then, allowed *private* carriers to reduce the number of empty backhaul miles that they operate by *diverting* traffic from established for-hire carriers. The "allocative efficiency" merely diverted traffic, it did not reduce the overall number of empty miles. In so doing, the private carriers force rates to levels so low that they are often not compensatory. Rate cutting, although benefiting some shippers and some private carriers, has had a detrimental effect on the financial integrity of the industry.

Generally speaking, those competing in the truckload sector lack the sophistication of their LTL counterparts in identifying costs. This, coupled with unlimited entry into the industry (competition) and the relative monopsony power enjoyed by their shipper customers, exerts an ongoing downward pressure on rates. The result is a very high degree of turnover in that segment of the industry, more often than not resulting in the bankruptcy of the carrier. This waste of resources could be minimized if the industry were controlled by effective rate and entry regulation.

3. *Business Failure Rates*

Destructive competition brought about by concentration in the LTL sector, coupled with intense rate competition created by overcapacity in the truckload sector, has resulted in the highest rate of motor carrier business failure in the nation's history. In a publication entitled *Gearing Up For Safety*, the Office of Technology Assessment (OTA) of the U.S. Congress reported the following:

> Profit margins have fallen even for the most successful carriers, a product of intense price competition caused partly by changes in manufacturing and partly by continuing overcapacity. Carriers' expenses per ton-mile are up

> 75% since 1978, while revenues have increased only 54%. General freight revenues per ton-mile have increased slightly more than the consumer price index since 1978, but have not matched price increases in the general economy, particularly for large shippers and those in highly competitive city-pair traffic lanes.[27]

Profit margins have indeed declined, and they remain substantially below those of the manufacturing industries. Early in 1988, analysts were estimating 1987 carrier bankruptcies had increased more than eightfold over 1978 levels.[28] The following chart tracking motor carrier failure rates through 1986 illustrates how the numbers have steadily increased after de facto deregulation began in 1978:

Failure Rate—All For-Hire Trucking Companies

Year	Number of Carriers	Number of Carrier Failures	Failure Rate per 10,000 Carriers
1978	67,030	162	24.2
1979	68,451	186	27.2
1980	72,146	382	52.9
1981	75,167	610	81.2
1982	79,115	960	121.3
1983	83,262	1,228	147.5
1984	78,078	1,411	180.7
1985	80,308	1,541	191.1
1986	85,024	1,561	183.6

As important as the statistics themselves are the observations that accompany the report. In tracking the failure rate through 1985, Dun & Bradstreet observed:

> Our information indicates that trucking industry failures occur throughout the entire industry, from smaller to larger firms and among all types of carriers. It is important to note that almost two-thirds of the failures occurred during 1983-1985, in an expanding economy. . . .
>
> The rise in the failure rate coincided with deregulation of the trucking industry.[29]

Glaskowsky concurs: "Clearly, a large number of carriers have exited the industry—many of them bankrupt—as a result of the effects, direct or indirect, of deregulation."[30]

Ron Roth, Director of Statistical Analysis of the American Trucking Association, compiled statistics on motor carrier bankruptcies and made

27. OFFICE OF TECHNOLOGY ASSESSMENT, GEARING UP FOR SAFETY: MOTOR CARRIER SAFETY IN A COMPETITIVE ENVIRONMENT, 26 (Sept. 1988).

28. D. Waring, Jr., statement before the California Public Utilities Commission, 4 (Mar. 10-11, 1988).

29. N. GLASKOWSKY, *supra* note 8, at 8 (citing Dun & Bradstreet).

30. *Id.* at 8.

a comparison of motor carrier profit margins to the profit margins of all manufacturers. His findings are presented in the following table (profit margins are in terms of after tax earnings as a percentage of gross revenues):

Bankruptcies and Profit Margins for Interstate Motor Carriers
Vis-a-Vis Profit Margins for All Manufacturers since 1978

Year	Motor Carrier Bankruptcies	Motor Carrier Profit Margins	All Manufacturers
1978	162	2.92	5.4
1979	186	1.97	5.7
1980	382	1.73	4.8
1981	610	1.58	4.7
1982	960	0.77	3.5
1983	1,228	2.37	4.1
1984	1,416	2.24	4.6
1985	1,543	1.74	3.9
1986	1,564	2.64	3.8
1987	1,351	1.57	4.9

Source: Ron Roth, Director of Statistical Analysis, American Trucking Associations, Jan. 1988.

Dempsey attributes the increase in carrier bankruptcies and the decline in carrier profit margins, as compared to all manufacturers, to deregulation. He makes the following observations:

> Note that carrier failures have exceeded 1,000 each year since 1983. This is all the more remarkable in light of the fact that by 1984, the national economic recession had abated, and in 1986, fuel prices had declined significantly . . . these waves of carrier bankruptcies have created service and pricing instability, and a deteriorating margin of safety.
>
> Note also that the profit margins of all manufacturers have been consistently superior to those of interstate motor carriers since deregulation began. Although profit margins for all manufacturers fell during the recession of the early 1980s, the drop was not nearly as drastic as that experienced by the deregulated motor carriers. Today, the profit margin of interstate motor carriers is among the lowest of all American industries.[31]

The financial erosion of the deregulated industry has touched many regional interstate carriers who also serve Oregon on an intrastate basis. One such carrier, based in Portland, had a delinquent highway-use tax account with the Oregon PUC. In a September 1988 letter, the company's president explained the circumstances leading to the delinquency:

> Unfortunately we are a product of the effects of deregulation, and have been unable due to capital restraints and contract obligations negotiated before deregulation to financially adjust. With the entry of less than quality

31. P. DEMPSEY, *supra* note 2 and 17 (citing *Truckers in Trouble*, INSIGHT, Nov. 3, 1986, at 45).

> operators into our industry, freight rates have dropped to levels that legitimate trucking companies that *"do it right"* cannot survive. Proof of this fact is that there are no full truckload, flatbed companies left that were the strong operators during the 60's and 70's, such as Mitchell Bros., West Coast Truckline, Mellow, etc.
>
> The net effect is we voluntarily shut our operation down effective March 31, 1988. This is the reason why our February and March reports were not filed on a timely basis. In an attempt to weather out the effects of deregulation we depleted our assets to absorb our losses; subsequently when we closed our doors we had a $300,000 negative net worth and were in arrears to the IRS for withholding taxes in excess of $56,000 and to the State of Oregon for $24,000.[32]

In spite of business failures, lost jobs, depleted capital investment and bankruptcies, many economic theorists insist that deregulation has not resulted in predatory pricing, overcompetition in the truckload sector, or destructive competition. They say this is all part of the "shaking out" process; these failures are to be expected and are even desirable because the nation is enroute to a higher level of economic efficiency. It might be difficult for the company president just quoted to get real excited about the lofty goals of economic theory, since the application of that theory at the federal level has just forced him to close his company's doors. It is very difficult, indeed, for most people to rationalize that Oregon business closures and the loss of Oregon jobs does much to enhance the state's economic growth.

C. *Deregulation and Discrimination in Rates*

Because of the diverse operating characteristics and capital requirements of the truckload and LTL segments of the motor carrier industry, the impact of deregulation on rates should be considered separately for each segment.

Since deregulation, rates in the for-hire truckload sector have dropped. Whether the decrease in the level of interstate truckload rates has been in the public interest, or whether it is just another illusion of deregulatory success, depends on the point of view. Private carriers and large shippers certainly realize that deregulation has served their interests because they are the ones reaping the benefits. Equally certain is the fact that the best interests of other groups have not been served, such as the owner-operators that have gone broke, the small shippers that pay higher rates, the former Teamster members whose wages have been cut to near-subsistence levels, and those who have lost their jobs. Whether good or bad, the undeniable fact is that large shippers now have the eco-

32. Letter from Oregon motor carrier to the Public Utility Commission of Oregon, Motor Audit Division (Sept. 28, 1988).

nomic leverage to exercise substantial control over interstate truckload rates, and those rates have decreased since deregulation.

Just as in the truckload sector, deregulation has allowed the large players in the LTL market to make whatever pricing arrangements that they choose and both the carriers and the shippers in that market have very predictably pursued rates that are in their individual best interests.

As the megacarriers continue to struggle for market share in the LTL market, they offer very attractive and very selective concessions on inflated rates to the large shippers in the form of discounts. The shippers respond by playing one carrier against another, benefiting at least in the short run from the discriminatory pricing game played by the carriers. We have observed, however, that the LTL portion of the industry is going through an intense period of concentration, presently exhibiting the characteristics of an oligopoly. It is not unreasonable to suppose that rates will increase as shippers find themselves served by fewer and fewer LTL carriers.

The small shipper unable to provide the carrier with a large volume of traffic lacks the bargaining power to negotiate the level of discounts available to its larger shipper counterpart and winds up playing the inflated published rate. The result, of course, is price discrimination. Because discount agreements aren't generally disclosed, the smaller shipper may often be unaware of the actual rate level at which freight is moving.

In the deregulated for-hire truckload and LTL markets, rate discrimination runs rampant as rate levels are determined by the relative levels of power that shippers and carriers exert in negotiations. In markets where the carrier has the most power, such as in remote areas off the major transportation corridors, rate levels will be quite high. In markets where there is intense competition, or where the shipper contingent exerts the majority of market power, rate levels will be very low with special "deals" cut for the most powerful shippers.

1. Deceptive Rates

Robert Wittenberg, Director of Marketing and Commerce for Gross Common Carrier, Inc. of Wisconsin Rapids, Wisconsin, outlined certain effects of deregulation in a presentation before the National Conference of State Transportation Specialists in June 1986. Wittenberg noted three scenarios in which shippers were demanding unusual practices of carriers, including discriminating and deceptive rate discounting: First, the shipper will request that the carrier increase class rates by 25%, and show these rates on the freight bill. The shipments move on a collect basis, then the carrier is required to refund the excess to the shipper. The

motor carrier is required by the shipper to deliberately misrepresent actual freight charges paid.

Second, the shipper bills the customer for the cost of the goods plus freight charges. The carrier is asked to cut a separate bill showing a low discount rate for presentation to the customer, and another with a higher discount for actual billing to the shipper.

Third, shipments move on a collect basis to small customers primarily in rural areas, with no discount shown on the freight bill and full charges to be collected from the consignee. A 45% discount is then to be forwarded to the shipper at the end of each month.[33]

The existence of discriminatory and deceptive pricing in interstate, deregulated commerce was confirmed by two New England-based carriers at the Duclos-Gordon Transportation Seminar held at Syracuse University in November 1988. Representatives from St. Johnsbury Trucking Co. of Holliston, Massachusetts and Stott & Davis Trucking Co. of Auburn, New York admitted some large shippers required them to charge consignees full, undiscounted rates, on freight collect shipments, then rebate to the shipper the difference between the discounted rate the shipper was actually charged and the full rate paid by the consignee.[34] Both also stated the practice is discriminatory, unfair, and should be prohibited by law.

The deregulatory theorists' claim that the public benefits from lower freight rates is, in such cases, obviously false. The only one benefiting in this type of situation is the shipper possessing clout in the market.

2. *Rate Comparisons*

Since 1983, the Interstate Commerce Commission (ICC) has approved ten general interstate tariff increases which total to a 51.3% increase in rates. In that same time period, the Oregon Public Utility Commission has approved only three general increases, totaling 8.2%. Washington, another regulated state, has granted five increases since 1983, totaling 20.9%.

In both Oregon and Washington, rate increases are granted or denied on the basis of cost data obtained from a group of study carriers. In Oregon, rate increases have been approved on the basis of revenue need computations allowing the study group to earn a 15% after tax return on equity capital. The large discrepancy between the level of increases allowed by the Oregon and Washington Commissions and that permitted by

33. R. Wittenberg, *supra* note 20, at 15-16.

34. St. Johnsbury Trucking Co., Holliston, MA; Stott & Davis Motor Express, Inc., Auburn, NY (statement of representatives appearing during Duclos-Gordon Seminar in Transportation Regulation, Syracuse University (Oct. 31-Nov. 4, 1988)).

the ICC makes it apparent that motor carrier operating costs have nothing to do with a level of rates that receive "rubber stamp" approval.

Obviously, interstate tariff rates are greatly inflated and it is from this base that selective discounting has become such a popular marketing tool with big carriers and big shippers. The prejudiced extension of discounts, however, leaves some shippers paying the inflated rates while others receive preferential treatment. This form of price discrimination has not resulted in lower overall rates to the general public. Price discrimination has simply provided a vehicle for shifting the competitive advantage of reduced transportation rates to shippers with the most market power, while causing increased transportation costs to rural areas. Regulated Oregon rates, on the other hand, provide rate levels lower than the average discounted interstate rate levels, and those rates are nondiscriminatory.

Two recent Oregon studies have examined the gap between interstate and intrastate rates for LTL and household goods transportation, paying particular attention to the effects of selective discounting on actual freight charges. One study, conducted as a joint effort of the Oregon Department of Justice and the Oregon PUC, studied transportation charges for the movement of household goods. A second study, submitted to PUC by a major Oregon-based carrier, compared interstate and intrastate general commodity freight rates.

3. *Household Goods Rates*

In February 1988, the Financial Fraud section of the Oregon Department of Justice (DOJ) investigated the propriety of tariff rate discounting. The DOJ staff questioned whether Oregon consumers were being shortchanged by the disallowance of discounts in the intrastate transport of household goods. To examine interstate rates alongside intrastate rates, and to gauge the effect of interstate discounting, the PUC and the DOJ agreed to engage in a joint study.

Two major household goods carriers with terminals in Portland were selected for audit. More than 1,000 freight bills of interstate movements of household goods were reviewed to glean those that did not exceed 600 miles total from origin to destination. The low mileage interstate movements could then be re-rated at Oregon intrastate mileage rates, according to Oregon Draymen & Warehousemen's Tariff 8-C.

The subsequent rate comparison focused on 25 household goods moves. Ten of the movements were for "national accounts," large companies that have arrangements with one carrier to move its employees. Interstate household goods tariff rates called for the ten moves to cost $20,676.07. Each of the accounts was awarded a discount, however,

reducing the total by 32% to $13,995.87. For the ten national account moves together, Oregon intrastate charges totaled $118.08 less than even the discounted interstate charges. The discounted interstate charges undercut the intrastate charge in only 3 of the 10 moves.

The other 15 movements selected showed an even wider gap between interstate and intrastate rates. Interstate household goods transportation rates called for the 15 moves to cost $23,626.05. The same weight of household goods, moving identical mileage at Oregon intrastate tariff rates, would have cost $14,707.12 (38% less). Interstate charges were discounted for 12 of these 15 shippers, reducing actual total charges by 33% to $15,936.06. The discounted interstate charges undercut the intrastate charge in only 4 of the 15 moves.

Overall, interstate household goods tariff rates called for the 25 moves to cost $44,302.12. The same weight of household goods, moving identical mileage at Oregon intrastate tariff rates, would have cost $28,584.91 (35% less). Interstate charges were discounted for 22 of the 25 shippers in the study, reducing actual charges by 33% to $29,931.93. Even after this discounting, intrastate rates were lower by a total of $1,347.02.

4. *Company X LTL Freight Rate Study*

In December 1987, the Oregon PUC received a rate study completed by a major Oregon-based carrier (referred to here as Company X). The study was submitted to spotlight the variance between interstate and intrastate rate levels. The carrier believed the marked difference would manifestly show the need for intrastate rate increases. In its introduction to the study, Company X stated:

> We seldom hear anything positive about deregulation—at least not expressed by management of LTL trucking organizations. But the interstate market is now the most profitable market that (Company X) participates in.
>
> The one advantage to less regulation of pricing in the interstate/intrastate market is the ability it has given us to increase rates in a fashion that protects the overall revenue level for business conducted. Even though discounting is very prevalent with large customers, we handle enough undiscounted business that the resulting return is kept in adequate position.[35]

To expose the dichotomy between interstate and intrastate rates, Company X selected one week of intrastate freight activity from October 1987. The freight bills used were for shipments wholly within Oregon, originally rated according to Pacific Inland Tariff Bureau Intrastate Tariff 399. In re-rating the bills at interstate levels, Company X used ICC Tariff

35. Freight rate study submitted by Oregon-based motor carrier to the Oregon Public Utility Commission, Economic Regulation Division (Dec. 21, 1987), Appendix at 7.

3000B. Overall, the study found Oregon intrastate rates to be an average of 34% below interstate rates.

Most interesting was that portion of the study revealing the effect of rate discounting. Rate discounts normally extended to certain Company X shippers in interstate traffic were extended to those shippers in the re-rating exercise. A total of 44 shipments qualified for Company X discounts of interstate rates. Discount amounts ranged from 25-50%, but averaged 38%. Though interstate rates called for the 44 shipments to cost $3,710.44, rate discounting resulted in a net interstate charge of $2,306.43. This net charge was only $61.30 below the actual intrastate charges ($2,367.73). In 17 of the 44 individual shipments, discounting still left net interstate charges above intrastate charges. Thus, the effect of Company X's interstate discounting was to merely reduce interstate charges to a point where they shadowed intrastate charges.

In re-rating ten other shipments, Company X applied its private interstate tariff rate agreements with two shippers. Similar to the negligible effect of rate discounting, the net effect of these special contracts was to place interstate charges for the ten shipments just $52.67 below intrastate charges.

In 161 other shipments during the week, Company X offered no rate discounts when re-rating the bills for interstate charges. Full interstate rates called for the 161 shipments to cost $18,451.53. Oregon intrastate charges totaled $11,670.86, 37% less.

5. *Innovative Pricing*

The proponents of deregulation promised deregulation would bring about "pricing innovations," but aside from kickbacks and discounting (which is more of a selective marketing tool than a pricing innovation) much of the industry and the shipping public has failed to realize anything particularly new. What has occurred, however, is wider use of freight-all-kinds (FAK) rates, released value rates, off-peak rates, etc. at the interstate level. This type of pricing was around long before the Motor Carrier Act of 1980 and was published in many tariffs.

Oregon continues to meet the challenges set forth in the area of rates in a manner that satisfies the goals of the state transportation policy. In 1986, the Pacific Inland Tariff Bureau (PITB) submitted a proposal to institute a simplified, zip code tariff in Oregon. The proposal, as submitted, would have resulted in a number of increases and would have established rates discriminating against shippers in outlying areas. In essence, it would have created a condition similar to the one just described in the interstate market. The Oregon PUC worked with PITB on the proposal and the result was a simple, usable class rate tariff that was revenue neu-

tral, with no changes of import to rate levels in rural areas.[36]

The Oregon PUC has also worked closely with both shippers and carriers to ensure that both headhaul and backhaul shippers receive maximum benefit from known backhaul situations. Where possible, headhaul rates on truckload traffic have been approved which consider the revenue to be earned on specific return trip movements. The load factor for the round trip movement is increased, in these situations, and equitable rates are afforded both the headhaul and the backhaul shippers. The combination of headhaul and backhaul rates for the round trip total the minimum amount that will allow the carrier to recover the fully allocated costs of the round trip.

The Oregon legislature wisely proclaimed that the state transportation policy should promote safe, adequate, and *economical* service to the *general public* without *unjust discrimination* or *destructive competitive practices*. It has been clearly illustrated that deregulation promotes both rate discrimination and destructive competitive business practices, and is blatantly contrary to the public transportation policy set forth by the legislature. Regulation in Oregon continues to provide rate levels that are both compensatory and nondiscriminatory.

D. Deregulation and Small Communities

Paul Stephen Dempsey points to a general deterioration of service throughout the transportation industry, since the advent of federal deregulation, in his book *The Social and Economic Consequences of Deregulation*:

> Nearly a decade has elapsed since the federal government launched its grand experiment in transportation deregulation. The outlines of a consistent trend are becoming visible in all deregulated industries—airlines, railroads, and trucking, bus and telephone companies. While deregulation has created a class of beneficiaries, small businesses and consumers in small towns and rural communities are not among them. Today, they pay higher prices for poorer service.[37]

A 1988 performance audit of the Colorado Public Utilities Commission reached conclusions similar to those of Dempsey. In the publication *Performance Audit of the Public Utility Commission 14-15*, the Colorado State Auditor said:

> One clear pattern emerges from the studies on the impacts of deregulation in different public utility industries: small communities and rural areas have often paid a heavy price. Many small communities and rural areas have lost

36. *The Investigation of Designs and Levels of Motor Common Carrier Class Rates, on the Commissioner's Own Motion*, Oregon Public Utility Commission, MO 43, Order No. 86-1055 (Oct. 14, 1986) (investigation initiated Apr. 22, 1986).

37. P. Dempsey, *supra* note 2, at 59.

> all of their passenger transportation services; many others have had their services reduced significantly. In addition, the costs of both passenger transportation and telephone services have increased, often substantially, in these areas. The implications of the loss of services and increases in costs to small communities are significant. Many of these communities are trying to attract new businesses and keep existing businesses and residents from moving away.[38]

Proponents of deregulation contend that if Oregon intrastate LTL traffic were deregulated, rural communities would still have United Parcel Service (UPS) or small package service by bus line. UPS, however, is a regulated LTL carrier of small packages and there is no reason to assume its service or rates would remain the same in a deregulated environment. And since deregulation of the bus industry, the majority of small Oregon communities are no longer served by bus lines.

ICC Chairman Heather Gradison, in a September 1986 letter to South Dakota Senator Larry Pressler, emphasized the negative impact the Bus Regulatory Reform Act of 1982 has had on service to small communities. Gradison noted that while 4,514 communities had lost bus service, only 896 had gained service. Small communities appeared to be most affected, as 3,432 of the towns losing service had a population of 10,000 or less.[39]

It is interesting to note that while theorists argue that deregulation would not curtail service to small communities, a 10-year program was introduced into the Airline Deregulation Act of 1978 to subsidize airline service to small communities. The program has not been very effective, as witnessed by more than 140 small towns that have lost air service, and its cost certainly is not consistent with the savings promised by economic deregulation.[40]

According to Dempsey, in *The Social and Economic Consequences of Deregulation*, the level of motor carrier service to small communities is not as obvious a problem, yet, as is price discrimination:

> Because of the glut of capacity in the trucking industry, and the fact that the overwhelming majority of states continue to regulate intrastate motor carriage and enforce the common carrier obligation, we have not yet seen wholesale motor carrier abandonments of small communities. . . . Evidence already exists of widespread price discrimination against small shippers, particularly those in rural areas and small towns.[41]

It cannot be overemphasized that rural America today has only felt

38. COLORADO STATE AUDITOR, PERFORMANCE AUDIT, PUBLIC UTILITIES COMMISSION (Jan. 1988).

39. Letter from ICC Chairman Heather J. Gradison to Sen. Larry Pressler (Sept. 8, 1986).

40. P. Dempsey, *With Deregulation, Big Get Bigger*, Philadelphia Inquirer, Dec. 19, 1987, at 9-A.

41. P. DEMPSEY, *supra* note 2, at 77.

the impact of interstate deregulation. It has yet to experience the impact that intrastate deregulation would bring. Price discrimination on interstate shipments to these communities already exists. Without the common carrier obligation to serve rural areas, and there would be none in a deregulated environment, the wholesale abandonment that Dempsey describes would be imminent.

Martin E. Foley, Executive Director of the National Motor Freight Traffic Association, Inc., presented a report entitled *In the Matter of Regulation of General Freight Transportation by Truck* to the California Public Utilities Commission in October 1988. He summed up the manner in which the financial distress brought about by deregulation continues to hamper the economic growth of small communities:

> Many small and rural communities simply do not have the traffic volumes or are not located on major traffic lanes so as to render service to them attractive or economical. A myth circulating at the time "deregulation" was being pushed was that with freer entry, many small carriers would surface which would fill any service void created by other carriers vacating those markets. What was not realized was that in the deregulated environment those carriers have the hardest time surviving. From 1984 through August 1987, 95.5% of all carrier failures, some 5,208 bankruptcies, have occurred among the small-sized trucking companies, namely, those with operating revenues under $1,000,000. The economic prospects for the future do not look much brighter for the small-sized carriers. During the first six months of 1987, it is estimated that 30% of the carriers operated at a loss. As to the smaller sized Class II carriers, the proportion operating at a loss was 34%. . .
>
> Studies of the impact of "deregulation" on full service, less-than-truckload, interstate general commodity carriers have demonstrated similar serious problems for that segment of the industry. During the 9-year period from 1978 to 1986, over 54% of the carriers went out of business; 120,274 employees lost their jobs; and shipments decreased by 36%.
>
> To the extent that service to small or rural areas is uneconomical, carriers will have no incentive to service those points. Inasmuch as there is ample evidence that small shippers are paying considerably higher rates under deregulation, those able to bear such pricing, if service is available, will find themselves reaching competitive markets at a cost disadvantage in relation to their larger or better-located competitors.
>
> The nexus between the competitive and financial environment created by deregulation and the loss of service to small and rural areas cannot be denied. Carriers struggling for their existence cannot handle traffic which does not produce an adequate profit. On the other hand, small shippers at such locations are at a disadvantage because they often cannot afford the rates necessary to create an incentive for trucking companies to provide service to those points.[42]

42. M. Foley, *In the Matter of Regulation of General Freight Transportation by Truck*, statement before the California Public Utilities Commission (Oct. 27, 1988) at 31-33 (citing L. Batts,

1. DISCRIMINATORY RATES

Small communities in Oregon, as might be expected, exert little market power. They, too, suffer from the impact of rate discrimination. Within the motor carrier industry, it is a well-known fact that published interstate rates are between 30 and 40% above discounted rates extended to select shippers. Carriers regularly offer those rate discounts to preferred shippers as a marketing tool. In many cases, however, small communities along the Oregon coast or in the interior off major corridors are unable to avail themselves of these discounts on interstate shipments.

Buck Colleknon, general manager of TP Freight Lines, Inc., a regional carrier based in Oregon, reports several major national carriers interlining with TP are now frequently refusing to extend interstate discounts to the Oregon coastal area.[43] Colleknon said they will only offer the discount if the traffic terminates at a point that they serve as a single-line carrier. In other words, if Yellow Freightlines, Roadway Express, Consolidated Freightways, or ANR have freight destined for the Oregon coast, the shippers will not receive a discount if the freight is interlined with TP.

Roadway Express cancelled all of its joint-line discounts in the early summer of 1988. Only Oregon freight to or from Portland is rated with the interstate discount. Other Oregon locations are left to either pay the inflated interstate rate or whatever negotiated rate their market position will yield, with the interline carriers serving their location.

Two other carriers, Risberg's Truck Line and Oregon Freightways also report that interstate discounts are not extended to interlined shipments. Late in 1988, Jerry Eiler President of Oregon Freightways said the practice had been going on for about a year and the trend was gaining intensity.[44]

Of course, national interstate carriers serve very few areas off the major traffic lanes. Remote areas in Oregon are generally served by regional carriers with intrastate operating authority. The regional carriers offer the rural communities just, reasonable, and nondiscriminatory rates, as well as adequate service levels on intrastate freight. They are unable, however, to correct the interstate rate discrimination that forces these rural Oregon communities into a form of economic isolation.

The effect to rural Oregon, victimized by pricing discrimination, is to

---

Statement of American Trucking Associations on Impact of Deregulation on Small Carriers before the U.S. House of Representatives Committee on Small Business (Oct. 6, 1987), and J. Harkins, remarks on the State of the LTL Trucking Industry at the Regular Common Carrier Conference (Dec. 1987)).

43. Telephone conversations with Buck Colleknon, General Manager, TP Freight Lines, Inc. (Oct. 21, 1988).

44. Telephone conversation with Jerry Eiler, President, Oregon Freightways (Oct. 21, 1988).

stifle economic development and to promote mass urbanization. Industries located in these areas incur higher transportation costs than their counterparts located on major traffic lanes, placing them at a competitive disadvantage. As a result, it is difficult to attract capital for economic expansion or, in some cases, to retain capital that already exists in the community.

E. Impact on Truck Safety

The Research and Analysis Section of the Oregon Public Utility Commission's Transportation Safety Program has compiled statistics of accident and violation ratios based on averages for the years 1984 through 1987. Oregon carriers subject to both rate and entry regulation have a better safety record than private carriers, unregulated interstate carriers, or Oregon carriers subject only to entry regulation.

Accident records show Oregon rate and entry regulated carriers have a low total accident ratio, compared with their deregulated or partially-regulated counterparts. Their four-year averages also show them with fewer preventable accidents and fewer fatalities per 100 million miles:

ACCIDENT RATIOS OF MOTOR CARRIERS OPERATING IN OREGON

MILES = millions of miles traveled, four-year total.
TAR = total accident ratio, four-year average per million miles traveled.
PAR = preventable accident ratio, four-year average per million miles
FATALS = fatalities, four-year average per 100 million miles.

	AVERAGES—1984-1987			
	MILES	TAR	PAR	FATALS
Intrastate				
Entry & Rate-Regulated				
General Commodities	894.5	1.34	0.65	4.65
Entry Regulated Only				
Logs, Poles, Piling	727.0	1.44	0.71	7.59
Sand & Gravel	182.4	1.94	1.06	6.07
Unregulated, Registration Only				
"B" Commodities	507.5	1.93	1.03	6.45
Private Carriers	1057.3	1.46	0.71	5.24
Interstate				
General Commodities	1098.4	1.31	.072	4.80
ICC-Exempt Commodities	165.4	2.00	1.05	5.23
Motor Carrier				
Industry Average		1.50	0.76	5.55

Source: Research and Analysis Section, Transportation Safety Program, Oregon Public Utility Commission.

Oregon's safety inspection records from 1984 through 1987 show rate and entry regulated carriers have fewer total violations per inspection, fewer critical violations, and a lower vehicle out-of-service percentage than their deregulated or partially-regulated counterparts:

VIOLATION RATIOS OF MOTOR CARRIERS OPERATING IN OREGON

INSPECTS = number of inspections conducted, four-year total.
TVR = total violation ratio, four-year average per inspection.
CVR = critical violation ratio, four-year average per inspection.
OSV% = out-of-service vehicle percentage. (Oregon considers each licensed unit of a combination to be a "vehicle." Each inspection inspects an average of 1.8 "vehicles".)

		AVERAGES—1984-1987		
	INSPECTS	TVR	CVR	OSV%
Intrastate				
Entry & Rate-Regulated				
General Commodities	7,908	2.91	0.711	21.32
Entry Regulated Only				
Logs, Poles, Piling	8,866	3.55	0.944	27.34
Sand & Gravel	3,297	3.89	1.051	33.42
Unregulated, Registration Only				
"B" Commodities	5,313	3.95	1.019	28.71
Private Carriers	15,665	3.76	0.906	29.45
Interstate				
General Commodiites	11,059	3.14	0.933	24.44
ICC-Exempt Commodities	2,163	3.88	1.072	29.04
Motor Carrier				
Industry Average		3.48	0.958	27.59

Source: Research and Analysis Section, Transportation Safety Program, Oregon Public Utility Commission.

Analysis of the National Accident Sampling System (1981-85) data indicates that nearly 2 of every 5 motor vehicle accidents involve a heavy truck belonging to a carrier not regulated by the ICC.[45] In Oregon, the highest at-fault accident rate belongs to ICC-exempt interstate carriers for each of the years 1984 through 1986.[46] The deregulated carriers and those subject only to entry regulation are the ones having a deleterious effect on Oregon highway safety, not the Oregon carriers subject to rate and entry regulation.

Even though they deny it as a product of deregulation, theorists recognize that the motor carrier safety record is continuing to deteriorate. However, they see increased safety inspections, rather than economic regulation, as the solution. According to Nicholas Glaskowsky:

> . . . it is no coincidence that the deregulators now call loudly for much stiffer safety inspection and regulation of the trucking industry. This demand is cer-

45. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 27, at 99.

46. OREGON PUBLIC UTILITY COMMISSION, TRUCK INSPECTIONS AND TRUCK ACCIDENTS IN OREGON, STATISTICS AND SUMMARY (1984, 1985, 1986) at 36.

tainly praiseworthy, but one may also note that it is a tacit admission of the existence of a growing safety problem in the motor carrier industry clearly related to deregulation.[47]

Vehicle inspections and safety programs apply equally to all carriers, regulated or not. Based on Oregon accident and inspection records, it is unlikely that the stepped-up safety inspection program proposed by the deregulation theorists will be an acceptable substitute for economic regulation if the safety record of ICC-exempt and partially-regulated carriers is to be restored.

1. *Deregulation and Motor Carrier Safety*

The number of heavy truck accidents (those with gross vehicle weights in excess of 26,000 pounds) has increased steadily over the past few years, reaching, according to the Office of Technology Assessment (OTA), an estimated 278,322 accidents nationwide in 1986. The accident rate for trucks between 10,000 and 25,999 pounds has also increased, but not as rapidly as the increase in the heavy truck accident rate.[48] Figures presented to the Interstate Commerce Commission by the American Insurance Association indicate the accident rate for interstate truckers increased from 2.65 accidents per million miles in 1983 to 3.06 per million miles in 1984, then to 3.39 per million miles for the first half of 1985.[49]

Many are concerned that the financially ailing motor carrier industry is not capable of being a safe industry, and recognize that the financial distress of the industry is a product of deregulation. Proponents of deregulation, however, argue there is no connection between economic deregulation and the deteriorating safety record of the industry. These theorists attempt to rationalize their opinion by asserting that the Motor Carrier Act of 1980 (MCA) only opened rate and entry competition and did not directly change any existing safety requirements such as drivers' hours-of-service limitations or insurance requirements. Economic deregulation, they insist, is a separate issue from the safety problem existing in the industry today.

To those directly involved with motor carrier operations, the connection between the poor financial condition of motor carriers resulting from deregulation and motor carrier safety is very obvious: *Any condition that tends to depress the profitability of a motor carrier will have a definite and negative impact on the safety of that carrier's operation.*

47. N. Glaskowsky, *supra* note 8, at 32.

48. Office of Technology Assessment, *supra* note 27, at 85.

49. N. Glaskowsky, *supra* note 8, at 32.

In his book, *The Social and Economic Consequences of Deregulation*, Dempsey commented:

> . . . some deregulation proponents dogmatically insist that no one has proven conclusively that economic deregulation causes safety deterioration (and anyway, nothing as handsome as deregulation could give birth to so grotesque an offspring). One is reminded of the argument by the tobacco companies that no one has conclusively established that cigarettes cause cancer. No one has been able to step forward with conclusive evidence to prove (or for that matter, disprove) either proposition. Nonetheless, public policy suggests that the burden of proof ought reasonably be placed on the constituency which, common sense suggests, is harming innocent people.[50]

Deregulation seems to have worsened the overcapacity problem in the for-hire motor carrier industry. Severe rate competition has resulted, and caused financial distress for many carriers. As the carriers cut costs in order to survive, they reduce wages, hire owner-operators, operate older vehicles, cut maintenance and force drivers to work longer hours. High operating ratios, diminished levels of vehicle maintenance, longer work hours, increased use of owner-operators, and an aging vehicle fleet have all been linked, either directly or indirectly, to the continuing decline in motor carrier safety.

The excess capacity that was brought about by unrestricted entry lowered both the efficiency and profitability of the industry. The Office of Technology Assessment made some astute observations about the effects of overcapacity on motor carrier safety in its report, *Gearing Up For Safety*:

> Overcapacity leads to price discounting and shrunken profit margins, creating difficult economic trade-offs for decisions about investment in safety-related equipment and safety-conscious hiring and scheduling practices. Competition, increased operating costs, and low, erratic profit margins create a need to control costs that can lead to shortchanging safety-related driver training, truck maintenance, and equipment improvements. Carriers are, in general, interested in safety, but they will measure investments in new safety equipment and technologies against tangible economic rewards. Cost and safety trade-offs are particularly problematic for owner-operators and small carriers, who have to generate revenue regularly to stay in business and may have no regular operations base or maintenance facility.[51]

In spite of its findings that link the financial health of carriers to some of the leading causes of accidents, and its recognition that overcapacity is one of the reasons for deterioration of the financial health of the industry, the OTA was unable to "clearly link economic regulation and motor carrier safety." It concluded:

> . . . the economic success of a carrier has an identifiable effect on the opera-

50. P. DEMPSEY, *supra* note 2, at 100-101.

51. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 27, at 27.

> tions and fleet condition; in fleets having financial difficulties, vehicles are not as well maintained and equipment tends to be older. However, the absence of good data from the period before economic deregulation, the effects on all business activity of the 1982 recession, and the many changes in carrier operations that occurred as the result of other governmental policy decisions, all lead OTA to conclude that no clear link can be established between changes in economic regulation and motor carrier safety.[52]

Few are apt to disagree with the OTA's observations that economic deregulation has had a major negative impact on the financial condition of the motor carrier industry. It is also a reasonable supposition that many other economic factors have played a part in this financial deterioration. Quantifying the impact of economic deregulation as compared to these other factors in the pre- and post-deregulation eras might be difficult, if not impossible, but that is what would be necessary to establish a statistically "clear link" between the changes in economic regulation and motor carrier safety. However, to deny that such a link exists, whether or not it is absolutely "clear," would be preposterous.

The financial distress that deregulation forced upon the motor carrier industry has also made it necessary for carriers to pay the lowest wages possible in their ongoing struggle for survival. In *Testimony of the California Trucking Association on the Correlation Between Regulation and Public Safety*, the CTA reported truck drivers' wages dropped from $6.50 per hour in 1979 to just over $4.50 per hour by 1985, a decrease of over 30%. During the same time period, factory workers' wages increased just over 15%.[53]

Low wages in the deregulated motor carrier industry have attracted untrained, inexperienced, unqualified drivers. At least one study has found that high accident rate carriers have a disproportionate number of truck accidents in which the driver was under 30 years of age and had less than 2 years of experience.[54] Analysis of the National Accident Sampling System (NASS) data indicates the level of training of the driver is an important factor in heavy vehicle accidents.[55]

After presiding over hearings before the California Public Utilities Commission in 1985, which resulted in reinstatement of rate regulation in that state, Administrative Law Judge William Turkish summarized some of his observations in his report:

> We believe truck highway safety depends not merely on the adoption of a public safety program and police enforcement of such program, but also to

---

52. *Id.* at 10.

53. Correlation Between Regulation and Public Safety, *supra* note 18, at 4 & 5 (Exhibits 5 and 6).

54. Corsi, Fanara, & Roberts, *Linkages Between Motor Carrier Accidents and Safety Regulation*, 20 LOGISTICS AND TRANSP. REV. 156 (1984).

55. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 27, at 89.

> the degree of commitment of the trucking firms' owners and drivers as well as the independent owner-driver in allocating the necessary resources, priority, and attention to safety measures, as well as to the regulatory climate created by the policies of the Commission through its program of economic regulation.
>
> The evidence in this record is clear that indiscriminate and noncompensatory rate reductions have placed carriers in a position where, in order to survive and protect their investments, they feel compelled to drive long hours, operate at excessive speeds, cut back on their truck maintenance and equipment replacement programs, and drive on bald, recapped, or defective tires. The creation of a regulatory climate in which carriers have the opportunity to earn sufficient revenues to earn a profit on their investment and not be subjected to competitive throat-cutting is the single most effective manner in which economic regulation can contribute to highway safety. . .[56]

Dabney T. Waring, Jr., Director of Cost Research for the Motor Common Carrier Associations, participated in hearings before the California Public Utilities Commission in March and April 1988. Waring commented on the manner in which deregulation has brought economic distress to the industry, and explained how the resulting erosion of carriers' financial condition had a negative impact on their safety record:

> [T]wo aspects of deregulation that impact profitability and thus highway safety, are relaxed entry restrictions and unfettered rate competition. Open entry results in excess capacity which means less than full-vehicle loads and empty miles. Further, the excess capacity creates the pressure to reduce rates which, absent regulatory restraint, quickly and easily reach non-remunerative levels. The effect on safety can show up in many ways. When profits are down or absent, cash flow will dry up. Of all the uses of funds (salaries, fuel, rent, debt payments),the one that is most easily postponed is maintenance. The next alternative is to attempt to economize on labor either by lower wages or by getting more for the wage dollar which means either working harder, driving faster or working more hours per day. These are the ingredients for a deterioration in highway safety. . .[57]

2. *Pre-MCA Carriers vs. Post-MCA Carriers*

Prior to deregulation, entry restrictions caused carriers to operate near capacity. Between July 1980 and the end of 1985, there was a net increase of approximately 16,000 new entrants into the industry; and addition of 89%.[58] The new entrants provided an oversupply of capacity and increased the number of empty miles operated. This combination has driven load factors down and reduced rates to unreasonably low levels. The excess capacity is frequently offered at rates below a com-

56. W. Turkish, *Administrative Law Judge's Proposed Report*, California Public Utilities Commission, Case No. 10368 (Oct. 8, 1985).

57. Waring, Jr., *supra* note 28, at 11.

58. Corsi, Fanara, & Jarrell, *Safety Performance of Pre-MCA Motor Carriers, 1977 Versus 1984*, —— TRANSP. J. 30 (1988).

pensatory level, and those rates often divert backhaul traffic away from existing full-service carriers. The excess capacity brought about by deregulation did not create more efficient operations. Quite to the contrary, it is one of the major causes of the increased number of empty truck miles and declining load factors that plague the industry today.

The safety record of the new entrants is significantly worse than that of established carriers. An article entitled *Safety Performance of Pre-MCA Motor Carriers, 1977 Versus 1984* appeared in the Spring 1988 issue of the *Transportation Journal*. The article, authored by Thomas Corsi, Philip Fanara, Jr., and Judith Jarrell, noted that a previous study conducted by Corsi and Fanara found:

> . . . based on the accident experience during 1985 and 1986 of 837 new entrants and 1,082 established carriers . . . a statistically significant (at the .01 level) difference in the number of accidents per million vehicle miles between new entrants and established carriers. Moreover, established carriers were found to have had an average accident rate of 1.3 accidents per million vehicle miles, while the comparable average among the new entrants was 1.65 per million vehicle miles—27% higher. . . .
>
> [T]he study showed that without data on entrants from other time periods, it could not be concluded that the post-MCA entrants are worse (or better) than were entrants at other times in terms of the overall safety record. *However, the MCA intensified the accident rate problem by facilitating an unprecedented increase in the number of new entrants. . .*[59]

Examining a different data base, the Corsi article concludes:

> . . . among all the established carriers taken together, the accident rate fell from an average of 1.37 accidents per million vehicle miles in 1977 to 1.29 accidents per million vehicle miles in 1984—a statistically significant (at the .06 level of confidence) decline. However, this decline was due largely to the influence of the strong decline in accident rates among General Freight Truckload carriers. For these carriers, there was also a statistically significant (at the .01 level) decrease in mean accident rate from 1.68 accidents per million vehicle miles in 1977 to a comparable level of 1.27 in 1984. In other industry segments, the mean accident rate remained essentially unchanged. . .[60]

From the Corsi article, it appears that the established carriers who survived deregulation had about the same safety record before and after the MCA, but the new entrants who arrived on the scene as a result of the MCA were responsible for a significant increase in the number of motor carrier accidents.

Both regulatory advocates and deregulatory theorists seem to agree that the adoption of the MCA has caused financial distress within the industry. The theorists argue this is good because only the efficient carriers

---

59. *Id.* at 30 (emphasis added).

60. *Id.* at 32-33.

will survive. Regulatory advocates argue the deterioration of the financial health of an infrastructure industry is not in the public interest. No matter who is right in this debate, both sides agree the financial condition of many carriers is rapidly going downhill. The Corsi article statistically linked the safety performance of the study group, involved in accidents in 1977 and 1984, to the financial condition of those carriers:

> The most interesting difference in the significance of individual coefficients between 1977 and 1984 is that in 1984 the coefficient for carrier operating ratio is significantly and positively linked to accident rate, while in 1977 no such significant linkage existed. Thus, in the post-MCA era carrier increases in operating ratio or worsening of operating position was significantly linked with an increase in its accident rate. . . .
>
> Despite claims to the contrary that deregulation and safety concerns are unlinked, it is clear that some firms operating in the new competitive environment in a precarious financial situation have significantly higher accident rates than do those not in financial distress. This relationship or linkage is new to the competitive post-MCA environment. . .[61]

3. *Owner-Operators*

Professor Garland Chow of the University of British Columbia conducted a study entitled *Deregulation, Financial Condition and Safety in the General Freight Trucking Industry*. His study confirms Dabney Waring's view that the distressed financial condition of the motor carrier has a direct impact on the level of motor carrier safety:

> The carrier which eventually goes bankrupt spends less on safety and maintenance, has older equipment, and depends on owner-operators more than carriers not going bankrupt. As these financially distressed carriers approach their eventual demise, they spend even less on safety, on new equipment, and more on subcontracted line haul. However, we did not find similar relationships among non-financially distressed carriers. The aggregate conduct of the general freight segment of trucking is generally consistent with the hypothesis that safety performance deteriorates with the declining health of the industry. Less is spent on safety and on maintenance and the fleet ages.[62]

Rita Bontz, President of the Maryland Independent Truckers and Drivers Association of Baltimore, Maryland, testified before the U.S. House of Representatives in 1985 regarding deregulation and the effect of an increased usage of owner-operators in transportation service:

> We believe the Congress intended to improve the trucking industry and to rid it of unnecessary and burdensome regulations when it enacted the Motor Carrier Act (of 1980). But the implementation of the Act has generated an

61. *Id.* at 35-36.

62. Chow, *Deregulation, Financial Condition and Safety in the General Freight Trucking industry*, Transportation Deregulation and Safety Conference, The Transportation Center, Northwestern University, June 22-25, 1987.

'anything goes' attitude which has severely damaged safety on the nation's highways and caused many reliable trucking companies and owner-operators to go out of business. And when we lose experienced truckers and companies everyone feels the loss in the quality of service and the diminishing safety on the highways.

Truck owner-drivers . . . are more in demand by motor carriers because they can avoid high labor costs and shift many operating costs to us while obtaining reliable, safe transportation of freight. Unfortunately, the carrier, in an effort to survive the fierce and predatory competition, has cut freight rates to a point where we are often operating at a break-even point or marginal profit. In some cases, we operate below cost as we struggle to 'hang on until things get better.'

Because of the economic situation facing owner-drivers, many are forced to push themselves beyond their physical limits and in some cases truckers skimp on maintenance and particularly on the much needed replacement of equipment—the effects of which are reflected in the growing problems in safety on the highways.[63]

In *Testimony of the California Trucking Association on the Correlation Between Regulation and Public Safety*, presented before the California Assembly Utilities and Commerce Committee in October 1986, the CTA reported that the amount of traffic contracted out to subhaulers (owner-operators) increased from just under 18% in 1978 to more than 28% in 1985.[64]

The Portland *Oregonian* newspaper investigated the state of the motor carrier industry in a series of articles appearing early in 1987. The *Oregonian* concluded motor carrier safety had been jeopardized by deregulation, especially by the surge of new carriers, price cutting, deferred maintenance, and the hiring of untrained drivers.[65] In one article, Jack Wayne Peterson, one-time Oregon Trucking Association Driver-of-the-Year, commented on the subject of safety:

. . . What the trucking industry has now is a lot of people with a down payment for a truck, and they go out and do their thing. . . You got people out there driving too many hours with not enough rest. Most are independents driving their own trucks, but some are working for a company, like me. There are companies that push their drivers to break the rules. I'm not talking just about little fly-by-night outfits either. Some big companies are doing it. . . . There are guys driving singles to Los Angeles in 23 hours. There's no way you can do that legally. Most of them do it because they have to—to

63. R. Bontz, statement before the Subcommittee on Surface Transportation, Committee on Public Works and Transportation, U.S. House of Representatives, Oversight Hearing on the Motor Carrier Act of 1980 (Nov. 5, 1985).

64. Correlation Between Regulation and Public Safety, *supra* note 18, at 15 (Exhibit 16).

65. Zaitz & Long, *Deregulation Paved Way for Dangerous Drivers, Rigs*, Portland Oregonian, Apr. 19, 1987, at B6.

make payments on their trucks.[66]

While Chow's study found the carrier going bankrupt depends more on owner-operators than those not going bankrupt, the Corsi study found a correlation between the use of owner-operators and the accident rate, and confirmed the use of owner-operators has increased since the MCA. According to Corsi:

> In both the 1977 and 1984 equations, owner-operators use (as measured by vehicle miles rented with driver as a portion of total vehicle miles) is positively and significantly (at the .01 level) linked to accident rates. As carrier use of owner-operators increases, there is a corresponding increase in accident rates. This finding confirms an earlier result based on 1981 data that was noted by the authors in an earlier paper.
>
> That the linkage between owner-operator use and higher accident rates existed prior to the passage of the MCA and has continued throughout the transition period is a particularly significant finding. The basis for this longitudinal linkage is multidimensional, involving the owner-operator's perceived need to violate hours-of-service regulations to meet minimum financial needs as well as inability to either replace equipment in a timely fashion or repair it on a regular basis. *The longstanding owner-operator safety problem has been intensified in the post-MCA environment because of their greater use by carriers who view owner-operators as an effective method of lowering costs or improving productivity in comparison, primarily, with union employee drivers.*[67]

Deregulation, then, has been identified as a major reason for the substantial increase in the number of owner-operators on the highway, and a direct relationship has been established between the use of owner-operators and higher accident rates.

4. *Age of Fleet*

There can be no doubt that declining profit margins and dwindling cash flow have had a negative impact on the equipment replacement policies of motor carriers. An aging fleet is one of the consequences of economic deregulation of the motor carrier industry. According to the Office of Technology Assessment's review of accident reports, speed too fast for driving conditions is the leading factor associated with heavy vehicle accidents, followed by the level of training of the driver, then *the age of the vehicle*.[68]

The average age of motor carrier equipment on the highways is increasing, as evidenced by the following table compiled by Michael Evans and updated by Dabney Waring:

---

66. Long, *Trucker Blames Safety Problems on Deregulation*, Portland Oregonian, Apr. 20, 1987, at B5.

67. Corsi, Fanara, & Jarrell, *supra* note 59, at 34 (emphasis added).

68. Office of Technology Assessment, *supra* note 27, at 88.

CHARACTERISTICS OF STOCK OF TRUCKS

	(1)	(2)	(3)	(4)
1970	7.3	3.9	17.7	100
1971	7.3	4.0	18.3	99
1972	7.2	4.0	19.7	92
1973	7.0	4.0	21.3	85
1974	7.0	4.1	23.3	81
1975	6.9	4.4	24.8	80
1976	7.0	4.8	26.5	82
1977	6.9	5.1	28.2	82
1978	6.9	5.5	30.5	82
1979	6.9	5.9	32.6	82
1980	7.1	6.5	35.2	84
1981	7.5	7.2	36.1	90
1982	7.8	7.9	37.0	97
1983	8.1	8.5	38.1	101
1984	8.2	9.6	40.1	109
1985	8.1	10.7	42.4	115
1986	8.0	11.5	44.8	117
1987	8.0	11.8	47.3	113

(1) Average age, all trucks.
(2) Number of trucks, in millions, 12 years and older.
(3) Number of trucks in use, in millions.
(4) Ratio of number of trucks 12 years and older to total trucks in use, 1970 = 100.
Source: Motor Vehicle Manufacturers Association: FACTS & FIGURES (quoted in Waring, Jr., *supra* note 28, at 5).

Waring made the following observations regarding the table:

> . . . the average age (of equipment) which hovered around seven years or less in the late seventies has risen to eight years or more in mid-eighties and the number of trucks aged 12 years or more has more than doubled in that period. Further, the proportion of these old trucks to the total has risen about 40% in that period. This is one of the consequences of rate cutting and the ensuing economic pressure. It has an impact on highway safety . . . and sooner or later impacts economic efficiency.[69]

While the investment in new equipment declined, and the average age of the motor carrier fleet increased, the amount spent on vehicle maintenance per mile declined. In its publication *Motor Carrier Annual Report, Class I & II Carriers, Financial & Operating Statistics, Total, General Freight Carriers*, the American Trucking Association compiled maintenance expense and mileage data, and converted the maintenance expense amounts to constant dollars by using the GNP deflator. The resulting expense figures were divided by the number of vehicle miles oper-

69. Waring, Jr., *supra* note 28, at 5.

ated. The computed cost per vehicle mile was then indexed with 1976 = 100:

INDEX OF MAINTENANCE EXPENSE PER MILE
(1976 = 100)

YEAR	INDEX
1976	100
1977	95
1978	86
1979	91
1980	98
1981	97
1982	92
1983	87
1984	84
1985	83
1986	79

Source: *Motor Carrier Annual Report, Class I & II, Financial & Operating Statistics, Total, General Freight Carriers*, American Trucking Association.

Waring commented on the declining trend and the statistical accuracy of the table:

> Statistically, the index declined at a rate of 1.7% per year from 1976 to 1986, with the assurance of a "t" test of well under 1% that the trend is not due to chance. However, for the period 1980 to 1986, the fact of a decline in maintenance is even more dramatic; the annual rate of decline was 3.6%, again with the "t" test well under 1%.[70]

While the information, compiled from a data base of *all Class I and Class II general freight carriers*, indicates that less is spent per mile for maintenance, Corsi made an additional discovery for *a group of Class I and Class II carriers with accidents reportable to the Bureau of Motor Carrier Safety*. The Corsi data base consisted of statistics on accident rates for 1,216 carriers in 1977 and 937 carriers in 1984. Both the 1977 and the 1987 groups had reportable accidents in their group year, and all carriers in both groups had been certificated prior to passage of the MCA. The Corsi article reported:

> . . . consistent in both 1977 and 1984 equations is that carrier maintenance expenses per vehicle mile traveled are significantly (at the .05 level in 1977 and at the .01 level in 1984) positively linked to accident rate. While at first glance this finding might seem counter-intuitive since maintenance expenses might be viewed as accident-prevention behavior, upon further reflection, it is clear that higher carrier maintenance expenses per vehicle mile are indicative of carriers with an aging vehicle fleet in need of significant, repeated repair. The maintenance expenses per vehicle mile variable is reflecting the

70. *Id.* at 6, n.6.

> known association between older equipment and higher accident propensity. . . .
>
> The multiple regression results linking higher carrier maintenance per vehicle mile expenses with significantly higher accident rates in 1977 and 1984 suggest that carriers with rapid increases in their maintenance per vehicle mile expenses are most likely to be failing to replace their aging vehicle fleets and, hence, are increasing their accident probabilities. Thus, firms with significant increases in maintenance expenses might very well be dangerously lengthening their equipment age. . .[71]

The Class I and Class II general freight carriers, as a group, spend less per vehicle mile on maintenance as they try to cut costs. The accident study group probably also deferred maintenance costs up to some point in time. However, as their fleet continued to age, they were forced into rapidly increased repair expenditures just to keep operating. It appears that the carriers with older equipment, who have deferred maintenance expenses to save money and who are currently spending heavily on repairs to stay on the road, are the ones most prone to accidents.

5. *"THE CALIFORNIA REPORT"*

In spite of indisputable evidence linking deregulation to a decline in motor carrier safety, theorists cite "The California Report" to uphold their contention that the link doesn't exist. The "Report" is a Joint Legislative Report (JLR) of the California Public Utilities Commission and the California Highway Patrol completed after the California Commission re-regulated intrastate trucking in 1986.[72] The report is, at best, highly controversial. It contends that accident rates have actually decreased over a ten-year period and that they were highest in 1977, before *de facto* federal deregulation.

A number of issues have been raised which challenge the validity of the JLR. The report is accused of grossly overstating mileage estimates because those estimates are based on diesel taxes paid and make no allowance for the fuel consumption of pickups or vans registered as "trucks," or for automobiles. A comparison of California Department of Motor Vehicles Reports of registered diesel-powered vehicles at December 31, 1977 and May 29, 1987 reveals that the total number of diesel-powered vehicles in that state increased from 71,307 to 236,792. Of the 165,491 additional diesel vehicles registered by May 29, 1987, only 3,678 of that increase were tractors. The remainder were autos, pickups, stationwagons, and vans. Diesel tractors accounted for 90.7% of the total number of diesel-powered vehicles registered in California at Decem-

71. Corsi, Fanara, & Jarrell, *supra* note 59, at 34.

72. JOINT LEGISLATIVE REPORT, AB 2678, FINAL REPORT ON TRUCK SAFETY, CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE CALIFORNIA HIGHWAY PATROL (Nov. 1987).

ber 31, 1977, but only 18.8% of that total at May 29, 1987.[73]

The JLR even suggests its mileage estimates might be understated because new equipment is more fuel efficient. It fails to take into account the aging fleet of registered vehicles, nor recognize Department of Transportation statistics showing the average miles per gallon of trailer combination trucks was virtually unchanged between 1977 and 1986.

While there are a number of other problems with the California Report's integrity, as to its weak methodology, an equally serious problem was raised as to its premise. Gerald O'Hara, California Teamsters Public Affairs Council Director, criticized the study in a December 1987 letter to the California PUC:

> At this point, we feel that the staff's conduct with respect of the safety study reveals a level of barely concealed ideological support for one particular side of a political dispute which so strains its credibility as a neutral entity, that we have severe doubts as to its commitment to discharge its statutory enforcement obligations.[74]

O'Hara explained in-depth concerns with the politically-motivated conclusions reached by the report's authors, and some of the methodological failures in the study:

> In effect, the study's hypothesis is a calculated, if unsophisticated, exercise in rhetorical legerdemain: by failing to uphold its premise, the proponents of deregulation can claim they have "debunked the safety myth.
>
> Having set up a straw man, the study then knocks it down with plainly insufficient data."[75]

It appears any position supported with quotes from, or reference to, the "California Report" should be examined with caution.

---

73. *Id.* at 78-79 (Exhibits A & B) (comments of Charles Lawlor, President, Di Salvo Trucking).

74. Letter from Gerald O'Hara, Director, California Teamsters Public Affairs Council, to Stanley Hulett, President, California Public Utilities Commission, p. 1 (Dec. 4, 1987).

75. *Id.* at 3.

APPENDIX

GRADING REGULATED MOTOR CARRIER SERVICE—PORTLAND TO EUGENE

In a random survey conducted by the staff of the Oregon PUC Transportation Program in the fall of 1988, Oregon general freight shippers and receivers were asked to grade the level of motor carrier service existing between Portland and Eugene. The survey was conducted to provide the Commission with information regarding current regulated service in that Interstate 5 traffic lane. Two motor carriers seeking authority to operate argued there is a need for additional service, while existing authorized carriers argued they provide adequate service now. Though Commission policy, in authority application cases, has considered surveys to be insufficient evidence of the need for additional service or the adequacy of existing service, staff saw a random survey as a means of providing information important to the debate.

A list of Portland businesses shipping freight to Eugene, and Eugene businesses receiving freight from Portland, was compiled from two weeks of freight bills supplied by three major carriers. From the total list of 730 shippers and 482 receivers, 103 were randomly-selected from each. In the end, the survey consisted of responses from a total of 75 of the randomly-selected shippers and 72 of the receivers. A summary of the results follows:

Primary Business Activity:	Shippers	Receivers
Retailing	9%	31%
Wholesaling	32%	10%
Manufacturing	31%	17%
Services	4%	17%
Combinations of Abvoe	18%	15%
Others	5%	8%
Average Shipment Destination/Origin:	Shippers: Shipments are Destined	Receivers: Shipments Originate
Local	4%	4%
Statewide	15%	34%
Regional	55%	16%
Nationwide	21%	40%
Combination of Above	5%	6%
Regularly Use:	Shippers	Receivers
1 Carrier	32%	28%
2 Carriers	40%	35%
3 Carriers	16%	18%
4 or more Carriers	11%	19%

Require Freight Service from Portland to Eugene:	Shippers	Receivers
Daily	23%	32%
2-4 Times per Week	34%	34%
Weekly	18%	10%
Monthly/Seasonally/Irregularly	25%	24%
General Quality of Service:	**Shippers**	**Receivers**
Excellent	35%	31%
Quite Good	47%	40%
Adequate	16%	24%
Minimally Acceptable	1%	4%
Unsatisfactory	1%	1%

Two of the survey's questions were similar in that they asked respondents to assign a number in an evaluation of four aspects of general freight motor carrier service from Portland to Eugene:

1. Adequacy of time schedules.
2. Timely and reliable pick-up service.
3. Timely and reliable delivery service.
4. Settlement of loss and damage claims.

In the first question, respondents were asked to evaluate the importance to their firm of each of the four aspects of motor carrier service. In the second question, respondents were asked to rate how well the existing service meets the needs of their firm. In each of the two questions, respondents assigned a number from 1 to 10 to each of the aspects, with 10 indicating the greatest importance or the most favorable rating. By comparing the numbers assigned in answering the first four-part question with those assigned in answering the second, the survey provides a gauge of the adequacy of motor carrier service. The numbers assigned each of the aspects indicate whether the level of service exceeded the degree of importance to the firm, equaled importance, or fell short of importance:

ADEQUACY OF TIME SCHEDULES

Service Rating	Shippers	Receivers
Exceeds Importance	22%	10%
Equals Importance	48%	66%
Falls Short of Importance	30%	24%

TIMELY AND RELIABLE PICK-UP SERVICE

Service Rating	Shippers	Receivers
Exceeds Importance	11%	22%
Equals Importance	53%	60%
Falls Short of Importance	36%	18%

TIMELY AND RELIABLE DELIVERY SERVICE

Service Rating	Shippers	Receivers
Exceeds Importance	6%	10%
Equals Importance	60%	55%
Falls Short of Importance	34%	35%

SETTLEMENT OF LOSS AND DAMAGE CLAIMS

Service Rating	Shippers	Receivers
Exceeds Importance	28%	19%
Equals Importance	39%	51%
Falls Short of Importance	33%	30%